



24 June 2021

Ms Philippa Lynch PSM
Chief Executive and Principal Registrar
High Court of Australia
PO Box 6309
KINGSTON ACT 2604

Via email: nerissa.kitson@hcourt.gov.au

CC: Senator the Hon Michaelia Cash, Attorney-General,
attorney@ag.gov.au; DLO@ag.gov.au

Dear Ms Lynch,

High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021 [F2021L00391]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified technical scrutiny concerns in relation to the above instrument, and the committee therefore requests your advice in relation to the matters identified below.

As you are aware, the instrument is made under subsection 19(2) of the *High Court of Australia Act 1979* (the Act) and regulates the conduct of persons in the building and precincts of the High Court in Canberra. The matters provided for in the instrument are in addition to the powers exercisable by a 'security officer' or 'authorised court officer' within the meaning of the *Court Security Act 2013* and *Court Security Regulation 2013*.

Paragraph 5(i) of the instrument provides that a person shall not behave in an 'offensive and disorderly manner' within the High Court building or precincts. Similarly, paragraph 5(xii) provides, in part, that a person shall not 'create any nuisance' within the High Court building or precincts. The committee considers that these are subjective concepts with a potentially broad application but notes that there is no guidance on either the face of the instrument or its explanatory statement as to how these discretionary concepts are to be interpreted and applied in practice. In addition, there is no clause-by-clause analysis of the instrument in its accompanying explanatory statement to assist in interpreting these concepts.

From a scrutiny perspective, the committee considers that key terms and concepts should be clearly defined to remove any potential confusion or misunderstanding. In this regard, the committee is concerned, for example, that celebrations or peaceful protests within the precincts may potentially be caught within the broad scope of these provisions, and notes that the High Court has a distinguished history of such events taking place in its precinct.

The committee further notes that contravention of a direction made under subsection 19(2) of the Act is an offence of strict liability under subsections 19(6) and 19(6A) of the Act.

In light of the above, the committee would appreciate your advice in relation to:

- the factors that are taken into account in determining whether an individual has acted in an 'offensive and disorderly manner' or created 'any nuisance';
- examples of the type of conduct that is proscribed by these provisions;
- whether events such as celebrations or peaceful protests within the High Court precincts would fall within the meaning of either paragraph 5(i) or 5(xii); and
- further details about who makes these determinations in practice.

Please note that if the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may, in accordance with its usual practice, give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by 8 July 2021, although please contact the committee's secretariat to discuss this timeframe if required.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you in advance for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation