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

# Scrutiny Report 35

23 SEPTEMBER 2019

## 

## The Committee

### Committee Membership

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### Role of Committee

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

## Resolution of Appointment

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

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

### Disallowable Instruments—No comment

The Committee has examined the regulatory impact statement:

* **Disallowable Instrument DI2019-198 being the Rail Safety National Law (Drug and Alcohol Analysts) Appointment 2019 (No 2) made under section 11 of the** *Rail Safety National Law (ACT) Act 2014* **revokes an appointment made under DI2019-58 and appoints a specified analyst, contracted by the Office of the National Rail Safety Regulator, to conduct drug and alcohol testing for the purposes of the Act.**
* **Disallowable Instrument DI2019-199 being the University of Canberra (University Seal) Statute 2019 made under section 40 of the** *University of Canberra Act 1989* **repeals DI2007-217 and determines the documents that must be executed under seal, and who must witness the affixing of the seal to a document.**
* **Disallowable Instrument DI2019-200 being the Children and Young People (Death Review Committee) Chair Appointment 2019 (No 1) made under section 727E of the *Children and Young People Act 2008* appoints a specified person as chair of the Children and Young People Death Review Committee.**
* **Disallowable Instrument DI2019-201 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2019 (No 1) made under sections 29 and 29A of the** *Cemeteries and Crematoria Act 2003***and sections 78 and 79 of the** *Financial Management Act 1996* **re-appoints specified persons as chair, deputy chair and members of the ACT Public Cemeteries Authority Governing Board.**
* **Disallowable Instrument DI2019-202 being the Official Visitor (Disability Services) Appointment 2019 (No 1) made under paragraph 10(1)(c) of the** *Official Visitor Act 2012* **appoints a specified person as an official visitor for the purposes of the** *Disability Services Act 1991***.**
* **Disallowable Instrument DI2019-203 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 8) made under section 13 of the** *Road Transport (General) Act 1999* **declares that certain parts of the road transport legislation do not apply to an entrant vehicle or the driver of an entrant vehicle participating in the Subaru Australia Corporate Ride Day on 26 September 2019.**

### Disallowable Instruments—Comment

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

Positive comments / Minor drafting issue

* **Disallowable Instrument DI2019-196 being the Controlled Sports (Fees) Determination 2019 (No 1) made under section 89 of the** *Controlled Sports Act 2019* **determines fees payable for the purposes of the Act.**

This instrument determines fees for the *Controlled Sports Act 2019*. The Committee notes, with approval, that section 2 of the instrument references section 81 of the *Legislation Act 2001*, which allows certain things to be done (including allowing instruments to be made) prior to the commencement of an Act. This is necessary, for this instrument, because section 2 of the Controlled Sports Act provides that it does not commence until six months after the notification day for the Act. The Act was notified on 11 April 2019. The instrument was made on 13 August 2019.

The Committee also notes, with approval, that (in accordance with the Committee’s oft-stated preferences[[1]](#footnote-1)) the explanatory statement for the instrument identifies the “old” and “new” fees relating to the instrument. The explanatory statement states:

Table 1 below indicates the amount of the old fee (under the Boxing Control Act [which was replaced by the Controlled Sports Act]), the amount of the new fee for comparable items, and a summary of the reason for the change as a result of the commencement of the Act and notification of this instrument. All other matters are new fees made under the Act. All fees align with comparative costs in other regulating jurisdictions, and are most reflective of the fees made under the *Combat Sports Act 2013* (NSW).

Fees relating to registrable events can potentially be offset for promoters by a small increase in ticket prices of around $1-2, given that the fee payable is based on ticket sales.

Section 56 of the Legislation Act is an over-arching provision, relating to fees. One of its principal effects is that fees are to be determined by disallowable instrument. This enables the Legislative Assembly to scrutinise fees determinations and also provides the Committee with its scrutiny function, over fees determinations.

The Committee notes shat subsection 56(5) of the Legislation Act sets out various requirements for fees determinations. Some are things that a fees determination “must” do, and some are things that the determination “may” do. Paragraph 56(5)(g) provides:

(g) may make provision about waiving, postponing or refunding the fee (completely or partly);

Section 5 of the instrument provides:

**5 Refund Policy**

Refunds may be granted in accordance with the Fee Refund Policy upon application by the applicant.

The Committee notes that the “Fee Refund Policy” can be found at <https://www.sport.act.gov.au/__data/assets/pdf_file/0004/1411492/Fee-Refund-Policy-Controlled-Sports.pdf>. This is not mentioned, either in the instrument itself or in the explanatory statement for the instrument. The Committee suggests that it would be preferable if guidance was provided as to where the Fee Refund Policy can be found.

**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 SL2019-20 being the Magistrates Court (Lakes Infringement Notice) Amendment Regulation 2019 (No 2) made under the** *Magistrates Court Act 1930* **amends the Magistrates Court (Lakes Infringement Notices) Regulation to provide the administering authorities for an infringement notice offence, and also provide identification requirements for a police officer serving an infringement notice, or reminder notice, on a person.**
* **Subordinate Law SL2019-22 being the Gaming Machine Amendment Regulation 2019 (No 2) made under the** *Gaming Machine Act 2004* **clarifies the reporting requirements for community purpose contributions for clubs with gross gaming machine revenue of $200 000 or more per reporting year.**

## Proposed amendments

### Proposed Government amendments

The Committee has examined proposed Government amendments to the following bill:

### Education Amendment Bill 2017

The Government has proposed various amendments to the Education Amendment Bill 2017 relating to registration for home education. These include various provisions which may impact on the protection against interference with a person’s privacy, family, or home provided by section 12 of the HRA.

Proposed new section 132A will require that the home base for a child’s home education is appropriate for educating the child and comply with any requirement in a determination made by the director-general. This proposed new section includes as examples of what may be considered appropriate that the home base is well ventilated with appropriate lighting, heating and cooling, is not excessively noisy, has appropriate furniture and is sanitary with no health and safety risks to the child including from others living at the property. The parents of a child being educated at home must make available for inspection, on the request of the director-general, documents that show that the home base meets these requirements.

The proposed amendments will also insert consequential amendments to the *Education Regulation 2005* into the Bill to include a requirement for registration of a child for home education to meet with an authorised person to show them home education documents, including documents that show that the home base for a child’s home education is appropriate. Photographs, video recordings and description in writing will be included as examples of such documents (see Schedule 1 to the proposed amendments inserting section 8 of the Regulations).

These amendments relating to a child’s home base provide for possibly extensive information to be collected relating to the home and private life of children and others residing in the home base. The supplementary explanatory statement accompanying the proposed amendments does not include any discussion of human rights implications. The explanatory statement accompanying the Bill includes a discussion of the privacy implications of the Bill but only those related to reporting on the education progress of a home educated child. In the Committee’s view, recognition of the increased potential privacy impact of the proposed amendments should be included in the supplementary explanatory statement and a justification for that potential provided using the framework set out in section 28 of the HRA.

The proposed amendments to the Bill to amend the Education Regulation also set out various personal details that must be included in an application to register a child for home education or renewal of registration. They also set out particulars that must be included in the home education register established under s 139 of the *Education Act 2004*.[[2]](#footnote-2) In particular the Committee is concerned with the requirement to identify the child’s gender in the register. In the Committee’s view, the potential limitation on privacy involved in requirements for disclosure of this personal information should be recognised in the supplementary explanatory statement and a justification provided using the framework set out in section 28 of the HRA.

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

### Proposed Private Member’s amendments

The Committee has examined proposed amendments by a Private Member to the following bill:

### Litter Legislation Amendment Bill 2019

Ms Caroline Le Couteur MLA has proposed amendments to the Litter Legislation Amendment Bill 2019*.* These amendments will broadly create the “code advisory council” to make recommendations about the development of a hoarding code of practice, reverse the increase in penalties associated with some litter offences provided in the Bill, remove the proposed category of aggravated littering, and require a support person to accompany an authorised person in entering private land. The supplementary explanatory statement accompanying the proposed amendments states that the proposed amendments have no human rights implications. The Committee however, has some concerns over the possible impact of the amendments to rights of privacy and equality protected under the HRA.

Proposed amendment 8 relates to the issue of abatement notices to deal with the deposit of litter at an open private place which has a significant adverse impact on the amenity, use or enjoyment of adjoining land to be inserted into the *Litter Act 2004* by new subdivision 4.3.3 of the Bill. Under the Bill, the Magistrates Court can issue an order to abate the amenity impact, which includes authorising a person to enter the open private place and do whatever is necessary to implement the order, including complying with the abatement notice. The proposed amendment 8 will insert a new paragraph 24BH(4)(c) to require an authorised person, when entering the open private land, to be accompanied by a support person who remains at the place while the order is implemented.

Support person is not defined in the proposed amendments, but an example in the proposed provision lists a social worker, person with expertise in dealing with mental health conditions and a carer. The supplementary explanatory statement accompanying the proposed amendments states the amendment “ensures the presence of a representative of the person who is the subject of the abatement order, in recognition of the likely vulnerability of that person”.

In the Committee’s view, the proposed amendment will authorise, indeed require, an additional person to enter private property. There is no requirement in the proposed amendment that the person subject to the abatement order consent to the support worker entering the private place. This potentially limits the protection against arbitrary or unlawful interference with privacy and reputation protected by section 12 of the HRA. The Committee also notes that under the Bill a person given an abatement notice may be ordered to pay the reasonable costs and expenses incurred by the Territory in implementing an order for an authorised person to carry out abatement activity at a private place, which would also include the costs associated with the accompanying support person. Given the potential impact of the amended Bill on persons suffering from mental illness or otherwise in a disadvantaged or vulnerable position the amendment will have the potential to impact on the right to equality before the law protected by section 8 of the HRA.

The Committee recognises that the intention of the support person is to provide support for potentially vulnerable people subject to an abatement order. That may be used in justifying the potential impact on the rights set out above. However, the potential impact on those rights should be recognised in the supplementary explanatory statement accompanying the proposed amendments along with a justification for that impact 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.**

## Government responses

The Committee has received responses from:

* The Minister for Justice, Consumer Affairs and Road Safety, dated 16 September 2019, in relation to comments made in Scrutiny Report 34 concerning the Official Visitor Amendment Bill 2019.
* The Attorney-General, dated 16 September 2019, in relation to comments made in Scrutiny Report 34 concerning the Courts (Fair Work and Work Safety) Legislation Amendment Bill 2019.
* The Minister for Planning and Land Management, dated 17 September 2019, in relation to comments made in Scrutiny Report 34 concerning the Planning and Development (Community Concessional Leases) Amendment Bill 2019.
* The Attorney-General, dated 20 September 2019, in relation to comments made in Scrutiny Report 34 concerning the Freedom of Information Amendment Bill 2019.

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

* The Minister for Justice, Consumer Affairs and Road Safety, dated 9 September 2019, in relation to comments made in Scrutiny Report 33 concerning Disallowable Instrument DI2019-173—Victims of Crime (Fees) Determination 2019 (No 1).
* The Minister for Planning and Land Management, dated 17 September 2019, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instrument DI2019-182—Road Transport (General) (Pay Parking Area Fees) Determination 2019.
* The Minister for Climate Change and Sustainability, dated 20 September 2019, in relation to comments made in Scrutiny Report 34 concerning Disallowable Instruments:
  + DI2019-194—Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2019; and
  + DI2019-195—Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2019.

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

The Committee wishes to thank the Minister for Planning and Land Management, the Minister for Justice, Consumer Affairs and Road Safety, the Attorney-General and the Minister for Climate Change and Sustainability for their helpful responses.

### Government responses—Comment

#### Planning and Development (Design Review Panel) Amendment Bill 2019

In its initial comments in Report 31 on the *Planning and Development (Design Review Panel) Amendment Bill 2019* the Committee noted that design review panel rules and design principles provided for in the Bill did not have to be registered as notifiable instruments under the *Legislation Act 2001*. The Committee requested further information on why notification requirements were not considered appropriate under the Bill. The Minister responded in a letter dated 24 June 2019 to which the Committee made further comments in its Report 32. In that further comment, the Committee, after setting out further details of the operation of the rules and principles and responding to the elements of the Minister’s response, stated:

the requirement to publish a notice on an agency’s website is appropriate to provide awareness of administrative decisions made under legislation but not for instruments, such as the design review panel rules or principles here, which establish legally binding standards which are used to make further decisions under legislation. The Committee recommends that the Bill declare the rules and principles as notifiable instruments …

The Minister responded to this further comment in his letter of 8 August 2019. In that further response the Minister stated:

I note that the Design Review Panel rules in section 138AJ of the Bill set out the process for Panel meetings and are administrative in nature. I also note that the Design Review Panel has an advisory role only in applying the design principles in section 138AK of the Bill. As such, notifiable instruments for the rules and principles are not warranted.

The Committee notes that the Bill has now been enacted. However, the further response of the Minister does not, in the Committee’s view, satisfy the concerns raised in its earlier comments.

Section 138AJ provides that the Minister may make design review panel rules, which include not only rules about the conduct of meetings of the Panel but also the terms of reference for the Panel, how the Panel is to be constituted, and, in particular, the processes and procedures for assessing development proposals. Proponents of prescribed development proposals (and the Committee notes that Amendments to the Bill have extended the scope of development proposals so prescribed[[5]](#footnote-5)) have to consult the design review panel about the proposal in accordance with the design review panel rules. In considering the proposal as part of a consultation, the panel may provide advice about how the proposal could be made consistent or more consistent with design principles. That advice must be provided to the planning and land authority. A proponent has to lodge a development application within 18 months of the advice, and include a response to the advice of the panel. The advice, and the proponent’s response, has to be considered by the authority when deciding development approval, and can for some proposals prevent approval where the authority considers the response unsatisfactory.

Therefore, in the Committee’s view, the design review panel rules are not merely administrative in nature. The rules have a legal effect on the approval process and potentially a significant practical effect on their subsequent approval.

Similarly, the design principles made by the Minister under section 138AK are the principles against which the design review panel considers any proposal. Given the Panel’s advice and response are considered in the approval process, and an unsatisfactory response can prevent approval of some proposals, the role of the principles is not limited to the Panel’s advisory role.

The Committee is also concerned that there has been no response to its request that a justification be provided for the displacement of subsection 47(6) of the Legislation Act. The Bill provided for the design panel rules to apply, adopt or incorporate an instrument as in force from time to time (subsection 138AJ(2)) . As a statutory instrument made under a power given by an Act, any such instrument as in force at the time it was incorporated in the design panel rules or as subsequently amended or remade is taken to be a notifiable instrument under subsection 47(6) of the Legislation Act. It therefore would need to be registered on the ACT legislation register (section 9 of the Legislation Act). Subsection 47(7) of the Legislation Act allows that notification requirement to be displaced. However, as the Committee commented in its Report on the Bill, any displacement of notification requirements should be justified and clear provision made in the Bill or explanatory statement for how affected persons can get access to the instruments in question.

As the Committee also noted, it is uncertain whether the requirement to publish the design panel rules on the Authority website applies to any instrument applied, adopted or incorporated in those rules, and whether the web site would also have to be amended whenever such an instrument was amended or remade. The requirement for notification provided by section 47(6) of the Legislation Act is intended to overcome this uncertainty, providing for notification of both the contents and fact of amendment to statutory instruments that might not otherwise be available. It applies even where the underlying instrument, in this case the design panel rules, are not themselves notifiable instruments. Even if it is accepted that the design panel rules are not appropriately notifiable instruments, a justification for the displacement of subsection 47(6) of the Legislation Act should be provided. Consideration should also be given to clarifying that there is a requirement to publish all changes to instruments applied, adopted or incorporated into the design panel rules.

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

Giulia Jones MLA

Chair

September 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 34, dated 10 September 2019**
* Health Amendment Bill 2019.
* Planning and Development (Controlled Activities) Amendment Bill 2019.

1. See the Committee’s document titled *Subordinate legislation—Technical and stylistic standards—Tips/Trap*s, available at <https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf>. [↑](#footnote-ref-1)
2. The authority to prescribe details for the register in regulations will be inserted by clause 11 of the Bill. [↑](#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/responses-to-comments-on-bills. [↑](#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/response-to-comments-on-subordinate-legislation. [↑](#footnote-ref-4)
5. See Government Amendments to the Bill introduced pursuant to standing order 182A(b) during debate of the Bill on 1 August 2019 (available at <https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/1394791/MoP104F.pdf>) [↑](#footnote-ref-5)