

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

SCRUTINY REPORT 21

11 SEPTEMBER 2018

THE COMMITTEE

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

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

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BILLS

BILL—NO COMMENT

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

CLIMATE CHANGE AND GREENHOUSE GAS REDUCTION (PRINCIPAL TARGET) AMENDMENT BILL 2018

This Bill amends the Climate Change and Greenhouse Gas Reduction Act 2010 to bring forward the principal target date for achieving net zero emissions from 30 June 2050 to 30 June 2045.

BILLS—COMMENT

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

BETTING OPERATIONS TAX BILL 2018

This Bill establishes the legislative framework for a tax on betting operations where the bet was placed by a person located within the ACT.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill requires betting operators, whose revenue from bets placed by persons in the ACT exceeds a threshold amount, to be registered and provide a monthly return to the Commissioner for ACT Revenue. The return must include the betting operator's name, address, telephone number and email address as well as various details required to establish the operator's tax liability. A betting operator is defined in the Bill as "any person who earns revenue as a result of accepting bets or providing a service through which bets are made" (proposed section 13). As the Bill will require the collection of personal information relating to betting operators the Bill potentially engages the protection against undue interference with privacy provided by section 12 of the HRA.

The explanatory statement accompanying the Bill states that the Bill does not have any human rights concerns as it "is expected only corporate entities will lodge returns and pay the tax once registered with the ACT Revenue Office". However, the Bill is not defined to apply only to corporations, and there is no information provided on why only corporate entities are likely to register and lodge returns. The potential limitation on the rights of non-corporate persons should therefore be acknowledged in the explanatory statement.

The Committee notes, however, that the explanatory statement does, in outlining the requirements of section 13, provide a justification for the collection of the information. It states:

The collection of information such as name, address, contact details of the betting operator are necessary to allow the commissioner to ascertain whether that operator is liable to pay betting operations tax. Ascertaining an operator's tax liability and collecting the tax constitute core purposes of the Bill.

While generally matters relating to the human rights aspects of a Bill should be included in a distinct section of the explanatory statement, the Committee acknowledges the minor nature of the impact on privacy involved and the justification provided.

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

CIVIL LAW (WRONGS) (CHILD ABUSE CLAIMS AGAINST UNINCORPORATED BODIES) AMENDMENT BILL 2018

This Bill amends the *Civil Law (Wrongs) Act 2002* by providing for child abuse claims against unincorporated bodies that are not otherwise able to be sued to be brought against related trusts.

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 FREEDOM OF ASSOCIATION (SECTION 15 HRA)

The Bill will require an unincorporated body that is subject to a personal injury claim for child abuse but is, because of its unincorporated status, not capable of being sued, to nominate another entity to act as the defendant in the proceeding. The unincorporated body has 120 days from the start of the proceedings to make the nomination. The nominee has to consent before they can be nominated to become the defendant. If no nomination is made, or the entity nominated is not capable of being sued or doesn't have sufficient assets to meet any judgement or order, then the court may order that a related trust, selected from a list supplied by the unincorporated body, be appointed as the defendant. Related trusts are defined as being "controlled by the unincorporated body which the body uses to conduct the body's activities", where control is broadly defined to include direct or indirect power to control the distribution of property, power to obtain beneficial enjoyment of trust assets or income, power to appoint trustees or beneficiaries, or accustomed to act according to the unincorporated body's instructions or wishes (proposed section 114B).

A trustee who is nominated or appointed to be the defendant can apply or be indemnified out of trust property to pay any liability that arises from the child abuse claim, regardless of any limitation, for example in the trust deed or otherwise, up to the total value of the trust property. The requirement to nominate or appoint a related trustee applies regardless of when the child abuse, or alleged child abuse, occurred. The Bill will therefore provide for property held by a trust related to an unincorporated body to be paid to meet a successful child abuse claim even where the current individuals or bodies involved with the trust or body have no connection with the claim in question.

The Bill potentially applies to a wide range of unincorporated bodies. "Body" is defined in the *Legislation Act 2001* to include "any group of people joined together for a common purpose".¹ Proposed section 114C will apply the provisions in the Bill to an unincorporated body regardless of whether the body has "a written constitution or fixed membership" or "any other particular attribute". The explanatory statement accompanying the Bill suggests that an "unincorporated body could include secular, religious or community-based organisations, volunteer-based organisations, unfunded or government funded organisations and local, national or international organisations."

¹ *Legislation Act 2001*, Dictionary, Part 1.

Similarly, the Redress and Civil Litigation Report by the Royal Commission into Institutional Responses to Child Sexual Abuse, which the Bill is intended to implement,² comments:

Unincorporated associations are voluntary combinations of persons with a common object or purpose. They differ widely in size, nature and other characteristics—a former Chief Justice of Australia described their variety as “infinite”. Common examples of unincorporated associations include many religious groups and sporting or other special interest clubs.³

Proposed section 114D will require an unincorporated body to nominate another entity to act as the defendant where, but for being unincorporated, the unincorporated body would be capable of being sued.⁴ One possible interpretation of this provision is that it will limit the range of bodies otherwise subject to the proposed provisions in the Bill to those capable of being incorporated, and hence able to be sued as a distinct legal person, under the *Associations Incorporation Act 1991* or similar legislation. However, given the scope of the Bill, the more likely interpretation of proposed section 114D is that it will only prevent the provisions of the Bill applying to claims brought against incorporated bodies or individuals who are already able to be sued in their own right.

Therefore, it is possible that the Bill could apply to a wide range of unincorporated associations, including extended families, kinship or indigenous groups, charities or other community organisations. Individuals who wish to raise and use money for an unincorporated association may have little option but to use and control a trust for that purpose if they wish to protect themselves against the possible misuse of that money by others. The use of a trust may be required by governments, donors, creditors, employees and/or insurers.⁵ The Bill therefore impairs the establishment and continued operation of unincorporated associations. This may limit the right of individual members to the freedom of association protected by section 15 of the HRA, and may also limit the specific association rights that provide for people to join with other members of their community for particular religious and cultural purposes in section 27 HRA (Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities) and section 14 HRA (Right to freedom of thought, conscience, religion and belief). Reference to this potential limitation and a justification using the framework set out in section 28 of the HRA should be provided.

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

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

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

RIGHT TO THE EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (SECTION 8 HRA)

The Bill only extends the capacity to bring claims against unincorporated associations in relation to a physical injury that arises from physical or sexual abuse of a child. The provisions of the Bill will not

² See Explanatory Statement, page 2.

³ Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report, 2015, page 496.

⁴ Note that the ability of the Court to appoint a related trust as defendant arises if there has been a failure to nominate or the entity nominated is unsuitable, and hence would seem to also only be available where s 114D applies.

⁵ See also the comments of the Scrutiny of Act and Regulations Committee, *Alert Digest*, 58th Parliament, No. 4 of 2018, at page 23.

apply to any claim or part of a claim that arises where the victim is an adult. The Bill therefore discriminates on the basis of age, engaging the right to equal protection of the law without discrimination protected by section 8 of the HRA. A justification for why the provisions of the Bill will only apply to adults despite the similar difficulty of establishing a proper defendant in situations of institutional abuse should be provided using the framework set out in section 28 of the HRA.

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

COURTS AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2018 (NO 2)

This Bill amends the *ACT Civil and Administrative Tribunal Act 2008*, *Court Procedures Act 2004*, *Director of Public Prosecutions Act 1990*, *Magistrates Court Act 1930*, and *Supreme Court Act 1933* to “create further improvements and efficiencies in ACT court and tribunal structures and processes, and the operation of the ACT justice system”.⁶

***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 EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill will extend the age limits for service as Magistrates and the ACT Civil and Administrative Tribunal presidential members and the Director of Public Prosecutions from 65 to 70 years. The explanatory statement acknowledges that by retaining age limits the Bill potentially limits the right to equality protected under section 8 of the HRA, and justifies that limitation as consistent with the retirement age of the federal judiciary and to allow turnover in the judiciary. The explanatory statement also points out the Bill will support greater inclusion through supporting flexible working arrangements.

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

CRIMES (RESTORATIVE JUSTICE) AMENDMENT BILL 2018

This Bill will amend the *Crimes (Restorative Justice) Act 2004* to improve access to restorative justice in the Territory by: reducing the administrative burdens involved with referring a matter to a restorative justice process; making it possible to refer a matter to be considered for restorative justice without the need for the offender to be involved at the point of referral; making it easier for participants with physical limitations to indicate consent; reducing the threshold for young offenders of needing to take responsibility for their offences; and the requirements involved with reporting to the court.

⁶ Explanatory statement, page 2.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

Currently, under the Crimes (Restorative Justice) Act, a restorative justice process is initiated through a referral by a referring entity, which can include various directors-general, the sentence administration board and victims of crime commissioner (see table 22, item 5, column 2). The referring entity must be satisfied that the offender is an eligible offender (section 24) which in turn requires that the offender has agreed to take part in a restorative justice process (subparagraph 19(1)(b)(iv)). The Bill will amend this requirement by providing for referrals to be made after sentencing (but before any sentence has come to an end) without the knowledge of the offender (proposed section 28A). The referring entity just has to be satisfied that it is not appropriate, or reasonably practicable in the circumstances, to notify the offender that the offence is being considered for restorative justice (proposed paragraph 28A(1)(c)).

This will allow the director-general to determine whether the offence is suitable for a restorative justice process under section 32, including whether the offender is suitable based on their contrition or remorse, personal characteristics and motivation, and the perceived impact of the offence (section 36). Section 63 allows the director-general to request information from a referring entity for “information about a victim, the parent of a victim, an offender, or any other person if it is reasonably necessary for the administration of the Act”. Therefore the proposed insertion of section 28A will increase the personal information able to be collected by the director-general about the offender and thus limit the right against undue interference with privacy protected by section 12 of the HRA.

The explanatory statement recognises this potential interference and sets out a justification, including the following:

Information required for the purpose of administration of the Act relates to the Director-General’s ability to facilitate a restorative justice conference in a carefully managed and safe environment. Accordingly, documentation which may be sought by the Director-General may include, and is not limited to, contact details of required participants, statements of facts, risk assessment reports and criminal histories. All requests for disclosure of information about a participant in a restorative justice process, made under section 63, are considered reasonable as they are authorised by current law and are necessary for the administration of the restorative justice scheme.

The Committee refers the Assembly to this analysis.

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

GOVERNMENT AGENCIES (LAND ACQUISITION REPORTING) BILL 2018

This private member’s Bill introduces reporting requirements for all acquisitions undertaken by ACT Government entities.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will require the Minister to present quarterly reports to the Assembly and the relevant committee detailing all acquisitions of interest in land undertaken by ACT government entities. Those reports will include details of the land or interest in land that was acquired, including the compensation or other amount paid. Where land, or interest in land, is acquired from individuals, those individuals do not have to be identified. However, the information provided under the Bill may be matched with other publicly available information to reveal personal and other private information. The Bill therefore engages with the right against undue interference with privacy protected under section 12 of the HRA.

The explanatory statement accompanying the Bill acknowledges the potential limitation of this right and sets out a justification using the framework set out in section 28 of the HRA. The Committee refers that analysis to the Assembly. As the Committee acknowledged in commenting on the Lands Acquisition (Reporting Requirements) Amendment Bill 2018,⁷ there are currently various publication requirements relating to government acquisitions of land and interests in land. The Bill will not require personal identifiers to be included in any report, and where land is acquired for public housing purposes only details of the suburb will be included in the report to the Assembly. More detailed personal information will be subject to the generally confidential nature of committee deliberations.

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

GOVERNMENT PROCUREMENT (SECURE LOCAL JOBS) AMENDMENT BILL 2018

This Bill will amend the *Government Procurement Act 2001* to establish a regulatory scheme requiring tenderers for certain types of territory-funded work to hold a certificate certifying that they comply with a “secure local jobs code” in order to be considered for procurement contracts.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

Proposed section 22M will allow the Minister to make a secure local jobs code setting out workplace standards and related requirements. These may include requirements for proposed tenderers to provide to territory entities and the proposed “secure local jobs code registrar” names of subcontractors and the “physical addresses, working hours, and contact details of a contact person for each of the entity’s work sites, and its subcontractor’s work sites” (proposed subsection 22M(2)(a)). To the extent this information may include personal information of individuals subject to complying with the code, the Bill will potentially limit the protection against undue interference with privacy provided by section 12 of the HRA.

⁷ See *Scrutiny Report 15*, 13 March 2018.

The explanatory statement includes a justification for why any interference is reasonable using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that analysis. In particular the Committee notes: the requirements to provide information will only apply to a limited class of entities (namely entities involved in construction work, industrial cleaning, traffic control and security services, or services or works for labour above a prescribed estimated value); the *Information Privacy Act 2014* will apply to the collection and use of the information by the registrar and, generally, the Territory entity; that the obligation arises from a choice by the entity to seek a procurement contract with a Territory entity; and that no criminal sanctions are involved.

The Committee notes that the Bill also provides for access to this information to other entities “on request ... for the purpose of allowing the entity to exercise any right of entry the entity has under a law in force in the ACT”. The explanatory statement provides an example of “a WHS permit-holder exercising their right of entry under the *Work Health and Safety Act 2012*”. Similarly, proposed section 22S provides for the registrar to request “relevant information” in various circumstances relating to compliance with the code. Failure to comply with the request could result in sanctions, including an entity being in breach of their contract with the territory entity.⁸ The explanatory statement does not provide any justification for the potential limitation on privacy presented by these provisions.

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

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

DISPLACEMENT OF SECTION 47(6) OF THE *LEGISLATION ACT 2001*

Proposed section 22F will include, as territory-funded work that requires a certificate, building or other industrial cleaning services within the meaning of the ANZSIC, Class 7311. “ANZSIC” is defined to mean the Australian and New Zealand Standard Industrial Classification 2006 as in force from time to time. Proposed subsection 22F(2) purports to displace the requirements of section 47(6) of the *Legislation Act 2001* from applying to ANZSIC. The Bill includes the note: “The ANZSIC does not need to be notified under the Legislation Act because s 47 (6) does not apply (see Legislation Act, s 47 (7)). The ANZSIC is available free of charge at www.abs.gov.au.” The explanatory statement suggests that section 47(6) is “displaced because the ANZSIC is subject to copyright and is publicly available free of charge on the Australian Bureau of Statistics website.”

The Committee notes that the requirement to notify ANZSIC does not technically arise in this instance. Section 47 of the Legislation Act applies where the authorising law (in this case the Bill) authorises or requires the making of a statutory instrument (termed the relevant instrument) about a matter. Under subsection 47(3), the relevant instrument, not the authorising law, may apply another instrument as in force only at a particular time. An instrument can be applied as in force from time to time where subsection 47(3) is displaced, for example by the authorising law expressly providing for the relevant instrument to apply another instrument as in force from time to time (subsection 47(4)). Where subsection 47(3) is so displaced, subsection 47(6) provides that the other

⁸ For example, the Committee notes that proposed section 4 provides for model terms to be included in procurement contracts including that the contractor must hold a secure local jobs code certificate for the duration of the contract. Cancellation of a certificate is one of the actions the registrar can take under proposed section 22T where information requested under proposed section 22S has not been provided.

instrument and any future changes are taken to be a notifiable instrument made under the relevant instrument. Subsection 47(6) does not apply where the authorising law itself provides for the application of an instrument as in force from time to time.

In any event, the Committee is generally concerned with any attempt to apply an instrument, particularly one developed outside of the Territory government, as in force from time to time. Doing so may inappropriately delegate legislative powers to the makers of the instrument. The Committee commends the approach taken in this Bill to include a note following the section explaining where the instrument will be publicly available and providing a justification in the explanatory statement for not making separate provision for notification.

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

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions – Committee terms of reference paragraph 3(c)

The Bill provides for most decisions of the registrar that relate to obtaining and maintaining a certificate to be reviewed by the ACT Civil and Administrative Tribunal (see proposed Part 4A). However, decisions under proposed section 22P (allowing the registrar to exempt the entity from a requirement of the code if they are satisfied that complying with the requirement would result in the entity not complying with a Commonwealth law) are not included. The Committee recognises that whether an entity will be complying with a Commonwealth law may be a question of law, which may make judicial review of decisions more appropriate. The questions of consistency between the Code and Commonwealth laws may also raise constitutional questions. However, the Committee requests further information about why decisions under proposed section 22P are not included in the list of reviewable decisions.

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

RED TAPE REDUCTION LEGISLATION AMENDMENT BILL 2018

This Bill amends over 14 Acts, Regulations and Instruments, including all Acts which refer to faxes or telexes as the only form of communication, with the intention of addressing “outdated requirements and reduce red tape by addressing duplication and providing greater clarity for ACT businesses, individuals and community organisations in achieving regulatory outcomes”.⁹

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will amend the *Associations Incorporation Act 1991*, including in relation to disclosure of personal interests and contact details. Currently a committee member has to disclose, to the committee and general meeting of the association, any direct or indirect pecuniary interest in a

⁹ Explanatory statement, page 2.

contract or proposed contract to which the association is or may be a party (section 65). The Bill will amend this to require disclosure of any material person interest in a matter being considered at a committee meeting (clause 31). As this will require the committee member to disclose personal interests in a broader range of matters, the Bill potentially limits the right against undue interference with privacy protected by section 12 of the HRA. The Bill will also replace various references in the Act to a person's address with reference to their contact details, including address, email and telephone number. These contact details will be among the range of details that must be included in the register of members under proposed section 67. Details in the register may be available to other members of the association unless access to the personal details have been restricted "where there are special circumstances which justify doing so" (see proposed sections 67A and 67B).

The explanatory statement recognises these potential limits on the right to privacy and provides a justification using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2018-215 being the Climate Change and Greenhouse Gas Reduction (Interim Targets) Determination 2018 made under subsection 7(2) of the *Climate Change and Greenhouse Gas Reduction Act 2010* determines targets to reduce greenhouse gas emissions.**
- **Disallowable Instrument DI2018-217 being the Plant Diseases (Importation Restriction Area) Declaration 2018 (No 2), including a regulatory impact statement made under section 12 of the *Plant Diseases Act 2002* declares specified areas of the Northern Territory to be subject to an importation restriction.**
- **Disallowable Instrument DI2018-218 being the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2018 (No 1) made under section 23 of the *Official Visitor Act 2012* revokes DI2015-284 and makes the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines.**
- **Disallowable Instrument DI2018-219 being the Public Place Names (Taylor) Determination 2018 (No 3) made under section 3 of the *Public Place Names Act 1989* determines the name of one road in the Division of Taylor.**
- **Disallowable Instrument DI2018-220 being the Domestic Animals (Cat Containment) Declaration 2018 (No 1) made under section 81 of the *Domestic Animals Act 2000* revokes DI2017-199 and declares specified areas of land as cat containment areas.**
- **Disallowable Instrument DI2018-221 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 6) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the ACT Professional Standards Council, representing Tasmania.**

- **Disallowable Instrument DI2018-222 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 7) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* revokes DI2017-235 and appoints a specified person as a member of the ACT Professional Standards Council, representing Queensland.**
- **Disallowable Instrument DI2018-224 being the Public Place Names (Moncrieff) Determination 2018 made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Moncrieff.**
- **Disallowable Instrument DI2018-225 being the Auditor-General Acting Appointment 2018 made under section 8 of the *Auditor-General Act 1996* appoints a specified person to act as Auditor-General.**
- **Disallowable Instrument DI2018-226 being the Public Place Names (Taylor) Determination 2018 (No 4) made under section 3 of the *Public Place Names Act 1989* determines the names of 16 roads in the Division of Taylor.**

DISALLOWABLE INSTRUMENT—COMMENT

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

Disallowable Instrument DI2018-223 being the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2018 (No 1) made under section 27 of the *Working with Vulnerable People (Background Checking) Act 2011* repeals DI2012-190 and makes the Working with Vulnerable People Commissioner's Risk Assessment Guidelines.

REFERENCE TO EXTRINSIC MATERIAL

This instrument, made by the Commissioner for Fair Trading, under section 27 of the *Working with Vulnerable People (Background Checking) Act 2011*, makes guidelines in relation to how the Commissioner will make risk assessments, for the purposes of determining whether a person poses an unacceptable risk of harm to a vulnerable person accessing a regulated activity, under the Working with Vulnerable People (Background Checking) Act.

Schedule 1 of the instrument sets out the substantive guidelines. The following paragraph appears on page 7:

RISK ANALYSIS

The intent of the risk analysis process is not to determine whether a person is guilty or innocent. Risk analysis is the process “to comprehend the nature of risk and to determine the level of risk.” The level of risk is influenced by the combination of potential sources of risk, likelihood and their consequences; particularly where they impact on the **inherent requirements of the job** in which the person will be engaged.

Further information on “the inherent requirements of the job” is set out on page 16 of the guidelines. The quoted “to comprehend the nature of risk and to determine the level of risk” is footnoted to *AS/NZS ISO 13000:2009—Risk management—Principles and guidelines*.

The table on page 5 of the instrument also references clauses of the AS/NZS.

Page 2 of the instrument contains the following statement:

The risk assessment process described in the Guidelines is consistent with the Australian/New Zealand Standard *AS/NZS ISO 31000:2009 – Risk management – Principles and guidelines* (the Standard). The Standard provides generic guidelines and establishes a number of principles for the identification and management of risk.

The explanatory statement for the instrument states:

Schedule 1 of the Instrument outlines the factors that will be considered by the Commissioner in conducting a risk assessment. The risk assessment process has been based on the Australia/New Zealand Standard *AS/NZS ISO 31000:2009 – Risk management – Principles and guidelines*.

No other information is provided in relation to the application of AS/NZS, under the guidelines.

The Committee notes that section 27 of the Working with Vulnerable People (Background Checking) Act provides:

27 Risk assessment guidelines

- (1) The commissioner must make guidelines (risk assessment guidelines) about how risk assessments are to be conducted under this Act.
- (2) A guideline may apply, adopt or incorporate an instrument, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47(5) or (6) is not disapplied (see s 47(7)).

Note 2 A reference to an instrument includes a reference to a provision of an instrument (see Legislation Act, s 14(2)).

- (3) A risk assessment guideline is a disallowable instrument.

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

It appears to the Committee that *AS/NZS ISO 31000:2009—Risk management—Principles and guidelines* is applied, adopted or incorporated, for the purposes of subsection 27(2). There is no indication that subsections 47(5) or (6) of the *Legislation Act 2001* are disapplied. This means that the AS/NZS would be a “notifiable instrument” and, as a result, should appear on the ACT Legislation Register. According to the Committee’s searches, it does not.

The Committee seeks the Minister’s advice as to the status of *AS/NZS ISO 31000:2009—Risk management—Principles and guidelines* in relation to this instrument and, in particular, whether subsections 47(5) or (6) of the *Legislation Act 2001* apply to the AS/NZS, and asks the Minister to respond.

SUBORDINATE LAW—NO COMMENT

The Committee has examined the following subordinate law and offers no comments on it:

Subordinate Law SL2018-13 being the Litter Regulation 2018 made under the *Litter Act 2004* prescribes the volume of litter for the purposes of sections 9A and 9B of the Act.

SUBORDINATE LAW—COMMENT

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

STRICT LIABILITY OFFENCE

Subordinate Law SL2018-14 being the Road Transport (Offences) Amendment Regulation 2018 (No 2) made under the *Road Transport (General) Act 1999* determines infringement notice penalty amounts.

Section 4 of this subordinate law substitutes new subsections 12A(3) and (4) for the existing subsection 12A(3) (and the note) of the Road Transport (Offences) Regulation 2005. The new subsection 12A(3) creates an offence, in relation to taking action to prevent a person from reading or receiving an infringement notice that has been placed on or attached to a vehicle. Subsection 12A(4) provides that an offence against subsection 12A(3) is a strict liability offence.

The Committee has consistently taken a particular interest in relation to strict liability offences. In its document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#)¹⁰, the Committee stated:

STRICT AND ABSOLUTE LIABILITY OFFENCES

As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the Explanatory Statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes that its approach to strict and absolute liability offences is also consistent with the protection of the right to the presumption of innocence, provided by section 22 of the *Human Rights Act 2004*.

With those requirements in mind, the Committee notes that the explanatory statement for this subordinate law states:

¹⁰ https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

Clause 4 Section 12A (3) and note

This clause identifies that the offence is one of strict liability. Part 1.9 of the existing *Road Transport (Offences) Regulation 2005* provides for an infringement notice penalty against section 12A(3). The Guide for Framing Offences provides that a prerequisite for an infringement notice is that the offence is one of strict liability. Defences to the offence have not been specified and, as such, a person will have the normal defences, including having made a mistake, available to them.

The Committee notes that, at pages 2-3, the [Guide for Framing Offences](#)¹¹ states:

Infringement notices

- The only offences suitable for infringement notices are strict or absolute liability offences that have straightforward ‘yes or no’ criteria. Any offence that has complex legal distinctions is not suitable for an infringement notice.
- The ACT Government has a long-standing policy that the nominal amount on an infringement notice should not exceed 20% of the maximum fine stipulated in the offence.

In terms of the Committee’s requirement that, for an offence of strict liability, it seeks an explanation as to “the reasons a particular offence needs to be one of strict liability”, the explanation based on the requirements of the Guide for Framing Offences is an unusual one. In particular, the explanation does not adopt the sort of reasoning that is generally provided, in relation to the balancing of the interests of accused persons with the public interest in ensuring that a particular regulatory scheme operates efficiently to serve its intended purpose.

Another justification that is often provided is that the relevant offence applies only to people involved in a particular activity or industry, who are well-aware of the existence of the relevant offence and, also, the need to comply with the relevant requirements. Rather, the explanatory statement for this subordinate law states that the offence needs to be a strict liability offence “because the Guide for Framing Offences requires that infringement notice offences need to be strict liability offences”. This seems to be akin to putting the cart before the horse.

The Committee seeks the Minister’s advice as to the justification (leaving aside the reference to the Guide for Framing Offences) for the offence created by this subordinate law being a strict liability offence, and asks the Minister to respond.

The Committee draws the attention of the Legislative Assembly to this subordinate law, under principle (1)(b) of the Committee’s terms of reference, on the basis that it may unduly trespass on rights previously established by law.

REGULATORY IMPACT STATEMENT — NO COMMENT

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

Disallowable Instrument DI2018-217 being the Plant Diseases (Importation Restriction Area) Declaration 2018 (No 2).

¹¹ <http://www.justice.act.gov.au/cache/attachments/2072>.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Workplace Safety and Industrial Relations, dated 21 August 2018, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instruments:
 - DI2018-109—Dangerous Substances (Fees) Determination 2018.
 - DI2018-110—Machinery (Fees) Determination 2018;
 - DI2018-111—Scaffolding and Lifts (Fees) Determination 2018;
 - DI2018-112—Workers Compensation (Fees) Determination 2018; and
 - DI2018-113—Work Health and Safety (Fees) Determination 2018.
 - DI2018-130—Work Health and Safety (Work Safety Council Employee Representative) Appointment 2018 (No 1);
 - DI2018-132—Work Health and Safety (Work Safety Council Employee Representative) Appointment 2018 (No 2); and
 - DI2018-133—Work Health and Safety (Work Safety Council Employer Representative) Appointment 2018 (No 2).
- The Minister for the Environment and Heritage, dated 21 August 2018, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instrument DI2018-202—Utilities (Technical Regulation) (ACT Dam Safety Code) Approval 2018.
- The Minister for Disability, Children and Youth, dated 31 August 2018, in relation to comments made in Scrutiny Report 20 concerning Disallowable Instrument DI2018-124—Children and Young People (Care and Protection Organisation) Guidelines 2018 (No 1).

[These responses](#)¹² can be viewed online.

The Committee wishes to thank the Minister for Workplace Safety and Industrial Relation, The Minister for the Environment and Heritage, and the Minister for Disability, Children and Youth for their helpful responses.

GOVERNMENT RESPONSE—COMMENT

DISAPPLICATION OF SUBSECTION 47(6) OF THE *LEGISLATION ACT 2001*

Disallowable Instrument DI2018-202 being the Utilities (Technical Regulation) (ACT Dam Safety Code) Approval 2018 made under section 73 of the *Utilities (Technical Regulation) Act 2014* revokes DI2014-292 and approves the ACT Dam Safety Code 2018.

¹² <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>.

In *Scrutiny Report 20* of the 9th Assembly (7 August 2018), the Committee commented on the instrument mentioned above, made under section 73 of the *Utilities (Technical Regulation) Act 2014*. The instrument approves a technical code (**Code**) for “listed dams” (as defined by section 69 of the *Utilities (Technical Regulation) Act*) that are covered by that Act. As noted in the explanatory statement for the instrument, the purpose of the Code that is approved by the instrument is “to identify and regulate the safety of dams that have the potential for a failure which could have a significant adverse effect on the community.”

The Committee noted that section 6 of the Code provides:

6. APPLICABLE GUIDELINES

Under section 73(2) of the Act, this Code adopts the current ANCOLD Guidelines (the guidelines), as guidelines for the purpose of this Code.

Section 47(6) of the Legislation Act does not apply in relation to the ANCOLD Guidelines adopted above (see section 47(7) of the Legislation Act). Therefore, the ANCOLD Guidelines do not need to be notified on the Legislation Register. The ANCOLD Guidelines may be purchased at <https://www.ancold.org.au/>.

The Committee noted that the explanatory statement for the instrument states (in relation to the ANCOLD Guidelines):

The Code adopts the Australian Committee on Large Dams (ANCOLD) Guidelines as the basis for dam safety. The ANCOLD guidelines are accepted by professionals in Australia as outlining requirements for good practice in dam ownership, and are referenced as the basis for the regulation of dam safety in all eastern states of Australia.

The Committee noted that section 73 of the *Utilities (Technical Regulation) Act* provides:

73 Technical codes for listed dams—approval

- (1) The Minister may approve a technical code for listed dams as recommended by the technical regulator if the Minister is satisfied on reasonable grounds that—
 - (a) section 72 has been complied with; and
 - (b) the code is—
 - (i) consistent with the objects of this Act; and
 - (ii) not inconsistent with another technical code.
- (2) An approved technical code may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.
- (3) The Legislation Act, section 47(6) does not apply in relation to an AS or AS/NZS applied, adopted or incorporated under subsection (2).

Note An AS or AS/NZS does not need to be notified under the Legislation Act because s 47 (6) does not apply (see Legislation Act, s 47(7)). An AS or AS/NZS may be purchased at www.standards.org.au.

- (4) An approval is a disallowable instrument.

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

The Committee noted that the effect of subsection (3) is that it disapplies subsection 47(6) of the *Legislation Act 2001* only in relation to the application, adoption or incorporation of an AS or an AS/NZS in a technical code. The Committee then noted that the concepts of “AS” and “AS/NZS” are defined in section 164 of the Legislation Act, which provides:

164 References to Australian Standards etc

- (1) In an Act or statutory instrument, a reference consisting of the words ‘Australian Standard’ or ‘AS’ followed by a number is a reference to the standard so numbered published by or on behalf of Standards Australia.
- (2) In an Act or statutory instrument, a reference consisting of the words ‘Australian/New Zealand Standard’ or ‘AS/NZS’ followed by a number is a reference to the standard so numbered published jointly by or on behalf of Standards Australia and Standards New Zealand.

Examples—s 164

- 1 AS 4608-1999
- 2 AS/NZS 4906: 1994

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

The Committee then noted that it was not clear (to the Committee) how the ANCOLD Guidelines fit within the exemption provided by subsection 73(3) of the Utilities (Technical Regulation) Act, noting that the [ANCOLD website](#)¹³ states:

The Australian National Committee on Large Dams Incorporated (ANCOLD Inc) is an incorporated voluntary association of organisations and individual professionals with an interest in dams in Australia. ANCOLD was formed in 1937 as the Australian national committee of the International Commission on Large Dams (ICOLD), a non-government organisation established in 1928, and is one of 100 member countries.

ANCOLD’s mission is to be the industry body, representing its Members and Associates, disseminating knowledge, developing capability and providing guidance in achieving excellence for all aspects of dam engineering, management and associated issues.

The Committee suggested that this would seem to put the ANCOLD Guidelines outside of the definition of AS and AS/NZS in section 164 of the Legislation Act, making the ANCOLD Guidelines a “notifiable instrument”, under subsection 47(5) of the Legislation Act.

The Committee sought the Minister’s advice in relation to the application of subsection 73(3) of the Utilities (Technical Regulation) Act to the ANCOLD Guidelines.

¹³ <https://www.ancold.org.au/>

The Committee also drew the attention of the Legislative Assembly to the instrument, on the basis that it may not be in accord with the general objects of the Act under which it is made, contrary to principle (1)(a) of the Committee's terms of reference.

In his response to the Committee's comments, the Minister for the Environment and Heritage Minister states:

Section 73(3) of the Act provides that 'The Legislation Act, section 47(6) does not apply in relation to an AS or AS/NZS applied, adopted or incorporated under subsection (2)'. This means that if the ACT were to adopt an Australian Standard as a technical code under the Act, that Standard would not need to be notified on the Legislation Register, as usually required by section 76(6). The ANCOLD Guidelines are not Australian Standards, and so section 73(3) of the Act does not apply to them.

I have asked my Directorate to further consider the status of section 47 of the *Legislation Act 2001* and its application to this instrument.

The Committee requests that the Minister advise the Committee of the outcome of his Directorate's further consideration of the status of section 47 of the *Legislation Act 2001* in its application to this instrument, and asks the Minister to respond.

The Committee notes that the Minister's response goes on to state:

The Committee has also drawn the attention of the Legislative Assembly to the instrument on the basis that it 'may not be in accord with the general object of the Act under which it is made'. The Committee does not indicate how it has reached this conclusion.

This instrument is to approve a technical code for dam safety in the ACT. The objects of the Act are listed in section 6 and include that the Act is to 'ensure the safe, reliable and efficient delivery of regulated utility services' and to 'ensure the safe and reliable operation and maintenance of regulated utility services to protect ... the public'. I am satisfied that approving a code for dam safety therefore helps to achieve the objects of the Act.

The Committee notes that part of its role, in scrutinising subordinate legislation, is to ensure (on behalf of the Legislative Assembly) that subordinate legislation is properly authorised by the empowering legislation and also is in accordance with any other, generally-applicable, legislation (eg the *Legislation Act 2001*). The Committee's original comment was made on the basis of that role. The comment was based on potential issues with the application of subsection 73(3) of the *Utilities (Technical Regulation) Act 2014* and subsection 47(6) and section 164 of the *Legislation Act 2001*. In particular, the Committee intended to indicate its concern that the apparent reliance on subsection 73(3) of the *Utilities (Technical Regulation) Act* was correct.

In making the comment, the Committee sought to refer the comment to the Committee's principles, as set out in the Committee's [resolution of appointment](#)¹⁴. On that basis, the Committee identified principle (1)(a), which requires the Committee to 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) "is in accord with the general objects of the Act under which it is made".

¹⁴ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role>.

The Committee notes that the equivalent scrutiny principle in other Australian jurisdictions is more obviously relevant to the particular example. For example, the equivalent principle of the Senate Standing Committee on Regulations and Ordinances' terms of reference requires that committee to scrutinise instruments to ensure that they are "in accordance with the statute" (see [Senate Standing Order 23\(3\)\(a\)](#))¹⁵.

On further reflection, the Committee acknowledges that the reference to principle (1)(a) was not as helpful as it might have been, in this instance, and that the potential relevance of the principle to the particular case was not as clear as it might have been. The Committee will bear this in mind in making any future comments, by reference to this principle.

This comment does not require a response from the Minister.

Elizabeth Lee MLA
Chair

11 September 2018

¹⁵ https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
 - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
- **Report 8, dated 8 August 2017**
 - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
- **Report 12, dated 21 November 2017**
 - Crimes (Criminal Organisation Control) Bill 2017 (PMB).
- **Report 17, dated 4 May 2018**
 - Crimes (Consent) Amendment Bill 2018 (PMB).
- **Report 19, dated 24 July 2018**
 - Anti-corruption and Integrity Commission Bill 2018 (PMB)
- **Report 20, dated 7 August 2018**
 - Disallowable Instrument DI2018-125—Road Transport (General) Vehicle Registration and Related Fees Determination 2018 (No 2)
 - Disallowable Instrument DI2018-126—Road Transport (General) Driver Licence and Related Fees Determination 2018 (No 1)
 - Disallowable Instrument DI2018-127—Road Transport (General) Numberplate Fees Determination 2018 (No 2)
 - Disallowable Instrument DI2018-128—Road Transport (General) Refund and Dishonoured Payments Fees Determination 2018 (No 1)
 - Disallowable Instrument DI2018-129—Road Transport (General) Fees for Publications Determination 2018 (No 1)
 - Disallowable Instrument DI2018-138—Agents (Fees) Determination 2018
 - Disallowable Instrument DI2018-140—Births, Deaths and Marriages Registration (Fees) Determination 2018
 - Disallowable Instrument DI2018-142—Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2018
 - Disallowable Instrument DI2018-143—Co-operatives National Law (ACT) (Fees) Determination 2018
 - Disallowable Instrument DI2018-144—Prostitution (Fees) Determination 2018
 - Disallowable Instrument DI2018-145—Registration of Deeds (Fees) Determination 2018
 - Disallowable Instrument DI2018-146—Retirement Villages (Fees) Determination 2018
 - Disallowable Instrument DI2018-147—Traders (Licensing) (Fees) Determination 2018
 - Disallowable Instrument DI2018-175—Domestic Animals (Fees) Determination 2018 (No 2)
 - Disallowable Instrument DI2018-177—Tree Protection (Fees) Determination 2018 (No 1)
 - Disallowable Instrument DI2018-188—Associations Incorporation (Fees) Determination 2018
 - Disallowable Instrument DI2018-189—Land Titles (Fees) Determination 2018
 - Disallowable Instrument DI2018-190—Liquor (Fees) Determination 2018
 - Disallowable Instrument DI2018-191—Partnership (Fees) Determination 2018
 - Disallowable Instrument DI2018-192—Security Industry (Fees) Determination 2018
 - Disallowable Instrument DI2018-193—Gaming Machine (Fees) Determination 2018
 - Disallowable Instrument DI2018-194—Race and Sports Bookmaking (Fees) Determination 2018

- Disallowable Instrument DI2018-195—Unlawful Gambling (Charitable Gaming Application Fees) Determination 2018
- Disallowable Instrument DI2018-196—Casino Control (Fees) Determination 2018
- Disallowable Instrument DI2018-199—Public Trustee and Guardian (Fees) Determination 2018
- Disallowable Instrument DI2018-200—Unit Titles (Management) (Fees) Determination 2018
- Disallowable Instrument DI2018-209—Court Procedures (Fees) Determination 2018