

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

SCRUTINY REPORT 41

28 APRIL 2020

# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)  
Ms Bec Cody MLA (Deputy Chair)  
Mr Deepak-Raj Gupta MLA

## SECRETARIAT

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

## CONTACT INFORMATION

Telephone 02 6205 0199  
Facsimile 02 6205 3109  
Post GPO Box 1020, CANBERRA ACT 2601  
Email [scrutiny@parliament.act.gov.au](mailto:scrutiny@parliament.act.gov.au)  
Website [www.parliament.act.gov.au](http://www.parliament.act.gov.au)

## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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

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# BILLS

## BILLS—COMMENT

### COVID-19 EMERGENCY RESPONSE BILL 2020

This Bill will allow urgent effect to be given to Commonwealth agreements and operational requirements to allow the Government to respond to, and prevent the further spread of, COVID-19. It amends a range of legislation, including the provision for broad regulation-making powers. The Bill was passed on 2 April 2020, the same day it was introduced, and notified on 7 April 2020.

***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 Bill engages a long list of rights protected under the Human Rights Act. These are generally recognised in the explanatory statement and, where limited, a justification provided using the framework set out in section 28 of the HRA. The Committee recognises the extraordinary nature of the COVID-19 emergency that has led to the introduction of this Bill and the urgency for many of the amendments. As the Assembly has considered and passed this Bill prior to consideration by this Committee, the following comments highlight specific concerns with the operation and effect of the Bill rather than describing the human rights potentially limited and the justifications provided for those limits.

#### EMERGENCY PERIOD

The explanatory statement accompanying the Bill states that the amendments “will end after 12 months, unless otherwise extended by a future bill” and that this “approach has been taken to reinforce the emergency and temporary nature” of the measures adopted. This approach is reflected in many of the amendments expiring 12 months after the commencement of the Bill. However, the Committee is concerned that the 12 month expiry period does not apply uniformly across the Bill, and that departures from that approach are not adequately justified in the context of their potential limitation on human rights.

The Bill takes a variety of approaches to defining the period in which the amendments will operate. Generally, the amendments apply during an emergency period defined as a state of emergency declared under the *Emergencies Act 2004* section 156 because of the coronavirus disease 2019 (COVID-19), or an emergency declared under the *Public Health Act 1997* section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19). However, other amendments apply during an emergency period defined as the period during which the *Public Health (Emergency) Declaration 2020 (No 1)* (NI2020-153), as extended or further extended, is in force.<sup>1</sup> The Committee notes that NI2020-153 is a notifiable instrument declared under section 119 of the Public Health Act and so the different emergency periods may largely intersect. However, it is not clear to the Committee why the Bill uses a variety of ways to define the emergency period, including at times in relation to amendments to the same Act.

<sup>1</sup> See for example, clauses [1.4], [1.31], [1.46], [1.63], [1.64] and [1.69]

The Bill also takes a variety of approaches to extending the period of operation of some amendments beyond the end of the COVID-19 emergency. For example, amendments to the *Children and Young People Act 2008* include allowing the Childrens Court to determine the period of appraisal orders and temporary parental responsibility provisions for up to six months after the expiry of the emergency period (see clause [1.9]). The authority for two day extensions of transfer of daily care responsibilities to the director-general in exceptional circumstances (clause [1.11]), extension of assessment orders by the Childrens Court (clause [1.13]) and extension of approval of foster and kinship carers (clause [1.14]) similarly expire six months after the end of the emergency period. The Committee notes that, in the case of extension of orders by the Childrens Court, it is not clear whether it is intended that the assessment period may extend even beyond six months from the end of the emergency period provided the order is made during the emergency period. However, voluntary care agreements (clause [1.10]), and protection against penalties for breaching obligations under a care and protection order (clause [1.12]) are extended for three months after the emergency period. For each of these provisions, the explanatory statement refers to the lack of staff or health officials that might be available during the emergency period and the potential need to prioritise the allocation of resources or services. The difference in time periods is not explained.

The Bill will also amend the *Corrections Management Act 2007* to extend local leave permits for full time detainees from seven days to 28 days or up to three months for the purpose of receiving long-term medical or palliative care [clause [1.18]]. The provision expires 12 months after commencement, without any necessary connection to the emergency period.

Amendments to the *Firearms Act 1996* (clause [1.34]), *Leases (Commercial and Retail) Act 2001* (clause [1.46]), *Prohibited Weapons Act 1996* (clause [1.63]) and *Residential Tenancies Act 1997* (clause [1.64]) allow the Minister to make a declaration modifying the operation of those Acts in various aspects in response to the public health emergency. During the emergency period, the Minister is able to extend the operation of the declaration for three months after the end of the emergency period where they consider it justified by the effect of the pandemic. The need for an ability to extend the operation of the declaration beyond the emergency period, and the three months' period, is not set out in the explanatory statement.

As discussed further below, the amendments to the Supreme Court Act define the emergency period as starting on 16 March 2020 and ending on 31 December or another day prescribed in regulations. The amendments expire 12 months after the commencement of the Bill, but potentially permit orders for judge-only trials being made for a longer period where regulations are made during the 12 months from commencement (see clauses [1.66] – [1.68]).

The Committee therefore requests further information from the Minister as to why different time-periods were chosen for the operation of the various provisions in the Bill discussed above, and how these relate to the justifications provided for any limitation of human rights.

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

#### NOTIFIABLE INSTRUMENTS

As discussed above, the amendments to the *Firearms Act 1996* (clause [1.34]), *Leases (Commercial and Retail) Act 2001* (clause [1.46]), *Prohibited Weapons Act 1996* (clause [1.63]) and *Residential Tenancies Act 1997* (clause [1.64]) allow the Minister to make a declaration modifying the operation of those Acts. The Bill provides for the declaration to be a disallowable instrument, ensuring scrutiny by the Assembly, and this Committee, of what may be substantial amendments to legislation.

However, any extension to the period of operation of those declarations is a notifiable instrument. The Committee is not clear why any extension, particularly given it will enable a declaration to extend beyond the period of the public health emergency, in some cases for an extended period, should not also be subject to scrutiny and disallowance by the Assembly. The Committee therefore requests consideration be given to converting any extension to a disallowable instrument.

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

#### EMERGENCY ACTION UNDER THE CHILDREN AND YOUNG PEOPLE ACT

As discussed above, the Bill will allow the Childrens Court to extend the period for which the director-general has daily care responsibility for a child or young person for up to two additional days (clause [1.11]). The Childrens Court is able to extend the period where the director-general has such daily care responsibility during the emergency period or six months following, and there are exceptional circumstances justifying the extension.

The Committee is concerned that the request to extend the period may be unconnected to circumstances arising out of the public health emergency. The explanatory statement accompanying the Bill, in justifying the amendment's limitation on the right to protection of family and children provided by section 11 of the HRA, refers to the delays in being able to provide vital services in protecting children from harm that might be associated with the public health emergency. The explanatory statement also states that the "granting of an extension is contingent on the Childrens Court forming the view that, but for the public health emergency, compliance with the usual statutory timeframes would have occurred" ... and the "right is necessarily limited because of the changes in circumstances due to the public health emergency" (p 13). It is not clear to the Committee why the Childrens Court would be so limited other than by having regard to human rights in interpreting and exercising their authority. The Committee therefore requests the Minister confirm the basis on which any extension is limited to responding to circumstances due to the public health emergency.

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

#### TRIAL BY JURY

Under the *Supreme Court Act 1933* (SCA) a defendant in a criminal trial is generally entitled to be tried by a jury (see section 68A). They can elect to be tried by judge alone provided they are not being tried for certain excluded offences (section 68B). The Bill will amend these provisions and insert a new section 68BA to allow a judge to order a criminal proceeding—that is a prosecution on indictment—to be tried by judge alone. The court must be satisfied that a trial by judge alone will ensure the orderly and expeditious discharge of the business of the court and is otherwise in the interest of justice. The parties to the proceeding must be given the opportunity to make submissions before any such order, having been given seven days' notice. The amendments will apply where the trial is to be conducted, in whole or in part, during the COVID-19 emergency period, defined as from 16 March 2020 until either 31 December or another day prescribed by regulation.

As the explanatory statement accompanying the Bill states, removal of the right to a trial by jury may limit a number of rights protected by the HRA. This may include the right to a fair trial protected by section 21 of the HRA and the right to have criminal charges decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Rights in criminal proceedings protected by section 22 of the HRA include: the right of a person charged with a criminal offence to

be tried without reasonable delay; having adequate time and facilities to prepare their defence and to communicate with lawyers or advisers; to be tried in person; to have legal assistance in the interests of justice; to obtain the attendance and examine witnesses; and a right of appeal. While the right to a trial by jury may contribute to or augment these protections, a right to trial by jury is not explicitly protected by the HRA.

However, trial by jury has long been recognized as a fundamental element of our criminal justice system.<sup>2</sup> Legislation which seeks to limit access to a trial by jury is subject to strict construction in favour of the accused.<sup>3</sup> The Committee also notes that section 80 of the Constitution requires trial by jury of an indictment of any offence in Commonwealth legislation.<sup>4</sup> The right to a trial by jury is therefore considered by the Committee as a fundamental right requiring justification analogous to that required under the HRA.

The explanatory statement accompanying the Bill justifies the amendments to the Supreme Court Act as required to allow the effective administration of justice to continue without placing members of a jury at unnecessary risk. The amendments will ensure that trials being heard on indictment are not seriously delayed, which may have adverse effects on the fair trial of the accused, including contributing to loss of evidence or require extending the period they remain in custody. Delay may also have adverse effects on witnesses and victims, eroding the ability to recall events and prolonging the period before they are asked to provide evidence.

The Committee recognizes that the right to a jury trial will only be denied where a judge considers it in the interests of justice and after the opportunity to put submissions to the Court. However, the Committee is concerned that the amendment places undue weight on the interests of “the orderly and expeditious discharge of the business of the court” and the interests of prosecutors in circumstances where the accused, in whose interests the right to be tried without unreasonable delay is provided, does not consent to a judge-only trial.

The Committee is also concerned the amendment does not explicitly require the Court to consider other options available to it to reduce the risks placed on members of the jury, including use of video-conferencing facilities or testing and isolating jury members for short lengths of time. The Committee notes that the Bill will also amend the *Evidence (Miscellaneous Provisions) Act 1991* to facilitate the recording of evidence while witnesses’ recollections are fresh and allow other procedural measures in recognition of the potentially “significant period of time before normal court functioning, particularly jury trials, resume”.

Any order to proceed to a trial by judge alone should also consider whether other factors related to the COVID-19 emergency may also contribute to a delay in proceedings, such as the difficulty of witnesses travelling to Court or getting access to records or materials. Consideration of the extent of any delay caused by the need to protect jury members, particularly where the emergency period is nearing its end or the trial is likely to extend at least in part outside of the emergency period, should be expressly required.

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<sup>2</sup> See for example, *Newell v The King* (1936) 55 CLR 707, where Latham CJ expressed the view (at 711) that “[t]he right to a jury is one of the fundamental rights of citizenship”, while Evatt J (at 713) held that “trial by jury has been universally regarded as a fundamental right of the subject”.

<sup>3</sup> See for example *Tassell v Hayes* (1987) 163 CLR 34.

<sup>4</sup> The Committee accepts that under current authority this requirement will not apply to offences under Territory legislation (see *R v Bernasconi* (1915) 19 CLR 629).

The Committee is also concerned that the emergency period can be extended beyond 31 December 2020 where another day is prescribed by regulation. While the authority to extend the emergency period expires 12 months after commencement of the Bill, the period so extended can be considerably longer. The explanatory statement accompanying the Bill states that the time period chosen, and ability to extend, reflects the uncertainty of how long the emergency will continue and the likelihood of a backlog of cases to hear. While any regulation extending the emergency period will be subject to scrutiny, including by this Committee, the Committee remains concerned with the ability to extend the period in which a trial by judge alone may be ordered, potentially for a large amount of time, and beyond the period in which harm to jurors of holding a trial by jury can be demonstrated.

The amendments to the Supreme Court Act will apply to criminal proceedings that begin prior to the commencement of the Bill. A judge-only trial can be ordered where the trial is to be conducted, even in part, during the emergency period. This would potentially allow jury trials that were on-going at the time of the commencement of the Bill to be converted to judge-only trials where that is considered in the interests of justice. The entitlement to have a jury trial will therefore be retrospectively denied. While this does not limit the right against retrospective criminal laws provided by section 25 of the HRA, it does affect the presumption protected by section 84 of the *Legislation Act 2001* that amendments to legislation will not “affect an existing right, privilege or liability acquired, accrued or incurred under the law”.<sup>5</sup> While the explanatory statement recognizes the potential retrospective application of the amendments, no specific justification is provided.

The Committee therefore asks the Minister for further information on the nature, and possible effects, of the delays associated with jury trials as a result of restrictions in place due to the COVID-19 emergency, and what consideration has been given to alternative means to protect jury members in the conduct of jury trials. The Committee also requests further justification for the ability of regulations to extend the period in which jury trials can be ordered and for the application of the provision to criminal proceedings which commenced prior to the commencement of the provisions.

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

## **PUBLIC HEALTH (EMERGENCIES) AMENDMENT BILL 2020**

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This Bill amends the *Public Health Act 1997* to allow a declaration of a public health emergency made because of the COVID-19 emergency to be extended for up to 90 days. The Bill was passed on 2 April 2020, the same day it was introduced, and notified on 7 April 2020

***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 Public Health Act provides the Minister with the authority to declare a public health emergency if they consider it justified in the circumstances (section 119). The emergency declaration can originally be in force for up to five days, but prior to the Bill could only be extended for an additional two days at a time. The Bill will allow an extension of a declaration made because of the COVID-19

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<sup>5</sup> See *R v Girvan* [2012] ACTSC 142.

disease for up to 90 days. The declaration has to be revoked if the Minister decides it is no longer justified, taking into account the advice of the Chief Health Officer. The Chief Health Officer must provide advice at least every 30 days. Extensions of up to 90 days because of the COVID-19 disease will be possible until 12 months has passed since the last such declaration was in force.<sup>6</sup>

While an emergency declaration is in force, the Chief Health Officer may take any action or give any direction they consider necessary or desirable to alleviate the emergency, including segregation or isolation of persons, evacuation, limiting access, and taking control of vehicles. The Chief Health Officer can also direct that a person undergo a medical examination, or surrender, destroy or modify anything in their possession or control (section 120). An authorised person can enter any place, using such reasonable force and assistance as necessary, prevent access, close roads or paths, or remove any person who is obstructing the authorised person (section 121).

By extending the duration of an emergency declaration, the Bill potentially limits a wide range of human rights, including the right to equal protection under section 8, protection of home and privacy under section 12, freedom of movement under section 13, freedom of assembly and association under section 15, and the right to liberty under section 18. The explanatory statement accompanying the Bill includes a justification for these limitations using the framework set out in section 28 of the HRA. Noting that the Bill has already been passed, the Committee makes the following comments.

The declaration and any extension is a notifiable instrument, and the Minister must also give additional notice, on an ACT Government website or in a daily newspaper, as soon as practicable. The Chief Health Officer has to maintain a record of all actions taken and directions given for the purposes of alleviating the emergency. The Chief Health Officer must also prepare a report on any emergency, setting out the particulars of the events giving rise to the emergency, actions taken to deal with it, directions given and any other appropriate matter. The report has to be given to the Minister within three months after it is prepared and then presented to the Assembly within six sitting days.

The Committee is concerned about the lack of transparency and accountability of actions taken by the Minister and Chief Health Officer in relation to a COVID-19 emergency. As a notifiable instrument, any extension by the Minister is not subject to scrutiny by the Assembly, or by this Committee. There is no requirement to make public any advice received by the Health Minister, and a failure by the Health Minister to provide advice at least every 30 days does not invalidate the extension or further extension. Any direction given, particularly when given orally, does not have to be reported on until the end of the emergency declaration.

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<sup>6</sup> The Bill provides for the operation of the amendments by having schedule 1 of the Bill commence at the end of a 12-month period during which no COVID-19 declaration (including as extended or further extended) has been in force. Schedule 1 then amends the Public Health Act to omit reference to COVID-19 declarations. However, the Committee notes that COVID-19 declaration is not defined for the purposes of the commencement provision. The Bill includes a definition of a COVID-19 declaration for the purposes of section 119 of the Public Health Act. The Committee acknowledges that the intent of the commencement provision is reasonably clear, but it would be preferable to amend the commencement provision to include a definition of COVID-19 declaration.

As the explanatory statement accompanying the Bill states:

public communications are important to ensure that the public have a properly informed understanding of the risk and are effectively engaged in public health measures. Communication will assist people to make more informed decisions and will help to reduce the spread of the COVID-19.

The Committee also notes that a declaration of a public health emergency, as extended, is used to define the emergency period for the various amendments in the COVID-19 Emergency Response Bill discussed above.

The Committee would, therefore, request a response from the Minister why regular reports could not be provided to the Assembly on the nature of the advice provided by the Chief Medical Officer on the continuing justification for a COVID-19 declaration, and the nature of the actions taken and directions given for the purposes of the emergency. Consideration could also be given to amending the legislation to provide for a consequence of the failure of the Chief Health Officer to provide advice to the Minister, including shifting the onus onto the Minister to justify not revoking the declaration.

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

## PROPOSED AMENDMENT

### **ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020**

On 20 April 2020, the Committee received a proposed Government amendment to the Electronic Conveyancing National Law (ACT) Bill 2020. This proposed amendment will displace the requirement for an operating requirement or participation rule, which set out requirements for Electronic Lodgement Network operators and participants, to commence operation 20 days after notification. The amendment will allow operating requirements or participation rules notified before the commencement of the Bill on 1 June 2020 to come into effect upon notification.

The Committee has no further comment.

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2020-15 being the Motor Accident Injuries (Insurer Communication) Guidelines 2020 made under section 487 of the Motor Accident Injuries Act 2019 makes the Insurer Communication Guidelines.**
- **Disallowable Instrument DI2020-18 being the Public Health ('COVID-19' AKA 'Novel Coronavirus'—Temporary Notifiable Condition) Declaration 2020 (No 1) made under paragraphs 101(a) and (b) of the Public Health Act 1997 declares COVID-19 to be a transmissible notifiable condition.**
- **Disallowable Instrument DI2020-19 being the Road Transport (General) Application of Road**

**Transport Legislation Declaration 2020 (No 1) made under section 12 of the *Road Transport (General) Act 1999* suspends specified parking rules in specified areas to support the National Multicultural Festival event.**

- **Disallowable Instrument DI2020-23 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2020 (No 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* approves sports bookmaking operations at Thoroughbred Park Racecourse during the Black Opal Stakes held on 8-9 March 2020.**
- **Disallowable Instrument DI2020-24 being the Road Transport (General) Deciding Applications for Registration—Written-off Vehicles Declaration 2020 (No 1) made under section 13 of the *Road Transport (General) Act 1999* allows for the registration of repairable write-off vehicles that were not registered in the ACT or another Australian jurisdiction prior to the incident that caused the vehicles to be notified as written-off vehicles.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### RETROSPECTIVITY—POSITIVE COMMENT

**Disallowable Instrument DI2020-20 being the Road Transport (General) Hazard Perception Test Exemption Declaration 2020 (No 1) made under section 13 of the *Road Transport (General) Act 1999* exempts a person, in certain circumstances, from completing a hazard perception test to be eligible for a provisional car licence.**

This instrument is made under subsection 13(1) of the *Road Transport (General) Act 1999*, which allows the Minister to declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration. The explanatory statement for the instrument states that the instrument is made because changes to the ACT's driver licensing scheme for learner and provisional car drivers that commenced on 1 January 2020 are not yet effective. The explanatory statement states:

These changes included the introduction of successful completion of a hazard perception test as an eligibility requirement for obtaining a provisional car licence.

This instrument declares that a person, in certain circumstances, is exempt from completing a hazard perception test to be eligible for a provisional car licence under section 22 of the *Road Transport (Driver Licensing) Regulation 2000*.

The hazard perception test is not yet available, and this has resulted in certain ACT residents and interstate transfers not being able to complete the hazard perception test prior to obtaining an ACT provisional car licence despite meeting all the other eligibility requirements.

Section 2 of the instrument states that the instrument (which was made on 20 February 2020) is taken to have commenced on 1 January 2020. This means that it has a retrospective effect. However, the Committee notes that the explanatory statement goes on to state:

A regulatory impact statement is not required as this instrument does not impose appreciable costs on the community or a part of the community (see section 34(1), *Legislation Act 2001*). Exempting identified people from the requirement to complete a Hazard Perception Test prior to applying for a provisional licence does not operate to the disadvantage of anyone by

adversely affecting their rights or imposing liabilities on the person (see section 36 (1), *Legislation Act 2001*).

While it would have been preferable if the explanatory statement also referred to section 76 of the *Legislation Act 2001*, which only allows retrospective commencement of statutory instruments (which includes disallowable instruments) that are “non-prejudicial”, the Committee notes that the explanatory statement addresses the Committee’s requirements in relation to retrospective operation (ie that the explanatory statement indicate that the retrospective operation does not operate to the disadvantage of any person, by adversely affecting their rights or imposing liabilities on the person).

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

#### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2020-21 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 2) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver, while participating in a special stage of the AGI Sport Rally Test Day.**
- **Disallowable Instrument DI2020-22 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 3) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver, while participating in a special stage of the 2020 National Capital Rally Test Day.**

The instruments mentioned above, made under section 13 of the *Road Transport (General) Act 1999*, disapply the *Motor Accident Injuries Act 2019*, for a limited period, in relation to areas specified in Schedules 1 of each instrument. The particular application of the instruments is to disapply the Motor Accident Injuries Act in relation to the holding of events known as the “AGI Sports Rally Test Day” and “2020 National Capital Rally Test Day”, respectively, are car rallies.

The practical effect of the instruments is that vehicles participating in the events are not required to be covered by ACT compulsory third party insurance. This is because the event is, instead, covered by a \$100 million general liability policy, held by the Motorsport Australia. If the Motor Accident Injuries Act was *not* disappplied then the Motorsport Australia policy would not operate.

The Committee notes that the explanatory statement for each instrument contains a discussion of “human rights implications” of the instrument. The explanatory statement for the first instrument mentioned above states (in part):

#### **Human rights implications**

During the development of this Instrument, due regard was given to its effect and the operation of the rally in relation to the compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

Section 28 of the HRA provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28 (2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected
- b) the importance of the purpose of the limitation
- c) the nature and extent of the limitation
- d) the relationship between the limitation and its purpose
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 13 of the HRA provides a right for people to move freely within the ACT.

The declarations in this instrument do not of themselves restrict a person's freedom of movement within the Territory, however the operation of the test day in closing parts of the forest in which the test day will be conducted to members of the public will restrict the free movement of people in that area of the Territory during the event. As parts of the road transport law are being disapplied for the event to operate as intended, vehicles will be travelling in parts of the forest in excess of the usual speed limits and in a manner not consistent with the road rules. As such, the restriction on the free movement of people in those parts of the forest at those times is considered reasonable and proportionate to ensure safety of non-participants and represents the least restrictive approach that enables the event to proceed.

The explanatory statement for the second instrument mentioned above contains a similar statement.

**The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these instruments.**

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

#### SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2020-6 being the Court Procedures Amendment Rules 2020 (No 1) made under the *Court Procedures Act 2004* amends the Court Procedures Rules to allow the Registrar of the Supreme Court to exercise the Courts jurisdiction in respect of specified provisions under the *Evidence (Miscellaneous Provisions) Act 1991*.**
- **Subordinate Law SL2020-7 being the Motor Accident Injuries (Insurer Information Collection) Regulation 2020 made under the *Motor Accident Injuries Act 2019* determines the information a licensed insurer must provide to the Motor Accident Injuries Commission about applications and claims.**
- **Subordinate Law SL2020-8 being the Road Transport (Offences) Amendment Regulation 2020 (No 1) made under sections 23 and 233 of the *Road Transport (General) Act 1999* amends the Road Transport (Offences) Regulation by inserting specified infringement notice penalty amounts and relocating the infringement notice penalty for operating a vehicle in contravention of a self-clearing defect notice.**

#### SUBORDINATE LAW—COMMENT

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

HUMAN RIGHTS ISSUES / DRAFTING ISSUE

**Subordinate Law SL2020-5 being the Magistrates Court (Heritage Infringement Notices) Regulation 2020 made under the *Magistrates Court Act 1930* provides for a scheme for infringement notice for certain offences against the *Heritage Act 2004*.**

The effect of this subordinate law is to allow infringement notices to be issued in relation to two offences under the *Heritage Act 2004*. For both offences, the penalty is \$1000 for individuals and \$5000 for corporations (see section 8 and Schedule 1 to the subordinate law). The capacity to issue an infringement notice is provided for as an alternative to prosecution for an offence.

Infringement notices are provided for by Part 3.8 of the *Magistrates Court Act 1930*. Section 118 of that Act provides:

**118 Purpose and effect of pt 3.8**

- (1) The purpose of this part is to create a system of infringement notices for certain offences as an alternative to prosecution.
- (2) This part does not—
  - (a) require an infringement or reminder notice to be served on a person; or
  - (b) affect the liability of a person to be prosecuted for an offence if—
    - (i) an infringement or reminder notice is not served on the person for the offence; or
    - (ii) the person does not comply with an infringement or reminder notice served on the person for the offence; or
    - (iii) an infringement notice served on the person for the offence is withdrawn; or
  - (c) prevent the service of 2 or more infringement notices on a person for an offence; or
  - (d) limit or otherwise affect the penalty that may be imposed by a court on a person for an offence.

Regulations such as the current subordinate law are provided for by section 119 of the *Magistrates Court Act*:

**119 Regulations about infringement notice offences**

- (1) A regulation may prescribe an offence for the definition of "infringement notice offence" in section 117 by—
  - (a) stating the offence; or
  - (b) referring to the provision creating the offence; or
  - (c) providing that all offences, or all offences except for stated offences, against an Act or subordinate law are infringement notice offences.

- (2) Subsection (1) does not limit the way that a regulation may prescribe an offence for that definition.
- (3) A regulation may, for the definition of infringement notice penalty in section 117, prescribe—
  - (a) an amount as the penalty payable by anyone for an offence if it is dealt with under this part; or
  - (b) different amounts as the penalties payable for different offences if they are dealt with under this part; or
  - (c) different amounts as the penalties payable for the same kind of offence committed by different people or in different circumstances if the offence is dealt with under this part.
- (4) However, an infringement notice penalty prescribed for a person for an offence must not exceed the maximum fine that could be imposed by a court on the person for the offence.
- (5) Subsection (3) does not limit the way that a regulation may prescribe an amount for that definition.

The Committee notes that it considers subordinate laws, such as the subordinate law mentioned above, on a regular basis. As legislation creates new offences, new offences are added to the body of offences that can be dealt with by infringement notice. In *Scrutiny Report 39* of the 9<sup>th</sup> Assembly (17 February 2020), the Committee considered a similar subordinate law, the Magistrates Court (Long Service Leave Infringement Notices) Regulation 2020 (SL2020-2), which provides for infringement notices for offences against the *Long Service Leave (Portable Schemes) Act 2009*. In *Scrutiny Report 39*, the Committee noted that, for that subordinate law, the explanatory statement contained the following discussion of the human rights implications of that subordinate law.

#### **HUMAN RIGHTS IMPLICATIONS**

As it concerns a strict liability offence, the Regulation might be seen to engage the presumption of innocence. In a strict liability offence, there is no requirement to establish a fault element, such as intention, knowledge, recklessness, or negligence.

Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. Section 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

This Regulation does not create any new offences; it facilitates the administration of strict liability offences already contained in the *Long Service Leave (Portable Schemes) Act 2009*. Without the ability to issue infringement notices, the only option available to the Registrar of the Long Service Leave is to apply to ACAT for an order to enforce an obligation under the Act. This is a serious response, and this Regulation provides a method to achieve the policy purpose that is less restrictive on human rights.

The Committee drew the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for that subordinate law.

The Committee notes that the Magistrates Court (Long Service Leave Infringement Notices) Regulation 2020 and the subordinate law mentioned above appear to be very similar in effect. That being so, the Committee seeks the Minister’s advice as to why a discussion of the human rights implications was not included in the explanatory statement for the subordinate law mentioned above.

In making this comment, the Committee notes the discussions that the Committee has previously had, with various Ministers, about the Committee’s role in relation to scrutinising subordinate legislation by reference to the *Human Rights Act 2004*, given that section 38 of the Human Rights Act gives the Committee formal jurisdiction only in relation to human rights issues raised by bills. The Committee continues to be aware of that formal limitation. However, the Committee has noted (with approval) an increasing tendency of explanatory statements for subordinate legislation to include discussion of any human rights issues involved in the subordinate legislation. A recent example of that increasing tendency is demonstrated by the discussion, earlier in this *Scrutiny Report*, of two instruments (DI2020-21 and DI2020-22) made under section 13 of the *Road Transport (General) Act 1999*. The Committee has only recently identified the inclusion of a discussion of human rights implications in explanatory statements for such instruments. The Committee considers that this (and the increasing tendency, overall) is a positive development. It is in that context that the Committee raises the issue with the subordinate law mentioned above.

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

Beyond the issue in relation to the absence of a discussion of any possible human rights issues, the Committee notes that the explanatory statement for this subordinate law is generally quite sparse, compared to other explanatory statements. The explanatory statement contains a clause-by-clause description of the subordinate law but (unlike other explanatory statements) offers little by way of the background to the subordinate law.

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

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

The Committee also raises a drafting issue in relation to this subordinate law. The Committee notes that Schedule 1 to the instrument provides:

**Schedule 1                      Heritage Act 2004 infringement notice offences and penalties**

(see s 7 and s 8)

column 1 item	column 2 offence provision	column 3 offence penalty (penalty units)	column 4 infringement penalty (\$)
1	74 (3)	100	1 000
2	75 (3)	100	1 000

Sections 7 and 8 of the subordinate law (which relate to Schedule 1) provide:

**7 Infringement notice offences**

The *Magistrates Court Act 1930*, part 3.8 applies to an offence against a provision of the *Heritage Act 2004* mentioned in schedule 1, column 2.

**8 Infringement notice penalties**

- (1) The penalty payable by an individual for an offence against the *Heritage Act 2004*, under an infringement notice for the offence, is the amount mentioned in schedule 1, column 4 for the offence.
- (2) The penalty payable by a corporation for an offence against the *Heritage Act 2004*, under an infringement notice for the offence, is 5 times the amount mentioned in schedule 1, column 4 for the offence.
- (3) The cost of serving a reminder notice for an infringement notice offence against the *Heritage Act 2004* is \$34.

The Committee notes that there is no reference in sections 7 or 8 to a penalty unit offence amount, represented by column 3 in the table. The Committee can identify no reference to the column 3 amount in the rest of the subordinate law, or in part 3.8 of the Magistrates Court Act. That being so, the Committee seeks the Minister's advice as to the operation of column 3 in Schedule 1 to the instrument mentioned above (noting that 100 penalty units—using the definition set out in section 133 of the *Legislation Act 2001*—amounts to \$16 000 for an individual and \$81 000 for a corporation).

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

## RESPONSES

### GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 17 April 2020, in relation to comments made in Scrutiny Report 40 concerning the Public Interest Disclosure Amendment Bill 2020.
- The Attorney-General, dated 20 April 2020, in relation to comments made in Scrutiny Report 40 concerning the Electronic Conveyancing National Law (ACT) Bill 2020 and the Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020.
- The Minister for Employment and Workplace Safety, dated 22 April 2020, in relation to comments made in Scrutiny Report 40 concerning the Loose-fill Asbestos Legislation Amendment Bill 2020.

[These responses](#)<sup>7</sup> can be viewed online.

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<sup>7</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

- The Attorney-General, dated 23 March 2020, in relation to comments made in Scrutiny Report 39 concerning Disallowable Instrument DI2019-283—Major Events (ICC T20 Women's World Cup 2020) Declaration 2019 (No 1).
- The Minister for the Environment and Heritage, dated 3 April 2020, in relation to comments made in Scrutiny Report 39 concerning the regulatory impact statement to Subordinate Law SL2019-32—Environment Protection Amendment Regulation 2019 (No 1)—Regulatory impact statement.

**These responses<sup>8</sup> can be viewed online.**

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

## GOVERNMENT RESPONSES—COMMENT

### ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020

### LAND TITLES (ELECTRONIC CONVEYANCING) LEGISLATION AMENDMENT BILL 2020

On 20 April 2020 the Committee received a response from the Attorney-General to the Committee's comments in Report 40 on the Electronic Conveyancing National Law (ACT) Bill 2020 and the Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020. The Committee had raised various issues relating to the right to privacy and reputation, rights to recognition and equality before the law, rights in criminal proceedings and an inaccuracy in the explanatory statement. The Committee thanks the Attorney-General for his extensive comments provided in response and notes the Attorney-General's intention to introduce an amended explanatory statement in part to address some of the Committee's concerns.

The Committee also raised a concern over how, in its view, the Electronic Conveyancing National Law (ACT) Bill 2020 insufficiently subjected the exercise of legislative power to parliamentary scrutiny. As a national law, the Committee recognises the potential benefits of adoption of a national framework. However, the Committee is concerned that the automatic adoption of amendments to the national law as a law in the Territory will not allow for sufficient scrutiny by the Assembly, and this Committee, including scrutiny of potential impacts on human rights protected under the HRA.

As the Government pointed out in the explanatory statement accompanying the Bill, and in its response to the Committee's concerns, the Government will have notice of any impending changes to the national law and will be able to move an amendment in the Assembly to prevent the ACT adopting incompatible legislation. The Government has also indicated that any amendment to the national law, on notification by the directorate, will be notified on the ACT Legislation Register. The Government response also indicates that they would expect ACT stakeholders to be consulted before any amendment to the national law now that the ACT is a member of the Australian Registrars' National Electronic Conveyancing Council.

<sup>8</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

The Committee remains concerned, however, that the Assembly will not have the opportunity to scrutinise amendments to the national law where the Government does not consider it necessary to modify any amendments to ensure compatibility or otherwise. The Committee seeks an assurance from the Minister that any amendments to the national law that would otherwise be automatically adopted as a law in the ACT will be tabled in the Assembly at the first opportunity and an opportunity to debate those amendments provided.

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

#### PUBLIC INTEREST DISCLOSURE AMENDMENT BILL 2020

On 17 April 2020, the Committee received a response from the Chief Minister to the Committee's comments in Report 40 on the Public Interest Disclosure Amendment Bill 2020. The Committee thanks the Chief Minister for his response.

The Committee, in its report, expressed concern over the Bill's introduction of a public interest test before a disclosure protected as a public interest disclosure (proposed section 17A). As the Committee commented, and the Chief Minister's response confirms, the various protections under the *Public Interest Disclosure Act 2012* will only apply where the Integrity Commissioner is satisfied, on reasonable grounds, that that the disclosure is disclosed in the public interest. The Bill makes no provision to review a decision of the Integrity Commissioner that a disclosure was not in the public interest.

Only public interest disclosures have to be investigated. A public interest disclosure can be given to a Member of the Assembly, or to a journalist, where the investigation has not progressed for three months or after an investigation there is clear evidence that disclosable conduct has or is likely to have occurred but the discloser has been informed that no action will be taken. If the Integrity Commissioner forms the view that a disclosure was not disclosed in the public interest (or was not otherwise a public interest disclosure), then the Integrity Commissioner has to provide notice of that conclusion to relevant people and inform them that the protections against reprisal under the Act do not apply. It is only where the Integrity Commissioner doesn't provide that notice within three months after the original disclosure that information not accepted by the Integrity Commission as having been disclosed in the public interest can be disclosed to a member of the Assembly or a journalist, and is generally protected under the Act (proposed section 27).

As the Committee pointed out in its report, the amendments make it clear that only disclosable conduct will be protected under the Act. Disclosable conduct is defined as an action or a policy, practice or procedure of a public sector entity, or public official for a public sector entity, that is maladministration or results in a substantial and specific danger to public health or safety, or the environment. Maladministration involves the substantial mismanagement of public resources, public funds, or the performance of official functions. The Bill expressly excludes disclosures of an action, policy, practice or procedure that relates to a personal work-related grievance of the person disclosing the conduct from being disclosable conduct. Various examples of personal work-related grievances are noted in the Bill. It was therefore not clear to the Committee what purpose is served by the additional requirement of a disclosure having to be in the public interest.

In his response, the Chief Minister states that the public interest test strengthens the exclusion of personal work-related grievances. The Chief Minister's response notes that the exclusion of work-related grievances only applies to grievances of the person disclosing the conduct. As the explanatory statement accompanying the Bill states, the exclusion of work-related grievances

reflects the availability of other mechanisms to investigate and, where appropriate, take action in relation to such conduct. If these other mechanisms are not available where the discloser is not personally aggrieved, then it is not clear to the Committee why it is appropriate to exclude such disclosures from protection. If other mechanisms are available, then exclusion from protection under the Act could appropriately be defined through reference to those existing mechanisms.

The Chief Minister's response then states:

The public interest test for matters that are disclosable conduct would assess whether the conduct being disclosed affects others, for example, the general public, or whether it only affects the person making the disclosure. The public interest test will also consider whether the disclosure is genuinely being made in the public interest.

It is not clear to the Committee why, where the disclosure does not relate to a work-related grievance of the disclosure, a disclosure of maladministration or a substantial and specific danger to public health or safety, or the environment would not, by definition, affect others. It is not clear to the Committee why the motivations of the person making the disclosure, or whether the person making the disclosure stood to gain from the disclosure in some way, should prevent such a disclosure being in the public interest.

As discussed above, the Committee, in its report, also noted that the Bill did not provide for any appeal or review of the Integrity Commissioner's decision that a disclosure was not disclosed in the public interest. The Chief Minister, in his response, states:

Given the nature of the role of the Integrity Commissioner, combined with the fact that the Integrity Commissioner's decisions under the *Integrity Commission Act 2018* are not reviewable, it would not have been appropriate to include provisions in the PID Amendment Bill for appeal/review of the decision of the Integrity Commissioner that a matter was not disclosed in the public interest.

In the Committee's view, the role of the Integrity Commission in deciding whether a disclosure of disclosable conduct is a public interest disclosure is substantially different from their role under the *Integrity Commission Act 2018*. Where an assessment of the public interest in a disclosure reflects, at least in significant part, an assessment of the personal motivations or circumstances of the person making the disclosure (and not the agency or official under investigation), and forms the basis of any substantial protections under the Act, the Committee considers it appropriate that some form of merits review be available to review the Integrity Commissioner's decision.

The Committee therefore requests a further response from the Minister providing information on what considerations would be relevant to an assessment of the public interest that are not otherwise reflected in the Bill, and why an appeal from the Integrity Commissioner's decision on the public interest would not be inconsistent with their other roles under the Act and the Integrity Commission Act.

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

Giulia Jones MLA  
Chair

28 April 2020

## 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 37, dated 19 November 2019**
  - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
  - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member's amendments).
- **Report 38, dated 4 February 2020**
  - Electoral Legislation Amendment Bill 2019 (Private Member's amendments).
- **Report 39, dated 17 February 2020**
  - Disallowable Instrument DI2019-286—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2).
  - Unit Titles Amendment Bill 2019 (Private Member's amendments).
- **Report 40, dated 24 March 2020**
  - Confiscation of Criminal Assets (Unexplained Wealth) Amendment Bill 2020.
  - Education and Care Services National Amendment Regulations 2019.
  - Labour Hire Licensing Bill 2020.
  - Rail Safety National Law National Regulations (Application of Law) Variation Regulations 2019.
  - Residential Tenancies Amendment Bill 2020.