

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

SCRUTINY REPORT 6

15 JUNE 2021



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Mr Jeremy Hanson MLA (Chair)  
Dr Marisa Paterson MLA (Deputy Chair)  
Ms Jo Clay MLA

## SECRETARIAT

Ms Julia Agostino (Secretary)  
Ms Sophie Milne (Assistant Secretary)  
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)  
Mr Daniel Stewart (Legal Adviser—Bills)

## CONTACT INFORMATION

Telephone 02 6205 0171  
Facsimile 02 6205 3109  
Post GPO Box 1020, CANBERRA ACT 2601  
Email [scrutiny@parliament.act.gov.au](mailto:scrutiny@parliament.act.gov.au)  
Website [www.parliament.act.gov.au](http://www.parliament.act.gov.au)

## 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;

# TABLE OF CONTENTS

**BILL** ..... 1

**Bill—No comment**..... 1

**LOOSE-FILL ASBESTOS LEGISLATION AMENDMENT BILL 2021** ..... 1

**SUBORDINATE LEGISLATION** ..... 1

**Disallowable Instruments—No comment** ..... 1

**Disallowable Instruments—Comment** ..... 1

**General Comment**..... 4

**Consistency in explanations for fees increases**..... 4

**Human Rights Issues** ..... 7

**RESPONSES** ..... 13

**Government response**..... 13

**OUTSTANDING RESPONSES** ..... 14

**Bills/Subordinate Legislation**..... 14



## BILL

### BILL—NO COMMENT

The Committee has examined the following bill and offers no comment on it:

#### **LOOSE-FILL ASBESTOS LEGISLATION AMENDMENT BILL 2021**

---

This Bill amends the definition of buyback scheme within the *Civil Law (Sales of Residential Property) Act 2003*, *Dangerous Substances Act 2004*, *Government Agencies (Land Acquisition Reporting) Regulation 2019* and the definition of loose-fill asbestos insulation eradication buyback program (LAIE buyback program) in the *Planning and Development Regulation 2008*, so that these definitions no longer refer to the *Appropriation (Loose-fill Asbestos Insulation Eradication) Act 2014-2015*. From 18 August 2021, all financial and budget implications for any newly-identified properties that participate in the Scheme will be funded through existing budgetary mechanisms.

The Committee notes that this Bill is stated to commence on 18 August 2021. Passage of the Bill after that date will result in the Bill having retrospective effect. However, this will not have a prejudicial effect on any individual's rights or liberties.

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2021-57 being the Integrity Commission (Commissioner) Appointment 2021 made under section 25 of the *Integrity Commission Act 2018* appoints a specified person as the ACT Integrity Commissioner.**
- **Disallowable Instrument DI2021-58 being the Integrity Commission (Acting Commissioner) Appointment 2021 (No 3) made under section 25 of the *Integrity Commission Act 2018* appoints a specified person as the acting ACT Integrity Commissioner.**
- **Disallowable Instrument DI2021-59 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2021 (No 1) made under section 79E of the and section 78 of the *Long Service Leave (Portable Schemes) Act 2009* and *Financial Management Act 1996* appoints a specified person as a member of the Long Service Leave Governing Board, representing employer organisations.**
- **Disallowable Instrument DI2021-82 being the Labour Hire Licensing (Exempt Workers) Determination 2021 (No 1) made under section 8(2) of the *Labour Hire Licensing Act 2020* determines who is, or is not, a worker for the purposes of the Act.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### *Human rights issues*

- **Disallowable Instrument DI2021-52 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2021 (No 1) made under section 33 of the Road Transport (Safety and Traffic Management) Regulation 2017 declares Dickson Village (ACT) Pty Ltd to be a parking authority for the area of Block 21 of Section 30 in the division of Dickson.**

This instrument determines a particular entity to be a “parking authority”, in relation to a stated area, for section 33 of the *Road Transport (Safety and Traffic Management) Regulation 2017*. The effect of the determination is that any ticket parking scheme operated by the entity can be enforced, under the ACT’s road transport legislation.

The Committee notes that the explanatory statement for the instrument states that “[n]o rights contained in the *Human Rights Act 2004* are impacted by this 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.**

### *Fees determinations / Human rights issues*

- **Disallowable Instrument DI2021-53 being the Veterinary Practice (Fees) Determination 2021 (No 1) made under section 144 of the *Veterinary Practice Act 2018* determines fees payable for the purposes of the Act and revokes DI2020-93.**
- **Disallowable Instrument DI2021-60 being the Road Transport (General) Fees for Publications Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2020-211 and determines fees payable for various kinds of road transport publications.**
- **Disallowable Instrument DI2021-61 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2020-212 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2021-62 being the Road Transport (General) Numberplate Fees Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2020-213 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2021-63 being the Road Transport (General) Driver Licence and Related Fees Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2020-214 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2021-64 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2021 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2020-215 and determines fees payable for the purposes of the Act.**



- **Disallowable Instrument DI2021-70 being the Fisheries (Fees) Determination 2021** made under section 114 of the *Fisheries Act 2000* revokes DI2019-125 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-71 being the Water Resources (Fees) Determination 2021** made under section 107 of the *Water Resources Act 2007* revokes DI2020-200 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-72 being the Architects (Fees) Determination 2021** made under section 91 of the *Architects Act 2004* revokes DI2020-181 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-73 being the Building (Fees) Determination 2021** made under section 150 of the *Building Act 2004* revokes DI2019-112 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-74 being the Construction Occupations (Licensing) (Fees) Determination 2021** made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2019-113 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-75 being the Electricity Safety (Fees) Determination 2021** made under section 64 of the *Electricity Safety Act 1971* revokes DI2019-114 and determines fees payable under the Act.
- **Disallowable Instrument DI2021-76 being the Environment Protection (Fees) Determination 2021** made under section 165 of the *Environment Protection Act 1997* revokes DI2020-197 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-77 being the Gas Safety (Fees) Determination 2021** made under section 67 of the *Gas Safety Act 2000* revokes DI2021-77 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-78 being the Heritage (Fees) Determination 2020** made under section 120 of the *Heritage Act 2004* revokes DI2020-198 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-79 being the Nature Conservation (Fees) Determination 2021 (No 2)** made under section 368 of the *Nature Conservation Act 2014* revokes DI2021-16 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-80 being the Water and Sewerage (Fees) Determination 2021** made under section 45 of the *Water and Sewerage Act 2000* revokes DI2019-116 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2021-81 being the Labour Hire Licensing (Fee) Determination 2021 (No 1)** made under section 75 of the *Labour Hire Licensing Act 2020* determines fees payable under the Act.
- **Disallowable Instrument DI2021-83 being the Road Transport (General) Concession Determination 2021 (No 1)** made under section 96 of the *Road Transport (General) Act 1999* revokes DI2018-245 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.

- **Disallowable Instrument DI2021-84 being the Unit Titles (Management) (Fees) Determination 2021 made under section 119 of the *Unit Titles (Management) Act 2011* revokes DI2020-155 and determines fees payable for the purposes of the Act.**

#### GENERAL COMMENT

Each of the instruments mentioned above determines fees payable, under various Acts. At this time of the year, the Committee expects to scrutinise approximately 100 such instruments, as the Executive Government determines fees for the forthcoming financial year. The instruments mentioned above are evidently the first batch of such instruments, for the 2021-22 financial year.

The Committee's expectations, in relation to fees determinations (and other matters), are set out in its document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#).<sup>1</sup> In that document, the Committee states:

#### FEES DETERMINATIONS

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:

- by whom the fee is payable; and
- to whom the fee is to be paid

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, 10 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 first instrument mentioned above – Veterinary Practice (Fees) Determination 2021 (No 1) [DI2021-53] – is a good example of the explanation that has been provided, for this year's fees increases. The explanatory statement states:

The fee payable for the 2021-2022 financial year is included at column 5. Fees relating to initial registration fees for practitioners and specialists including the application fees have been increased by 2.5%. All other fees have been increased by 5%. The main reason for the

---

<sup>1</sup> [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf).

increase is due to make up for the freeze to fees in 2020-21 which were maintained at 2019-20 levels due to the impact of COVID-19.

The Committee notes that the reference to the previous freeze in fees is not repeated in relation to other instruments considered for this *Scrutiny* Report.

The explanatory statement for the second instrument mentioned above – Road Transport (General) Fees for Publications Determination 2021 (No 1) [DI2021-60] – mentions a different increase amount and explanation, together with a circumstances-specific fees increase explanation:

The fees for ACT publications have been increased by the wage price index of 1.75% in accordance with budget memo 2021/08, rounded down to the nearest ten cents except for the national driver work diary which remains at \$25 in line with advice from the National Heavy Vehicle Regulator.

A similar approach is taken in the explanatory statements for DI2021-61, DI2021-62, DI2021-63 and DI2021-64, made under the same Act. The explanatory statement for DI2021-64 is, again, more circumstances-specific, stating:

Light vehicle registration and other registration related road transport fees and charges have been increased by the wage price index of 1.75% in accordance with budget memo 2021/08, rounded down to the nearest ten cents. The short-term pro-rata rate for the Road Rescue Fee has not increased and remains at \$2.30 as this fee is one twelfth of the 12-month fee rounded down to the nearest 10 cents. The short-term registration surcharge (payable for registration periods of less than 12 months) has not been changed and remains at \$10.

Heavy vehicle fees are agreed nationally by transport and infrastructure ministers as the Infrastructure and Transport Ministers Meeting (ITMM). ITMM agreed in March 2021 for heavy vehicle registration charges to increase by 2.5%. The Roads component of heavy vehicle registration charges have been increased in line with advice from the National Transport Commission. The Regulatory component of heavy vehicle registration charges have not been increased as these are set to align with the approved budget of the National Heavy Vehicle Regulator.

The explanatory statement for the seventh instrument mentioned above – Fisheries (Fees) Determination 2021 [DI2021-70] – offers the following explanation for the fees increases determined by the instrument:

The regulatory fees in the determination, which applied in the 2019-20 and 2020-21 financial years, have been increased by 1.75% for the 2021-22 financial year based on the wage price index as per government's advice. Appropriate rounding has been made in relation to increases.

The explanatory statement goes on to discuss six new fees that are determined by the instrument.

The explanatory statement for the eighth instrument mentioned above – Water Resources (Fees) Determination 2021 [DI2021-71] – offers the same increase figure but, again, a circumstances-specific explanation:

The regulatory fees (excluding water abstraction charge) in the determination have been increased by 1.75% for the 2021-22 financial year based on the wage price index and then appropriate rounding has been applied in relation to increases. The Government will index the Water Abstraction Charge (WAC) by 3% as per the decision in the 2016-17 Budget.

The instrument includes an exemption from the payment of the Grant of Water Access Entitlement (WAE) fee where the intended use of the water involves the Territory complying with commitments under the Basin Plan 2012 (Cwlth).

This exemption relates to the Grant of WAE fee where the entitlement would be granted (a) to provide the shared reduction amount for the southern Basin Australian Capital Territory zone and/or (b) to facilitate the Territory's participation in the Murray-Darling Basin Water Efficiency Program – ACT Led Efficiency Project.

The explanatory statement for the ninth instrument mentioned above – Architects (Fees) Determination 2021 [DI2021-72] – offers the same increase figure and a similar (but also slightly different) explanation:

The regulatory fees in the determination have been increased by 1.75% for the 2021-22 financial year, based on the wage price index as per government's advice, Administration fees relating to refunds are increased by 1.75% (the Wage Price Index), as per the government's Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

The same increase figure and a similar explanation appears in the explanatory statements for DI2021-73 and DI2021-80. The explanatory statements for DI2021-74, DI2021-75, DI2021-76, DI2021-77, DI2021-78 and DI2021-79 are also similar, but without the reference to "the government's Fees and Charges Policy and Guidelines".

The eighteenth instrument mentioned above – Labour Hire Licensing (Fee) Determination 2021 (No 1) [DI2021-81] – determines new fees, for the *Labour Hire Licensing Act 2020*.

The nineteenth instrument mentioned above – Road Transport (General) Concession Determination 2021 (No 1) [DI2021-83] – also determines new fees, for the *Road Transport (General) Act 1999*. The explanatory statement for the instrument states:

The preference of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) tis hat [sic] Instruments or Explanatory Statements identify the amount of the old and new fee, any percentage increase and also the reason for any increase in the Instrument or the Explanatory Statement.

While neither the explanatory statement nor the instrument itself seems to actually address the Committee's preferences (in terms of "old" and "new" fees, magnitude of increases, etc), it is also not clear that the Committee's preferences strictly or easily apply to the instrument, which determines percentages of fees payable in relation to driver licensing and vehicle registration by persons eligible for concessions.

Finally, the Committee notes that the explanatory statement for the twentieth instrument mentioned above – Unit Titles (Management) (Fees) Determination 2021 [DI2021-84] – contains the following explanation, in relation to the fees provided for by the instrument:

This determination increases the fee in item 422 of the schedule in recognition of the commencement of the *Unit Titles (Management) Certificate Determination 2020* (DI2020-285) on 1 November 2020 which prescribes an additional set of information that must now be provided in a unit title certificate under section 119 (1) (a) of the Act. The fee increase is required as the Certificate must now include significantly more information than previously required, such as information on levies, insurance, warranties and service contracts.

This determination also contains a new fee in item 425 of the schedule which is consequential to amendments introduced by section 104 of the *Unit Titles Legislation Amendment Act 2020*, and now required under section 119 (1) (b) of the Act.

As the fees in items 422 and 425 of the schedule are non-government fees payable to the owners corporation, the 2018 Treasury Guidelines for Fees and Charges does not apply to this determination.

The other fees in this determination, items 423 and 424 of the schedule, are unchanged from the previous fee determination *Unit Titles (Management) (Fees) Determination 2020* (DI2020-155).

**The comments immediately above do not require a response from the relevant Ministers.**

#### HUMAN RIGHTS ISSUES

The Committee notes that the explanatory statements for all the instruments mentioned above, except DI2021-53 and DI2021-81, address potential human rights issues, by way of a statement that there are no human rights issues arising from the relevant instrument.

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

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

#### *COVID-19-related instrument / Retrospectivity*

- **Disallowable Instrument DI2021-54 being the Liquor (COVID-19 Emergency Response—Licence Fee Waiver and Reduction) Declaration 2021 (No 1) made under section 35 and 229 of the Liquor Regulation 2010 revokes DI2021-23 and waives or reduces fees payable for specified liquor licences due to the COVID-19 public health emergency.**

This instrument, made under sections 35 and 229 of the *Liquor Regulation 2012*, waives or reduces certain fees payable under the *Liquor Act 2010*. The explanatory statement for the instrument indicates that the waivers and reductions are made in the context of “[supporting] Canberra’s economic recovery from the COVID-19 pandemic”.

Section 2 of the instrument provides that it is taken to have commenced on 1 April 2021. Given that the instrument was notified on the ACT Legislation Register on 22 April 2021, this means that the instrument has a retrospective effect.

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.

This instrument commences retrospectively pursuant to section 76 of the Legislation Act to ensure that an economic tapering measure declared by this instrument comes into effect from 1 April 2021, immediately after the cessation of a COVID-19 economic survival measure on 31 March 2021, set out in the *Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2021 (No 1)* DI2021–23 (repealed). This instrument allows eligible liquor licences to receive a 50% fee reduction from 1 April 2021 despite its later notification date. This declaration gives effect to fee waivers and reduction for eligible liquor licensee in aid of their business recovery and is justifiably non-prejudicial in accordance with section 76 of the Legislation Act.

The Committee also notes that the retrospective operation of this instrument was foreshadowed in the explanatory material for the *Liquor Amendment Regulation 2021 (No 1)* [SL2021-7], which the Committee considered in *Scrutiny Report 5* of the 10<sup>th</sup> Assembly (26 May 2021).

**This comment does not require a response from the Minister.**

*Is this a disallowable instrument?*

- **Disallowable Instrument DI2021-56 being the Public Trustee and Guardian (Investment Board) Appointment 2021 (No 1) made under paragraph 48(1)(b) of the *Public Trustee and Guardian Act 1985* appoints a specified person as a member of the Public Trustee and Guardian Investment Board.**

This instrument appoints a specified person to the Public Trustee and Guardian Investment Board, under paragraph 48(1)(b) of the *Public Trustee and Guardian Act 1985*. The Committee notes that Note 2 to subsection 48(1) of the *Public Trustee and Guardian Act* states:

*Note 3* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see *Legislation Act 2001*, div 19.3.3).

This particular appointment is made by disallowable instrument, bringing it within the Committee's legislative scrutiny jurisdiction.

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*,<sup>2</sup> 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”.

---

<sup>2</sup> [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf).

The Committee notes that the explanatory statement for the instrument mentioned above contains no such statement. In making this comment, the Committee acknowledges that the explanatory statement refers to the specified person's current and previous employment, which is apparently in the private sector. In the circumstances, it might be reasonably be assumed that the specified person is not a public servant. However, the Committee considers that it is always preferable that this issue be addressed, explicitly, in the explanatory statement for an instrument of appointment.

**The Committee draws the attention of the Legislative Assembly to the instrument mentioned above, under principle (10)(d) 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 person appointed by the instrument mentioned above is not a public servant.**

**This comment requires a response from the Minister before 4 August 2021, before the time for disallowance of the instrument has expired.**

*Minor drafting issue*

- **Disallowable Instrument DI2021-65 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2021 (No 1) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2021-66 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2021 (No 2) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2021-67 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2021 (No 3) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2021-68 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2021 (No 4) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part time member of the ACT Gene Technology Advisory Council.**

The Committee notes that each of the instruments mentioned above appoints a specified person as a "part time member" of the ACT Gene Technology Advisory Council. In each case, section 4 of the relevant instrument formally appoints the relevant person as a "part time member". The appointments are made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004*, which provides (in part):

**11 Advisory council**

- (1) The ACT Advisory Council on Gene Technology is established.
- (2) The advisory council consists of 8 members appointed by the Minister.

The Committee can identify no provision of the relevant Act that allows for the appointment of "part time members" – only *members*.

The Committee notes that, in each case, the explanatory statement for the instrument contains the following statement:

All members of the ACT Gene Technology Council are part time.

While this may be the case, the fact remains that the relevant Act does not provide for the appointment of “part time members”. The Committee considers that it would be preferable, for reasons of clarity and to avoid any possibility of legal uncertainty, if the wording of these instruments of appointment reflected the formal terminology of the provisions under which they are made.

**This comment does not require a response from the Minister.**

*Human rights issues*

- **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.**

This instrument makes “drug testing standards”, under section 887 of the *Children and Young People Act 2008*. The instrument is specifically made under paragraph 887(2)(c) of the *Children and Young People Act*, which allows for standards to be made in relation to:

- (c) the conduct of drug testing under a drug use provision in a care and protection order (***drug testing standards***);

The explanatory statement for the instrument states:

These standards outline the conduct of drug testing under a drug use provision in a care and protection order. The use of a drug use provision in a care and protection order is addressed by section 488: What is a drug use provision? of the *Children and Young People Act 2008*.

Section 488 of the *Children and Young People Act* provides:

**488 What is a drug use provision?**

In the care and protection chapters:

"drug use provision", for a stated person, in a care and protection order, or an interim care and protection order, for a child or young person means a provision about usage of drugs by the stated person that includes 1 or more of the following directions:

- (a) that the stated person must not use a stated drug;
- (b) that the stated person may use a stated drug only in accordance with the conditions in the provision;
- (c) that the stated person undergo drug testing as directed by the director-general in accordance with the drug testing standards.

*Note* The Minister may make drug testing standards under s 887.

The explanatory statement for the instrument states:

Under a drug use provision, a stated person may be required to comply with one or more of the following directions:

1. not use a stated drug



2. use a stated drug only in accordance with the conditions of the drug use provision
3. undergo drug testing as directed by the Director-General in accordance with the Drug Testing Standards.

Turning to the substance of the instrument, it deals with issues such as:

- methods of drug testing;
- when to request drug testing;
- the proposition that Child and Youth Protection Services only requests drug testing when it is clearly linked to the best interests of children;
- how to request drug testing;
- the proposition that Child and Youth Protection Services seeks to engage individuals in drug testing through voluntary processes, where possible;
- the collection of samples;
- the enforcement of compliance with drug testing (including through the Childrens Court, where appropriate);
- the recording and provision of results;
- the use of results (including as evidence, in the Childrens Court); and
- disputing and challenging results.

It seems fairly obvious that the actions and activities encompassed by what is indicated, above, have at least the potential to engage human rights protected by the *Human Rights Act 2004*. For example, 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). 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 notes that, despite this apparent potential for various human rights to be engaged, the explanatory statement for the instrument contains no mention of human rights or the Human Rights Act. The Committee is surprised by this.

In making this observation, the Committee acknowledges that, under section 38 of the *Human Rights Act 2004*, the Committee only has a formal, statutory role in relation to “human rights issues raised by bills presented to the Assembly”. The Committee acknowledges that it has no formal, statutory role in relation to human rights issues raised by *subordinate legislation* presented to the Assembly.

Nevertheless – as the Committee has recently observed, in *Scrutiny Report 2* of the 10<sup>th</sup> Assembly (24 March 2021) and in *Scrutiny Report 3* of the 10<sup>th</sup> Assembly (14 April 2021) – the Committee has, in recent years, been pleased to note that, increasingly, explanatory statements for subordinate legislation considered by the Committee has included a discussion of human rights issues, despite the absence of any formal, statutory requirement to address such issues, for subordinate legislation, unlike the requirement imposed by section 37 of the Human Rights Act, to provide a “compatibility statement” in relation to the consistency of bills with human rights. The Committee has recently noted (in those *Scrutiny Reports*) that, among other things, the provision of human rights analysis assists the Committee in its role under principle (10)(c)(ii) of the Committee’s terms of reference, which requires the Committee to consider whether subordinate legislation may unduly trespass on rights previously established by law.

In *Scrutiny Report 3*, explicitly recognising the limitations on the Committee’s formal, statutory jurisdiction, the Committee raised human rights concerns in relation to the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1) [DI2021-4]. The Committee sought a response from the relevant 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 has welcomed Minister Cheyne’s very helpful response to its comments.

The comment on this instrument is made in the spirit of that co-operative response from Minister Cheyne. The Committee would be grateful for the Minister’s views.

**The Committee draws the attention of the Legislative Assembly to this 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.**

**The Committee also draws the attention of the Legislative Assembly to this instrument, under principle (10)(d) 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.**

**This comment requires a response from the Minister before 4 August 2021, before the time for disallowance of the instrument has expired.**

## SUBORDINATE LAWS—COMMENT

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

### *Human rights issues*

- **Subordinate Law SI2021-8 being the Nature Conservation Amendment Regulation 2021 (No 1) made under the *Nature Conservation Act 2014* identifies further areas to be added to the Molonglo River Reserve.**

This subordinate law amends Schedule 1 of the *Nature Conservation Regulation 2015*, to prescribe 2 “Special Purpose Reserves”, in the Molonglo Valley.

The explanatory statement for the subordinate law includes a statement that “[the subordinate law] does not affect 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 SL2021-9 being the Labour Hire Licensing Regulation 2021 made under the *Labour Hire Licensing Act 2020* establishes a licensing scheme to regulate the provision of labour hire services in the ACT.**

According to the explanatory statement, this subordinate law supports the objects of the *Labour Hire Licensing Act 2020*, to establish “a licensing scheme to regulate the provision of labour hire services in the ACT”, by seeking to:

- a) protect workers from exploitation by providers of labour hire services; and
- b) ensure labour hire service providers meet their workplace obligations and responsibilities to the workers they supply; and
- c) promote the integrity of the labour hire service industry; and
- d) promote responsible practices in the labour hire services industry.

The explanatory statement discusses human rights issues:

### **Human Rights**

The information requirements for a labour hire licence application may engage the right to privacy under section 12 of the *Human Rights Act 2004* (HR Act). This has been considered and addressed as part of the Explanatory Statement for the Labour Hire Licensing Bill 2020. As the Explanatory Statement for the Bill demonstrates, the information requirements are appropriate and justified in order to determine the suitability of applicants based on a number of factors going to the applicant’s character, integrity, professionalism, history of compliance with workplace laws and standards and past regulatory actions or convictions for the purposes of the new scheme.

**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.**

## RESPONSES

### GOVERNMENT RESPONSE

The Committee has received a response from:

- The Attorney-General, dated 27 May 2021, in relation to comments made in Scrutiny Report 4 concerning the Courts and Other Justice Legislation Amendment Bill 2021.

**[This response<sup>3</sup>](#) can be viewed online.**

The Committee wishes to thank the Attorney-General their helpful responses.

Jeremy Hanson MLA  
Chair

15 June 2020

---

<sup>3</sup> <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 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021
  - Disallowable Instrument DI2020-287 Litter (Amenity Impact) Code of Practice 2020 (No 1)
  
- **Report 4, dated 4 May 2021**
  - Crimes (Stealth) Amendment Bill 2021