

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

SCRUTINY REPORT 44

16 JUNE 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—NO COMMENT

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

FINANCIAL MANAGEMENT AMENDMENT BILL 2020

This Bill will amend the *Financial Management Act 1996* to double the amount that can be appropriated without an Appropriation Act in place over the next financial year to allow the ongoing operations of government to continue if the budget is delayed until after the forthcoming Territory elections.

PLANNING AND DEVELOPMENT AMENDMENT BILL 2020

This Bill amends the *Planning and Development Act 2007*, the *Planning and Development Regulation 2008* and the *Land Titles Act 1925* to provide for the direct sale of a lease of land to the University Of New South Wales.

BILLS—COMMENT

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

ELECTRICITY FEED-IN (RENEWABLE ENERGY PREMIUM) AMENDMENT BILL 2020

This Bill will amend the *Electricity Feed-in (Renewable Energy Premium) Act 2008* to implement recommendations of a 2018 review of that Act relating to seeking further information from the reporting entity for annual reporting purposes, recovery of reasonable administration costs for the ACT electricity distributor, and clarification of existing penalty provisions in the Act to strengthen requirements around the reliability of reported information.

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 A FAIR TRIAL (SECTION 21 HRA)

The Bill will allow electricity distributors to pass on administration costs incurred in meeting their obligations under the Act to eligible entities, with the maximum amount to be determined by the Minister. As eligible entities can include individuals who own commercial or retail premises on which a compliant renewable energy generator is installed, the Bill will allow the Minister to make a determination increasing the costs of individuals in participating in the ACT Small and Medium-scale Feed-in Tariff Scheme.

The explanatory statement accompanying the Bill recognises that, by allowing the Minister to affect the costs passed on to individuals without providing for their participation, the Bill may limit the right to a fair trial protected by section 21 of the HRA. The explanatory statement provides a justification for that possible limitation using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting that in making any determination the

Minister must ensure that the electricity distributor, eligible entities and ACT electricity consumers are not unreasonably financially disadvantaged by the determination, and any determination is a disallowable instrument.

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

PUBLIC HEALTH AMENDMENT BILL 2020

This Bill amends the *Public Health Act 1997* to provide that compensation will not be payable to an otherwise eligible person in relation to any loss or damage suffered as a result of anything done in relation to a COVID-19 declaration.

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 A FAIR TRIAL (SECTION 21 HRA)

The making of a COVID-19 declaration under Part 7 of the Public Health Act enables a wide range of emergency actions and directions to be taken by the chief health officer, including isolation of individuals, restricting access to an area, and taking control of property (see section 120). Under section 122 anyone who has suffered loss or damage as a result of anything done under Part 7 while an emergency declaration is in force may apply for compensation. Compensation will be payable in an amount the Minister considers appropriate having regard to the loss or damage suffered. The Bill will amend the Act to remove any claim to compensation for loss or damage as a result of anything done in relation to a COVID-19 declaration while that declaration is in force, except anything done in relation to a direction relating to control of property.

The explanatory statement accompanying the Bill recognises that, by removing a claim to compensation, the Bill may limit the right to a fair trial protected by section 21 of the HRA, which includes the right to have rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The explanatory statement provides that the any claim to compensation under section 122 does not amount to a “suit at law” as recognised in relevant international jurisprudence as being entitled to protection under the right to a fair trial, as section 122 merely provides for a right to apply for compensation. In the Committee’s view, it is likely that section 122 would be interpreted as providing an entitlement to compensation, with a discretion conferred on the Minister only as to the amount of compensation considered appropriate. However, the explanatory statement goes on to provide, in the alternative, that any limit to the right to a fair trial is reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting the nature of the COVID-19 emergency and the measures being taken to address the impact of the measures taken in response.

The explanatory statement also addresses the retrospective impact of the Bill, with the Bill taken to have commenced on 16 March 2020, the date the Minister for Health first declared a public health emergency in relation to COVID-19.

The Committee notes that emergency actions or directions taken under section 120 of the Public Health Act are not notifiable or disallowable instruments. They are therefore not required to be registered on the Legislation Register¹ nor subject to scrutiny by this Committee. Any directions taken only have to be reported on, and tabled in the Assembly, at the conclusion of the health emergency. In its *Report 41*, in commenting on the Public Health (Emergencies) Amendment Bill 2020, the Committee noted its concerns over the potential lack of transparency and accountability of actions taken under Public Health Act in relation to the COVID-19 emergency. The recommendations of the Committee included more regular reporting of the actions and directions made by the Chief Health Officer for the purposes of the emergency. In her response to the Committee, the Minister indicated that she would provide a ministerial statement at each sitting, providing a summary of actions taken and Public Health Directions issued.

In its *Report 41*, the Committee highlighted the potential human rights impacts of directions and actions taken under section 120 of the Public Health Act. Any direction or action taken under section 120, including other functions arising under the Public Health Act as a result of the COVID-19 declaration, would have to be consistent with human rights protected under the HRA. The Committee notes that the availability of compensation under section 122 may be a relevant factor in establishing the reasonableness of any limitation of human rights in exercising functions under the COVID-19 declaration.

The explanatory statement accompanying the Bill recognises this potential relevance in considering the impact of removing access to compensation on other rights under the HRA implicated in the operation of the COVID-19 declaration. The explanatory statement states the amendments do not adversely affect the proportionality of limitations imposed by public health directions:

The proportionality of the public health directions that have been made, including restrictions on, for example, the rights to freedom of movement or association, stands on them being a necessary and proportionate response to the COVID-19 pandemic informed by relevant medical opinion in the context of a broadly consistent national response. In the current context, the existence or otherwise of a right to apply for compensation under section 122 is not directly relevant to that analysis and is not determinative.

The Committee also notes that the explanatory statement goes on to argue that even if the claim to compensation was integral to justifying any limitation on rights protected by the HRA, “the explanation for the amendment to section 122 and the assessment of the potential financial consequences of it makes it the least restrictive option, reasonably available, for the ACT”.

The Committee acknowledges the valuable assistance provided by the ACT Human Rights Commissioner in correspondence dated 10 June 2020. In her letter, the Commissioner contrasted the approach taken in the Bill with that in Victoria under s 204 of the *Public Health and Wellbeing Act 2008* (Vic), which restricts compensation claims to circumstances in which a direction was based on “insufficient grounds”. The Commissioner also queried whether the act of grace framework under the *Financial Management Act 1996* is a satisfactory alternative to compensating unreasonable loss or damage arising from implementation of public health directions.

¹ The Committee notes that some directions have been registered: see for example, the Public Health (Restricted Activities – Gatherings, Business or Undertakings) Emergency Direction 2020 (No 2).

In the Committee's view, the availability of compensation for acting outside the scope of the authority provided by the Public Health Act, or for acting incompatibly with human rights in exercising a function under the Public Health Act, does not directly affect the compatibility of the Bill or the Public Health Act as amended under the HRA. However, the Committee recognises the potential benefits of providing for compensation to be available in limited circumstances. The Committee therefore requests information from the Minister as to whether the approach taken in Victoria, or any other form of limited compensation scheme, has been considered.

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

PROPOSED AMENDMENTS

RESIDENTIAL TENANCIES AMENDMENT BILL 2020

AMENDMENTS PROPOSED BY MS LE COUTEUR MLA

On 9 June 2020, the Committee received proposed amendments to the Residential Tenancies Amendment Bill 2020 from Ms Le Couteur MLA. The proposed amendments will repeal the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (DI2020-46) and, with some amendments, insert its provisions into the *Residential Tenancies Act 1997*. The declaration provides for tenants and lessors to agree to include a rent reduction clause in residential tenancy agreement, and imposes a moratorium on terminations and associated actions for a failure to pay rent at premises lived in by a person who has been impacted by the COVID-19 pandemic. The proposed amendments will also prevent termination and other related action after the end of the moratorium period because of the tenant's failure to pay rent during the moratorium period. A tenant in an impacted household will also, under the proposed amendments, be able to terminate a residential tenancy agreement by giving three weeks written notice in the moratorium period.

The Committee was not provided with an explanatory statement accompanying the proposed amendments. The Committee notes that the proposed amendments may limit the protection of privacy and reputation provided by section 12 of the HRA through providing for impacted households to share information such as illness, carer responsibilities, occupation, and income with the lessor for the purpose of determining the validity of any termination notices and other actions provided for in the proposed amendments. The Committee requests the Member provide an explanatory statement for the proposed amendments, including any human rights impacts using the framework set out in section 28 of the HRA.

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

AMENDMENTS PROPOSED BY THE GOVERNMENT

On 9 June 2020, the Committee also received proposed Government amendments to the Residential Tenancies Amendment Bill 2020, together with a revised explanatory statement. These amendments include: delaying the commencement and transitional arrangements in respect of provisions relating to occupancy agreements for education providers and clarifying the impact of University Medical Leave Rules and University Disciplinary Requirements; clarifying the jurisdiction of the ACT Civil and Administrative Tribunal to hear an education provider occupancy dispute referred to it by the ACT Human Rights Commission; clarifying the scope of a grantor's entitlement to access premises where the premise are believed to be abandoned; and other minor and technical amendments.

The Committee notes that, in its *Report 40*, the Committee raised various concerns over the distinction drawn in the Bill for occupancy agreements relating to education providers. These concerns were addressed in a response by the Attorney-General received by the Committee on 9 June 2020, and reflected in these proposed Government amendments and revised explanatory statement. The Committee thanks the Attorney-General for his response and has no further comments.

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 DI2020-95 being the ACT Teacher Quality Institute Board Appointment 2020 (No 4) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2020-96 being the ACT Teacher Quality Institute Board Appointment 2020 (No 2) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* reappoints a specified person as a member of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2020-97 being the ACT Teacher Quality Institute Board Appointment 2020 (No 3) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* reappoints a specified person as a member of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2020-101 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 4) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-102 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 5) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-103 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 6) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-104 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 7) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**

- **Disallowable Instrument DI2020-105 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 8) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-106 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 11) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-107 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 9) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-91 being the Nature Conservation (Fees) Determination 2020 (No 1) made under section 368 of the *Nature Conservation Act 2014* revokes DI2019-127 and determines fees payable for the purposes of the Act.

This instrument determines fees, payable under the *Nature Conservation Act 2014*. The relevant fees are applicable to the 2019-2020 financial year.

The explanatory statement for the instrument states:

The purpose of this instrument is to waive fees for holders of an annual pass for entry to Tidbinbilla Nature Reserve in 2020 for a period of 5 months following the expiry of their pass. This is to account for the period when the reserve was closed during the bushfire in the reserve and the neighbouring Namadgi National Park and in response to the COVID-19 pandemic.

The instrument also temporarily sets the daily entry fees for the reserve to nil, to reduce the risk of COVID-19 transmission for both the public and staff, as cash handling is a known source of transmission.

The explanatory statement for the instrument goes on to address potential human rights issues:

Human rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. In this case, no human rights are impacted.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

This comment does not require a response from the Minister.

FEES DETERMINATION / WHY IS THIS INSTRUMENT BEING RE-MADE?

- **Disallowable Instrument DI2020-93 being the Veterinary Practice (Fees) Determination 2020 (No 2) made under section 144 of the *Veterinary Practice Act 2018* determines fees payable for the purposes of the Act and revokes the Veterinary Practice (Fees) Determination 2020 (No 1).**

This instrument, made on 7 May 2020, determines fees payable under the *Veterinary Practice Act 2018*, for the 2020-2021 financial year. It revokes and replaces the Veterinary Practice (Fees) Determination 2020 (No 1), made on 22 April 2020, which the Committee considered in *Scrutiny Report 43* of the 9th Assembly (2 June 2020). The differences between the two instruments appear to relate to date ranges within which various fees apply. However, the Committee notes that this issue is not addressed in the explanatory statement for the instrument.

The Committee seeks the Minister’s advice as to why the earlier instrument is being replaced, so soon after being made.

That issue aside, the Committee notes that it has consistently required that the explanatory material for fees determinations indicate the reason for any fees increases. The Committee notes that, as was the case with the original instrument, the explanatory statement for this instrument states:

The fee payable for the 2020-2021 financial year is included at column 5. Fees have been maintained at 2019-20 levels due to the impact of COVID 19.

The comment immediately above does not require a response from the Minister.

The comment about why the earlier instrument is being replaced, so soon after being made, requires a response from the Minister.

ARE THESE INSTRUMENTS VALIDLY MADE?

- **Disallowable Instrument DI2020-98 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 1) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person in a judicial position as chair of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-99 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 2) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person in a judicial position as deputy chair of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-100 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 3) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person in a judicial position as deputy chair of the Sentence Administration Board.**
- **Disallowable Instrument DI2020-108 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 10) made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.**

Each of the first three instruments mentioned above appoints a specified person as either chair or deputy chair of the Sentence Administration Board. Each of the appointments is made under section 174 of the *Crimes (Sentence Administration) Act 2005*. The Committee notes that subsection 174(2) of that Act provides:

- (2) The Minister may appoint a person to be chair or deputy chair only if the person is judicially qualified.

Subsection 174(8) then provides:

- (8) For this section, a person is judicially qualified if the person has been a legal practitioner for not less than 5 years.

The Committee notes that none of the explanatory statements for the first three instruments mentioned above directly addresses the requirement that the specified person has been a legal practitioner for not less than five years. All of the explanatory statements indicate that the specified person has, at least, a background in the law but none directly address the statutory requirement. While it might be assumed that the appointments would not have been made if the relevant persons did not meet the requirement, the Committee considers that it is preferable that statutory requirements such as that contained in subsection 174(8) of the *Crimes (Sentence Administration) Act* be expressly addressed.

The Committee seeks the Minister's confirmation that each of the persons appointed by the first three instruments mentioned above has been a legal practitioner for not less than five years.

This comment requires a response from the Minister.

In relation to the fourth instrument mentioned above (ie DI2020-108), the Committee notes that it appoints a specified person as a non-judicial member of the Sentence Administration Board. The appointment is made by disallowable instrument.

The Committee notes that section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions, by Ministers. It provides:

227 Application—div 19.3.3

- (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
- (2) However, this division does not apply to an appointment of—
 - (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
 - (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
 - (c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is **not** a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,² the Committee stated:

Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that (unlike the explanatory statements for DI2020-98 to DI2020-107, which also deal with appointments to the Sentence Administration Board) the explanatory statement for the fourth instrument mentioned above contains no such statement.

The Committee seeks the Minister’s confirmation that the specified person appointed by the fourth instrument mentioned above (ie DI2020-108) is not a public servant.

The Committee draws the attention of the Legislative Assembly to each of the instruments mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 3 June 2020, in relation to comments made in Scrutiny Report 40 concerning the Confiscation of Criminal Assets (Unexplained Wealth) Amendment Bill 2020.
- The Attorney-General, dated 4 June 2020, in relation to further comments made in Scrutiny Report 41 concerning the Electronic Conveyancing National Law (ACT) Bill 2020 and the Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020.
- The Attorney-General, undated, in relation to comments made in Scrutiny Report 40 concerning the Residential Tenancies Amendment Bill 2020 (received via email on 9 June 2020).

[These responses](#)³ can be viewed online.

- The Attorney-General, dated 3 June 2020, in relation to comments made in Scrutiny Report 41 concerning Subordinate Law SL2020-5—Magistrates Court (Heritage Infringement Notices) Regulation 2020.

² https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

³ <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 12 June 2020, in relation to comments made in Scrutiny Report 42 concerning Subordinate Law SL2020-12—Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020.

[These responses⁴](#) can be viewed online.

The Committee wishes to thank the Attorney-General for his helpful responses.

GOVERNMENT RESPONSE—COMMENT

PUBLIC INTEREST DISCLOSURE AMENDMENT BILL 2020

On 19 May 2020, the Committee received a further response from the Chief Minister on its comments in relation to the Public Interest Disclosure Amendment Bill 2020. The Committee, in its *Report 40* and then in commenting on the initial Government response in *Report 41*, had discussed the requirement introduced in the Bill that a disclosure of disclosable conduct is only protected under the Act where the Integrity Commissioner is satisfied, on reasonable grounds, that the disclosure is disclosed in the public interest. The Committee was concerned that this public interest requirement was in addition to the requirement that the disclosure is of maladministration by a public sector entity or public official or conduct which results in a substantial and specific danger to public health or safety, or the environment. The Committee noted that conduct which relates to a personal work-related grievance of the person disclosing the conduct was explicitly excluded from protection. The additional requirement that disclosure is in the public interest could be seen as imposing an unreasonable restriction on the freedom of expression protected by section 16 of the HRA.

In his further response, the Chief Minister confirmed the purpose of the public interest requirement is to ensure that the discloser is “not solely or personally affected by the wrongdoing and that the wrongdoing that is disclosed also affects others”. The public interest requirement “provides an additional safeguard to ensure that the wrongdoing does affect others and that the legislation is not being used for tactical or strategic purposes that are not in line with the intentions and objects of the Public Interest Disclosure Act”, and “essentially seeks to prohibit the abuse of the legislation by aggrieved individuals and strengthens the exclusion of personal matters from the scope of the legislation”.

The Committee remains concerned about the reasonableness of the limitations presented by the Bill due to the public interest requirement. There are various features of the Act as amended by the Bill which will reduce the scope for using the legislation for tactical or strategic purposes. The Bill does not provide protection to disclosures which are frivolous or vexatious (see proposed paragraph 17A(2)(c)). A court may order that a person loses any protection under the Act where they knowingly provide false or misleading information or the disclosure is vexatious (section 37). While the Integrity Commissioner has an obligation to investigate public interest disclosures or refer the disclosure to another investigating agency, there are various protections to prevent interference with the interests of individuals identified in the disclosure. The investigation can be brought to an end without a requirement to take further action—and without providing protection for any further disclosures—where the investigating entity is reasonably satisfied that there is a more appropriate way to deal with the conduct being alleged (proposed subparagraph 20(2)(d)(iii)).

⁴ <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 Act as amended will provide protection against reprisals or detrimental action taken against the discloser, but only where that action is due to the making the disclosure, and not in response to any other conduct even if it is related to the content disclosed. Any liability for the person's own conduct is not affected by making a disclosure of that conduct under the Act (section 38). The Bill will continue to allow the Supreme Court to grant an injunction to remedy or prevent detrimental action, but only where that detrimental action was taken because of a public interest disclosure (proposed section 42). The Bill will provide protection from criminal or civil liability but only for providing information in relation to a public interest disclosure and only where the investigating entity requests the information and it is relevant to the investigation (proposed section 42A).

The Committee, therefore, does not accept that a disclosure could be inappropriately made for merely tactical or strategic purposes, or why other provisions of the Act as amended will not adequately ensure the purpose of the Act of encouraging disclosure, investigation and correction of wrongdoing by public sector agencies and officials.

The Committee also expressed concerns about the inability to appeal an assessment by the Integrity Commissioner that the disclosure was not disclosed in the public interest. The Chief Minister, in his further response, describes the role of the Integrity Commissioner under the Public Interest Disclosure Act as amended will not be dissimilar to the role the Integrity Commissioner plays under the Integrity Commission Act in "achieving a balance between the public interest in exposing corruption in public administration and the public interest in avoiding undue prejudice to a person's reputation".

In the Committee's view there is a significant difference between the role of the Integrity Commissioner under the two Acts, and in particular with respect to the assessment of the public interest in making the disclosure. Under the Integrity Commission Act anyone can make a complaint to the Commission about conduct that may be corrupt conduct. Corrupt conduct is defined in objective terms which do not depend on the satisfaction of the Integrity Commissioner. The Commissioner is able to dismiss the complaint when they are satisfied the complaint does not justify investigation, including where the subject matter of the corruption is trivial, is frivolous or vexatious or not made in good faith, lacks substance or credibility, or was not made genuinely or was made primarily for a mischievous purpose. Importantly, protection against liability or detrimental action is provided to anyone who makes a complaint.

The Public Interest Disclosure Act, in contrast, conditions any obligation to take further action, and importantly any protection under the Act, on whether the disclosure is disclosed in the public interest. By requiring the Commissioner to be satisfied not only that the disclosure relates to public sector wrongdoing but is also disclosed in the public interest, the Bill will make it clear that disclosure of wrongdoing under the Act is not itself sufficient to be in the public interest and subject to protection. The motivations of the person making the disclosure, including the extent to which they might benefit if wrongdoing is investigated or remedied, may be relevant to protection being available, even in circumstances where there are no other appropriate options for redress. Other considerations beyond the interests of the individual making the disclosure, including the interests of the public officials involved, may be used by the Commissioner to deny protection for the person disclosing wrongful conduct.

The express objects of the Integrity Commission Act do not include the protection of persons who expose corrupt conduct. In contrast, the objects of the Public Interest Disclosure Act include "ensuring people who make public interest disclosures are protected and treated respectfully." The Bill will amend one of the objects of the Public Interest Disclosure Act by changing the current

“providing a way for people to make public interest disclosures” to “providing a way for people to disclose disclosable conduct”. However, the reliance on the assessment of the public interest in the disclosure by the Integrity Commissioner in determining when the protections under the Act are available means that disclosing disclosable conduct may lead to recriminations without redress or other protection under the Act.

In the Committee’s view, the requirement that the Integrity Commissioner be satisfied that a disclosure is in the public interest before the disclosure is taken to be a public interest disclosure and subject to the protections under the Act will have the effect of restricting disclosure of public sector wrongdoing. As the explanatory statement accompanying the Bill recognises, any such restriction limits the right to freedom of expression as protected under section 12 of the HRA and has to be justified as reasonable using the framework set out in section 28 of the HRA. On the basis of the material provided to the Committee it is not satisfied that the reasonableness of any limitation of the right to freedom of expression has been demonstrated.

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

Giulia Jones MLA
Chair

16 June 2020

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**
 - Disallowable Instrument DI2019-286—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2).
 - Unit Titles Amendment Bill 2019 (Private Member’s amendments).
- **Report 41, dated 28 April 2020**
 - COVID-19 Emergency Response Bill 2020.
- **Report 42, dated 19 May 2020**
 - Crimes (Offences Against Vulnerable People) Amendment Bill 2020.
 - Disallowable Instrument DI2020-28 Road Transport (Public Passenger Services) Independent Taxi Service Operator—Service Standards 2020 (No 1).
- **Report 43, dated 2 June 2020**
 - Disallowable Instrument DI2020-83 Commissioner for Sustainability and the Environment Appointment 2020 (No 2).
 - Disallowable Instrument DI2020-116 Long Service Leave (Portable Schemes) COVID-19 Emergency Leave Determination 2020 (No 1).