

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

SCRUTINY REPORT 39

17 February 2020

THE COMMITTEE

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

- (1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

PROPOSED AMENDMENTS

MAGISTRATES COURT (INFRINGEMENT NOTICES) AMENDMENT BILL 2019

The Committee has received proposed amendments to the Magistrates Court (Infringement Notices) Amendment Bill 2019 to be moved by Ms Caroline Le Couteur MLA. These amendments allow the commencement date of the Bill to be delayed, make clear that waiver of an infringement penalty has the same effect as if it had been paid, and set out the process where waiver of a penalty has been refused. The Committee has no comment on these amendments.

UNIT TITLES AMENDMENT BILL 2019

AMENDMENTS PROPOSED BY MS LE COUTEUR MLA

The Committee has received proposed amendments to the Unit Titles Legislation Amendment Bill 2019 to be moved by Ms Caroline Le Couteur MLA. These proposed amendments include: amendments to the *Civil Law (Sale of Residential Property) Act 2003* and *Residential Tenancies Act 1997* to impose additional disclosure requirements relating to adaptable housing dwellings; amendments to the *Unit Titles (Management) Act 2011* preventing owners corporations by special resolution adopting an owners corporation's rule which prohibits or restricts the installation, operation or maintenance of sustainability infrastructure in or on an owner's unit; amendments to the *Unit Titles (Management) Act 2011* requiring additional information be provided at the first annual general meeting; and amendments to the default owners corporation rules in Schedule 1 of the *Unit Titles (Management) Regulation 2011* to prevent permission to erect sustainability infrastructure being unreasonably withheld.

Under the proposed amendments, a person will commit a strict liability offence if they publish an advertisement for the sale of a unit which is an adaptable housing dwelling but which does not contain a statement to that effect, subject to a maximum penalty of five penalty units. By introducing a strict liability offence, the proposed amendments potentially limit the right to the presumption of innocence protected by section 22 of the HRA. The Committee has not received an explanatory statement accompanying the proposed amendments or other statement justifying the possible limitation. While the Committee acknowledges that the proposed penalty for the strict liability is only five penalty units, a justification for the strict liability element should be provided, particularly where an element of the offence (the unit is an adaptable housing dwelling) may in some cases be difficult to determine.

The proposed amendments will also require, where the unit is being rented or sold, disclosure that the unit is an adaptable housing dwelling. The proposed amendments will define an adaptable housing dwelling as a dwelling that complies with Australian Standard AS 4299-1995 (Adaptable Housing). The proposed amendments will also require, when a unit which is an adaptable housing dwelling is being offered for sale, any contract for sale of the unit include documents and plans demonstrating compliance with that Standard. There is no requirement that the Standard be notified on the ACT legislation register or otherwise made available to the public.¹

¹ Cf section 47 of the *Legislation Act 2001* which applies to instruments authorised by legislation.

There may also be uncertainty over which is the relevant version of the Standard—the version of the Standard at the time of enactment of the Bill or as it is amended from time to time.²

The Committee therefore requests a justification for defining adaptable housing dwelling through reference to an Australian Standard, which version of the Standard was intended, and in particular why it could be considered reasonable to include compliance with the standard as an element of a strict liability offence.

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

AMENDMENTS PROPOSED BY MR PARTON MLA

On 31 January 2020, the Committee received proposed amendments to the Unit Titles Amendment Bill 2019 from Mr Mark Paton MLA. These amendments clarify the role of the owners corporations to lodge and pay for excess charges in relation to building insurance claims.

The Committee has no comment on these amendments.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2019-253 being the Public Place Names (Whitlam) Determination 2019 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of 22 roads in the Division of Whitlam.**
- **Disallowable Instrument DI2019-254 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 11) made under section 12 of the *Road Transport (General) Act 1999* disapplies parking rules in specified areas to support SouthFest 2019.**
- **Disallowable Instrument DI2019-255 being the Nature Conservation (Native Woodland) Action Plans 2019 made under sections 104 and 105 of the *Nature Conservation Act 2014* revokes DI2004-52 and DI2016-210 and sets out the final version of specified action plans.**
- **Disallowable Instrument DI2019-256 being the Government Procurement (Non-Public Employee Member) Appointment 2019 (No 1) made under section 12 of the *Government Procurement Act 2001* appoints a specified person as a part-time non-public employee member of the Government Procurement Board.**
- **Disallowable Instrument DI2019-259 being the Public Health (Chief Health Officer) Appointment 2019 made under section 7 of the *Public Health Act 1997* appoints a specified person as the Chief Health Officer.**

² Cf section 131 of the *Legislation Act 2001* which applies instruments referred to in signpost definitions as in force from time to time.

- **Disallowable Instrument DI2019-260 being the Health Records (Privacy and Access) (Fees) Determination 2019 (No 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* revokes DI2018-294 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-261 being the Health (Fees) Determination 2019 (No 2) made under section 192 of the *Health Act 1993* repeals DI2019-180 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-262 being the Work Health and Safety (Work Safety Council) Appointment Revocation 2019 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* revokes DI2017-59, DI2017-60, DI2017-222, DI2018-32, DI2018-130, DI2018-132 and DI2018-133.**
- **Disallowable Instrument DI2019-263 being the Public Place Names (Strathnairn) Determination 2019 made under section 3 of the *Public Place Names Act 1989* determines the names of 19 roads in the Division of Strathnairn.**
- **Disallowable Instrument DI2019-264 being the Public Place Names (Whitlam) Determination 2019 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the names of three roads in the Division of Whitlam.**
- **Disallowable Instrument DI2019-265 being the Road Transport (General) Driver Licence and Related Fees Determination 2019 (No 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2019-95 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-266 being the Nature Conservation (Spotted-tailed Quoll) Action Plan 2019 made under sections 104 and 105 of the *Nature Conservation Act 2014* revokes DI2013-277 and sets out the final version of the action plan for the Spotted-tailed Quoll.**
- **Disallowable Instrument DI2019-267 being the Environment Protection (Automotive Trades) Code of Practice 2019, including a regulatory impact statement, made under section 31 of the *Environment Protection Act 1997* accredits the Environment Protection (Automotive Trades) Code of Practice.**
- **Disallowable Instrument DI2019-268 being the Utilities (Licensing) Exemption 2019 made under section 22 of the *Utilities Act 2000* exempts the Territory, as represented by the Directorate that has responsibility from time to time for providing the non-potable water supply service, from the requirement for a licence to operate the Inner North Reticulation Network.**
- **Disallowable Instrument DI2019-269 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2019 (No 1) made under section 13 of the *Road Transport (General) Act 1999* disapplies specified provisions of the Road Transport (Safety and Traffic) Management Act, the Road Transport (Third-Party Insurance) Act, the Road Transport (Vehicle Registration) Act, the Road Transport (Vehicle Registration) Regulation, and the Road Transport (Driver Licensing) Regulation for vehicles and persons participating in the Summernats 33 Car Festival 2020.**
- **Disallowable Instrument DI2019-270 being the Duties (Pensioner Concession Duty Deferral Scheme) Determination 2019 made under section 75AG of the *Duties Act 1999* revokes DI2019-139 and determines the Pensioner Concession Duty Deferral Scheme for the deferred payment of duty payable by a Pensioner Duty Concession Scheme transferee on an eligible transaction.**

- **Disallowable Instrument DI2019-271 being the Taxation Administration (Amounts Payable— Home Buyer Concession Scheme) Determination 2019 (No 3) made under section 139 of the *Taxation Administration Act 1999* revokes DI2019-137 and determines, for the purposes of the Scheme, the eligibility criteria of the eligible property, determination of amounts, method of calculation of duty payable and eligibility requirements.**
- **Disallowable Instrument DI2019-272 being the Taxation Administration (Amounts Payable— Rates) Determination 2019 (No 2) made under paragraph 46(2)(f) of the and section 139 of the *Rates Act 2004 and the Taxation Administration Act 1999* revokes DI2019-142 and determines amounts for fixed charge and percentage rates for the purposes of the Rates Act 2004.**
- **Disallowable Instrument DI2019-273 being the Senior Practitioner (Positive Behaviour Support Plan) Guideline 2019 (No 2) made under section 12 of the *Senior Practitioner Act 2018* makes the Positive Behaviour Support Plan Guideline (Version 2).**
- **Disallowable Instrument DI2019-274 being the Senior Practitioner (Positive Behaviour Support Panel) Guideline 2019 (No 2) made under section 21 of the *Senior Practitioner Act 2018* revokes DI2019-65 and makes the Positive Behaviour Support Panel Guideline (Version 2).**
- **Disallowable Instrument DI2019-275 being the Taxation Administration (Amounts Payable— Ambulance Levy) Determination 2019 made under section 139 of the *Taxation Administration Act 1999* revokes DI2018-300 and determines the amount RA for the reference months January to December 2020.**
- **Disallowable Instrument DI2019-276 being the Motor Accident Injuries (Persons Living Outside of Australia) Guidelines 2019 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Persons Living Outside of Australia Guidelines.**
- **Disallowable Instrument DI2019-277 being the Motor Accident Injuries (UVP Liability Contribution) Guideline 2019 made under section 332 of the *Motor Accident Injuries Act 2019* makes the UVP Liability Contribution Guideline 2019.**
- **Disallowable Instrument DI2019-278 being the Motor Accident Injuries (WPI Assessment) Guidelines 2019 made under section 146 of the *Motor Accident Injuries Act 2019* makes the Whole Person Impairment Assessment Guidelines.**
- **Disallowable Instrument DI2019-279 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 13) made under section 12 of the *Road Transport (General) Act 1999* suspends specific parking rules in specified areas to support the New Year's Eve in the City event.**
- **Disallowable Instrument DI2019-280 being the Legislative Assembly Precincts (Fees) Determination 2019 made under section 11A of the *Legislative Assembly Precincts Act 2001* revokes DI2012-261 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2019-281 being the Veterinary Practice (Board) Appointment 2019 (No 3) made under subsection 93(2) of the *Veterinary Practice Act 2018* appoints specified persons as the president and a member of the Veterinary Practitioners Board.**
- **Disallowable Instrument DI2019-282 being the Tree Protection (Advisory Panel) Appointment 2019 (No 1) made under section 69 of the *Tree Protection Act 2005* appoints specified persons as members of the Tree Advisory Panel.**

- **Disallowable Instrument DI2019-284 being the Civil Law (Wrongs) CPA Australia Ltd Professional Standards (Accountants) Scheme 2019 (No 1) made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* revokes DI2017-310 and gives notice of the Professional Standards Council of New South Wales' approval of the CPA Australia Ltd Professional Standards (Accountants) Scheme.**
- **Disallowable Instrument DI2019-285 being the Building and Construction Industry Training Levy (Governing Board) Appointment 2019 (No 1) made under section 6 of the and sections 78 and 79 of the *Building and Construction Industry Training Levy Act 1999* and *Financial Management Act 1996* appoints a specified person as chairperson of the Building and Construction Industry Training Fund Authority Board, representing the building and construction industry.**
- **Disallowable Instrument DI2020-1 being the Public Place Names (Yarralumla) Determination 2020 made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Yarralumla.**
- **Disallowable Instrument DI2020-2 being the Public Place Names (Taylor) Determination 2020 made under section 3 of the *Public Place Names Act 1989* determines the names of eight roads in the Division of Taylor.**
- **Disallowable Instrument DI2020-3 being the Official Visitor (Corrections Management) Appointment 2020 (No 1) made under paragraph 10(1)(b) of the *Official Visitor Act 2012* appoints specified persons as official visitors for the Corrections Management Act 2007.**
- **Disallowable Instrument DI2020-4 being the Motor Accident Injuries (Industry Deed) Approval 2020 made under section 24 of the *Motor Accident Injuries (Premiums and Administration) Regulation 2019* approves the content of the Insurance Industry Deed.**
- **Disallowable Instrument DI2020-5 being the Waste Management and Resource Recovery (Processing Refund Protocol) Determination 2020 made under section 64L of the *Waste Management and Resource Recovery Act 2016* revokes DI2018-208 and determines the ACT Container Deposit Scheme Processing Refund Protocol.**
- **Disallowable Instrument DI2020-6 being the Utilities (Consumer Protection Code) Determination 2020 made under sections 59 and 63 of the *Utilities Act 2000* revokes DI2012-149 and determines the Consumer Protection Code 2020.**
- **Disallowable Instrument DI2020-7 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Cultural Facilities Corporation.**
- **Disallowable Instrument DI2020-8 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 79 of the *Financial Management Act 1996* revokes DI2018-276 and appoints a specified person as deputy chair of the Cultural Facilities Corporation.**
- **Disallowable Instrument DI2020-9 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 3) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2018-277 and appoints a specified person as a member of the Cultural Facilities Corporation.**

- **Disallowable Instrument DI2020-10 being the Cultural Facilities Corporation (Governing Board) Appointment 2020 (No 4) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2018-278 and appoints a specified person as a member of the Cultural Facilities Corporation.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2019-258 being the Road Transport (General) Application of Road Transport Legislation Declaration 2019 (No 12) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to an entrant vehicle or driver participating in a special stage of the Damesa Industries Rallye Des Femmes.**

This instrument, made under section 13 of the *Road Transport (General) Act 1999*, disapplies the *Road Transport (Third Party Insurance) Act 2008*, for a limited period, in relation to areas specified in Schedules 1 and 2 to the instrument. The particular application of the instrument is to disapply that Act in relation to the holding of an event known as the “Damesa Industries Rallye Des Femmes”—a car rally.

The practical effect of the instrument is that vehicles participating in the event are not required to be covered by ACT compulsory third party insurance. This is because the event is, instead, covered by a \$100 million general liability policy, held by the Confederation of Australian Motor Sport (CAMS). If the ACT Act was *not* disapplied then the CAMS policy would not operate.

The Committee notes that the explanatory statement for the instrument contains a discussion of “human rights implications”. It states (in part):

Section 13 of the HRA provides a right for people to move freely within the ACT.

The declarations in this instrument do not of itself restrict a person’s freedom of movement within the Territory, however the operation of the rally in closing parts of the forest in which the rally will be conducted to members of the public will restrict the free movement of people in that area of the Territory during the event. As parts of the road transport law are being disapplied for the event to operate as intended, vehicles will be travelling in parts of the forest in excess of the usual speed limits and in a manner not consistent with the road rules. As such, the restriction on the free movement of people in those parts of the forest at those times is considered reasonable and proportionate to ensure safety of non-participants and represents the least restrictive approach that enables the event to proceed.

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

This comment does not require a response from the Minister.

HAS THIS INSTRUMENT BEEN VALIDLY MADE?

- **Disallowable Instrument DI2019-283 being the Major Events (ICC T20 Women's World Cup 2020) Declaration 2019 (No 1) made under section 6 of the *Major Events Act 2014* applies the provisions of the Act to the ICC T20 Women's World Cup 2020 tournament being held at Manuka Oval from 22 to 28 February 2020.**

This instrument, made under section 6 of the *Major Events Act 2014*, declares cricket matches to be held at Manuka Oval, between 22 and 28 February 2020, as part of the ICC T20 Women's World Cup 2020 tournament, to be a “major event”, for that Act. Section 6 provides:

6 Major event—declaration

- (1) The Executive may, not later than 28 days before the proposed date of an event, declare the event to be a major event (a ***major event declaration***).
- (2) The Executive may only make a major event declaration in relation to an event if satisfied—
 - (a) that the event is a major event at an international, national, State or Territory level; and
 - (b) it is in the public interest to do so; and
 - (c) on reasonable grounds it is necessary and appropriate to do so.
- (3) In deciding whether to make a major event declaration, the Executive must consider whether the event will do any of the following:
 - (a) generate significant tourism opportunities for the ACT by attracting a large number of international participants or spectators;
 - (b) significantly raise the ACT's international profile;
 - (c) require a high level of professional management and coordination;
 - (d) attract significant sponsorship and media coverage;
 - (e) attract large numbers of people as participants or spectators;
 - (f) offer substantial cultural, economic, social, sporting or other benefits for the ACT and ACT residents.
- (4) The Executive may not declare a public protest or demonstration to be a major event.
- (5) A major event declaration is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.
- (6) The Executive must give additional public notice of the major event declaration.

Note **Public notice** means notice on an ACT government website or in a daily newspaper circulating in the ACT (see Legislation Act, dict, pt 1). The requirement in s (6) is in addition to the requirement for notification on the legislation register as a disallowable instrument.

- (7) Failure to publish a declaration in accordance with subsection (6) does not affect the validity of the declaration.

The Committee notes that neither the instrument itself, nor the explanatory statement for the instrument, addresses the requirements of subsection 6(2) or (3) of the Act. While it may be argued that the Ministers in question would not have made the declaration *unless* satisfied of these matters, and while these matters might reasonably be assumed, in the case of an international sporting event, such as this one, the Committee considers that it would have been preferable if the requirements of subsections 6(2) and (3) of the Act were addressed, in the explanatory statement for the instrument.

The Committee also notes that subsection 6(6) of the Act requires that an “additional public notice” be given of the declaration of a major event. The Note to subsection 6(6) indicates that this “public notice” means “notice on an ACT government website or in a daily newspaper circulating in the ACT”. Again, there is nothing in the explanatory statement for the instrument that indicates that this requirement has been complied with, in this case.

While the Committee notes that, under subsection 6(7) of the Act, the failure to give this “additional public notice” does not affect the validity of this instrument, the Committee seeks the Ministers’ advice as to whether the “additional public notice” has been given, in this case.

This comment requires a response from the Ministers.

HAS THIS INSTRUMENT BEEN VALIDLY MADE?

- **Disallowable Instrument DI2019-286 being the Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2) made under section 109 of the *Animal Welfare Act 1992* appoints specified persons as chair and members of the Animal Welfare Advisory Committee.**

This instrument, made under section 109 of the *Animal Welfare Act 1992*, appoints a specified person as chair of the Animal Welfare Advisory Committee and also appoints 4 further specified persons as members of that Committee. The formal part of the instrument indicates that, in addition to section 109 of the Act, the instrument should be “read with *Animal Welfare (Advisory Committee) Establishment 2015*, ss 4, 5”.

In *Scrutiny Report 37* of the 9th Assembly (19 November 2019), the Committee commented on a similar instrument, the Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1) (DI2019-216). The Committee observed that, under subsection 109(2) of the Animal Welfare Act, the Animal Welfare Advisory Committee is to be “constituted in accordance with its instrument of establishment” which, under subsection 109(4), is a *disallowable* instrument. However, the Committee also noted that the Animal Welfare (Advisory Committee) Establishment 2015—which, as is the case with this instrument, would appear to be the “instrument of establishment”—appears on the ACT Legislation Register as a *notifiable* instrument (see <https://www.legislation.act.gov.au/ni/2015-219/>). As the Committee observed in relation to the earlier instrument, this means that it has not been subject to disallowance by the Legislative Assembly (or scrutiny by the Committee).

In *Scrutiny Report 37*, the Committee noted that the Animal Welfare (Advisory Committee) Establishment 2015 sets out various matters in relation to the Animal Welfare Advisory Committee, including terms of appointment for members, pre-requisites for appointment and procedural issues. The Committee noted that, while the instrument under consideration (in the earlier case) addressed pre-requisites set out in the Animal Welfare (Advisory Committee) Establishment 2015, the Committee was concerned that the latter may not have been validly made. The same comment applies to the present instrument.

In *Scrutiny Report 37*, the Committee sought the Minister’s advice on this issue and, in particular, the Minister’s advice as to whether the Animal Welfare (Advisory Committee) Establishment 2015 is intended to operate as the “instrument of establishment”.

The Minister for City Services responded to that request for advice, in a letter dated 12 February 2020. The response states (in part):

At the time of the appointments the now repealed *Animal Welfare Act 1992* under section 109(4) sets out that the establishment of the Committee was under a notifiable instrument. The *Animal Welfare Act 1992* was amended in October 2019 which changed the establishment of the Animal Welfare Committee from a Notifiable Instrument to a Disallowable Instrument. I propose to remake the instrument as a Disallowable Instrument.

The Committee assumes that the instrument that the Minister proposes to re-make is the Animal Welfare (Advisory Committee) Establishment 2015.

The Committee notes that it is correct that, at the time that the earlier instrument was made (ie 23 September 2019), subsection 109(4) of the Animal Welfare Act provided that the “instrument of establishment” was a *notifiable* instrument. As a result, it would appear that the earlier instrument was validly made. This is not the case with the current instrument, however. It was made on 23 December 2019, by which time subsection 109(4) of the Animal Welfare Act had been amended. As a result, the Committee’s concerns about the validity of the instrument continue to apply.

The Committee seeks the Minister’s advice on when the Animal Welfare (Advisory Committee) Establishment 2015 will be re-made and the Minister’s advice on whether the instrument mentioned above (ie DI2019-286) will also be re-made.

This comment requires a response from the Minister.

In addition, the Committee notes that (as was the case in relation to the earlier instrument) the explanatory statement for the present instrument contains no indication as to whether or not the specified persons appointed by the instrument are public servants.

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

227 Application—div 19.3.3

- (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
- (2) However, this division does not apply to an appointment of—

- (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
- (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
- (c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is **not** a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,³ the Committee stated:

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

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

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

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

This comment requires a response from the Minister.

SUBORDINATE LAWS—NO COMMENT

The Committee has examined the following subordinate laws and offers no comments on them:

- **Subordinate Law SL2019-30 being the Court Procedures Amendment Rules 2019 (No 3) made under the *Court Procedures Act 2004* amends the Court Procedures Rules relating to first appearances in criminal proceedings in the Magistrates Court.**
- **Subordinate Law SL2019-32 being the Environment Protection Amendment Regulation 2019 (No 1), including a regulatory impact statement made under the *Environment Protection Act 1997* extends daytime noise standards on Fridays and Saturdays in certain areas.**

³ https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

- **Subordinate Law SL2020-1 being the Firearms Amendment Regulation 2020 (No 1) made under the *Firearms Act 1996* amends the Firearm Regulation to allow the Firearms Registrar to issue a permit to authorise the possession and display of a mortar.**
- **Subordinate Law SL2020-3 being the Medicines, Poisons and Therapeutic Goods (Continued Dispensing) Amendment Regulation 2020 (No 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* allow pharmacists to supply a prescription-only medicine to a person as a pharmaceutical benefit without a prescription in defined circumstances.**

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES / STRICT LIABILITY OFFENCES

- **Subordinate Law SL2019-29 being the Road Transport (Driver Licensing) Amendment Regulation 2019 (No 1), including a regulatory impact statement made under the *Road Transport (Driver Licensing) Act 1999* and *Road Transport (General) Act 1999* introduces reforms to the driver licensing scheme for learner and provisional car drivers.**

This subordinate law amends the Road Transport (Driver Licensing) Regulation 2000, in relation to reforms to the ACT's driver licensing scheme for learner and provisional car drivers announced by the Government in June 2019. According to the explanatory statement for the subordinate law:

The goal of the reforms is to reduce the number of young and novice drivers involved in fatal and serious injury crashes and help them gain experience and confidence on the road in a staged way.

The explanatory statement for the subordinate law goes on to state that the amendments that it makes:

- Increase the minimum learner licence tenure for persons who are under 25 when they are issued with a learner licence from 6 months to 12 months.
- Mandate required driving hours for learner drivers before they are eligible for a provisional licence, to ensure that adequate experience is gained prior to independent driving.
- Introduce a Hazard Perception Test as an eligibility requirement for a provisional licence, to ensure that new drivers have the cognitive capacity to identify and react to hazards on and around the road.
- Introduce a two staged provisional licence (P1 and P2) that focuses on increased restrictions on provisional drivers who are under the age of 25.
- Introduce late-night peer-passenger restrictions for P1 drivers to reduce the risk of provisional drivers crashing as the dangers of distraction, challenging driving conditions, risk-taking behaviour and fatigue are enhanced at night.
- Reduce the demerit point threshold for learner drivers to ensure that sanctions are a swift and certain deterrent and in recognition that they are our safest drivers.

- g) Remove options for provisional drivers to increase their demerit point threshold to ensure that sanctions are a swift and certain deterrent and in recognition that they are over-represented in road accidents.
- h) Provide learner drivers with the option to complete approved learner driver training courses to achieve a component of the required driving hours and to provide additional road safety education.
- i) Establish a new application and approval process for licence training courses.

The Committee notes that the explanatory statement for the subordinate law contains 6 pages of detailed discussion of the human rights (as defined in the *Human Rights Act 2004*) engaged by the amendments made by the subordinate law. The human rights identified are:

- the right to recognition and equality before the law (section 8);
- the right to freedom of movement (section 13); and
- the right to be presumed innocent (section 22).

In relation to the right to be presumed innocent, the explanatory statement discusses this issue by reference to the new strict liability offence created by the subordinate law and the minor and technical amendments made to some existing strict liability offences. The Committee notes that, in fact, seven strict liability offences are contained in the subordinate law—new subsections 11A(3), 11B(2), 19(8), 20(6), 29(4), 32(4) and 60(3). The Committee notes that the discussion addresses the Committee's oft-stated concerns, in relation to strict liability offences.

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 / STRICT LIABILITY OFFENCES

- **Subordinate Law SL2019-31 being the Road Transport Legislation Amendment Regulation 2019 (No 1) made under the *Road Transport (General) Act 1999*, *Road Transport (Safety and Traffic Management) Act 1999* and *Road Transport (Vehicle Registration) Act 1999* amends specified road transport legislation to establish the regulatory framework for personal use of e-scooters; to provide the road transport authority with the power to refuse, cancel or suspend the registration of vehicles with offensive messaging, and vehicles that fail to comply with a recall notice issued under the Australian Consumer Law; introduce an exemption to the requirement to wear a helmet on religious grounds; and introduce an offence for displaying a copy of a parking permit or mobility parking scheme authority in or on a vehicle.**

This subordinate law amends the Road Transport (Road Rules) Regulation 2017, the Road Transport (Safety and Traffic Management) Regulation 2017 and the Road Transport (Vehicle Registration) Regulation 2000. It also makes consequential amendments to the Road Transport (Offences) Regulation 2005. According to the explanatory statement, the amendments made by the subordinate law:

- establish the regulatory framework for personal use of e-scooters and other similar devices through amendments to the existing framework for personal mobility devices;

- provide the road transport authority with the power to refuse, cancel or suspend the registration of vehicles with offensive messaging;
- provide the road transport authority with the power to refuse, cancel or suspend the registration of vehicles that fail to comply with a recall notice issued under the Australian Consumer Law;
- introduce an exemption to the requirement to wear a helmet on religious grounds; and
- introduce an offence for displaying in or on a vehicle a copy of a parking permit or mobility parking scheme authority.

The Committee notes that the explanatory statement for the subordinate law contains nine pages of detailed discussion of the human rights (as defined in the *Human Rights Act 2004*) engaged by the amendments made by the subordinate law. The human rights identified are:

- the right to privacy and reputation (section 12);
- the right to freedom of movement (section 13);
- the right to freedom of thought, conscience, religion and belief (section 14);
- the right to freedom of expression (section 16); and
- the rights in criminal proceedings (section 22).

In relation to the rights in criminal proceedings, the explanatory statement addresses the right to the presumption of innocence until proven guilty (subsection 22(1)) and the right against self-incrimination (paragraph 22(2)(i)). The discussion in relation to these issues is by reference to five new strict liability offences and amendments to two existing strict liability offences. The Committee notes that the discussion addresses the Committee's oft-stated concerns, in relation to strict liability offences.

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 / STRICT LIABILITY OFFENCES

- **Subordinate Law SL2020-2 being the Magistrates Court (Long Service Leave Infringement Notices) Regulation 2020 made under the *Magistrates Court Act 1930* enables infringement notices to be issued for prescribed offences against the *Long Service Leave (Portable Schemes) Act 2009*.**

This subordinate law enables infringement notices to be issued for certain offences under the *Long Service Leave (Portable Schemes) Act 2009*. Infringement notices can be issued as an alternative to prosecution.

The explanatory statement for the subordinate law contains a discussion of the human rights implications of the subordinate law:

HUMAN RIGHTS IMPLICATIONS

As it concerns a strict liability offence, the Regulation 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. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, 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 *Long Service Leave (Portable Schemes) Act 2009*. Without the ability to issue infringement notices, the only option available to the Registrar of the Long Service Leave is to apply to ACAT for an order to enforce an obligation under the Act. 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.

REGULATORY IMPACT STATEMENTS

REGULATORY IMPACT STATEMENTS—NO COMMENT

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

- **Disallowable Instrument DI2019-267 being the Environment Protection (Automotive Trades) Code of Practice 2019.**
- **Subordinate Law SL2019-29 being the Road Transport (Driver Licensing) Amendment Regulation 2019 (No 1).**

REGULATORY IMPACT STATEMENTS—COMMENT

The Committee has examined the regulatory impact statement for the following disallowable instrument and offers these comments on it:

- **Subordinate Law SL2019-32 being the Environment Protection Amendment Regulation 2019 (No 1).**

The subordinate law mentioned above is accompanied by a regulatory impact statement. Section 34 of the *Legislation Act 2001* sets out the fundamental requirements relating to the preparation of regulatory impact statements. Subsection 34(1) provides:

- (1) If a proposed subordinate law or disallowable instrument (the **proposed law**) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law (the **administering Minister**) must arrange for a regulatory impact statement to be prepared for the proposed law.

Section 35 of the Legislation Act then provides for the content of regulatory impact statements:

35 Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the **proposed law**) must include the following information about the proposed law in clear and precise language:

- (a) the authorising law;
- (b) a brief statement of the policy objectives of the proposed law and the reasons for them;
- (c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
- (d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
- (e) if the proposed law is inconsistent with the policy objectives of another territory law—
 - (i) a brief explanation of the relationship with the other law; and
 - (ii) a brief explanation for the inconsistency;
- (f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
- (g) a brief assessment of the benefits and costs of implementing the proposed law that—
 - (i) if practicable and appropriate, quantifies the benefits and costs; and
 - (ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);
- (h) **a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.** [emphasis added]

The Committee's role in relation to regulatory impact statements arises from paragraph 35(h) above, and from principle (2) of the Committee's terms of reference, which requires the Committee to consider "whether any explanatory statement or explanatory memorandum associated with legislation **and any regulatory impact statement** meets the technical or stylistic standards expected by the Committee" [emphasis added].

The Committee notes that the regulatory impact statement for this instrument **does not** contain a discussion of “the scrutiny committee principles”, as required by paragraph 35(h) of the Legislation Act (though it *does* contain a brief reference to human rights issues).

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

This comment requires a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Chief Minister, dated 7 February 2020, in relation to comments made in Scrutiny Report 38 concerning Subordinate Law SL2019-28 Motor Accident Injuries (Premiums and Administration) Regulation 2019.
- The Minister for City Services, dated 12 February 2020, in relation to comments made in Scrutiny Report 37 concerning Disallowable Instrument DI2019-216—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1).

[These responses](#)⁴ can be viewed online.

- The Minister for City Services, dated 12 February 2020, in relation to comments made in Scrutiny Report 38 concerning the Cemeteries and Crematoria Bill 2019.

[This response](#)⁵ can be viewed online.

The Committee wishes to thank the Chief Minister and the Minister for City Services for their helpful responses.

Giulia Jones MLA
Chair

17 February 2020

⁴ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

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>.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
 - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
 - Electoral Amendment Bill 2018 (Private Member’s amendments).
- **Report 35, dated 23 September 2019**
 - Planning and Development (Design Review Panel) Amendment Bill 2019 (further Government response).
- **Report 37, dated 19 November 2019**
 - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
 - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s amendments)
- **Report 38, dated 4 February 2020**
 - Disallowable Instrument DI2019-230 Smoke-Free Public Places (Public Transport Interchanges) Declaration 2019 (No 1).
 - Electoral Legislation Amendment Bill 2019 (Private Member’s amendments).