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

SCRUTINY REPORT 12

21 NOVEMBER 2017
COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)
Ms Bec Cody MLA (Deputy Chair)
Ms Elizabeth Lee MLA
Mr Chris Steel MLA

SECRETARIAT

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

CONTACT INFORMATION

Telephone  02 6205 0173
Facsimile  02 6205 3109
Post       GPO Box 1020, CANBERRA ACT 2601
Email      scrutiny@parliament.act.gov.au
Website    www.parliament.act.gov.au

ROLE OF COMMITTEE

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

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

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

   (a) is in accord with the general objects of the Act under which it is made;

   (b) unduly trespasses on rights previously established by law;

   (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

   (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

   (a) unduly trespass on personal rights and liberties;

   (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

   (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

   (d) inappropriately delegate legislative powers; or

   (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the Human Rights Act 2004; and

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.
# Table of Contents

## Bills

- Bill—No Comment
  - Revenue Legislation Amendment Bill 2017 (No 2)  

## Bills—Comment

- Crimes (Criminal Organisation Control) Bill 2017
- Crimes (Police Powers and Firearms Offence) Amendment Bill 2017
- Domestic Animals (Dangerous Dogs) Legislation Amendment Bill 2017
- Domestic Animals (Racing Greyhounds) Amendment Bill 2017
- Education Amendment Bill 2017
- Inspector of Correctional Services Bill 2017
- Lakes Amendment Bill 2017
- Racing (Greyhounds) Amendment Bill 2017
- Reportable Conduct and Information Sharing Legislation Amendment Bill 2017
- Workers Compensation Amendment Bill 2017

## Subordinate Legislation

- Disallowable Instruments—No Comment

## Government Responses

- Government Response—Comment

## Outstanding Responses
**BILLS**

**BILL—NO COMMENT**

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

**REVENUE LEGISLATION AMENDMENT BILL 2017 (NO 2)**

This Bill amends various Acts to improve administration and operation of the ACT tax system.

**BILLS—COMMENT**

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

**CRIMES (CRIMINAL ORGANISATION CONTROL) BILL 2017**

This Bill “seeks to introduce a criminal organisation control regime, adapted for the use in the ACT, to prevent, disrupt and deter the operations of organised criminal organisations.”

The Bill, if enacted, would enable the Supreme Court to make a declaration that an organisation was a “criminal organisation” where the court was satisfied that members of the organisation associated for purposes related to serious criminal activity, and the continued existence of the organisation was an unacceptable risk to the safety, welfare and order of the ACT community. A member of a declared criminal organisation could then be subject to an interim and then final control order where it is “reasonably necessary to restrict, or impose conditions on, the person’s activities in order to end, prevent or reduce a serious threat to public safety and order.”

It is an offence with a maximum penalty of two to five years for a person subject to a control order to associate with other members of the organisation who are also subject to a control order. It is also an offence for a controlled member to recruit another person to become a member of the organisation.

The Bill also provides for reciprocal recognition of declarations and orders made in other States and Territories under analogous legislation. It provides protection against disclosure of criminal intelligence which relates to criminal activity and which, if disclosed, could prejudice a criminal investigation, disclose a confidential source of information or endanger a person’s life or physical safety. A criminal intelligence monitor is to be designated to monitor, test and make submissions about criminal intelligence, declarations and control order applications, and to represent the interests of the respondents to such applications.

---

1 Explanatory statement at p 3.
2 Proposed paragraph 21(1)(b)
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 freedom of association (section 15 HRA)
Freedom of expression (section 16 HRA)
Right to a fair trial (section 21 HRA)

The explanatory statement sets out a passage from submissions received on an exposure draft of the Bill from the ACT Human Rights Commission which acknowledges that:

control order regimes and prohibitions on certain people working in specified industries will limit various rights contained in the HR Act, including the right to equality and non-discrimination (s 8), the right to freedom of association (s 15), the right to freedom of expression (s 16), and the right to a fair hearing (s 21).

The explanatory statement then goes on to outline the legitimate objective of the Bill as a whole, its rational connection to that objective and why it represents the least restrictive means of doing so. However, the statement does so principally by claiming to have met the concerns raised by the ACT Human Rights Commission’s submission. There is no reference to which aspects of the Bill may give rise to issues relating to one or more of the human rights identified. The “significant safeguards and limitations on [the proposed legislation’s] scope” which demonstrate the proportionality of any restrictions on human rights are not identified in this context. References in the individual clause descriptions to amendments made on the basis of recommendations made in the ACT Human Rights Commission submission do not sufficiently identify the nature of the human rights concern raised nor allow the sufficiency of the amendment to be determined.

In the Committee’s view, the explanatory statement fails to meet the standards expected in relation to the elements of section 28 of the HRA. The framework set out in section 28 of the HRA needs to be considered with sufficient particularity to demonstrate how each of the limitations on human rights under the Bill should be considered a rational and proportionate response. In the context where the Bill raises significant concerns over its limitations on a number of human rights, a more substantial justification is required.

The Committee also has concerns over the extent to which elements of the Bill continue to raise significant human rights concerns. For example, the ACT Human Rights Commission raised the concern over use of control orders to avoid the fair trial standards of a prosecution and recommended that the Bill should “include an express requirement that the court must consider the possibility of whether the available evidence would support a criminal prosecution before a control order is made.”

---

The ACT Human Rights Commission was also concerned about the exposure draft’s prohibition on persons subject to a control order working in particular prescribed occupations and recommended that reliance instead be placed on “fit and proper” person tests in relevant licencing regimes, or alternatively providing the court with discretion to set the terms of a control order on a case by case basis. The Bill adopts the latter approach, allowing the court to make such orders it considers appropriate in the circumstances. However, in the Committee’s view this approach may be too broad to be considered a proportionate response and further justification is required.

**RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11 HRA)**

**RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)**

The Bill will also, if enacted, act to restrict a number of human rights not identified in the human rights implications section of the explanatory statement. For example, interim orders and control orders may be taken out against people under the age of 18, affecting the right to protection of children under section 11 of the HRA. The Court is required to act in the best interests of the child in making those orders. The Bill also imposes various requirements for individuals to identify themselves and provides for publication of names of controlled members of declared organisations, limiting the right to privacy and reputation protected by section 12 of the HRA. The extent of these limitations should be justified in the explanatory statement using the framework set out in section 28 of the HRA.

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

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

**CREATION OF OFFENCES BY REGULATION**

Proposed subsection 90(2) provides:

(2) A regulation may prescribe offences for contraventions of a regulation and prescribe maximum penalties of not more than 30 penalty units for offences against a regulation.

While the maximum penalty for the offence of 30 penalty units is within the limits recommended in the Guide for Framing Offences, there needs to be a justification provided for why offences can be provided for by regulations rather than in the principal Act.

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

**CRIMES (POLICE POWERS AND FIREARMS OFFENCE) AMENDMENT BILL 2017**

This Bill amends the Crimes Act 1900 to establish a new offence of discharging a firearm (including airguns and air pistols) at a building or conveyance (ie aircraft, vehicle or vessel), and to provide powers to police to establish a crime scene to protect or preserve evidence.

---

1 At p 6-7.
2 Department of Justice and Community Safety, Guide for Framing Offences, 2010.
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 PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11 HRA)
RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)
RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

The new Division 10.4A to be established by the Bill will enable police officers to establish crime scenes at public places, which includes premises to which the public has access, and private premises. A crime scene can be established at a public place, or at a private premises where the owner or occupier consents, where the police officer “reasonably suspects that an offence punishable by a term of imprisonment has been or is being committed at the place or somewhere else”, and “considers that it is reasonably necessary to immediately establish a crime scene at the public place to protect or preserve evidence relating to the offence.”.

Where the owner or occupier of a private premises does not consent, a crime scene can only be established where the police officer reasonably suspects that the offence is a serious offence, which for the purposes of the new Division involves an offence that in the ACT is punishable by imprisonment for 5 years or longer, arises out of use of a motor vehicle causing death or serious injury, or is a family violence offence. The police officer must make reasonable attempts to obtain consent of the owner, or consider that it is reasonably necessary in the circumstances to establish a crime scene without consent.

Where a crime scene has been established, police officers can exercise various powers “at or in relation to” the place in question, including entering the place or any other premises to access the place, controlling the movement of people or things at the place, directing a person to provide their name and home address, and, if the police officer reasonably suspects a person possesses evidence removed from the place or has interfered with evidence at the place, detain and conduct a frisk search or ordinary search of the person. Police can also remove a conveyance and take it to a secure place. Police can use reasonable and necessary force in exercising these powers. Preventing “a person from interfering with or removing evidence from, or otherwise obstructing an investigation at, the place” is given as an example of the power to control the movement of people or things.

Because the establishment of a crime scene can lead to a person being prevented from entering or leaving their home, the Bill engages the rights to protection of the family and children under section 11 of the HRA, privacy and reputation under section 12 of the HRA (which includes the right not to have privacy, family, home or correspondence interfered with unlawfully or arbitrarily), and freedom of movement under section 13 of the HRA.

The explanatory statement for the Bill includes an analysis of why the limitations of these rights are reasonable and demonstrably justified using the framework set out in section 28 of the HRA and the Committee commends this analysis to the Assembly. In particular, the Committee notes:

- Establishment of a crime scene does not generally authorise the search or seizure of property without a warrant, but only to cover, move within the place or photograph things that might be evidence;
• A crime scene can last for up to 6 hours (or 48 hours in the case of a conveyance which has been moved to a secure place) or until consent, where that was necessary has been withdrawn, a warrant to search the place has been issued or been refused, or it is “no longer reasonably necessary to protect or preserve evidence at the place in relation to the offence”.

• There are various notice obligations, including to the owner or occupier of the private dwelling and reporting requirements in general; and

• That a crime scene cannot be established in a private dwelling more than once in 24 hours unless related to another offence arising out of a different course of conduct.

The Committee notes that a crime scene can be established in a private dwelling where either the owner or occupier consents, or reasonable steps have been taken to obtain the consent of the owner (but not occupier) or it is reasonably necessary to establish a crime scene without consent. This would enable a crime scene to be established without seeking the consent of the occupier of the premises where this is different from the owner of the premises. Police have an obligation to notify the occupier after a crime scene has been established. In the Committee’s view it would generally seem reasonable to attempt to obtain the consent of the occupier of the premises, at least where this is different to the owner, or that the explanatory statement provide further justification for why any attempt to seek consent is limited to the owner of private premises before a crime scene can be established without consent.

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

The Committee also notes that establishment of a crime scene provides authority for police to detain and conduct a frisk search or ordinary search of a person where they suspect the person possesses evidence removed or interfered with evidence from a crime scene (section 210G). That power is limited only by being exercised “at or in relation to the place” where a crime scene is established, and “if it is necessary to immediately exercise the power to protect or preserve evidence relating to” the offence in question.

It is not clear whether this power to detain and search is considered to be in addition to the powers set out in Division 10.4 of the Crimes Act which authorise police officers to detain and search a person.6 Section 207 of the Crimes Act enables a stop and search where a police officer “suspects, on reasonable grounds” that a person has something “relevant to a serious offence, or a thing stolen or otherwise unlawfully obtained” but only where it is necessary to exercise those powers to “prevent the thing from being concealed, lost or destroyed” and it is necessary to do so without a warrant because the circumstances are serious and urgent. A serious offence for the purposes of Division 10.4 “means an offence punishable by imprisonment for longer than 12 months” (section 185). The thing being searched for or other evidential material found can be seized, and any detention must be no longer that “is necessary and reasonable to conduct” the search. Powers to detain and search in relation to conveyances is similarly provided for in sections 209 and 210, though there is no power to seize.

---

6 The Committee notes section 186 of the Crimes Act provides that Part 10 is not intended to limit or exclude the operation of other territory laws.
There is therefore significant overlap between the powers to detain and search under proposed section 210G and the existing provisions in the Crimes Act. To the extent the powers under section 210G are intended to be additional then a justification for why additional powers are warranted should be provided in the explanatory statement. The Committee notes that uncertainty over the authorisation to conduct the search may extend to whether there is power to seize objects found while conducting the frisk or ordinary search as opposed to merely cover, move or photographing the objects as provided for in subsection 210G(f).

To the extent the powers under section 210G are intended to be in substitution of the powers under section 210G then this should be made clearer through explicit provision in the Bill and explanatory statement. In either event, the extent to which being “at or in relation to” the place where a crime scene is established is intended to be limited to physical proximity should also be made clear.

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

**DOMESTIC ANIMALS (DANGEROUS DOGS) LEGISLATION AMENDMENT BILL 2017**

This Bill amends the *Domestic Animals Act 2000* relating to the registration and investigation of complaints relating to dangerous dogs.

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

**PROTECTION OF PROPERTY**

The Bill provides for the investigation of complaints against dogs who have attacked or harassed persons or other animals and, in some cases, provides for the destruction of the dog. Dogs subject to complaints can, and in some cases must, be seized and impounded while the complaint is being investigated. Conditions on how dangerous dogs are to be kept or used are also provided for. While the Bill does not extend the powers of authorised persons to enter private premises or otherwise interfere with a person’s privacy, it does provide for seizure and possible destruction of a person’s property. To that extent it trespasses on personal rights and liberties.

The explanatory statement recognises the impact on property rights and states:

> The solution [of destroying a dog in order to protect the public from further attacks] is necessary and proportionate to the severity of the attack and the threat to the right to life, protection of the family and children, freedom of movement, and the right to liberty and security of the person. This proportionality is maintained for lower levels of injury from dog attacks and harassment.

The Committee refers this analysis to the Assembly.

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

**DOMESTIC ANIMALS (RACING GREYHOUNDS) AMENDMENT BILL 2017**

This Bill amends the *Domestic Animals Act 2000* and associated legislation to remove the legal and administrative basis for greyhound racing; proscribe greyhound racing and trialling; and place controls on those who will continue to own, breed or train racing greyhounds in the Territory.
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)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

This Bill will make it a criminal offence to conduct or allow a greyhound to take part in a greyhound race in the ACT. It will also increase the regulation of owning and training greyhounds in the ACT intended to race in other jurisdictions. The Bill will therefore restrict the ability to earn money from greyhound racing in the ACT.

The explanatory statement suggests that it could be argued that restricting a person’s employment or livelihood may interfere with their right to privacy protected under section 12 of the HRA and to be left alone to pursue a livelihood of their choice, even where, as in greyhound racing, that livelihood is predominantly carried out in public. Similarly, by restricting greyhound racing, by discriminating against a particular form of “profession, trade or calling” may interfere with the right to equal protection before the law protected by section 8 of the HRA.

To the extent the Bill does engage these rights, the explanatory statement provides an analysis of the reasonable basis and justification for those restrictions using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that analysis.

RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill will also introduce three strict liability offences:

- having day to day control of a racing greyhound without holding a racing greyhound licence (clause 23, proposed section 39D);
- having day to day control of a racing greyhound and failing to comply with a condition of the racing greyhound licence (clause 23, proposed section 39G); and
- failing to report details of a litter of greyhounds within seven days (clause 26, proposed section 72M).

These offences carry a penalty of 50 penalty units (proposed sections 39D and 39G) or 10 penalty units (clause 26). consistent with the Guide for Framing Offences. As noted in the explanatory statement, there are defences still available against strict liability offences. The explanatory statement also sets out a justification for the use of strict liability offences in the Bill, including the increasingly regulated nature of the greyhound racing industry and why those possibly subject to the offences should be aware of their legal obligations, and the Committee refers the Assembly to that justification.

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

---

7 Department of Justice and Community Safety, Guide for Framing Offences, 2010 at page 29. It is noted that the explanatory statement incorrectly refers to the maximum penalty units applied for strict liability offences as 10 penalty units.

8 Explanatory statement at p 10.
STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE)

EDUCATION AMENDMENT BILL 2017

This Bill amends the Education Act 2004 to remove provisional registration for home education, to limit registration to children who usually live in the ACT and provide for regulations to set out information needed as part of any application for registration for home education and in the parents' annual reports to the director-general.

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 doesn’t change the requirement for parents who wish to home educate their children to apply for and be registered. The Bill removes the automatic period of provisional registration following an application and provides for the information to be provided to be formally prescribed in regulations rather than left to the discretion of the director-general through use of approved forms. By requiring additional information be provided about any children’s education the Bill could engage the right to privacy protected under section 12 of the HRA. The explanatory statement sets out a justification for this possible limitation which, in substance, includes the elements set out in section 28 of the HRA. The Committee refers the Assembly to that analysis.⁹

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

INSPECTOR OF CORRECTIONAL SERVICES BILL 2017

This Bill establishes a new oversight mechanism and independent statutory authority called the Inspector of Correctional Services, to examine the operations of adult and youth correctional facilities.

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)

Under clause 18(2) of the Bill, the Inspector of Correctional Services “must, if appropriate and practicable, consult with people, or use staff, suitable to the cultural background or vulnerability of any detainee involved in a matter being examined or reviewed.” As the explanatory statement recognises, this potentially engages the right to equal protection of the law without discrimination by requiring the Inspector to discriminate on the basis of cultural or linguistic background, disability or gender. The Committee agrees that this provision acts to “ensure these vulnerable detainee cohorts have equal enjoyment of human rights to the broader detainee population”¹⁰ and does not act as a form of legal discrimination which acts to maintain unequal or separate standards of care or protection.

⁹ Explanatory statement at p 4-5.
¹⁰ Explanatory statement at p 7.
**RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)**

Under the Bill, the Inspector has the power to enter a correctional facility at any time and inspect documents including health records of detainees (clause 19). The Inspector also has power to require information or documents be provided where the Inspector “believes, on reasonable grounds, that a person can provide information or produce a document or something else relevant to an examination or review” of correctional centres and services (clause 22). A person can also be required to attend an interview and answer questions (clause 23). The Bill therefore engages the right to privacy protected by section 12 of the HRA.

The explanatory statement sets out a justification for any limitation of the right to privacy addressing the elements set out in section 28 of the HRA, and the Committee refers the Assembly to that analysis. The Committee notes that the Inspector must consider whether parts of any reports to the Assembly must be kept confidential due to public interest considerations including identifying or allowing the identification of any person detained, working or otherwise at a correctional centre, or who disclosed information to the Inspector (clause 28). It will also be an offence to disclose protected information disclosed to or obtained exercising functions under the Act (clause 37).

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

**RIGHT AGAINST SELF-INCrimINATION (SECTION 22 HRA)**

Clause 25 of the Bill removes the privileges against self-incrimination and exposure to a civil penalty where a person is required to provide information to the Inspector or answer questions in an interview. The Bill therefore limits the rights in criminal proceedings protected under section 22 of the HRA. The explanatory statement sets out a justification for the abrogation of the privileges and the Committee refers the Assembly to that analysis. In particular, the Committee notes that any self-incriminating material cannot generally be used as evidence against that person in later court proceedings (clause 25(4)), and that a person who discloses information is protected against detrimental action through the offence to be created by clause 26.

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

**LAKES AMENDMENT BILL 2017**

This Bill amends the *Lakes Act 1976* in relation to, among other things: application of the Act in emergencies; relationship with other planning and environment laws; permit requirements; navigation and safety; the classification of waterways; drug and alcohol testing of lake users; cross-jurisdictional recognition of approvals; obligations on persons involved with accidents; appointment, entry, inspection and enforcement powers of inspectors; and exemptions.

*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 PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

The Bill provides for a large number of strict liability offences. The explanatory statement, at pages 6-9 provides a detailed discussion of the nature of the strict liability offences to be introduced by the Bill and their justification. The explanatory statement also summarises that discussion at pages 10-11 in the context of the limitations in the Bill on the right to a fair trial in criminal proceedings protected by section 21 of the HRA and the right to the presumption of innocence protected by subsection 22(1) of the HRA. The Committee refers the Assembly to this analysis, noting the elements of that analysis discussed below.

A new Part 5A is to be inserted to provide for drug and alcohol offences. These include strict liability offences imposed in circumstances similar to offences in the Road Transport (Alcohol and Drugs) Act 1977. A period of imprisonment is imposed in relation to:

- Section 50E—Person operating boat with medium level concentration of alcohol (maximum six months imprisonment).
- Section 50F—Person operating boat with high level concentration of alcohol (maximum 12 months imprisonment).
- Section 50G—Person operating boat under the influence of alcohol or a drug to extent incapable of having proper control (maximum 12 months Imprisonment).
- Section 50H—Person operating boat with a prescribed drug (maximum three months imprisonment).

The terms of imprisonment are justified in the explanatory statement on protecting the safety of other users of the waterways. As a penalty of imprisonment is consistent with those imposed for driving under the influence, users of waterways would be expected to know and understand the consequences of their actions.

The Bill also imposes strict liability offences intended to protect the safety of children, including wearing of life jackets by children and operating a boat while intoxicated.

Other strict liability offences are justified as regulatory in nature where those affected by the offence could be expected to be aware of it, such as exceeding speed limits, failing to comply with directions or requests, or breach of licence or exemption conditions. They can also be imposed due to the objective nature of the elements of the offence and the need to take enforcement action in the circumstances to deter further infringements. These strict liability offences have penalties not exceeding 50 penalty units.

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

RIGHT AGAINST SELF-INCrimINATION (SECTION 22 HRA)

Under section 53(2), the common law privileges against self-incrimination are not available to refuse to provide information, documents, or answers required by sections 45, 47B, 50Q, 50R, 50X, 50ZQ and division 5D.5 (other than section 50ZU). However, the responses provided are not admissible as evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence against the relevant provision or relating to the falsity of the response.
The explanatory statement acknowledges these provisions infringe the right against self-incrimination protected by paragraph 22(2)(i) of the HRA 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 this matter to the attention of the Assembly, but does not require a response from the Minister.**

**RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)**

The Bill will make it an offence to refuse to comply with a direction by an inspector to leave a lake area where a direction has been issued by the Minister prohibiting entry or that an area is prohibited, but the direction has not been notified as required of a notifiable instrument (proposed section 47C). It will also be an offence not to comply with a direction of an inspector to do or not do something due to safety concerns, to ensure compliance with the Act or prevent damage to property (proposed section 47D). Passengers on domestic commercial vessels can also be directed not to board or to leave a vessel in certain circumstances (proposed section 47E).

Each of these provisions may limit the right to freedom of movement protected under section 13 of the HRA. A justification for this limit should be provided in the explanatory statement 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.**

**RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)**

Part 5D of the Bill sets out the functions and powers of an inspector to monitor and enforce compliance with the law. This includes powers to enter places, premises, boats and vehicles without consent where the entry is authorised by a warrant or to protect life or property in serious and urgent circumstances. There are powers to seize evidence of an offence in certain circumstances. An inspector will also be able to enter boats on a lake area if they believe on reasonable grounds that an offence is being or has been committed. These provisions limit the right to privacy protected by section 12 of the HRA. The explanatory statements sets out a justification for this limitation and the Committee refers the Assembly to this analysis. In particular, the Committee notes the limited circumstances in which an inspector can enter without consent or an authorised warrant or can seize property, and the need for the inspector to show their identity card.

The right to privacy is also engaged by the drug and alcohol testing provisions in the Bill which enable similar procedures to those currently used in relation to road users under the *Road Transport (Alcohol and Drugs) Act 1977*. The Committee notes the justification for that limitation in the explanatory statement, including the reference to sections in the Road Transport (Alcohol and Drugs) Act which offer some privacy protections, and refers the Assembly to that analysis.

Section 50Q requires a master of a boat to provide information on request to persons involved in a boating accident, including information from the master’s licence or permit, and name and address details. Part 5C provides for safety investigations to be carried out relating to boating accidents or other matters that affect safety on a lake. As part of that investigation, a person may be required to provide information, produce documents or appear before the safety inspector (proposed section 50X). Safety inspection reports can be made public where it is in the interest of safety to do so. These clauses potentially limit the right to privacy protected under section 12 of the HRA. A justification should be provided in the explanatory statement 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.**
RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11 HRA)

As mentioned above, proposed section 50B will create a strict liability offence for a person under 18 operating a boat while intoxicated. This limitation of the right to protection of children protected under section 11 of the HRA is recognised in the explanatory statement and a justification provided. The Committee refers the Assembly to that justification.

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 insufficiently subject the exercise of legislative power to parliamentary scrutiny—Committee terms of reference paragraph (3)(e)

DISPLACEMENT OF SECTION 47 OF THE LEGISLATION ACT 2001

Clause 31 of the Bill will amend the regulation making power in section 56 of the Act to allow regulations to make provisions for a range of things including requirements for registration of boats, equipment to be carried, qualifications needed to operate a boat, and various safety requirements. The maximum penalties for offences included in regulations is increased from 10 to 30 penalty units.

Proposed subsection 56(3) displaces the operation of subsections 47(3), (5) and (6) of the Legislation Act 2001. This allows an Australian Standard or an Australian/New Zealand Standard to be incorporated by reference in regulations as those standards apply as in force from time to time, the standard is not taken to be a notifiable instrument, and there is no need to notify amendments to the standard from time to time.

The explanatory statement provides an explanation for the exclusions of section 47 of the Legislation Act in the following terms (at page 45):

The reason for disapplying the application of section 47(5) and 47(6) is to avoid breaching copyright. The copyright in Australian Standards is owned by a nongovernment organisation, Standards Australia.

Many Australian and International Standards are available for viewing at the National Library of Australia (NLA). An online search of the NLA’s catalogue can be undertaken to identify which Standards it has available.

As raised previously by the Committee, where standards or other instruments are authorised to be incorporated by reference into regulations or otherwise but the requirements of section 47 of the Legislation Act are, even in part, displaced, consideration should be given to making the standard available to the public in some form, particularly where, as here, the standard may have a role in establishing an offence under the Act. While standards may be available from the National Library, consideration should be given to making all standards incorporated by reference in the regulations available to the public in some way which does not give rise to copyright concerns.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.
This Bill amends the Racing Act 1999 and related legislation to remove the legal framework for the administration and control of greyhound racing in the ACT, as well as the Racing (Race Field Information) Regulation 2010 relating to the use of ACT race field information by licensed wagering operators.

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, along with the Domestic Animals (Racing Greyhounds) Amendment Bill 2017 discussed above, will prevent greyhound racing in the ACT. To the extent this will affect the livelihood of those currently engaged in greyhound racing in the ACT, there may be some effect on their privacy as protected under section 12 of the HRA—in the sense to be left alone to pursue a livelihood of any choice—or possibly the right to recognition and equality before the law protected under section 8 of the HRA to the extent this includes protection against discrimination on the basis of occupation. The explanatory statement includes a justification for any limitation of these rights using the framework in section 28 of the HRA and the Committee refers the Assembly to that analysis.

The Bill will also amend the Racing (Race Field Information) Regulation 2010 which provides for the use of race field information such as the participants running and the results of each authorised race meeting. The amendments affect the information that has to be provided in order to be approved to use race field information, which includes an applicant’s personal details and whether they are subject to prosecution or disciplinary action. To the extent that additional personal details provided or amendment to the protections in place preventing misuse or disclosure of that information the Bill limits the right to privacy protected by section 12 of the HRA.

The explanatory statement sets out the justification for any limit through the framework set out in section 12 of the HRA. The Committee refers the Assembly to that analysis. In particular the Committee notes the commercial purpose of having access to race field information and the various protections in place, including compliance with the Australian Privacy Principles in the Privacy Act 1988 (Cwlth).

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 inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

Henry VIII clause

The Bill will insert a new Part 11 in the Racing Act to provide for transitional provisions. The proposed section 110 states:

110 Transitional regulations

  (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the Racing (Greyhounds) Amendment Act 2017.
(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

As the explanatory statement acknowledges, this clause is a Henry VIII clause, in that it empowers regulations that will have the effect of amending the Racing Act. The explanatory statement justifies the inclusion of this clause by stating:

In developing the Amendment Bill, every attempt has been made to foresee issues arising in the transition to end the greyhound racing industry in the ACT. However, this provision is necessary in the Amendment Bill as there is no practical alternative available to ensure that any unforeseen matters which might arise during the transition can be addressed expeditiously.

Proposed section 111 will limit the capacity to make transitional regulations to two years.

The Committee draws the use of the Henry VIII clause to the attention of the Assembly and justification provided.

REPORTABLE CONDUCT AND INFORMATION SHARING LEGISLATION AMENDMENT BILL 2017

This Bill amends the Children and Young People Act 2008 and the Ombudsman Act 1989 to allow for more effective sharing of information between entities working towards the promotion of children’s safety.

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 PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11 HRA)

Under the Ombudsman Act, the Ombudsman must monitor the practices and procedures of what are termed designated entities for the prevention of reportable conduct and dealing with allegations and convictions involving their employees. The Ombudsman must also monitor any investigations conducted by those entities, or conduct their own investigation into reportable allegations.11 The definition of designated entity is also applied in the Children and Young People Act in defining those entities able to request and provide reportable conduct information.12

The Bill will amend the definition of designated entities to limit the range of health service providers included, including the exclusion of services provided by a private health facility (other than hospitals and ambulance services) unless prescribed by regulation. This will have the effect of reducing the range of entities subject to monitoring by the Ombudsman, and therefore, to the extent that reduces the protection offered by the Ombudsman for children and young people it limits their right to protection under section 11 of the HRA.

11 See Division 2.2A Ombudsman Act.
12 See Division 25.3.3 Children and Young People Act.
The explanatory statement sets out a justification for any limit using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that analysis. The Committee notes the justification is premised on the excluded services are “both low risk to children in terms of scope and relevance to the purpose of the Scheme, and who have a limited capacity to comply with the regulatory requirements of the Scheme.” It is on that basis that the amendments are intended to have the effect of allowing the Ombudsman “to appropriately focus their resourcing, monitoring and oversight on the most vulnerable children and young people, thus enhancing the effective protection of children and young people”.

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will generally expand the range of entities who are able to transfer information about children and young people, including the Ombudsman, the Commissioner for Children and Young People, the Commissioner of Fair Trading, relevant directors-general, the ACT Human Rights Commission, the chief executive officer of the ACT Teacher Quality Institute and the police. This will further limit the right to privacy and reputation protected under section 12 of the HRA.

The explanatory statement sets out a justification for the limitation of the right to privacy and the Committee refers the Assembly to that analysis. In particular the Committee notes that information can only be shared for purposes of promoting the safety, health or wellbeing of a child, or a class of children.

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

WORKERS COMPENSATION AMENDMENT BILL 2017

This Bill amends the Workers Compensation Act 1951 and the Workers Compensation Regulation 2002 to bring the recognition of various diseases and compensation levels up to date and for other purposes.

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 PRESUMPTION OF INNOCENCE (SECTION 22 HRA)

Clause 6 of the Bill introduces a strict liability offence where an employer fails to pay weekly compensation to a worker. It has a maximum penalty of 10 penalty units. As an offence of strict liability shifts the burden onto the defendant to raise a defence, this clause limits the rights to the presumption of innocence protected by section 22 of the HRA.

The explanatory statement includes the following justification:

The determining question of whether or not payments have been made is straightforward and the offence will only be applied in circumstances where the employer has been notified of the need to make the payment.\(^\text{14}\)

There is no reference in the explanatory statement to the availability of defences under the criminal code, including the defences of reasonable mistake of fact and an intervening conduct or event. The Committee refers this justification to the Assembly.

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

**RETROSPECTIVE OPERATION OF THE LAW**

Clauses 5, 7 and 8 of the Bill act to increase the age up to which injured workers may be eligible to continue to receive weekly compensation payments to reflect increases in the Commonwealth pension age. When enacted, they will commence on 1 July 2017. The provisions therefore have retrospective effect.

The date of commencement reflects the date at which the Commonwealth pension age was increased from 65 to 65.5. The retrospective effect is therefore intended to ensure that injured workers are able to continue to have access to weekly payments until they are eligible for the Commonwealth pension. The retrospective operation therefore does not have prejudicial effect.

The Committee draws this matter 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 DI2017-253 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 8) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to a designated vehicle, or driver of a designated vehicle, participating in the Innate Test Day.


\(^\text{14}\) At page 3.
GOVERNMENT RESPONSES

The Committee has received responses from:


- The Chief Minister, dated 14 November 2017, in relation to comments made in Scrutiny Report 11 concerning Disallowable Instruments:
  - DI2017-238—Territory Records (Advisory Council) Appointment 2017 (No 2)
  - DI2017-239—Territory Records (Advisory Council) Appointment 2017 (No 3)
  - DI2017-240—Territory Records (Advisory Council) Appointment 2017 (No 4)
  - DI2017-241—Territory Records (Advisory Council) Appointment 2017 (No 5)
  - DI2017-242—Territory Records (Advisory Council) Appointment 2017 (No 6)
  - DI2017-243—Territory Records (Advisory Council) Appointment 2017 (No 7)

  Electronic copies of these responses were not provided at the time of publication of this Report.


The Committee would like to thank the Minister for Health and Wellbeing, the Chief Minister and the Minister for Police and Emergency Services for their helpful responses.

GOVERNMENT RESPONSE—COMMENT

**HEALTH PRACTITIONER REGULATION NATIONAL LAW AND OTHER LEGISLATION AMENDMENT ACT 2017 (QUEENSLAND—ACT NO 32 OF 2017)**

The Committee commented on the National Law mentioned above in Scrutiny Report 11 of the 9th Assembly (30 October 2017). The Committee’s comment focussed on the fact that the National Law was tabled (on 24 October 2017) without an explanatory statement or a tabling statement. As a result, the Committee (and the Legislative Assembly) was not provided with information as to how the National Law affected the ACT, nor how (if at all) it is relevant to the ACT. In particular, no information was provided as to the capacity of the Legislative Assembly to scrutinise (or amend) this National Law.
The Committee drew the attention of the Legislative Assembly to this National Law, under principle (2) of the Committee’s terms of reference, on the basis that (in this case) the absence of an explanatory statement did not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements. As it is important that the Legislative Assembly’s capacity to scrutinise and amend this National Law be clarified before any opportunity to amend (or disallow) this National Law has expired, the Committee states that its comment required a response from the Minister as a matter of urgency.

The Minister for Health and Wellbeing responded to the Committee’s comment, in a letter dated 2 November 2017. The Committee is grateful for the Minister’s prompt response.

The Minister’s response states:

ACT Health has been advised by the ACT Parliamentary Counsel’s Office that an Explanatory Statement is not required for the tabling of the *Health Practitioner Regulation National Law* amendments in the ACT. This is because the amendments to the *Health Practitioner Regulation National Law* (National Law) that are being made in [the National Law that was the subject of the Committee’s comment] automatically apply in the ACT as passed by the Queensland Parliament on 6 September 2017 (according to the commencement provision in section 2). For clarity, the effect of the *Health Practitioner National Law (ACT) Act 2010*, section 6 is to apply the national law as in force from time to time. The ACT Legislative Assembly is not required to pass these provisions.

The Committee notes that the original National Law—ie the Health Practitioner Regulation National Law (ACT) Bill 2009—was considered by its predecessor Committee, in Scrutiny Report No 18 of the 7th Assembly (see https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/371469/7scrutiny18.pdf). In that Scrutiny Report, referring to the explanatory statement for the National Law, the Committee noted that the explanatory statement stated that …

.... “introduction of national law in a State or Territory Parliament for adoption by other participating States and Territories, is a standard approach to implementing national schemes in areas, like health, where Constitutional powers rest with the States and Territories, and not the Commonwealth”, but acknowledges that “concerns about abrogating the rights of Parliaments tend to be greatest when, as in this case, the proposed law includes pre-determined legislative provisions based on an agreement between governments”.

The Scrutiny Report went on to state:

The Committee has reviewed the provisions for the adoption in the Territory of the Queensland Act as a national law and those for the making and operation of regulations under that law. The Committee will, in a future report, reflect on aspects of the scheme contained in this Bill. At this point, the Committee notes only that it should not be taken to have accepted any aspect of this scheme as a precedent for other national law schemes.

The Committee notes that it has kept the issue of “national scheme” legislation under close review and has recently written to the Attorney-General, seeking to open a dialogue with the Executive on legislative scrutiny issues that arise from “national scheme” legislation.
The Committee notes that *Scrutiny Report No 18* goes on to state:

The Committee recommends that the Minister responsible for the administration of this national registration scheme advise the Assembly of any proposed change to the legislation or to the regulations.

Though it is not mentioned in the Minister’s response, it should be noted that (at least) the tabling of the National Law that was the subject of the Committee’s recent comment follows that recommendation. Indeed, the Minister’s response states:

[The National Law that was the subject of the Committee’s comment] was provided to the members of the ACT Legislative Assembly for information only.

The Minister’s response goes on to state:

Following the amendments made to the National Law through [the National Law that was the subject of the Committee’s comment], the *Health Practitioner National Law (ACT)* was republished on 28 September 2017 and is available on the ACT Legislation Register.

The Minister’s response then advises:

I have sought further advice from ACT Health regarding the appropriate process for Assembly scrutiny of amendments of this nature.

**The Committee requests that the Minister provide a copy of that further advice, when it is received, as that further advice can be expected to inform any dialogue that the Committee enters into with the Attorney-General.**

Finally, the Committee notes that the Minister’s response also provides a copy of the Explanatory Notes for the National Law that was the subject of the Committee’s comment, as passed by the Queensland Parliament. The Committee thanks the Minister for this further information. However, it would have been preferable if it was provided at the time of the tabling of the National Law that was the subject of the Committee’s comment.

**The Committee thanks the Minister for her prompt and informative response, which will inform any future dialogue that the Committee has with the Attorney-General (on behalf of the Executive) on issues arising from “national scheme” legislation. The Committee requests that, in future, this information also be provided when future amendments to this National Law are tabled.**

Giulia Jones MLA
Chair
21 November 2017
# OUTSTANDING RESPONSES

## Bills/Subordinate Legislation

<table>
<thead>
<tr>
<th>Report</th>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>18 July 2017</td>
<td>Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB)</td>
</tr>
<tr>
<td>8</td>
<td>8 August 2017</td>
<td>Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Disallowable Instrument DI2017-57 - Electoral Commission (Chairperson) Appointment 2017 (No 2)</td>
</tr>
<tr>
<td>10</td>
<td>17 October 2017</td>
<td>Heavy Vehicle National Amendment Regulation 2017</td>
</tr>
<tr>
<td>11</td>
<td>30 October 2017</td>
<td>Disallowable Instrument DI2017-249 - Smoke-Free Public Places (Public Transport Stations) Declaration 2017 (No 1), including a regulatory impact statement</td>
</tr>
</tbody>
</table>