

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

SCRUTINY REPORT 15

13 MARCH 2018

## COMMITTEE MEMBERSHIP

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

## SECRETARIAT

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## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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

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## BILLS

### BILLS—NO COMMENT

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

#### **APPROPRIATION BILL 2017-2018 (NO 2)**

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This Bill will appropriate additional money for recurrent payments, capital injections and payments on behalf of the Territory in the financial year beginning 1 July 2017.

#### **APPROPRIATION (OFFICE OF THE LEGISLATIVE ASSEMBLY) BILL 2017-2018 (NO 2)**

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This Bill will appropriate additional money for expenditure by the Office of the Legislative Assembly for the financial year beginning 1 July 2017.

#### **PLANNING AND DEVELOPMENT (LEASE VARIATION CHARGE DEFERRED PAYMENT SCHEME) AMENDMENT BILL 2018**

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This Bill amends the *Planning and Development Act 2007* and other related legislation to provide a deferred payment scheme for the Lease Variation Charge payable where a nominal rent lease is varied. The Bill also makes minor changes to simplify and improve the administration of the Lease Variation Charge.

### BILLS—COMMENT

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

#### **COURTS AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2018**

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This Bill amends legislation relating to ACT court and tribunal structures and processes, and the operation of the ACT justice and coronial systems.

***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)

An effective investigation into the death of an individual where the cause of death is unknown, suspicious or needs to be better ascertained has been an accepted element of the right to life as protected by section 9 of the HRA.<sup>1</sup> A coronial inquiry also has to balance the need for an effective investigation with the rights to privacy and reputation protected by section 12 of the HRA. While rights protected under the HRA do not extend to deceased persons, a coronial investigation may harm the reputation or otherwise cause hurt or distress to family members who continue to enjoy privacy protection.<sup>2</sup>

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<sup>1</sup> See for example *R (Middleton) v West Somerset Coroner* [2004] AC 182.

<sup>2</sup> See for example *Putistin v. Ukraine*, App. no. 16882/03, European Court of Human Rights, Judgment of 21 November 2013.

The Bill seeks to amend the *Coroners Act 1997* by introducing new sections 19A to 19C to allow the Coroner to order release of medical records without a court order or subpoena and without the current requirement of having to conduct an invasive post-mortem examination. The records have to be returned as soon as reasonably practicable. The records can then be used by the coroner in deciding whether to dispense with any post-mortem examination. Proposed section 19A will also enable an ancillary examination, including taking blood, bodily fluid, or tissue samples, fingerprints, x-rays or photographs. It is intended that these less intrusive examinations will remove the need for a more intrusive post-mortem to be carried out, and to possibly allow the deceased person's body to be released to relatives of the deceased person more quickly.

These amendments, by enabling the coroner to gain access to sensitive personal information of the deceased, therefore promote the legitimate interests of seeking to prevent undue distress to the deceased's relatives while ensuring an adequate examination of the cause and circumstances of the deceased's death. Therefore, in the Committee's view, there is no human rights issue created by this aspect of the Bill.

The Committee notes that, if the deceased was entitled to protection of their privacy under section 12 of the HRA, and to the extent to which personal rights and liberties, for the purposes of the Committee's terms of reference paragraph 3(a), might extend to deceased persons, the new provisions would be considered a necessary and proportionate means to achieve its legitimate ends as set out in the explanatory statement. In particular the Committee notes the requirements to be introduced in proposed section 17A that the Coroner must have regard to "the desirability of minimising the causing of distress or offence to people who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the exercise of the function or decision", and the continued application of the privacy principles under the *Health Records (Privacy and Access) Act 1997* and the *Information Privacy Act 2014* to deceased persons.

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

#### PROTECTION FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT (SECTION 10 HRA)

The *Judicial Commissions Act 1994* provides for the investigation of complaints about the behaviour or physical or mental capacity of a judicial officer. Under section 35 of that Act, in investigating a complaint the Judicial Council can request that the judicial officer undergo a specified medical examination. The request can only be made after the Council, or, given that the Council is satisfied that a complaint is wholly or partly substantiated and a Judicial Commission has been appointed, the Judicial Commission, forms the opinion on reasonable grounds that the judicial officer may be physically or mentally unfit to exercise efficiently the functions of his or her office. A failure to comply with the request is noted in any report on the complaint. Such a request would not be seen as voluntary and free of coercion and hence would limit the protection against subjecting someone "to medical or scientific experimentation or treatment without his or her free consent" as provided under subsection 10(2) of the HRA.

To the extent that the medical report containing sensitive medical information is then provided to the Council, referred to in reporting to the government or Attorney-General when it is used to make findings on material questions of fact, or referred to in public proceedings of the Commission, the current provisions also limit the right to privacy protected under section 12 of the HRA. Given the report can be used to form an adverse finding against a judicial officer and hence used to discriminate on the basis of a disability, the requirement for a medical examination may also limit the right to protection against discrimination protected under section 8 of the HRA. However, in the

Committee's view, any impact of section 35 of the Judicial Commissions Act on the rights to privacy and equal treatment is subsidiary to the effect on the protection against forced medical treatment provided by subsection 10(2) of the HRA.

The Bill will amend the existing requirements by limiting the specified medical examination to one which relates only to the physical or mental fitness of the judicial officer to exercise efficiently the functions of his or her office. The Bill will also make clear what is currently implied in the relevant provisions that the requested examination should include a reference to a reasonable time in which to undertake the examination, and include a request that any report of the examination be provided to the Council. The Bill also amends the current requirement that a failure to undergo a medical examination be included in various reports on the complaint. It is proposed that a report will only have to include the failure to attend the examination where the failure was without reasonable excuse. The Bill will therefore partially ameliorate the extent to which the existing provisions offend the protection against forced medical treatments protected by subsection 10(2) of the HRA.

A requirement that a person subject themselves to a medical examination is often justified for the purposes of anti-discrimination legislation on the basis that the report is relevant to the inherent requirements of the position for which the person is employed. The requirement that the examination relate only to the physical or mental fitness of the judicial officer can be considered equivalent to requiring the examination relate only to the inherent requirements of the position. By limiting the scope of any examination, the Bill limits the protection against forced medical treatments only to the extent necessary and proportionate to the objectives of ensuring fairness in considering complaints relating to fitness of judicial officers and is therefore a reasonable limitation for the purposes of section 28 of the HRA. The explanatory statement includes a discussion of the reasonableness of the limitation using the framework set out in section 28 of the HRA and the Committee refers that analysis to the Assembly.

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

## LANDS ACQUISITION (REPORTING REQUIREMENTS) AMENDMENT BILL 2018

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This Bill amends the *Lands Acquisition Act 1994* to require details of land acquisitions by the ACT government entities to be reported quarterly to the Assembly and to a relevant standing committee of the Assembly.

***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 details of individuals who have sold land to the territory to be provided to an Assembly standing committee. Currently there are various requirements to report details of land acquisitions and land ownership by the Territory government. These include:

- The *Land Titles Act 1925* provides public access to the name of any property owner through registration of certificates of title, including historical records, which can be accessed through a public terminal or for a fee;

- The Lands Acquisition Act provides for acquisition by agreement or compulsory acquisitions. These generally involve public notice of pre-acquisition declarations which include details of the government authority intending to acquire the property, the land in question, the interest in the land to be acquired and the public purpose to which the land will be put. Alternatively, urgent proposed acquisitions can be initiated by issue of a certificate containing such information as the government thinks appropriate which is placed before the Assembly and notified under the *Legislation Act 2001*. There are also notification requirements after the acquisition goes ahead, including the price agreed upon. However, the Lands Acquisition Act also recognises the ability for the ACT Government to acquire land through a direct negotiation with the land owner without a pre-acquisition declaration or certificate, and which does not require public notification of the price paid;
- The *Government Procurement Act 2001* includes requirements to publish notifiable invoices exceeding \$25 000,<sup>3</sup> which from 1 July this year will explicitly include invoices relating to the purchase of property by the Territory or a Territory entity<sup>4</sup>; and
- The *City Renewal Authority and Suburban Land Agency Act 2017* provides for reports to be tabled in the Assembly including details of any land acquired by the Authority or Agency.

The amendment will not affect these existing requirements, but require a report be presented to both the Assembly and the relevant Assembly standing committee. Within six sitting days after each quarter, the Minister must present a report including details of the land in which an interest has been acquired or, if the land was acquired for public housing purposes, the suburb in which the land is located, and the name of the seller if the seller was a corporation or body. The amounts paid in relation to the acquisition, as well as valuations considered, also must be notified. The Bill will also require the report to be provided to the relevant Assembly standing committee, which is defined as a standing committee nominated by the Speaker or the committee responsible for public accounts. Along with the report, details of the land acquired for public housing and the identity of the seller of the property, if other than a corporation or other body, also must be provided to the relevant standing committee.

The effect of the Bill will be to collocate various sources of information relating to the acquisition of interests in land in one report to the Assembly, with additional information, including the name of persons from whom the property was acquired, being provided to the relevant standing committee. The Bill therefore provides for the disclosure of personal information, either through the collocation making it more likely that the details of the acquisition will be able to be publicly linked to the seller, or through directly providing that link to the relevant standing committee. The Bill therefore limits the right to privacy protected by section 12 of the HRA.

Given the public availability and limited number of sources of information relating to land sales, the collocation of information relating to the acquisition is unlikely to substantially increase the likelihood of the sale being linked to the individual in question. Any effect on the privacy of the individuals concerned is therefore proportionate to the legitimate end of facilitating acquisitions of property by the government being subjected to public scrutiny and therefore can be considered a reasonable limit for the purposes of section 28 of the HRA. Disclosure of personal details to the relevant standing committee will in general be treated as confidential and protected against

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<sup>3</sup> See section 12C of the *Government Procurement Regulations 2007*.

<sup>4</sup> See section 4, *Government Procurement (Financial Integrity) Amendment Act 2017*.



unauthorised disclosure unless disclosure is authorised by that committee.<sup>5</sup> Therefore any limitation on the right to privacy involved in disclosure of personal details to the relevant standing committee is proportionate to the increased scrutiny made possible through that disclosure. An analysis of the limitation on the right to privacy is provided in the explanatory statement using the framework set out in section 28 of the HRA, and the Committee refers that analysis to the Assembly.

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

## WORKPLACE LEGISLATION AMENDMENT BILL 2018

This Bill will amend the *Public Sector Management Act 1994* to provide for recovery of overpayments to public sector employees from an employee's salary. The Bill will also amend the *Workplace Privacy Act 2011* to prevent various sections of that Act which have not yet commenced from coming into effect.

***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)

Section 246 of the Public Sector Management Act currently requires the head of service and a public servant to agree on the arrangements for repayment of any amount owed to the Territory to which the public servant was not entitled, such as an overpayment of salary. The Bill will amend this requirement by allowing the head of service to determine reasonable arrangements for repayment if an agreement cannot be reached within what the head of service considers to be a reasonable period. In determining the reasonable arrangements for repayment the head of service has to take into account various considerations, including the public servant's financial circumstances, any hardship the arrangement may cause to the public servant, and any other relevant circumstance.

The Bill will not provide for any additional obligation on the public servant to divulge information about their financial circumstances or other hardship. The process by which an agreement might be reached or disagreement resolved between the head of service and the public servant will continue to be governed by enterprise agreements made under the *Fair Work Act 2009* (Cwlth). The Bill will therefore not increase the powers of the head of service to compel disclosure, or use of personal information other than through use of information otherwise made available to them for the purposes of determining reasonable arrangements for repayment. To the extent that this will limit the right to privacy protected by section 12 of the HRA, the limitation is reasonable in light of the legitimate objective of facilitating repayment and the use of personal information to reduce the hardship associated with any arrangement.

The explanatory statement accompanying the Bill includes a justification for any limit on the right to privacy using the framework set out in section 28 of the HRA and the Committee refers the Assembly to that discussion.

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

<sup>5</sup> See orders 240 and 241, Chapter 20 of the *Standing Orders and continuing resolutions of the Assembly*, as at November 2017.

## RIGHT TO A FAIR TRIAL (S 21 HRA)

The right to a fair trial protected by section 21 of the HRA includes providing procedural fairness to those affected by administrative decisions. The explanatory statement accompanying the Bill suggests that this right might be limited through the absence, in the Bill, for any process for negotiating a reasonable recovery arrangement, leaving this to industrial agreements and the processes for resolution by the Fair Work Commission. To the extent that the Bill does limit any procedural fairness obligation, that limitation is argued to be reasonable and justified using the framework set out in section 28 of the Human Rights Act.

Any statutory limitation on procedural fairness requirements otherwise required in the making of administrative decisions has to be clearly expressed or implicated. In the Committee's view, the amendment will therefore not displace any procedural fairness requirements otherwise required, including providing notice to the public servant that a reasonable period has elapsed and no agreement has been reached and that the head of service is considering determining a reasonable arrangement for repayment, and according an opportunity to provide the head of service with information relevant to the considerations set out in the amended section 246. Other requirements for resolving disputes available under relevant industrial agreements would similarly remain available. Therefore, the Bill does not present any limitation on procedural fairness or otherwise limit the right to a fair trial protected by section 21 of the HRA.

**This comment 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 DI2018-8 being the Public Place Names (Gungahlin District) Determination 2018 made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the District of Gungahlin.**

**Disallowable Instrument DI2018-9 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 1) made under section 12 of the *Road Transport (General) Act 1999* disapplies specified road transport legislation applying to pay parking for the National Multicultural Festival 2018.**

**Disallowable Instrument DI2018-10 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 2) 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 drive participating in the Innate Test Day.**

## GOVERNMENT RESPONSES

- The Minister for Planning and Land Management, dated 19 February 2018, in relation to comments made in Scrutiny Report 13 concerning the Building and Construction Amendment Bill 2017.

- The Minister for Workplace Safety and Industrial Relations, dated 20 February 2018, in relation to comments made in Scrutiny Report 13 concerning the Work Health and Safety Legislation Amendment Bill 2017.

***These responses can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.***

- The Attorney-General, dated 20 February 2018, in relation to comments made in Scrutiny Report 13 concerning Disallowable Instrument DI2017-263—Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2017 (No 1).
- The Attorney-General, dated 27 February 2018, in relation to comments made in Scrutiny Report 14 concerning Disallowable Instrument DI2018-2—Legal Aid (Review Committee Panels) Appointment 2018.

***These responses can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.***

The Committee wishes to thank the Minister for Planning and Land Management, the Minister for Workplace Safety and Industrial Relations and the Attorney-General for their responses.

## GOVERNMENT RESPONSE—COMMENT

### BUILDING AND CONSTRUCTION AMENDMENT BILL 2017

In Report 13, in relation to the *Building and Construction Amendment Bill 2017* (the Bill) and its incorporation of an Australian/New Zealand standard, the Committee commented that the Bill did not provide for public access to the standard and asked the Minister why greater access to the standard was not provided for in the Bill.

In his response to the Committee, the Minister pointed out that the Bill did include a proposed new section 3D of the *Electrical Safety Act 1971* which would require the standard in question to be available for inspection by anyone upon request at the construction occupations registrar’s office. The Committee acknowledges that its report failed to include reference to that proposed section and thanks the Minister for his response.

Giulia Jones MLA  
Chair

13 March 2018

## 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 14, dated 19 February 2018**
  - Disallowable Instrument DI2017-272 - Food (Fees) Determination 2017 (No 1)
  - Disallowable Instrument DI2017-273 - Medicines, Poisons and Therapeutic Goods (Fees) Determination 2017 (No 1)
  - Disallowable Instrument DI2017-274 - Public Health (Fees) Determination 2017 (No 1)
  - Disallowable Instrument DI2017-275 - Radiation Protection (Fees) Determination 2017 (No 1)
  - Disallowable Instrument DI2017-286 - Health Records (Privacy and Access) (Fees) Determination 2017 (No 1)
  - Disallowable Instrument DI2017-287 - Construction Occupations (Licensing) Interval Metering Transitional Code of Practice 2017
  - Disallowable Instrument DI2017-308 - Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2017, including a regulatory impact statement
  - Disallowable Instrument DI2017-309 - Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2017, including a regulatory impact statement
  - Disallowable Instrument DI2017-311 - Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2017
  - Disallowable Instrument DI2017-313 - Veterinary Surgeons (Acting Member) Appointment 2017 (No 1)
  - Subordinate Law SL2017-43 - Road Transport (Road Rules) Regulation 2017