

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

SCRUTINY REPORT 50

25 AUGUST 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—COMMENT

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

EMERGENCIES AMENDMENT BILL 2020

This Bill will amend the *Emergencies Act 2004* and make other consequential amendments relating to the appointment of an emergency controller and deputy emergency controller.

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

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION (SECTION 15 HRA)

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

Currently, where a declaration of a state of emergency has not been made, but the Chief Minister is satisfied that an emergency has happened, is happening or is likely to happen, the Chief Minister may appoint an emergency controller. In those circumstances, the Chief Minister must review the appointment within 48 hours, and the appointment lapses after seven days. The Bill will remove any requirement for review of the appointment and allow for the appointment to continue for up to 28 days.

The Bill will also allow the appointment of a deputy emergency controller. Both the emergency controller and deputy controller will be able to exercise a broad range of powers to manage the response to the emergency. The explanatory statement describes these as including the power to:

- direct the movement of people, potentially limiting freedom of movement, freedom of association and the right to liberty;
- direct the owner of property to place the property under the control of the emergency controller, or take possession of premises, both potentially limiting the right to privacy and the right to property under the Universal Declaration of Human Rights;
- direct a person to give information or produce documents, potentially limiting the right to privacy; and
- use any necessary and reasonable force to remove a person obstructing response operations to another place, potentially limiting the right to liberty and security of person.

The explanatory statement also recognises that the application and enforcement of these powers has the potential to result in discrimination against a number of vulnerable groups, potentially limiting the right to equality before the law protected by section 8 of the HRA.

The explanatory statement includes a justification for why these potential limits should be considered reasonable, pointing to the legitimate purposes of responding to significant dangers or disruption to essential services, allowing for greater certainty and planning during emergency responses and need for continuity of powers, as well as the possibility of the experience of the previous bushfire season being repeated. Subject to the following comment, the Committee refers that statement to the Assembly.

The Committee notes that the Bill will introduce new safeguards requiring the emergency controller to advise the Chief Minister and Minister for Police and Emergency Services (MPES) at least every seven days about the status of the emergency and, where a state of emergency has been declared, whether that declaration is still justified. Any state of alert, state of emergency and the appointment of the emergency controller must be revoked if, after taking into account the advice of the emergency controller, the Chief Minister or MPES decides they are no longer necessary.

However, there is no requirement under the Bill for any advice from the emergency controller to be made public. The explanatory statement accompanying the Bill notes that “in a national security incident that led to the appointment of an emergency controller or a state of emergency the emergency controller’s advice may be of a sensitive or classified nature”. The Committee is concerned that there is limited accountability for both the advice of the emergency controller and the decisions of the Chief Minister or MPES, and requests further information on why provision could not be made to have any advice made public within a reasonable period subject to redaction of sensitive or classified material.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENT—COMMENT

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES / MINOR DRAFTING ISSUE

Disallowable Instrument DI2020-233 being the Rates (Instalment Dates) Determination 2020 made under subsection 19(4) of the *Rates Act 2004* determines the due dates of rates instalments for each quarter of the 2020-21 financial year, in order to bring the instalment payment dates, delayed as a result of COVID-19, back on schedule.

This instrument determines due dates for rates instalments, under subsection 19(4) of the *Rates Act 2004*. The relevant dates have been adjusted, by reference to the COVID-19 pandemic. The explanatory statement for the instrument states:

Section 19 (4) of the *Rates Act 2004* allows the Minister to determine payment instalment dates that are earlier or later than when they are ordinarily due. Under the *Rates (Instalment Dates) Determination 2020* (the Instalment Dates Determination), the Minister has determined the due dates of rates instalments for each quarter of the 2020-21 financial year that are under 3 months apart but at least separated by 2 months and 3 weeks. This is required to gradually transition out of the delayed schedule, resulting from the temporary COVID-19 measure, and to bring the rates instalment payment dates back on schedule.

To minimise cashflow impacts on ratepayers, the adjustments are spaced over 12 months. The payment dates for the first three quarters of the 2020-21 financial year will occur later than would otherwise have been scheduled. Note, that as part of the economic survival packages the ACT Government also provides that persons experiencing financial hardship may be eligible to defer the payment of rates on their principal place of residence, interest-free for up to one year. The Commissioner for ACT Revenue has the ability to defer the payment of rates under sections 46 and 47 of the *Rates Act 2004*.

Section 5 of the instrument states:

5 Human Rights Act 2004

In my opinion, as the Minister, this instrument is consistent with human rights. This instrument is non-prejudicial because it does not limit existing rights.

The explanatory statement also discusses potential human rights issues:

Section 5 of the Instalment Dates Determination provides that, in the Minister's opinion, the determination is consistent with human rights. This ensures that the determination is compatible with human rights, and that proper consideration has been given to human rights in making the determination.

The ACT Human Rights Commission was consulted on this instrument.

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.

The Committee notes that section 3 of the instrument sets out definitions for the instrument. Included is a definition of **COVID-19 emergency**, defined by reference to the definition in subsection 19(8) of the Rates Act. However, the Committee notes that, in fact, neither the instrument nor the explanatory statement for the instrument actually uses that term.

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

NATIONAL REGULATIONS—COMMENT

The Committee has examined the following national regulation and offers these comments on it:

HUMAN RIGHTS ISSUES

Education and Care Services National Amendment Regulations 2020, made under the Education and Care Services National Law as applied by the law of the States and Territories, together with an explanatory memorandum.

These national regulations are made under sections 301 and 324 of the Education and Care Services National Law and are applicable in the ACT under the *Education and Care Services National Law (ACT) Act 2011*. The substantive amendments made by the national regulations relate to the transportation of children by education service providers. According to the explanatory memorandum for the national regulations, the amendments "clarify and strengthen operational requirements for service operators providing transportation".

The national regulations were tabled in the Legislative Assembly on 20 August 2020. The Committee notes that, under section 2 of the national regulations, the substantive amendments made by the national regulations commence on 1 September and 1 October 2021.

The Committee notes, with approval, that the national regulations are accompanied by a detailed and informative explanatory memorandum that addresses the particular application of the national regulations to various jurisdictions, including the ACT. In this context, the Committee notes that the explanatory memorandum addresses potential human rights issues. It states:

The amendments do not engage human rights issues under the ACT's *Human Rights Act 2004*.

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

This comment does not require a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 19 August 2020, in relation to comments made in Scrutiny Report 27 concerning the Minister's response to comments made by the Committee in Scrutiny Report 26 on the Electoral Amendment Bill 2018.
- The Chief Minister, undated, in relation to comments made in Scrutiny Report 49 concerning the City Renewal Authority and Suburban Land Agency Amendment Bill 2020 (received via email on 20 August 2020).
- The Minister for Mental Health, dated 19 August 2020, in relation to comments made in Scrutiny Report 48 concerning the Mental Health Amendment Bill 2020.
- The Minister for Education and Early Childhood Development, dated 21 August 2020, in relation to comments made in Scrutiny Report 48 concerning the Education Amendment Bill 2020.
- The Chief Minister, dated 21 August 2020, in relation to comments made in Scrutiny Report 49 concerning the Sexuality and Gender Identity Conversion Practices Bill 2020.

These responses¹ can be viewed online.

- The Treasurer, dated 19 August 2020, in relation to comments made in Scrutiny Report 47 concerning Disallowable Instrument DI2020-205—Taxation Administration (Owner Occupier Duty) COVID-19 Exemption Scheme Determination 2020.

This response² can be viewed online.

¹ <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>.

² <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 wishes to thank the Attorney-General, the Chief Minister, the Minister for Mental Health, the Treasurer, and the Minister for Education and Early Childhood Development for their responses.

PRIVATE MEMBER'S RESPONSE

The Committee has received a response from Ms Le Couteur, dated 19 August 2020, in relation to comments made in Scrutiny Report 48 on proposed amendments to the Electoral Amendment Bill 2018, and wishes to thank Ms Le Couteur for her response.

This response³ can be viewed online.

GOVERNMENT RESPONSES—COMMENT

MENTAL HEALTH AMENDMENT BILL 2020

On 19 August 2020, the Committee received a response from the Minister in relation to the Committee's comments in its *Report No 48* on the Mental Health Amendment Bill 2020. In that report, the Committee expressed concern over the designation of legally binding guidelines issued by the Chief Psychiatrist as notifiable instruments, and the displacement for any notification requirements of any law of another jurisdiction or an instrument as in force from time to time which are adopted in the guidelines.

The Minister, in his response, justifies the displacement of notification on the basis of the need to participate in multi-jurisdictional or national arrangements by ensuring consistency with source documents and any amendments. He also indicates that laws of other jurisdictions are freely available, and that the Guidelines will clearly state where any law or instrument adopted can be located, with the option of linking to the source.

However, as the Committee noted in commenting on the Bill:

The Committee is concerned that not all instruments that may be adopted in Guidelines under [the proposed amendments] would be publicly accessible. By adopting laws of another jurisdiction or instruments generally as in force from time to time the Bill will also allow guidelines to be amended, with the effect of changing, without adequate notice, the requirements faced by mental health facilities and having to be considered in exercising functions under the Act.

The Minister's comments do not address these concerns.

The Minister also commented that "[m]ost jurisdictions allow the Chief Psychiatrist to make mandatory guidelines through policy alone, however, we have taken the step of making these guidelines notifiable instruments to ensure a higher standard of transparency and visibility." The Committee makes no comment on the suitability of the approach taken in other jurisdictions, but notes that the mandatory nature of the Guidelines is a result of legislative changes introduced by this Bill, and that it is appropriate that instruments having legislative effect, as the proposed Guidelines will, be subject to scrutiny and possible disallowance by the Assembly.

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

The Committee therefore requests a further response to the Committee's concerns.

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

EDUCATION AMENDMENT BILL 2020

On 21 August 2020, the Committee received a response from Minister in relation to its comments in *Report 48* on the Education Amendment Bill 2020. The Committee raised some concerns over the use of an Australian Standard in the regulation of boarding facilities provided by schools, and displacement of notification requirements for that standard. The Minister, in her response, has pointed out the current absence of any specific conditions relating to the operation of boarding facilities and the Australian Standard applying a common national framework. The response also indicates that further work will complement the requirement to adhere to the Australian Standard, and that a review will be undertaken of the current approach. The Australian Standard will also be provided to all schools operating boarding facilities.

The Committee remains concerned at the adoption of an Australian Standard which the Committee is not able to access and where there has been no attempt to outline and justify the impact of the Standard on human rights protected under the HRA. While the Australian Standard may have been developed with the intention of providing a common national framework, it has not been adopted as a mandatory requirement in all States and Territories. Providing schools with access to the Australian Standard will not address the Committee's concerns that "the lack of public availability may prevent access by students, their parents and guardians and others who have a vital interest in ensuring the adequacy of policies and procedures adopted by schools and the accountability of government regulation and enforcement". The Committee also recommended an amendment to the Bill to require a timely review of the operation of the Standard and adoption of Child Safe Standards recommended by the Royal Commission.

The Committee therefore requests a further request from the Minister as to how public access to the Standard will be provided and the scope and timing of any review of the Bill's regulation of Boarding Houses.

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

SEXUALITY AND GENDER IDENTITY CONVERSION PRACTICES BILL 2020

On 24 August 2020, the Committee received a response from the Chief Minister to the Committee's comments in its *Report 49* on the Sexuality and Gender Identity Conversion Practices Bill 2020. The Committee thanks the Chief Minister for his timely response.

The Committee had raised concerns over the potential for the definition of sexuality or gender identity conversion practices to include religious teachings or practices which are premised on a person's sexuality or gender identity being a matter of personal choice. By expressly excluding only acceptance, support or understanding from the definition of a conversion practice, the Bill may potentially be interpreted as not excluding discouragement or non-acceptance. The Committee had therefore asked for further information on whether other approaches were considered which may more clearly limit the scope of conversion practices under the Bill.

The Chief Minister's response reiterates the intention of the definition of conversion practices is to:

cover practices that actively seek to change the sexuality or gender identity of a person. It is not intended that mere expressions of religious tenets or beliefs relating to sexuality or gender identity would constitute a conversion practice, nor would failing to provide support to a person.

The Committee remains concerned that this intention is not adequately reflected in the Bill.

The Chief Minister's response indicates that a carve out for religious organisations who perform conversion practices was contemplated but rejected on the basis of the demonstrable harm of such practices. The response points to a La Trobe University report (La Trobe University, Gay & Lesbian Health Victorians & the Human Rights Law Centre, *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia* (2018)) as support.

The Committee acknowledges the many forms of conversion practices identified in the report and the harm caused. However, the Committee notes that this report, having considered the potential human rights impacts, recommends that the prohibition of conversion practices involve a civil penalty rather than criminal offence. The report recommends an offence of removing a person from Australia for the purposes of a conversion therapy, but only for forced or coerced therapies or situations where there is a risk of physical harm. The report also recommends that, except in the case of minors or persons with an impaired decision-making ability, any prohibition on conversion practices be limited to:

any conduct by 'professionals' (defined to include social workers, unregistered and registered health practitioners, teachers and more) aimed at 'changing', 'suppressing', 'curing', 'healing', or 'repairing' a person's sexual orientation or gender identity of any adult. (at p 67).

These recommendations support the view that alternative approaches to restriction of conversion practices, other than a blanket exemption for religious organisations which was rejected by the Government, may be available.

The Committee also raised some questions on the role that consent might play in the operation of the Bill. The Chief Minister's response reiterates that, in considering potential remedies for harm caused by conversion practices, the ACT Civil and Administrative Tribunal (ACAT) is given "broad scope to consider the individual circumstances of the case, including the conduct of all parties, rather than excluding matters based solely on issues of consent".

Committee notes that the La Trobe University report also states that, unlike children and persons with impaired decision-making ability:

adults who freely choose to seek out discussions within their faith communities should be permitted to exercise their own agency to engage in these informal faith-based activities (including pastoral care, prayer and group activities) if they wish (at p 66).

This was in the context of having discussed the range of complaints and compensation mechanisms that may already be available where the conversion practice was part of a therapeutic health service. The report did not recommend that all providers of conversion practices, including providers of pastoral care, prayer and group activities, or distributors of material within faith communities, face claims for compensation for any harm caused. The Committee, therefore, remains concerned, particularly given the broad range of practices that may potential come within the definition of a conversion practice, that consent does not play a more explicit role in ACAT's consideration of remedies for harm caused.

The Committee requests a further response from the Chief Minister on why alternative approaches to the definition and regulation of conversion practices may not be considered adequate and why consent should not be explicitly included as a consideration in any remedies awarded by ACAT.

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

Bec Cody MLA
Deputy Chair

25 August 2020

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **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**
 - Unit Titles Amendment Bill 2019 (Private Member's amendments).
- **Report 41, dated 28 April 2020**
 - COVID-19 Emergency Response Bill 2020.
- **Report 44, dated 16 June 2020**
 - Disallowable Instrument DI2020-93 Veterinary Practice (Fees) Determination 2020 (No 2).
 - Residential Tenancies Amendment Bill 2020 (Private Member's amendments).
- **Report 45, dated 30 June 2020**
 - Disallowable Instrument DI2020-117 Liquor (Fees) Determination 2020.
 - Disallowable Instrument DI2020-119 Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020.
 - Disallowable Instrument DI2020-120 Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020.
- **Report 46, dated 21 July 2020**
 - Disallowable Instrument DI2020-130 Gambling and Racing Control (Governing Board) Appointment 2020 (No 2).
 - Disallowable Instrument DI2020-131 Gambling and Racing Control (Governing Board) Appointment 2020 (No 1).
 - Disallowable Instrument DI2020-132 Lotteries (Fees) Determination 2020 (No 1).
 - Subordinate Law SL2020-20 Court Procedures Amendment Rules 2020 (No 3).

- **Report 47, dated 28 July 2020**

- Disallowable Instrument DI2020-147 Animal Welfare (Advisory Committee) Establishment 2020 (No 1).
- Disallowable Instrument DI2020-171 Lotteries (Fees) Determination 2020 (No 2).

- **Report 48, dated 11 August 2020**

- Disallowable Instrument DI2020-216 Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2).
- Royal Commission Criminal Justice Legislation Amendment Bill 2020—Government response.