

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

SCRUTINY REPORT 38

4 February 2020

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

BILL—NO COMMENT

The Committee has examined the following bill and offers no comment on it:

HUMAN RIGHTS (WORKERS RIGHTS) AMENDMENT BILL 2019

This Private Member's Bill will amend the *Human Rights Act 2004* to include new economic, cultural and social rights to work based on clauses 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights.

BILLS—COMMENT

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

CEMETERIES AND CREMATORIA BILL 2019

This Bill will repeal the existing *Cemeteries and Crematoria Act 2003* and regulations and replace them with a new regulatory framework for existing and future cemetery and crematoria facilities.

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 includes various provisions relating to provision and access to personal information which may limit the protection of privacy and reputation provided by section 12 of the HRA. These include provisions relating to applications for burial, cremation and internment, and rights to bury or have cremated remains interred at a facility. A public register will have to be maintained of personal details relating to applicants and licence holders establishing or operating a cemetery or crematorium. There will also be requirements to provide identification to an authorised person if requested. The explanatory statement accompanying the Bill recognises these potential limits and sets out why they should be considered lawful and non-arbitrary. The Committee refers the Assembly to that statement.

The Bill will also allow authorised persons to enter premises for inspection purposes, which may include entry without consent to residential premises where these are being used as a cemetery or crematorium. The Committee recognises that under proposed section 86 this power of entry will only be available where the authorised person believes on reasonable grounds that entry is necessary due to the risk to the environment and public health. However, the potential engagement of the rights to privacy and reputation protected by section 12 of the HRA should be recognised in the explanatory statement accompanying the Bill.

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)

The Bill will establish a number of strict liability offences. These generally involve obligations on licensees in operating a cemetery or crematorium as part of the regulatory framework. However, the strict liability offences include obligations that apply to the community generally, such as transporting human remains in an unacceptable container or wrapping, or failing to provide identification if directed by an authorised person. The explanatory statement accompanying the Bill recognises that these strict liability offences may limit the right to the presumption of innocence protected by section 22 of the HRA. The Committee refers that statement to the Assembly.

The explanatory statement suggests that strict liability offences applying to operators of cemeteries or crematoriums generally have a simple yes / no criteria and allow for an escalating and proportionate offence framework. There is no justification given, however, for those strict liability offences which apply generally,¹ and the outline of individual sections refer to the strict liability nature of the offences² without further explanation or discussion. Consideration should be given to amending the explanatory statement to include further justification of the use of strict liability offences where appropriate.

In the Committee's view, addressing the suitability of the strict liability nature of the offence can be useful in clarifying the elements and scope of the offence. For example, the offence of transporting human remains in an unacceptable container or wrapper in proposed section 14 would generally not be considered suitable for a strict liability offence due to the uncertainty over what is meant to be acceptable. However, what is an acceptable container or wrapper is defined in the Bill, including through reference to approval by the Chief Health Officer. The role of the definition is not, however, included in the outline of the provision in the explanatory statement. In pointing out the objective basis for this strict liability offence the explanatory statement would usefully have included reference to the definition of acceptable container or wrapper in outlining the effect of the section.

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

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

CREATION OF OFFENCES BY REGULATION

The Bill includes the power to create offences by regulation, with maximum penalties of 10 penalty units. While the Committee recognises the minor nature of any such offences given the limited penalties available, the Committee requests a justification be provided for the inclusion of a power to create offences by regulations.

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

¹ The Committee notes that the explanatory statement refers to the specific offence of damaging a headstone or memorial. The Committee has not been able to identify a strict liability offence of this nature in the Bill, noting that section 44 will create an offence of damaging or disturbing property at a cemetery or crematorium, but will not be a strict liability offence.

² The Committee notes that the description in the explanatory statement of proposed section 56 does not include reference to the strict liability nature of the proposed offence.

HENRY VIII CLAUSE

Part 20 of the Bill includes transitional provisions dealing with applications and actions taken under existing legislation and regulations. It includes the power for regulations which modify the transitions chapter³ of the Bill, including in relation to other Territory laws, in relation to anything which, in the Executive's opinion, is not adequately or appropriately dealt with in that Part, and which have effect despite anything elsewhere in the Act. This is an example of a Henry VIII clause which provides for regulations which can modify the operation of other legislation. The Committee recognises that transition to new regulatory regimes may often result in unanticipated impacts. However, the Committee requests further information on why a regulation making power of this breadth, particularly given the five year period in which transition regulations might be made, is needed in the context of this Bill.

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

MAGISTRATES COURT (INFRINGEMENT NOTICES) AMENDMENT BILL 2019

This Private Member's Bill will amend the *Magistrates Court Act 1930* and *Magistrates Court Regulation 2009* to provide for infringement notice penalties to be waived or discharged through entering into an infringement notice management plan involving payment by instalments or participation in an approved community work or social development program.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will provide for applicants seeking to enter into an infringement notice management plan to provide various forms of information. That includes their financial circumstances, whether they are the holder of a concession card (as prescribed in regulations), if they are applying to participate in an approved community work or social development program, and relevant circumstances such as mental illness, disability, substance addiction, homelessness, or being subject to family violence. The administering authority and responsible Director-General can also request any further information before approving an application.

These requirements for personal information may limit the protection of privacy and reputation provided by section 12 of the HRA. The explanatory statement accompanying the Bill sets out a statement of why any such limitation should be considered reasonable using the framework set out in section 12 of the HRA. The Committee refers that statement to the Assembly, recognising the limited use of the information and restrictions placed on both the administering authority and Director-General in their use of the information.

³ The Committee notes that proposed section 213 refers to modification to this Chapter, despite the Bill not being divided into Chapters. The Committee presumes that reference was intended to be made to modifications to Part 20. Given the potential importance of transition regulations this aspect of the Bill should be clarified.

The Committee notes that the Bill will include a defined list of relevant circumstances which are involved in consideration of infringement notice management plans and, in particular, participation in an approved community work or social development program. Restricting relevant circumstances in this way may potentially limit the right to equality before the law protected by section 8 of the HRA. However, in this case, the “relevant circumstances” do not prevent an individual applying for a benefit under the Bill, or restrict the range of circumstances that can be considered in making decisions under the Bill. The Committee therefore acknowledges that any limitation on the right to equality is not likely to be significant.

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

UNIT TITLES LEGISLATION AMENDMENT BILL 2019

This Bill will amend legislation associated with the development, governance and administration of unit title in the ACT, in relation to mixed commercial and residential developments, pre-settlement disclosure requirements and other matters.

***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 make various amendments to the ability of owners corporations to affect unit owners which may be considered a limitation on the protection of privacy, family and home provided by section 12 of the HRA. These include the ability to modify the contribution to common levies or funds through passing a special resolution, allowing animals to be kept without approval, and provision for tailored owners corporations rules. There will also be provision for assistance animals, as defined through reference to various discrimination legislation, to be kept in units without approval.

The explanatory statement accompanying the Bill recognises this potential limitation and provides a detailed discussion of the various provisions in the Bill and why they either should not be considered unlawful or arbitrary and hence do not limit section 12 or are reasonably justified using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly. The Committee notes the various restrictions placed on the role of owners corporations and access to review by the ACT Civil and Administrative Tribunal, as well as the modification of special resolutions under the *Unit Titles (Management) Act 2011* from requiring 66% of the votes cast to, generally, 75%.

The Committee would also like to commend the Minister on the extensive overview in the explanatory statement of what is a lengthy and complex Bill.

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

PROPOSED AMENDMENTS

ELECTORAL LEGISLATION AMENDMENT BILL 2019

On 10 December 2019, the Committee received proposed amendments to the *Electoral Legislation Amendment Bill 2019* from Ms Le Couteur MLA. These amendments relate to reducing the age of eligible voters from 18 to 16 years old and allowing 14 year-olds to enrol to vote; providing for candidate information, including statements about the candidate of not more than 500 words, to be published on the Elections ACT website; increasing electoral expenditure caps; limiting allowable administrative expenditure for MLAs; restrictions on political parties, candidates or associated entities accepting gifts from an individual or corporate group with a total value of over \$10 000 in a year; creating an offence of disseminating electoral advertising which contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent; restricting the defined area of a polling place from the proposed 100m of a building to 6m of a building; and creating an offence to place electoral advertising on public unleased land and amending proposed provisions relating to removal of non-compliant electoral advertising signs by the Territory.

The Committee notes that these amendments generally relate to communication about electoral matters and are likely to significantly limit the right to freedom of expression protected by section 16 of the HRA and right to take part in public life protected by section 17 of the HRA. The Committee has not been provided, by way of explanatory statement or otherwise, with any justification for why such limits should be considered reasonable using the framework set out in section 28 of the HRA. The Committee requests that such a justification be provided.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2019-227 being the Public Place Names (Taylor) Determination 2019 (No 2) made under section 3 of the *Public Place Names Act 1989* amends DI2018-251 to revoke the name of two roads, and determines the names of two roads in the Division of Taylor.**
- **Disallowable Instrument DI2019-232 being the Civil Law (Wrongs) Australian Property Institute Valuers Limited Scheme Amendment 2019 (No 1) made under section 4.10 of Schedule 4 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of New South Wales' approval of an amendment to the Australian Property Institute Valuers Limited Professional Standards Scheme.**
- **Disallowable Instrument DI2019-233 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2019 (No 2) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2017-247 and DI2019-222 and determines the maximum fares relating to the hiring or use of a taxi.**

- **Disallowable Instrument DI2019-235 being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2019 (No 2) made under section 12 of the *Road Transport (General) Act 1999* disapplies section 205 of the Road Transport (Road Rules) Regulation to support parking arrangements for major cricket events at Manuka Oval in 2019 and 2020.**
- **Disallowable Instrument DI2019-236 being the Planning and Development (Lease Variation Charge Deferred Payment Scheme) Determination 2019 (No 2) made under paragraph 279AA(1)(b) and subsection 279AC(2) of the *Planning and Development Act 2007* revokes DI2019-140 and determines the amount of the lease variation charge to be deferred for the purposes of the Act.**
- **Disallowable Instrument DI2019-239 being the Board of Senior Secondary Studies Appointment 2019 (No 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the University of Canberra.**
- **Disallowable Instrument DI2019-240 being the Board of Senior Secondary Studies Appointment 2019 (No 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Australian Catholic University.**
- **Disallowable Instrument DI2019-241 being the Board of Senior Secondary Studies Appointment 2019 (No 3) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Association of Parents and Friends of the ACT Schools.**
- **Disallowable Instrument DI2019-242 being the Board of Senior Secondary Studies Appointment 2019 (No 4) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with vocational education and training organisations.**
- **Disallowable Instrument DI2019-248 being the Food (Fees) Determination 2019 (No 1) made under section 150 of the *Food Act 2001* revokes DI2018-261 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-249 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2019 (No 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* revokes DI2018-262 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-250 being the Public Health (Fees) Determination 2019 (No 1) made under section 137 of the *Public Health Act 1997* revokes DI2018-260 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-251 being the Radiation Protection (Fees) Determination 2019 (No 1) made under section 120 of the *Radiation Protection Act 2006* revokes DI2018-259 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-252 being the Tobacco and Other Smoking Products (Fees) Determination 2019 (No 1) made under section 70 of the *Tobacco and Other Smoking Products Act 1927* revokes DI2018-239 and determines fees payable for the purposes of the Act.**

- **Disallowable Instrument DI2019-257 being the Financial Management (Territory Authorities) Guidelines 2019 made under section 133 of the *Financial Management Act 1996* revokes DI2017-63 and prescribes the entities that are territory authorities for the purposes of the Act.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2019-226 being the Fuels Rationing (Fuel Restriction Scheme) Approval 2019, including a regulatory impact statement, made under section 8 of the *Fuels Rationing Act 2019* approves the Fuel Restriction Scheme.**

This instrument approves a Fuel Restriction Scheme, for section 8 of the *Fuels Rationing Act 2019*. The Committee notes that the explanatory statement for the instrument addresses human rights issues arising from the instrument. The discussion relates to the right to the freedom of movement, arising under section 13 of the *Human Rights Act 2004*. The explanatory memorandum states:

HUMAN RIGHTS

The scheme engages the *Human Rights Act 2004* (the HRA), notably the right to freedom of movement in section 13. However, the failure of a consistent supply of liquid fuels is a risk to life, health and safety if that supply severely inhibits the function of emergency services, and as such a proportionate limitation of the right to freedom of movement is necessary.

Right to freedom of movement

Nature of the right affected: Section 13 of the HRA provides that everyone has the right to move freely within the ACT and to enter and leave it. The Scheme allows the Minister to apply mandatory fuel restriction measures to the sale and purchase of fuel in Stage 2 fuel restrictions in the event voluntary fuel restrictions are not sufficient. Limiting people’s access to fuel may limit their ability to travel via combustion engine vehicles.

Importance of the purpose of the limitation: The Scheme must have the power to limit the sale and purchase of fuel in order to secure adequate fuel supplies to support the continued function of essential services such as police, ambulance and emergency services.

Nature and extent of the limitation: While the enactment of a fuel restriction under the Scheme may limit people’s ability to travel via combustion engine vehicles, it is most likely that people will still be able to purchase limited volumes of fuel under Stage 2 fuel restrictions to fuel their personal and business vehicles. It is also the intention of the Scheme that public transport and taxi services will continue to operate during fuel restrictions, which will support the free movement of people. The Scheme does not in any way limit the free movement of people for methods of transport that do not require fuel.

Relationship between the limitation and its purpose: The ability for the Minister to limit the sale and purchase of fuel is essential to ensure that sufficient fuel is available to support the continued function of essential services such as police, ambulance and emergency services.

Less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve: Voluntary fuel restriction measures may be used to reduce the consumption of fuel to manage a shortage of fuel. However, in some circumstances, voluntary restrictions will not be sufficient to secure adequate fuel supplies for the continued operation of essential services. The Scheme provides that Stage 2 (mandatory) fuel restrictions may only be enacted if voluntary fuel restrictions are not sufficient to meet one or more objectives outlined in Section 11 (1) (b) of the Act.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

RETROSPECTIVITY—POSITIVE COMMENT

- **Disallowable Instrument DI2019-228 being the Land Tax (Affordable Community Housing) Determination 2019 (No 2) made under paragraph 13A(5)(a) of the *Land Tax Act 2004* revokes DI2019-32 and 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.**
- **Disallowable Instrument DI2019-229 being the Planning and Development (Remission of Lease Variation Charges—Affordable Rental Development Concession) Determination 2019 made under section 278 of the *Planning and Development Act 2007* determines the circumstances and the amount of the lease variation charge for the chargeable variation to be remitted for a development application for land to be developed and used for affordable rental.**

Each of the instruments mentioned above has a retrospective effect. The explanatory statement for the first instrument states:

This instrument revokes and replaces *Land Tax (Affordable Community Housing) Determination 2019 (No 1)*, (DI2019-32). It commences retrospectively from 28 March 2019 and clarifies and confirms the availability of an alternate ACT Housing Strategy income threshold for tenants, as well as an owner's application requirements for this affordable community housing Scheme.

Criterion 3 is updated from the previous instrument to provide that an owner's parcel must be rented by a tenant or tenants whose combined gross income (at the time the parcel is rented) is less than or equal to:

- \$100,000 per annum (based on the ACT Housing Strategy, October 2018), or
- the annual income limits for a household (based on Commonwealth National Rental Affordability Scheme (NRAS) limits),

whichever is the greater.

The update to Criterion 3 allows for an alternate threshold for determining a tenant's eligibility for affordable community housing under this instrument.

Criterion 1 is also updated from the previous instrument to specify that within 14 days of the rental of a parcel for affordable community housing, the owner (or their agent) is required to provide certain documents in support of their application for a land tax exemption under this instrument. This application requirement, previously categorised under Criterion 4 of DI2019-32, required owner's to supply information before the 1st day of the next quarter. This requirement has been altered in this instrument to better streamline its operation and allow for a community housing provider to supply particulars of rental where they act as the agent for the owner.

As indicated above, section 3 of the instrument provides that the instrument “is taken to have commenced on 28 March 2019”. The Committee notes with approval that this retrospective operation is addressed in the explanatory statement, which states:

Retrospectivity

This instrument is taken to commence on 28 March 2019.

Section 76(1) of the *Legislation Act 2001* provides that a statutory instrument may provide that a non-prejudicial provision of an instrument commences retrospectively.

The inclusion of an alternate ACT Housing Strategy threshold will bring more households into scope for affordable community housing. In effect, this expands the pool of eligible tenants and increases the potential for participation in the scheme. The inclusion of this provision does not operate to the disadvantage of any person by adversely affecting that person’s rights, or by imposing additional liabilities on that person.

The other updates in this instrument aid to improve the operation of the land tax exemption for affordable community housing participants.

The second instrument mentioned above introduces a 25% remission of the Lease Variation Charge that arises under section 276C of the *Planning and Development Act 2007*, if the lessee varying the lease is a “registered community provider”. The explanatory statement for the instrument states that the object of the remission is “to encourage the development of more affordable rental housing for low to moderate income households”. Again, the instrument has retrospective operation. Section 3 of the instrument states that the instrument “is taken to have commenced on 1 October 2019”.

The Committee notes with approval that the explanatory statement for the instrument addresses the retrospectivity issue, stating:

Retrospectivity

This instrument has retrospective commencement from 1 October 2019.

Section 76(1) of the *Legislation Act 2001* provides that a statutory instrument may commence retrospectively provided it is non-prejudicial, that is it does not operate to the disadvantage of a person by adversely affecting the person’s rights or imposing liabilities on the person. This instrument provides a concession on the LVC payable for land that is developed and used for affordable rental housing. It promotes a purpose which will be of overall benefit to the ACT community.

This comment does not require a response from the Ministers.

STRICT LIABILITY OFFENCES / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2019-230 being the Smoke-Free Public Places (Public Transport Interchanges) Declaration 2019 (No 1) made under section 90 of the *Smoke-Free Public Places Act 2003* declares specified public transport interchanges to be smoke-free public places.**

This instrument determines various locations (principally in bus interchanges) as “smoke-free public places”, for section 9O of the *Smoke-Free Public Places Act 2003*. The explanatory statement for the instrument notes that smoking in a “smoke-free public place” may give rise to a strict liability offence, under section 9T or 9U of the Act. The Committee notes, with approval, that the explanatory statement addresses both the strict liability issue and the *Human Rights Act 2004* implications of the strict liability offence issue, stating:

Strict Liability Offences

This Declaration is linked to strict liability offences within the Act under sections 9T and 9U. The appropriateness of strict liability offences relating to Declarations made under section 9O of the Act was considered by the ACT Legislative Assembly as part of the *Smoke-Free Public Places Amendment Act 2016*.

In the case of this Declaration, the application of strict liability offences is considered necessary and appropriate to ensure the integrity of the smoke-free regulatory scheme and to align with Government and community expectations.

Public messaging about smoke-free transport areas will include social media and the installation of signage in new parts of interchange areas. Thus, a defendant can reasonably be expected to be aware of the smoke-free area and possible penalties.

It is also noted that all other Australian jurisdictions, with the exception of Western Australia, have legislated to make smoking at public transport stops an offence. A person travelling in the ACT from another jurisdiction is therefore likely be reasonably aware of a community expectation that smoking in public transport waiting areas is prohibited. This expectation is supported by established offences in neighbouring jurisdictions and the signage displayed in ACT transport interchanges and on ACT Government buses.

Inspectors have favoured an educative approach in preventing smoking at public transport stops, public transport waiting areas and public transport interchanges in the ACT. Enforcement of this smoking ban will continue to prioritise explaining the ban and requesting that the smoker extinguish their cigarette or move outside the smoke-free area. Inspectors will retain their discretion to issue an infringement notice under the *Magistrates Court (Smoke-Free Public Places Infringement Notices) Regulation 2010* to people found to be smoking within a smoke-free zone. However, infringement notices are only be issued for repeated contraventions of the Declaration or for disregarding an inspector’s direction to stop smoking.

Human Rights Considerations

The application of strict liability has been accepted in the ACT as engaging the right to be presumed innocent under the *Human Rights Act 2004* (HRA). This is because such offences do not require a person to *intend* to undertake the prohibited conduct. It is sufficient to prove only that the defendant engaged in the conduct. The absence of intention as an element of the offence generally places a burden upon the defendant to challenge the prosecution case by establishing a defence. This Declaration has therefore been considered in relation to the factors listed under section 28 of the HRA, section 9O of the Act and community expectation.

Any limitations imposed by this Declaration are considered justified and proportionate in a free and democratic society. This is because the Declaration provides public health protections to the majority of the ACT population using public transport and is largely consistent with other states and territories, as well as community and government expectations. It is suggested that the

object of protecting people who are waiting for public transport from the public health risks created by SHS is of sufficient importance to justify limitation to the rights listed above. In addition, the nature and extent to which these rights have been limited is no more than necessary, and they will be supported by an educative approach.

The Committee notes the reference, above, to the “educative approach” favoured by inspectors. The Committee seeks the Minister’s advice as to the legal basis for the approach that is referred to, above.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment requires a response from the Minister.

MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2019-231 being the Official Visitor (Disability Services) Appointment 2019 (No 2) made under paragraph 10(1)(c) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the *Disability Services Act 1991*.**

This instrument appoints a specified person as an official visitor, for paragraph 10(1)(c) of the *Official Visitor Act 2012*. The Committee notes that the explanatory statement for the instrument states:

This instrument appoints [the specified person] for the purposes of the *Disability Services Act 1991*. The Minister for Disability has recommended the appointments of [the specified person] as persons who are experienced and well-qualified. [emphasis added]

The inappropriate use of the plural would tend to indicate that the explanatory statement has been drafted using an earlier explanatory statement that appointed multiple official visitors. As the Committee cautions in its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,⁴ the use of existing legislative material as “precedents” or “templates” should be undertaken with caution, as different criteria, etc may apply:

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 one 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.

⁴ https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

The Committee reminds instrument-makers to be aware of this issue.

This comment does not require a response from the Minister.

COMMENCEMENT OF INSTRUMENTS / RELIANCE ON SECTION 81 OF THE LEGISLATION ACT 2001?

- **Disallowable Instrument DI2019-234 being the Motor Accident Injuries Levy Determination 2019 (No 1) made under section 490 of the *Motor Accident Injuries Act 2019* determined the amount of the motor accident levy.**
- **Disallowable Instrument DI2019-237 being the Motor Accident Injuries (Business Plan) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Business Plan Guidelines.**
- **Disallowable Instrument DI2019-238 being the Motor Accident Injuries (Defined Benefit Application) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Defined Benefit Application Guidelines.**
- **Disallowable Instrument DI2019-243 being the Motor Accident Injuries (Income Replacement Benefit) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Income Replacement Benefit Guidelines.**
- **Disallowable Instrument DI2019-244 being the Motor Accident Injuries (Internal Review) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Internal Review Guidelines.**
- **Disallowable Instrument DI2019-245 being the Motor Accident Injuries (Premiums) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the MAI Premium Guidelines.**
- **Disallowable Instrument DI2019-246 being the Motor Accident Injuries (Quality of Life Benefit) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Quality of Life Benefit Guidelines.**
- **Disallowable Instrument DI2019-247 being the Motor Accident Injuries (Treatment and Care) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Treatment and Care Guidelines.**

Each of the instruments mentioned above (and subordinate law SL2019-28, discussed below) is made under the *Motor Accident Injuries Act 2019*, which was notified on 31 May 2019. Section 2 of the *Motor Accident Injuries Act* provides:

2 Commencement

- (1) This Act commences on a day fixed by the Minister by written notice.

Note 1 The naming and commencement provisions automatically commence on the notification day (see *Legislation Act*, s 75(1)).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see *Legislation Act*, s 77(1)).

- (2) If this Act has not commenced within 12 months beginning on its notification day, it automatically commences on the first day after that period.
- (3) The Legislation Act, section 79 (Automatic commencement of postponed law) does not apply to this Act.

The entry for the Act on the [ACT Legislation Register](#)⁵ states:

This Act commences on 1 February 2020.

This is a reflection of the operation of the commencement notice for the Motor Accident Injuries Act (CN2019-13)⁶.

This means that the various instruments (and subordinate law) mentioned are made before the provisions under which they are made have commenced. This fact is reflected in the commencement provisions for the second and sixth instruments mentioned above (ie DI2019-237 and DI2019-487), which provide:

2 Commencement

- (1) This instrument commences on the day after it is notified.
- (2) The *Legislation Act 2001*, section 81(6) applies to this instrument.

Note: The Legislation Act 2001, s 81 provides for the exercise of a power given by a law if the law, or amending law, has been notified but has not yet commenced.

For completeness, the Committee notes that (as indicated above) section 81 of the *Legislation Act 2001* provides for the exercise of power, under an Act that has been notified (ie after being passed by the Legislative Assembly) but has not yet commenced. It allows the making of instruments such as these, in anticipation of the commencement of the Act. Subsection 81(6) of the Legislation Act provides:

- (6) If an appointment or statutory instrument made under this section declares that this subsection applies to it, then, unless the appointment or instrument commences on a different date or at a different time under another provision of this chapter, the appointment or instrument commences on—
 - (a) for an appointment or statutory instrument that is a legislative instrument—the day after its notification day; or
 - (b) for any other appointment or statutory instrument—the day after the day it is made or, if it is required under an Act or statutory instrument to be approved (however described) by the Executive, a Minister or any other entity, the day after the day it is approved.

Paragraph 81(6)(a) would seem to apply to DI2019-237 and DI2019-487.

⁵ <https://www.legislation.act.gov.au/a/2019-12/>.

⁶ <https://www.legislation.act.gov.au/cn/2019-13/>

The Committee notes that remaining instruments (and SL2019-28) commence on the commencement of section 3 of the Motor Accident Injuries Act (ie 1 February 2020). This would tend to indicate that the different approach taken to the commencement of DI2019-237 and DI2019-487 is connected to the commencement of the instruments in question (ie prior to the commencement of the Motor Accident Injuries Act). In any event, it is evident that all the instruments mentioned above (and SL2019-28) rely on section 81 of the Legislation Act. The Committee considers that it may have been helpful if this was mentioned in the explanatory statements for the instruments (and the subordinate law).

This comment does not require a response from the Minister.

SUBORDINATE LAWS—COMMENT

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

STRICT LIABILITY OFFENCE / HUMAN RIGHTS ISSUES

- **Subordinate Law SL2019-28 being the Motor Accident Injuries (Premiums and Administration) Regulation 2019 made under the *Motor Accident Injuries Act 2019* prescribes matters relating to the operation and administration of the motor accident injuries insurance scheme.**

This subordinate law provides for various matters relating to the new “compulsory motor accident injuries insurance scheme”, provided for by the *Motor Accident Injuries Act 2019*. Part of the scheme involves the issuing of “collection notices” to licensed insurers, requiring licensed insurers to make contributions (determined by the Motor Accident Injuries Commission) to the “nominal defendant fund”, established by section 330 of the Act. Section 23 of this subordinate law provides:

23 Offence—failure to pay contribution—Act, s 331 (1) (b)

- (1) A licensed insurer commits an offence if—
 - (a) a collection notice is in force for the licensed insurer; and
 - (b) the licensed insurer does not pay the amount stated in the notice to the nominal defendant fund on or before the due date stated in the collection notice.

Maximum penalty: 20 penalty units.

- (2) If the Magistrates Court convicts a licensed insurer, or finds a licensed insurer guilty, of an offence against this section, the court may order the insurer to pay any unpaid amount to the nominal defendant fund.
- (3) An order under subsection (2) is in addition to a penalty imposed for the offence.
- (4) For the enforcement of payment of the order and the calculation of interest in relation to a judgment, the order is taken to be a final judgment of the Magistrates Court for the amount stated in the order.

Though the term “strict liability” is not used in the provision, this provision, in effect, creates a strict liability offence.

The Committee seeks the Minister’s advice as to why the terminology “strict liability offence” is not used, in the actual provision, especially when that term is used in the explanatory statement, in justifying the provision.

The Committee notes that the explanatory statement for the subordinate law states:

Human rights Implications

Strict liability offence - clause 23

The regulation provides a strict liability offence in clause 23 for a licensed insurer that does not pay an amount specified in a collection notice to the nominal defendant fund on or before the due date stated in the collection notice. The maximum penalty is 20 penalty units. The absence of burden of proof for a strict liability offence may engage the presumption of innocence under section 22 of the *Human Rights Act 2004*.

The offence is based on an existing offence in section 30D of the Road Transport (Third-Party Insurance) Regulation 2008.

The financial viability of the MAI scheme depends on the nominal defendant fund being fully funded to pay claims against any unidentified or uninsured motor vehicles. Licensed insurers, in turn, must pay their share of contributions to this fund in a timely manner. A licensed insurer must be a company incorporated under the *Corporations Act 2001* (Cth). It is reasonable for a licensed insurer to be fully aware of the statutory obligations of an MAI insurer under the Principal Act including the insurer’s obligation to pay into the fund. The prudential benefits to the MAI scheme of the use of a strict liability offence are considered to outweigh the trespass of the presumption of innocence.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment requires a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the regulatory impact statement for the following disallowable instrument and has no comments on it:

- **Disallowable Instrument DI2019-226 being the Fuels Rationing (Fuel Restriction Scheme) Approval 2019.**

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 25 November 2019, in relation to comments made in Scrutiny Report 37 concerning the Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019.

- The Minister for Employment and Workplace Safety, dated 26 November 2019, in relation to comments made in Scrutiny Report 37 concerning the Long Service Leave (Portable Schemes) Amendment Bill 2019.
- The Attorney-General, dated 5 December 2019, in relation to comments made in Scrutiny Report 36 concerning the Residential Tenancies Amendment Bill 2019.
- The Minister for the Environment and Heritage, dated 9 December 2019, in relation to comments made in Scrutiny Report 37 concerning the Heritage Amendment Bill 2019.
- The Chief Minister, dated 11 December 2019, in relation to comments made in Scrutiny Report 37 concerning the Legislative Assembly (Office of the Legislative Assembly) Amendment Bill 2019.

[These responses](#)⁷ can be viewed online.

The Committee wishes to thank the Chief Minister, the Attorney-General, the Minister for Employment and Workplace Safety and the Minister for the Environment and Heritage their helpful responses.

Giulia Jones MLA
Chair

4 February 2020

⁷ <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>.

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 35, dated 23 September 2019**
 - Planning and Development (Design Review Panel) Amendment Bill 2019 (further Government response).
- **Report 37, dated 19 November 2019**
 - Disallowable Instrument DI2019-216—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1).
 - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
 - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s amendments)