

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
(LEGISLATIVE SCRUTINY ROLE)

SCRUTINY REPORT 6

30 May 2017



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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

### BILLS—NO COMMENT

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

PLANNING AND DEVELOPMENT (TERRITORY PLAN VARIATIONS) AMENDMENT BILL 2017
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This Bill will amend the *Planning and Development Act 2007* by requiring that the Planning and Land Authority be satisfied that any proposed technical amendment also be unlikely to be contentious or otherwise cause adverse public comment before more limited or no consultation requirements are applicable to the amendment.

### BILLS—COMMENT

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

UTILITIES (STREETLIGHT NETWORK) LEGISLATION AMENDMENT BILL 2017
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This Bill amends the *Electricity Safety Act 1971*, the *Electricity Safety Regulation 2004* and the *Utilities Act 2000* to amend the regulatory structure for operation and maintenance of streetlights. It includes provisions relating to access to streetlighting facilities and governance of the relationships between the Territory, electricity distributors and streetlight service providers.

***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 (S 12 HRA)*

Sections 231 and 232 of the Utilities Act authorises the Territory (which in effect will generally mean “territory service authorised persons” under subdivision 14.2.3) to enter and occupy land and carry out any work on that land for installing, maintaining or upgrading streetlighting infrastructure. Clauses 12 and 13 of the Bill will expand this authority to include entering and occupying any structure, other than a structure used for residential purposes, where streetlighting infrastructure is installed.

As the explanatory statement recognises, these provisions may limit the right to privacy provided under s 12 of the Human Rights Act. The explanatory statement provides for a basis on which the lawful authority to interfere with privacy is non-arbitrary in the sense of being reasonable, necessary and proportionate to the need in question. The Committee notes in particular that the right of entry does not extend to residential structures and requires the giving of notice under clause 15 of the Bill unless urgent circumstances make it necessary to protect people, property or the environment or the integrity of the network. The Territory also has various obligations under the Utilities Act in relation to the work including that all reasonable steps be taken to ensure that there is as little inconvenience, detriment and damage as practicable.

**The Committee draws the discussion in the explanatory statement to the attention of the Assembly.**

***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—Committee terms of reference paragraph 2***

Clause 4 of the Bill will amend the regulation making power in s 66 of the Electricity Safety Act that enables standards to be set in relation to electrical equipment and installations. The regulation making power will be extended to include standards in relation to design, approval and certification.

Clause 5 of the Bill reflects this extended regulation making power in amending the Electricity Safety Regulations to allow the streetlight network to comply with AS/NZS 3000, which is generally required under s 5 of the Electricity Safety Act, if it complies with part of that standard, namely “a specific design and installation method in AS/NZS 3000 part 1”.

The Committee notes that the purpose of these amendments is to make it easier to meet the legislative requirement to comply with the relevant standard, and as such reduce reliance on the standard in establishing the rights and obligations of persons affected. However, as the Committee has noted in the past, access to Australian Standards is often limited or costly. Where, as in this case, a standard adopted in regulations is not a notifiable instrument for the purposes of the *Legislation Act 2001* (see s 66(4) Electricity Safety Act), the Committee has generally required some justification for the use of the standard despite its limited availability, and some mechanism by which public access to the standard may be provided. While the reference to AS/NZS 3000 is more limited in these amendments, in the Committee’s view justification for continued reference to the standard and possible means of access should be included in the explanatory statement.

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

## PROPOSED GOVERNMENT AMENDMENT

The committee has examined a proposed amendment to the Red Tape Reduction Legislation Amendment Bill 2017 to amend clause 18 of that Bill by adding reference to an ACNC registered entity. The Committee has no comment to make in relation to it.

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

**Disallowable Instrument DI2017-29 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 3) made under section 12 of the *Road Transport (General) Act 1999* declares that specified provisions of the road transport legislation do not apply to the You are Here Festival at Haig Park in April 2017.**

**Disallowable Instrument DI2017-30 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2017 (No 1) made under section 75A of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares Megaside Pty Ltd to be a Parking Authority for the area block 11 section 44 in the division of Belconnen.**

**Disallowable Instrument DI2017-31 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2017 (No 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2016-249 and amends the schedule of determined venues to include the Canberra North Bowling ACT Rugby Union Club as an approved sports bookmaking venue.**

**Disallowable Instrument DI2017-34 being the Public Place Names (Taylor) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the names of 7 roads in the Division of Taylor.**

**Disallowable Instrument DI2017-37 being the Nature Conservation (Eastern Grey Kangaroo) Controlled Native Species Management Plan 2017 made under section 163 of the *Nature Conservation Act 2014* sets out the Eastern Grey Kangaroo: Controlled Native Species Management Plan, May 2017.**

## NATIONAL LAWS—COMMENT

### EDUCATION AND CARE SERVICES NATIONAL LAW AMENDMENT ACT 2017 (VICTORIA)

#### *ISSUES ARISING FROM "NATIONAL LAWS"*

The *Education and Care Services National Law Amendment Act 2017* (Victoria) (**Amendment Act**) was tabled in the Legislative Assembly on 11 May 2017. The Committee notes, with approval, that a detailed and helpful explanatory statement was tabled with the Amendment Act.

An obvious, threshold issue is why the Committee is considering, in the subordinate legislation part of this *Scrutiny Report*, a piece of legislation that is not only, expressly, an “Act” but also an Act of Victoria.

As noted in the explanatory statement, the Amendment Act is made under section 6 of the *Education and Care Services National Law (ACT) Act 2011* (**ACT Act**).<sup>1</sup> That section provides:

#### **6 Adoption of Education and Care Services National Law**

- (1) Subject to this section, the Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—
  - (a) applies as a territory law; and
  - (b) as so applying may be referred to as the *Education and Care Services National Law (ACT)*; and
  - (c) so applies as if it were part of this Act.
- (2) A law that amends the Education and Care Services National Law set out in the schedule to the Victorian Act and is passed by the Victorian Parliament after this Act’s notification day must be presented to the Legislative Assembly not later than 6 sitting days after the day it is passed.

<sup>1</sup> The Committee commented on the ACT Act in *Scrutiny Report No. 37* of the 7<sup>th</sup> Assembly (16 June 2011), at page 1. The Committee also discussed issues arising from National Regulations arising under this particular National Law in *Scrutiny Report No. 42* of the 8<sup>th</sup> Assembly (1 March 2016), at page 12 and in *Scrutiny Report No. 45* of the 8<sup>th</sup> Assembly (31 May 2016), at page 25.

- (3) The amending law may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed.
- Note* See the Legislation Act, s 65 (Disallowance by resolution of Assembly).
- (4) If the amending law is not presented to the Legislative Assembly in accordance with subsection (2), or is disallowed under subsection (3), the Education and Care Services National Law applying under subsection (1) is taken—
- (a) not to include the amendments made by the amending law; and
  - (b) to include any provision repealed or amended by the amending law as if the amending law had not been made.
- (5) Section 303 (4) (Parliamentary scrutiny of national regulations) of the Education and Care Services National Law set out in the schedule to the Victorian Act does not apply as a territory law.

Under subsection 6(1) of the ACT Act, the Education and Care Services National Law set out in the schedule to the *Education and Care Services National Law Act 2010* (Victoria) (**National Law**), as in force from time to time, is taken to apply as a territory law as if that law were part of the ACT Act.

Subsection 6(2) of the ACT Act provides that a law that amends the National Law, as passed by the Victorian Parliament, must be presented to the Legislative Assembly within six sitting days after it is passed. Subsection 6(3) provides that such an amending law may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed. Subsection 6(4) provides that if an amending law is disallowed (or is not presented to the Legislative Assembly, as required), the National Law remains in its unamended state, as far as its application to the ACT.

As noted in the explanatory statement for the Amendment Act (which is an “amending law”, for section 6 of the ACT Act), the amendments to the National Law to which the Amendment Act gives effect were given the Royal Assent, in Victoria, on 27 March 2017. Given that the Amendment Act was tabled in the Legislative Assembly on 11 May 2017, this means that it was tabled in accordance with the requirement set out in subsection 6(2) of the ACT Act. The issue now is the scrutiny of the Amendment Act by the Legislative Assembly.

For the Committee, the threshold issue is the basis on which the Committee should examine the Amendment Act. Should the Committee examine the Amendment Act under principle (3) of its Resolution of Appointment (ie as primary legislation) or should it examine the Amendment Act under principle (1) of the Resolution of Appointment (ie as subordinate legislation)? While it may seem logical to examine the Amendment Act under principle (3), the fact is that that principle requires the Committee to consider “clauses of bills” (and Government amendments to “bills”) introduced into the Legislative Assembly. Clearly, the wording of this resolution does not sit easily with consideration of the Amendment Act under that principle.

Arguably, examination of the Amendment Act, by the Committee, sits more logically under principle (1), which requires the Committee to consider “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)”. While there may be some debate about how closely such an application of

principle (1) applies to the Amendment Act (a particular issue being whether the Amendment Act can be said to be “made under an Act”, for the purposes of principle (1)), the Committee considers that this principle more obviously applies to the Committee’s examination of the Amendment Act. The Committee considers that this approach is supported by the fact that (as noted in the explanatory statement for the Amendment Act) subsection 6(5) of the ACT Act maintains the capacity of the Legislative Assembly to disallow an amendment to the National Law, unilaterally, by providing that subsection 303(4) of the National Law does not apply in the ACT. Without the disapplication of subsection 303(4) of the National Law, the disallowance of an amendment to a National Law would not have any effect in the ACT unless there was similar disallowance in a majority of the participating jurisdictions. On the Committee’s analysis, it appears that the Northern Territory, South Australia and the Western Australian jurisdictions have similarly preserved the “normal” disallowance power of their legislature.

Having come to that view, the Committee simply notes that this is an issue that only arises because of the peculiarities of the application of National Laws (and, in particular, *this* National Law) to the ACT. The Committee considers that these sorts of issues should be more carefully considered (and dealt with) in the passage of National Laws that allow for this sort of exercise.

A further issue is the fact that, while the ACT Act preserves the power of the Legislative Assembly to disallow an amendment to the National Law, there is no mention of the (limited) power of the Legislative Assembly to *amend* an instrument that is disallowable by the Legislative Assembly, under section 68 of the *Legislation Act 2001*. This means that the power given by the ACT Act is an all-or-nothing power. There would appear to be no capacity for the Legislative Assembly to disallow particular provisions of an amendment to a National Law or to amend provisions of an amendment to a National Law. This means that the power of the Legislative Assembly is limited to a take-it-or-leave-it approach.

**The Committee seeks the Minister’s views in relation to the issues discussed above and, in particular, in relation to how the Minister considers that the Committee’s scrutiny principles are intended to apply to National Laws such as the *Education and Care Services National Law Amendment Act 2017* (Victoria).**

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

*HUMAN RIGHTS ISSUES*

Further to the discussion above, a particular issue for the ACT is the application of the *Human Rights Act 2004* (HRA) to the Amendment Act and, specifically, the Committee’s role under section 38 of that Act. Section 38 provides:

**38 Consideration of bills by standing committee of Assembly**

- (1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.
- (2) In this section:
  - relevant standing committee*** means—
    - (a) the standing committee of the Legislative Assembly nominated by the Speaker for this section; or

- (b) if no nomination under paragraph (a) is in effect—the standing committee of the Legislative Assembly responsible for the consideration of legal issues.

As with the discussion above (ie as to which of the Committee’s principles, set out in the Committee’s Resolution of Appointment, applies), there is a threshold issue in relation to the application of section 38 in this instance. Clearly, the Committee’s role under section 38 of the HRA applies in relation to “bills presented to the Assembly”. Consistent with the discussion above, it is difficult to apply section 38 of the HRA to the Amendment Act, as (clearly) the Amendment Act is not a “bill presented to the Assembly”. However, the Committee has consistently adopted an approach that involves consideration of any human rights issues arising from subordinate legislation considered by the Committee.

That being so, the Committee notes that the explanatory statement for the Amendment Act identifies and discusses (at pages 4 to 11) various human rights issues—particularly, the right to privacy and protection (section 12 of the HRA), the right to a fair trial (section 21 of the HRA<sup>2</sup>), issues arising in relation to the creation of strict liability offences (sections 18, 21 and 22 of the HRA), and compatibility with the United Nations Convention on the Rights of the Child—as being engaged by the Amendment Act. The Committee considers the discussion, in the explanatory statement for the Amendment Act, of the human rights issues raised by the Amendment Act to be satisfactory.

**The Committee draws the attention of the Legislative Assembly to the discussion, in the explanatory statement presented to the Legislative Assembly for the *Education and Care Services National Law Amendment Act 2017 (Victoria)*, of the human rights issues arising from that Act, in its application in the ACT.**

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

**However, the Committee seeks the Minister’s views in relation to the issues discussed above, in relation to the application of section 38 of the *HRA* to National Laws such as the *Education and Care Services National Law Amendment Act 2017 (Victoria)* and, in particular, in relation to how the Minister considers that section 38 applies to the Committee’s scrutiny of National Laws such as the *Education and Care Services National Law Amendment Act 2017 (Victoria)*.**

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

## GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 28 April 2017, in relation to comments made in Scrutiny Report 3 concerning the Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2016.

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<sup>2</sup> Though the Committee notes that the explanatory statement for the Amendment Act refers to clause 45 of the relevant (Victorian) Bill, as does the compatibility statement (but not the explanatory memorandum) for the Victorian legislation on which the Amendment Act relies, when it should refer to clause 46.

- The Chief Minister, dated 5 May 2017, in relation to comments made in Scrutiny Report 5 concerning the City Renewal Authority and Suburban Land Agency Bill 2017.
- The Minister for Health, dated 8 May 2017, in relation to comments made in Scrutiny Report 5 concerning the Gene Technology Amendment Bill 2017.

A copy of these responses can be viewed online at <http://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role>.

The Committee would like to thank the Minister for Health and the Chief Minister for their responses.

## COMMENT ON GOVERNMENT RESPONSE

In *Scrutiny Report No 5*, in considering the City Renewal Authority and Suburban Land Agency Bill 2017, the Committee asked for a response on two issues raised by that Bill—the engagement of the right to privacy under section 12 of the HRA and provision for offences to be created by regulation. In relation to both these issues the Committee requested that consideration be given to amending the explanatory statements to include reference to the issues raised and provide further justification for the approaches taken in the Bill.

In response to the concerns over the right to privacy, the Minister sets out the various restrictions on the sharing of protected information provided by the Bill, the intended purpose of the sharing of such information, and the continued application of the *Information Privacy Act 2014*. The clause in question therefore “does not engage the right to privacy under section 12 of the [Human Rights Act]”.

In the Committee’s view, the Minister’s response supports an argument that any interference with a person’s privacy proposed by the Bill will not be unlawful or arbitrary. This does not mean, however, that the Bill does not raise any issues in relation to the right to privacy that should be discussed in the explanatory statement. As the Committee commented, the effect of the provisions in the Bill are to require the disclosure of information, potentially including personal information. The explanatory statement states these provisions override other territory law which may prohibit the sharing or disclosing of information to parts of the ACT Government. The Bill provides that there *may* be limits placed on further use or storage of the information, but only where disclosing the information to another information holder rather than a Minister. The Committee has consistently taken the view that any potential for proposed legislation to interfere with a person’s privacy should be acknowledged in the explanatory statement along with an explanation of why that interference does not limit the right to privacy in s 12 of the *Human Rights Act 2004*. In this way, the compatibility of the provision in question with the right to privacy, including, as in this case, an intention for the provision to impose a further restriction on the sharing of protected information, can be made clear.

In relation to the concerns over providing for offences to be created by regulation, the Minister has responded that this is not an uncommon form of words in territory legislation, and that any offence would be limited by the scope of the Act, would generally be minor at least in terms of maximum penalties, and is disallowable. The Minister’s response also provides that the government does not have any intention to create offences “at this stage”.

In the Committee's view, conferral of a power to create offences by regulation, unconfined except for the scope of the Act, needs to be justified. It is not sufficient to limit any offence, if created, to a limited penalty. The creation of an offence in subordinate legislation, even regulations subject to disallowance by the Assembly, should be based on demonstrated need and defined and circumscribed in primary legislation to the greatest extent possible.<sup>3</sup>

Giulia Jones MLA  
Chair

30 May 2016

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<sup>3</sup> See also Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010 at p.30.

## OUTSTANDING RESPONSES

### *BILLS/SUBORDINATE LEGISLATION*

#### **Report 5, dated 27 April 2017**

Aboriginal and Torres Strait Islander Elected Body Amendment Bill 2017

Justice and Community Safety Legislation Amendment Bill 2017

Liquor Amendment Bill 2017