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

# Scrutiny Report 37

19 November 2019

##

## 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 comment on them:

#### Building and Construction Legislation Amendment bill 2019

This Bill amends various Acts relating to building and construction and related work in the Territory to improve and refine their operation, including the making of rectification orders and enforceable undertakings and liability of directors and executive officers.

***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 *Building Act 2004* to provide for signs to be erected to protect the public where a stop notice has been issued, and for a register of stop notices to be maintained and made available to the public where the Constructions Occupations Registrar is satisfied on reasonable grounds that publishing the information is appropriate, and necessary or desirable to protect the public. A building inspector will also be able to give written directions to an occupier to not use a building or premises until they are made safe and comply with the Act.

The Bill will also amend the *Construction Occupations (Licensing) Act 2004* to provide for public notification of any decision to cancel a licence, without having to wait for a review of the decision. The Registrar must update the register within a working day of when any cancellation is lifted, overturned or expires, or a direction to remove information is received. The Bill also provides for enforceable undertakings to rectify work done relating to a contravention of the Act in providing construction services. Any orders within the last 10 years by the ACT Civil and Administrative Tribunal (ACAT) or a court in relation to such an undertaking will be included in the public register, along with any other details about the rectification undertaking that the Registrar believes on reasonable grounds is necessary or desirable to protect the public.

These amendments engage the protection of privacy and reputation provided by section 12 of the HRA. The explanatory statement accompanying the Bill provides a detailed discussion of the operation and justification of these amendments and why they should be considered lawful and non-arbitrary 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 a fair trial (section 21 HRA)

##### Right to the presumption of innocence (section 22 HRA)

Section 26B of the Construction Occupations (Licensing) Act currently requires licensees to give notice to the Registrar within 24 hours of certain events, including where a corporate licensee becomes subject to a winding up order or a controller or administrator is appointed. The Bill will extend liability for a failure to give notice to corporate officers. An executive officer of a corporation will be taken to have committed an offence where: the corporation commits an offence against section 26B; the officer was reckless about whether the offence was committed; the officer was in a position to influence the conduct of the corporation; and the officer failed to take reasonable steps to prevent the offence being committed (clause 26).

The Bill will also extend liability of directors of corporations to pay penalties imposed for offences, orders for payments associated with occupational discipline orders made by ACAT, and other debts owing under the Construction Occupations (Licensing) Act and associated operational Acts (clause 56).

These provisions potentially engage the right to a fair trial protected by section 21 of the HRA, and right to be presumed innocent protected by section 22 of the HRA. The explanatory statement accompanying the Bill recognises these potential impacts and sets out a statement justifying any limitations using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

The Bill will also introduce a strict liability offence; a person will commit an offence if, without authorisation of the Registrar, they move, alter, damage deface or prevent access to a sign displayed in relation to a stop notice. The offence will have a maximum penalty of 50 penalty units. The explanatory statement accompanying the Bill recognises that imposition of strict liability may potentially limit the right to the presumption of innocence protected under section 22 of the HRA and sets out a detailed statement for why strict liability is appropriate in this context, both using the framework in section 28 of the HRA and more generally. The Committee refers the Assembly to that statement.

The Committee would also like to commend the Minister on the clear and detailed explanatory statement which sets out the context and operation of the various amendments made by the Bill including a regulatory impact analysis, the nature and justification of penalties and offences to be created, human rights implications, and potential retrospective operation.

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

#### Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019

This Bill amends: the *Construction Occupations (Licensing) Act 2004*, the *Construction Occupations (Licensing) Regulation 2004* and the *Liquor Act 2010* to provide for cancellation of a licence on the basis of a person’s criminal activities, and to provide for an exclusion order scheme to exclude certain people from specified licensed premises; the *Crimes Act 1900* to introduce new tiered offences of serious affray and amend the penalties for offences of fighting and offensive behaviour; and the *Crimes (Sentencing) Act 2005* to Increase maximum penalties for specified offences committed in connection with a criminal group or committed by a person associated with a criminal group.

***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 freedom of association (section 15 HRA)

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

##### Rights in criminal proceedings (section 22 HRA)

###### Effect on sentencing of membership of a criminal group

The Bill will introduce a new Part 4.6 into the Crimes (Sentencing) Act to increase the maximum penalties that can be associated with a list of offences where the offender is connected or associated with a criminal group. These provisions, described more fully below, may limit the right to a fair trial protected by section 21 of the HRA and rights in criminal proceedings, including the right to be informed of a charge prior to trial, protected by section 22 of the HRA. By acting to deter association in criminal groups the provisions will limit the right to freedom of association protected by section 15 of the HRA. The explanatory statement accompanying the Bill includes a discussion of these impacts and their reasonableness using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly and makes the following comments.

A criminal group is broadly defined in the Bill as a group that has an objective of engaging in, or obtaining material benefits from, indictable offences. A group is two or more people, however structured, even where they are based or operate outside of the ACT, the people involved change over time, or only some of them are involved in any particular activity. After a person has pleaded or been found guilty, the Director of Public Prosecutions can apply to the Court for a decision that the offender committed one of the listed offences in connection, or while associated, with a criminal group. An offence is committed in connection with a criminal group where it was committed for the benefit of at least two of the group members, at the direction of one person in the group or to further the group’s objectives. An offender is associated with a criminal group if they have recruited members, engaged in conduct which supported the group, managed or lead the group or otherwise directed its activities, or identified themselves as associated with the group. Where the court finds that an offence is committed in connection with a criminal group, the maximum penalty is increased by 25%, if committed while associated with a criminal group the maximum penalty is increased by 10%.

As the explanatory statement accompanying the Bill states, the objective of these provisions is to deter involvement with criminal groups while preventing the decision of guilt or innocence being impacted by allegations of involvement with organised crime. However, the Committee is concerned that involvement with criminal gangs is not merely “an additional factor to be taken into consideration upon sentencing” as it is described in the explanatory statement in justifying the human rights impact of the provisions. Involvement in criminal activity and association with criminal organisations may already be taken into account in sentencing, at least in considering the risks of committing further offences. The Bill will operate to increase the maximum penalties associated with an offence, including where the offence in question has no relation to the criminal activities or objectives of the group. For any given circumstances, the penalty to be applied may therefore be increased without a correlative increase in culpability of the offender. Regardless of the nature of the criminal activity of the group, connection or association with a criminal group will increase the penalty associated with the offence. Involvement in criminal groups may therefore have a disproportionate effect on the rights of the offender through reducing the sentencing discretion of the court.

Being informed of a charge prior to trial, under the right to be informed protected by section 22 of the HRA, would generally not include which elements of offences will be relied on or established by the prosecution. As, under the Bill, involvement with criminal gangs will only go to sentencing and not the offences in question, details of any charges would therefore not be expected to include evidence to be relied upon in establishing membership of a criminal group. However, decisions on how to plead or run the case may be affected, at least in part, by the possible penalties applicable. A fair trial and understanding of the charges faced by the accused would generally include notice of their possible consequences. It is not clear to the Committee why notice cannot be provided, at least only to the accused, at the time of being charged or as early as possible, of the possibility of an increased penalty being sought in the event that the accused is found or pleads guilty to the offence along with the nature of the circumstances which will be relied upon in any such application.

The Committee therefore requests that further justification be provided for the reasonableness of the impact of these provisions on the rights to a fair trial and rights in criminal proceedings, including why it is necessary to not provide earlier notice of a possible application for an increased penalty to the accused.

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

*Criminal intelligence*

The Bill includes various provisions relating to the withholding of criminal intelligence. Criminal intelligence is variously defined as information relating to actual or suspected criminal activity which, if disclosed, would prejudice a criminal investigation, enable the existence or identity of a confidential source of information to be discovered, or endanger life or physical safety. The Bill will allow an application to protect criminal intelligence to be made in a decision to cancel a construction occupational licence, an application for sentencing to be on the basis of membership of a criminal group, and various decisions under the Liquor Act including cancellation of a liquor licence for criminal activity. If accepted by the court or ACAT as criminal intelligence the information can be considered but not disclosed to the accused or licence holder. If not accepted as criminal intelligence, then the police or prosecution must be given an opportunity to withdraw the information before it is disclosed. In the context of sentencing decisions, any application to decide whether information is criminal intelligence must be heard in a closed court.

By withholding information that might be relevant to the decision or proceedings from the accused or person affected, the Bill will further limit the right to a fair trial protected by section 21 of the HRA. This impact is not identified and justified as reasonable in the explanatory statement accompanying the Bill. The Committee asks that the explanatory statement be amended to include such a justification.

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

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

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

*Cancellation of occupational licences*

The Bill will provide for licenses issued under the Construction Occupations (Licensing) Act and licenses or permits issued under the Liquor Act to be cancelled where continuing to hold them presents an unacceptable risk to community safety because of the criminal activity of a person involved. Once a licence or permit has been cancelled, it is an offence for the person whose criminal activity was at least part of the basis of the cancellation order to be involved in the business. Allowing a person whose criminal activity was at least part of the basis of a cancellation order to participate in the business before that business’s licence or permit was cancelled may also be the basis of occupational discipline under the Liquor Act.

Drawing a distinction in being subject to cancellation or occupational discipline on the basis of criminal activity may limit the right to equality before the law protected by section 8 of the HRA. This possible limitation is recognised in the explanatory statement accompanying the Bill along with a justification for why any limitation should be considered reasonable using the framework provided in section 28 of the HRA. The Committee refers that statement to the Assembly subject to the following comments.

A decision to cancel a licence or permit may be made public. The Bill will insert new paragraphs in section 107A to include information relating to cancellation decisions on the public register. The provisions relating to occupational licences may therefore limit the protection of privacy and reputation provided by section 12 of the HRA. The human rights statement included in the explanatory statement accompanying the Bill does not include the possible impact of these provisions when discussing the right to privacy and reputation. The Committee therefore requests that the explanatory statement be amended to include a justification for any limitation.

Under the provisions, ACAT may cancel a licence or permit only where a person involved with the licence or permit has engaged in criminal activity, and because of that activity continuing to hold the licence presents an unacceptable risk to community safety. In making such a decision ACAT may consider factors including minimising the possibility of criminal activity in the relevant industry, whether the licensee has been convicted of a relevant offence (which include offences punishable for five years or more, or involving fraud or dishonesty), and non-conviction information about the licensee. Non conviction information includes having only been charged with or been acquitted of a relevant offence, or having a conviction set aside. By allowing cancellation of a licence in addition to a penalty already imposed for a past offence, or in circumstances where there were allegations made but not conviction, the Bill potentially limits the right not to be tried or punished more than once protected by section 24 of the HRA.

The Committee recognises, however, that the intention of these provisions is to prevent a risk to public safety rather than impose an additional punishment for the commission of a criminal offence. The Committee recommends, however, that consideration be given to amending the explanatory statement to include discussion of section 24 of the HRA to make it clear that past offences or non-conviction information is not itself sufficient to justify cancellation of the licence or permit, and that cancellation decisions can only be made where the past conduct suggests that the licence or permit may enable future conduct which poses a risk to community safety.

The Bill provides for a cancellation order to be revoked where ACAT is satisfied that, as a result in a change in circumstances, the licensee is no longer engaged in criminal activity. It is not clear whether the reference to change in circumstances includes circumstances that were present at the time of the decision to cancel the licence or permit but which was not considered by ACAT, or whether a change in circumstances, including the further passage of time, can be taken into account where the holder of the licence or permit was not engaged in criminal activity at the time of the cancellation decision. The Committee also notes that proposed section 187L, which makes it an offence for a person whose criminal activity was at least part of the basis of a cancellation order to continue to be involved in the business, operates on the basis of there having been a cancellation order made and may potentially continue to apply even where the cancellation order has been revoked. Clauses 18 to 21, which will make it a ground for occupational discipline to have allowed a person whose criminal activity was at least part of the basis of a cancellation order be involved in the business, also seem to operate on this basis. The Committee recommends that the application of the revocation powers in these circumstances should be made clear.

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

**The Committee notes that it has received proposed amendments to this Bill. These are discussed later in this report and may be relevant to any response from the Minister.**

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

*Exclusion orders*

The Bill will insert a new division into the Liquor Act allowing a magistrate to make orders prohibiting a person from entering or remaining on various licensed premises, for a stated period up to 12 months. The orders are available where, in the previous year, the person was engaged with others in violent conduct on or in the immediate vicinity of any licensed premises, and making the order will reduce the risk to public safety (see proposed section 143F). The exclusion will apply to all premises with a general, on (other than restaurant or café), club or special licence unless a particular licensed premises is specifically excluded.

By excluding entry to licensed premises the Bill will limit the right to freedom of movement protected by section 13 of the HRA. The explanatory statement 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. The Committee refers that statement to the Assembly subject to the following comments.

The Bill potentially allows even a small risk to public safety to justify the making of an exclusion order. It is also not necessary for the risk to be connected with the person’s past violent conduct. It is, therefore, not clear to the Committee that the limit on freedom of movement is a reasonable one. Consideration could be given to limiting the circumstances where an exclusion order can be made in similar terms to that used in relation to cancelling occupational licenses, namely to where, because of the past conduct of the person, there is an unacceptable risk to public safety. The Committee also recognises that, under the Human Rights Act, the Magistrate when issuing an exclusion order must act consistently with the right to freedom of movement. However, it could be made clear in the Act that the Magistrate must consider the circumstances of the violent conduct, and the nature of the risk to the community that past conduct suggests, in making an exclusion order.

Proposed section 143L allows a magistrate to amend an exclusion order so that it does not apply to a particular licensed premises. The amendment is only permitted where there has been a change in circumstances which means the person has a legitimate and genuine need to be on particular premises and allowing the person to be on the premises would not pose a risk to public safety. Similarly, an exclusion order can be revoked altogether if there has been a change in circumstances that means being on licenced premises would no longer pose a risk to public safety. As discussed above in relation to occupational licence cancellations, it is not clear to the Committee that change in circumstances in this context includes circumstances that existed at the time of the making of the original order but were not considered by the magistrate. It is also not clear whether a reduction but not elimination of the risk to public safety could justify amendment or revocation. There is also no justification provided in the explanatory statement accompanying the Bill for limiting the number of times a person can apply to have the exclusion order amended or revoked. The Committee asks that the operation of the proposed section 143L be clarified and that further justification for its operation be included in the explanatory statement.

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

#### Crimes (Offences Against Frontline Community Service Providers) Amendment Bill 2019

This Private Member’s Bill amends the *Crimes Act 1900* to add offences relating to frontline community service providers including police and corrections officers, health practitioners as hospitals and correction centres, or an emergency service member, and to make various offences, when committed against a frontline community service provider, aggravated offences.

***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)

##### Rights in criminal proceedings (section 22 HRA)

This Bill introduces offences against frontline community service providers, namely assault, using a motor vehicle to endanger, or using a motor vehicle to damage their vehicle. The Bill will also add to the category of aggravated offences, which currently apply to offences against pregnant women, to include offences against frontline community service providers. The possibility of aggravation and the accompanied increased penalties will also apply to a wider range of offences. By drawing a distinction in the operation of offences under the Crimes Act on the basis of membership of particular professions the Bill will potentially limit the right to equality before the law protected by section 8 of the HRA.

The Bill will also provide a defence for the new offence of assault of a frontline community service provider and the new aggravated offences if the defendant did not know, and could not reasonably have known, that the person was a frontline community service provider. It is not necessary for the prosecution to prove that the defendant had a fault element in relation to any factor of aggravation and chapter 2 of the Criminal Code (other than expressly or implied applied provisions) does not apply to the offences which could be aggravated offences. By affecting the relative burdens imposed on the defendant the Bill will limit rights in criminal proceedings, particularly the presumption of innocence, protected by section 22 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limits and provides a justification for their reasonableness using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

#### Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019

This Bill amends the *Crimes Act 1900* to create new offences relating to safety and protection of police officers, firefighters and paramedics.

***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 the presumption of innocence (section 22 HRA)

The Bill will create three new offences: assault of an emergency worker; driving a motor vehicle at police; and damaging a police vehicle. By providing protection to a particular group in the community the Bill will potentially limit the right to equality before the law protected by section 8 of the HRA.

The Bill may also limit the right to the presumption of innocence protected by section 22 of the HRA by including elements of strict liability and presumption in the new offences.

An assault on an emergency worker is committed when the assault takes places while the emergency worker is exercising a function given to them as an emergency worker, or the assault is because of, or in retaliation for, action taken by the emergency worker in exercising such a function. Similarly, driving a motor vehicle at police is an offence where the police officer is exercising a function given to them as a police officer. Strict liability applies to these requirements of exercising official functions.

It is presumed in these new offences that the defendant knew that the person was an emergency worker if they had identified themselves as an emergency worker or it was reasonably apparent that they were an emergency worker in all the circumstances. It is also presumed that a person knows or is reckless about whether the police officer is a police officer where they identified themselves as a police officer, they are in a marked police vehicle, it is reasonably apparent the vehicle is being used as a police vehicle (such as having a siren on), or it was reasonably apparent the person was a police officer in the circumstances. It is also presumed in the offence of damaging a police officer that the defendant knew that the damaged vehicle was a police vehicle if it was marked or that fact was reasonably apparent in the circumstances.

Strict liability removes the requirement for the prosecution to establish a mental fault element. The statutory presumptions provide sufficient proof of an element of an offence, shifting the burden to the defence to displace the presumption. The explanatory statement accompanying the Bill recognises that both strict liability and statutory presumptions therefore limit the right to the presumption of innocence protected by section 22 of the HRA, and a justification for the reasonableness of these limits is provided using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement, noting that strict liability is only being applied where the defendant’s knowledge of a police officer’s particular functions is not relevant to their culpability, and that the presumptions apply only to shift the burden to the defendant where the element is reasonably established and any contrary indication is within the knowledge of the defendant.

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

#### Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019

This Private Member’s Bill will amend the *Domestic Animals Act 2000* to require a register be kept of people disqualified from keeping animals and allow access to that register, allow complaints that a person is keeping an animal in contravention of a disqualification order, and allow the Registrar to sell or otherwise dispose of the animal so kept.

***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 section 138A of the Domestic Animals Act, where a person is convicted, or found guilty, of various animal welfare offences, the court may disqualify the person from keeping an animal for a period decided by the court. A person may be disqualified from keeping a particular animal, a particular kind of animal or any animal. The Court must provide particulars of the disqualification to the Registrar. The Bill will require the Registrar to keep a register of people who have been disqualified and the particulars provided by the Court. Anybody will be able to request access to information on the register, either by asking about a named person or anyone living at a stated address. The Registrar, unless they are satisfied the request is frivolous or vexatious, must respond to the request by providing any particulars of the disqualification included on the register. However, the Registrar does not have to provide personal information of the disqualified person, such as the disqualified person’s name, address, date of birth, and any other similar information that might be used to identify or contact the person.

The Bill requires that personal details of a person and particulars of the disqualification order are maintained on a register. While personal details are not provided in response to a request, the request relates to either a named person or specified address. The person making the request is therefore able to associate any information given with a particular person or household. The information provided will therefore be private or affect the reputation of that person or household, potentially limiting the protection of privacy and reputation provided by section 12 of the HRA.

The explanatory statement accompanying the Bill does not identify any potential limits on human rights. The Committee therefore requests that an amended explanatory statement be prepared recognising the Bill’s potential limit on the protection of privacy and reputation and why any limit should be considered reasonable using the framework set out in section 28 of the HRA.

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

#### Heritage Amendment Bill 2019

This Bill will amend the *Heritage Act 2004* to increase the measures that can be taken to repair damage to heritage places.

 ***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 Bill will allow the Heritage Council to issue a repair damage direction to repair damage to a place or object that has heritage significance or Aboriginal place or object. The direction can be issued to the owner or occupier of the place, owner or custodian of the object, or a person whose work affects a heritage place or object. It is an offence for a person subject to a repair damage direction to fail to comply within the time stated in the direction or as extended, unless the person has a reasonable excuse for failing to comply. Where there has been a failure to comply with a repair damage direction, an authorised person, with necessary assistance, may enter premises to carry out the repairs on the direction, with the reasonable costs of repair being a debt owing to the Territory.

As the requirement to carry out repairs and hence be subject to the new offence, and the obligation to pay the costs of any repairs carried out by the Territory, may have a disproportionate impact on members of the community without the financial resources to carry out the repairs, these provisions may limit the right to equality before the law protected by section 8 of the HRA.

The potential of the Bill to limit the right to equality is recognised in the explanatory statement accompanying the Bill. However, rather than set out why any such limit may be considered reasonable using the framework set out in section 28 of the HRA, the explanatory statement suggests that the right to equality is not limited due to several alleviating features. These features include the possibility of revoking the issue of a repair damage direction, extending the time period in which it must be complied with, or waiving or deferring the time for payment of a debt due to the Territory. In the Committee’s view, these features do not prevent the Bill acting to limit the right to equality but rather go to justify those limits as reasonable. The Committee requests that the Minister consider amending the explanatory statement to provide that justification using the framework set out in section 28 of the HRA.

The Committee also notes that each of the alleviating features referred to in the explanatory statement do not expressly include consideration of financial or other hardship as a factor to be considered. It may therefore not be clear that a person in such circumstances would seek revocation or an extension. The Committee requests that the Minister consider including reference to revoking a repair damage direction as a possible response to an application under proposed section 67B to extend the time to repair and to include financial or other hardship as a factor that can be considered. That would require the Council to consider the possibility of revoking the direction where an application is made.

The authority for an authorised person, with necessary assistance of one or more other skilled persons, to enter premises to carry out repairs may limit the protection of privacy and reputation provided by section 12 of the HRA. Section 12 provides the right not to have privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The requirements of lawful and non‑arbitrary interference generally correspond to requirements of reasonableness which, as the Committee has noted in the past, can be demonstrated through adoption of the framework set out in section 28 of the HRA. The explanatory statement accompanying the Bill recognises the potential for authorised entry and repair to interfere with a person’s privacy and home but suggests that the right under section 12 is not limited. As the explanatory statement sets out, entry to premises is only authorised between 8 am and 6 pm, or at any reasonable time with the occupier’s consent. Entry is only permitted to carry out the task set out in the repair damage direction and until the task is complete, and at least seven days’ notice must be given. In the Committee’s view these elements of the Bill can be used as part of a justification of the reasonableness of the interference with a person’s privacy and home and should be set out in the explanatory statement on that basis.

The Committee also notes that the Bill will extend the powers to enter premises to include giving a repair damage direction (clause 12), and that any repair damage direction must be included in the public heritage register (clause 5) which may also limit privacy and reputation rights. The Committee recommends that any amendment to the Human Rights section of the explanatory statement include reference to these aspects of the Bill.

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

#### Legislative Assembly (Office of the Legislative Assembly) Amendment Bill 2019

This Bill will amend the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* and the *Electoral Act 1992* to provide for establishing a communication allowance for members of the Assembly.

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

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

##### Right to take part in public life (section 17 HRA)

The Bill, after passage of a continuing resolution of the Assembly entitling members of the Legislative Assembly to a communication allowance, will require the Clerk of the Legislative Assembly to pay the allowance, with the amount to be determined by the continuing resolution. The allowance can only be used for routine communication with the member’s constituents and equipment for that communication. Routine communication is not exhaustively defined in the Bill, but the Bill provides that routine communication does not include various acts including soliciting a vote for the member, fundraising, how to vote instructions, or supporting commercial purposes. Routine communication also does not include material referring to the performance of current or former members, political parties, or candidates other than the member’s own performance as a member, policy position, their political party’s performance, or performance of a member of that party. The continuing resolution can also exclude other uses of the allowance.

Part 14 of the Electoral Act includes caps and reporting requirements on electoral expenditure. Electoral expenditure is broadly defined to generally include expenditure on producing and communicating electoral material that is intended or likely to affect voting at an election.[[1]](#footnote-1) The Bill will amend the Electoral Act to exclude expenditure using the communication allowance from electoral expenditure for the purpose of Part 14.

In the Committee’s view, the effect of the Bill will be to increase the funds available to current members of the Assembly to spend on what would otherwise be electoral matters. While the definition of routine communication rules out using the communications allowance for some forms of electoral expenditure, including material comparing or critical of the performance of other potential candidates, it does not limit members to informing constituents of matters of relevance to them or otherwise matters necessarily connected to their role as members or ministers. The explanatory statement accompanying the Bill refers to the intent of excluding use of the allowance from the definition of electoral expenditure is for the allowance to be in addition to the electoral expenditure cap. It is also not clear to the Committee how the restrictions on routine expenditure will be monitored and enforced, and whether use of the allowance on non-routine matters will still not be included in electoral expenditure for the purposes of the Electoral Act.

As the Bill therefore confers an advantage on current members, and may advantage them or other members of their party if they seek re-election, the Bill may limit the right to equality protected by section 8 of the HRA, and the right to take part in public life, including the right to be elected at periodic elections, protected by section 17 of the HRA.

The explanatory statement accompanying the Bill states that the Bill will support the right to freedom of expression protected by section 13 of the HRA as well as the right to take part in public life. It does not suggest any limitations on human rights. The Committee asks that the Minister to consider amending the explanatory statement to set out a justification for the reasonableness of any limit on human rights as set out above.

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

#### Long Service Leave (Portable Schemes) Amendment Bill 2019

This Bill will amend the *Long Service Leave (Portable Schemes) Act 2009* to increase inspector powers, make interest payable on unpaid levies, enable the Long Service Leave Authority to recover unpaid levies from directors of companies after establishment of phoenix companies, and provide increased clarity for employers on the operation of the scheme.

***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 a fair trial (section 21 HRA)

##### Rights in criminal proceedings (section 22 HRA)

*Inspector’s powers to request documents*

The *Long Service Leave (Portable Schemes) Act 2009* provides forlong service leave for workers in four covered industries in the ACT: building and construction, contract cleaning, security and community services. Inspectors have powers to enter workplaces of covered workers and other premises to inspect documents and records. The Bill will extend these powers to include being able to require covered employers, contractors and working directors, financial institutions and accountants to provide information, documents or anything else that they have access to and are reasonably required by the inspector under the Act. A person must take reasonable steps to comply with a requirement, subject to a penalty of 50 penalty units.

This power to require documents 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 for its reasonableness using the framework provided in section 28 of the HRA. The Assembly refers that statement to the Assembly, subject to the following comment.

The Bill will extend the powers of inspectors who enter premises to require anyone at the premises to answer questions or give information. The Bill will also abrogate the privilege against self-incrimination by requiring a person to answer a question or provide information or a document even where it may tend to incriminate the person or expose them to a penalty. These amendments will further limit the protection of privacy and reputation, limit the right to a fair trial in section 21 of the HRA and rights in criminal proceedings in section 22 of the HRA including the right not to be compelled to testify against yourself or to confess guilt.

The Committee recognises that under the amendments information, documents or things obtained through the inspection powers are not admissible in evidence in a civil or criminal proceeding other than for an offence arising out of their false or misleading nature. A warning must also be given about the nature of the requirement to provide information or answer questions, including the effect of the abrogation of the privilege. However, even a limited abrogation of the privilege should be recognised in the explanatory statement accompanying the Bill and a justification provided using the framework set out in section 28 of the HRA.

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

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

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

##### Rights in criminal proceedings (section 22 HRA)

*Liability of company directors to pay levy*

The Act provides for a levy to be paid by employers for covered workers to cover future long service entitlements. The Bill will insert a new Part 5A to enable levies to be collected from directors of companies that failed to pay the levy and who then became a director in a new phoenix company. The ability to recover arises where: the original company which failed to pay the levy (referred to as the defunct company) disposed of property that had the effect of preventing or hindering creditors from the benefit of the property in the winding-up of the company (referred to as a creditor-defeating disposition); that company then ceases to trade; and another company is formed that is an employer in the same covered industry and conducts substantially the same business (referred to as the phoenix company). The Authority can recover, as a debt, unpaid levies, interest and any costs incurred in the recovery against any director who was a director of the defunct company when the property was disposed of and is also a director of the new phoenix company.

As the liability to repay the debt automatically arises without notice to the director (and may only be contested in proceedings related to recovery of the debt), and the director is liable regardless of their culpability in failing to pay the levy or seeking to avoid payment, the liability may potentially limit the right to a fair trial protected by section 21 of the HRA and rights in criminal proceedings, particularly the presumption of innocence, protected in section 22 of the HRA. The explanatory statement recognises these potential limits and provides a justification for their reasonableness using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, subject to the following comments.

It is not clear to the Committee what the connection is between making a creditor-defeating disposition and being liable to repay the unpaid levy. The explanatory statement refers to the process of “rebirthing” an enterprise by stripping an insolvent company of any remaining assets and transferring them to a new entity which is essentially the same business. However, the Bill does not expressly limit creditor-defeating dispositions to dispositions while the company was insolvent or which resulted in insolvency. Any disposition of property during the life of the company may have the effect of preventing it being available to the creditors in the winding up of the company. This aspect of these provisions should be made clearer.

Recovery of unpaid levies is only possible against directors of both the company at the time of the creditor-defeating disposition and the phoenix company. The director may not have been involved with the defunct company at the time the levy was unpaid, and there is no necessary connection between the disposition of the property and the inability to pay the levy or recover unpaid levies during the winding up process. The Bill therefore may limit the right to equality before the law protected by section 8 of the HRA. The Committee therefore requests further information on the intended operation of proposed Part 5A and consideration given to amending the explanatory statement to include a justification for the differential treatment of directors of defunct companies.

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

#### Revenue Legislation Amendment Bill 2019 (No 2)

This Bill amends various taxation laws to extend the period of the unfit for occupation exemption and make other amendments to clarify and simplify administration and operation.

***Do any provisions of the Bill (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?—Committee terms of reference paragraph (3)(c)***

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

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

Under section 23(5) of the *Land Rent Act 2008*, unpaid land rent and any interest payable is a debt owing to the Territory. Under subsection 23(5), the Commissioner may remit or refund all or part of an amount of interest paid or payable by the lessee. The Bill will amend section 33 of the Land Rent Act to allow an objection, a form of internal review by the Commissioner, to any decision to refuse to remit interest paid or payable by a lessee. However, unlike other objections allowed under the Land Rent Act, determinations of an objection to a decision to refuse to remit interest paid or payable will not be reviewable by the ACT Civil and Administrative Tribunal. By denying an avenue of review, the Bill may potentially limit the right to a fair trial protected by section 21 of the HRA, and otherwise come within the Committees terms of reference by making rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

The explanatory statement accompanying the Bill recognises this potential limit and provides for a justification for its reasonableness using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement. While the Committee does not consider consistency with other taxation Acts, which also do not allow for ACAT review of decisions not to remit interest, to be a justification in itself, the availability of internal review and the role of decisions relating to collection of interest to the general integrity of the taxation system remain factors demonstrating the reasonableness of any limitation.

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

### Proposed amendments

#### Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019

In a letter to the Committee received on the 11 November 2019, the acting Attorney-General presented proposed amendments to the Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019. These amendments include changing the need to minimise the possibility of criminal activity in the construction industry from a possible consideration to a consideration that must be taken into account in making a cancellation order for criminal activity under the *Construction Occupations (Licensing) Act 2004* and *Liquor Act 2004*; and making it clear that offences or occupational discipline relating to allowing a person whose criminal activity was part of the basis for a cancellation order only apply while the cancellation order is in place. The Committee notes that comments on the Bill above in this report include reference to aspects of the Bill amended by these proposed amendments. The Committee’s earlier comments on the uncertain application of proposed section 187L and clauses 18 to 21 of the Bill will be addressed by these proposed amendments. Otherwise, the comments of the Committee on the Bill remain appropriate.

The Committee has no further comments.

#### Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019

In a letter to the Secretary of the Committee dated 11 November 2019, Mrs Giulia Jones MLA has proposed amendments to the Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019. These amendments replace references to emergency workers and police in the Bill with reference to a frontline community service provider, and define that term to mean a police officer, corrections officer, health practitioner providing health services at a hospital or correctional centre, or a member of an emergency service. The Bill’s use of presumptions that the offender knew the person was an emergency worker or policeman is replaced by a defence if the defendant did not know and could not reasonably have known that the person was a frontline community service provider. No further human rights issues are identified in the letter accompanying the amendments.

The Committee has no comments on the proposed amendments.

#### Education Amendment Bill 2017

##### *Proposed amendment to be moved by Ms Lee MLA*

In a letter to the Committee dated 31 October 2019, Ms Elizabeth Lee MLA has proposed an amendment to the Government’s proposed amendments to the *Education Amendment Bill 2017*. The Government’s proposed amendments were considered by the Committee in its report number 35, dated 23 September 2019. Ms Lee’s proposed amendments provide that it is a reasonable excuse not to comply with certain requirements relating to compulsory education where the Director-General is still considering an application for registration for home education. The amendment will also create a default position of accepting an application for home education if not responded to within 28 days.

The Committee has no comments on Ms Lee’s proposed amendment.

##### *Proposed government amendments*

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

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

In a letter to the Committee received on 12 November 2019, the Minister for Education and Early Childhood Development has proposed revised amendments to the *Education Amendment Bill 2017*. In its *Report 35*, the Committee considered an earlier version of these proposed amendments. The Committee made various comments relating to the privacy implications of having to provide personal details as part of assessing the suitability of the child’s home base in registering for home education, and having to identify the gender of the child. These revised amendments remove the requirements for documentation and assessment at the application stage. The revised explanatory statement accompanying the proposed amendments also makes it clear that an option of not disclosing the child’s gender will be available on the registration forms. These revisions to the proposed amendments address the concerns raised by the Committee.

As set out in the revised explanatory statement accompanying the proposed amendments, the Bill, as amended, will still require home education progress reports to be provided once a year as a condition of registration, as well as parents making a statement as to the suitability of the child’s home base. The proposed amendments include amendments to the *Education Regulation 2005* to provide for information which must be included in a registration application and progress reports, set out details of the conditions of registration including information to be provided when meeting with an authorised person to discuss the home education of the child, and details included on the home education register. The potential for these requirements to limit the protection of privacy and the home provided by section 12 of the HRA is recognised in the revised explanatory statement, and a justification for their reasonableness is provided using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, and has no further comment.

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

#### Planning and Development (Controlled Activities) Amendment Bill 2019

In a letter received by the Committee on 12 November 2019, Mr Alistair Coe MLA has proposed further amendments to the Planning and Development (Controlled Activities) Amendment Bill 2019. In its *Report 36*, the Committee commented on initial proposed amendments to the Bill relating to the power under the *Planning and Development Act 2007*, of the Planning and Land Authority, to authorise a person to enter private property and carry out rectification work. The proposed amendments required an authorisation person to carry out rectification work where there had been a failure to keep a household clean and, if the Authority considered the rectification may cause distress to the occupier, may require the accompaniment of a support person for the occupier. In its comment on this proposed amendment, the Committee was concerned that there was no basis on which the appropriateness of the support person could be determined by the Authority, such as obtaining consent or consulting with the occupier. The committee recommended that consideration be given to including further elements protecting the privacy of persons provided by section 12 of the *Human Rights Act 2004* (HRA).

The further proposed amendments respond to this recommendation of the Committee by providing that the support person must not remain at the premises if the person who failed to comply with the direction does not consent to the support person remaining at the premises. The Authority, by notifiable instrument, must also determine criteria for the appointment of a support person. These further proposed amendments therefore address the Committee’s concerns.

The further proposed amendments also may potentially affect the right to recognition and equality before the law protected by section 8 of the HRA. Currently, an authorised person is only able to enter property after the exhaustion of any review rights in the ACT Civil and Administrative Tribunal for review of the controlled activity order on which the rectification direction is based. The further proposed amendments will allow a direction authorising rectification work immediately on non-compliance with a controlled activity order where the Authority reasonably believes the premises are a health risk or a safety risk.

The explanatory statement accompanying the further proposed amendments addresses the potential limit on equality before the law, as well as the amendment’s remaining potential limit on protection of privacy and the home provided by section 12 of the HRA, and provides a justification for any limits using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, subject to these further comments.

The Committee notes that, as provided in the initial proposed amendments, the support person may accompany the authorised person in carrying out rectification work where the Authority considers the work may cause distress to the occupier of the premises. The support person is expressed as “for the occupier”. Concerns about any interference with privacy and home that might arise due to an additional person entering the premises also arise in relation to the occupier of the premises. However, the further proposed amendments will allow consent to be given by the person who failed to comply with the direction to carry out rectification work. Under section 366 of the Planning and Development Act, a direction can be given to any of the owner or occupier of the premises or anyone who failed to keep a property clean. The explanatory statement accompanying the further amendments refers to the support person’s presence having the consent of the owner. It is not clear to the Committee why consent for the support worker is not sought from the occupier of the premises.

The Committee, in commenting on the initial proposed amendments, also referred to the additional costs that might have to be paid by a person who is required to comply with a rectification direction if the authorised person is supported by a support person. The disproportionate impact of this requirement may limit the right to equality before the law protected by section 8 of the HRA. The explanatory statement accompanying the further amendments refers to this possible increase in costs in suggesting:

[o]ther amendments have been proposed to mitigate the imposition of reasonable costs, requiring the planning and land authority to create a notifiable instrument relating to the deferment of costs. This will address the circumstances in which reasonable costs may be recouped and how.

The “other amendments” refer to the initial proposed amendments which would require the Authority to determine, by notifiable instrument, the circumstances when payment of all or part of the cost of rectification work carried out by an authorised person on a lessee’s leasehold may be deferred by the lessee. The Committee notes that this deferment does not extend to waiving the liability, and applies only where the liability is imposed on the owner of the property. Deferment also requires a caveat over the property to be lodged under the *Land Titles Act 1925* which creates a charge over the leasehold (see Part 11.4 of the Planning and Development Act). In the Committee’s view, any disproportionate impact of liability to repay the costs of rectification work is not fully met through the ability to defer those costs.

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

#### Residential Tenancies Amendment Bill 2019

In an email received by the Committee on 12 November 2019, Ms Le Couteur MLA has proposed an amendment to the *Residential Tenancies Amendment Bill 2019*. The amendment will substitute new standard residential tenancy terms that will require the lessor to nominate a bank account if the tenant wishes to pay the rent in that way.

The Committee has no comment on this proposed amendment.

## Subordinate Legislation

### Disallowable Instruments—No comment

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

* **Disallowable Instrument DI2019-204 being the Utilities (Technical Regulation) Operating Certificate Fees Determination 2019, including a regulatory impact statement made under section 110 of the** *Utilities (Technical Regulation) Act 2014* **revokes DI2016-263 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2019-210 being the Civil Law (Wrongs) Chartered Accountants Australia and New Zealand Professional Standards Scheme 2019 (No 1) made under Schedule 4, section 4.10 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of New South Wales' approval of the Chartered Accountants Australia and New Zealand Professional Standards Scheme.**
* **Disallowable Instrument DI2019-211 being the Road Transport (General) Withdrawal of Infringement Notices Guidelines 2019 (No 1) made under subsection 38(1) of the** *Road Transport (General) Act 1999* **revokes DI2018-70 and determines the guidelines for the withdrawal of infringement notices.**
* **Disallowable Instrument DI2019-212 being the Road Transport (General) Waiver of Infringement Notice Penalties Guidelines 2019 (No 1) made under section 31I of the** *Road Transport (General) Act 1999* **determines the guidelines for the waiver of infringement notice penalties.**
* **Disallowable Instrument DI2019-213 being the Road Transport (General) Extension of Time Guidelines 2019 (No 1) made under section 30 of the** *Road Transport (General) Act 1999* **issues the guidelines for deciding applications for an extension of time in relation to taking action in response to an infringement or reminder notice.**
* **Disallowable Instrument DI2019-215 being the Public Place Names (Taylor) Determination 2019 (No 1) made under section 3 of the** *Public Place Names Act 1989* **amends DI2018-251 to revoke the name of one road, and determines the names of four roads in the Division of Taylor.**
* **Disallowable Instrument DI2019-217 being the Territory Records (Advisory Council) Appointment 2019 (No 1) made under section 44 of the** *Territory Records Act 2002* **revokes DI2017-241 and appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.**
* **Disallowable Instrument DI2019-218 being the Territory Records (Advisory Council) Appointment 2019 (No 2) made under section 44 of the** *Territory Records Act 2002* **revokes DI2018-265 and appoints a specified person as a member of the Territory Records Advisory Council, representing organisations interested in records management and archives.**
* **Disallowable Instrument DI2019-219 being the Race and Sports Bookmaking (Tax Rates) Revocation 2019 made under section 65 of the** *Race and Sports Bookmaking Act 2001* **revokes DI2007-129.**
* **Disallowable Instrument DI2019-220 being the Public Sector Management Amendment Standards 2019 (No 1) made under section 251 of the** *Public Sector Management Act 1994* **provides a provision to protect officers who may be affected by amendments to the Long Service Leave Act.**
* **Disallowable Instrument DI2019-221 being the Health (Interest Charge) Determination 2019 (No 1) made under section 193 of the** *Health Act 1993* **revokes DI2013-305 and determines the interest charged on the aggregate amount of fees and charges unpaid after the due date.**
* **Disallowable Instrument DI2019-223 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2019 (No 1) made under subsection 10(3) of the** *Blood Donation (Transmittable Diseases) Act 1985* **revokes DI2018-28, DI2018-211, AF2018-2 and AF2018-23 and approves the blood donor declaration form, prepared by the Australian Red Cross Blood Service.**
* **Disallowable Instrument DI2019-224 being the Racing (Appeals Tribunal) Rules 2019 (No 1) made under subsection 45(1) of the** *Racing Act 1999* **revokes DI2018-293 and establishes the rules of the Tribunal.**

### Disallowable Instruments—Comment

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

Human rights issues

* **Disallowable Instrument DI2019-214 being the Controlled Sports Code of Practice 2019 (No 1) made under section 49 of the** *Controlled Sports Act 2019* **approves the Controlled Sports Code of Practice.**

This instrument approves a code of practice, for section 49 of the *Controlled Sports Act 2019*. The explanatory statement for the instrument states:

The code of practice is a key document that details the technical requirements for conducting controlled sports events in the ACT. It is designed to cover a wide range of combat sports that fall within the scope of the Act (see section 7, and dictionary). Some of the sports covered include:

|  |  |  |
| --- | --- | --- |
| Aikido | Kendo | Pankration  |
| Boxing | Kickboxing | Sanda |
| Fencing | Kung Fu Wushu | Shooto |
| Judo | Kyokushin | Taekwondo |
| Ju-Jitsu or Brazilian Ju- Jitsu | Mixed Martial Arts | Sumo |
| Karate | Muay Thai | Wrestling |

\**This is not a conclusive list. As sports evolve or adapt rules, more may be included. The Act defines inclusions by technique, rather than sporting name. This list is provided as an example only.*

As defined in the Act, controlled sports are a combat sport, or any other high-risk sport or activity prescribed by regulation. Combat sports include sports or activities involving the intent of striking, hitting, grappling, throwing or punching of another person.

The Committee notes that the explanatory statement also includes a discussion of potential issues for the Committee, in its legislative scrutiny role, including human rights issues. The explanatory statement states that “[t]his Instrument does not affect any human rights set out in the *Human Rights Act 2004* and is in accordance with the Scrutiny of Bills 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 for this instrument.**

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

Has this instrument been validly made?

* **Disallowable Instrument DI2019-216 being the Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1) made under section 109 of the** *Animal Welfare Act 1992* **appoints specified persons as members of the Committee.**

This instrument appoints four specified persons as members of the Animal Welfare Advisory Committee, under section 109 of the *Animal Welfare Act 1992*. The instrument also relies on the Animal Welfare (Advisory Committee) Establishment 2015, also made under section 109 of the Animal Welfare Act. Section 109 provides:

**109 Establishment and functions**

 (1) The Minister must establish an Animal Welfare Advisory Committee.

 (2) The committee is to be constituted in accordance with its instrument of establishment.

 (3) The functions of the committee are as follows:

 (a) to advise the Minister about animal welfare legislation;

 (b) to advise the authority about matters in relation to animal welfare, including animal welfare legislation;

 (c) to participate in the development of approved codes of practice and mandatory codes of practice;

 (d) to provide advice to other Territory authorities, and to community bodies, about programs for the improvement of community awareness about animal welfare;

 (e) to advise the Minister about any other matter relating to animal welfare;

 (f) to report annually to the Minister on the activities of the committee.

 (4) The instrument of establishment is a disallowable instrument.

 *Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act

The Committee notes that subsection 109(4) states that the “instrument of establishment” is a *disallowable* instrument. However, the Committee also notes that the Animal Welfare (Advisory Committee) Establishment 2015—which would appear to be the “instrument of establishment”—appears on the ACT Legislation Register as a *notifiable* instrument ( see <https://www.legislation.act.gov.au/ni/2015-219/>). This means that it has not been subject to disallowance by the Legislative Assembly (or scrutiny by the Committee).

The Committee notes that the Animal Welfare (Advisory Committee) Establishment 2015 sets out various matters in relation to the Animal Welfare Advisory Committee, including terms of appointment for members, pre-requisites for appointment and procedural issues. While the instrument under consideration addresses pre-requisites set out in the Animal Welfare (Advisory Committee) Establishment 2015, the Committee is concerned that the latter may not have been validly made.

**The Committee seeks the Minister’s advice on this issue and, in particular, the Minister’s advice as to whether the Animal Welfare (Advisory Committee) Establishment 2015 is intended to operate as the “instrument of establishment”.**

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

In addition, the Committee notes that the explanatory statement for the instrument contains no indication as to whether or not the specified persons appointed by the instrument are public servants.

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

**227 Application—div 19.3.3**

 (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

 (2) However, this division does not apply to an appointment of—

 (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

 (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

 (c) a person to a statutory position if the only function of the position is to advise the Minister.

Given paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is **not** a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled [*Subordinate legislation—Technical and stylistic standards—Tips/Traps*](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf),[[2]](#footnote-2) the Committee stated:

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

The Committee notes that the explanatory statement for this instrument contains no such statement.

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

**The Committee seeks the Minister’s confirmation that the persons appointed by the instrument mentioned above are not public servants.**

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

Finally, the Committee notes that the instrument is expressly given retrospective effect. It was made on 23 September 2019 but (under section 2) “is taken to have commenced on 14 June 2019”. The Committee notes, with approval, that the retrospectivity issue is dealt with in the explanatory statement for the instrument, which states:

Due to an administrative oversight this Disallowable Instrument has been made retrospectively, noting the commencement of these appointments on 14 June 2018, and therefore that the appointments must end on 13 June 2021.

The retrospective commencement of this instrument will not prejudicially affect the rights of people. See: *Legislation Act 2001*, sections 73(2)(a), 73(5)(b), 75A(1), 76(1) and 76(4). Retrospective commencement requires clear indication. See *Legislation Act* *2001*, section 75B (1).

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

Minor drafting issue

* **Disallowable Instrument DI2019-222 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2019 made under section 60 of the** *Road Transport (Public Passenger Services) Act 2001* **revokes DI2017-247 and determines the maximum fares relating to the hiring or use of a taxi.**

This instrument determines maximum fares for taxi services, under section 60 of the *Road Transport (Public Passenger Services) Act 2001*.

The Committee notes that section 2 of the instrument provides:

**2 Commencement**

 This instrument commences on 1 November 2019.

However, the explanatory statement for the instrument states:

This determination will commence on notification and will remain in force until it is amended or revoked.

The ACT Legislation Register indicates that the instrument (made on 26 September 2019) was notified on 30 September 2019. This puts the explanatory statement at odds with the commencement provision.

However, the Committee also notes that the ACT Legislation Register also indicates that this instrument was “never effective”, as it was repealed by the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2019 (No 2) (DI2019-233). The Committee notes that the explanatory statement for *that* instrument states:

This determination revokes the current fare determination: *Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2017 (No 1)* DI2017-247.

It also revokes the *Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2019* DI2019-222 which has not yet commenced. This instrument contained an erroneous reference to 1 October 2019 in column 4, schedule 1 to the previous determination. This instrument replaces that reference with 1 November 2019 in accordance with the instrument’s commencement date.

This determination will commence on 1 November 2019 and will remain in force until it is amended or revoked.

This means that the issue identified in relation to the commencement of the earlier instrument does not arise in relation to the commencement of the later instrument.

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

Human rights issues

* **Disallowable Instrument DI2019-225 being the Controlled Sports Public Interest Guidelines 2019 (No 1) made under section 13 of the** *Controlled Sports Act 2019* **makes the Controlled Sports Public Interest Guidelines.**

This instrument makes “public interest guidelines”, for section 13 of the *Controlled Sports Act 2019*. That Act regulates “combat sports”. Section 13 of the Controlled Sports Act provides:

**13 Consideration of public interest**

 (1) If a provision in this part requires the registrar to consider if it is in the public interest for a person to be registered as a [controlled sports](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s11.html#controlled_sports_official) [official](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s11.html#controlled_sports_official) or a [controlled sports](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s7.html#controlled_sport) contestant, the registrar—

 (a) must consider if the person, or for a corporation, a [relevant person](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s13.html#relevant_person), has—

 (i) been convicted or found guilty of a [class A offence](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s13.html#class_a_offence); or

 (ii) had a [controlled sports official](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s11.html#controlled_sports_official)'s registration or a [controlled](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s7.html#controlled_sport) [sports](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s7.html#controlled_sport) contestant's registration (however described) suspended or cancelled under this Act or a corresponding law; and

 (b) must consider any guidelines made by the Minister under subsection (2); and

 (c) may consider if the person, or for a corporation, a [relevant person](http://classic.austlii.edu.au/au/legis/act/consol_act/csa2019230/s13.html#relevant_person), has been convicted or found guilty of a class B offence; and

 (d) may consider any other relevant matter.

 *Note* ***Corresponding law*** —see the dictionary.

***Relevant person***, for a corporation*—see the dictionary.*

 (2) The Minister may make guidelines about what the registrar must take into account when considering the public interest for a provision in this part.

 (3) A guideline is a disallowable instrument.

 *Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act

This means that the guidelines made by this instrument apply only to situations where the Registrar of Controlled Sports is required to consider if it is in the public interest for a person to be registered as a controlled sports official or a controlled sports contestant. The explanatory statement for the instrument states:

Combat sports present a number of public safety risks, from physical harm to contestants through to public safety in the conduct of events and the potential for exploitation given the value of rewards being offered for particular contests and revenue generated through the event. Consultation and research have highlighted the potential for criminal associations within some parts of the industry.

Section 12 of the Act creates the position of Registrar of Controlled Sports (Registrar) to undertake a number of decision-based functions within the Act. This includes matters such as decisions on registrations and considerations of public interest, registered event approvals, and considerations on suspension or cancellation of registration. The Guidelines will support this decision-making process and make it clear to the public how certain matters will be treated.

The Guidelines provide the framework of what the Registrar will consider when making an assessment of the public interest to make a determination regarding registrations as a controlled sports official or controlled sports contestant; i.e. in determining whether an applicant poses an unacceptable risk of harm.

Section 13 of the Act outlines the consideration of public interest process relating to registrable events, including the matters that the Registrar *must* consider, and additional matters that the Registrar *may* consider when making a decision about whether to grant registration to an applicant applying to be a controlled sports official or contestant for registrable events. Offences are categorised as Class A (must consider) or Class B (may consider).

Section 13 (2) allows the Minister to make guidelines about what the Registrar must consider when assessing the public interest for registrations of officials and contestants. These guidelines make it clear how the risk assessment process will be undertaken in relation to matters that may be highlighted during the registration process. A relative weighting is given to each factor based on the risk factors relating to safety and integrity of controlled sports events in the ACT.

The explanatory statement goes on to mention the role of the *Human Rights Act 2004* in relation to the operation of the instrument:

The *Human Rights Act 2004*, as well as the principles of the *Discrimination Act 1991* have been considered and applied during the development of the Guidelines. When delegated officers undertake assessments on behalf of the Registrar, the officers are required to comply with impacting ACT legislation, such as the *Human Rights Act 2004*, *Discrimination Act 1991* and the *Information Privacy Act 2014*.

**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—No Comment

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

* **Subordinate Law SL2019-25 being the Court Procedures Amendment Rules 2019 (No 2) made under the** *Court Procedures Act 2004* **amends Rules 1608 and 1631 of the Court Procedures Rules by omitting "court officer" and substituting "an appropriate officer of the court" and "registrar", respectively.**

### Subordinate Laws—Comment

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

Human rights issues

* **Subordinate Law SL2019-26 being the Controlled Sports Regulations 2019 made under the** *Controlled Sports Act 2019* **sets out the conditions and requirements to be met in relation to controlled sports events.**

This subordinate law makes regulations for the *Controlled Sports Act 2019*. The explanatory statement for the subordinate law states:

The specific objectives of the Regulation are to set out:

* requirements for applying to be an official or a contestant in a controlled sport event
* conditions applying to registration as an official or contestant in a controlled sport event
* requirements relating to applications to register a controlled sport event
* conditions for approved non-registrable controlled sport events
* requirements for notification of non-registrable controlled sports events to the registrar
* requirements for medical reporting at a registered controlled sport event, and
* minimum ages for contestants at registered and non-registrable controlled sports events.

The explanatory statement goes on to mention the role of the *Human Rights Act 2004* in relation to the operation of the subordinate law:

The *Human Rights Act 2004*, as well as the principles of the *Discrimination Act 1991* have been considered and applied during the development of the Regulation. When the registrar or delegated officers undertake assessments and make decisions they must comply with impacting ACT legislation, such as the *Human Rights Act 2004*, *Discrimination Act 1991,* *Information Privacy Act 2014* and the *Health Records (Privacy and Access) Act 1997*.

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

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

Human rights issues

* **Subordinate Law SL2019-27 being the Road Transport (Offences) Amendment Regulation 2019 (No 2) made under sections 23 and 233 of the** *Road Transport (General) Act 1999* **amends the *Road Transport (Offences) Regulation 2005* by increasing infringement notice penalty amounts for specified offences under the road transport legislation.**

This subordinate law increases amends the Road Transport (Offences) Regulation 2005, “to increase the infringement notice penalty amounts for most offences under road transport legislation” (according to the explanatory statement). The explanatory statement for the subordinate law states:

Most infringement notice penalties, excluding the amount of the [Victim Services Levy], are being increased by the Wage Price Index (WPI) of 2.5%. Budget Memo 2019/09 identifies that the WPI to be used for 2019/20 is 2.5%.

The reason for indexation of infringement penalty amounts is to maintain the value of those penalties in real terms in order to preserve their deterrent effect. Any variation to that indexation is outlined below.

Several variations to the general rule for indexation of penalties are set out, in the explanatory statement.

In relation to the Victim Services Levy (**VSL**), the explanatory statement states:

Most road transport infringement notice penalties other than those relating to parking offences and most offences against the *Heavy Vehicle National Law (ACT)* (HVNL) include a component, not identified separately, accounting for the Victim Services Levy (VSL) applicable to the offence. The VSL is currently set at $60.

The explanatory statement goes on to discuss the role of the *Human Rights Act 2004* in relation to the operation of the subordinate law:

**Human rights implications**

During the development of this Regulation, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

Section 13 of the HRA provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. This is relevant in the ACT today, in respect to circumstances involving people’s access to public places.

Section 22(1) of the HRA provides that everyone has the presumption of innocence until proven guilty. The rights under section 22 of the HRA are very important rights that have long been recognised in the common law and are now codified in the ACT through the HRA.

Section 28 of the HRA provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

1. the nature of the right affected
2. the importance of the limitation
3. the nature and extent of the limitation
4. the relationship between the limitation and its purpose
5. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The offences regulation does not, of itself, impose restrictions or limitations on a person’s human rights or rights to move freely in the ACT. The proposed amendments to the offences regulation increase most infringement notice penalty amounts under the road transport legislation to maintain the value of those penalties in real terms and preserve their deterrence effect. The amendments do not change the infringement notice arrangements under the road transport legislation that offers people a choice of accepting a lesser penalty without admitting the offence or remaining liable for prosecution and diverts people away from the criminal justice system.

As such the amendments are not considered to be limiting any human rights.

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

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

### Regulatory impact statement—No comment

The Committee has examined the regulatory impact statement accompanying the following disallowable instrument and offers no comments on it:

* **Disallowable Instrument DI2019-204 being the Utilities (Technical Regulation) Operating Certificate Fees Determination 2019.**

### National Regulations—Comment

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

**Rail Safety National Law National Regulations (Fees) Variation Regulations 2019 (No 155 of 2019) made under the** *Rail Safety National Law (South Australia) Act 2012* **and section 55 of the** *Rail Safety National Law (ACT) Act 2014***, provide for an increase in the annual fees payable by a rail transport operator.**

**Rail Safety National Law National Regulations Variation Regulations 2019 (No 61 of 2019) made under the** *Rail Safety National Law (South Australia) Act 2012* **and section 55 of the** *Rail Safety National Law (ACT) Act 2014***, amends clauses on annual reporting provisions, drug and alcohol management program FOI and reporting of notifiable occurrences in the Rail Safety National Law National Regulations 2012.**

The Committee notes, with approval, that explanatory statements are provided for both of these national regulations, despite the absence of a formal legal requirement to do so. Similarly, the Committee also notes that the potential application of ACT-specific requirement—the possible application of the *Human Rights Act 2004* and also requirements in relation to climate change implications – are addressed, in the explanatory statement.

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

## Responses

### Government responses

The Committee has received responses from:

* The Minister for Police and Emergency Services, dated 24 October 2019, in relation to comments made in Scrutiny Report 36 concerning Disallowable Instrument DI2019-206—Emergencies (Strategic Bushfire Management) Plan 2019.
* The Minister for Planning and Land Management, dated 13 November 2019, in relation to comments made in Scrutiny Report 36 on the Government response to Disallowable Instrument DI2019-182—Road Transport (General) (Pay Parking Area Fees) Determination 2019.

[**These response**](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)**s[[3]](#footnote-3) can be viewed online.**

* The Minister for Corrections and Justice Health, dated 11 November 2019, in relation to comments made in Scrutiny Report 36 concerning the Sentencing (Parole Time Credit) Legislation Amendment Bill 2019.
* The Minister for Education and Early Childhood Development, dated 12 November 2019, in relation to comments made in Scrutiny Report 35 concerning proposed Government amendments to the Education Amendment Bill 2017.

[**These response**](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/_recache)**s*[[4]](#footnote-4)* can be viewed online.**

### Private Member’s response

* Mr Alistair Coe MLA, dated 12 November 2019, in relation to comments made in Scrutiny Reports 34 and 35 concerning the Planning and Development (Controlled Activities) Amendment Bill 2019, and proposed amendments to the Bill.

The Committee wishes to thank the Minister for Police and Emergency Services, the Minister for Corrections and Justice Health, the Minister for Education and Early Childhood Development, Mr Coe MLA, and the Minister for Planning and Land Management for their helpful responses.

Giulia Jones MLA

Chair

19 November 2019

## 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 35, dated 23 September 2019**
* Planning and Development (Design Review Panel) Amendment Bill 2019 (further Government response).
* **Report 36, dated 15 October 2019**
* Residential Tenancies Amendment Bill 2019
1. See the definition of electoral matter in section 4, and definitions of electoral advertising and electoral expenditure in section 198, of the *Electoral Act 1992*. [↑](#footnote-ref-1)
2. https://www.parliament.act.gov.au/\_\_data/assets/pdf\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf. [↑](#footnote-ref-2)
3. 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-3)
4. 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-4)