

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

SCRUTINY REPORT 40

24 MARCH 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:

APPROPRIATION BILL 2019-2020 (No 2)

This Bill provides for the appropriation of additional monies for the 2019-2020 financial year.

CORONERS AMENDMENT BILL 2020

This Bill amends the *Coroners Act 1997* to enshrine restorative principles within its objects and to distinguish between death in care (which relates to custody or orders under the *Mental Health Act 2015* or the need for emergency detention under section 309 of the *Crimes Act 1900*) and other deaths in custody.

GAMING MACHINE AMENDMENT BILL 2020

This Bill amends the *Gaming Machine Act 2004* and Regulations to provide for a phased reduction in the Gaming Machine Tax rebate by 50 cents in every dollar in gross gaming machine revenue over \$4 000 000, amend reporting requirements relating to community purpose contributions, and introduce transitional provisions reducing the minimum monetary contributions for larger clubs and community contributions shortfall taxes.

MOTOR ACCIDENT INJURIES AMENDMENT BILL 2020

This Bill will amend the *Motor Accident Injuries Act 2019* relating to payment of legal costs or fees for providing services in relation to the Motor Accident Injuries Scheme. At present, only those costs or fees prescribed in regulations can be payable. The Bill will amend the Act so that, if a legal cost or fee is not prescribed by a regulation, a lawyer is still able to be paid or seek the recovery of their fees. The Bill will commence retrospectively from 1 February 2020—the date of commencement of the Motor Accident Injuries Act. The amendment is intended to establish the intended operation of the Act and will not substantially prejudice rights or interests of individuals subject to the scheme.

RATES AMENDMENT BILL 2020

This Bill amends the *Rates Act 2004* to lengthen the period used to calculate the ‘average unimproved value’ of parcels of land in the Territory from three to five years, consequential amendments to the calculation of the Airport land growth index, and requires redeterminations of unimproved value of a parcel of land after a lease is varied.

BILLS—COMMENT

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

ABORIGINAL AND TORRES STRAIT ISLANDER ELECTED BODY AMENDMENT BILL 2020

This Bill amends the *Aboriginal and Torres Strait Islander Elected Body Act 2008* to make provision for the Aboriginal and Torres Strait Islander Elected Body (ATSIEB) to advocate at a national level, to enable broadcasting of ATSIEB public hearings, to impose reporting timeframes, and to clarify the operation of the *Electoral Act 1992* in relation to ATSIEB elections.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will amend the operation of the Electoral Act in relation to ATSIEB elections, including in relation to preparing a certified extract and list of electors for each polling place and referring to this list where a person claims to vote. As this list includes each elector's name, year of birth and gender, the Bill potentially engages with the protection of privacy protected by section 12 of the HRA. The explanatory statement accompanying the Bill sets out why the Bill should not be regarded as an arbitrary or unlawful interference with privacy, including the various ways access to and use of this personal information is protected through restrictions under the Commonwealth *Electoral Act 1918* and the ACT *Information Privacy Act 2014*. 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.

BIRTHS, DEATHS AND MARRIAGES REGISTRATION (TISSUE DONOR ACKNOWLEDGMENT) AMENDMENT BILL 2020

This Private Member's Bill amends the *Births, Deaths and Marriages Registration Act 1997* to allow a next of kin of a deceased person to apply to the Registrar-general of births, deaths and marriages to include a statement in the register of a person's death that they were a tissue donor, or to request the Chief Minister for a letter acknowledging the tissue donation.

***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)

As a request for acknowledgement that the deceased was tissue donor involves passing on the details of the deceased person and verifying they were a tissue donor, as well as details of the next of kin making the request, the Bill may potentially engage the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill provides a justification for why any engagement with this protection is reasonable, justified and proportionate. 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 Member.

CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED WEALTH) AMENDMENT BILL 2020

This Bill amends the *Confiscation of Criminal Assets Act 2003* to provide for orders depriving a person of unexplained wealth derived from serious criminal activity.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Reversal of the burden of proof

The Bill will expand the orders available under the *Confiscation of Criminal Assets Act* to restrict access to property and wealth. The Bill may lead to the forfeiture or limitation on the use of a family home or otherwise impact on the ability to provide care for children or other dependents, engaging the protection of family and children under 11 of the HRA. By restricting access to a person's home or requiring a person to establish the basis of their property or wealth, the Bill may also limit the protection of privacy and reputation provided by section 12 of the HRA. The Bill will also place the burden of proof on a person potentially subject to an unexplained wealth order to prove that their wealth was not derived from serious criminal activity, potentially limiting rights to a fair trial under section 21 of the HRA.

The explanatory statement accompanying the Bill includes a statement setting out the reasons why the Bill should be considered compatible with these rights as they are protected under the HRA. Subject to the following comments, the Committee refers that statement to the Assembly.

The Bill will introduce a new Part 7A into the Act allowing the court to make an order for the payment to the Territory of an amount assessed as the value of a person's unexplained wealth (an unexplained wealth order (UWO)). An application for an UWO by the Director of Public Prosecutions has to include an affidavit from a police officer stating the grounds on which the officer suspects: that a person's total wealth was not all lawfully acquired; and at least part of a person's wealth was derived from serious criminal activity (that is, conduct which, at the time, was a serious criminal offence generally punishable by five years' imprisonment or longer). There is no requirement to specify particular offences—the criminal activity can be described in the affidavit in general terms. Before making the order, a court has to assess whether some portion of a person's total wealth was not derived from serious criminal activity or already subject to forfeiture orders or penalties under the Act. The DPP has to provide evidence of a person's wealth, but the onus is on that person to prove that their wealth was obtained lawfully.

If there is any unexplained wealth, then the court must make an UWO requiring the person to pay the Territory an amount equal to the person's unexplained wealth. The court can refuse to make an order or order payment of a lower amount where that is in the public interest. However, it is not in the public interest to reduce the amount payable just because a specific serious offence has not been particularised or proved to be associated with the person's unexplained wealth. Therefore, there is no necessary link between all of the unexplained wealth and the serious criminal activity—a court could make an order where the unexplained wealth far exceeds the wealth, if any, derived from the serious criminal activity that might have been identified in the affidavit accompanying the application.

The Committee is concerned whether the Bill is reasonably justified given the uncertain relationship between the limitations on rights identified and the Bill's purpose, and whether there is any less restrictive means reasonably available to achieve that purpose. The Bill will insert a new paragraph in the purposes section of the Act: "to deprive a person of any unexplained wealth derived from serious criminal activity". To the extent this purpose merely restates the operation of provisions of the Bill it does not identify a legitimate objective justifying interference with rights under the HRA. Existing purposes of the Act generally relate to enrichment from, or relating to, the commission of an offence. The purpose of the Bill outlined in the explanatory statement is arguably broader when it states:

The purpose of introducing local unexplained wealth laws is to more effectively deter and disrupt serious criminal activity, including organised crime, and ensure those involved in such crime do not profit from their illegal activities.

The Committee notes that the Bill is intended to operate as a form of civil rather than criminal proceeding. For the purposes of the application of the Human Rights Act, the distinction between civil and criminal proceedings is a matter of substance rather than form, and requires consideration of the extent to which the operation of the Bill will not function as a form of punishment for prior wrongdoing. In the Committee's view, this would generally require there be a direct relationship between the restrictions or property forfeited under the UWO provisions and the unjust enrichment by reason of unlawful conduct.

As a civil measure, the shift in the onus of proof may result in UWO orders being made that have not been established as relating to profit from illegal activities. The Bill will only require a reasonable suspicion that some part of the unexplained wealth was derived from serious criminal activity before the onus of proof shifts to the person the subject of the application. The Committee is concerned that there may be a number of reasons why it could be difficult to establish that wealth was not derived from serious criminal activity. These include:

- the length of time since property was acquired (under the Bill, wealth includes property owned, effectively controlled, expended, consumed or disposed of by the person before the commencement of the section and whether in or outside the ACT (see proposed section 11B));
- whether the property in question was a gift (unexplained wealth can include the value of property derived from the serious criminal activity of any person, and not just the activity of the person subject to the order); and
- the uncertainty associated with when property was derived from serious criminal activity (given "derived" is broadly defined in the Act as derived or realised, completely or partly and whether directly or indirectly).

There may also be uncertainty over when the public interest will warrant not making an order for the full amount of unexplained wealth. As already mentioned, not particularising or proving a specific serious offence is not sufficient to refuse to make an UWO or reduce the amount otherwise payable. Similarly, a reduction in the person's, or their dependant's, standard of living won't be sufficient. The Bill will also make provision for hardship relief, allowing a relevant court, once the UWO is fully satisfied (that is, the amount of the order has been fully paid or recovered), to provide for an amount to relieve undue hardship to the dependant caused by the UWO. Hardship relief can only be provided if the court is satisfied that dependants over 18 had no knowledge of the person's conduct which is the subject of the UWO. The court cannot take into account hardship arising from a previous standard of living that was likely to have been the result of unexplained wealth. It is therefore not clear to the Committee what additional factors would be taken into account by the court in considering the public interest in not making or reducing an unexplained wealth order.

The Committee recognises the difficulty described in the explanatory statement accompanying the Bill of the DPP establishing all sources of unexplained wealth, and that sources of wealth is a “matter that typically is peculiarly within the respondent’s knowledge to explain and the respondent is therefore most appropriately placed to produce evidence explaining the origins of their wealth”. However, it is not clear to the Committee that displacing the burden of establishing the source of wealth in all circumstances, regardless of the nature of that wealth and its relationship with the serious criminal activity which is presented to the court, is a reasonably proportionate response to the objective of preventing gain from serious illegal activity.

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

Retrospective operation

The Bill will enable a court to make an UWO in circumstances wealth was obtained from serious criminal activity prior to the Bill’s commencement. The definitions of wealth in the Bill will include the value of property acquired or controlled in the past, even if subsequently consumed or disposed of (see clause 7). A serious criminal activity is defined by the nature of the offence at the time of the conduct. There is no requirement in the Bill that the conduct constituting a serious criminal activity occur after the commencement of the Bill.

The Bill will also make provision for unexplained wealth restraining orders, which will prevent disposing or otherwise dealing with certain property that may be subject to an UWO. As with UWOs, before making an unexplained wealth restraining order a court must be satisfied that there are reasonable grounds to suspect that part of a person’s wealth was not lawfully acquired and at least in part derived from serious criminal activity. There must also be reasonable grounds to suspect that the property in question is either owned by the person with unexplained wealth, is under that person’s effective control, or is tainted property (meaning it was used in the commission of an offence, or derived from the commission of an offence, or derived from such property). Restraining orders can be varied to allow living and business expenses of the person or their dependants to be met from the restrained property. The Bill will place additional limits on payment of such expenses—expenses may be available if it is necessary to avoid undue hardship, based on a standard of living that did not result from unexplained wealth, and tainted property can be used to meet expenses only where it is just and equitable given any impact on third parties.

An unexplained wealth restraining order is intended to primarily be used to ensure property is available to meet an UWO. The application for the restraining order must state that the police officer believes that the property sought to be restrained may be required to satisfy an UWO. The restraining order is only temporary—the order ends if an UWO is not applied for within six weeks, or after an UWO application was refused or a successful UWO complied with. However, during that period any person with knowledge of the restraining order cannot deal with the property (including, for example, accessing money in a bank account subject to a restraining order). The Court can also order that the public trustee and guardian take control of the restrained property for the duration of the restraining order.

An unexplained wealth restraining order will also be a form of restricted access proceeding, meaning it can be applied for and granted without providing notice to any other person (see section 243 of the Act). A person with an interest in restrained property can apply for revocation of the order on the basis that there were not and are no longer grounds for making the order.

The Committee is concerned that in making an unexplained wealth restraining order there is no need for any evident link between the property subject to the order and the serious criminal offence which is alleged to have given rise to part of the unexplained wealth. A restraining order can be made against any current property, indeed all current property of a person (see proposed section 26A), where there are reasonable grounds that some part of a person's wealth is derived from serious criminal activity. There is no time limit on applying for an unexplained wealth restraining order (see clause 16). The restraining order can therefore deprive access to property that has been lawfully acquired and affect individuals, including dependants, who have not enjoyed the benefits of any wealth derived from serious criminal activity.

The Committee therefore requests the Minister provide further information on the intended operation of the unexplained wealth restraining order so far as it enables restraining use, or forfeiture, of property with no established connection to serious criminal activity, where that activity occurred prior to the commencement of the Bill. Consideration should also be given to including reference to this retrospective operation of the Bill and its justification in the explanatory statement.

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

ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020

This Bill provides for the electronic lodgement of conveyancing documents to be provided in electronic form, including through establishing and authorising an Electronic Lodgement Network (ELN). It will apply the Electronic Conveyancing National Law as set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW)¹ (NSW Act) as a law in the ACT, to be referred to as the Electronic Conveyancing National Law (ACT).

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW / THE EQUAL PROTECTION OF THE LAW WITHOUT DISCRIMINATION (SECTION 8 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Electronic Conveyancing National Law (ACT) will enable the ACT Registrar-general to provide for and operate an ELN. An ELN is an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of land titles legislation. As described in the explanatory statement accompanying the Bill, personal information, such as name and address details, are included as part of these documents. Collection and use of that data by the operator of the ELN (the ELNO) and subscribers to the ELN (who lodge documents with the ELN or otherwise act on behalf of their clients) may therefore limit the protection of privacy provided by section 12 of the HRA.

The explanatory statement justifies any limits to privacy in part on the basis that the national framework allows for the lawful collection and use of personal information and imposes obligations on subscribers and ELNOs to protect that data. However, the Committee notes that the examples

¹ Available at <https://legislation.nsw.gov.au/#/view/act/2012/88/app1>.

presented in the explanatory statement of obligations placed on ELNOs and subscribers are not contained within the national law. The current model operating requirements² and model participation rules,³ include requirements for confidentiality and protecting client information. However, there is no requirement that the proposed model rules be adopted—they only have to be considered by Registrar-general in making any operating requirements and participation rules (see section 24 of the national law). The Committee asks that the Minister confirm the basis of the legal duties to protect information and amend the explanatory statement to make this clear.

The national law will also require subscribers and the ELNOs to verify the identity of parties transacting on the ELN. The explanatory statement recognises that verification of identity will involve dealing with personal information which could limit the protection of privacy provided by section 12 of the HRA. It may also potentially disadvantage some sectors of the community who may find it difficult to provide verification documents, limiting the right to equality before the law protected by section 8 of the HRA. The explanatory statement describes the need for verification to prevent against fraudulent behaviour and describes various ways in which verification could be achieved. However, it is not clear to the Committee how these alternative approaches will be encouraged under the framework. The Committee notes that the Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020 (considered below) will provide for the Registrar-general to make Verification of Identity Rules, but it is not clear to the Committee how these rules will provide the protection of personal information and equal protection suggested by the explanatory statements accompanying these Bills. The Committee asks the Minister to provide clarification on how the verification requirements in the national law will protect against undue interference with privacy and unequal treatment.

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA) AND PRIVILEGE AGAINST EXPOSURE TO A PENALTY

Under the Electronic Conveyancing National Law (ACT) the Registrar-general will be able to investigate compliance with the operating requirements or participation rules or suspected or alleged cases of misconduct by participants in the ELN. Section 34 will require ELNOs and subscribers to cooperate with compliance examinations, including any reasonable requirement to furnish specified information or documents. Failing to comply may lead to enforcement action including suspension or revocation of the ELNO's approval or a subscriber's ability to participate. Subsection 34(5) makes it clear that it is not a reasonable excuse to fail to cooperate where it might tend to incriminate the person or make them liable to a penalty.

By limiting the privilege against self-incrimination the national law will potentially limit the rights in criminal proceedings protected by section 22 of the HRA as well as unduly trespass on a well-recognised personal right or liberty. The Committee notes that subsection 34(6) prevents the information or documents provided in a compliance investigation, as well as other information directly or indirectly derived from that information or document, being admitted as evidence against an individual in a criminal proceeding. However, documents that are required to be kept under the national law, land titles legislation, operating requirements or the participation rules will be admissible. There is also no protection against use of the information or documents in a civil penalty or other non-criminal matter.

² Available from https://www.arnecc.gov.au/publications/model_operating_requirements

³ Available from https://www.arnecc.gov.au/publications/model_participation_rules

The explanatory statement accompanying the Bill recognises the limit on the right against self-incrimination and provides a justification using the framework set out in section 28 of the HRA. The explanatory statement refers to the “immutable need for confidence in the land titles register in the ACT” and need to ensure the Registrar-Generals capacity to uphold the integrity of the ELN through conducting compliance examinations. Subject to the comment below, the Committee refers this statement to the Assembly.

Section 35 of the national law allows the Registrar-general, instead of or during a compliance examination, to refer the matter to another authority empowered to take investigatory, disciplinary or other action, including regulatory or disciplinary bodies and bodies in another State or Territory. The Bill will amend this section to allow the Registrar-general to give the other authority any information held by the Registrar-General that is reasonably relevant to the matter.

The Committee is concerned that this power is very broadly expressed. It can include providing personal information that might be in the possession of the Registrar-general, and is subject to only a limited form of the privilege against self-incrimination. There is no limit to the nature of the body who can be provided with information other than as body empowered by law to take action of some form, even if that action is not directly related to the integrity of the ELN. There is no justification for this power provided in the explanatory statement, other than referencing an equivalent power that may be provided under the *Land Titles Act 1925*, if amended by the *Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020*, for the Registrar-general to refer a matter to an appropriate authority instead of, or as well as, taking action under section 48I of the Land Titles Act. The Committee notes that neither the Land Titles (Electronic Conveyancing) Legislation Amendment Bill, nor the Land Titles Act, limits the right against self-incrimination. The explanatory statement for that Bill also does not provide any justification for the authority to pass on information to another authority.

The Committee therefore requests further information on why the power to give information to another body in section 35 of the Electronic Conveyancing National Law (ACT), as amended by this Bill, is justified given its potential limits on the right against self-incrimination or liability to a civil penalty and the protection of privacy and reputation protected by section 12 of the HRA. Consideration should also be given to amending the explanatory statement to include such a justification.

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

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—Committee terms of reference paragraph 2

The Committee notes that the explanatory statement accompanying the Bill has an inaccurate outline of clause 1.1 of the Bill. Clause 1.1 displaces section 25 of the national law for the purposes of the ACT by requiring notification of operating requirements and participation rules at least 20 business days before they commence, subject to an exception for emergency situations. While the outline in the explanatory statement is accurate as far as the effect of the clause, it should be reworded to accurately reflect the wording of the new section 25.

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

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny?—Committee terms of reference paragraph (3)(e)

NATIONAL SCHEME LAWS

The Bill adopts the national law set out in the appendix to the NSW legislation as in force from time to time as a law in the ACT. The Bill provides that any future amendments to the national law that is passed by the New South Wales Parliament will not commence in the ACT until 90 days after the law commences in NSW, or on a different day as declared by the Minister in a notifiable instrument. The Bill will also exclude the *Legislation Act 2001* from applying to the Electronic Conveyancing National Law (ACT).

The explanatory statement accompanying the Bill states that the Intergovernmental Agreement for a National Electronic Conveyancing Law⁴ requires at least 75% of participating states to agree to the form of any substantive amendments. The parties to the agreement would have at least 6 weeks to consider any proposed changes. The Territory would therefore have the opportunity to consider any proposed changes to ensure amendments are developed in a manner consistent with the HRA. The commencement of the changes can also be delayed by the Minister. The explanatory statement suggests that the Minister is therefore able to exercise the application provision in the Bill “to ensure there is sufficient time for the Legislative Assembly to amend the Electronic Conveyancing National Law (ACT), so that the Territory did not adopt the disagreed amendment”.

However, the Committee is concerned that amendments to the national law will automatically lead to changes to the law in the Territory, possibly without any opportunity for scrutiny of those changes by the Assembly (or this Committee) and possibly without notice to persons who may be impacted by those changes.

The explanatory statement includes:

In the event of amendment to the Electronic Conveyancing National Law, on notification by the Directorate, the ACT legislation register will note those amendments will come into effect on a specified date (being the 90th day after the law commenced in New South Wales) unless the Minister varies the commencement date.

The Committee also notes, and commends, the practice generally adopted by the Government to date of tabling automatic amendments to similar national laws and making them available to the Committee. However, there is no requirement in the Bill or other legislation for notification by the Directorate nor registration and notification of any amendments other than a declaration by the Minister changing the date of commencement. The Committee therefore requests further information from the Minister on how to ensure that the Assembly and the public is informed of any changes to the national law with sufficient time to allow consideration by the Assembly. For example, the Bill might be amended to provide for any amendments to the national law to be tabled before the Assembly on the next sitting day after they have been passed by the NSW Parliament.

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

⁴ Intergovernmental Agreement for a National Electronic Conveyancing Law between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania and the Northern Territory of Australia, that came into operation on 21 November 2011, available at https://www.arnec.gov.au/regulation/intergovernmental_agreement..

FIREARMS LEGISLATION AMENDMENT BILL 2020

This Bill will make amendments to the *Firearms Act 1996*, *Firearms Regulation 2008* and *Prohibited Weapons Act 1996* to support the legitimate activities of biathletes, pentathletes and Commonwealth aviation security inspectors.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

Right to recognition and equality before the law (section 8 HRA)

By adding exemptions to offences under ACT firearms laws to allow aviation security inspectors to carry fake weapons to test airport security, and for biathlon and modern pentathlon athletes, participants, coaches and officials to possess and use laser target shooting devices for competition and training, the Bill will potentially limit the right to equality before the law protected by section 8 of the HRA. The explanatory statement accompanying the Bill includes a description of why the exemptions should be considered reasonable. 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.

LABOUR HIRE LICENSING BILL 2020

This Bill will provide for the licensing and regulation of providers of labour hire services, and for other purposes.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will require applicants for a labour hire licence to provide information to the proposed Labour Hire Licence Commissioner to assess their suitability to hold a licence, including whether the applicant has previously had a licence cancelled or suspended, or been convicted of an offence against a labour hire industry law. The Commissioner is required to keep a public register of records of the licensee including their name, and any condition on the licence.⁵ The collection and publication of this personal information may limit the protection of privacy and reputation provided by section 12 of the HRA. The explanatory statement provides a justification for any limit, including the requirements of the Commissioner to comply with the *Information Privacy Act 2014*. The Committee refers that statement to the Assembly.

⁵ The Committee notes that the explanatory statement refers to the register having to be kept under section 29 of the Bill. The reference should be to section 31.

Proposed Part 7 of the Bill will provide for enforcement of labour hire licencing requirements by authorised persons, including powers of entry and search of residential premises. An authorised person may be authorised to enter residential premises with a search warrant issued by a Magistrate under proposed subdivision 7.2.3, or where a labour hire business is conducted on the premises and the authorised person believes on reasonable grounds that the risk is so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary. These provisions may potentially limit the protection of home and privacy provided by section 12 of the HRA, and a justification for these powers should be provided in the explanatory statement accompanying the Bill using the framework set out in section 28 of the HRA.

Proposed section 74 of the Bill authorises disclosure of any information provided or obtained by the Commission in an exercise of their functions to a relevant responsible entity where appropriate. A responsible entity is defined to mean an entity responsible for administration of labour hire laws or general workplace laws or standards. As this may authorise the disclosure of personal information the potential limit to the protection of privacy provided by section 12 of the HRA should be recognised and justified using the framework in section 28 of the HRA.

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA) AND PRIVILEGE AGAINST EXPOSURE TO A PENALTY

Proposed subsection 35(3) will create a civil penalty of engaging, without reasonable excuse, an unlicensed labour hire service provider who was not included on the public register. The penalty for contravention will be 800 penalty units for an individual and 3000 penalty units for a corporation. The explanatory statement accompanying the Bill recognises that this penalty is significant and provides a justification for why it should not be characterised as criminal for the purposes of enlivening the rights in criminal proceedings protected by section 22 of the HRA. That justification refers to the financial penalty being a lower amount than the criminal penalties applied generally throughout the Bill. However, the Committee notes that the Bill does not provide for any penalty greater than the 800 or 3000 penalty units applicable to the proposed subsection 35(3). The offence of providing a labour hire service without a licence provides for the same penalties as a maximum (noting that the civil penalty in proposed section 35 does not provide for a reduction in the penalties). Other offences proposed in the Bill provide for lower penalties.

The Committee therefore asks the Minister whether it was intended that the proposed civil penalty be of an equivalent if not greater amount than the other principle offence in the Bill, and whether the characterisation of the penalty as a civil penalty is justified.

The Bill includes three strict liability offences (proposed sections 48 (non-return of identity card), 57 (interference with seized thing) and 59 (failure to comply with direction to give name and address)). As strict liability alters what must be established in the prosecution of these offences, their inclusion may potentially limit the right to the presumption of innocence provided by section 22 of the HRA. A justification for the use of strict liability should have been provided in the explanatory statement accompanying the Bill, using the framework set out in section 28 of the HRA.

Proposed section 38 will require a labour hire licensee provide information about their compliance with the Act to the Commissioner within a stated reasonable period. Proposed subsection 38(1) will prevent any information provided being admitted in evidence against the person in a civil or criminal proceeding, other than proceedings relating to regulatory action under part 6 of the Act. Part 6 provides for imposing conditions, suspending or cancelling labour hire licences or disqualifying the licensee from reapplying.

The explanatory statement accompanying the Bill describes proposed section 38 as affording self-incrimination protections for licensees when providing information to the Commissioner requested under that section. However, it is not clear to the Committee whether the provision is intended to abrogate or otherwise affect such privileges. As a note to subsection 38(3) states, section 170 of the *Legislation Act 2001* requires legislation to be interpreted to preserve the common law privileges against self-incrimination and exposure to the imposition of a civil penalty. Given such privileges have not been expressly abrogated, the proposed section may be interpreted as maintaining the privileges as well as providing additional protection against use of information provided. The Committee asks the Minister to confirm that this is the intended meaning of the provision and that consideration be given to amending the explanatory statement to make it clear that the privileges against self-incrimination and exposure to the imposition of a civil penalty continue to apply and allow a person to refuse to provide information to the Commissioner without the threat of regulatory action being taken as a result.

Proposed section 55 expressly abrogates the privilege against self-incrimination in answering a question or providing information or documents under proposed Part 7. This engages the right against self-incrimination protected in section 22 of the HRA, and a justification for its reasonableness should have been included in the discussion of human rights in the explanatory statement. The Committee notes that the proposed section prevents such information from being admissible in evidence against the person in civil or criminal proceedings other than offences arising out of false or misleading nature of such information, and that proposed section 56 will preserve the privilege for certain proposed sections provided where a warning is not provided.

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

LAND TITLES (ELECTRONIC CONVEYANCING) LEGISLATION AMENDMENT BILL 2020

This Bill amends the *Land Titles Act 1925*, the *Land Titles (Unit Titles) Act 1970* and other legislation as part of establishing the legislative framework to apply the national electronic conveyancing system in the Australian Capital Territory.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill will extend current practices relating to the collection and use of personal information by the Registrar-general and representatives acting on behalf of clients in the conveyancing transaction. The Registrar-general is also authorised to provide identifiable information to law enforcement and other Directorates under prescribed circumstances. The Bill will also prevent the Registrar-general from registering a dealing unless the identity of a person has been verified in accordance with new verification of identity rules. The Bill will therefore potentially limit the protection of privacy provided by section 12 of the HRA. Given the difficulties some people may encounter in providing verification of identity documents, the Bill may also limit the right to equality before the law protected by section 8 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limits and sets out a justification using the framework set out in section 28 of the HRA. As that statement suggests, collection of personal information is necessary to ensure accurate and legal transfer of title or registration of other dealing relating to land and to prevent fraudulent dealings. Personal information is currently submitted to the Registrar-general or collected as part of the Client Authorisation Form and made publicly available under the current paper-based system. The Land Titles Act and *Information Privacy Act 2014* place limitations on the lawful collection and use of personal information.

However, the explanatory statement also relies on obligations on lawyers, mortgagees and identity agents protecting the data they obtain in preparation for a lodgement being imposed by Verification of Identity Rules. The Bill will allow the Registrar-general to make verification of identity rules about how a person must be identified and what documents must be kept for the purpose of verifying the person's identity. These rules are a disallowable instrument. However, the Committee notes that there is no explicit requirement that the Verification of Identity Rules include obligations in regard to the collection and protection of personal information so collected.

The explanatory statement also suggests that where people are unable to establish their identity through official documents, it is possible for a subscriber to verify the identity of a person in some way that constitutes the taking of reasonable steps. However, it is not clear to the Committee how the requirement of reasonable steps will be incorporated into the verification rules, and how parties subject to the verification rules would be encouraged to permit alternative forms of identification.

The Committee therefore requests further information on how personal information and equality before the law will be protected under the Bill.

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

LOOSE-FILL ASBESTOS LEGISLATION AMENDMENT BILL 2020

This Bill amends legislation relating to building, planning and development and dangerous substances to place restrictions on residential premises containing loose-fill asbestos.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

FREEDOM OF EXPRESSION (SECTION 16 HRA)

Under the Bill, owners and occupiers of residential houses affected by asbestos will have to have an asbestos management plan (AMP) completed by a licensed asbestos assessor every 6 to 24 months. Affected premises, and whether those premises have an AMP in place, will be included on an affected residential premises register. The AMP will have to be displayed in an approved case provided by the ACT government in a visible location at affected premises. Development approvals and building work on affected premises will be restricted to demolition and remediation of affected premises, or work which is essential for health, safety or reasonable living conditions.

Only occupants of an affected premises at the time the premises is added to the affected residential premises register, and their support persons, will be permitted to occupy the premises after the property is sold, transferred or transmitted.

By placing restrictions on residential premises affected by asbestos the Bill will potentially limit the right to equal protection of the law protected by section 8 of the HRA. By placing restrictions on the use and enjoyment of a person's home, requiring details of the asbestos present in the home to be collected, and permitting details of the homes affected and the AMP's in place to be made public, the Bill will potentially limit the protection of personal privacy and the home provided by section 12 of the HRA. By requiring an AMP to be displayed prominently in a person's home and restricting development and building work the Bill may also limit the right to freedom of expression protected by section 16 of the HRA.

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

The Bill will amend the *Building (General) Regulation 2008* to prevent building work from being exempted from approvals where it involves affected residential premises. Building approvals must not be issued unless it relates to demolition or is essential for health, safety or reasonable living conditions at affected residential premises. Similarly, the Bill will also amend the *Planning and Development Act 2007* to prevent development approval from being granted on affected residential premises unless the development relates to remediation. There will no longer be exemptions from having to obtain development approval for affected residential premises under the *Planning and Development Regulation 2008* unless the development is for demolition including asbestos removal, or work essential for health, safety or reasonable living conditions at affected residential premises.

The Committee is concerned that the restrictions on development and building work on affected residential premises may have an undue effect on residents with special needs, particularly where those special needs change over time requiring modification to their premises. Building work may be needed for the health, safety or living conditions of the particular occupant that might not be considered essential in other circumstances. The Committee notes that the Minister may make guidelines about work essential for health, safety or reasonable living conditions for the purpose of exemptions from development approvals (see clause 43 of the Bill). Those guidelines will be a notifiable instrument. However, it is not clear to the Committee whether those guidelines will similarly affect building approvals or other contexts in which the health, safety or reasonable living conditions of occupants may justify alterations. Similarly, it is not clear if alterations to premises to accommodate a support person would be included in any exemptions.

The Committee therefore seeks further information from the Minister as to how the criteria of being essential for health, safety or reasonable living conditions will be assessed and enforced so as not to unduly impact on occupants of premises with special needs.

The Bill will amend the *Dangerous Substances Act 2004* to prohibit new occupants in affected premises once they are transferred or transmitted. The Bill will ensure that the Land Titles register includes an administrative interest noting that any transfer or transmission of the premises will place an occupancy prohibition on the premises. Where there is such an administrative interest noted on the land titles register, then it will be an offence for any new owner of affected residential premises to allow unapproved occupants to occupy the premises. An approved occupant is defined for this purpose as a resident who has occupied the premises continuously from when the premises was added to the affected residential premises register, or their support person approved by the Minister to occupy the premises (see proposed section 47T). In deciding whether to approve a

support person, the Minister must consider whether support is reasonably necessary for ongoing physical or emotional care of the resident and it is reasonably necessary for the support person to occupy the premises to provide the support. A refusal can be appealed to the ACT Civil and Administrative Tribunal.

The explanatory statement accompanying the Bill acknowledges that this prohibition on new occupants could prevent a family member from returning to live in an affected property. However, the Committee is concerned that this will also prevent new family members, including domestic partners, from joining the existing occupant of affected premises. It is not clear to the Committee that this restriction is necessary given the justification provided in the explanatory statement—preventing the risks of exposure to loose-fill asbestos and securing community safety—given the alternative of including family members as approved persons. The Committee therefore requests further information on how extending approved persons to include family members would undermine the objectives of the Bill. The Committee also notes that seeking approval from the Minister will require disclosure of sensitive health information. The impact of this disclosure on privacy of existing occupants and the protection provided by section 12 of the HRA should be acknowledged and justified using the framework set out in section 28 of the HRA.

The Bill will also prevent, for affected residential premises included in the affected residential premises register, any new residential tenancy agreements, subletting or assignments of premises, or occupancy agreements after 1 July 2020. The Committee is concerned this may prevent an existing occupant or support person, who is an approved occupant for the purpose of the prohibition on new occupants under the Dangerous Substances Act, entering into enforceable agreements to preserve their living conditions after the transfer or transmission of the premises to a new owner. The Committee therefore requests further information on how the proposed amendments to the *Residential Tenancies Act 1997* may affect on-going occupants and any new approved occupants, and how this limitation is justified for the purposes of the HRA.

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

PUBLIC INTEREST DISCLOSURE AMENDMENT BILL 2020

This Bill amends the *Public Interest Disclosure Act 2012* to increase the role of the Integrity Commissioner and other purposes.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will continue the protection afforded to public interest disclosures from any civil liability, including liability for defamation. To the extent defamation is an element of the protection generally afforded to a person’s reputation, eroding liability for defamation could limit the protection of privacy and reputation provided by section 12 of the HRA. 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 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.

FREEDOM OF EXPRESSION (SECTION 16 HRA)

The Public Interest Disclosure Act provides for protection against reprisals arising from public interest disclosures. The Act currently protects disclosures about conduct that could, if proved, be a criminal offence or give reasonable grounds for disciplinary action. Maladministration, a substantial misuse of public funds by a public sector entity or public official, or substantial and specific danger to public health or safety or to the environment are also protected. The Bill will reduce the scope of disclosable conduct to maladministration or specific and substantial dangers to public health or the environment by public sector entities or public officials. Personal work-related grievances or giving effect to government policies about amounts, purposes or priorities of public expenditure are not included as disclosable conduct. Allegations of criminal activity, grounds for disciplinary action, and misuse of public funds may instead involve disclosures of corrupt conduct which the Bill will shift to protection under the *Integrity Commission Act 2018*.

The Bill will also provide for copies of all disclosures to generally be given to the Integrity Commissioner for assessment and investigation. The Integrity Commissioner must assess the disclosure and decide if they are satisfied on reasonable grounds that the disclosure is about disclosable conduct, was disclosed in the public interest and not frivolous or vexatious. Only when the Integrity Commissioner is so satisfied is the disclosure taken to be a public interest disclosure and protected against reprisals by the Act.

The requirement that protection is only provided to disclosures that are in the public interest is not currently reflected in the Act. The Act requires either that the person making the disclosure honestly believes it shows disclosable conduct, or, regardless of what the discloser believes, the information does tend to show disclosable conduct. Such public interest disclosures generally have to be investigated, unless the disclosure has been withdrawn, it is impractical to investigate for several specified reasons, it is wrong in a material way, or there is a more appropriate way to deal with the disclosable conduct. Disclosure to the Assembly or to journalists is permitted in certain circumstances, including where an investigation under the Act isn't initiated or progressed or despite clear evidence hasn't resulted in any action being taken, or the standard route of disclosure is unreasonable given the significant risk of detrimental action.

The Bill generally maintains these protections for public interest disclosures, with the Integrity Commissioner being inserted as having to investigate or refer the matter for investigation by others. Where the Integrity Commissioner is not satisfied that a disclosure meets the requirements for a public interest disclosure, including where they are not satisfied it was disclosed in the public interest, then the Integrity Commissioner has to provide notice to the discloser and any person they initially disclosed the information to that the information will not be protected by the Act. Disclosures that are not assessed by the Integrity Commissioner to be public interest disclosures can only be disclosed to journalists or members of the Assembly and receive protection under the Act where that notice has not been provided within 3 months of the initial disclosure (see proposed new section 27).

The Bill will therefore add an additional hurdle before providing protection for disclosures of disclosable conduct. The explanatory statement accompanying the Bill outlines the purpose of the public interest test as:

to ensure that the discloser is not solely or personally affected by the disclosure matter and strengthens the exclusion of personal employment-related grievances from the scope of this legislation. The conduct relating to the disclosure must affect others and must also be genuinely in the public interest.

However, given that conduct that relates to a personal work-related grievance will be explicitly not included as disclosable conduct under the Bill, the Committee is not clear on what further element has to be established before the public interest test is met. The Committee is concerned that introducing an additional element that has to be met before disclosure of disclosable conduct is protected restricts the range of disclosures that are protected under the Act, and the uncertainty over the scope of the public interest test may deter potential disclosers from coming forward. The Committee notes that there is no provision made in the Bill for appeal or review of the decision of the Integrity Commissioner that a disclosure was not disclosed in the public interest.

The explanatory statement accompanying the Bill recognises that by generally imposing restrictions on the protection offered by the Act the Bill potentially limits the right to freedom of expression protected by section 16 of the HRA. However, the justification for these limits set out in the explanatory statement do not include reference to the public interest test and its effect of limiting the scope of disclosures that will be subject to protection by the Act, at least where that conduct does not disclose corruption.

The Committee therefore requests further information on the role and justification of the public interest test to be introduced by the Bill.

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

RESIDENTIAL TENANCIES AMENDMENT BILL 2020

This Bill amends the *Residential Tenancies Act 1997* (the RTA), the *Human Rights Commission Act 2005*, the *Uncollected Goods Act 1996*, and the *Residential Tenancies Regulation 1998* to introduce greater certainty in relation to co-tenancies and occupancy agreements, including introducing new mandatory occupancy principles.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The RTA presently recognises the difference between an occupancy agreement and a residential tenancies agreement. An occupancy agreement is currently defined as a right to occupy premises for use as a home, given for value, which is not a residential tenancy agreement. Various occupancy principles—including the state of the premises, rights to quiet enjoyment, grantor’s entitlements of entry, termination of the agreement and eviction—have to be considered in decisions under the RTA but are not required to be complied with by the parties to the occupancy agreement.

The Bill will redefine an occupancy agreement by specifying the circumstances in which such an agreement, as opposed to a tenancy agreement, is possible—namely where the agreement is to live in: the same premises as the grantor; residential premises associated with an education provider; sleeping spaces in boarding houses or dormitories with shared facilities; crisis accommodation or part of a housing support program; premises provided because of membership in a club or other entity; or premises or a site in a residential park. The Bill restates and expands the occupancy principles and

requires them to be part of an occupancy agreement. Provisions relating to condition reports, security deposits, occupants' access to the premises including shared facilities, entry by the grantor, termination of the agreement and abandonment are all dealt with through specific provisions.

As the Bill continues to draw a distinction between occupancy agreements and residential tenancy agreements and provides for different forms of protections and obligations depending on the type of agreement in place, the Bill potentially limits the right to recognition and equality before the law protected by section 8 of the HRA. The right not to have a person's privacy, family, home or correspondence interfered with unlawfully or arbitrarily protected by section 12 of the HRA is also potentially limited by the implications of an occupancy agreement on the enjoyment of a person's place of residence, including the grantor's rights to enter the premises generally and after suspected abandonment.

The explanatory statement accompanying the Bill sets out a justification for any potential limits to these rights. Subject to the comments below, the Committee refers that statement to the Assembly.

The Committee is concerned that there is insufficient evidence to justify the distinction drawn in the Bill for occupancy agreements relating to education providers. In relation to the right to equality, the statement describes the purpose of the distinction between occupancy agreements and residential tenancies as:

to facilitate a wider range of housing options where a tenancy agreement may either be ill-suited or inappropriate. The measure is of importance as, without this measure, residential tenancy agreements may create an obstacle to the provision of flexible housing and related support services in appropriate circumstances. The current measure, by more clearly defining the distinction between an occupancy agreement and a residential tenancy agreement, will assist to achieve the stated purpose of the measure. The proposed amendments will improve the proportionality of any distinction overall, by increasing the protections contained in occupancy agreements.

In outlining the new provisions relating to occupancy agreements in clause 22 the Bill, the explanatory statement describes the policy intent is that people should be residential tenants unless there are strong policy reasons to not recognise a tenancy. However, the broader policy goal of recognising occupancy agreements by education facilities is not made clear, with the explanatory statement simply restating the circumstances in which an occupancy agreement in relation to education providers is recognised.⁶

The Bill also contains a number of significant exemptions for certain educational facilities:

- The occupancy principles introduced by the Bill require any penalty or consequence other than termination for breaching an occupancy rule to be reasonable and proportionate and not impose undue hardship. However, this does not apply to a penalty or consequence under a university disciplinary requirement, which is defined in the Bill as having been made under or authorised by the *Australian National University Act 1991* (Cwlth) or the *University of Canberra Act 1989*. (see proposed paragraph 71EA(2)).

⁶ See Residential Tenancies Amendment Bill 2020, Explanatory Statement, p 15.

- Under the Bill, an occupancy agreement can only be terminated: with the agreement of all parties; there is a breach of an occupancy principle which justifies termination; or as set out in the agreement. However, an occupancy agreement can also be terminated where permitted or required under a university discipline requirement. An occupancy agreement may generally only allow a party to terminate the agreement “under circumstances that are reasonable having regard to the nature of the occupancy” (proposed subsection 71EK(2)), unless, again, an occupancy agreement may be terminated under a university discipline requirement.
- The proposed changes to section 73 will prevent the ACT Civil and Administrative Tribunal from getting involved in resolving occupancy disputes until the parties have sought to resolve their dispute within a reasonable time under a dispute resolution procedure authorised under the *Australian National University Act 1991* (Cwlth) or the *University of Canberra Act 1989*.

The explanatory statement does not provide a justification for the potential limitation of human rights affected by these provisions. In describing the termination of occupancy agreement provisions, the explanatory statement suggests the special provision for discipline requirements under the university statutes avoids “potential inconsistencies between the two statutory regimes” and that university students will continue to enjoy protection where not covered by a university disciplinary requirement, and will also be able to access conciliation processes under the Human Rights Commission Act.⁷

However, there is no analysis in the explanatory statement of the reasonableness of the university discipline requirements provided under the university statutes, the extent to which accommodation providers, particularly those that provide accommodation under an arrangement with the universities concerned, are held to account for complying with those principles in practice, nor justification for why legislation involving these two universities, and no other university or education providers, is given special status. The Committee is also concerned that these provisions may unduly impact on certain cohorts of students who might be disproportionately represented in university affiliated accommodation.

The Committee therefore requests that the Minister provide a justification for the potential impact on human rights of the provisions in the Bill relating to education facilities.

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

⁷ The Committee notes that the explanatory statement, in describing the effect of new section 41A of the Human Rights Commission Act which allows a person to complain to the Commission about an occupancy dispute, incorrectly describes an occupancy dispute as being defined by section 73 of the RTA. It should be made clear that this refers to the current definition in section 73 of the RTA. The Bill will change that definition to make reference to university occupancy agreements. The Bill will instead redefine occupancy agreements for the purpose of the Human Rights Commission Act in clause [1.10] without reference to university occupancy agreements, allowing the Commissioner to investigate complaints without waiting for university dispute resolution procedures to be attempted. The Committee thanks Dr Helen Watchirs, ACT Human Rights Commissioner, for pointing out this error (in a letter to the Committee addressed on 12 March 2020).

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny?—Committee terms of reference paragraph (3)(e)

DISPLACEMENT OF SUBSECTION 47(6) OF THE LEGISLATION ACT 2001

The Bill will substitute a new section 1B into the *Residential Tenancies Regulation 1998* which will extend requirements for smoke alarms to include premises subject to an occupancy agreement (currently the requirement only extends to residential tenancy agreements). These requirements include that smoke alarms must comply with Australian Standard AS 3786 (Smoke alarms using scattered light, transmitted light or ionization) as in force from time to time. Under section 1C of the Regulations, subsection 47(6) of the *Legislation Act 2001* does not apply to AS 3786, meaning that the standard does not have to be notified on the legislation register. However, section 1C goes on to require the Director-general to make a copy of AS 3786 available for inspection by members of the public during ordinary business hours at a place decided by the Director-general.

While the Committee recognises that the reliance on the standard and displacement of subsection 47(6) is reflected in the current provisions, it asks that the Minister confirm the continued need to displace the notification requirements relating to this particular standard, and that consideration be given to including a justification for the displacement of subsection 47(6) of the Legislation Act in the explanatory statement.

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

PROPOSED AMENDMENTS

BIRTHS, DEATHS AND MARRIAGES REGISTRATION (TISSUE DONOR ACKNOWLEDGEMENT) AMENDMENT BILL 2020

On 17 March 2020, the Committee received proposed Government amendments to the Births, Deaths and Marriages Registration (Tissue Donor Acknowledgment) Amendment Bill 2020. These proposed amendments will remove the possibility of requesting a letter from the Chief Minister acknowledging the deceased person was a tissue donor, and amend the definition of a tissue donor. The Committee has no further comment.

HUMAN RIGHTS (WORKERS RIGHTS) AMENDMENT BILL 2019

On 17 March 2020, the Committee received proposed Government amendments to the Human Rights (Workers Rights) Amendment Bill 2019. These proposed amendments will amend the Bill to clarify the expression of workers' rights and otherwise better align it with the current structure and approach of the HRA. The Committee has no further comment.

RESIDENTIAL TENANCIES AMENDMENT BILL 2020

On 16 March 2020, the Committee received proposed amendments to the Residential Tenancies Amendment Bill 2020 from Ms Le Couteur MLA. The proposed amendments will reduce the time after which a lessor and any remaining co-tenants are taken to have consented to a request from a co-tenant to stop being a party to the residential tenancy agreement. Under the Bill the remaining co-tenants and lessor have to apply to the ACT Civil and Administrative Tribunal within 21 days to not be taken to have consented. Under the proposed amendments this time will be reduced to 14 or seven days respectively. The Committee has no further comment.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2020-11 being the Public Unleased Land (Fees) Determination 2020 (No 1) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2019-108 and amends the fees associated with outdoor dining payable for the purposes of the Act.**
- **Disallowable Instrument DI2020-13 being the Court Procedures (Fees) Determination 2020 (No 1) made under section 13 of the *Court Procedures Act 2004* revokes DI2019-164 and introduces four new fees to support claims under the Motor Accident Injuries Act brought to the ACAT.**
- **Disallowable Instrument DI2020-14 being the Public Health (Novel Coronavirus—Temporary Notifiable Condition) Declaration 2020 made under paragraphs 101(a) and (b) of the *Public Health Act 1997* declares novel coronavirus (2019-nCoV) to be a transmissible notifiable condition.**
- **Disallowable Instrument DI2020-16 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2020 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2017-250 and prescribes a method for measuring greenhouse gas emissions.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2020-12 being the Legal Aid (Commission President) Appointment 2020 made under subsection 16(2) of the *Legal Aid Act 1977* appoints a specified person as part-time president of the Legal Aid Commission.**

This instrument, made under subsection 16(2) of the *Legal Aid Act 1977*, appoints a specified person as the President of the Legal Aid Commission. The Committee notes that section 3 of the instrument appoints the specified person as “part-time President” of the Commission. As the Committee has noted in the past, there is no such position as “part-time President”. Nor “part-time member”. In making this comment, the Committee acknowledges that the part-time nature of these positions is provided for by subsection 16(4) of the *Legal Aid Act*. However, the Committee does not believe that this means that persons should formally be appointed as “part-time” members, etc.

This comment does not require a response from the Minister.

RETROSPECTIVITY—POSITIVE COMMENT

- **Disallowable Instrument DI2020-17 being the Climate Change and Greenhouse Gas Reduction (Renewable Electricity Target Measurement Method) Determination 2020 made under section 10 of the *Climate Change and Greenhouse Gas Reduction Act 2010* determines the method for measuring compliance with the 100 per cent renewable electricity target.**

This instrument, made on 19 February 2020, determines the method for measuring compliance with the 100 per cent renewable electricity target, for section 10 of the *Climate Change and Greenhouse Gas Reduction Act 2010*. Section 2 of the instrument provides that it is “taken to have commenced on 1 January 2020”. This means that the instrument has a retrospective effect.

The Committee notes (with approval) that the retrospectivity issue is addressed in the explanatory statement for the instrument, which states:

The instrument commences retrospectively. The purpose of retrospective commencement is to make sure that the method for measuring compliance with the renewable energy target aligns with the date for the target for the use of renewable energy in section 9(1) of the Act. By ensuring the methodology is in place for the entire duration of the target will remove a potential source of ambiguity about how the target will be measured.

The instrument applies from 1 January 2020. This retrospectivity does not contravene section 76 of the *Legislation Act 2001* because it is non-prejudicial. The instrument does not adversely affect any person’s rights or impose liabilities on any person.

This comment does not require a response from the Minister.

SUBORDINATE LAW—NO COMMENT

The Committee has examined the following subordinate law and offers no comments on it:

- **Subordinate Law SL2020-4 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2020 (No 1) made under the *Road Transport (Safety and Traffic Management) Act 1999* amends the Road Transport (Safety and Traffic Management) Regulation to include one additional device and remove two devices from the definition of radar speed measuring devices.**

NATIONAL REGULATIONS—COMMENT

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

RETROSPECTIVITY

- **Education and Care Services National Amendment Regulations 2019, made under the Education and Care Services National Law as applied by the law of the States and Territories, together with an explanatory memorandum.**

These National Regulations are made under section 301 of the Education and Care Services National Law, which applies in the ACT as a result of section 6 of the *Education and Care Services National Law (ACT) Act 2011*.

The Committee notes that the National Regulations were tabled in the Legislative Assembly on 13 February 2020. The Committee also notes (with approval) that, despite there being no formal, statutory requirement to do so, the National Regulations were accompanied by an explanatory statement.

Subsection 3(1) of the National Regulations provides that the majority of the National Regulations came into operation on 31 December 2019. Given that the National Regulations were not tabled in the Legislative Assembly until 13 February 2020, it might be thought that they have a retrospective operation. However, the Committee notes that section 302 of the Education and Care Services National Law provides:

302 Publication of national regulations

- (1) The national regulations are to be published on the NSW Legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.
- (2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

The explanatory statement for the National Regulations states that, in accordance with subsection 302(1), the National Regulations were published on 31 December 2019, on the NSW legislation website. This means that, strictly speaking, the National Regulations do not have a retrospective operation. Indeed, under subsection 302(2), retrospective operation is, in effect, not possible.

The Committee is concerned, however, that persons or entities potentially affected by these National Regulations would have to monitor the NSW legislation website, in order to know that the legislative changes made by these National Regulations had come into effect. As a result, the Committee seeks the Minister’s advice as to what (if any) steps were taken to advise persons or entities potentially affected by these National Regulations of their effect and that they had commenced.

This comment requires a response from the Minister.

NO EXPLANATORY STATEMENT

- **Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019 (No 141/2019), made under the Health Practitioner Regulation National Law as applied by the law of the States and Territories, dated 10 December 2019.**

This National Regulation is made under section 245 of the Health Practitioner Regulation National Law, which applies in the ACT as a result of section 6 of the *Health Practitioner Regulation National Law (ACT) Act 2010*. The Committee notes that it was tabled in the Legislative Assembly on 13 February 2020. The Committee also notes that it was tabled without an explanatory statement. While the Committee notes that it has previously debated with Ministers the need for National Laws to be tabled with an explanatory statement, despite the absence of a formal, statutory requirement to do so, the Committee also notes that Ministers have, generally, accepted the Committee’s views on this issue and have, generally, been providing explanatory statements for National Regulations.

In relation to the absence of an explanatory statement for this National Regulation, the Committee notes that the Minister made a tabling statement, that states (in part):

There is no Explanatory Statement as part of this amendment, as the original Explanatory Statement which set out the exemption [that is effected by this National Regulation] still applies.

The Committee also notes that the tabling statement sets out more substantive detail on the effect of both the National Regulation and the earlier National Regulation. On this basis, the Committee does not press the issue of the absence of an explanatory statement, in this particular case.

This comment does not require a response from the Minister.

COMMENCEMENT INFORMATION / RETROSPECTIVITY

- **Rail Safety National Law National Regulations (Application of Law) Variation Regulations 2019 (No 238 of 2019), made under the *Rail Safety National Law (South Australia) Act 2012*, together with an explanatory statement.**

These National Regulations were made under section 264 of the Rail Safety National Law, which applies in the ACT as a result of section 6 of the *Rail Safety National Law (ACT) Act 2014* 18 February 2020. The Committee also notes (with approval) that, despite there being no formal, statutory requirement to do so, the National Regulations were accompanied by an explanatory statement.

Section 2 of the National Regulations provides:

2—Commencement

These regulations come into operation—

- (a) at the same time as section 118 of the *Rail Safety Legislation Amendment (National Services Delivery and Related Reforms) Act 2019* of Victoria comes into operation; or
- (b) on the day on which these regulations are made,

whichever occurs later.

The text of the National Regulations states that they were made on 7 November 2019.

The Committee has considered whether these National Regulations might, possibly, have a retrospective operation. On the basis of section 2, above, this depends on whether section 118 of the *Rail Safety Legislation Amendment (National Services Delivery and Related Reforms) Act 2019* of Victoria has come into operation. That, in turn, depends on section 2 of *that* Act, which provides:

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision of this Act does not come into operation before 1 July 2020, it comes into operation on that day.

The Committee's research of the Victorian legislation website indicates that the *Rail Safety Legislation Amendment (National Services Delivery and Related Reforms) Act 2019* has not been proclaimed. If that is the case then there would be no question of retrospective operation (including in the sense discussed above, in relation to the Education and Care Services National Amendment Regulations 2019). The Committee would appreciate the Minister's confirmation that this is the case.

This comment requires a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Planning and Land Management, dated 19 February 2020, in relation to comments made in Scrutiny Report 35 concerning the Minister's response to further comments made by the Committee in Scrutiny Report 32 on the Planning and Development (Design Review Panel) Amendment Bill 2019.

[This response⁸](#) can be viewed online.

- The Minister for Health, dated 18 February 2020, in relation to comments made in Scrutiny Report 38 concerning Disallowable Instrument DI2019-320—Smoke-Free Public Places (Public Transport Interchanges) Declaration 2019 (No 1).

[This response⁹](#) can be viewed online.

The Committee wishes to thank the Minister for Planning and Land Management and the Minister for Health for their helpful responses.

Giulia Jones MLA
Chair

March 2020

⁸ <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>.

⁹ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
 - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
 - Electoral Amendment Bill 2018 (Private Member's amendments).
- **Report 37, dated 19 November 2019**
 - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
 - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member's amendments).
- **Report 38, dated 4 February 2020**
 - Electoral Legislation Amendment Bill 2019 (Private Member's amendments).
- **Report 39, dated 17 February 2019**
 - Disallowable Instrument DI2019-283—Major Events (ICC T20 Women's World Cup 2020) Declaration 2019 (No 1)
 - Disallowable Instrument DI2019-286—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2)
 - Subordinate Law SL2019-32—Environment Protection Amendment Regulation 2019 (No 1)—Regulatory impact statement.
 - Unit Titles Amendment Bill 2019 (Private Member's amendments).