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

SCRUTINY REPORT 30

30 April 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):

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

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

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

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

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

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

   (a) unduly trespass on personal rights and liberties;

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

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

   (d) inappropriately delegate legislative powers; or

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

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

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

BILLS—COMMENT

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

GAMING LEGISLATION AMENDMENT BILL 2019

This Bill will amend the Gambling and Racing Control Act 1999 and the Gaming Machine Act 2004 to make provision for a diversification and sustainability support fund and other minor or technical amendments.

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)

In establishing an advisory board for the new diversification and sustainability support fund, the Bill will require prospective and appointed board members to disclose information about their current interests and associations, their partner’s business interests and their criminal history. These provisions will therefore potentially limit the protection against undue interference with privacy and reputation provided by section 12 of the HRA.

The Bill will also provide for applications from entities, which may include individuals, seeking payments from the diversity and sustainability support fund. As the explanatory statements notes, guidelines to be established under the Bill are likely to require applicants to provide personal and financial information relevant to their application. Information collected from applicants will be able to be disclosed to a range of persons, including public servants, for the purpose of administering the fund. These provisions will therefore also potentially limit the protection against undue interference with privacy and reputation in section 12 of the HRA.

A justification for these provisions is provided in the explanatory statement accompanying the Bill using the framework set out in section 28 of the HRA and the Committee refers the Assembly to this statement. In particular the Committee notes the importance of board members avoiding conflicts of interest and the various protections against unauthorised use of information obtained under gaming laws.

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

WATER RESOURCES AMENDMENT BILL 2019

This Bill will amend the Water Resources Act 2007 to identify the ACT’s water resource plan for how water planning and management takes place in the Territory, and specify the amount of water available from water management areas up to the sustainable development limit as part of requirements under the Basin Plan as made under the Water Act 2007 (Cwlth).
**Displacement of Section 47(6) of the Legislation Act 2001**

The Bill will provide for various instruments made under the Act, as well as anything else prescribed by regulations, to form the Territory’s water resource plan. The Bill also enables the water resource plan to apply, adopt or incorporate an instrument as in force from time to time. The Bill removes any obligation under section 47(6) of the *Legislation Act 2001* to notify any such instrument on the Territory’s legislation register.

As the Committee has commented previously, any displacement of section 47(6) should be accompanied by an explanation of why it is considered appropriate to displace any notification requirements under the Legislation Act. Information should also be provided on whether access to any incorporated instruments will be made available.

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

**Working with Vulnerable People (Background Checking) Amendment Bill 2019**

This Bill will amend the *Working with Vulnerable People (Background Checking) Act 2011* to include working and volunteering under the National Disability Insurance Scheme (NDIS) as regulated activities requiring registration, and to provide for disqualifying offences for those activities.

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

The Act provides for persons engaging in a regulated activity to be registered under the Act. Registration is based on a risk assessment, conducted by the Commissioner of Fair Trading, of whether the person applying for registration poses an unacceptable risk of harm to a vulnerable person. Risk Assessment guidelines made by the Commissioner provide for what must or may be taken into account in carrying out a risk assessment. Convictions or allegations of having committed relevant offences are taken into account under the guidelines as part of that risk assessment process. Relevant offences are defined in section 26 to mean various categories of offences. These include sexual offences and offences involving violence as well as offences involving dishonesty or relating to property or a driving offence.

The Bill will extend the range of offences considered as part of the risk assessment process for a person applying for registration to engage in providing support or services to people with a disability by a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (Cwlth). The Bill will define class A and class B disqualifying offences through inclusion in a new Schedule to the Act or prescription in regulations. The risk assessment process will include taking into account any disqualifying offence in a person’s criminal history, including whether the offence is a class A or class B disqualifying offence, and, for a class B disqualifying offence or charge for a class A disqualifying offence, whether exceptional circumstances apply that justify the person being registered.

The explanatory statement accompanying the Bill states, at page 3, that:

> the amendments in the Bill will result in a bar for a person who has been convicted or found guilty of a ‘class A disqualifying offence’ and there is no discretion for the Commissioner to accept an application for registration made by the person. On the other hand, a person who has been charged with, or convicted or found guilty of a ‘class B disqualifying offence’ may apply for registration if there are ‘exceptional circumstances’.
However, it is not clear to the Committee how this will be achieved by the Bill. The Bill does not expressly restrict who can apply for registration due to being convicted or found guilty of a class A disqualifying offence (see for example the limited amendment in clause 17). Under clause 29 of the Bill a person will not be eligible to reapply for registration to engage in an NDIS activity if their initial application was refused or cancelled “because of a class A disqualifying offence” but it is not clear how this would be identified or why a similar restriction would apply to initial applications. The Bill also does not amend the basis on which an application for registration is refused under section 40 or suspended or cancelled under section 57—these will remain based on a negative or additional risk assessment that the person poses an unacceptable risk of harm to a vulnerable person. Any bar to accepting an application can therefore only be established through the risk assessment guidelines.

In the Committee’s view, if it is intended that there is no discretion to allow a person convicted or found guilty of certain offences to obtain registration then this should be clearly provided for in the Bill rather than a matter for the risk assessment guidelines issued by the Commissioner. The Committee also notes that there may be uncertainty over whether guidelines can exclude any discretion for the Commissioner to accept an application. The Act requires the Commissioner to make guidelines “about how risk assessments are to be conducted” (section 27) and which have to provide for matters the Commissioner must (including disqualifying offences, which under the Bill will be included as part of a person’s criminal history) or may take into account (section 28). These provisions may be interpreted as requiring the discretion of the Commissioner to accept an application be preserved.

The Committee therefore asks the Minister to clarify how disqualifying offences are intended to affect the discretion of the Commissioner in assessing risk or otherwise refusing or cancelling registrations under the Act and to consider amendment of the Bill and the explanatory statement to more clearly reflect this position.

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

The Act currently provides for non-conviction information to be taken into account as an element of the risk assessment process. Non-conviction information is defined in section 25 to mean various types of information about a relevant offence or alleged relevant offence, including whether a person has been charged with an offence but the charge has not been finalised or has been withdrawn, and the person has been acquitted or their conviction has been set aside. Section 30 provides for various considerations, including the circumstances of the offence, relevance, and truthfulness of any information provided, to be taken into account in relation to any relevant offence or any alleged relevant offence included in the non-conviction information. In this way, while non-conviction is taken into account in assessing risk, the circumstances of that non-conviction are also considered.

Clause 33 of the Bill will amend section 30 to require the various considerations to also be taken into account in relation to disqualifying offences or any alleged disqualifying offence included in the non-conviction information about the person. However, as set out above, relevant offences are defined in the Act and in many cases will be different to disqualifying offences. Non-conviction information is information about relevant offences or alleged relevant offences, and hence may not include information about disqualifying offences. It is therefore not clear to the Committee how information about disqualifying offences (or alleged disqualifying offences) will be included in the non-conviction information and considered under the risk assessment guidelines. It may be that the section will apply to disqualifying offences which are also relevant offences for the purposes of the Act, or that the non-conviction information will be about distinct relevant and disqualifying offences.
The Committee notes that the Act distinguishes between a person’s criminal history and their non-conviction information. Criminal history means a conviction or finding of guilt for a relevant offence. A person’s criminal history, and various aspects of the circumstances surrounding any relevant offence included in that history, have to be taken into account under the risk assessment guidelines (section 29). Under the Bill, charges for disqualifying offences will be included in a person’s criminal history but not where the charge is withdrawn or discharged, or the person acquitted. It is not clear to the Committee, however, whether it is intended that a charge for a disqualifying offence can also be considered under section 30 even if it has been withdrawn, discharged or the person acquitted so as not to be included in a person’s criminal history.

The Committee asks that the Minister clarify the intended operation of sections 24, 25, 29 and 30 with respect to allegations of disqualifying offences which have not resulted in a conviction or finding of guilt or which might otherwise be referenced in relation to non-conviction information.

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

The Bill defines disqualifying offences primarily through inclusion in a new schedule, schedule 3, which sets out the offence, a short description, and any condition that has to be met for the offence to be included (such as having to be against a vulnerable person). However, disqualifying offences of both class A and class B can also be prescribed by regulation. The Committee notes that, under the Bill, disqualifying offences will only be considered in an application for registration for an NDIS activity. However, the explanatory statement refers to further work being undertaken in the future to finalise those offences that will apply broadly to registrations for other activities and which will include implementing the recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse. However, it is not clear if this is intended to be achieved through amendments to the Act or through regulations or other subordinate instruments. The Committee is concerned that disqualifying offences, particularly if they are to have the effect of preventing registration, are able to be defined in regulations and asks the Minister for an explanation for why disqualifying offences cannot be adequately defined in the Act and amended in the future as necessary.

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

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 not to be tried or punished more than once (section 24 HRA)

The Bill will restrict registration in relation to NDIS activity for people who have been charged or convicted with certain offences. It therefore potentially limits the right to equality before the law protected by section 8 of the HRA. To the extent the Bill will prevent a person with a prior conviction of certain offences from being able to be engaged in NDIS activity, the Bill might also be considered to potentially limit the right not to be tried or punished more than once in section 24 of the HRA.
These potential limitations are recognised in the explanatory statement accompanying the Bill along with a justification provided using the framework set out in section 28 of the HRA. The Committee refers this analysis to the Assembly, noting that the analysis is based on the Bill barring a person who is convicted of a class A disqualifying offence from being registered to engage in NDIS activity.

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will potentially limit the protection against undue interference with privacy and reputation in a number of ways. The Bill will require an applicant for registration to include a written statement by the applicant about whether an allegation has been made or an investigation commenced in relation to a regulated activity (clause 21). An application for registration to engage in an NDIS activity must be accompanied by additional information, including civil penalties imposed, family violence orders or protection orders, or has parental responsibility for a child under a care and protection order (clause 23). The Commission is able to request information from any entity that is relevant to whether the applicant continues to pose an acceptable risk of harm to a vulnerable person (clause 23).

There are also various provisions allowing for the sharing of information by the Commissioner. An application for registration to engage in an NDIS activity must also be accompanied by consent for the Commissioner to give information about the status of the application or about the applicant to various entities involved in the NDIS scheme or law enforcement agencies, which includes any entity prescribed by regulation (clause 23). A substituted section 63A will allow the Commissioner, if satisfied on reasonable grounds that the information is relevant to preventing harm or risk of harm to vulnerable people, to give information obtained in exercising a function under the Act to a wider range of entities, including entities and officers of other State and Territories.

A person engaging in an NDIS activity on an interim basis who receives a negative notice must inform their employer and each vulnerable person the person has contact with as part of that activity (clause 39). The Commissioner must tell an employer where a person’s registration is subject to an interim condition (but not the reason for that condition) (clause 52). The Commissioner may also provide information about the registration status, including whether it is subject to conditions and anything else prescribed in regulations, of a person the employer is associated with (clause 64).

The explanatory statement acknowledges the potential for the amendments to section 63A and the authorisation to inform an employer of a person’s registration to limit the protection against undue interference with privacy or reputation provided by section 12 of the HRA. However, this statement does not recognise all the ways in which that right may potentially be limited described above, and does not provide a justification using the framework set out in section 28 of the HRA. The Committee asks that the Minister consider revising the explanatory statement to provide such a justification.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.
RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

Under proposed new subsection 37(3A), where the Commissioner is satisfied that the applicant poses an unacceptable risk of harm to a vulnerable person, they will be prevented from providing reasons for a proposed negative notice if the Act or any other law prevents that information from being provided. This will limit the ability of the person applying for registration to argue for a reconsideration of the decision and ultimately to seek review of the decision in ACAT. This therefore reduces the procedural fairness otherwise provided to the applicant and hence limits the right to a fair trial protected by section 21 of the HRA.

The explanatory statement accompanying the Bill suggests the amendment could prevent information being given to an applicant where an active investigation is underway and disclosing information to the person may compromise that investigation. However, there is no recognition that this may potentially limit the right to a fair trial nor any justification using the framework set out in section 28 of the HRA. The Committee asks that the Minister consider revising the explanatory statement to provide such a justification.

Section 44 of the Act provides for a degree of procedural fairness in decisions imposing conditions on registration. If the Commissioner intends to register a person conditionally, they must give the person notice of that intent and, under section 44, the person must ask the Commissioner in writing to reconsider the decision within 20 working days. Under subsection 44(3), the person may give, and the Commission must consider, any new or corrected information the person believes is relevant to reconsidering the decision to register a person conditionally.

Clauses 43 and 44 of the Bill will remove subsection 44(3) and replace it with a requirement that, in asking for a reconsideration, the person must give the Commissioner any new or corrected information the person considers relevant (proposed subsection 44(1A)). The explanatory statement states that this will “require a person to have new or corrected information a person considers relevant to their assessment before that person can make a request to the Commissioner to reconsider a proposed conditional registration”. The Committee is concerned that this is potentially an inaccurate description of the operation of the amendment. On its face, adding subsection 44(1A) will require any new or corrected information the person considers relevant to be given to the Commissioner, but does not prevent the person from requesting a reconsideration even without new or corrected information. To impose a requirement that the Commissioner can only be asked to reconsider imposing conditions on registration where the person has new or corrected information would potentially restrict the procedural fairness rights of persons applying for registration and protected by section 21 of the HRA. It is also possible that, given the ambiguity in the proposed subsection, the subsection would be interpreted as preserving general procedural fairness obligations.

The Committee therefore asks the Minister to confirm the intended operation of the amendment to section 44. If it is intended to restrict the circumstances where a proposed conditional registration will be reconsidered, then this should be made clear in the legislation and acknowledged in the explanatory statement as potentially limiting the right to a fair trial protected by section 21 of the HRA. If it is not intended to reduce procedural fairness obligations then the explanatory statement should be revised.

The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.
**RIGHT TO THE PRESUMPTION OF INNOCENCE (SECTION 22 HRA)**

The Bill will introduce several strict liability offences: new sections 21A and 55A relate to a failure to disclose changes in relevant information in a timely way; new subsections 33(3A) to (3C) and 53(3A) to (3C) with a failure to comply with a request of the Commissioner, and new section 54B with a failure to comply with interim conditions. Each impose a penalty of 50 penalty units. The description of the clauses in the explanatory statement justifies the strict liability of the offence as necessary to provide timely enforcement powers for the protection of vulnerable people, particularly as people may be permitted to work whilst an assessment is being made.

The Committee would prefer that strict liability offences, and their potential to limit the right to the presumption of innocence protected by section 22 of the HRA, are recognised in the human rights implications of any explanatory statement, particularly where, as in this case, the strict liability offences can be justified through common features rather than requiring individual justification on a clause by clause basis. The Committee asks that the Minister consider revising the explanatory statement to set out the strict liability offences and their potential impact on section 22 of the HRA and provide a justification 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.

**SUBORDINATE LEGISLATION**

**DISALLOWABLE INSTRUMENTS—COMMENT**

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

**IS THIS APPOINTMENT VALIDLY MADE?**

- Disallowable Instrument DI2019-24 being the Veterinary Practice (Board) Appointment 2019 (No 1) made under subsection 93(2) of the Veterinary Practice Act 2018 appoints specified persons as members of the Veterinary Practitioners Board.

This instrument is made under subsection 93(2) of the *Veterinary Practice Act 2018*, which requires the Minister to appoint members of the Veterinary Practice Board. Section 93 provides:

93  Board membership

(1) The board has the following members:

(a) president;

(b) 4 members who—

(i) are registered veterinary practitioners; and

(ii) have been registered for a continuous period of at least 3 years immediately before the day of appointment;

(c) 1 member who is not a veterinary practitioner, to represent community interests;

(d) 1 member who is not a veterinary practitioner.
(2) The Minister must appoint the board members.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).

(3) The Minister may appoint a person as a community representative to the board only if satisfied that the person has interests, skills or qualifications that will help the board in carrying out the objects of this Act.

(4) The members mentioned in subsection (1) (c) and (d) must live in the ACT.

The instrument appoints a specified person as a registered veterinary practitioner with three years continuous registration as a veterinary practitioner and also a specified person a person who is not a veterinary practitioner (but not as a community member). The explanatory statement indicates that the appointments are made under paragraphs 93(2)(b) and 93(2)(d), respectively.

The Committee notes with approval that the explanatory statement for the instrument indicates that the person appointed as a registered veterinary practitioner is a registered veterinary practitioner with 3 years continuous registration as a veterinary practitioner and also that the person appointed as not a veterinary practitioner is not a veterinary practitioner. The Committee also notes with approval that the explanatory statement indicates that the 2 specified persons are not public servants, in accordance with the Committee’s oft-stated requirement (see the Committee’s publication Subordinate legislation—Technical and stylistic standards—Tips/Traps).¹

The explanatory statement also refers to the requirements of section 96 of the Veterinary Practice Act, which provides:

96 Consultation about appointment to board

(1) Before appointing someone, other than a community representative, to the board the Minister must consult the board.

(2) The Minister must also seek advice, and nominations, from declared professional bodies and any other entities the Minister considers suitable to give advice, and make nominations, in relation to the board.

Examples—entities suitable to give advice

• academic institutions
• industry representatives

(3) Subsection (1) does not apply if the board is suspended.

In relation to these requirements, the explanatory statement states:

Section 96 of the Act provides that before appointing someone, other than a community representative, to the Board the Minister must consult the Board. The Minister has consulted the Board on the appointments of [the specified persons].

However, the Committee notes that there is no indication, in the explanatory statement, that the requirements of subsection 96(2) have been met. Further, in relation to the specified person appointed under paragraph 93(1)(d), there is no indication that the requirement in subsection 93(4) that the person live in the ACT is met. In making this observation, the Committee notes that the relevant requirements are expressed in terms of “must”.

As the Committee recently noted in its Scrutiny Report No 27 of the 9th Assembly (at pages 4 to 7), in relation to certain appointments to the Board of Senior Secondary Studies, in making this comment, the Committee suggests that it is not merely being pedantic in relation to trying to ensure that any pre-requisites for a particular appointment have been met.

As the Committee has previously noted, in 2011, in the case of Kutlu v Director of Professional Services Review ([2011] FCAFC 94 (28 July 2011))2, the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the (Commonwealth) Health Insurance Act 1973, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

In Kutlu, a medical practitioner challenged action taken against him on the basis that members of various committees appointed from the PSR Panel that were involved in the action against him were not properly appointed, because the AMA had not been consulted in relation to various appointments. The Full Federal Court considered whether the statutory requirement to consult was a mandatory requirement, or merely direction that would not result in invalidity if not followed. The Court found that it was a mandatory requirement and that the requirements to consult were “essential preliminaries to the Minister’s exercise of the power of appointment”. The Full Court found that, as a result, various things done in relation to Dr Kutlu, by various committees, were invalid. The Court stated (at para 32):

[T]he scale of both Ministers’ failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers’ conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices ...

The Committee has previously noted that the wider effect of the decision in Kutlu was to invalidate scores of other investigations of other medical practitioners. Its effect was extremely damaging—including in a financial sense—to the Commonwealth.

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The decision in *Kutlu* (and its consequences) underlines the Committee’s reasons for maintaining its diligence in relation to attempting to ensure that any pre-requisites for appointments that come before the Committee have been met. As the Committee has consistently stated, the Committee does not consider that what it seeks imposes an onerous requirement on those who make appointments.

In the present context, the Committee considers that, similarly, the explanatory statements for each of the instruments should, preferably, also have addressed the requirement in subsection 8(3) of the Board of Senior Secondary Studies Act that the Minister may only appoint a person to be a board member if satisfied that the person has qualifications and expertise relevant to the functions of the board.

The Committee seeks the Minister’s assurance that, for the appointments made by this instrument, the requirements of subsection 93(4) and 96(2) of the *Veterinary Practitioners Act 2018* (as applicable) have been met.

This comment requires a response from the Minister.

**NATIONAL LAWS—COMMENT**

**Adequacy of explanatory statement/human rights issues**

- Health Practitioner Regulation National Law and Other Legislation Amendment Act 2019 (Queensland Act No 3 of 2019)

This National Law was tabled in the Legislative Assembly on 2 April 2019, by the Minister for Health and Wellbeing. The National Law operates in the ACT as a result of section 6 of the *Health Practitioner Regulation National Law (ACT) Act 2010*, which provides:

6 Application of Health Practitioner Regulation National Law

The Health Practitioner Regulation National Law, as in force from time to time, set out in the schedule to the Qld Act —

(a) applies as a territory law, as modified by schedule 1; and

(b) as so applying may be referred to as the Health Practitioner Regulation National Law (ACT); and

(c) so applies as if it were a part of this Act.

“Qld Act” is defined in the Dictionary to the Health Practitioner Regulation National Law (ACT) Act as follows”

"Qld Act" means the Health Practitioner Regulation National Law Act 2009 (Qld).

The Committee notes that what has been tabled is a copy of a Queensland Amendment Act that amends the “Qld Act” and a copy of the explanatory notes relating to the relevant Queensland Bill.

As the Committee has previously noted (see, generally, the discussion in Scrutiny Reports 11, 12 and 13 of the 9th Assembly, re the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (Queensland—Act No 32 of 2017), the way that this particular “national scheme” legislation operates is that the Queensland Act, as amended, operates in the ACT without reference to the Legislative Assembly. As the Committee has previously noted, there is not even a formal requirement to table this particular National Law in the Legislative Assembly. Rather, in the
light of concerns previously expressed by the Committee, the Minister has adopted a policy of tabling material such as this in the Legislative Assembly. The Committee is grateful to the Minister for adopting this approach.

The Committee does not intend to repeat its previous comments about the fundamentally unsatisfactory nature of this “national scheme”, which allows for law (in the form of amendments to the “original” National Law) to apply in the ACT without any capacity of the Legislative Assembly to “pass” (or even scrutinise) the relevant amendments. The comments made in Scrutiny Reports 11, 12 and 13 of the 9th Assembly stand. However, there are comments that the Committee will make in relation to the explanatory notes that have been provided, in this instance.

**SOME HISTORICAL BACKGROUND**

First, the Committee will set out some history.

As indicated above, in *Scrutiny Report 10 of the 9th Assembly* (30 October 2017), the Committee commented on the *Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017* (Queensland—Act No 32 of 2017). The Committee’s comment focussed on the fact that the National Law was tabled without an explanatory statement or a tabling statement. As a result, the Committee (and the Legislative Assembly) was not provided with information as to how the National Law affected the ACT, nor how (if at all) it is relevant to the ACT. In particular, no information was provided as to the capacity of the Legislative Assembly to scrutinise (or amend) this National Law.

The Committee drew the attention of the Legislative Assembly to this National Law, under principle (2) of the Committee’s terms of reference, on the basis that (in this case) the absence of an explanatory statement did not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements. As it was important that the Legislative Assembly’s capacity to scrutinise and amend this National Law be clarified before any opportunity to amend (or disallow) this National Law had expired, the Committee stated that its comment required a response from the Minister as a matter of urgency.


The Minister’s first response stated:

> ACT Health has been advised by the ACT Parliamentary Counsel’s Office that an Explanatory Statement is not required for the tabling of the *Health Practitioner Regulation National Law* amendments in the ACT. This is because the amendments to the *Health Practitioner Regulation National Law* (National Law) that are being made in [the National Law that was the subject of the Committee’s comment] automatically apply in the ACT as passed by the Queensland Parliament on 6 September 2017 (according to the commencement provision in s 2). For clarity, the effect of the *Health Practitioner National Law (ACT) Act 2010*, s 6 is to apply the national law [sic] as in force from time to time. The ACT Legislative Assembly is not required to pass these provisions.

In *Scrutiny Report 12*, the Committee noted that the original National Law—ie the *Health Practitioner Regulation National Law (ACT)* Bill 2009—was considered by its predecessor Committee in *Scrutiny Report No 18 of the 7th Assembly*. In that Scrutiny Report, referring to the explanatory statement for the National Law, noted that the explanatory statement stated that:

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“introduction of national law in a State or Territory Parliament for adoption by other participating States and Territories, is a standard approach to implementing national schemes in areas, like health, where Constitutional powers rest with the States and Territories, and not the Commonwealth”, but acknowledges that “concerns about abrogating the rights of Parliaments tend to be greatest when, as in this case, the proposed law includes pre-determined legislative provisions based on an agreement between governments”.

Scrutiny Report No 18 went on to state:

The Committee has reviewed the provisions for the adoption in the Territory of the Queensland Act as a national law and those for the making and operation of regulations under that law. The Committee will, in a future report, reflect on aspects of the scheme contained in this Bill. At this point, the Committee notes only that it should not be taken to have accepted any aspect of this scheme as a precedent for other national law schemes.

In Scrutiny Report 12, the Committee noted that it has kept the issue of “national scheme” legislation under close review and that it had recently written to the Attorney-General, seeking to open a dialogue with the Executive on legislative scrutiny issues that arise from “national scheme” legislation.

In Scrutiny Report 12, the Committee noted that Scrutiny Report No 18 goes on to state:

The Committee recommends that the Minister responsible for the administration of this national registration scheme advise the Assembly of any proposed change to the legislation or to the regulations.

The Committee went on to note (in Scrutiny Report 12) that, though it is not mentioned in the Minister’s response, it should be noted that (at least) the tabling of the National Law that was the subject of the Committee’s recent comment follows that recommendation. The Committee noted that the Minister’s response first stated:

[The National Law that was the subject of the Committee’s comment] was provided to the members of the ACT Legislative Assembly for information only.

The Committee noted that the Minister’s first response goes on to state:

Following the amendments made to the National Law through [the National Law that was the subject of the Committee’s comment], the Health Practitioner National Law (ACT) was republished on 28 September 2017 and is available on the ACT Legislation Register.

The Minister’s response then advises:

I have sought further advice from ACT Health regarding the appropriate process for Assembly scrutiny of amendments of this nature.

In the light of these comments, in Scrutiny Report 12, the Committee requested that the Minister provide a copy of that further advice, when it is received, as that further advice can be expected to inform any dialogue that the Committee enters into with the Attorney-General.
Finally, in Scrutiny Report 12, the Committee noted that the Minister’s response also provides a copy of the Explanatory Notes for the National Law that was the subject of the Committee’s comment, as passed by the Queensland Parliament. The Committee thanked the Minister for this further information. The Committee noted, however, that it would have been preferable if that information was provided at the time of the tabling of the National Law that was the subject of the Committee’s original comment.

The Minister then provided a further response to the Committee, dated 3 January 2018, which the Committee considered in Scrutiny Report 13 of the 9th Assembly (6 February 2018). In this further response, the Minister states:

ACT Health sought advice and has been advised by the ACT Parliamentary Counsel’s Office (PCO) that the ACT Legislative Assembly’s role in scrutiny of amendments or regulations made under national laws depends on the terms of the particular national law.

The requirements for the tabling of the amendments or regulation made under national laws are not the same in every case. Some amendments or regulations made under national laws do require tabling in the ACT Legislative Assembly, whilst some do not.

In this case there is no requirement for amendments of the national law itself or of national regulations made under that law to be tabled in the Assembly.

Amendments of the National Law and regulation apply automatically in the ACT and are brought about by the terms of the ACT legislation that originally applied the national law scheme in the Territory, that is, the Health Practitioner Regulation National Law (ACT) Act 2010 (s 6 of that Act).

Given that there is no requirement to table any amendments to the National Law, it followed that no explanatory statement was required to be tabled with the Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017.

In Scrutiny Report 13, the Committee indicated that it was aware that the requirements for the tabling of the amendments or regulations made under National Laws are not the same in every case. The Committee noted that this is a matter of ongoing concern for the Committee. The Committee is mindful of endeavouring to ensure that some level of consistency is imposed on such requirements. In particular, the Committee is mindful of endeavouring to ensure that all amendments or regulations made under National Laws are subject to tabling in, and/or disallowance by, the Legislative Assembly.

As to the proposition that the absence, in this case, of a requirement to table meant that no explanatory statement was required, the Committee stated that it disagreed. The Committee stated that it had consistently noted (see, eg, the discussion in Scrutiny Report 15 of the 8th Assembly, 11 March 2014, at page 28), the particular (complicated) circumstances of National Laws mean that the Committee (and the Legislative Assembly) would be greatly assisted by an explanation of the relevant legislative scheme, saving the Committee (and the Legislative Assembly) from having to work out the mechanics of the operation (and presentation, and disallowance) of such laws for itself.

Further, the Committee stated that it had also previously noted, there is no formal requirement that subordinate legislation (or disallowable instruments) be accompanied by an Explanatory Statement. However, the Committee has also noted, in its document titled Subordinate legislation—Technical
and stylistic standards—Tips/Traps⁴, the value of explanatory statements to the Committee (and the Legislative Assembly):

Principle [2] of the Committee’s terms of reference require it to “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”. Many of the issues identified below involve things that the Committee considers ought to be addressed in the Explanatory Statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

A further point is that addressing potential issues expressly in Explanatory Statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee’s comments. Often, the explanation is something that could have been included in the Explanatory Statement for a piece of subordinate legislation. It may involve no more than a sentence (e.g. “this is not a public servant appointment”, this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee’s comments.

In the context of the National Law dealt with in Scrutiny Reports 11, 12 and 13 of the 9th Assembly, the Committee noted that the issues that the Committee has identified with that particular legislation demonstrated one of the points that the Committee has consistently made about the value of explanatory statements, to the Committee and the Legislative Assembly. The absence of an explanatory statement for the particular legislation required the Committee to undertake research and analysis in order to be satisfied that the National Regulations in question are valid, etc. This (and the discussion that the Committee had with the Minister) might not have been necessary if an explanatory statement had been provided that dealt with the procedural issues that the Committee has raised.

In concluding its comments in Scrutiny Report 13, the Committee recommended to Ministers that, in circumstances such as with that particular National Regulation, where there is no formal requirement to table amendments, etc, then, at the very least, explanatory material produced in the “host” jurisdiction for the National Regulation be tabled in the Legislative Assembly.

The Committee notes that this is what appears to have happened in the case of the National Law that is the subject of this (new) comment. As indicated above, what appears to have been provided to the Legislative Assembly is a copy of the explanatory notes that were tabled in the Queensland Parliament.

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An issue that has not been mentioned above (or in the previous discussions, in Scrutiny Reports 11, 12 and 13 of the 9th Assembly) is the Committee’s obligations under section 38 of the Human Rights Act 2004, “to report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly”. This National Law raises various human rights issues.

The changes to the Health Practitioner Regulation National Law engage the right against undue interference with privacy and reputation protected by section 12 of the Human Rights Act. The current mandatory reporting requirements under the National Law will be amended by making special provision for treating practitioners who, in the course of providing a health service to another health practitioner becomes aware that the other practitioner may be placing the public at risk of harm. Treating practitioners currently have to report their reasonable belief that a health practitioner is engaged in sexual misconduct in connection with the practice of their profession. The changes to the National Law extend this obligation where the treating practitioner has a reasonable belief about the future risk of engaging in sexual misconduct.

The changes impose a higher threshold of there being a substantial risk of harm to the public before treating practitioners have an obligation to report. However, in forming a view as to whether this higher threshold is met, a treating practitioner must form the view that the practitioner being reported is not taking appropriate steps to manage any risks to patients associated with their health issues. The potential implicit disclosure of additional personal details means that the changes don’t reduce the harm to privacy or reputation of a practitioner subject to any report.

The changes also enable inspectors to keep a seized document for longer than six months if it may be needed in a proceeding for an offence under the National Law. This may also limit the right to privacy given the nature of the personal information possibly included in the documents relevant to proceedings for offences relating to falsely claiming to be a health practitioner.

In the Committee’s view, the changes made by this National Law therefore raise human rights issues. If they were presented in a Bill before the Legislative Assembly, these issues would need to be identified in an explanatory statement and a justification provided, using the framework set out in section 28 of the Human Rights Act. The Committee asks that consideration be given for the same process to also be adopted in relation to changes to National Laws that have the effect of amending Territory legislation automatically, without further action by the Legislative Assembly.

In making this comment, the Committee notes that the explanatory notes provided contain (at pages 9-10) a discussion of the National Law by reference to the “fundamental legislative principles” that apply to Queensland legislation, under section 4 of the Legislative Standards Act 1992 (Qld). The Committee notes that this obligation includes whether “legislation has sufficient regard to .... rights and liberties of individuals”. The Committee notes, however, that the discussion does not satisfy the sorts of requirements imposed (in the ACT) by the Human Rights Act.

A PRACTICAL ISSUE—COMMENCEMENT OF THE RELEVANT AMENDMENTS

Section 2 of this National Law provides that the National Law commences on a day to be fixed by proclamation. The Committee has not been able to identify any further information as to the commencement of the National Law. A search of the Queensland legislation website (where the National Law is published) indicates that commencement of the substantive provisions of the
National Law are yet to be proclaimed. The Committee could identify no relevant information (relating to this National Law) on the ACT Legislation Register. This being so, the Committee is concerned as to how a person or entity affected by the amendments made by this National Law would know that the amendments have commenced, let alone how such persons and entities would even be aware of this particular National Law.

The Committee would appreciate the Minister’s views on this issue.

Concluding Comments

While the Committee acknowledges the Minister’s (continuing) view that there is no legal obligation to provide explanatory statements in relation to legislation such as this, under the Health Practitioner Regulation National Law (ACT) Act (see, eg, the Minister’s response, dated 16 March 2019, in relation to the Health Practitioner Regulation National Law Regulation 2018), the Committee re-states its view that principle (2) of the Committee’s terms of reference involves a necessary implication that there will be explanatory statements provided with legislation considered by the Committee.

The Committee draws the attention of the Legislative Assembly to this National Law, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement/notes provided with the National Law does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

This comment requires a response from the Minister.

Responses

Government Responses

The Committee has received responses from:


  This response can be viewed online.


  This response can be viewed online.

Private Member’s Responses


The Committee has received responses from:


These responses can be viewed online.


Giulia Jones MLA
Chair
30 April 2019

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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 29, dated 1 April 2019**