

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

SCRUTINY REPORT 49

18 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

BILLS—COMMENT

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

CITY RENEWAL AUTHORITY AND SUBURBAN LAND AGENCY AMENDMENT BILL 2020

This Bill will amend the *City Renewal Authority and Suburban Land Agency Act 2017* to provide for a process to revitalise the Sydney and Melbourne Buildings, which are located within the City Renewal Project declared under that 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 RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

FREEDOM OF EXPRESSION (SECTION 16 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

The Bill will provide for the City Renewal Authority, having consulted with the owners of the buildings and others and provided an opportunity for public consultation, to prepare a draft revitalisation plan for leased public areas of the Sydney and Melbourne Buildings. Once approved by the Minister, the revitalisation plan will be a disallowable instrument. If work required under the revitalisation plan is not carried out within the stated period, the Authority can issue a direction requiring work to be completed within a specified time. A direction issued by the Authority is subject to merits review by the ACT Civil and Administrative Tribunal (ACAT). If work is not completed as directed, the Authority can authorise a person to carry out the revitalisation work. Such authorised persons will have authority under the Bill to carry out the work, including authority to enter premises during business hours or with the consent of the owner. The building owner will be liable for reasonable costs of revitalisation work carried out by authorised persons.

As the Bill will provide for owners of certain buildings to be subject to requirements to carry out work to their buildings, the Bill may limit the right to equality protected by section 8 of the HRA. By authorising entry to premises operating under a commercial lease the Bill may limit the protection of privacy provided by section 12 of the HRA. A revitalisation plan may place restrictions on owners of the relevant buildings and possibly limit the right to expression protected by section 16 of the HRA. The issue of a direction to carry out work engages the right to a fair hearing protected by section 21 of the HRA.

The explanatory statement accompanying the Bill recognises the Bill's potential limit of these rights and provides a justification for why any such limit should be regarded as reasonable. Subject to the following comment, the Committee refers that statement to the Assembly.

The explanatory statement justifying the limitation on the right to equality describes the Sydney and Melbourne buildings as “iconic and important buildings [which] have historical and cultural significance, and contribute to the social, cultural and economic life of the city centre”. The statement continues:

Due to the prominence and significance of the Sydney and Melbourne Buildings, and the public funding which has been invested in their proximity (including the city terminus of Light Rail and the verges and footpaths on Northbourne Avenue) it is considered appropriate to require building owners to maintain and revitalise these buildings to ensure their condition reflects their importance and prominence.

The Committee is concerned with how this justification relates to the broader purposes of the Act to encourage, carry out and support public and private sector investment and participation in urban renewal. It is not clear to the Committee why building owners should be required to meet the costs of revitalisation works which are not reflected in an increase in the value of the buildings themselves but provide a broader public amenity or add to the value of proximate public works. The Committee therefore requests further information on whether less restrictive options which encourage, rather than require at private expense, revitalisation works have been considered and why they were considered inappropriate to achieve the legitimate objectives of the Bill.

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

This Bill seeks to prohibit certain practices aimed at changing a person’s sexuality or gender identity and allow for complaints to be made to the ACT Human Rights Commission in relation to providing such services.

***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)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF (SECTION 14 HRA)

RIGHT TO FREEDOM OF EXPRESSION (SECTION 16 HRA)

RIGHT TO EDUCATION (SECTION 27A HRA)

The Bill creates offences and provides for resolution of complaints and possibly payment of compensation in relation to certain sexuality or gender identity conversion practices (conversion practices).

A conversion practice is defined as “a treatment or other practice the purpose, or purported purpose, of which is to change a person’s sexuality or gender identity”. There are explicit exclusions of practices with various purposes, including assisting a person undergoing or considering undergoing a gender transition, assisting a person express their gender identity, provide acceptance,

support or understanding of a person, or facilitate a person's identity exploration and development. Practices by health service providers which in their judgement are a necessary part of a safe and appropriate health service or to comply with the provider's legal or professional obligations are also excluded.

The Bill will make it an offence to perform a conversion practice on a protected person. A protected person will be defined under the Bill as a child or someone with impaired decision-making ability in relation to a matter relating to the person's health or welfare. It will also be an offence to remove a protected person from the Territory with the purpose of performing a conversion practice on them.

The Bill will also allow complaints about conversion practices to be made to the ACT Human Rights Commissioner. Where such complaints have not been successfully conciliated or otherwise withdrawn, they may be referred to the ACT Civil and Administrative Tribunal (ACAT). Where ACAT is satisfied that the person complained about has engaged in a harmful conversion practice, it can make orders to not repeat or continue the harmful practice, or to take steps to redress or pay compensation for any loss or damage suffered by the complainant because of the harmful practice. Harmful practice is defined for this purpose as a conversion practice that caused, or is likely to cause, harm to a person or otherwise has or is likely to adversely affect a person's rights, interests or welfare.

By restricting the manifestation or demonstration of religious belief, or the expression of information or ideas, that seek to change a person's sexuality or gender identity, the Bill may limit the right to freedom of thought, conscience, religion and belief protected by section 14 of the HRA and the right to freedom of expression protected by section 16 of the HRA. By restricting the removal of protected persons from the Territory the Bill may limit the right to freedom of movement protected by section 13 of the HRA. The Bill may also impact education of children and people with impaired capacity which includes religious teaching that may align with conversion practices, potentially limiting the right to education in section 27A of the HRA. By restricting conversion practices that may have been carried out within a person's home, or carried out by family members, or potentially affecting an individual's choice to seek out conversion practices the Bill may also limit the protection of privacy provided by section 12 of the HRA.

The explanatory statement accompanying the Bill recognises these potential human rights limitations and provides a justification for why they should be considered reasonable under the framework set out in section 28 of the HRA. Subject to the following comments the Committee refers that statement to the Assembly.

As the explanatory statement provides, the Bill is targeted at practices that are demonstrably harmful and based on unfounded claims that it is possible to change a person's sexuality or gender identity. The Bill is not intended to "interfere with religious teachings more broadly", or to "prevent religious schools from teaching the tenets of their faith, including teachings on homosexuality or gender identity. It is aimed only at practices that actively seek to change the sexuality or gender identity of a person".

However, the Committee is concerned that the definition of conversion practices may extend to such religious teachings or practices where they are premised on a person's sexuality or gender identity being a matter of individual choice or other than an immutable characteristic. Where a religious teaching or belief includes aspects of sexuality or gender identity being a matter of individual choice, then the expression of that belief may itself be considered a conversion practice.

The exclusions from the meaning of conversion practice in the Bill relating to providing acceptance, support or understanding, or facilitating social support or identity exploration and development are characterised in the explanatory statement as “support and affirmation of an individual’s identity and choices”. Their inclusion may suggest that not providing support and affirmation could be a form of practice which has, as one of its purposes at least, the discouragement of a person’s sexuality or gender identity. It is not clear to the Committee whether this would be accepted as a purpose to change a person’s sexuality or gender identity for the purposes of the Bill.

The Committee therefore requests further information on what other options were considered to more clearly limit the forms of religious teachings or other beliefs that may be within the meaning of conversion practices for the purposes of the Bill and why they were considered inappropriate to achieve the legitimate objectives of the Bill.

The Bill makes explicit that the offence of performing a conversion practice on a protected person does not depend on whether or not the person, or the person’s parent or guardian, consented to the practice. However, there is no similar provision in the offence of removing a protected person from the Territory for a conversion practice (removal offence). The explanatory statement refers to the removal offence as not applying to consenting adults who may themselves wish to leave the Territory to undertake conversion practices. It is not clear to the Committee whether this was intended to apply to adult protected persons who, while impaired in their decision-making ability, retain the capacity to consent to removal from the ACT. The Committee therefore seeks further information on the role that consent may play in the context of the removal offence.

The Bill will also allow for complaints to be made to the ACT Human Rights Commission, and potentially referred to ACAT, in circumstances where the person had originally consented to the conversion practice. As the explanatory statement suggests:

A complaint about a conversion practices may be made regardless of whether a person agreed or consented to the practice at the time. This is considered to be the least rights restrictive means to achieve the objective, as limiting the prohibition to instances where the practice was non-consensual would not prevent the harm caused by conversion practices. Evidence indicates that conversion practices are undertaken in a range of informal and formal contexts and that consent may be obtained through misleading claims or indoctrination. People who are subject to these practices are generally not made aware of the harm these practices can cause. This measure is the least rights restrictive way to ensure that these practices can be prevented, and that a clear message is sent that such practices are not accepted in the ACT.

The Committee is concerned that a person may be subject to orders from ACAT—including the practice not be repeated or the payment of compensation—in circumstances where the individual bringing the complaint had consented to the practice and the person complained about played no role in influencing that consent. The Committee notes that, in making any order ACAT must consider the nature of the conversion practice and any mitigating factors, and may consider any other matter ACAT considers relevant. However, it is not clear that the consent or conduct of the person harmed by the conversion practice would be considered relevant. The Committee therefore requests further information from the Minister as to how consent to the conversion practice, particularly in circumstances where that consent was not influenced by the person carrying out the practice, would affect any order made by ACAT.

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

RESPONSE

GOVERNMENT RESPONSE

The Committee has received a response from the Minister for Tertiary Education, dated 14 August 2020, in relation to comments made in Scrutiny Report 47 concerning Disallowable Instrument DI2020-145—Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 2).

[This response¹](#) can be viewed online.

The Committee wishes to thank the Minister for Tertiary Education for his response.

Giulia Jones MLA
Chair

18 August 2020

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>.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
 - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
 - Electoral Amendment Bill 2018 (Private Member's amendments).
- **Report 37, dated 19 November 2019**
 - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
 - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member's amendments).
- **Report 38, dated 4 February 2020**
 - Electoral Legislation Amendment Bill 2019 (Private Member's amendments).
- **Report 39, dated 17 February 2020**
 - 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).
- Disallowable Instrument DI2020-205 Taxation Administration (Owner Occupier Duty) COVID-19 Exemption Scheme Determination 2020.

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

- Disallowable Instrument DI2020-216 Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2).
- Education Amendment Bill 2020.
- Electoral Amendment Bill 2018 (Private Member's amendments).
- Mental Health Amendment Bill 2020.
- Royal Commission Criminal Justice Legislation Amendment Bill 2020—Government response.