

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

SCRUTINY REPORT 8

24 AUGUST 2021

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

- (10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:
- (a) considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
 - (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;
 - (b) reporting 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*;
 - (c) considering 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):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and
 - (d) 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 Assembly;

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BILLS

BILLS—COMMENT

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

BAIL AMENDMENT BILL 2021

This Private Members Bill amends the *Bail Act 1992* to add to the list of offences to which the presumption for bail does not apply the offence by including an assault of frontline community service provider.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

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

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bail Act authorises the grant of bail for accused persons being held in custody. Division 2.2 provides for a presumption of bail, where a person will be entitled to bail subject to limitations and restrictions depending on the nature of the alleged offence. The presumption does not apply to a person accused of offences listed in Schedule 1 of the Act. The Bill will add to Schedule 1 the offence of assault of frontline community service provider as provided by section 26A of the *Crimes Act 1900*.

As the Bill will prevent a person from being presumed to be entitled to bail, and therefore will have to meet more stringent requirements before being granted bail, the Bill will potentially limit the right to liberty and security of person provided by section 18 of the HRA. Rights to recognition and equality before the law as protected by section 8 of the HRA and freedom of movement as protected by section 13 of the HRA may also be limited. Removal of the presumption for bail also gives rise to the need for the prosecution and courts in determining whether to grant bail to consider factors including the nature and seriousness of the offence and strength of the evidence against the person (see sections 22 and 23 of the Bail Act). This may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.

The explanatory statement accompanying the Bill generally recognises these potential limitations (other than the restriction on the presumption of innocence). It provides a justification using the framework set out in section 28 of the HRA. That statement refers to the retention of the accused's ability to apply for bail, and compares the seriousness of the assault on frontline workers with other offences contained in Schedule 1 of the Bail Act (and for which the presumption of bail is similarly excluded).

The Committee notes that, in the absence of a presumption for or against bail, the criteria for the grant of bail balances concerns over the administration of justice and protecting the safety and welfare of other persons against the interests of the person subject to be detained. It is not clear to the Committee that the comparisons of the seriousness of offences included in the explanatory statement reflect these concerns. The Committee therefore requests further information from the Member as to the basis on which the comparisons included in the explanatory statement were selected, and how these comparisons reflect the legitimate concerns on which the Bail Act operates. Consideration should be given to amending the explanatory statement to include reference to this information.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond prior to debate on this Bill.

COAG LEGISLATION AMENDMENT BILL 2021

This Bill amends various Acts and Regulations to replace references to the Council of Australian Governments (COAG) and associated ministerial forums, councils and associated bodies, which have ceased to operate following agreements by the National Cabinet on 29 May 2020 and 23 October 2020. The Bill will generally insert a new term of Ministerial Council, meaning a body (however described) consisting of relevant Ministers of the Commonwealth and each state and territory.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

DELAYED COMMENCEMENT AND POSSIBLE RETROSPECTIVE OPERATION

The Bill will amend the *Health (National Health Funding Pool and Administration) Act 2013* to insert transitional provisions replacing references to COAG and the standing council on health with, from 29 May 2020 and 23 October 2020 respectively, references to the First Ministers' Council and Ministerial Council. The new bodies are authorised from those dates to finish anything that was started but not finished by the previously named body.

The Bill will also amend the *Utilities Act 2000* to insert transitional provisions replacing any reference in that Act to COAG EC (ie the COAG Energy Council) to be taken, from 23 October 2020, with the newly defined Ministerial Council.

Given these provisions may provide authority for acts done prior to the commencement of the Bill, the Committee is concerned that they may operate retrospectively to potentially affect rights or interests of individuals affected by the activities of the substituted bodies. The Committee therefore seeks an assurance from the Minister that rights or interests of individuals will not be affected by these provisions, or, if so, a justification for that affect provided.

The Committee also notes that the Bill will commence on a day fixed by the Minister by written notice or 18 months after notification. Section 79 of the *Legislation Act 2001*, which provides for automatic commencement 6 months after notification, is displaced. There is no justification for the possible delayed commencement in the explanatory statement accompanying the Bill. Given the possible retrospective operation of the Bill, and the potential uncertainty accompanying a delay in the commencement of legislation which has been passed by the Assembly, the Committee seeks further information from the Minister as to why a delay of up to 18 months for the commencement of the Act is considered necessary.

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

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee Resolution of Appointment paragraph (10)(a)(iv)

HENRY VIII CLAUSES

The amendments to the Health (National Health Funding Pool and Administration) Act and Utilities Act include the power to make regulations prescribing transitional matters necessary or convenient to be prescribed because of the enactment of the Bill, and to modify the transitional provisions, including in relation to another territory law, to provide for anything that, in the Executive's opinion, is not adequately or appropriately dealt with by those provisions. Any amendment to the transitional provisions by regulations will have effect despite anything elsewhere in the relevant Act or another Territory law. Both transition amendments will expire two years after commencement of the Bill.

The explanatory statement accompanying the Bill recognises that provision for regulations to have effect despite anything to the contrary in primary legislation – referred to as Henry VIII clauses – requires justification. The statement includes the following for each provision:

A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

The Committee refers these statements to the Assembly.

The Committee notes that the discussion in the explanatory statement of amendments to the Utility Act includes describing any amendments to the transition provisions as having effect as if amended by an Act, but will not bind future enactments of the Assembly and will have no ongoing effect after the expiry of the transition provisions. It is not clear to the Committee why this discussion was not included in relation to the amendments of the Health (National Health Funding Pool and Administration) Act. The Committee is also concerned that the effects of any regulations amending the transition provisions may continue beyond the stated two year expiry period. However, the Committee recognises the limited scope of the transition provisions in the Bill and the Acts being amended.

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

COVID-19 EMERGENCY RESPONSE (CHECK-IN INFORMATION) AMENDMENT BILL 2021

This Bill amends the *COVID-19 Emergency Response Act 2020* to restrict the use of information collected for the purpose of contract tracing in relation to a Covid-19 declaration.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill creates two strict liability offences. The first restricts the way check-in information is collected. An authorised collector, a person who must collect check-in information or chooses to register for use of the Check In CBR app, can only collect check-in information through the direct entry of the information into the Check In CBR app or as permitted under a public health direction or

exemption. Breach of this new offence will be subject to a maximum penalty of 40 penalty units (see proposed section 2D). The Committee notes that *Public Health (Check In Requirements) Emergency Direction 2021 (No 2)* currently provides for the manual collection of contact details where the Check In CBR app is not available, subject to those records being kept for 28 days, produced if required by an authorised person, and not used for any other purpose.

The second strict liability offence to be introduced by the Bill relates to how check-in information, once collected, can be communicated, published, recorded or otherwise used. Use by a person other than an authorised person is an offence subject to a maximum penalty of 40 penalty units (see proposed section 2E). Authorised persons are defined as those persons authorised to exercise emergency powers under the *Public Health Act 1997*, including the chief health officer and health officials and other persons authorised by the chief health officer, ambulance service members and police officers (see subsection 121(4) of the Public Health Act). There are exceptions to this offence which allow non-authorised persons to use check-in information only in certain circumstances or for certain purposes, including in the initial collection of the check-in information, in accordance with public health directions. It is also an exception to use check-in information for the purpose of investigating or prosecuting offences for failing to comply with contract tracing requirements or giving false or misleading information in response to those requirements.

As strict liability removes the burden on the prosecution to establish the fault elements of the offence, the Bill will potentially limit the presumption of innocence protected by the rights in criminal proceedings set out in section 22 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and provides a justification for why it should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the comments below, the Committee refers that statement to the Assembly.

Check-in information is defined in the Bill as information about the presence of a person collected for the purpose of contact tracing. It is intended to apply to the information collected upon entry to premises, either through use of the Check In CBR app, or, where that app is not available, manually collected. That information is then generally only available to authorised persons who can access the information from the Check In CBR app or from premises where manual records were kept. However, check-in information does not include “information collected in the ordinary course of carrying on a business, activity or undertaking if the information would have been collected in any case for a purpose other than contact tracing.” The Committee is concerned that this may prevent information that would otherwise have been collected in the ordinary course of a business from being protected under the Bill. Not all information collected through the Check In CBR app or under health directions will be included as check-in information and protected against misuse.

As described above, the proposed offence for misuse of the check-in information generally restricts use to authorised persons. Proposed subsection 2E(4) states that an authorised person may use check-in information only for a permitted purpose. Permitted purposes is defined to mean: undertaking or relating to undertaking contract tracing or assisting State entities undertake contract tracing; the purpose of investigating or prosecuting offences for failing to comply with contract tracing requirements in a public health direction or giving false or misleading information in response to those requirements; or for statistical or summary information that could not reasonably be expected to lead to the identification of an individual. The Committee is concerned that this restriction on the use of check-in information by authorised persons may not extend to all information accessible through access to the check-in Canberra app or as otherwise collected under public health directions. The Committee is also not clear as to the intended enforcement of this restriction, given the limitation on the use of the check-in information is not part of the offence and may be subject to other legislation which authorises the use of lawfully accessed information for purposes other than those set out in the Bill.

The Committee therefore requests further information on how the limitation on check-in information to not include information collected in the ordinary course of business will apply so as to ensure that all contract tracing information collected using the Check In CBR app or under health directions will be protected against misuse, and how the limitations on use by authorised persons of check-in information is intended to be enforced.

The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond prior to the Bill being debated.

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2021

This Bill amends:

- the *Road Transport (Safety and Traffic Management) Act 1999* to extend automatic licence disqualification periods for culpable driving or negligent driving which occasions death or grievous bodily harm;
- the *Road Transport (General) Act 1999* to introduce an increased maximum penalty for negligent driving which occasions actual bodily harm; and
- the *Road Transport (Road Rules) Regulation 2017* to introduce new offences involving traveling on personal mobility devices without proper control, failing to comply with a direction from a police officer to get off, or not get on, certain vehicles or animals such as bicycles and horses due to a belief the person is under the influence of alcohol or drugs.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

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

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

RIGHT TO WORK AND OTHER WORK-RELATED RIGHTS (SECTION 27B)

Various rights protected under the HRA are potentially limited by the amendments put forward in the Bill. The extension of automatic disqualification periods may limit the right to work protected by section 27B of the HRA. Creation of new offences relating to not controlling personal mobility devices and being directed to get off, or not get on, various alternatives to motorised transport may have an unequal effect on those persons with substance abuse issues or who may be dependent on such transport due to a physical or mental impairment of some form,¹ and hence may potentially limit the right to equality before the law protected by section 8 of the HRA. As these new offences will be strict liability offences the presumption of innocence protected by the rights in criminal proceedings under section 22 of the HRA may also be limited. Extending the penalties associated

¹ The Committee notes that motorised wheelchairs are not included in the definition of personal mobility devices under the Road Transport (Road Rules) Regulation, s 18A.

with negligent driving occasioning actual bodily harm, including a potential for imprisonment of up to six months, may limit the right to liberty and security of person protected by section 18 of the HRA. By adding restrictions on the use of certain forms of transport the amendments generally may limit the right to freedom of movement protected by section 13 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limitations and provides a justification for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers this statement to the Assembly.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2021-90 being the Long Service Leave (Portable Schemes) Contract Cleaning Industry Employer Levy Determination 2021 made under subsection 56A(1) of the Long Service Leave (Portable Schemes) Act 2009 revokes DI2018-44 and determines the levy payable by employers in the contract cleaning industry for each quarter.**
- **Disallowable Instrument DI2021-91 being the Long Service Leave (Portable Schemes) Community Sector Industry Employer Levy Determination 2021 made under subsection 56A(1) of the Long Service Leave (Portable Schemes) Act 2009 revokes DI2018-45 and determines the levy payable by employers in the community sector for each quarter.**
- **Disallowable Instrument DI2021-92 being the Children and Young People (Death Review Committee) Deputy Chair Appointment 2021 (No 1) made under section 727EA of the Children and Young People Act 2008 appoints a specified person as deputy chair of the Children and Young People Death Review Committee.**
- **Disallowable Instrument DI2021-93 being the Children and Young People (Death Review Committee) Appointment 2021 (No 2) made under section 727D of the Children and Young People Act 2008 appoints a specified persons as members of the Children and Young People Death Review Committee.**
- **Disallowable Instrument DI2021-103 being the Official Visitor (Mental Health) Appointment 2021 (No 1) made under paragraph 10(1)(e) of the Official Visitor Act 2012 appoints a specified person as an official visitor for the purposes of the Mental Health Act 2015.**
- **Disallowable Instrument DI2021-106 being the Domestic Animals (Assistance Animal Accreditation) Guidelines 2021 made under section 95 of the Domestic Animals Act 2000 revokes DI2020-170 and makes the Assistance Animal Accreditation Guidelines to provide for the accreditation of assistance animals in the ACT.**
- **Disallowable Instrument DI2021-107 being the Unit Titles (Management) Certificate Determination 2021 made under section 119 of the Unit Titles (Management) Act 2011 revokes DI2020-285 and prescribes the information that must be provided with a unit title certificate.**

- Disallowable Instrument DI2021-116 being the Civil Law (Wrongs) Professional Standards Council Appointment 2021 (No 6) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.
- Disallowable Instrument DI2021-117 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2021 (No 1) made under section 6 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Governing Board, representing the interests of employers in the building and construction industry.
- Disallowable Instrument DI2021-118 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2021 (No 2) made under section 6 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Governing Board, representing the interests of employers in the building and construction industry.
- Disallowable Instrument DI2021-119 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2021 (No 3) made under section 6 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Governing Board, representing the interests of employees in the building and construction industry.
- Disallowable Instrument DI2021-120 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2021 (No 4) made under section 6 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Building and Construction Industry Training Fund Governing Board, representing the interests of employees in the building and construction industry.
- Disallowable Instrument DI2021-121 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 1) made under section 9 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the CIT Board, with expertise and knowledge in governance, audit and risk, finance, and health and community sectors.
- Disallowable Instrument DI2021-122 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 2) made under section 9 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the CIT Board, with expertise and knowledge in business development, finance, VET, governance, audit and risk, and strategic change management.
- Disallowable Instrument DI2021-123 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 3) made under section 9 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the CIT Board, with expertise and knowledge in education pedagogy, VET, infrastructure development and growing higher education in the health sector.
- Disallowable Instrument DI2021-124 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 4) made under section 9 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* re-appoints a specified person as a member of the CIT Board, with expertise and knowledge in customer service, event management, educational technology and instructional design.

- Disallowable Instrument DI2021-132 being the Board of Senior Secondary Studies Appointment 2021 (No 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as chair of the ACT Board of Senior Secondary Studies.
- Disallowable Instrument DI2021-134 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2021 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2020-295 and determines the conditions under which non-executive members may, on behalf of the Territory, employ staff and engage consultants or contractors.
- Disallowable Instrument DI2021-135 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2021 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2020-150 and determines the conditions under which the Speaker may, on behalf of the Territory, employ staff and engage consultants or contractors.
- Disallowable Instrument DI2021-137 being the Civil Law (Wrongs) Australian Institute of Building Surveyors Professional Standards Scheme 2021 (No 1) made under section 4.10 of Schedule 4 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of New South Wales' approval of the Australian Institute of Building Surveyors Professional Standards Scheme.
- Disallowable Instrument DI2021-152 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Chair) Appointment 2021 made under section 21 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as chair of the ACT Climate Change Council.
- Disallowable Instrument DI2021-168 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2020-194 and determines the percentages and income threshold amounts for the purposes of the *Land Rent Act 2008*.
- Disallowable Instrument DI2021-169 being the Taxation Administration (Amounts Payable—Land Tax) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2020-177 and determines the fixed charge and percentage rates for land tax, and a flat percentage rate for the foreign ownership surcharge for the purposes of the *Land Tax Act 2004*.
- Disallowable Instrument DI2021-171 being the Taxation Administration (Amounts Payable—Duty) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2019-141 and determines differential rates of duty, or the method by which an amount of duty is payable under the *Duties Act 1999*.
- Disallowable Instrument DI2021-172 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2019-271 and determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable.
- Disallowable Instrument DI2021-173 being the Taxation Administration (Off the Plan Unit Duty Concession Scheme) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* determines, for the purposes of the scheme, the type of eligible property; the eligibility requirements, and the concession amounts.
- Disallowable Instrument DI2021-174 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable under the *Duties Act 1999*.

- **Disallowable Instrument DI2021-175 being the Duties (Pensioner Duty Deferral Scheme) Determination 2021** made under section 75AG of the *Duties Act 1999* determines a scheme for the deferred payment of duty by a pensioner and their domestic partner (if any) on an eligible transaction.
- **Disallowable Instrument DI2021-176 being the Taxation Administration (Amounts Payable—Safer Families Levy) Determination 2021** made under section 139 of the *Taxation Administration Act 1999* determines the safer families levy for the purposes of the *Rates Act 2004*.
- **Disallowable Instrument DI2021-178 being the Rates (Objections Period) Determination 2021** made under paragraph 71(2)(b) of the *Rates Act 2004* determines the period for the lodging of an objection by an eligible owner.
- **Disallowable Instrument DI2021-180 being the Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2021 (No.1)** made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-299 and determines the arrangements under which office-holders may, on behalf of the Territory, employ staff or engage consultants and contractors.
- **Disallowable Instrument DI2021-181 being the Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2021 (No 1)** made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-300 and determines the arrangements under which Members may, on behalf of the Territory, employ staff or engage consultants or contractors.
- **Disallowable Instrument DI2021-184 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Office-holders' Staff Determination 2021 (No 1)** made under subsection 6(3) of the *Legislative Assembly (Members' Staff) Act 1989* provides for the portability of accrued personal, annual and long service leave entitlements when ACTPS officers take leave without pay to work for a Minister.
- **Disallowable Instrument DI2021-185 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Members' Staff Determination 2021 (No 1)** made under subsection 11(3) of the *Legislative Assembly (Members' Staff) Act 1989* provides for the portability of accrued personal, annual and long service leave entitlements when ACTPS officers take leave without pay to work for a Member.

DISALLOWABLE INSTRUMENTS—COMMENT

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

FEES DETERMINATIONS / COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-94 being the Animal Welfare (Fees) Determination 2021 (No 1)** made under section 110 of the *Animal Welfare Act 1992* revokes DI2020-159 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-95 being the Clinical Waste (Fees) Determination 2021 (No 1)** made under section 40 of the *Clinical Waste Act 1990* revokes DI2020-180 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-96 being the Domestic Animals (Fees) Determination 2021 (No 2)** made under section 144 of the *Domestic Animals Act 2000* revokes DI2021-15 and determines fees payable under the Act.

- Disallowable Instrument DI2021-97 being the Public Unleased Land (Fees) Determination 2021 (No 1) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2020-274 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-98 being the Tree Protection (Fees) Determination 2021 (No 1) made under section 109 of the *Tree Protection Act 2005* revokes DI2020-162 and determines the fee payable for applications for reconsideration.
- Disallowable Instrument DI2021-99 being the Waste Management and Resource Recovery (Fees) Determination 2021 (No 1) made under section 126 of the *Waste Management and Resource Recovery Act 2016* revokes DI2020-163 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-100 being the Dangerous Goods (Road Transport) Fees and Charges Determination 2021 made under section 194 of the *Dangerous Goods (Road Transport) Act 2009* revokes DI2020-184 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-101 being the Dangerous Substances (Fees) Determination 2021 made under section 221 of the *Dangerous Substances Act 2004* revokes DI2020-185 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-102 being the Machinery (Fees) Determination 2021 made under section 5 of the *Machinery Act 1949* revokes DI2020-186 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-104 being the Scaffolding and Lifts (Fees) Determination 2021 made under section 21 of the *Scaffolding and Lifts Act 1912* revokes DI2020-187 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-105 being the Work Health and Safety (Fees) Determination 2021 made under section 278 of the *Work Health and Safety Act 2011* revokes DI2020-188 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-108 being the Road Transport (General) (Parking Permit Fees) Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2019-58 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-109 being the Road Transport (General) (Pay Parking Area Fees) Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2019-182 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-112 being the Births, Deaths and Marriages Registration (Fees) Determination 2021 made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* revokes DI2019-122 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-113 being the Emergencies (Fees) Determination 2021 made under section 201 of the *Emergencies Act 2004* revokes DI2019-90 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-114 being the Firearms (Fees) Determination 2021 made under section 270 of the *Firearms Act 1996* revokes DI2020-138 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-115 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2021 (No 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2019-233 and determines the maximum fares relating to the hiring or use of a taxi.

- Disallowable Instrument DI2021-125 being the Community Title (Fees) Determination 2021 made under section 96 of the *Community Title Act 2001* revokes DI2019-132 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-126 being the Planning and Development (Fees) Determination 2021 made under section 424 of the *Planning and Development Act 2007* revokes DI2019-133 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-127 being the Stock (Fees) Determination 2021 made under section 68 of the *Stock Act 2005* revokes DI2020-201 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-128 being the Stock (Levy) Determination 2021 made under section 6 of the *Stock Act 2005* revokes DI2020-203 and determines the levy amount per stock unit and the number of animals making up a stock unit.
- Disallowable Instrument DI2021-129 being the Stock (Minimum Stock Levy) Determination 2021 made under section 7A of the *Stock Act 2005* revokes DI2020-202 and sets the minimum stock levy.
- Disallowable Instrument DI2021-130 being the Surveyors (Fees) Determination 2021 made under section 80 of the *Surveyors Act 2007* revokes DI2020-204 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-131 being the Unit Titles (Fees) Determination 2021 made under section 179 of the *Unit Titles Act 2001* revokes DI2019-135 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-136 being the Juries (Payment) Determination 2021 made under sections 49 and 51 of the *Juries Act 1967* revokes DI2020-209 and determines payments made to jurors for the purposes of the Act.
- Disallowable Instrument DI2021-138 being the Agents (Fees) Determination 2021 made under section 176 of the *Agents Act 2003* revokes DI2020-143 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-139 being the Associations Incorporation (Fees) Determination 2021 made under section 125 of the *Associations Incorporation Act 1991* revokes DI2020-152 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-140 being the Casino Control (Fees) Determination 2021 made under section 143 of the *Casino Control Act 2006* revokes DI2020-157 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-141 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2021 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* revokes DI2020-142 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-142 being the Co-operatives National Law (ACT) (Fees) Determination 2021 made under schedule 1 of the *Co-operatives National Law (ACT) Act 2017* revokes DI2020-141 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-143 being the Land Titles (Fees) Determination 2021 made under section 139 of the *Land Titles Act 1925* revokes DI2019-156 and determines fees payable for the purposes of the Act.

- Disallowable Instrument DI2021-144 being the Liquor (Fees) Determination 2021 made under section 227 of the *Liquor Act 2010* revokes DI2020-236 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-145 being the Partnership (Fees) Determination 2021 made under section 99 of the *Partnership Act 1963* revokes DI2019-167 and determines the fee payable for an application for registration as an incorporated limited partnership.
- Disallowable Instrument DI2021-146 being the Registration of Deeds (Fees) Determination 2021 made under section 8 of the *Registration of Deeds Act 1957* revokes DI2019-120 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-147 being the Retirement Villages (Fees) Determination 2021 made under section 262 of the *Retirement Villages Act 2012* revokes DI2020-140 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-148 being the Traders (Licensing) (Fees) Determination 2021 made under section 52 of the *Traders (Licensing) Act 2016* revokes DI2019-117 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-149 being the Security Industry (Fees) Determination 2021 made under section 50 of the *Security Industry Act 2003* revokes DI2019-166 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-150 being the Sex Work (Fees) Determination 2021 made under section 29 of the *Sex Work Act 1992* revokes DI2019-118 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-151 being the Gaming Machine (Fees) Determination 2021 made under section 177 of the *Gaming Machine Act 2004* revokes DI2020-129 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-153 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2021 made under section 48 of the *Unlawful Gambling Act 2009* revokes DI2020-158 and determines the fee to accompany an application by a charitable organisation to conduct charitable gaming for the purposes of the Act.
- Disallowable Instrument DI2021-154 being the Court Procedures (Fees) Determination 2021 made under section 13 of the *Court Procedures Act 2004* revokes DI2020-154 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-155 being the Guardianship and Management of Property (Fees) Determination 2021 made under section 75 of the *Guardianship and Management of Property Act 1991* revokes DI2020-153 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-156 being the Public Trustee and Guardian (Fees) Determination 2021 (No 2) made under section 75 of the *Public Trustee and Guardian Act 1985* revokes DI2021-85 and determines fees payable for the purposes of the Act.
- Disallowable Instrument DI2021-157 being the Lotteries (Fees) Determination 2021 made under section 18A of the *Lotteries Act 1964* revokes DI2020-171 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2021-160 being the Victims of Crime (Fees) Determination 2021 (No 1) made under subsection 50(1) of the *Victims of Crime Regulation 2000* revokes DI2020-172 and determines the fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2021-161 being the Health (Fees) Determination 2021 (No 2) made under section 192 of the *Health Act 1993* repeals DI2021-8 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2021-170 being the Rates, Land Tax, Land Rent and Duties (Certificate and Statement Fees) Determination 2021 made under section 252AB of the *Duties Act 1999*, section 32 of the *Land Rent Act 2008*, section 43 of the *Land Tax Act 2004* and section 78 of the *Rates Act 2004* revokes DI2020-193 and determines the fee payable to the Commissioner for ACT Revenue to apply for a certificate for the purposes of the Acts.**
- **Disallowable Instrument DI2021-179 being the Race and Sports Bookmaking (Fees) Determination 2021 made under section 97 of the *Race and Sports Bookmaking Act 2001* revokes DI2020-156 and determines fees payable for the purposes of the Act.**

Each of the instruments mentioned above determines fees (or, in a few cases, rates, rates of payment, maximum taxi fares, etc), for various Acts. As the Committee noted in *Scrutiny Report 6 of the 10th Assembly* (15 June 2021), the Committee expects to be required to consider in excess of 100 such instruments at this time of the year, as new fees, etc are determined for the new financial year.

As the Committee also stated in *Scrutiny Report 6*, in recent years, the Committee has been pleased to observe that the standard of fees determinations (and their explanatory statements) is much-improved (in terms of them meeting the Committee's long-held views about fees determinations) from, say, ten years ago. This improvement is again evident in this batch of instruments. The Committee notes that the requirement in relation to setting out the "old" and "new" fees has been consistently met. The Committee also notes that, in the batch of instruments mentioned above, there is a high degree of consistency in the explanations provided for the various fees increases. In addition, there are some instruments that provide for different increases/explanations, in the circumstances of particular Acts. These issues are discussed below.

Consistency in explanations for fees increases

The Committee notes that the explanatory statement for the first instrument mentioned above (DI2021-94), which determines fees for the *Animal Welfare Act 1992*, states:

This determination increases fees contained in DI2020-159 by forecast Wage Price index (WPI) 1.75% as per Budget Memo 2021/08, rounded for cash handling and other purposes.

The Committee notes that this explanation is consistent with the explanation provided in relation to the majority of fees instruments discussed in *Scrutiny Report 6 of the 10th Assembly* (15 June 2021). The same explanation is also provided in relation to the majority of the remaining instruments mentioned above. Some variations on that explanation are discussed below.

The explanatory statement for the Emergencies (Fees) Determination 2021 (DI2021-113) states:

This determination sets the relevant fees for services provided by an emergency service, including the ACT Ambulance Service and the ACT Fire and Rescue Service.

The new determination sets the fees that will apply beginning on 1 July 2021 and repeals the *Emergencies (Fees) Determination 2019* (the 2019 determination). It provides for fee increases in line with annual adjustments to the Wages Price Index (WPI) of 1.75%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges. Explanatory notes in the determination list the fees previously determined to enable comparison.

The determination does not impose new fees.

The determination does not remove any former fees.

The Committee notes that a similar explanation, in relation to the rounding *up* of fees, in certain circumstances, appears in the explanatory statements for DI2021-139, DI2021-140, DI2021-141, DI2021-142, DI2021-143, DI2021-144, DI2021-145, DI2021-146, DI2021-147, DI2021-148, DI2021-149, DI2021-150, DI2021-151, DI2021-153, DI2021-154, DI2021-155, DI2021-156, DI2021-157 and DI2021-179.

The explanatory statement for the Juries (Payment) Determination 2021 (DI2021-136), which determines amounts payable to jurors, under the *Juries Act 1967*, in relation to jury service, states:

Under section 51 of the *Juries Act 1967*, a person summoned or appointed to serve as a juror is entitled to be paid the amount determined by the Minister for the person's attendance at the court in accordance with the summons or appointment, whether or not the person serves as a juror. Schedule 2 of the instrument lists the amounts that a juror is to be paid under section 51. The amounts in schedule 2 have been increased by 1.75%, which is the 2020-21 Treasury Budget forecast **CPI index**. [emphasis added]

The Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2021 (No 1) (DI2021-115), which determines maximum fares for hiring a taxi, under the *Road Transport (Public Passenger Services) Act 2001*, also relies on the Consumer Price Index (CPI), rather than the Wage Price Index (WPI). The explanatory statement states:

This instrument is titled the *Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2021 (No 1)* and increases the ACT's maximum taxi fare. The fare increases in this instrument have been based on the Consumer Price Index (CPI) for the ACT. Any increase in maximum regulated fares in this instrument are based on a CPI increase in 2020-21 of 1.75% and rounded to the nearest five cents.

Similarly, the Victims of Crime (Fees) Determination 2021 (No 1) (DI2021-160), which determines fees payable to service providers, under the *Victims of Crime Regulation 2000*, also relies on the CPI, rather than the WPI. The explanatory statement states:

Under section 50 of the *Victims of Crime Regulation 2000*, the Minister may, in writing, determine fees that are payable for services provided to an eligible victim under the regulation by a service provider.

The Minister delegated this function to the Director-General under his express delegation power in section 254A of the *Legislation Act 2001*, limited to the extent that the Director-General may determine fees only as commensurate with the Consumer Price Index (CPI) (instrument NI2018-337).

The fees payable which applied previously are listed in italic in Schedule 1, column 3 of the instrument. ACT Treasury has forecast a CPI increase of 1.75% for 2021-22. This rate has been applied to calculate the fees payable for the 2021-22 period. The new amounts for 2021-22 are set out in Schedule 1, column 4 of the instrument.

Fees payable have been increased based on the forecast CPI rate and rounded to the nearest dollar.

Act-specific explanations for fees increases

The explanatory statements for following determinations indicate that the relevant fees are determined in relation to the particular to the circumstances of the relevant Act:

Public Unleased Land (Fees) Determination 2021 (No 1) (DI2021-97)

Indexed Fees

This determination increases fees contained in DI2020-274 by forecast Wage Price index (WPI) 1.75% as per Budget Memo 2021/08, rounded for cash handling and other purposes.

As part of an independent review of GST related revenue the Directorate has adopted changes to the following fees:

- Fees at 1.4, 1.5, 1.6 and 1.7 of Schedule 1 now include GST.

Waste Management and Resource Recovery (Fees) Determination 2021 (No 1) (DI2021-99)

Indexed Fees

This determination increases fees contained in DI2020-163 by forecast Wage Price index (WPI) 1.75% as per Budget Memo 2021/08, rounded for cash handling and other purposes.

Fees related to the West Belconnen Resource Management Centre have been removed due to the closure of this facility.

As part of an independent review of GST related revenue the Directorate has adopted changes to the following fees:

- Fees at 2.1 and 2.2 of Schedule 1 now include GST.
- Fees at 1.1 and 1.2 of Schedule 2 no longer include GST.

Retirement Villages (Fees) Determination 2021 (DI2021-147)

The new determination sets the fees that will apply beginning on 1 July 2021 and repeals the Retirement Villages (Fees) Determination 2020 DI2020-140. It provides for fee increase of \$3.00 on top of the annual adjustments to the Wages Price Index (WPI) of 1.75%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar.

The additional increase is in order to support cost recovery for reforms under the Land Titles Modernisation Program, aligning with lodgement fees under the Land Titles (Fees) Determination 2021 for comparable items under that determination. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges. Explanatory notes in the determination list the fees previously determined to enable comparison.

Security Industry (Fees) Determination 2021 (DI2021-149)

The new determination sets the fees that will apply beginning on 1 July 2021 and repeals the *Security Industry (Fees) Determination 2019* DI2019-166. It provides for fee increases in line with annual adjustments to the Wages Price Index (WPI) of 1.75%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges.

Item 238.1 has been incorporated into existing item 237 to provide one fee covering replacement licences and sub-licences that are issued as a result of a variation. This change is aimed at simplifying the fee framework.

Explanatory notes in the determination list the fees previously determined to enable comparison.

Guardianship and Management of Property (Fees) Determination 2021 (DI2021-155)

This determination provides for fee increases from the previous financial year by a Wages Price Index (WPI) forecast of 1.75%. Calculations are rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This gives effect to the Government's policy decision to limit growth in government fees and charges for households to no more than ACT's forecast WPI for 2021-21. This approach aligns with the 2021 Treasury Guidelines for Fees and Charges. Explanatory notes in the determination list the fees previously determined to enable a comparison with the previous financial year.

The fee for the hourly rate for the examination of accounts maintained by an external financial manager is GST exempt and, when rounded, would have been \$269. As this service is subsidised by Community Service Obligation funding, the Public Trustee and Guardian applies a 25% rebate to the fee. With the rebate applied, the fee would be \$201.00. Adjustments to this rebate can be made by the Public Trustee and Guardian under fee reductions and waivers provision in the *Public Trustee and Guardian Act 1985*.

Lotteries (Fees) Determination 2021 (DI2021-157)

The new determination sets the fees that will apply beginning on 1 July 2021 and repeals the Lotteries (Fees) Determination 2020 (No 2) DI2020-171. It provides for fee increases in line with annual adjustments to the Wages Price Index (WPI) of 1.75%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges. Explanatory notes in the Attachment to this explanatory statement list the fees previously determined to enable comparison.

Clause 5 of the instrument provides for the refund or waiver of fees. Clause 5(1) provides that if an application under section 7 of the Act for approval to conduct a lottery is withdrawn before assessment, the fee, less \$66.00 is refundable. The previous determination provided that the fee, less \$65.00 was refundable.

The new instrument does not change the types of fees that may be charged in comparison to the revoked instrument.

Health (Fees) Determination 2021 (No 2) (DI2021-161)

The Determination comes into effect on 1 July 2021 and reproduces Determination DI2021-8 [ie the previous determination] except for:

- items on Attachment A, which have increased by the Wage Price Index of 1.75% (subject to rounding);
- items on Attachment B, which have increased by indexation rates as advised by the Commonwealth;
- items on Attachment C, relate to the fees under section E. Other Accommodation, which have been expanded to cover up to and over 7 days, in line with NSW Interstate Patient Travel Assistance and Accommodation Scheme (IPTAAS) rebate;
- items on Attachment D, which have been removed from the fee determination;
- the inclusion of a definition of Defence;
- an amendment to include non-admitted services in (Clause 10) Involuntary Admissions and Non-Admitted services;
- minor wording and numbering changes; and
- the date of effect.

Rates, Land Tax, Land Rent and Duties (Certificate and Statement Fees) Determination 2021 (DI2021-170)

This instrument determines the fee payable to the Commissioner to apply for a Certificate (incorporating a statement of amounts payable and payments made) under the above-mentioned provisions. The fee is only payable once per property as a single application for a Certificate may be made under all of the relevant provisions.

For 2021-22, regulatory fees and charges are indexed for a Wage Price Index of 1.75 per cent. Accordingly, for 2021-22, the fee has been increased from \$122 to \$124 (rounded to the nearest dollar).

The fee amount reflects the fact that the Certificate provides information on all ACT Revenue Office charges concerning a parcel of land, including outstanding rates, land tax, land rent and any deferred amounts.

COVID-19-related instrument

The Gaming Machine (Fees) Determination 2021 (DI2021-151) is a COVID-19-related instrument. The explanatory statement states:

DI2020-129 [ie the previous instrument] included fees that were listed as ‘Nil’ where the matter for which the fee was payable was undertaken as a result of the surrender of a gaming machine authorisation to receive an incentive payment under the ACT Government’s COVID-19 Economic Survival Package (ESP). This arrangement was put in place to support community clubs and Casino Canberra in the early days of the COVID-19 pandemic. This arrangement has now concluded.

The new determination sets the fees that will apply beginning on 1 July 2021 and repeals the *Gaming Machine (Fees) Determination 2020* DI2020-129. It provides for fee increases in line with annual adjustments to the Wages Price Index (WPI) of 1.75%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges.

Human rights issues

The Committee notes that the explanatory statement for the Clinical Waste (Fees) Determination 2021 (No 1) (DI2021-95) states:

Human Rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. In this case, no human rights are impacted.

The Committee notes that similar statements appear in the explanatory statements for DI2021-109, DI2021-113, DI2021-125, DI2021-127, DI2021-128, DI2021-129, DI2021-130, DI2021-131, DI2021-151, DI2021-157 and DI2021-179.

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

This comment does not require a response from the relevant Ministers.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-110 being the Public Place Names (Hume) Determination 2021 made under section 3 of the *Public Place Names Act 1989* determines the names of a new road in the Division of Hume.**

This instrument, made under section 3 of the *Public Place Names Act 1989*, determines the name of a street in the Division of Hume. The Committee notes that the explanatory statement for the instrument discusses human rights issues. It states:

Human Rights

Section 12 of the *Human Rights Act 2004* creates the right to privacy and reputation.

Conceivably, the naming of a place has the potential to infringe the right to privacy and reputation of a person after whom a place is named. In this case the process through which places are named ensures that this right is not infringed and that only appropriate information is included in a determination. This process includes the consultation described above.

Additionally, in relation to places named after people, only the names of deceased people are determined.

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.

COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2021-111 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 1) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2020-88 and provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.**

This instrument, made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* allows a pharmacist or intern pharmacist to administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards set out in Schedule 1 to the instrument. The Committee notes that the instrument expressly relates to the administration of COVID-19 vaccines.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-133 being the Pest Plants and Animals (Pest Animals) Declaration 2021 (No 1) made under section 16 of the *Pest Plants and Animals Act 2005* revokes DI2016-132 and DI2021-40 and determines specified animals to be pest animals.**

This instrument determines certain animals to be pest animals, under section 16 of the *Pest Plants and Animals Act 2005*. The Committee notes that the explanatory statement for the instrument discusses human rights issues. It states:

HUMAN RIGHTS IMPLICATIONS

There are no human rights implications arising from the declaration of a pest animal. The instrument does not engage any rights under the *Human Rights Act 2004*.

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.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-158 being the Plastic Reduction (Single-use Plastic Products) Exemption 2021 (No 1) made under section 17 of the *Plastic Reduction Act 2021* exempts specified single-use plastic products in accordance with Part 3 of the Act**
- **Disallowable Instrument DI2021-159 being the Plastic Reduction (Single-use Plastic Cutlery—Special Circumstances) Exemption 2021 (No 1) made under section 17 of the *Plastic Reduction Act 2021* determines a list of specified organisations that may supply single-use plastic cutlery and the circumstances under which they may supply it.**

The instruments mentioned above, both made under section 17 of the *Plastic Reduction Act 2021*, exempt certain single-use plastic products from that Act and determine a list of specified organisations that may supply single-use plastic cutlery and the circumstances under which they may supply it, respectively. In essence, the second instrument mentioned above allows the use of single-use cutlery in relation to persons in detention (in various specified facilities).

The Committee notes that the explanatory statement for the first instrument mentioned above discusses human rights issues. It states:

The Minister may make an exemption under [section 17] only if satisfied that:

- it is not practical or in the public interest for the person to comply with the provision; or
- it is not consistent with the person's human rights for the person to comply with the provision; and
- non-compliance will not have any significant adverse effect on public health, property or the environment.

In deciding whether it is not consistent with a person's human rights for the person to comply with the provision, the Minister must comply with section 40B of the *Human Rights Act 2004* (Human Rights Act). Section 40B provides that a public authority (including a Minister) must act consistently with human rights, and must give proper consideration to a relevant human right in making a decision, including a decision of whether or not to exempt a person under section 17 of the Act. A decision is still consistent with human rights if the decision limits human rights but the limitations are reasonably justified under section 28 of the Human Rights Act.

This instrument is not expected to impose any significant impact on a person's human rights.

The explanatory statement for the second instrument mentioned above contains a similar statement, but with the addition of the following:

This instrument acknowledges results of consultation when developing the Act, which found that alternatives to single-use plastic cutlery such as wood or bamboo can be more readily weaponised. In certain settings, this may impact on the right to life under the Human Rights Act.

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

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-162 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2021, including a regulatory impact statement made under section 7 of the Energy Efficiency (Cost of Living) Improvement Act 2012 revokes DI2012-93 and determines the energy savings targets for a specified compliance period.**
- **Disallowable Instrument DI2021-163 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2021, including a regulatory impact statement made under section 11 of the Energy Efficiency (Cost of Living) Improvement Act 2012 revokes DI2012-92 and determines the energy savings contribution for a specified compliance period.**

- **Disallowable Instrument DI2021-164 being the Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2021, including a regulatory impact statement made under section 22 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the shortfall penalty for noncompliance for a specified compliance period.**
- **Disallowable Instrument DI2021-165 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2021, including a regulatory impact statement made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* revokes DI2012-94, DI2013-229, DI2014-248 and DI2015-269, and determines the priority household target for a specified period.**

The instruments mentioned above determine various matters for sections 7, 8, 11 and 22 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*. The Committee notes that the explanatory statement for each of the instruments indicates that the instrument does not engage human rights, under the *Human Rights Act 2004*. The first three instruments also share a regulatory impact statement. The Committee notes that section 8 of that statement makes a similar statement, as does section 8 of the regulatory impact statement for the fourth instrument mentioned above.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements and the regulatory impact statements for these instruments.

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-166 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (No 2) made under section 156 of the *Residential Tenancies Act 1997* continues for a further three months the measure modifying the operation of section 49 of the Act so that the making of a payment order, as an alternative to making a termination and possession order, for a tenant of an impacted household during the moratorium period is required to be considered by the ACT Civil and Administrative Tribunal.**

This instrument is made under section 156 of the *Residential Tenancies Act 1997*. As indicated in the “overview”, in the explanatory statement for this instrument, the instrument is the 5th instrument made under section 156. The instruments have been made in the context of the COVID-19 pandemic. The explanatory statement for this instrument states:

The Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 1) (the First Declaration) and the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 2) (the Second Declaration) implemented a 6-month moratorium on evictions for rental arrears in line with the National Cabinet decision. The Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) (the Third Declaration) and the Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 (the fourth declaration) implemented a post moratorium transitional period. This Declaration extends the payment order measure in the Third and Fourth Declarations until 30 September 2021.

The Declaration continues the measure modifying the operation of section 49 of the RTA so that the ACT Civil and Administrative Tribunal (ACAT) is required to consider the making of a payment order as an alternative to making a termination and possession order for a tenant who was a member of an impacted household during the moratorium period for a further three months. It also creates the ability for the Minister to extend the payment order measure for an additional three months by notifiable instrument.

This measure will assist impacted households considered by the ACAT as being likely to comply with an arrears repayment plan to sustain their tenancies.

The Committee notes that the explanatory statement goes on to discuss human rights issues. It states:

COMPATIBILITY WITH HUMAN RIGHTS

The payment order measure in the Declaration positively engages the right to protection of family and children and the right to privacy in the *Human Rights Act 2004* (HRA) by providing a pathway to prevent evictions and to keep the family unit together during a period of considerable stress, providing time for families to improve their financial situation or consider their alternative options. The measure also promotes the right to privacy and home in section 12 of the HRA.

The Declaration also engages and may limit the right to privacy as the definition of a household “impacted” by the COVID-19 pandemic in clause 6, may require tenants to provide personal information to their real estate agents or lessor to demonstrate a loss of income and/or that they have been diagnosed with COVID-19 or are caring for someone who has.

This limitation is reasonable and proportionate in accordance with the test in section 28 of the HRA. The measures in the Declaration have an important purpose, which is to mitigate the risk of homelessness arising from financial stress due to the COVID-19 pandemic. The limitation on the right to privacy is necessary, as lessors may reasonably expect tenants to demonstrate the reason they are in arrears due to the pandemic. This ensures that lessors may otherwise exercise their normal statutory rights under residential tenancy law if circumstances extraneous to the pandemic permit. There are no other reasonably available and less restrictive alternatives that would not require the tenant to provide personal information to a third party.

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.

COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2021-167 being the Taxation Administration (Amounts Payable—Rates) Determination 2021 made under paragraph 46(2)(f) of the and section 139 of the Rates Act 2004 and Taxation Administration Act 1999 revokes DI2020-210 and determines charges for general rates, the Fire and Emergency Services Levy, and the City Centre Marketing and Improvements Levy.**

This instrument, made under paragraph 46(2)(f) of the *Rates Act 2004*, relates to the deferral of payment of rates, on application. The Committee notes that the explanatory statement for the instrument references the COVID-19 pandemic. It states:

ACT Government COVID 19 response measures affecting rates and levies (for the 2020-21 financial year) to assist ACT households and businesses have ceased, including:

- a residential land rates rebate;
- a freeze on the FESL at 2019-20 levels; and

- for CCMIL, the percentage rate is returned to pre-COVID 19 levels having been halved for 2020-21. [emphasis added]

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-177 being the Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2021 (No 2) made under section 137E of the *Taxation Administration Act 1999* provides for the operation of a further payroll tax exemption for eligible apprentices or trainees.**

This instrument extends the operation of a previous instrument – the (the Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2021 (DI2021-11), which, in turn, extended the operation of the Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2020 (DI2020-76) – that provided a payroll tax exemption to employers, in relation to eligible apprentices or trainees. According to the explanatory statement for this instrument, the exemption is given as part of a “Youth Support Package”, “to address the economic impacts of COVID-19 on young people”. This instrument extends the exemption to 30 June 2022.

The Committee notes that the explanatory statement for this instrument addresses human rights issues. It states:

Human Rights Act 2004

This instrument provides an exemption to payroll tax and does not limit, and is consistent with, human rights. By providing exemption to wages paid or payable to eligible employees, it promotes the right to work (section 27B of the *Human Rights Act 2004*) by supporting jobs for the ACT community, especially young people, including apprentices and trainees, who have been disproportionately affected by the COVID-19 pandemic.

In accordance with the legislation, the Payroll Tax Exemption Determination includes a statement about whether the scheme is consistent with human rights.

The ACT Human Rights Commission has been consulted on the Payroll Tax Exemption Determination.

A statement to this effect also appears in section 6 of the instrument.

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.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-182 being the Utilities (ACT Retail Electricity—Transparency and Comparability Code) Determination 2021 made under sections 59 and 63 of the *Utilities Act 2000* determines the ACT Retail Electricity (Transparency and Comparability) Code.**

This instrument determines an industry code—the Utilities (ACT Retail Electricity—Transparency and Comparability Code) Determination 2021—under the *Utilities Act 2000*. The Code is determined by the Independent Competition and Regulatory Commission (ICRC). According to the explanatory statement for the instrument:

The Code outlines the requirements for electricity retailers to:

- compare their prices to the Utilities (Representative Consumption and Reference Price) Determination 2021 in advertising to small customers
- undertake a better offer check to identify if the retailer has a better offer for the small customer, give a message to small customers that they may have a better offer, and encourage the small customer to contact them
- give small customers an entitlement to clear, timely and reliable information, provided in a respectful manner, to assist the small customer to assess the suitability of, and select, a retail electricity contract.

There is also an obligation for retailers to give small customers the contact details of the Australian Government's price comparator website.

The explanatory statement for the instrument discusses human rights issues. It states:

Human rights

There are no human rights implications arising from this instrument. The instrument does not engage any rights under the *Human Rights Act 2004* (ACT).

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.

COVID-19-RELATED INSTRUMENT / RETROSPECTIVITY

Disallowable Instrument DI2021-183 being the Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2021 made under section 35 of the *Liquor Regulation 2010* determines that the fee for an application for a commercial permit is waived from 1 July to 31 July 2021 for liquor licensees with a bar licence, nightclub licence, and restaurant and cafe licence.

This instrument, made under section 35 of the *Liquor Regulation 2010*, waives certain fees that would otherwise be payable by holders of a liquor licence. The Committee notes that the instrument expressly relates to the COVID-19 pandemic. The explanatory statement for the instrument states that it is intended

.... to provide economic support to venues selling liquor for consumption on premises in response to the Public Health (Mandatory Face Masks) Emergency Direction 2021 (No 2) [NI2021-402]. The public health direction was declared on 30 June 2021 and introduced face mask requirements to limit the spread of coronavirus disease 2019 (COVID-19). This declaration gives effect to fee waivers for eligible liquor licensees in aid of their businesses and is justifiably non-prejudicial in accordance with section 76 of the Legislation Act.

As indicated by the above, there is an issue with retrospectivity. The instrument was made on 1 July 2021 and notified on the ACT Legislation Register on 2 July 2021. Under the general rule for commencement of instruments, set out in subsection 73(2) of the *Legislation Act 2001*, the instrument would commence on the day after its notification day. However section 2 of this instrument states that it "is taken to have commenced" on 1 July 2021, ie retrospectively.

The Committee notes, with approval, that the explanatory statement for the instrument states:

Section 76 of the *Legislation Act 2001* (the Legislation Act) provides that non-prejudicial provisions may commence retrospectively. Section 76(4) of the Legislation Act notes that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Section 76(4) further provides that retrospectivity that is prejudicial to the Territory or to a territory authority or instrumentality is permitted.

As indicated by the earlier quote, the instrument is “justifiably non-prejudicial”.

This comment does not require a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2021-15 being the Court Procedures Amendment Rules 2021 (No 1) made under section 7 of the Court Procedures Act 2004 makes amendments to the Court Procedures Rules after a consultative review by the Courts and the Joint Rules Advisory Committee.**

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

- **Subordinate Law SL2021-10 being the Road Transport (Offences) Amendment Regulation 2021 (No 1) made under section 26 of the Road Transport (Driver Licensing) Act 1999 and sections 23 and 233 of the Road Transport (General) Act 1999 amends road transport legislation to increase notice penalty amounts for most offences, and to make minor technical amendments to road transport regulations.**

This (400-page) subordinate law amends various pieces of road transport legislation, “to increase infringement notice penalty amounts for most offences under the road transport legislation and make other minor technical amendments to road transport regulations.”

The explanatory statement for the subordinate law states that:

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.

In relation to the increased penalties provided for by the subordinate law, the explanatory statement states:

Most infringement notice penalties, excluding the amount of the VSL, are being increased by the Wage Price Index (WPI). Budget Memo 2021/08 identifies that the WPI to be used for 2021/22 is 1.75%.

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.

The explanatory statement then offers some background on the policy behind the setting of infringement notice penalties:

Government policy is that, in general, the infringement notice penalty for an offence should not exceed 20% of the maximum fine that may be imposed by a court for that offence (the 20% limit). The 20% limit is based on the existing penalty unit amount of \$160 for an offence committed by an individual.

Where an existing infringement notice penalty is not approaching the 20% limit the indexation has been undertaken by deducting \$60 from the existing infringement penalty amount, indexing that amount by 1.75% and then adding \$60.

Where an existing infringement notice penalty amount is near the 20% limit the indexation has been undertaken by deducting \$60 from the existing infringement penalty amount, indexing that amount by 1.75%, applying the 20% limit and then adding the VSL amount of \$60.

Where the existing infringement notice penalty for an offence is already at or above the 20% limit, the infringement notice penalty has not been increased.

For offences to which the VSL does not apply the infringement penalty amounts are indexed as above except for the VSL amounts.

A different approach is described, in relation to offences against the Heavy Vehicle National Law:

For offences against the Heavy Vehicle National Law (HVNL) the Transport and Infrastructure Council (now the Infrastructure and Transport Minister's Meeting (ITMM)) agreed that where it was decided that an offence could be dealt with by infringement notice, the infringement notice penalty would be set at 10% of the maximum penalty as indexed from time to time.

The National Heavy Vehicle Regulator (NHVR) issues a schedule each year identifying the level of the maximum penalty and the infringement notice penalty where the offence can be dealt with by infringement notice. Where an offence against the HVNL can be dealt with by infringement notice, the letters (HVINO) have been inserted in the infringement penalty column and a note at the beginning of the part directs readers to the NHVR's website where the infringement penalty amounts are accessible as has been the case for maximum court-imposed penalties under the HVNL since 18 September 2017. No additional offences, apart from offences against sections 567A and 567B, are identified as being infringeable and no offences identified as infringeable in the schedule provided by the NHVR has had the infringement penalty amount omitted.

The explanatory statement then notes some ACT-specific provisions, relating to the requirement for a driver of a vehicle to produce their driver licence on request and for the responsible person for a vehicle alleged to have been involved in the commission of an offence to give information about the name and address of the driver at the time of the alleged offence. The explanatory statement indicates that the infringement notice penalty amounts for those provisions have been increased in the same manner as other infringement penalty amounts *not* under the HVNL (ie the general approach, described above).

The explanatory statement goes on to discuss other particular issues relevant to the subordinate law, including stating that:

- all infringement notice penalty amounts are rounded down to the nearest dollar;
- the child rate infringement notice penalty amounts of \$75 for public passenger ticketing and conduct offences are *not* increased, stating that “[t]his amount continues to represent an appropriate deterrence for these offences”; and
- the infringement penalty amount relating to section 236(4A) of the *Road Transport (Road Rules Regulation 2017*, which relates to pedestrians engaging in commercial activities, such as window washing, at designated intersections are *not* increased, as “[t]his amount continues to represent an appropriate deterrence for these offences”.

The explanatory statement for the subordinate law then discusses human rights issues. It states:

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).

The offences regulation does not, of itself, impose restrictions or limitations on a person’s human rights. 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.

The amendments to the driver licensing regulation and the general regulation are technical amendments to better align internal provisions and to correct references in those regulations. They do not alter how a person would be treated under those regulations.

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.

HUMAN RIGHTS ISSUES

- **Subordinate Law SL2020-11 being the Victims of Crime (Financial Assistance) Amendment Regulation 2021 (No 1) made under the *Victims of Crime (Financial Assistance) Act 2016* amends the *Victims of Crime (Financial Assistance) Regulation 2016* to bring the payment amounts for victims of crime in line with the All Groups CPI (Canberra).**

This subordinate law amends the *Victims of Crime (Financial Assistance) Regulation 2016*, which prescribes payment amounts for victims of crime under the *Victims of Crime (Financial Assistance) Act 2016*. Section 25 of the *Victims of Crime (Financial Assistance) Regulation* requires yearly Consumer Price Index (CPI) increases for payments provided to victims under the following four sections:

- maximum total financial assistance (section 24);
- recognition payment for primary victim (section 28);
- recognition payment for class A related victim (section 29); and
- recognition payment for class B related victim (section 30).

The explanatory statement for the subordinate law states:

This regulation will bring payment amounts under these sections in line with the All Groups CPI (Canberra) for March 2020-March 2021 (as issued by the Australian Statistician) at 1.6%.

The explanatory statement then discusses human rights issues. It states:

Human rights considerations

This regulation supports the human rights of victims of crime by bringing financial assistance payments in line with CPI.

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.

STRICT LIABILITY OFFENCES / HUMAN RIGHTS ISSUES

- **Subordinate Law SL2021-12 being the Magistrates Court (Plastic Reduction Infringement Notices) Regulation 2021 made under the *Magistrates Court Act 1930* enables infringement notices to be issued for offences against the *Plastic Reduction Act 2021*, and enables authorised officers appointed under the Act to issue infringement and reminder notices.**

Part 3.8 of the *Magistrates Court Act 1930* allows infringement notices to be issued, as an alternative to prosecution, where it is considered that an infringement notice imposing a monetary fine would be sufficient rather than taking the matter before the courts. This subordinate law enables infringement notices to be issued in relation to 6 specified offences under the *Plastic Reduction Act 2021*. It enables authorised officers appointed under section 20 of the Plastic Reduction Act to issue infringement notices and reminder notices in relation to the specified offences. Under the Magistrates Court Act a person authorised to issue an infringement notice for an offence has the discretion to decide whether or not to issue a notice.

Given that the offences in question are all strict liability offences, this subordinate law facilitates the implementation of strict liability offences. This is recognised in the explanatory statement for this subordinate law, which states;

Human Rights Implications

This regulation contains strict liability offences, as such, it might be seen to engage the presumption of innocence. In a strict liability offence, there is no requirement to establish a fault element, such as intention, knowledge, recklessness, or negligence.

Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. Where a defendant can reasonably be expected to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. Section 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

This regulation does not create any new offences; it facilitates the administration of strict liability offences already contained in the *Plastic Reduction Act 2021*. Without the ability to issue infringement notices, the only option available to the regulating authority is to prosecute offences through the courts. This is a serious response, and this regulation provides a method to achieve the policy purpose that is less restrictive on 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.

HUMAN RIGHTS ISSUES

- **Subordinate Law SL2021-13 being the Mutual Recognition (Australian Capital Territory) Regulation 2021 made under the *Mutual Recognition (Australian Capital Territory) Act 1992* provides the *Plastic Reduction Act 2021* with a 12-month temporary exemption from the *Mutual Recognition Act 1992* (Cth).**
- **Subordinate Law SL2021-14 being the Trans-Tasman Mutual Recognition (Plastic Reduction) Regulation 2021 made under the *Trans-Tasman Mutual Recognition Act 1997* provides the *Plastic Reduction Act 2021* with a 12-month temporary exemption from the *Trans-Tasman Mutual Recognition Act 1997* (Cth).**

The subordinate laws mentioned above provide a temporary exemption to the *Plastic Reduction Act 2021* from the operation of the *Mutual Recognition Act 1992* (Cth) and the *Trans-Tasman Mutual Recognition Act 1997* (Cth), respectively. Without these exemptions, the *Plastic Reduction Act* would be in breach of those Acts, since the *Plastic Reduction Act* imposes additional, jurisdiction-specific requirements on the sale of goods across Australia, and across Australia and New Zealand. Such jurisdiction-specific requirements are prohibited by those Acts.

The explanatory statements for the subordinate laws indicate that the exemptions are time-limited (12 months in duration) and that permanent exemptions will be sought from all relevant jurisdictions.

The Committee notes that the explanatory statements go on to address human rights issues. The explanatory statement for the first instrument mentioned above states:

Human Rights Implications

This regulation does not create any new human rights implications. The human rights implications relating to the *Plastic Reduction Act 2021* are detailed in the explanatory statements for the *Plastic Reduction Bill 2020*.

A similar statement appears in the explanatory statement for the first instrument mentioned above.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for these subordinate laws.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Subordinate Law SL2021-16 being the Planning and Development Amendment Regulation 2021 (No 1) made under the *Planning and Development Act 2007* allows small waste facilities to continue to operate in Fyshwick.**

This subordinate law amends the *Planning and Development Regulation 2008*, to add a new section 20AA. The effect of the new section is to remove certain “sites” from the definition of “waste facility” in subsection 137F(2) of the *Planning and Development Act 2007*. That, in turn, operates to exclude such sites from the operation of Part 7.2AA of the Planning and Development Act, the object of which is “to contribute to the orderly and sustainable development of waste facilities in the ACT by limiting the development of new waste facilities in the division of Fyshwick” (subsection 137E(1)).

The explanatory statement for this subordinate law states:

In February 2021, the *Planning and Development Act 2007* was amended through the *Planning and Development Amendment Act 2021* to ban new waste facilities in Fyshwick. At the time, the ACT Government announced it would review its policies on new waste infrastructure across the Territory.

The first stage of the policy review has produced an amendment regulation to allow small waste facilities to continue to operate in Fyshwick. The amendment provides a carve out from the ban for waste businesses in Fyshwick that process up to 15,000 tonnes of waste per year from the ban, with the ban on any incineration facilities to be continued.

New businesses that process up to 15,000 tonnes of waste per year will be allowed to lodge a development application under the amendment regulation. Expansion of existing small waste businesses will be allowable up to 15,000 tonnes of waste per year in size. Existing businesses that already function above the 15,000 tonne per year processing limit will continue to be able to operate their existing facilities, however development applications for works which would increase the amount of waste processed on site are prohibited.

The amendment regulation delivers on Government’s previous commitment to deliver certainty for small waste processing facilities in Fyshwick.

The Committee notes that the explanatory statement for the subordinate law goes on to discuss human rights issues. It states:

SCRUTINY OF BILLS COMMITTEE PRINCIPLES AND HUMAN RIGHTS

This regulation is a de-regulation initiative and does not limit rights or impose obligations on any individuals.

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.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Subordinate Law SL2021-17 being the Magistrates Court (Public Health (COVID-19) Infringement Notices) Amendment Regulation 2021 (No 2) made under the *Magistrates Court Act 1930* determines the infringement notice penalties for individuals and corporations for a failure to comply with a face mask direction.**

Part 3.8 of the *Magistrates Court Act 1930* allows infringement notices to be issued, as an alternative to prosecution, where it is considered that an infringement notice imposing a monetary fine would be sufficient rather than taking the matter before the courts. This subordinate law amends the *Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020*, to enable infringement notices to be issued in relation to an offence under subsection 120(4) of the *Public Health Act 1997*. The particular offence dealt with by this subordinate law is the failure, without reasonable excuse, to comply with a public health order, including (specifically) an order to wear a face mask. The penalties provided for, under an infringement notice, are:

- (a) for an offence for failing to comply with a face mask direction—
 - (i) for an individual—\$200; and
 - (ii) for a corporation—\$1 000; or
- (b) in any other case—
 - (i) for an individual—\$1 000; and
 - (ii) for a corporation—\$5 000.

Clearly, the subordinate law is made in the context of the COVID-19 pandemic.

The explanatory statement for the subordinate law discusses human rights issues. It states:

Human rights implications

A police officer or other authorised person for the purpose of the [Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation] must consider relevant human rights in making a decision in accordance with the requirement in section 40B of the *Human Rights Act 2004*.

The Amendment Regulation [ie this subordinate law] engages the following rights under the *Human Rights Act 2004*:

- a. right to life (section 9);
- b. right to liberty and security of person (section 18);
- c. rights of children in the criminal process (section 20);
- d. right to a fair trial (section 21);
- e. rights in criminal proceedings (section 22); and
- f. right to work and other work-related rights (section 27B).

The Amendment Regulation to reduce the infringement notice penalty payable for an offence against section 120(4) of the *Public Health Act 1997* for failing to comply with a face mask direction is a less restrictive means of ensuring the protection of public health.

As an alternative to a prosecution, the payment of the infringement notice bars the prosecution of the person and the person is not taken to have been convicted of the offence (see section 125 of the *Magistrates Court Act 1930*). Further, Part 3.8.4 of the *Magistrates Court Act 1930* sets out the mechanism for a person to dispute liability for the infringement notice and this must appear in the infringement notice issued to the person. Where a person disputes liability and the administering authority determines that an information should be laid, the person is able to defend the charge. This mechanism together with other provisions of the existing criminal law supports the person's right to a fair trial and rights in criminal proceedings including the presumption of innocence under section 22(1) of the *Human Rights Act 2004*.

The Amendment Regulation may limit the rights of children in the criminal process under section 20 of the *Human Rights Act 2014* as it extends the infringement notice scheme to apply to a person who is 16 years or older where it relates to an offence for failing to comply with a face mask direction. Any limitation on rights can be justified on the basis that it is necessary for the purpose of protecting public health and is the least restrictive means to achieve this purpose. The extension of the infringement notice scheme in the limited circumstances of an offence for failing to comply with a face mask direction is appropriate and can be justified as the \$200 penalty amount is reasonable in the context of that age. It is also supported by public health advice in relation to the transmissibility of COVID-19 by young people and the effectiveness of masks as an infection control measure.

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 STATEMENTS—No COMMENT

The Committee has examined regulatory impact statements for the following instruments and has no comments on them:

- **Disallowable Instrument DI2021-162 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2021.**
- **Disallowable Instrument DI2021-163 being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2021.**
- **Disallowable Instrument DI2021-164 being the Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2021.**
- **Disallowable Instrument DI2021-165 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2021.**

NATIONAL REGULATIONS—COMMENT

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

POSITIVE COMMENT—PROVISION OF EXPLANATORY MATERIAL / HUMAN RIGHTS ISSUES

- **Education and Care Services National Amendment Regulations 2021 (2021 No 380—New South Wales) made under sections 221, 301 and 324 of the Education and Care Services National Law as applied by the law of the States and Territories.**
- **Rail Safety National Law National Regulations (Fees) Variation Regulations 2021 (2021 No 343—South Australia) made under section 264 of the Rail Safety National Law.**
- **Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021 (2021 No 235—South Australia) made under section 264 of the Rail Safety National Law.**

The National Regulations mentioned above were tabled in the Legislative Assembly on 3 August 2021 (the second and third National Regulations mentioned above) and 5 August 2021 (the first National Regulations mentioned above).

EDUCATION AND CARE SERVICES NATIONAL AMENDMENT REGULATIONS 2021

The *Education and Care Services National Amendment Regulations 2021* were made under sections 301 and 324 of the *Education and Care Services National Law*, which applies in the ACT under section 6 of the *Education and Care Services National Law (ACT) Act 2011*. Section 6 provides:

6 Adoption of Education and Care Services National Law

- (1) Subject to this section, the Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—
 - (a) applies as a territory law; and
 - (b) as so applying may be referred to as the Education and Care Services National Law (ACT); and
 - (c) so applies as if it were part of this Act.
- (2) A law that amends the Education and Care Services National Law set out in the schedule to the Victorian Act and is passed by the Victorian Parliament after this Act's notification day must be presented to the Legislative Assembly not later than 6 sitting days after the day it is passed.
- (3) The amending law may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed.

Note See the Legislation Act, s 65 (Disallowance by resolution of Assembly).

- (4) If the amending law is not presented to the Legislative Assembly in accordance with subsection (2), or is disallowed under subsection (3), the Education and Care Services National Law applying under subsection (1) is taken—

- (a) not to include the amendments made by the amending law; and
 - (b) to include any provision repealed or amended by the amending law as if the amending law had not been made.
- (5) Section 303(4) (Parliamentary scrutiny of national regulations) of the Education and Care Services National Law set out in the schedule to the Victorian Act does not apply as a territory law.

Some elements of section 6 should be noted. First, under subsection 6(1), a Victorian Act—the *Education and Care Services National Law Act 2010* (Vic)²—applies in the ACT, as if it was an ACT law. Second, the Victorian Act applies in the ACT *as in force from time to time*. Third, any amendments to the Victorian Act must be presented to the Legislative Assembly not later than six sitting days after the day it is passed. Fourth, such amendments may be disallowed by the Legislative Assembly in the same way that a disallowable instrument may be disallowed (ie section 65 of the *Legislation Act 2001* applies).

This fourth point is significant, as it means that disallowance of an amending law by the Legislative Assembly has a substantive effect. Subsection 303(4) of the Victorian Act would otherwise nullify the effect of disallowance by the Legislative Assembly, as it provides:

- (4) A regulation disallowed under subsection (3) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.

Turning to the substance of the *Education and Care Services National Amendment Regulations 2021*, the Committee notes (with approval) that these National Regulations are accompanied by an explanatory statement. In the 9th Assembly, the Committee was involved in a dialogue with various Ministers about the provision of explanatory material with National Regulations. A large part of the dialogue involved an argument that there was no formal, legal requirement, under relevant National Laws, to provide explanatory material with National Regulations. In short, the Committee maintained the view that explanatory material should be provided in order to allow the Committee to carry out its scrutiny obligations, regardless of any arguments about formal, legal requirements. The Committee was pleased to observe that, over time, Ministers evidently accepted the Committee's arguments and provided such material with National Regulations. The Committee is now pleased to see that practice continue.

The Committee also notes (with approval) that the explanatory statement for the *Education and Care Services National Amendment Regulations 2021* sets out useful background information on the operation of the *Education and Care Services National Law*, including much of the information relied upon by the Committee, in this *Scrutiny Report*.

The explanatory statement for the *Education and Care Services National Amendment Regulations 2021* indicates that, on 8 July 2021, the Ministerial Council responsible for the Education and Care Services National Law made these National Regulations. The Ministerial Council did so under section 221 of the Education and Care Services National Law, which provides:

² Available here <https://www.legislation.vic.gov.au/in-force/acts/education-and-care-services-national-law-act-2010/013>.

221 Powers of Ministerial Council

The Ministerial Council may—

- (a) make recommendations to the Board in relation to the exercise of the National Authority's functions under this Law; and
- (b) refer any matter to the Board for consideration and advice; and
- (c) make regulations in accordance with this Law; and
- (d) do anything necessary or convenient to be done in carrying out its functions

The explanatory statement indicates that the *Education and Care Services National Amendment Regulations 2021* were drafted by the Victorian Office of the Chief Parliamentary Counsel.

The explanatory statement states that the *Education and Care Services National Amendment Regulations 2021* were published on the NSW Legislation website, on 15 July 2021, as required by subsection 302(1) of the *Education and Care Services National Law*. Section 302 provides:

302 Publication of national regulations

- (1) The national regulations are to be published on the NSW Legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.
- (2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

Section 303 of the *Education and Care Services National Law* deals with parliamentary scrutiny of National Regulations. It provides:

303 Parliamentary scrutiny of national regulations

- (1) The member of the Ministerial Council representing a participating jurisdiction is to make arrangements for the tabling of a regulation made under this Law in each House of the Parliament of the participating jurisdiction.
- (2) A committee of the Parliament of a participating jurisdiction may consider, and report to the Parliament about, the regulation in the same way the committee may consider and report to the Parliament about regulations made under Acts of that jurisdiction.
- (3) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction in the same way, and within the same period, that a regulation made under an Act of that jurisdiction may be disallowed.
- (4) A regulation disallowed under subsection (3) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.

- (5) If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the day of its disallowance in the last of the jurisdictions forming the majority.

As noted above, subsection 6(5) of the *Education and Care Services National Law (ACT) Act 2011* provides that subsection 303(4) does not apply in the ACT.

Turning to legislative scrutiny issues, the Committee notes that the *Education and Care Services National Amendment Regulations 2021* were made on 8 July 2021, published on 15 July 2021 and tabled in the Legislative Assembly on 5 August 2021. This means that there are no issues in relation to tabling, etc within six sitting days, either for section 6 of the *Education and Care Services National Law (ACT) Act 2011* or for section 303 of the *Education and Care Services National Law*. There are also no issues with retrospectivity, given that, under section 3 of the *Education and Care Services National Amendment Regulations 2021*, the earliest that the substantive amendments commence is 30 July 2021 (noting that publication occurred on 15 July 2021).

The Committee notes that the formal parts of the *Education and Care Services National Amendment Regulations 2021* refer to section 324 of the *Education and Care Services National Law*. Section 324 provides for “savings and transitional provisions”. Section 22 of the *Education and Care Services National Amendment Regulations 2021* contains savings and transitional provisions.

The substantive amendments made by the *Education and Care Services National Amendment Regulations 2021* relate to:

- the display of quality ratings certificates by approved providers of education and care services;
- the transportation of children; and
- savings and transitional measures.

The Committee can identify no issues with the *Education and Care Services National Amendment Regulations 2021* under the terms of reference set out in the resolution appointing the Committee.

The Committee notes that the explanatory statement for the *Education and Care Services National Amendment Regulations 2021* discusses human rights issues. It states:

39. The amendments do not engage human rights issues under the ACT’s *Human Rights Act 2004*.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these National Regulations.

This comment does not require a response from the Minister.

RAIL SAFETY NATIONAL LAW NATIONAL REGULATIONS (FEES) VARIATION REGULATIONS 2021

The *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* were made under section 264 of the *Rail Safety National Law*, which applies in the ACT under section 6 of the *Rail Safety National Law (ACT) Act 2014*. Section 6 provides:

6 Application of Rail Safety National Law

The Rail Safety National Law set out in the schedule to the South Australian Act, as amended from time to time—

- (a) applies as a territory law; and
- (b) as so applying may be referred to as the *Rail Safety National Law (ACT)*; and
- (c) so applies as if it were part of this Act.

Section 7 is also relevant. It provides:

7 Exclusion of Legislation Act

- (1) The Legislation Act does not apply to the *Rail Safety National Law (ACT)*.
- (2) However, the Legislation Act, chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) applies to a national regulation as if—
 - (a) a reference to a subordinate law were a reference to a national regulation; and
 - (b) a reference in the Legislation Act, section 64 (1) (Presentation of subordinate laws and disallowable instruments) to—
 - (i) '6 sitting days' were a reference to '20 sitting days'; and
 - (ii) 'notification day' were a reference to 'published' as mentioned in the Rail Safety National Law (ACT), section 265 (1) (Publication of national regulations); and
 - (c) any other necessary changes were made.
- (3) Also, the Legislation Act, section 104 (References to laws include references to instruments under laws) and section 191 (Offences against 2 or more laws) apply to the Rail Safety National Law (ACT) as if that Law were an Act.
- (4) This section does not limit the application of the Legislation Act to the local application provisions of this Act.

Some elements of sections 6 and 7 should be noted. First, under section 6, a South Australian—the *Rail Safety National Law (South Australia) Act 2012*³—applies in the ACT, as if it was an ACT law. Second, the South Australian applies in the ACT *as amended from time to time*. Third, under section 7, any National Regulations must be presented to the Legislative Assembly not later than 20 sitting days after the day that they are published and may be disallowed by the Legislative Assembly. Fourth, under section 265 of the *Rail Safety National Law (South Australia) Act 2012* (the *Rail Safety National Law*), “published” refers to publication on the NSW legislation website in accordance with Part 6A of the *Interpretation Act 1987* of New South Wales.

³ Available here

[https://legislation.sa.gov.au/LZ/C/A/RAIL%20SAFETY%20NATIONAL%20LAW%20\(SOUTH%20AUSTRALIA\)%20ACT%202012/CURRENT/2012.14.AUTH.PDF](https://legislation.sa.gov.au/LZ/C/A/RAIL%20SAFETY%20NATIONAL%20LAW%20(SOUTH%20AUSTRALIA)%20ACT%202012/CURRENT/2012.14.AUTH.PDF).

Turning to the substance of the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021*, the Committee notes (with approval) that these National Regulations are accompanied by an explanatory statement. The Committee refers to its comments in relation to the *Education and Care Services National Amendment Regulations 2021* (above), on the provision of explanatory material with National Regulations.

The explanatory statement indicates that the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* were made under section 264 of the *Rail Safety National Law*. That section provides:

264—National regulations

- (1) For the purposes of this section, the designated authority is the Governor of the State of South Australia, or other officer for the time being administering the Government of that State, acting with the advice and consent of the Executive Council of that State.
- (2) The designated authority, on the unanimous recommendation of the responsible Ministers, may make regulations (national regulations) as contemplated by this Law, or as necessary or expedient for the purposes of this Law, including regulations that make provision for or in relation to any of the matters specified in Schedule 1 to this Law.
- (3) Where the national regulations refer to or incorporate a code, standard or other document prepared or published by a prescribed body—
 - (a) a copy of the code, standard or other document must be kept available for inspection by members of the public, without charge and during normal office hours, at the office or offices specified in the regulations; and
 - (b) in legal proceedings, evidence of the contents of the code, standard or other document may be given by production of a document purporting to be certified by or on behalf of the Regulator as a true copy of the code, standard or other document; and
 - (c) the code, standard or other document has effect as if it were a regulation made under this Law.

The explanatory statement indicates that amendments to the *Rail Safety National Law* are agreed to by Ministers sitting as the Infrastructure and Transport Ministers Meeting.

The Committee notes that the formal part of the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* includes a notation that it was made by the Governor of South Australia on 24 June 2021. The explanatory statement for the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* states that they were published on the NSW Legislation website on 25 June 2021. As noted above, they were tabled in the Legislative Assembly on 3 August 2021. This means that there are no issues in relation to tabling, etc within 20 sitting days. There are also no issues with retrospectivity, given that, under section 3 of the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021*, the National Regulations commence on 1 July 2021 (noting that publication occurred on 25 June 2021).

Turning to the substantive amendments made by the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021*, the amendments vary fees set out in the *Rail Safety National Law National Regulations 2012*. The explanatory statement indicates that the fees variations...

...provides an increase in the annual fees payable by a rail transport operator, in accordance with the cost recovery model agreed by the Infrastructure and Transport Ministers Meeting (ITMM).

While the Committee would have preferred to see more detail on the relevant fees increases, in line with its oft-stated preferences regarding instruments that increase fees,⁴ the Committee can identify no issues with the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* under the terms of reference set out in the resolution appointing the Committee.

The Committee notes that the explanatory statement for the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021* discusses human rights issues. It states:

Human rights and climate change implications

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

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these National Regulations.

This comment does not require a response from the Minister.

RAIL SAFETY NATIONAL LAW NATIONAL REGULATIONS (MODIFICATION OF FOI ACT) VARIATION REGULATIONS 2021

The *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021* were made under section 264 of the *Rail Safety National Law*, which applies in the ACT under section 6 of the *Rail Safety National Law (ACT) Act 2014*. The background information set out above, in relation to the *Rail Safety National Law National Regulations (Fees) Variation Regulations 2021*, also applies to these National Regulations.

The Committee notes that the formal part of the *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021* includes a notation that it was made by the Governor of South Australia on 13 May 2021. The explanatory statement for the *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021* states that they were published on the NSW Legislation website on 21 May 2021. As noted above, they were tabled in the Legislative Assembly on 3 August 2021. This means that there are no issues in relation to tabling, etc within 20 sitting days. There are also no issues with retrospectivity, given that, under section 2 of the *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021*, the National Regulations commence on 24 May 2021 (noting that publication occurred on 21 May 2021).

Turning to the substance of the amendments made by the *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021*, the explanatory statement states:

⁴ See the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

The *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021* amends clauses to protect evidence obtained under compulsion from freedom of information (FOI) in the *Rail Safety National Law National Regulations 2012*.

The explanatory statement goes on to state that the clause that makes the substantive amendment ...

.... [s]ubstitutes Clause 21 to clarify that any document provided in accordance with section 20, or that contains any part of a train safety recording, will be exempt from being compelled under the Freedom of Information Act.

The Committee notes that the explanatory statement for the *Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021* discusses human rights issues. It states:

Human rights and climate change implications

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

Given that the amendments involve limits on freedom of information, the Committee is a little surprised that the explanatory statement does not discuss the potential engaging of the right to privacy, provided for by section 12 of the *Human Rights Act 2004*.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these National Regulations.

The Committee seeks further information from the Minister as to the relevance (if any) of section 12 of the *Human Rights Act 2004* to these National Regulations.

This comment requires a response from the Minister.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Attorney-General, dated 4 August 2021, in relation to comments made in Scrutiny Report 7 concerning the Crimes Legislation Amendment Bill 2021.

This response⁵ can be viewed online.

- The Attorney-General, dated 1 August 2021, in relation to comments made in Scrutiny Report 6 concerning Disallowable Instrument DI2021-56 being the Public Trustee and Guardian (Investment Board) Appointment 2021 (No 1).
- The Minister for Health, received 4 August 2021, in relation to comments made in Scrutiny Report 6, concerning Disallowable Instrument DI2021-69 Children and Young People (Drug Testing) Standards 2021 (No 1).

These responses⁶ can be viewed online.

⁵ <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>.

⁶ <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>.

The Committee wishes to thank the Attorney-General and the Minister for Health for their helpful responses.

GOVERNMENT RESPONSE—COMMENT

Disallowable Instrument DI2021-69 being the Children and Young People (Drug Testing) Standards 2021 (No 1) made under section 887 of the *Children and Young People Act 2008* revokes DI2000-277 and determines the standards to address the conduct of drug testing under a drug use provision in a care and protection order.

The Committee commented on this instrument in *Scrutiny Report 6* of the 10th Assembly (15 June 2021). The instrument makes “drug testing standards”, under section 887 of the *Children and Young People Act 2008*.

In *Scrutiny Report 6*, the Committee observed that it seemed fairly obvious that the actions and activities that were covered by the instrument had at least the potential to engage human rights protected by the *Human Rights Act 2004*, including the rights to recognition and equality before the law (section 8), protection of the family and children (section 11), privacy and reputation (section 12), freedom of movement (section 13), take part in public life (section 17), liberty and security of person (section 18), humane treatment when deprived of liberty (section 19) might, conceivably, be engaged, as well as the rights of children in the criminal process (section 20), the right to a fair trial (section 21) and rights in criminal proceedings (section 22). The Committee also speculated that cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (section 27) might also be engaged for particular persons.

The Committee noted that, despite this apparent potential for various human rights to be engaged, the explanatory statement for the instrument contained no mention of human rights or the Human Rights Act. The Committee indicated that it was surprised by this.

While making observations about arguable limitations on the Committee’s jurisdiction in relation to human rights issues in subordinate legislation, the Committee also noted recent trends that it had observed in relation to explanatory statements for subordinate legislation that engaged human rights. The Committee also referred to recent correspondence with Minister Cheyne (the Minister responsible for Human Rights), in relation to concerns that the Committee had raised about possible human rights issues in the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1) [DI2021-4]. The Committee sought a response from the Minister. In her response, Minister Cheyne, in a letter dated 11 May 2021, both acknowledged the Committee’s comments and the premises on which they were put and (in the light of the Committee’s comments) undertook to ensure that explanatory statements for future instruments for which Minister Cheyne has responsibility more clearly address human rights issues.

The Committee noted that it welcomed Minister Cheyne’s very helpful response to its comments. In the context of those comments (and the co-operative response from Minister Cheyne), the Committee sought the views of the Minister responsible for the Children and Young People (Drug Testing) Standards 2021 (No 1) on possible human rights issues in that instrument. The Committee also drew the attention of the Legislative Assembly to the instrument, under principle (10)(c)(ii) of the Committee’s terms of reference, on the basis that the instrument may unduly trespass on rights previously established by law, and also under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument did not meet the technical or stylistic standards expected by the Committee.

Minister Stephen-Smith has responded to the Committee's comments, in a letter received on 4 August 2021.

In the response, Minister Stephen-Smith acknowledges that, "in the course of providing child protection services and support for vulnerable families, practice must be compatible with the *Human Rights Act 2004* and any limitation to human rights must occur in the least restrictive way possible". The Minister goes on to discuss existing processes for dealing with human rights issues, in the context of the instrument.

The Minister states:

The Government recognises the potential for the Standards [made by the instrument] to impact on the human rights of primary caregivers directed to undertake drug testing.

However, the Minister then goes on to set out detailed arguments as to why any limitations are considered to be proportionate.

The Minister concludes by stating:

I note the Committee's reference to Minister Cheyne's response to Scrutiny Report 3, in which the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1) (DI2021-4) was reviewed. Minister Cheyne outlined a commitment to ensure all future explanatory statements for legislative instruments related to her responsibilities will clearly address human rights implications.

I can confirm that the Community Services Directorate will ensure all future explanatory statements for instruments under the Children and Young People Act 2008 clearly explore human rights limitations and the application of proportionality.

Thank you for the opportunity to respond to the findings of the Committee, and for ensuring implications for human rights are given proper consideration.

The Committee is grateful to the Minister for addressing its concerns and for this very helpful and facilitative response.

This comment does not require any further response from the Minister.

Jeremy Hanson MLA
Chair

24 August 2021

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
 - Drugs of Dependence (Personal Use) Amendment Bill 2021
- **Report 4, dated 4 May 2021**
 - Crimes (Stealththing) Amendment Bill 2021.
- **Report 7, dated 4 May 2021**
 - Carers Recognition Bill 2021.
 - Domestic Violence Agencies Amendment Bill 2021 [response required before the Bill is debated].
 - Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) [response required before the Bill is debated].