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

# Scrutiny Report 48

11 AUGUST 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):
   1. is in accord with the general objects of the Act under which it is made;
   2. unduly trespasses on rights previously established by law;
   3. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
   4. 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:
   1. unduly trespass on personal rights and liberties;
   2. make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   3. make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   4. inappropriately delegate legislative powers; or
   5. 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:

#### Adoption Amendment Bill 2020

This Bill will amend the *Adoption Act 1993* to extend the factors used by the Court in considering whether to dispense with the requirement for parental consent for an adoption, include cultural inheritance, personal identity and sense of belonging when considering the best interests of the child or young person, and relax residency requirements for applications for adoption of persons 18 years or older.

***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)

The Bill will amend the considerations used by the court on an application to dispense with the consent of a person to the adoption of a child or young person. Generally an adoption requires the consent of the parents or adoptive parents, and guardians of a child or young person. The Court can dispense with consent in circumstances including where the person has abandoned or ill-treated the child or young person, or failed to discharge their obligations as a parent or guardian. The Bill will replace these considerations with whether it is necessary in the best interests of the child or young person to dispense with the requirement for consent of the person.

Dispensing with consent in making an adoption order which will permanently sever the legal connection between a child and their birth family may limit the right to the protection of family in section 11 of the HRA. The explanatory statement accompanying the Bill justifies the reasonableness of this potential limit using the framework in section 28 of the HRA. The Committee refers the Assembly to that statement.

**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 Amendment Bill 2020

This Bill will amend the Births, Deaths and Marriages Registration Act 1997 to provide additional means for children and young persons under 18 years of age to amend their name and gender or include adoptive parents on the Births, Deaths and Marriages Register.

***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 family and children (section 11)

##### Right to privacy and reputation (section 12 HRA)

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

##### Right to a fair trial (section 21 HRA)

Currently, parental consent is required for a young person under 18 to change their name or have their gender identity changed in the Register and a birth certificate issued with changed details, or to have a recognised details certificate issued that acknowledges a person’s name and altered sex. The Bill will allow a person over 16 to apply to amend the register to have their name changed to better reflect their gender identity or to record their change of sex, or have a recognised details certificate issued, without parental consent. A young person under 16 years of age will be able to similarly apply for a change to the register or have a certificate issued without parental consent where the ACT Civil and Administrative Tribunal (ACAT) has granted leave.

By allowing the young person to take action to change their registration and amend recognised details without parental consent the Bill restricts the role of the parent and the scope of parental responsibility to act in the interests of their children. The Bill will therefore potentially limit the right to protection of family provided by section 11 of the HRA and the protection against unlawful and arbitrary interference with the home provided by section 12 of the HRA. By distinguishing between young persons over 16 and those between 12 and 16 in their ability to have their name and sex details altered the Bill will potentially limit the right to equality before the law protected by section 8 of the HRA.

As stated above, the Bill provides for young persons to seek leave from ACAT to apply to the Registrar-General to have their name changed and altered sex recognised. Young persons between 12 and 16 may do so without parental consent. Young persons under 12 may apply without a form of parental consent where exceptional circumstances apply to the young person, such as having socially transitioned their gender identity. The young person may apply to ACAT to not have someone with parental responsibilities informed of the application. Under the Bill, any application for leave must be held in private, and there are limits on who may be able to make submissions in any hearing for leave and the subject matter of those submissions. The Bill may therefore limit the right to a fair hearing protected by section 21 of the HRA.

The explanatory statement recognises these potential limitations and provides a justification for why they should be considered reasonable 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.**

#### Education Amendment Bill 2020

This Bill will amend the *Education Act 2004* and *Education Regulation 2005* to impose requirements on schools which provide boarding facilities, make provision for the appointment of parent representatives on school boards where schools do not have a parents and citizens association, and enable the Director-General to provide information about non-attendance in ACT schools to corresponding officers in other States and the Northern 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 recognition and equality before the (section 8 HRA)

##### Right to education (section 27A HRA)

The Education Act currently allows fees to be charged to people who hold a temporary visa under the *Migration Act 1958* (Cth), section 30 (2) (section 26). The Bill will amend this section to explicitly provide for the Minister to waive any fees. The Minister must waive the fee if satisfied that the applicant has demonstrated financial hardship or their circumstances justify the waiver, or as prescribed in regulations. Fees will not be charged while the request is being considered.

As the provision will only partially limit the circumstances in which temporary visa holders will have to pay school fees, the Bill may limit the right to equality and non-discrimination protected by section 8 of the HRA and right to non-discriminatory access to free school education appropriate to their needs protected by section 27A of the HRA. The explanatory statement recognises this potential limit and provides a justification for its reasonableness 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.**

##### Right to privacy and reputation (section 12 HRA)

The Education Act currently enables the Director-General to provide information about whether a child or young person is receiving an education in the ACT to corresponding officers responsible for the administration of the legislation under which children are enrolled at an education provider or registered for home education in another State or the Northern Territory (section 145C). The Bill will extend this authority to share information where the director-general considers, on their own initiative, that sharing the information will be in the best interests of the child. The information which can be shared will be extended to include whether a child is contravening participation and school attendance requirements.

By increasing the circumstances in which information can be shared and the information about the child and young person that can be shared the Bill may 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 for why any limit should be considered reasonable using the framework set out in section 28 of the HRA. That statement describes the association between abuse or neglect and school non-attendance, usefully includes a description of the policies and process adopted by school principals and the Education Directorate in responding to non‑attendance, and sets out the requirements for consent of the parents or child before information is shared. 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.**

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

##### Reliance on Australian Standard and displacement of section 47(6) of the Legislation Act 2001

The Bill will require government schools which provide boarding facilities for students enrolled at the school to meet requirements prescribed in regulations. Similarly, non-government schools which provide boarding facilities will have to show they meet prescribed requirements in applying for registration or renewal and as a condition of their registration. The Bill will also extend the Regulation-making power in section 155 of the Act to include adopting Australian Standards as in force from time to time. Subsection 47(6) of the *Legislation Act 2001*, which would otherwise have the effect of requiring notification of the Australian Standard on the Legislation Register as a notifiable instrument, is expressly displaced.

The Bill will also amend the Regulations to prescribe, for both government and non-government schools, the following requirement:

A school that provides boarding facilities must have policies for the provision of the facilities that comply with AS 5725:2015 (Boarding Standard for Australian schools and residences) as in force from time to time.

A note to these new provisions states that AS 5725:2015 may be purchased at <http://www.standards.org.au>.

The Committee is concerned that the Bill will regulate the provision of boarding facilities through reference to an Australian Standard which is not registered on the Legislation Register and is not otherwise available other than by paying a fee to a non-government organisation. As the Committee has repeatedly emphasized, the delegation of legislative authority to non-government bodies, including Standards Australia, requires justification. That is particularly the case where, as here, the standard regulates conduct of residential boarding facilities and where the required standard may have significant impact on the privacy and protection from abuse of the children concerned. While it may be accepted that schools with boarding facilities may be able to pay to access the standard, the lack of public availability may prevent access by students, their parents and guardians and others who have a vital interest in ensuring the adequacy of policies and procedures adopted by schools and the accountability of government regulation and enforcement.

The explanatory statement accompanying the Bill, in providing an overview of the Bill, recognises that:

[s]chools in the ACT are currently not required to abide by specific conditions relating to the operation of boarding facilities. However, there is a risk to a child’s safety and wellbeing if they are residing in facilities that are not kept to a recognised standard. There is an obligation to ensure that the governance; facilities; parent, family and community engagement; staff; and the protection, safety, wellbeing and holistic development of boarders are being met to ensure the delivery of a quality boarding facility. Adhering to the standard will require schools to demonstrate they are doing this.

In describing the consistency of the Bill with human rights, the explanatory statement suggests that, by strengthening the requirements for schools with boarding facilities, the Bill will promote the right of every child to protection under section 11 of the HRA. The statement includes:

While further work continues to articulate the streamlined approach to introducing the Child Safe Standards across the ACT, an amendment has been proposed to require any school with boarding facilities to, as part of the registration and regulation process, adhere to AS 5725:2015 of the Australian Standard: Boarding Standard for Australian schools and residences. This will ensure stronger safeguards are in place to provide appropriate protections for those children and young people who in a vulnerable position living away from home.

The explanatory statement therefore appears to adopt the Australian Standard as a temporary measure while appropriate standards are being considered. However, there is no provision in the legislation for these standards to be reviewed, and given the Australian Standard will apply as in force from time to time, an acceptance of the continued application of that standard into the future.

The explanatory statement also refers to the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse that it is essential for government to monitor government and non-government boarding schools to ensure they meet the Child Safe Standards. The Committee notes that the Royal Commission noted the reference to the Australian Standard in describing the regulation of school boarding facilities in South Australia, Western Australia and the Northern Territory. The Royal Commission described this standard as setting out “principles to ensure the protection, safety, health and wellbeing of boarders, as well as effective communication with parents during vulnerable periods”.[[1]](#footnote-1) However, the Royal Commission did not adopt the Australian Standard, instead putting forward its own Child Safe Standards and practical guidance for how to meet them.

The Committee therefore requests that further justification be provided for why reference to the Australian Standard in this context is justified, and why provision cannot be made to ensure public access to the Australian Standard in some form. The explanatory statement should be amended to include that justification. The Committee also recommends that provision be made in the Bill for review and reconsideration of the appropriateness of the Australian Standard.

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

#### Mental Health Amendment Bill 2020

This Bill will amend the *Mental Health Act 2015* to give effect to a number of recommendations of recent reviews of the Act, including amendments to allow consent to immediate treatment without being taken to a separate facility, to expand the review power of the ACT Civil and Administrative Tribunal (ACAT), extend the rights of persons affected by offenders where offenders have been referred to ACAT on a mental health pathway, and require review of the mental health order provisions of the Act and new provisions within five years.

***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)

Under the Mental Health Act, the Director-General must maintain a register of people who have been harmed by an offence committed or alleged to have been committed by a forensic patient. A forensic patient is someone the subject, or who may be the subject, of a forensic mental health order. The Bill will extend the definition of forensic patient to include a person referred to ACAT by an order of a court under the *Crimes Act* *1900*, part 13 or the *Crimes Act 1914* (Cth), part 1B (which relate to fitness to plead or the impact of mental impairment on sentencing). This, along with other related amendments, will have the effect of extending requirements to disclose information to a registered affected person and allow them or the Victims of Crime Commissioner to participate in various ACAT hearings under the Act.

By extending requirements to disclose information and allow participation in ACAT hearings involving the mental health of persons subject to the Act the Bill will limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit and provides a justification for why it should be considered reasonable using the framework set out in section 28 of the HRA. The Committee notes in particular the role of the amendments to ensure a person harmed in the commission or possible commission of an offence is able to participate in hearings under the Mental Health Act in similar ways to criminal justice proceedings, and that this participation will also enable them to act to protect their safety and wellbeing.

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

##### Right to liberty and security of person (section 18 HRA)

Under section 77 of the Mental Health Act, a person may be apprehended and taken to an approved mental health facility or approved community care facility if they have breached a mental health order and continued to not comply with that order after various warnings. The Bill will allow a person to comply with the mental health order and avoid being apprehended by receiving treatment at another suitable place of treatment.

Subsection 80(1) of the Mental Health Act authorises a police officer or authorised ambulance paramedic to apprehend a person and take them to an approved mental health facility if they believe on reasonable grounds that the person has a mental disorder or illness and has attempted or is likely to attempt to commit suicide or inflict serious harm on themselves or others. The Bill will amend this provision to require that the police officer or paramedic also believe the person requires an immediate examination by a doctor and does not agree to be examined immediately. This will prevent a person being apprehended where they consent to be immediately examined by a doctor. The Bill will also make it clear that in forming their beliefs police officers and paramedic do not have to make a medical assessment or clinical judgement.

As the Bill will continue to allow a person to be apprehended and taken to an approved mental health facility the Bill limits the right to liberty and security of person protected by section 18 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit and provides a justification for why it should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting in particular the increased restrictions placed by the amendments on existing powers of apprehension. The Bill will also extend the ability to seek review of any apprehension under subsection 80(1) by ACAT within two working days.

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

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

##### Declaration of notifiable instrument and displacement of section 47(6) of the Legislation Act 2001

The Bill will insert a new section 198A which allows the Chief Psychiatrist to make guidelines in relation to any matter under the Act, for a mental health facility, mental health professional or anyone else exercising a function under the Act. Guidelines must include a statement of how they are consistent with the objects and principles of the Act and human rights. The Chief Psychiatrist must consult with the Chief Police Officer or Chief Officer of the Ambulance Service before making guidelines relating to functions under the Act carried out by their officers. Mental health facilities conducted by or under an agreement with the Territory, and anyone employed or engaged at such a facility, must comply with the guidelines. It is also a condition of holding a licence to operate a private psychiatric facility that the facility comply with the guidelines. Other persons exercising functions under the Act are only required to consider any applicable guideline in the exercise of their functions.

The Bill provides that the guidelines are notifiable instruments, which must be notified under the *Legislation Act 2001* but are not subject to disallowance. The explanatory statement accompanying the Bill states:

Guidelines will be notifiable instruments to ensure the highest level of transparency and accountability. It is not appropriate for guidelines to be disallowable instruments, as it is not appropriate for the Legislative Assembly to seek to disallow guidelines made by the Chief Psychiatrist using their professional expertise, having turned their mind to the delicate clinical and operational issues that underpin the treatment, care and support of people with mental illness or disorder.

The Committee recognises the Chief Psychiatrist must be qualified as a psychiatrist and the role of expert judgement in establishing the guidelines. The Committee also notes the requirement that any guidelines include a statement of how the guidelines are consistent with the objects and principles of the Act and human rights. However, the Committee is concerned that any guidelines will not be subject to scrutiny by this Committee and the Assembly, which would be made possible by declaring the guidelines to be disallowable instruments. Given the guidelines can relate to any matter under the Act and must be complied with by and in mental health facilities, the Committee seeks further information on why the potential for disallowance would prejudice the effective operation of the Act as amended.

Proposed section 198A will also allow guidelines to apply, adopt or incorporate a law of another jurisdiction or an instrument as in force from time to time. Subsection 47(6) of the Legislation Act, which would otherwise require notification on the Legislation Register of any such law or instrument, is also expressly displaced (see proposed subsection 198A(8)). The explanatory statement recognises that displacing subsection 47(6):

limits the rights to equal access to relevant laws. However, this limitation can be justifiably displaced because the law of another jurisdiction or instruments being incorporated in a guideline will be available on the internet or in another public accessing way. As it is a requirement under [proposed subsection 198A(9)] that a guideline is a notifiable instrument it is envisaged that the adoption of another jurisdiction’s laws or instruments into an ACT guideline made under [proposed subsection 198A] will clearly state where that law or instrument can be located.

The Committee is concerned that not all instruments that may be adopted in Guidelines under proposed section 198A would be publicly accessible. By adopting laws of another jurisdiction or instruments generally as in force from time to time the Bill will also allow guidelines to be amended, with the effect of changing, without adequate notice, the requirements faced by mental health facilities and having to be considered in exercising functions under the Act. The Committee therefore requests further information on why the requirements for notification under section 47(6) should be displaced in circumstances where the law or instrument adopted may not be freely available to the public and where notice of any changes is not provided to those directly affected by the provisions.

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

#### Public Health Amendment Bill 2020 (No 2)

This Bill will amend the *Public Health Act 1997* to allow the Minister to determine a quarantine fee payable by persons who have returned from overseas travel and are required to quarantine at a place other than the person’s home because of the COVID-19 pandemic.

***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)

As the explanatory statement accompanying the Bill recognises, by imposing a fee on those that return from overseas the Bill may disproportionately affect people of a different race or nationality who had travelled overseas to visit family and friends, or have difficulty paying the fee. The Bill may therefore limit the right to equality protected by section 8 of the HRA. The explanatory statement provides a justification for the reasonableness of any limitation using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting that the fee is limited to recovering the costs incurred by the Territory, and that the Minster must consider a person’s circumstances, including the circumstances of the travel and whether they are suffering financial hardship, when deciding whether to waive, defer or establish an instalment plan.

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

### Proposed Amendments

**Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020**

On 3 August 2020, the Committee received proposed Government amendments to the Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020 along with a revised explanatory statement. These amendments include delaying the commencement of the Bill until eight months after notification and requiring a review within two years of the new offence provisions introduced by the Bill. The Committee has no comment on these proposed amendments and revisions.

**Electoral Amendment Bill 2018**

On 4 August 2020, the Committee received proposed amendments to the Electoral Amendment Bill 2018 from Ms Le Couteur MLA. They include amendments previously provided by Ms Le Couteur to the Committee and reported on in the Committee’s *Report 28*. In that report, the Committee identified a number of concerns with rights protected under the *Human Rights Act 2004* (HRA) and requested Ms Le Couteur provide an explanatory statement setting out why the amendments should be considered a reasonable limitation under the framework set out in section 28 of the HRA. The Committee thanks Ms Couteur for responding to the Committee’s concerns and including such a statement to accompany these proposed amendments.

As described in the explanatory statement, the proposed amendments will:

* Establish a new offence for misleading electoral advertising;
* Introduce a cap for administrative expenditure payments to parties at the equivalent of five times the maximum amount payable per MLA;
* Restrict the receipt of donations to $10 000 per year from any individual or corporate group;
* Introduce a new category of prohibited donors, which includes property developers and gambling businesses.
* Broaden the definition of property developer contained in the Bill to include not-for-profit developers.

Each of these proposed amendments may limit the right to freedom of expression protected in section 16 of the HRA. The proposed amendments will also introduce a higher campaign expenditure cap for non-party candidates which, along with extending the category of prohibited donors to include gambling businesses, will limit right to recognition and equality before the law protected by section 8 of the HRA. The explanatory statement accompanying these proposed amendments includes a statement setting out a justification for why such limits should be considered reasonable under the framework set out in section 28 of the HRA. Subject to the comments below, the Committee refers that statement to the Assembly.

##### Limits on donations

The Committee notes that the explanatory statement relies at various points on analogous provisions in other jurisdictions and their compatibility with the Constitutional protection of political communication. While the Committee recognises the potential relevance of these comparisons, it cautions against reliance as a justification for the reasonableness of any limitation of the right to freedom of expression under section 16 of the HRA. For example, the High Court has emphasised that the protection of political communication does not create a personal right[[2]](#footnote-2) which might prevent restrictions on access to politicians and the political process or the making of donations as a form of expression. The possible recognition of these elements of the electoral process as protected under rights under the HRA should be included in any justification of potential limits on those rights.

The range of legitimate objections which may justify the reasonableness of any limitation on freedom of expression under the HRA may also be wider than those compatible with the maintenance of the constitutionally prescribed system of representative government required by the constitutional protection of political communication. However, the explanatory statement does not suggest that the purposes of the proposed amendments go beyond those accepted in the protection of political communication context; namely that limits on electoral donations are intended to limit actual and perceived corruption or undue influence of elected representatives and equalise opportunities to participate in the electoral process. However, evidence of the necessity to achieve that purpose of the proposed restrictions on freedom of expression in the context of the circumstances in the Territory will still be necessary.[[3]](#footnote-3)

The proposed amendments will prevent a party, Member of the Assembly, non-party candidate or associated entity from accepting a gift from or on behalf of an individual or corporate group of more than $10 000 in a financial year. The explanatory statement justifies this proposed amendment’s restriction on freedom of expression by stating:

This amendment is proportionate and justified given the potential for some donors to make very large donations, which may result in a significantly increased level of access to MLAs and influence in political decision making compared to the rest of the voting population.

There is no recognition that this amendment, by restricting access to political representatives, may restrict the right to take part in public life protected by section 17 of the HRA.

The Committee is concerned that there is limited justification provided for imposing a limit at $10 000 in order to prevent undue influence on political decisions. The explanatory statement describes $10 000 as “generous” and “much higher than the donation limit in Victoria, currently set at $4 000 across the four-year parliamentary term”. However, there is no evidence presented as to how $10 000 compares to other donations that might be expected in a Territory election, and why the limit will not act to significantly restrict electoral spending and the capacity of candidates to communicate with the electorate.

It is also not clear to the Committee how the justification for the limit on donations relates to the amendments in the Bill to prohibit donations by property developers and the proposed amendment’s addition of gambling businesses as a prohibited donor.[[4]](#footnote-4) The justification given for including gambling businesses, for example, suggests that, given their susceptibility to regulatory impacts, gambling businesses have exerted a corrupting influence through the use of political donations. It is not clear if that potential to have a corrupting influence would continue in the presence of a uniform limit on all donations. Similarly, the proposed amendments extend the range of property developers subject to the prohibition on making donations without considering the impact, if any, of a cap on donations on the necessity of such reforms.

##### Misleading political advertising

The proposed amendments will introduce an offence of misleading electoral advertising. A person will commit an offence if they disseminate, or authorise the dissemination of, an advertisement containing electoral matter which contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent. It is a defence if the defendant can prove they took no part in deciding the content of the advertisement and could not reasonably have been expected to have known that the statement was inaccurate and misleading.

Electoral matter is defined in the Electoral Act as printed or electronic matter that “is intended or likely to affect voting at an election” (section 4). Advertisement is not defined, though expenditure on electoral advertising has to be included in expenditure returns required under Part 14 of the Act, including expenditure on broadcasting or publishing advertising where there was no payment or other consideration for that publication or broadcast. It is currently an offence under section 292 of the Electoral Act to disseminate electoral matter without a statement of who authorised the matter and whether it was on behalf of a party, candidate or another person. However, that offence does not apply to dissemination of electoral matter contained in reportage or commentary in a particular news publications which has a general statement of authorisation, and where reportage or commentary does not include advertisements. Section 292 also does not apply to dissemination on social media where the individual is not paid to express their views, and to a variety of other items including MLA press releases, government agency publications, and t-shirts and badges. Electoral advertisements in a news publication that appear to be reportage or commentary must include the word “advertisement” as headline on each page. The distinctions drawn in these provisions between advertisements and reportage and commentary are not clearly applicable to the proposed offence.

The Electoral Act also contains an offence of disseminating electoral matter that is likely to mislead or deceive an elector about the casting of a vote, where it is a defence if the defendant did not know, and could not reasonably be expected to have known, that the electoral matter was likely to mislead or deceive an elector about the casting of a vote (section 297). Offences of this form have been interpreted narrowly by the courts; applying to statements that can influence how to cast a vote in favour of a particular candidate rather than influencing the decision on which candidate to vote for.[[5]](#footnote-5) The proposed offence clearly attempts to proscribe material which influences the choice of candidate.

The Committee recognises that the proposed offence is based on section 113 of the *Electoral Act 1985* (SA) which was considered consistent with the constitutional protection of political communication in the South Australian full court decision of *Cameron v Becker.[[6]](#footnote-6)* Preventing electors from being misled by restricting the dissemination of false or misleading electoral material may also be considered a legitimate justification for the limitation on freedom of speech protected under section 16 of the HRA. However, the Committee is concerned that the proposed amendments may go further than is justified in protecting the interests of informed electors and the integrity of the electoral process.

As the explanatory statement accompanying the proposed amendments suggests, voters are subject to various forms of advertising and political commentary, disseminated through multiple media subject in turn to more or less stringent forms of regulation. While the Electoral Act currently requires identification of advertisements in news publications, it may often be less clear what will constitute an advertisement in other forms of media. It is therefore not clear to the Committee whether the offence might not apply to news and commentary or other forms of legitimate expression.

To the extent advertising is interpreted narrowly, by restricting one means of access to voters the proposed offence may preference those with access to unrestricted forms of communication to voters, including those invited by the still powerful interests which control and conduct the electronic media.[[7]](#footnote-7) The range of media and forms of discussion in which false or misleading statements will remain unregulated may also reduce the effectiveness of the offence in preventing the misinforming of electors.

In addition to whether the dissemination involves an advertisement, there may also be uncertainty over whether a statement is “purporting to be a statement of fact”. The requirement that a statement of fact be misleading and deceptive “to a material extent” may relate variously to the degree of inaccuracy of the statement, the contribution the statement makes to the advertisement as a whole, or the impact on voters. These various uncertainties in the interpretation and application of the offence may expand its deterrent effect on legitimate forms of expression.

It will be a defence to the proposed offence if the defendant can establish they took no part in deciding the content of the advertisement and could not reasonably be expected to have known that the statement was inaccurate and misleading. As this places the evidential burden on the defendant to establish these matters the proposed amendments may limit the presumption of innocence protected by the rights in criminal trials in section 22 of the HRA. The explanatory statement suggests that this defence would “cover a publisher or other third party that prints, distributes or broadcasts the advertisement”. However, meeting the defence may require a publisher or third party distributer to establish the reasonableness of the steps taken to establish the accuracy of statements of fact included in advertisements.

The proposed amendments will allow the Commissioner, where they are satisfied that the elements of the offence apply, to ask a person to not disseminate the advertisement again or to publish a retraction. The person’s response to any such request must be considered in deciding the penalty for the offence. The Supreme Court may also prevent further dissemination or order a retraction. The Committee notes that a failure by the Commissioner to inform a person of the potential impact of refusing to comply with the Commissioner’s request may limit the right to a fair trial under section 21 of the HRA, particularly if there is no opportunity to challenge the merits of the Commissioner’s request.

The Committee also questions whether the role of the Commissioner presents an alternative, and less rights-limiting approach, to regulation of misleading electoral advertising. For example, by extending the authority of the Commissioner to issue take-down or retraction notices, providing an appropriate opportunity to challenge that decision, and limiting any offence to a failure to comply with the request, the objectives of the amendments may be achieved with less of a potentially inhibiting effect on legitimate expression. Further information from the Member is needed on whether alternative approaches to preventing misleading electoral advertising have been considered and why they would not be considered reasonably practicable means of achieving the same purpose which may have a less restrictive effect.

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

**Public Interest Disclosure Amendment Bill 2020**

On 3 August 2020, the Committee received proposed Government amendments to the Public Interest Disclosure Amendment Bill 2020. The amendments include clarifying who will be the relevant head of a public sector entity for the Office of the Legislative Assembly, members of the Assembly and staff of members of the Assembly, deleting paragraph 35(a)(iv) of the *Public Interest Disclosure Act 2012* which confers an immunity from the Assembly’s contempt powers on disclosers, and requiring Integrity Commissioner guidelines to include guidance to members of the Assembly. The Committee has no comment on these amendments.

## Subordinate Legislation

### Disallowable Instruments—Comment

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

Fees-type determination—explanation for increase

**Disallowable Instrument DI2020-209 being the Juries (Payment) Determination 2020 made under sections 49 and 51 of the** *Juries Act 1967* **revokes DI2019-185 and determines payments made to jurors for the purposes of the Act.**

This instrument is made under section 51 of the *Juries Act 1967*, which allows the Minister to determine an amount that jurors are entitled to be paid, in relation to their attendance at court. The instrument determines new (increased) payments, with effect from 7 July 2020. The Committee notes that, by way of explanation for the increase, the explanatory statement for the instrument states:

Under section 51 of the *Juries Act 1967*, a person summoned or appointed to serve as a juror is entitled to be paid the amount determined by the Minister for the person’s attendance at the court in accordance with the summons or appointment, whether or not the person serves as a juror. Schedule 2 of the instrument lists the amounts that a juror is to be paid under section 51. The amounts in schedule 2 have been increased by 1.5%, which is the 2020-21 Treasury Budget forecast CPI index.

The Committee notes that this is a slightly different approach to the vast majority of fees instruments, discussed in *Scrutiny Report 47* of the *9th Assembly* (28 July 2020), which increased regulatory fees, etc, which relied on a *Wage* Price Index (WPI) forecast of 2.0%. However, the Committee also notes that different considerations (presumably) apply to the setting of these payments.

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

COVID-19-related instrument

**Disallowable Instrument DI2020-210 being the Taxation Administration (Amounts Payable—Rates) Determination 2020 (No 2) made under paragraph 46(2)(f) of the** *Rates Act 2004* **and section 139 of the** *Taxation Administration Act 199***9 revokes DI2020-176 to correct minimum charges prescribed for general rates thresholds, and provides for a range of rates relief measures, including a $150 rebate to residential properties, an FESL freeze at the 2019-20 rate, and a 50% reduction of the CCMIL.**

This instrument determines rates, under section 139 of the *Taxation Administration Act 1999* and by reference, also, to the *Rates Act 2004*. Paragraph 46(2)(f) of the Rates Act allows the Minister to determine amounts and rates payable for the deferral of general rates for eligible non-pensioners. The instrument determines:

* + general rates, including deferral and rebate amounts;
  + Fire and Emergency Services Levy (FESL), including rebate amounts;
  + City Centre Marketing and Improvements Levy (CCMIL); and
  + Safer Families Levy.

The Committee notes that the explanatory statement for the instrument indicates that the instrument is made as part of the legislative response to the COVID-19 pandemic. It states:

In March and April 2020, the Government announced two economic stimulus packages to support business, industry and our community affected by the COVID-19 pandemic. As part of the stimulus packages, the Government will provide rates assistance to residential and commercial property owners to provide cashflow support.

The Rates Determination replaces the Taxation Administration (Amounts Payable—Rates) Determination 2020, DI2020-176 to correct minimum charges prescribed for general rates thresholds. Marginal rating factors are not affected.

The Rates Determination provides for a range of rates relief measures, including:

• a $150 rebate to all residential properties;

• FESL freeze at the 2019-20 rate; and

• a reduction of CCMIL by 50 per cent.

Fixed charges and percentage rates (marginal rating factors) are updated for general rates. Different amounts are now specified for commercial rates based on the average unimproved value (AUV) of parcels of land.

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

Fees determinations / Human rights issues

**Disallowable Instrument DI2020-211 being the Road Transport (General) Fees for Publications Determination 2020 (No 1) made under section 96 of the** *Road Transport (General) Act 1999* **revokes DI2019-94 and determines fees payable for various kinds of road transport publications.**

**Disallowable Instrument DI2020-212 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2020 (No 1) made under section 96 of the** *Road Transport (General) Act 1999* **revokes DI2019-93 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2020-213 being the Road Transport (General) Numberplate Fees Determination 2020 (No 1) made under section 96 of the** *Road Transport (General) Act 1999* **revokes DI2019-92 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2020-214 being the Road Transport (General) Driver Licence and Related Fees Determination 2020 (No 2) made under section 96 of the** *Road Transport (General) Act 1999* **revokes DI2020-35 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2020-215 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2020 (No 1) made under section 96 of the** *Road Transport (General) Act 1999* **revokes DI2019-89 and determines fees payable for the purposes of the Act.**

The instruments mentioned above, made under section 96 of the *Road Transport (General) Act 1999*, determine various fees payable under that Act. The Committee notes that the explanatory statement for the first instrument mentioned above states:

The preference of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) that Instruments or Explanatory Statements identify the amount of the old and new fee, any percentage increase and also the reason for any increase in the Instrument or the Explanatory Statement has also been taken into account in the preparation of the Instrument and the Explanatory Statement.

A similar statement appears in the explanatory statements for each of the other instruments mentioned above. The Committee notes, with approval, that in fact, the various instruments and their explanatory statements do address the Committee’s preferences, in relation to fees determinations.

The Committee notes that the explanatory statement for the first instrument mentioned above goes on to state:

There are no human rights or climate change implications arising from this instrument.

**The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned above.**

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

COVID-19-related instrument / Retrospective operation / Human rights issues

**Disallowable Instrument DI2020-216 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2) made under section 156 of the** *Residential Tenancies Act 1997* **revokes DI2020-46, provides for a temporary reduction in rent or occupancy fees, and a moratorium of terminations, rent increases, etc, for those impacted by COVID-19 and unable to meet their commitments under a residential tenancy agreement, and introduces an additional measure to allow a COVID-19 impacted household to terminate a fixed-term tenancy agreement without penalty.**

This instrument is made under section 156 of the *Residential Tenancies Act 1997*, which allows the Minister to make a declaration into various things, in the context of “the public health emergency caused by the COVID-19 pandemic”. It revokes and re-makes an earlier declaration, the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (DI2020-46). The explanatory statement for this instrument states:

The new Declaration retains all measures in the First Declaration and introduces an additional measure to allow a COVID-19 impacted household to terminate a fixed-term tenancy agreement without penalty by providing their landlord with three weeks’ notice.

The explanatory statement then offers the following background:

Earlier in the year, on 29 March 2020, the Prime Minister announced the National Cabinet Decision to implement a 6-month moratorium on evictions for those unable to meet their commitments under a residential tenancy agreement due to the impact of coronavirus (COVID‑19).

On 21 April 2020, the Minister made the First Declaration to introduce a moratorium in the ACT for 3 months and included a provision to allow the moratorium period to be extended for a further 3 months.

The Government considers that the measures put in place in the First Declaration remain necessary and important safeguards in the current environment. The Declaration extends the moratorium period for a further 3 months (until 22 October 2020) in line with the ACT Government’s public commitment and the National Cabinet Decision.

The moratorium on eviction applies only to those households that have been impacted by COVID-19. Landlords of COVID-19 impacted households are prevented from issuing their tenants with a notice to vacate for rent arrears (or applying for orders from the ACT Civil and Administrative Tribunal (ACAT) as a result of unpaid rent) during the moratorium period.

This Declaration also applies to tenants who have been issued with a notice to vacate, or who have failed to pay rent, prior to the commencement of this Declaration but who fall under the circumstances contemplated in the Declaration.

In line with the National Cabinet Decision to agree to the principle that tenants and landlords should be encouraged and incentivised to agree on rent relief or temporary amendments to the lease, the Declaration also provides that lessors and tenants and grantors and occupants are able to vary existing agreements to allow for temporary rent and occupancy fee reductions, effective immediately, and that there is no impediment to rents reverting to their previous rates after the COVID-19 emergency. The Declaration further prohibits landlords from unilateral rent increases for premises of impacted households during the moratorium period.

This Declaration also prohibits tenants from being added to residential tenancy databases due to a breach of residential tenancy agreements for failure to pay rent during the moratorium period, where the tenant is a member of a COVID-19 impacted household.

Restrictions are also introduced on accessing premises under residential tenancy agreements to undertake physical inspections and non-urgent repairs. These measures are included to assist in observing social distancing measures where possible.

The Declaration further provides that a COVID-19 impacted household may terminate a fixed-term tenancy agreement without penalty by providing a landlord with 3 weeks’ notice. Currently, tenants can apply to ACAT to seek early termination of fixed-term tenancies on the basis of severe hardship. This measure will provide an additional support to tenants. To ensure that this measure is not misused by those who are not COVID-19 impacted, safeguards have been included in the relevant provisions so that a tenant is required to provide evidence to their landlord to substantiate their claim.

The explanatory statement then addresses the potential for the instrument to have a retrospective operation:

While the Declaration is not retrospective as to commencement, certain measures in the Declaration have impacts on actions that may have already occurred in accordance with existing requirements under the [Residential Tenancies Act] and residential tenancy agreements (retrospective impact). Specifically, the moratorium to prevent landlords from taking measures to evict COVID-19 impacted households which are in rental arrears will apply even where the household was in rental arrears prior to the commencement of the moratorium period (including where the landlord had previously issued a termination notice, or ACAT had previously made an order in relation to unpaid rent, in respect of the household). This approach is adopted because the effects of COVID-19 may have impacted households’ ability to pay rent prior to the moratorium commencing, and because it is also recognised that COVID-19 impacted households may be in a particularly vulnerable situation if forced to seek new rental accommodation while the pandemic is ongoing.

The Committee notes that a similar discussion appeared in the explanatory statement for DI2020-46.

The Committee notes that the explanatory statement goes on to discuss, in detail, potential human rights implications of the instrument, by reference to the right to protection of the family and children and the right to privacy and reputation, set out in sections 11 and 12 of the *Human Rights Act 2004*, respectively. Again, the Committee notes that a similar discussion appeared in the explanatory statement of DI2020-46.

**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.**

### Subordinate Law—Comment

The Committee has examined the following subordinate law and offers these comments on it:

Disapplication of subsection 47(6) of the Legislation Act 2001 / Limitation of appeal rights / Human rights issues

**Subordinate Law SL2020-28 being the Planning and Development Amendment Regulation 2020 (No 1), including a regulatory impact statement, made under the** *Planning and Development Act 2007***, makes changes to development exemptions in relation to electric vehicle charging points and developments on school sites, and corrects an error for minor public works undertaken by, or on behalf of, the Territory in reserves.**

This subordinate law makes various amendments to Schedule 1 of the *Planning and Development Regulation 2008*. Schedule 1 deals with exemptions from the development approval process. The explanatory statement for this subordinate law states:

The amendment regulation proposes changes to development exemptions involving electric vehicle charging points, developments on school sites and correcting an error for minor public works when undertaken by, or on behalf of the Territory in reserves.

In addition to the amendments to Schedule 1 of the Planning and Development Regulation, section 4 of this subordinate law inserts a new section 400 into the Planning and Development Regulation, disapplying subsection 47(6) of the *Legislation Act 2001*, in relation to the *All Groups Consumer Price Index*. The Committee notes that the effect of subsection 47(6) of the Legislation Act is to make any (external to ACT law) instrument applied “as in force from time to time”, and any amendments or revisions of such (external) instruments, “notifiable instruments”, as defined by section 10 of the Legislation Act. This, in turn, means that they must be published on the ACT Legislation Register. The disapplication of this requirement means that (in this case) neither the relevant award nor any amendments to it must be published on the ACT Legislation Register. The Committee notes that, in this particular case, the disapplication of subsection 47(6) applies, generally, to the Planning and Development Regulation, not just to the amendments made by this subordinate law.

By way of explanation for the amendment made by section 4, the explanatory statement for this subordinate law states:

This clause substitutes section 400 of the Regulation. This clause is purely administrative and reflects a change to drafting practice about how the disapplication of s 47(6) of the Legislation Act is referred to in the Regulation.

Previous drafting practice listed each Australian Standard or Australian/New Zealand Standard separately in s 400 of the Regulation. The amendment in clause 4 removes references to each individual standard and relies upon s 426(4) of the *Planning and Development Act 2007* which disapplies s 47(6) of the Legislation Act.

The reference to the *All Groups Consumer Price Index* remains as it is not a Standard captured by s 426(4) of the Planning and Development Act.

The Committee notes that the amendment to the *Planning and Development Act 2007* that disapplied subsection 47(6) of the Legislation Act in relation to Australian Standards and Australian/New Zealand Standards was originally made by section 49 of the *Planning and Development Legislation Amendment Act 2008*.

Turning to the additional exemptions from the development approval process, the Committee notes that the effect of providing for additional exemptions has the effect of taking away the capacity of individuals to make representations about relevant proposals, as part of the development approval process. It can also have the effect of denying such persons a right of review, in the ACT Civil and Administrative Tribunal. The latter point brings into play principle (1)(c) of the Committee’s terms of reference, which requires the consider whether a subordinate law such as this “makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions”. This issue is addressed (in part) in the explanatory statement for this subordinate law, under the heading “Consistency with human rights”:

**Rights engaged**

The amending regulation potentially engages the right of taking part in public life, in particular the right and/or opportunity to take part in the conduct of public affairs, being the development application and approval process. The right is defined in Section 17(a) of the *Human Rights Act 2004:*

Every citizen has the right, and is to have the opportunity, to—

1. take part in the conduct of public affairs, directly or through freely chosen representatives.

Two pages of detailed discussion follow, justifying the limitation of the right in question, by reference to section 28 of the *Human Rights Act 2004*.

This issue is also discussed in the regulatory impact statement for this subordinate law, under the heading “Consistency of the proposed law with Scrutiny of Bills Committee principles”. The detailed discussion includes the following:

……….

(b) As discussed above, the amending regulation will result in the exemption of a small number of additional developments. Therefore, the proposals in the amending regulation will not be subject to public notification, and the possibility of third-party review in the ACAT.

However, as the amending regulation is specific, not general in its application, only a limited amount of additional development types will be exempt. Additionally, without this amendment regulation, a development application submitted for these types of development would be very likely to receive development approval based on the minimal potential impacts. It should also be noted that these are minor increases to existing categories of exemptions for these development types.

On this basis, the amendment regulation is not considered to unduly trespass on the statutory rights to comment on a DA and seek merits review, as the minor increases are reasonable and justified.

(c) The proposed amending regulation does not make rights, liberties and/or obligations unduly dependent upon non reviewable decisions. The amending regulation will exempt some developments from requiring approval, thereby removing the ability of the public to comment and potential third-party appeal rights. However, this decision is made in the context that these developments are unlikely to affect the general public or adjoining lessees, therefore there is no planning or development rationale to require development approval.

………..

There is also a further, very brief, discussion of the potential human rights issues.

**The Committee draws the attention of the Legislative Assembly to the discussion in the explanatory statement and the regulatory impact statement for this subordinate law of issues relevant to principle (1)(c) of the Committee’s terms of reference.**

**The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the** **explanatory statement and the regulatory impact statement for this subordinate law.**

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

### Regulatory impact statement—No Comment

The Committee has examined a regulatory impact statement for the following subordinate law and offers no comments on it:

**Subordinate Law SL2020-28 being the Planning and Development Amendment Regulation 2020 (No 1).**

## Responses

### Government responses

The Committee has received responses from:

* The Attorney-General, dated 10 July 2020, in relation to comments made in Scrutiny Report 42 concerning the Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020.

[**This response**](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills)***[[8]](#footnote-8)* can be viewed online.**

* The Attorney-General, dated 30 July 2020, in relation to comments made in Scrutiny Report 45 concerning Disallowable Instruments:
  + DI2020-109—Electronic Conveyancing National Law (ACT) Participation Rules 2020; and
  + DI2020-110—Electronic Conveyancing National Law (ACT) Operating Requirements 2020,
* The Attorney-General, dated 3 August 2020, in relation to comments made in Scrutiny Report 44 concerning Disallowable Instruments:
* DI2020-98 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 1);
* DI2020-99 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 2);
* DI2020-100 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 3); and
* DI2020-108 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 10).

[**These responses**](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation)***[[9]](#footnote-9)* can be viewed online.**

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

### Government response—Comment

**Royal Commission Criminal Justice Legislation Amendment Bill 2020**

On 23 July 2020, the Committee received a response from the Attorney-General on the Committee’s comments in relation to the Royal Commission Criminal Justice Legislation Amendment Bill 2020. The Committee thanks the Attorney-General for the timely response, noting that response was received prior to the Bill being debated (and passed) by the Assembly on that same day and only two days after the Committee’s report was provided.

In its Report 46, the Committee expressed concerns about the retrospective operation of the Bill, and in particular the maximum penalties potentially applicable where the offence occurred partly or wholly before 2 March 2018. Under the Bill, where the offender was in a relationship with a child that involved more than one sexual act, and that relationship commenced after 24 December 1991 (the date the original version of the offence commenced) and ended before 2 March 2018 (the date the amended version of the offence commenced) then the maximum penalty would be either imprisonment for seven, 14 or 25 years depending on whether the offender was also convicted of another relevant offence and the punishment applicable to that offence. The Committee’s concern was that these maximum’s had little relationship with the penalties that could have otherwise been applicable at the time to the conduct in question.

Subsection 25(1) of the *Human Rights Act 2004* HRA provides that no-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when the conduct was engaged in. The 1991 version of the offence required the commission of three criminal acts. However, each of the sexual acts themselves constituted offences. Accepting that the commission of three sexual acts would also involve being in a relationship with the Child, a person guilty of the 2018 version of the offence, even as amended as proposed by the Bill, would have engaged in conduct that was itself a, albeit different, criminal offence.

Subsection 25(2) of the HRA 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. In the Committee’s view, this prevents penalties that are higher than those applicable to offences which would have been committed at the time of the conduct in question. For the Bill, this suggests that the penalty should be related to that available for the individual sexual offences committed as part of the relationship. The penalty, in 1991 for example, for being in a relationship with a child which involved the commission of two sexual acts in general would be less than the penalty for a breach of the 1991 version of the offence. By basing the penalties on those applicable to the 1991 version of the offence, the Bill may therefore be considered to be in breach of the protection in subsection 25(2) of the HRA.

The Committee also raised a concern over the penalties applicable where the relationship in question was wholly before 24 December 1991. In that case, the Bill provides the penalty could be based on the highest maximum penalty for the offences constituted by the sexual acts alleged to be involved in the relationship. The Committee commented that, given there was no requirement for all members of the jury to agree on the same sexual acts involved in the relationship, the maximum penalty may be based on sexual acts which were not accepted by the jury.

In response the Attorney-General points to an example indicating that it would be unjust to allow the penalty to be based on the lowest maximum penalty applicable to the alleged sexual acts. However, even if that were accepted, the Committee does not see why basing the maximum penalty for breach of the relationship offence on the second lowest maximum penalty applicable to the individual sexual acts alleged would not be fairer to the accused. The reliance on the court’s discretion, as suggested by the Attorney-General, would continue to expose an accused to the possibility of a higher penalty depending only on the range of offences included in the indictment by the prosecutor.

The Committee remains concerned that the Bill, as now enacted, may limit the right to protection against retrospective criminal laws provided by section 25 of the HRA. However, as the Attorney‑General suggests, the proposed amendments, to the extent they engage and limit the right, may be considered necessary and justified. The Committee therefore requests a further response from the Attorney-General as to why any limitation of the right under section 25 of the HRA should be considered reasonable given the factors set out in section 28 of the HRA.

**The Committee asks the Minister to respond.**

Giulia Jones MLA

Chair

11 August 2020

## Outstanding Responses

### Bills/Subordinate Legislation

* **Report 27, dated 18 February 2019**
* Electoral Amendment Bill 2018 (Government Response).
* **Report 28, dated 12 March 2019**
* Electoral Amendment Bill 2018 (Private Member’s amendments).
* **Report 37, dated 19 November 2019**
* Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
* Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s amendments).
* **Report 38, dated 4 February 2020**
* Electoral Legislation Amendment Bill 2019 (Private Member’s amendments).
* **Report 39, dated 17 February 2020**
* Unit Titles Amendment Bill 2019 (Private Member’s amendments).
* **Report 41, dated 28 April 2020**
* COVID-19 Emergency Response Bill 2020.
* **Report 44, dated 16 June 2020**
* Disallowable Instrument DI2020-93 Veterinary Practice (Fees) Determination 2020 (No 2).
* Residential Tenancies Amendment Bill 2020 (Private Member’s amendments).
* **Report 45, dated 30 June 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.
* **Report 46, dated 21 July 2020**
* Disallowable Instrument DI2020-130 Gambling and Racing Control (Governing Board) Appointment 2020 (No 2).
* Disallowable Instrument DI2020-131 Gambling and Racing Control (Governing Board) Appointment 2020 (No 1).
* Disallowable Instrument DI2020-132 Lotteries (Fees) Determination 2020 (No 1).
* Subordinate Law SL2020-20 Court Procedures Amendment Rules 2020 (No 3) .
* **Report 47, dated 28 July 2020**
* Disallowable Instrument DI2020-145 Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 2).
* Disallowable Instrument DI2020-147 Animal Welfare (Advisory Committee) Establishment 2020 (No 1).
* Disallowable Instrument DI2020-171 Lotteries (Fees) Determination 2020 (No 2).
* Disallowable Instrument DI2020-205 Taxation Administration (Owner Occupier Duty) COVID‑19 Exemption Scheme Determination 2020.

1. Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 13: Schools*, 2017 available at <https://www.childabuseroyalcommission.gov.au/schools>, at pp 59-60. [↑](#footnote-ref-1)
2. *McCloy v New South Wales* [2015] HCA 34 at [30] per French CJ, Kiefel, Bell and Keane JJ. [↑](#footnote-ref-2)
3. Eg. *Unions NSW v New South Wales* [2019] HCA 1 [↑](#footnote-ref-3)
4. See the comment querying this aspect of the NSW legislation in *McCloy v New South Wales* [2015] HCA 34 at [63] per French CJ, Kiefel, Bell and Keane JJ. [↑](#footnote-ref-4)
5. See *Evans v Crichton-Browne* (1981) 147 CLR 169. [↑](#footnote-ref-5)
6. (1995) 64 SASR 238 [↑](#footnote-ref-6)
7. See *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at 176 per Mason J. [↑](#footnote-ref-7)
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. [↑](#footnote-ref-8)
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. [↑](#footnote-ref-9)