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

## SCRUTINY REPORT 46

21 JULY 2020

# THE COMMITTEE

## COMMITTEE MEMBERSHIP

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## ROLE OF COMMITTEE

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

# RESOLUTION OF APPOINTMENT

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

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

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

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

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

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

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

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

(a) unduly trespass on personal rights and liberties;

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

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

(d) inappropriately delegate legislative powers; or

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

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

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

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# BILLS

## BILLS—COMMENT

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

### ROYAL COMMISSION CRIMINAL JUSTICE LEGISLATION AMENDMENT BILL 2020

This Bill amends the *Crimes Act 1900* and the *Evidence Act 2011* to implement a number of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its Criminal Justice Report,[1] and amends section 127 of the Evidence Act relating to religious confessions divulging sexual abuse or non-accidental physical injury of a young person.

***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)

*Sexual relationship with child or young person under special care*

The Bill will amend section 56 of the Crimes Act. This provision was first introduced in 1991 as section 92EA to make it an offence to maintain a sexual relationship with a young person, where a sexual relationship comprised of engaging in various sexual offences involving young persons on at least three occasions.[2] In response to recommendations in the Royal Commission's Criminal Justice Report, the section was amended in 2018 to reduce the number of sexual offences involved to at least two, and to make it clear that each of the sexual offences involved did not have to be independently established. The amendments reflected the Royal Commission's findings that the experience of sexual abuse and the time involved before the abuse is reported made it difficult to establish details of specific instances of abuse. The amendments also extended the offence to sexual relationships that occurred prior to the amendments commencing.

The Royal Commission had recommended making the actus reus (or physical element) of the offence the relationship rather than the individual occasions of abuse. This would provide "the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence the complainant is more likely able to give". In the recent decision of *KN v R*[3] the ACT Court of Appeal held that section 56, like section 92EA as originally introduced, constituted the offence through establishing the commission of the sexual offences. Contrary to the recommendations of the Royal Commission, the amended section did not require establishing a relationship separate from the offences themselves.

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[1] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report. Available at: https://www.childabuseroyalcommission.gov.au/criminal-justice (the Committee notes that the link provided in the Explanatory Statement accompanying the Bill is no longer current).

[2] See *Crimes (Amendment) Act (No 3) 1991*.

[3] [2019] ACTCA 37

The Bill will amend section 56 of the Crimes Act to make it clear that the actus reus of the offence is the relationship. The offence will require being in a relationship with a child or young person which involves the commission of two or more relevant sexual offences. The Bill will define a relationship to include "repeated contact, interaction, engagement or association, of a sexual nature or otherwise" (proposed paragraph 56(2)(a)). As the explanatory statement accompanying the Bill describes the new provisions, the "section is intended to clarify that the prosecution must prove the existence of the relationship, not the individual sexual acts, beyond reasonable doubt", but "it is not intended that the relationship need be of a certain nature or particular class. Rather, it is simply the way in which the accused and child or young person are connected".

The Bill will maintain the ability to prosecute the offence without particularising any individual sexual act, and for a jury to convict an accused even where they disagree on which sexual acts were committed, provided they agree there was at least two. The amendments therefore limit the right to a fair trial protected under section 21 of the HRA, which includes the right of an accused to be given sufficient information to know the case against them. The explanatory statement accompanying the Bill recognises this potential limit 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 NOT TO BE TRIED OR PUNISHED MORE THAN ONCE (SECTION 24 HRA)

The Bill will continue to allow an individual to be charged and convicted both with an offence under section 56 and one or more sexual offences against the same child or young person during the period of the relationship, so long as the charges are on a single indictment. Where charges are prosecuted separately, then proposed section 56(8) will prevent a conviction for a section 56 offence if there has been any prior conviction or acquittal of one of the offences allegedly involved in the relationship. Similarly, if a person has been convicted or acquitted of a section 56 offence, then they can't later be convicted of a child sexual offence committed during the period of the relationship in question.

This restriction on bringing child sexual offence charges in the same indictment was based on clause 4 of the model provisions put forward by the Royal Commission in its Criminal Justice Report as a way of addressing any concerns with double jeopardy associated with allowing related charges to be prosecuted.[4] The Bill will also reintroduce a requirement of section 92EA that where related charges are included on the one indictment then any sentences upon conviction are to be served concurrently. These provisions therefore effectively prevent a person from being tried or punished for the same conduct more than once. The Committee therefore accepts the position in the explanatory statement accompanying the Bill that the Bill will not limit the right not to be tried or punished more than once protected by section 24 of the HRA.

[4] The Royal Commission, Criminal Justice Report, Parts III-VI, page 73.

On 6 July 2020, the Committee received a letter from the ACT Human Rights Commissioner who raised concerns over the possibility of including a course of conduct charge under section 66B of the Crimes Act in the same indictment as a charge for a section 56 offence. In her letter, the Commissioner states:

> The course of conduct offence in s 66B is intended to address circumstances where there is an absence of specificity but there is a course of sexual conduct that is persistent or repetitive. The combination of these charges in the same indictment has the potential to be unfair to the defendant and may also give rise to concerns about double jeopardy because they both provide different mechanisms to deal with similar problems.

The Commissioner notes that the explanatory statement accompanying the introduction of section 66B stated that any potential issue of double jeopardy:

> would be addressed by the existence of s 56(9) [the current equivalent of the proposed section 56(8) discussed above]. However, as pointed out by the ACTCA in the KN matter, the equivalents of current subsections 56(7) and 56(8)] have in fact displaced the principle of double jeopardy.

To avoid the risk of inconsistency with double jeopardy, the Commissioner therefore recommended that the section 66B course of conduct charge be precluded from being used in establishing a section 56 offence, or further justification be provided for its use.

The Committee agrees that there is a similar approach taken in both section 56 and 66B in responding to the concerns with establishing particulars of distinct sexual acts but is not convinced that including a section 66B charge as one of the sexual offences involved with a section 56 charge will result in double jeopardy or unfairness to the accused. Section 66B allows more than one incident of the same child sexual offence to be included as a charge of a single offence without having to include particulars of any specific incident of the offence or distinguish any specific incident of the offence from any other. Instead, section 66B requires only reasonable information about various incidents of a sexual offence over a stated period, and proof that taken together the incidents amount to a course of conduct. Section 56 similarly does not require particulars of a sexual act (or in the terminology of section 66B, an incident) that would be necessary if the sexual act were charged as a separate offence, but does require proof that a relationship involving at least two sexual offences existed. Similar limited particulars of any single sexual act would therefore be required for both sections.

The proposed paragraph 56(2)(d) in the Bill makes it clear that a section 66B offence can be one of the offences involved in the relationship for the purposes of a section 56 offence. However, relying on section 66B as part of a section 56 offence does not further reduce the required particulars. In establishing a section 56 offence, the prosecution would have to establish a course of conduct for the purposes of section 66B and at least one additional and separate sexual offence, and then establish that these offences were involved as part of a relationship that is distinct from the course of conduct and separate sexual act in question.

The Committee notes that in the case of *KN v R* it was accepted that the current subsection 56(8) (the equivalent of proposed subsection 56(7)) would allow charges against both section 56 and the separate individual offences which constituted the section 56 offence. The majority stated:

> But for ss 56(8) and (9) of the *Crimes Act* [the equivalent of proposed subsections 56(7) and 56(8)], the principle of double jeopardy would have applied and would have precluded the appellant being convicted of both the relationship offence and the specific offences against s 55 of the Crimes Act, as the latter offences were relied upon as the "sexual acts" founding the s 56(1) conviction. However, the principle of double jeopardy has been displaced by ss 56(8) and (9). Consequently, there has been no miscarriage of justice in this regard.[5]

The majority had earlier alluded to the possibility that their construction of section 56 may mean the section is contrary to section 24 of the HRA,[6] but did not return to this possibility. In considering this issue, the majority rejected the finding of Burns J in *R v DU*[7] that any charges for sexual offences in addition to the section 56 charge had to involve distinct sexual offences which were not relied on to establish the section 56 charge. Burns J preferred that interpretation in part because it "best achieves the object of protecting an accused from the danger of double jeopardy".[8] The majority in *KN v R* rejected that interpretation as not open on the terms of the legislation and inconsistent with the views of the Royal Commission on which the relevant subsections were based.

In the Committee's view, by stating the principle of double jeopardy was displaced, the majority in *KN v R* were not concluding that the provision limited the right in section 24 of the HRA, but that subsections 56(8) and 56(9) operated to prevent that principle from being applicable. The further amendments proposed in the Bill would only reinforce that conclusion. In the Committee's view, therefore, there is no relevant limitation in the Bill of the right to be tried or punished more than once as protected under section 24 of the HRA.

### RETROSPECTIVE CRIMINAL LAWS (SECTION 25 HRA)

The amendments to section 56 under the Bill will apply to relationships that occurred prior to commencement of the amendments. The amendments therefore engage and limit the right to protection from retrospective criminal laws under section 25 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation, but argues that the amended section 56 does not offend section 25 of the HRA because:

> it does not seek to criminalise conduct that was previously legal. The offence applies only to conduct that was unlawful at the time it was committed, and the amendment only affects the way in which it can be charged.

The explanatory statement also describes proposed subsection 56(6) as providing: "that where the offence occurred wholly or in part before the amendment day, … the sentence imposed must not exceed given penalties, which reflect relevant maximum penalties of the time the offence occurred." In this way, the amendments are said to not offend subsection 25(2) of the HRA (which provides that "a penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed").

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[5] [2019] ACTCA 37 at [85] per Murrell CJ and Rangiah J

[6] [2019] ACTCA 37 at [72].

[7] [2018] ACTSC 281.

[8] [2018] ACTSC 281 at [66].

Proposed subsection 56(6) includes a table setting out the method for calculating maximum penalties, as follows:

| **column 1**<br>**item** | **column 2**<br>**period of relationship** | **column 3**<br>**penalty** |
|---|---|---|
| 1 | wholly before 24 December 1991 | the lesser of—<br>(a) the current maximum penalty; and<br>(b) either—<br>(i) if 2 or more sexual acts alleged to be involved in the relationship are found to have occurred—the total of the maximum penalties for each offence constituted by the sexual acts; or<br>(ii) in any other case—the highest maximum penalty for the offences constituted by the sexual acts alleged to be involved in the relationship |
| 2 | started before, on or after 24 December 1991 and ended before 2 March 2018 | the lesser of—<br>(a) the current maximum penalty; and<br>(b) the 1991 maximum penalty |
| 3 | started on or after 24 December 1991 and ended on or after 2 March 2018 | the current maximum penalty |
| 4 | started on or after 2 March 2018 | the current maximum penalty |

The maximum penalty will therefore depend on whether the period of the relationship was before or after 24 December 1991 (when the original section 92EA commenced) or 2 March 2018 (when the current section 56 came into force). The current maximum penalty provided under section 56 is imprisonment for 25 years. The 1991 maximum penalty was either imprisonment for seven years, 14 years if the offender was also convicted of another relevant sexual offence, and for life if that other offence was punishable for a period of 14 years or more. The table does not establish how the penalty will be assessed where the relationship commenced prior to 1991 and continued after 2018.

Given that the amendments to section 56 will still require establishing that two or more relevant sexual offences were committed during the period of the relationship, it can be accepted that conduct punishable under the amended section 56 will also have been punishable, at least as separate offences, at the time they were committed. However, the Committee is concerned that the penalties applicable under the amendments may not “reflect relevant maximum penalties of the time the offence occurred”.

The penalty applicable under the proposed amendments will in some cases be higher than that applicable for the offences available at the time of the conduct in question. For example, for item 2, where the relationship occurred between 1991 and 2018, engaging in a relationship involving two sexual acts would have been punishable only by the penalties applicable independently to those two offences. Similarly, where the relationship ended after 2018 but the sexual offences in question occurred prior to 2018, they may have been punishable, even in total, for less than 25 years imprisonment.

The amendments will also continue the current capacity for a conviction where the members of a jury disagree on the sexual acts involved in the relationship. That may mean that not all of the sexual offences alleged will be found to have occurred and therefore reduced penalties may be applicable. However, under item 1(b)(ii), an offender may be subject to the highest penalty applicable to the alleged sexual offence even though there wasn't agreement on the jury that the offence was committed.

The Committee therefore requests further information on the intended operation of the assessment of penalties under the proposed amendment to section 56 and a further justification for why the proposed retrospective effect of the proposed amendments to section 56 should be seen as a necessary limit on section 25 of the HRA.

The Committee also notes that the proposed heading of section 56, "Sexual relationship with child or young person under special care", may not adequately reflect the nature of the offence. As the Royal Commission stated at page 71 of its Criminal Justice report, "[t]he language of 'relationship' does not sit easily with the exploitation involved in child sexual abuse offending." The Committee recognises that the amended offence will apply to a wide variety of relationships with children and young persons to be included as an element of the offence, but notes that the offence was described by the Royal Commission as "persistent child sexual abuse".[9]

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

*Tendency and Coincidence evidence*

The Bill will also implement recommendations of the Royal Commission's Criminal Justice Report relating to tendency and coincidence evidence in child sexual abuse trials. The Evidence Act places restrictions on the adducing of evidence that shows that a person had a tendency to act or think in a particular way or that it was improbable that events or the circumstances in which they happened were a coincidence. Generally tendency or coincidence evidence can only be adduced where the Court considers it will have significant probative value (that is, it rationally affects the assessment of the probability of the fact in issue to a significant extent). In a criminal trial, tendency or coincidence evidence can only be used by the prosecution against the accused where its probative value substantially outweighs any prejudicial effect it may have on the defendant.

The Royal Commission considered evidence that the traditional view of the Courts to tendency and coincidence evidence—that such evidence was highly prejudicial and would be given undue weight by juries—was wrong. Given the potential value of tendency and coincidence evidence in child sexual assault matters, the Royal Commission recommended that a specified test for admissibility of

[9] See also *Criminal Law Consolidation Act 1935* (SA) s 50.

such evidence be developed. Following that recommendation, the Council of Attorneys-General adopted a set of Model amendments to the Uniform Evidence Law relating to tendency and coincidence evidence.[10] The amendments in the Bill are closely based on those provisions.

The amendments to tendency and coincidence evidence provisions in the Evidence Act potentially engage the right to a fair trial protected by section 21 of the HRA. However, as the explanatory statement sets out, the Royal Commission accepted that this evidence, at least in the context of child sexual offences, does not give rise to an unfair prejudice. Given the amendments are limited in their application to child sexual offences, and the court retains the ability to determine that the evidence does not have significant probative value at least where there are exceptional circumstances, the Committee accepts that the right to a fair trial is not unduly limited by these amendments.

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO FREEDOM OF RELIGION (SECTION 14 HRA)

*Disclosure of religious confessions*

Section 127 of the Evidence Act allows someone who was or is a member of the clergy of a church or religious denomination to refuse to divulge a religious confession made to them in their professional capacity according to their church or religious denomination's ritual. The only current exception to this is where the confession was made for a criminal purpose. The Bill will amend section 127 to not allow someone to refuse to divulge a confession which includes information about a child or young person that is experiencing or has experienced sexual abuse or non-accidental physical injury, or there is a substantial risk they may experience such abuse or injury.

The Bill will also amend section 66A of the Crimes Act to make it clear that a person in authority in a relevant institution can be made aware of the risk a sex offence may be committed against a child or young person in the institution's care, and potentially has committed an offence under that section, because of information communicated during a religious confession.

The amendments align the Crimes Act and Evidence Act with the amendments introduced in the *Royal Commission Criminal Justice Legislation Amendment Act 2019* extending requirements to report child and young person sexual abuse, and follows recommendations of the Royal Commission's Criminal Justice Report.

The removal of protections against requirements to disclose information communicated in a religious confessions where it is against the rituals of a church or recognised religion limits the right to religious freedom protected by section 14 of the HRA. By potentially requiring disclosure of information that may include personal or private information and which was disclosed with an expectation of confidence, the Bill may also limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises these potential limits and provides a justification for their reasonableness using the framework set out in section 28 of the HRA. The Committee refers that justification to the Assembly.

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

[10] Available at https://www.pcc.gov.au/uniform/2019/29%20November%202019%20amendments.pdf.

## VICTIMS RIGHTS LEGISLATION AMENDMENT BILL 2020

This Bill amends the *Human Rights Commission Act 2005* and the *Victims of Crime Act 1994* to create a Charter of Rights for Victims of Crime, and a framework in which complaints about breaches of those rights can be resolved.

***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 includes various rights of victims to be given information about offenders. These include providing victims registered on the Youth and Adult Victims Register and the Affected Persons register with information about the offender where the relevant agency considers it appropriate in the circumstances. Victims must also be informed about orders relating to offenders' mental health, and there are various rights relating to updating victims and facilitating their involvement in the investigation and prosecution process. The information disclosed can include information about the offender, orders made against the offender, or the general area in which the offender will live.

These rights, particularly where they are not otherwise reflected in existing legislation, may limit the protection of privacy and reputation provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation, and sets out a detailed justification for why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. This discussion includes a useful table setting out the provisions of the Bill which are reflected in existing legislation and the operation and justification for any new rights. Subject to the following comment, the Committee refers the Assembly to this statement, noting the various limitations on the disclosure of information provided for in the Bill, including the restrictions on agency discretion about the appropriateness of disclosing information given the victims participation in the justice process or necessary links to the victim's safety.

As mentioned, the Bill includes new rights for victims to be informed about orders relating to an offender's mental health. The proposed section 16L will require the Director of Public Prosecutions to inform a victim where an offender is required by a court to have their mental health assessed by the ACT Civil and Administrative Appeals Tribunal (ACAT) or the Magistrates Court orders an offender to be taken to an approved mental health facility. The requirement applies to any indictable offence or any other offence where the victim has asked to be so informed. ACAT must also inform a victim if it is considering making various mental health orders, and where an order has been made must inform a victim of the nature and length of the order.

The explanatory statement accompanying the Bill, in discussing the Bill's human rights implications, states that under these new rights information will only be provided to a victim where it is clearly relevant to the offence by which the victim was impacted. The requirement for ACAT to disclose information about the consideration or making of mental health related orders is also justified as intended to help victims make decisions about their safety based on their knowledge about an order.

The Committee is concerned about the breadth of this requirement to disclose what may be sensitive health information about offenders to a victim, including victims who might have no other connection with the offender. It is not clear to the Committee why there is an obligation, rather than a discretion, on the DPP or ACAT to disclose the information, and how, as the explanatory statement suggests, the obligation is limited to where the disclosure of information is clearly relevant to the offence or relevant to the safety of the victim. The Committee therefore requests further information from the Minister on the operation of these provisions in the Bill.

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

*Right to freedom of movement (section 13 HRA)*

Proposed section 14I will require the DPP or a court or tribunal in some circumstances to minimise the victim's exposure to the accused, defence and supporting family members and ensure they are prevented from contacting or intimidating the victim. The requirement applies where the victim is in a court or tribunal building for a proceeding for the offence, and the victim has expressed concern about the need for protection from violence or harassment form the accused.

This requirement may limit the right to freedom of movement protected under section 13 of the HRA. This potential limitation is recognised and a statement of its reasonableness using the framework set out in section 28 of the HRA is provided in the explanatory statement accompanying the Bill. The Committee refers that statement to the Assembly.

**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 DI2020-121 being the Civil Law (Wrongs) Western Australian Bar Association Professional Standards Scheme 2020 (No 1) made under section 4.10, Schedule 4 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Western Australian Professional Standards Council's approval of the Western Australian Bar Association Professional Standards Scheme.**
- **Disallowable Instrument DI2020-122 being the Civil Law (Wrongs) New South Wales Bar Association Professional Standards Scheme 2020 (No 1) made under section 4.10, Schedule 4 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of New South Wales' approval of an amendment to the New South Wales Bar Association Professional Standards Scheme.**
- **Disallowable Instrument DI2020-123 being the Civil Law (Wrongs) Association of Consulting Surveyors National Professional Standards Scheme 2020 (No 1) made under section 4.10, Schedule 4 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of New South Wales' approval of the Association of Consulting Surveyors National Professional Standards Scheme.**

- **Disallowable Instrument DI2020-124 being the City Renewal Authority and Suburban Land Agency (Authority Board Deputy Chair) Appointment 2020 made under section 15 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as Deputy Chair of the City Renewal Authority Board.**
- **Disallowable Instrument DI2020-125 being the City Renewal Authority and Suburban Land Agency (Authority Board Member) Appointment 2020 (No 3) made under section 15 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as an expert member of the City Renewal Authority Board.**
- **Disallowable Instrument DI2020-126 being the City Renewal Authority and Suburban Land Agency (Authority Board Member) Appointment 2020 (No 1) made under section 15 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as an expert member of the City Renewal Authority Board.**
- **Disallowable Instrument DI2020-127 being the City Renewal Authority and Suburban Land Agency (Authority Board Member) Appointment 2020 (No 2) made under section 15 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as an expert member of the City Renewal Authority Board.**
- **Disallowable Instrument DI2020-128 being the Road Transport (General) Applications for Registration—Written-off Vehicles Declaration and Order 2020 (No 1) made under section 13 and section 14 of the** *Road Transport (General) Act 1999* **provides for registration in the ACT of interstate vehicles where those vehicles were damaged in the hailstorm on 20 January 2020 without the need for them to be re-registered in the jurisdiction in which they were registered at the time they became a written-off vehicle.**
- **Disallowable Instrument DI2020-133 being the Heritage (Council Member) Appointment 2020 (No 1) made under section 17 of the** *Heritage Act 2004* **appoints a specified person, an expert in the discipline of history, other than Aboriginal history, as a member of the ACT Heritage Council.**
- **Disallowable Instrument DI2020-134 being the Heritage (Council Member) Appointment 2020 (No 2) made under section 17 of the** *Heritage Act 2004* **appoints a specified person, an expert in the discipline of town planning, as a member of the ACT Heritage Council.**
- **Disallowable Instrument DI2020-135 being the Heritage (Council Member) Appointment 2020 (No 3) made under section 17 of the** *Heritage Act 2004* **appoints a specified person, an expert in the discipline of history, other than Aboriginal history, and town planning, as a member of the ACT Heritage Council.**
- **Disallowable Instrument DI2020-136 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 6) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **revokes DI2018-279 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.**
- **Disallowable Instrument DI2020-137 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 5) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **revokes DI2018-275 and appoints a specified person as Chair of the Cultural Facilities Corporation Governing Board.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### FEES DETERMINATION—COVID-19-RELATED INSTRUMENT

**Disallowable Instrument DI2020-129 being the Gaming Machine (Fees) Determination 2020 made under section 177 of the** ***Gaming Machine Act 2004*** **revokes DI2019-158 and determines fees payable for the purposes of the Act.**

This instrument determines fees, under section 177 of the *Gaming Machine Act 2004*. The explanatory statement for the instrument states:

> This fee determination provides that the fees listed in the Attachment to this explanatory statement are 'Nil' ($0) where the matter for which the fee is payable is undertaken as a result of the surrender of a gaming machine authorisation to receive an incentive payment under the ACT Government's COVID-19 Economic Survival Package (ESP).

The Committee notes that this means that the instrument is part of the legislative response to the COVID-19 pandemic.

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

### ARE THESE APPOINTMENTS VALIDLY MADE?

- **Disallowable Instrument DI2020-130 being the Gambling and Racing Control (Governing Board) Appointment 2020 (No 2) made under sections 11 and 12 of the** *Gambling and Racing Control Act 1999* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person as a member and deputy chair of the ACT Gambling and Racing Commission Governing Board.**
- **Disallowable Instrument DI2020-131 being the Gambling and Racing Control (Governing Board) Appointment 2020 (No 1) made under sections 11 and 12 of the** *Gambling and Racing Control Act 1999* **and sections 78 and 79 of the** *Financial Management Act 1996* **appoints a specified person, who has knowledge, experience or qualifications related to providing counselling services to people experiencing gambling harm, as a member of the ACT Gambling and Racing Commission Governing Board.**

The instruments mentioned above appoint two specified persons as member and chair and as a member, respectively, of the ACT Gambling and Racing Commission Governing Board. The formal parts of both instruments reference section 11 of the *Gambling and Racing Control Act 1999*, which establishes the Board, and also sections 78 and 79 of the *Financial Management Act 1996*.

Section 78 of the Financial Management Act applies, generally, to the appointment of the members of the governing board of a territory authority, other than the CEO. It deals with issues such as criteria for appointment, limitations on the appointment of public servants to a board, terms of appointment and conditions of appointment. Section 79 of the Financial Management Act deals, generally, with the appointment of chairs and deputy chairs of governing boards of territory authorities. It includes limitations on the appointment of a Chief Executive Officer (CEO) as a chair or deputy chair, as well as limitations on the appointment of public servants as chair or deputy chair of a board.

The Committee cannot identify a reason why section 79 is relied upon, in relation to the second instrument mentioned above (i.e. because it relates only to the appointment of the specified person as a member of the relevant board).

The Committee notes that section 11 of the Gambling and Racing Control Act also relates to the appointment of members of the Board. It provides:

**12 Governing board members**

(1) The governing board has 5 members, of whom 1 must have knowledge, experience or qualifications related to providing counselling services to people experiencing gambling harm.

*Note 1* The chair and deputy chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

*Note 2* The chief executive officer of the authority is a member of the board (see *Financial Management Act 1996*, s 80 (4)).

(2) A person is not eligible to be a member if—

(a) the person or the person's domestic partner has an interest in a business subject to a gaming law; or

*Note* For the meaning of ***domestic partner***, see the Legislation Act, s 169.

(b) the person would be unlikely to be able to properly exercise the functions of a member because of the person's business association, financial association or close personal association with someone else; or

(c) the person has been convicted or found guilty of an offence against a gaming law or a corresponding law; or

(d) within 5 years before the proposed appointment, the person has been convicted, or found guilty, of an offence in Australia punishable by imprisonment for at least 1 year; or

(e) within 5 years before the proposed appointment, the person has been convicted, or found guilty, of an offence outside Australia that, if it had been committed in the ACT, would have been punishable by imprisonment for at least 1 year.

*Note* ***Found guilty***—see the Legislation Act, dictionary, pt 1.

(3) In this section:

***corresponding law*** means a law of another jurisdiction, whether in or outside Australia, that regulates gaming or racing.

The Committee notes that the explanatory statements for the two instruments do not address the limitations on eligibility for appointment that are set out in subsection 12(2). While it might be assumed that the Minister would not have made the relevant appointments if any of the various limitations on eligibility applied—and while it might also be assumed that this Committee, which was

consulted on the appointments, in its non-legislative scrutiny role, would also have considered these matters—the Committee considers that it is always preferable that explanatory statements for appointments address such limitations on eligibility for appointment.

In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,[11] the Committee stated:

> **INSTRUMENTS OF APPOINTMENT**
>
> Various issues regularly arise in relation to appointments. The most obvious is the absence of a statement that "this is not a public service appointment". 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".
>
> **Some appointments require that an appointee meet certain requirements (eg be legally qualified or be a doctor) or not have certain disqualifying attributes (eg, in some circumstances, people must not be appointed to positions if they are legally-qualified or if they are doctors). These requirements are usually mandatory (demonstrated by the use of the word "must"). In both situations, it assists the Committee (and the Legislative Assembly) is the Explanatory Statement for the appointment contains a statement that the person appointed has a required qualification or attribute or does not have a disqualifying qualification of attribute.**
>
> Another issue has arisen in relation to appointments that require that a person nominated by a particular body (eg a professional association) be appointed or that a person be appointed from a list of persons submitted by a particular body. These requirements are usually mandatory (demonstrated by the use of the word "must"). In these situations, it assists the Committee if the Explanatory Statement for an instrument of appointment indicates that the relevant requirements have been met. Recently, the Committee has commented on Explanatory Statements in which, say, there is a statement that the person appointed is the nominee of a particular body when, in fact, the requirement is that a person be appointed from a list of persons submitted by a particular body. The point is that the Committee (and the Legislative Assembly) is assisted if the Explanatory Statement correctly recites the relevant requirement and indicates that the requirement has been met.
>
> Some instruments of appointment rely on the generic appointment provisions contained in sections 78 and 79 of the *Financial Management Act 1996*. In short, these provisions apply (in the absence of entity-specific provisions in individual Acts) to the appointment of members and chairs/deputy chairs of territory authorities with governing boards. If these provisions apply to an appointment, it is preferable that the correct provision is identified. If an instrument merely appoints a person as a member of a governing board, for example, there is no need for the instrument to refer to the section that deals with the appointment of chairs and deputy chairs (ie section 79). See also the discussion below on the over-reliance on "templates" and "precedents". [emphasis added]

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

**The Committee seeks the Minister's assurance that, for each of the appointments made by the two instruments mentioned above, the disqualifying factors identified in subsection 11(2) of the *Gambling and Racing Control Act 1999* do not apply.**

**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.**

ISSUES WITH FEES DETERMINATIONS

- **Disallowable Instrument DI2020-132 being the Lotteries (Fees) Determination 2020 (No 1) made under section 18A of the** *Lotteries Act 1964* **revokes DI2019-100, determines fees payable for the purposes of the Act, and provides that the commission may, if it is satisfied that it is appropriate to do so, refund, waive or remit specified fees due to the impact of COVID-19.**
- **Disallowable Instrument DI2020-138 being the Firearms (Fees) Determination 2019 made under section 270 of the** *Firearms Act 1996* **revokes DI2019-91 and determines fees payable for the purposes of the Act.**

The two instruments mentioned above determine fees, payable under the *Lotteries Act 1964* and the *Firearms Act* 1996, respectively. At this time of the year, the Committee expects to consider over 100 fees determinations, as the practice is to determine fees, at about this time, for the new financial year. The Committee expects that the next Scrutiny Report will deal with many more such instruments.

The Committee has always taken a keen interest in fees determinations, as they both form a vital part of the revenue of the Territory and have a significant impact on those who have to pay the relevant fees. In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,[12] the Committee stated:

> **FEES DETERMINATIONS**
>
> The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.
>
> The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:

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

- by whom the fee is payable; and
- to whom the fee is to be paid.

As indicated above, the first instrument mentioned above determines fees for the Lotteries Act, under section 18A of that Act. The Committee notes that neither the instrument itself, nor the explanatory statement for the instrument addresses:

- the amount of the “old” fee;
- any percentage increase, between the “old” and the new fee; or
- the reason for any increase.

All the explanatory statement says about the fees imposed is:

> With this instrument, the *Lotteries (Fees) Determination 2019* (*No 1*) DI2019-100 is revoked.
>
> This instrument also provides that the commission may, if satisfied that it is appropriate to do so, refund, waive or remit any fee or part of a fee payable for a matter stated in an item in the Schedule, column 2.
>
> The authority to refund, waive or remit any fee aims to facilitate the consideration of refunds, or waivers of such fees, due to the impact of COVID-19 on types of lotteries that are currently approved. This aims to provide a further means of supporting and encouraging businesses to continue operating, albeit with potentially varied prize offerings in order to ensure there is no breach of public health directions or other overt risk posed to entrants through the type of prize.

An examination of the fees determined by the previous instrument—DI2019-100—which is revoked by the first instrument mentioned above, indicates that the new fees appear to be the same as the “old” fees. However, the Committee considers that this should have been addressed, either in the instrument itself or in the explanatory statement for the instrument.

**The Committee draws the attention of the Legislative Assembly to the first instrument mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.**

**This comment requires a response from the Minister.**[13]

As indicated above, the second instrument mentioned above determines fees for the Firearms Act, under section 270 of that Act. The Committee notes that the explanatory statement for the instrument states:

[13] In making this comment, the Committee notes that the instrument in question is revoked and re-made by the Lotteries (Fees) Determination 2020 (No 2) (DI2020-171), which the Committee will consider for the next Scrutiny Report.

> Fees in the 2020-21 financial year have been increased from fees in the previous financial year by a Wage Price Index (WPI) forecast of 2.0%. Calculations are rounded down to the nearest dollar, with the exception of fees that have remained static for over three years, in which case calculations are rounded up to the nearest dollar. This gives effect to the Government's policy decision to limit growth in government fees and charges for households to no more than the ACT's forecast Wage Price Index for 2020-21. This approach also aligns with the 2018 Treasury Guidelines for Fees and Charges.
>
> Item numbers are included in the schedule, column 2, to enable the comparison of past fees set under the Act with those set by this instrument.
>
> The instrument contains further explanatory notes about the fee for each item in the past Financial Year.

The Committee notes that the fees for the previous financial year are indicated, in the Schedule to the instrument, by an italicised "explanatory note", for each item.

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

## SUBORDINATE LAWS—COMMENT

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

### COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

**Subordinate Law SL2020-19 being the Liquor Amendment Regulation 2020 (No 2) made under the** *Liquor Act 2010* **provides that the Commissioner for Fair Trading may waive a fee payable in relation to a licence or permit during a COVID-19 emergency, or in the 12 months following a COVID-19 emergency, and where the Commissioner considers the waiver is appropriate because of the financial impact of the emergency declaration on the business carried on under the licence or permit.**

This subordinate law amends the *Liquor Regulation 2010*. The amendments include powers for the Commissioner for Fair Trading to waive or reduce fees applicable under the *Liquor Act 2010*, in the context of the COVID-19 emergency. The explanatory statement for the instrument states:

> This amendment regulation amends the *Liquor Regulation 2010* to make provision in relation to the circumstances in which the Commissioner for Fair Trading (the commissioner) may waive or reduce fees.
>
> The amendment regulation provides that the commissioner may waive a fee payable in relation to a licence or permit during—
>
> (i) a COVID-19 emergency; or
>
> (ii) in the 12 months following a COVID-19 emergency;
>
> and where—
>
> (a) the commissioner considers the waiver is appropriate because of the financial impact of the COVID-19 emergency on the business carried on under the licence or permit.

The explanatory statement goes on to state:

> The *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020* [NI2020-181] (the closure direction) on 23 March 2020 directed the closure of:
>
> - Businesses that supply liquor for consumption ON the premises but not including any part of those businesses that sell liquor for consumption OFF the premises as defined by the Liquor Act;
> - hotels, whether licensed or unlicensed, but not to the extent that they provide accommodation, takeaway meals or a meal delivery service, or a bottleshop;
> - a casino;
> - cinemas, nightclubs or entertainment venues of any kind;
> - restaurants or cafes, other to than to the extent that they provide takeaway meals or a meal delivery services.
>
> The direction followed and was made in relation to the *Public Health (Emergency) Declaration 2020* (No 1) [NI2020-153], to prohibit the operation of non-essential business and undertakings to limit the spread of Novel Coronavirus 2019 (COVID-19).
>
> In order to slow the spread of COVID-19, clubs and other licensed premises will not be able to open and provide their normal services to the community. While this is necessary from a public health perspective, it will have a financial impact on the club industry and other licensed businesses.
>
> This amendment regulation supports the ability of the Government to implement fee waivers to assist in mitigating those impacts.
>
> This amendment regulation also introduces statutory rules with respect to first year micro-producer off licensees to remove barriers to entry for eligible applicants.

The explanatory statement goes on to address possible human rights implications of the subordinate law, stating:

> **HUMAN RIGHTS IMPLICATIONS**
>
> The Regulation does not engage any human rights set out in the *Human Rights Act 2004*.

**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.**

EXPLANATION OF CHARGES DETERMINED BY THE SUBORDINATE LAW

**Subordinate Law SL2020-20 being the Court Procedures Amendment Rules 2020 (No 3) made under the** *Court Procedures Act 2004* **amends the Court Procedures Rules to insert notes regarding Australia's obligations under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in the Civil and Commercial matters, and amends Schedule 4 in relation to transitional costs for work performed by a solicitor or clerk.**

This subordinate law amends the *Court Procedures Rules 2006*. The explanatory statement for the subordinate law states:

> The Rule-Making Committee (currently comprising the Chief Justice, Justice Elkaim, Chief Magistrate Walker and Magistrate Morrison) may make rules in relation to the practice and procedure of the ACT Courts and their registries pursuant to section 7 of the *Court Procedures Act 2004*. The Courts and the Joint Rules Advisory Committee have conducted a consultative review of the rules which has resulted in the amendments contained in *the Court Procedures Amendment Rules 2020 (No 3)*.
>
> The amended Rules inserts notes under Division 6.8.12 regarding Australia's obligations under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. Amendments have been made to schedule 4.
>
> The amendments will commence on 1 July 2020.

Sections 5, 6 and 7 of the subordinate law make amendments to Schedule 4 of the Court Procedures Rules. Schedule 4 is a "scale of costs", that sets out what costs can be charged (by solicitors) in relation to legal proceedings. The amendment made by section 6 replaces a series of items in the table in Part 4.2 of Schedule 4, that deal with what can be charged in relation to "attendances" by a solicitor or clerk, with a simplified version of those provisions. Part of that simplification appears to involve converting what can be charged from a per-hour basis to a per-six-minute basis. The basic charge rates appears to be unchanged from the earlier version of the provisions. However, there is no reference to this in the (very brief) explanatory statement for the subordinate law.

The Committee has always taken a particular interest in relation to subordinate legislation that imposes fees and charges, both because of the significance of fees, etc, in terms of raising revenue and because of the impact on those who have to pay the relevant fees, etc. The Committee takes the view that such fees, etc should be properly explained, especially by reference to any increase in fees, etc. The Committee expects that increases should be both identified and justified. The Committee considers that the same principles should apply to charges set out in a court's scale of costs or similar instrument.

As indicated above, there appears to be no increase in charges involved in the amendments made by this subordinate law. However, it would have been preferable if this had been made clear, in the explanatory statement for the subordinate law.

**The Committee draws the attention of the Legislative Assembly to this subordinate law, under principle (2) of the Committee's terms of reference, on the basis that the explanatory statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee.**

**This comment requires a response from the Minister.**

# RESPONSE

## GOVERNMENT RESPONSE

The Committee has received a response from:

- The Minister for Employment and Workplace Safety, dated 1 July 2020, in relation to comments made in Scrutiny Report 45 concerning the Employment and Workplace Safety Legislation Amendment Bill 2020.

  **This response[14] can be viewed online.**

The Committee wishes to thank the Minister for Employment and Workplace Safety, for her helpful response.

Giulia Jones MLA
Chair

21 July 2020

[14] 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.

# OUTSTANDING RESPONSES

## BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
  - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
  - Electoral Amendment Bill 2018 (Private Member's amendments).
- **Report 37, dated 19 November 2019**
  - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
  - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member's amendments).
- **Report 38, dated 4 February 2020**
  - Electoral Legislation Amendment Bill 2019 (Private Member's amendments).
- **Report 39, dated 17 February 2020**
  - Unit Titles Amendment Bill 2019 (Private Member's amendments).
- **Report 41, dated 28 April 2020**
  - COVID-19 Emergency Response Bill 2020.
- **Report 42, dated 19 May 2020**
  - Crimes (Offences Against Vulnerable People) Amendment Bill 2020.
- **Report 44, dated 16 June 2020**
  - Disallowable Instrument DI2020-93 Veterinary Practice (Fees) Determination 2020 (No 2).
  - Disallowable Instrument DI2020-98 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 1).
  - Disallowable Instrument DI2020-99 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 2).
  - Disallowable Instrument DI2020-100 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 3).
  - Disallowable Instrument DI2020-108 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 10).
  - Residential Tenancies Amendment Bill 2020 (Private Member's amendments).
- **Report 45, dated 30 June 2020**
  - Disallowable Instrument DI2020-109 Electronic Conveyancing National Law (ACT) Participation Rules 2020.

- Disallowable Instrument DI2020-110 Electronic Conveyancing National Law (ACT) Operating Requirements 2020.
- Disallowable Instrument DI2020-117 Liquor (Fees) Determination 2020.
- Disallowable Instrument DI2020-119 Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020.
- Disallowable Instrument DI2020-120 Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020.
- Justice Legislation Amendment Bill 2020.