

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

SCRUTINY REPORT 13

15 MARCH 2022

THE COMMITTEE

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

- (10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:
 - (a) considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
 - (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;
 - (b) reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
 - (c) considering whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and
 - (d) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly;

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BILLS—NO COMMENT

The Committee has examined the following bills and offers no further comment on them:

LEGISLATION (LEGISLATIVE ASSEMBLY COMMITTEES) AMENDMENT BILL 2022

This Bill amends provisions across relevant ACT enactments so that, with a number of exceptions, the Speaker of the Legislative Assembly would have the function of nominating, in writing, which Assembly standing committees are to perform particular statutory responsibilities and functions.

The amendments are intended to make statutory references to Assembly committees consistent and to remove any ambiguity as to which committees are required to perform particular statutory functions.

BILLS—COMMENT

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

CRIMES (CONSENT) AMENDMENT BILL 2022

This Private Member's Bill amends the *Crimes Act 1900* to affect the meaning and knowledge of consent as applied in sexual assault offences.

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

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

Positive communication

Part 3 of the *Crimes Act 1900* includes several sexual offences dependent on the lack of consent of the complainant, including sexual intercourse without consent (section 54) and act of indecency without consent (section 60). These offences require both that the complainant did not consent to the acts in question, and the accused person knew the complainant did not consent or was reckless as to that possibility. Consent is also relevant to the offences of sexual intercourse with a young person (section 55) and acts of indecency with young people (section 61). As part of a defence to these offences the accused person has to establish on the balance of probabilities that the complainant consented to the acts in question.

These provisions are termed sexual offence consent provisions in the Bill. The meaning of consent is not expressly defined in the Act, but section 67 provides circumstances where a person is taken to have not consented. The lack of any physical resistance is not, by reason only of that fact, to be regarded as consenting to sexual intercourse (subsection 67(2)). Section 67 is also relevant to the knowledge of the accused person – if it is established that an accused person knows that consent was caused by any of the circumstances listed in section 67 then the person is deemed to know that there was no consent (subsection 67(3)).

Under the Bill, consent will be based on the conduct of those involved rather than their individual states of mind. For the purposes of Part 3 of the Act, which includes a range of sexual offences, consent will mean informed agreement to a sexual act that is freely and voluntarily given and communicated by saying and doing something. For the purposes of the sexual offence consent provisions, belief that the other person has consented must also be reasonable in the circumstances. If the accused person believes that the complainant consented, but that belief is unreasonable, then the accused person is taken to know that the other person has not consented. To be reasonable, any belief in consent must have followed from the accused person saying or doing something to ascertain whether the other person consented. In other words, where an accused person does not say or do anything to ascertain whether the other person consented, the accused person is taken to know that the other person does not consent. The accused person will be taken to have the requisite state of mind to comprise the offence or the defence will not be available.

The Bill, therefore, will require both the complainant and accused person to take affirmative steps to communicate or ascertain consent. In this way, the Bill goes further than recent reforms in other jurisdictions. In recent NSW reforms, for example, following the approach taken in Tasmania and Victoria, consent does not require agreement be communicated. Instead, the list of circumstances where a person is taken to have not consented includes when the person does not say or do anything to communicate consent.¹ The recent NSW reforms include reference to a belief in consent not being reasonable if the accused person did not say or do anything to find out whether the other person consented. However, this requirement for the accused person to take affirmative steps was not recommended by the NSW Law Reform Commission (NSWLRC) report on which the reforms were based. The NSWLRC expressed concerns that such reforms could adversely affect the rights of the accused person.² This was also the view of recent reviews of sexual offences in Ireland and Northern Ireland.³ Those reviews generally considered a proportionate reform would be for the trial to take into account what, if anything, the accused person did to ascertain consent as part of assessing the reasonableness of the accused person's belief in consent.

By imposing an objective basis on which consent of a complainant can be established, the Bill may impose additional practical burdens on the accused person in establishing that they acted with the consent of the complainant. By expanding the objective basis on which the fault element of sexual offences may be established and, in particular, imputing fault in circumstances where an accused person did not say or do anything to ascertain whether the other person consented, the Bill limits the requirement in the prosecution of any relevant offence to establish the subjective intent of the accused person. While not strictly imposing a legal burden on the accused person, the Bill may still limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the HRA.

¹ Proposed *Crimes Act 1900* (NSW) ss 61HI and 61HJ to be introduced by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* Sch 1 Cl 9; see the discussion in NSW Law Reform Commission, *Consent in relation to sexual offences, Report 148* September 2020 (NSWLRC Report) at [5.30] – [5.34].

² See NSWLRC Report at [7.114] – [7.121].

³ J Gillen, *Gillen Review: Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2019) [11.58] – [11.61]; Law Reform Commission of Ireland, *Knowledge or Belief Concerning Consent in Rape Law, Report 122* (2019) [3.108].

The explanatory statement accompanying the Bill recognises the potential limit on the rights in criminal trials protected by section 22 of the HRA. It states that concerns over the potential inconsistency with these rights of a previous Bill have been addressed through separating provisions relating to the meaning of consent, the circumstances in which a person does not consent, and knowledge of non-consent. The statement justifies any remaining limits on a person's rights by requiring the accused person to take affirmative steps to avoid criminal liability, by suggesting there are similar requirements in other ACT offences, and the benefits of doing so outweigh any negative engagement of human rights.

The Committee notes that, while this Bill may limit human rights to a lesser degree when compared to previous bills, any potential limitation on human rights needs to be justified using the framework set out in section 28 of the HRA, and such a justification should be included within the explanatory statement accompanying the Bill. In particular, it is not clear to the Committee whether the recommendations of recent reviews discussed above present a less restrictive means reasonably available to achieve the purposes of the Bill. The Committee therefore seeks further information from the Member on why the requirements discussed above for affirmative steps to indicate and ascertain consent included in the Bill were considered necessary.

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

Principles of consent

The Bill will introduce what it terms "Principles of consent", namely: consent to participate in a sexual act is not to be presumed; every person has a right to choose not to participate in a sexual act; and a consensual sexual act involves ongoing and mutual communication and decision-making (proposed section 50A). It is not clear to the Committee what legal effect, if any, these principles are intended to have, including whether they are only intended to guide the interpretation of sexual offence consent provisions in Part 3 of the Act, applies more broadly to any offence potentially involving undefined sexual acts, or seeks to establish a distinct right. The Committee notes that the NSW amendments expressed similar principles as objectives to be recognized in the interpretation and application of consent,⁴ after the NSW Law Reform Commission recommended avoiding any added complexity and unforeseen legal affects which might come from the addition of standalone principles.⁵ The Committee therefore requests further information on the intended legal effect and application of the principles of consent and whether this could be made clear in the Bill.

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

⁴ Proposed *Crimes Act 1900* (NSW) s 61HF to be introduced by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* Sch 1 Cl 9.

⁵ NSW Law Reform Commission Report, at [4.15] – [4.22]

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

By imposing fault based on failing to take steps to ascertain whether the other person consents, the amendments in the Bill may have a disproportionate impact on accused persons whose age, mental or cognitive impairment or other disability may impact on their ability to take steps or recognize when such steps might be necessary. The Bill may therefore limit the right to equality protected by section 8 of the HRA.

The explanatory statement accompanying the Bill does not address this potential limitation. The statement recognizes the potential relevance of the provisions amended by the Bill to the differential experience of transgender people in sexual offence matters, but states that this experience is not further impacted by the changes in the Bill. The statement, in outlining the provisions of the Bill, notes that Part 2.3 of the Criminal Code would be relevant to:

whether an accused person's cognitive or mental impairment was a substantial cause of the accused person not saying or doing something to obtain consent, whereby the onus lies with the accused person on the balance of probability. In considering community standards of reasonableness and 'all the circumstances of the case', a trier of fact must consider an accused person's cognitive capacity or impairment.

However, under the Bill, where a person does not take any steps to ascertain consent, the circumstances of the case are not otherwise considered. Part 2.3 of the Criminal Code may apply to absolve a person of criminal responsibility but only where they were suffering from a mental impairment which affects their capacity to understand the nature and quality of their conduct, whether their conduct was wrong, or to control their actions. The person is then found not guilty because of mental impairment, which may have further significant implications.⁶

The Committee also notes that recent NSW reforms did not require an accused person to take steps to find out whether the other person consents where the accused person had a cognitive or mental health impairment which was a substantial cause of the accused person not doing anything.⁷

The Committee therefore requests further information on whether consideration was given to including special provision for persons who may be disproportionately affected by a requirement to take steps to ascertain consent, and why any disproportionate affect, to the extent it limits the right to equality set out in section 8 of the HRA, should be considered reasonable using the framework set out in section 28 of the HRA. Consideration should be given to amending the explanatory statement to include such a justification.

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

⁶ See Crimes Act Divs 13.3 and 13.4.

⁷ Proposed *Crimes Act 1900* (NSW) s 61HK(3) to be introduced by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* Sch 1 Cl 9.

DOMESTIC ANIMALS LEGISLATION AMENDMENT BILL 2022

This Bill amends the *Domestic Animals Act 2000* and regulations relating to domestic animals to require newly-acquired cats to be registered and restricted to their place of residence.

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

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill imposes a requirement to register cats and renew registration every 12 months. Registration requires disclosure to the registrar and recording of the cat owner's personal details including address and contact details, convictions of animal welfare offences, contact details of previous owners, and other information reasonably necessary for the registrar to carry out a function under the Act. Details on the register relating to cat registration is not generally available to the public, but collection and retention of personal information may still limit the protection of privacy provided by section 12 of the HRA.

The Bill will enforce requirements for registration and renewal through the imposition of strict liability offences. These offences generally, however, include requirements for prior notification of registration or renewal requirements, or do not apply to cats over 56 days of age or where a person has not owned or cared for the cat or been in the territory for 28 days. The Bill will also provide for all new cats to be confined to the premises of their owner or carer. Not keeping a cat confined is a strict liability offence. The proposed offence of failing to keep a cat confined is also subject to various exceptions, including having a reasonable excuse, controlling the cat by using a leash or harness, or, outside of declared containment areas, the cat was registered or born before 1 July 2022. By removing the requirement to establish the fault element through strict liability or placing an evidential burden on the defendant before an exception to the offence can be relied on, the Bill may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.

Vulnerable members of the community, including persons with a disability, living in unstable housing situations or otherwise experiencing financial hardship, may find it difficult to comply with the requirements relating to cat registration and containment. The new strict liability offences will be enforceable through the issue of infringement notices where authorised persons believe on reasonable grounds that a person has committed the offence. Payment of the monetary penalty associated with the infringement notice discharges any liability for the offence without a conviction. However, a requirement to pay a monetary penalty or face a larger criminal fine may disproportionately affect those people who do not have the means to pay the penalty or otherwise are in need of assistance. The Bill may therefore have a disproportionate impact on some members of the community and limit the right to equality in section 8 of the HRA.

The explanatory statement accompanying the Bill recognises these potential human rights' impacts and provides a detailed justification for why they should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the following comment, the Committee refers that statement to the Assembly,

The Bill will expand the circumstances in which a cat may be seized to include where the cat is not registered or confined to premises, or a keeper or carer refuses to give their name and address, as required under the Act. A cat may also be seized where the registrar refuses to register the cat or the cat's registration is cancelled, a litter is bred without a breeding licence, a cat is not de-sexed as required, or the authorises person reasonable believes that the keeper or carer of the cat is not demonstrating responsible cat management, care or control. Under section 128 of the Act, a cat can be seized from residential premises without the consent of the occupier or court warrant. This potential limit to the right to privacy is not recognised in the explanatory statement accompanying the Bill. The Committee therefore requests a justification be provided for why this potential limit should be considered reasonable using the framework provided in section 28 of the HRA, and consideration be given to amend the explanatory statement to include this justification.

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

RETROSPECTIVE CRIMINAL LAWS (SECTION 25 HRA)

The Bill is stated to commence on 1 July 2022. If the Bill is not enacted until after this date, it will operate retrospectively. Any retrospective prejudicial effect of proposed legislation may unduly trespass on an individual's rights and liberties. By introducing strict liability offences with possible retrospective affect the Bill may limit the protections against retrospective criminal laws in section 25 of the HRA.

The Committee notes that many provisions in the Bill refer to 1 July 2022, including exceptions to confinement requirements for cats born or registered before that date. The Bill also includes transitional provisions which take various provisions relating to the registration of cats as in force on and after 1 April 2022 to allow cat registrations prior to the commencement of the Act to be included in the proposed cat registration framework.

No explanation for the 1 July 2022 commencement date is provided in the explanatory statement accompanying the Bill, and no justification for any prejudicial retrospective effect or possible operation of retrospective criminal laws is provided. The Committee therefore requests information on why a set commencement date has been selected, what, if any, prejudicial effect this may have if the Bill is not notified until after that date, and why any prejudicial effect or limitation of section 25 of the HRA should be considered reasonable.

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

FAMILY VIOLENCE LEGISLATION AMENDMENT BILL 2022

This Bill amends various legislation relating to family violence to implement recommendations from the *Final Report of the Review of the Family Violence Act 2016*.

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

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

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

RIGHT TO LIBERTY (SECTION 18 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

RIGHT NOT TO BE TRIED AND PUNISHED MORE THAN ONCE (SECTION 24 HRA)

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

The Bill will amend the *Crimes Act 1900* to provide for higher maximum penalties for certain offences when committed in the context of family violence. Family violence is defined through reference to section 8 of the *Family Violence Act 2016* and includes physical or sexual violence, emotional or economic abuse, threatening or coercive behaviour in relation to family members. By extending possible terms of imprisonment the Bill may limit the right to liberty protected in section 18 of the HRA.

The Bill will make various amendments to encourage the making and use of victim impact statements. The *Crimes (Sentencing) Act 2005* will be amended to require a court to adjourn sentencing proceedings for serious offences to allow for the preparation of a victim impact statement. The adjournment can only be for a reasonable period and can be refused in special circumstances. An adjournment will delay the finalisation of the sentencing process and may limit the right to a fair trial protected by section 21 of the HRA and rights in criminal proceedings protected in section 22 of the HRA. These rights may also be limited through amendments to the *Evidence (Miscellaneous Provisions) Act 1991* to limit the ability of the defence to cross-examine the maker of a victim impact statement on the contents of the statement. Where a finding of guilt has not been made, the defence will only be able to cross-examine the maker of a victim impact statement where justified by the statement's probative value. After a finding of guilt has been made, the court can grant leave to cross-examine the maker of a victim impact statement only if satisfied cross-examination would materially affect the likely sentence to be imposed on an offender. A court can allow statements to be used in other proceedings only after a finding of guilt and where satisfied the use is justified by the statement's substantial probative value. The Bill will therefore limit the ability of the accused person to cross-examine witness and test their evidence.

The Bill will also amend the *Evidence (Miscellaneous Provisions) Act 1991* to protect the confidentiality of communications to counsellors by victims of family violence. This Act currently provides protection against the use of counselling communications made by, to or about a person against whom a sexual offence was or is alleged to have been committed. This will be extended by the Bill to include alleged family violence offences. The communication doesn't have to be about the offences. It just has to be made in circumstances which give rise to a reasonable expectation of

confidentiality. Protected confidences must not be disclosed in preliminary criminal proceedings and can only be disclosed in other proceedings where the court gives leave on the basis of the public interest in a fair proceeding. Limiting the ability to examine relevant communications and adduce them as evidence may limit the right to a fair trial protected by section 21 of the HRA and rights in criminal proceedings protected in section 22 of the HRA.

The Bill will also amend the list of disqualifying offences in Schedule 3 of the *Working with Vulnerable People (Background Checking) Act 2011*. Once included, these offences are relevant to the assessment of whether a person can be given registration to engage in a regulated activity that involves contact with a vulnerable person. Including additional disqualifying offences may therefore limit the right to equality (section 8 of the HR Act), the right not to be tried or punished more than once (section 24 of the HR Act) and the right to work (section 27B of the HR Act).

Each of these possible limitations is recognised in the explanatory statement accompanying the Bill and a justification is given for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

PROPOSED AMENDMENTS

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2021

On 4 March 2022, the Committee received proposed Government amendments to the Road Transport Legislation Amendment Bill 2021 [No 1]. This Bill was the subject of comment by this Committee in *Report 8* of 24 August 2021. The proposed amendments will introduce two new strict liability offences into the *Road Transport (Road Rules) Regulation 2017*. Under the new offences, a person must not travel in or on a personal mobility device, or drive a vehicle, without due care and attention or reasonable consideration for other road users. The offences will have a maximum penalty of 20 penalty units. As the proposed offences will be strict liability offences, the proposed amendments may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.

The proposed amendments will also amend the proposed new section 304A to be introduced by the Bill into the Road Transport (Road Rules) Regulation. The proposed section 304A will authorise a police officer to direct a person to get off, or not get on, a vehicle or animal if the police officer believes on reasonable grounds that the person is under the influence of alcohol or drugs. Not complying with the direction is a strict liability offence with a maximum penalty of 20 penalty units. The proposed amendment will lower the requirement for the police to believe on reasonable grounds to only having to suspect on reasonable grounds. As this lower limit may disproportionately impact people who may appear to be under the influence of alcohol or drugs or are not able to moderate their use the proposed amendments may limit the right to equality protected by section 8 of the HRA. Preventing a person from using a vehicle or animal may limit their freedom of movement protected by section 13 of the HRA. Amending the circumstances in which a strict liability offence may be triggered may limit the rights in criminal proceedings protected by section 22 of the HRA.

These possible limitations are recognised in the supplementary explanatory statement which was provided to the Committee and a justification given for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly and has no further comment.

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

On 4 March 2022, the Committee also received proposed amendments to the Road Transport Legislation Amendment Bill 2021 [No 1] to be proposed by Jo Clay MLA. The proposed amendments will remove reference to six month imprisonment as part of the Bill's proposed maximum penalty for the amended offence of negligent driving if the driving occasions actual bodily harm in section 6 of the *Road Transport (Safety and Traffic Management) Act 1999*. This will leave the maximum penalty of 50 penalty points. The proposed amendment will also amend the *Road Transport (Offences) Regulation 2005* to provide for an infringement notice penalty in the amount of \$900. The Committee has no comment on these proposed amendments.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2021-271 being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2021 (No 5) made under section 12 of the *Road Transport (General) Act 1999* provides that section 205 of the Road Transport (Road Rules) Regulation 2017 does not apply to a specified area if a Women's Ashes 2022 cricket match, a KFC Big Bash League 2021-2022 cricket match or an ICC Men's T20 World Cup cricket match proceed at Manuka Oval on one or more days within the period 6 December 2021 to 8 February 2022.**
- **Disallowable Instrument DI2021-275 being the Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2020-307 and determines the amount RA for the reference months January to December 2022 for the purposes of the Emergencies Act 2004.**
- **Disallowable Instrument DI2021-276 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2021 (No 2) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2021-134 and determines the conditions under which members may, on behalf of the Territory, employ staff and engage consultants or contractors.**
- **Disallowable Instrument DI2021-277 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2021 (No 2) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2021-135 and determines the conditions under which the Speaker may, on behalf of the Territory, employ staff and engage consultants or contractors.**

- **Disallowable Instrument DI2021-278 being the Independent Competition and Regulatory Commission (Regulated Water and Sewerage Services) Terms of Reference Determination 2021 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* refers to the Independent Competition and Regulatory Commission the matter of an investigation into, and the making of a price direction for, regulated water and sewerage services provided by Icon Water Limited.**
- **Disallowable Instrument DI2021-279 being the Motor Accident Injuries (Defined Benefits Application) Guidelines 2021 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2019-238 and makes the Defined Benefit Application Guidelines.**
- **Disallowable Instrument DI2021-280 being the Motor Accident Injuries (Income Replacement Benefit) Guidelines 2021 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2019-243 and makes the Income Replacement Benefit Guidelines.**
- **Disallowable Instrument DI2021-281 being the Motor Accident Injuries (Treatment and Care) Guidelines 2021 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2019-247 and makes the Treatment and Care Guidelines.**
- **Disallowable Instrument DI2021-282 being the Public Trustee and Guardian (Disposal of Unclaimed Deceased Person) Guidelines 2021 made under section 13A of the *Public Trustee and Guardian Act 1985* makes the Public Trustee and Guardian (Disposal of Unclaimed Deceased Person) Guidelines 2021.**
- **Disallowable Instrument DI2021-285 being the Cultural Facilities Corporation (Governing Board) Appointment 2021 (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 Governing Board.**
- **Disallowable Instrument DI2021-286 being the Cultural Facilities Corporation (Governing Board) Appointment 2021 (No 2) 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 Governing Board.**
- **Disallowable Instrument DI2021-290 being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2021 (No 1) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.**
- **Disallowable Instrument DI2021-291 being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2021 (No 2) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.**
- **Disallowable Instrument DI2021-292 being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2021 (No 3) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, providing expertise on transport, health and climate change matters.**
- **Disallowable Instrument DI2021-293 being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2021 (No 4) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.**

- **Disallowable Instrument DI2021-296 being the Civil Law (Wrongs) The Institute of Public Accountants Professional Standards Scheme 2021 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of Victoria's approval of the Institute of Public Accountants Professional Standards Scheme.**
- **Disallowable Instrument DI2021-297 being the Emergencies, Road Transport (General), Waste Management and Resource Recovery (Embassy and Diplomatic Residence Fees) Determination 2021 made under section 37 of the *Australian Capital Territory (Self-Government) Act 1988*, section 201 of the *Emergencies Act 2004*, section 96 of the *Road Transport (General) Act 1999* and section 126 of the *Waste Management and Resource Recovery Act 2016* determines fees payable, for the purposes of the Acts, in respect of services provided to an embassy or diplomatic residence.**
- **Disallowable Instrument DI2021-298 being the Public Sector Management Amendment Standards 2021 (No 1) made under section 251 of the *Public Sector Management Act 1994* amends the Public Sector Management Standards to remove SES member vehicle entitlements, other than parking, and replace them with superable supplementary base salary.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-269 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2021 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2020-280 and prescribes the method for measuring the amount of greenhouse gas emissions.**

This instrument, made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010*, determines a method for measuring the amount of greenhouse gas emissions. The Committee notes that the explanatory statement for the instrument contains the following discussion of human rights issues:

... as the determination only provides a tool to calculate the [greenhouse gas] emissions in the ACT, it does not engage a right contained in the *Human Rights Act 2004*.

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

This comment does not require a response from the Minister.

STRICT LIABILITY OFFENCES / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-270 being the Plastic Reduction (Public Event) Declaration 2021 made under section 15 of the *Plastic Reduction Act 2021* provides that certain single-use plastic products cannot be supplied at specified public events.**

This instrument is made under section 15 of the *Plastic Reduction Act 2021*, which provides:

15 Declaration of public events

- (1) The Minister may declare that—
- (a) a public event is an event to which this part applies (a **declared public event**); and
 - (b) a single-use plastic product other than a prohibited plastic product (a **declared single-use plastic product**) must not be supplied at the event.

Note Part 3 deals with the supply of prohibited plastic products.

- (2) The Minister may only make a declaration under subsection (1) in relation to a public event that is not a government event if—
- (a) the declaration is made not less than 3 months before the day the event starts; and
 - (b) the Minister is satisfied that—
 - (i) there is an alternative product to the declared single-use plastic product reasonably available to the organisers of the declared public event; and
 - (ii) the declaration will not have an unreasonable impact on the event.

Examples—unreasonable impact

- 1 supplies of the declared single-use plastic product have already been purchased by food vendors in advance of the public event
- 2 not having the declared single-use plastic product available for use at the public event would be incompatible with food safety requirements
- 3 the cost of the alternative product will make it unprofitable for food vendors to participate in the public event

- (3) A declaration is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (4) In this section:

government event means an event conducted by the Territory.

Section 3 of the instrument, in conjunction with column 1 of table 1 of the Schedule to the instrument, declares various events to be “public events”. They include Australia Day in the Capital 2022, the Royal Canberra Show and the Enlighten Festival. Section 4 of the instrument, in conjunction with column 3 of table 1 of the Schedule to the instrument, prohibits the supply of single-use plastic straws, single-use plastic takeaway containers and single use plastic plates at these events.

The prohibition is subject to the exemption set out in section 5 of the instrument, which provides:

5 Exemption

A single-use plastic straw may be supplied upon request for a person who needs it for a medical reason. It is not a requirement of this exemption that any form of proof or evidence is required to access a single-use plastic straw.

The Committee notes that the explanatory statement for the instrument contains the following discussion of human rights issues:

Human rights

As a result of this instrument, certain conduct is made an offence under s 16 of the Act. This is a strict liability offence, which may be seen to engage the presumption of innocence. The Explanatory Statement for the *Plastic Reduction Bill 2020* addressed the human rights considerations related to the creation of the offence.

Plastic straws are required by some people because of a disability or medical need, and alternatives (such as paper or reusable straws) do not have all the same properties as plastic straws. Because of this, prohibiting the supply of single-use plastic straws at an event potentially affects human rights. Under s 8 of the *Human Rights Act 2004*, everyone has the right to equal and effective protection from discrimination, including discrimination because of disability. Because plastic straws are required by some people, prohibiting the supply of them could have the effect of limiting access for some people to food and drink services that are otherwise available to people at the event. However, the declaration avoids this outcome by having an exemption that allows a single-use plastic straw to be supplied to those who need them.

Under s 12 of the Human Rights Act, everyone has the right not to have his or her privacy interfered with unlawfully or arbitrarily. Making an exemption to enable access to straws for those with a disability or medical need has the potential to raise the question of whether a person has a disability or medical condition. To avoid this, the exemption states that it is not a requirement of the exemption that any form of proof or evidence is required to access a single-use plastic straw. The exemption in the declaration does not prevent those that need plastic straws from being able to access them, while still achieving the aim of reducing the number of single-use plastic straws used at the event.

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

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-272 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 9) made under section 13 of the *Road Transport (General) Act 1999* provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, participating in a special stage of the Monaro Sprint Rally Testing.**

- **Disallowable Instrument DI2021-289 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2021 (No 1) made under section 13 of the Road Transport (General) Act 1999 disappplies specified provisions of the Road Transport (Safety and Traffic) Management Act 1999, the Motor Accident Injuries Act 2019, the Road Transport (Vehicle Registration) Act 1999, Road Transport (Vehicle Registration) Regulation 2000 and the Road Transport (Driver Licensing) Regulation 2000 for vehicles and persons participating in the Summernats 34 Car Festival 2022.**

The two instruments mentioned above are made under section 13 of the *Road Transport (General) Act 1999*, which allows the Minister to declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration. For the first instrument, the declaration provides that the *Motor Accident Injuries Act 2019* does not apply in relation to the Monaro Sprint Rally Testing, taking place on 9 December 2021. For the second instrument, the declaration provides that the *Motor Accident Injuries Act* and also various provisions of the *Road Transport (Safety and Traffic Management) Act 1999*, the *Road Transport (Vehicle Registration) Act 1999* and the *Road Transport (Vehicle Registration) Regulation 2000* do not apply (in certain circumstances) to the Summernats 34 Car Festival 2022, taking place between 6 and 9 January 2022.

The Committee notes that the explanatory statement for the first instrument contains the following discussion of human rights issues:

Human rights implications

During the development of this Instrument, due regard was given to its effect and the operation of the rally in relation to the compatibility with human rights as set out in the Human Rights Act 2004 (HRA).

Section 28 of the HRA provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28 (2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected
- b) the importance of the limitation
- c) the nature and extent of the limitation
- d) the relationship between the limitation and its purpose
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

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 event in closing parts of the forest in which the event 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 legislation are being disappplied 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 explanatory statement for the second instrument contains a similar statement (with amendments for the particular circumstances of Summernats, including the operation of “highly modified vehicles”).

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / RETROSPECTIVITY

- **Disallowable Instrument DI2021-273 being the Gaming Machine (Emergency Community Purpose Contribution—Local Live Performance Industry) Declaration 2021 (No 2) section 166A of the *Gaming Machine Act 2004* provides for contributions made to, or for the benefit of, a member of the local live performance industry for the purpose of providing music or other live entertainment (other than sport) for the club members and patrons, to be community purpose contributions for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency.**

This instrument is made under section 166A of the *Gaming Machine Act 2004*, which allows the Minister, in the context of “a COVID-19 emergency”, to declare that a contribution by a licensed club is a “community purpose contribution”. The effect of this particular determination is that contributions made, by a licensed club, “to, or for the benefit of, a member of the local live performance industry for the purpose of providing music or other live entertainment (other than sport) for club members and patrons” to be a “community purpose contribution”.

The explanatory statement for the instrument states:

In light of the outbreak of COVID-19 in the Australian Capital Territory (the Territory) in 2021, and the associated restrictions introduced by the public health emergency directions, the declaration extends the period of time for which clubs can claim contributions made to or for the local live performance industry as community purpose contributions. The declaration has been extended until 30 June 2022 to assist economic recovery for clubs and the local live performance industry.

The Committee notes that the instrument further extends the operation of an extension granted by an earlier instrument – DI2021-214.

Section 2 of the instrument – which was made on 6 December 2021 and notified on the ACT Legislation Register on that same date – is “taken to have commenced on 1 December 2021”. This means that the instrument has a retrospective operation. The Committee notes, with approval, that this is addressed in the explanatory statement for the instrument, which states:

Retrospectivity

Notwithstanding this instrument's notification date, it is taken to have commenced on 1 December 2021.

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.

Retrospective commencement of the provisions in the Declaration will have a non-prejudicial effect. The Declaration extends the period of time for which clubs can claim contributions made to or for the local live performance industry as community purpose contributions and this will not adversely affect any person's rights or impose liabilities.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-274 being the Road Transport (General) (Pay Parking Area Fees) Determination 2021 (No 2) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-109 and determines fees payable for the purposes of the Act.**

The Committee notes that the explanatory statement for this instrument includes a statement that there are no human rights (or climate change) implications arising from the instrument.

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2021-283 being the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration Revocation 2021 made under section 177 of the *Leases (Commercial and Retail) Act 2001* revokes the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021 (DI2021-218) as most of the measures put in place for the August lockdown have now been eased.**

This instrument revokes a COVID-19-related instrument – the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021 (DI2021-218) – with effect from 1 January 2021. The Committee notes that the explanatory statement for the instrument states:

The 2021 Commercial Leases Declaration commenced on 2 September 2021 and re introduced the requirement for good faith negotiations between parties with regard to the overarching principles and leasing principles set out in National Cabinet's Code of Conduct, prior to a landlord terminating a commercial lease or taking adverse action against an impacted tenant for a prescribed breach.

It operates where a tenant has been impacted financially by the COVID-19 pandemic and, as a consequence, fails to meet certain obligations (including the payment of rent) under their lease agreement. Similar obligations had been put in place under previous Declarations made under section 177 of the Leases Act.

The 2021 Commercial Leases Declaration is being revoked as most of the measures that were put in place for the August lockdown which restricted business activity and trading capacity have now been eased under the ACT Government's Pathway Forward. Since the ending of the lockdown in November 2021, conditions for business viability have improved while consumer confidence is increasing. In light of this, it is appropriate that the 2021 Commercial Leases Declaration be revoked.

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTIONS 47(3) AND (6) OF THE *LEGISLATION ACT 2001* / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-284 being the Radiation Protection (Radiation Protection Series) Codes of Practice 2021 made under section 116 of the *Radiation Protection Act 2006* approves specified codes of practice and approved standards of the Radiation Protection Series as published by the Australian Radiation Protection and Nuclear Safety Agency.**

This instrument, made under section 116 of the *Radiation Protection Act 2006*, approves codes of practice and standards for that Act. Section 116 provides:

116 Codes of practice

- (1) The Minister may approve codes of practice or standards for this Act.
- (2) An approved code of practice may apply, adopt or incorporate an instrument, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47(5) or (6) is not disappplied (see s 47(7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

Note 3 A reference to an instrument includes a reference to a provision of an instrument (see Legislation Act, s 14(2)).

- (3) A code of practice is a disallowable instrument.

Note A disallowable instrument must be notified and presented to the Legislative Assembly, under the Legislation Act.

The substantive effect of the instrument is to approve 16 documents published by the Australian Radiation Protection and Nuclear Safety Agency (**ARPANSA**), listed in section 3 of the instrument, as an approved code of practice or an approved standard.

Section 3 of the instrument provides:

4 Disapplication of Legislation Act, s 47(3) and (6)

The Legislation Act, s 47(3) and (6) do not apply to the documents listed by Section 3 of this instrument, as published from time to time.

Note The above instruments do not need to be notified under the Legislation Act because s 47(3) and (6) do not apply (see Legislation Act, s 47(7)).

The Committee notes that the effect of disapplying subsection 47(3) is that the documents in question are adopted as they exist, from time to time, contrary to the general rule (set out in subsection 47(3)) that such documents can only apply as they exist at a particular time. The Committee notes that, in this particular case, it is not necessary to disapply subsection 47(3), as this is provided for in subsection 116(2) of the Radiation Protection Act. The Committee also questions the reference, in the Note, to subsection 47(7) of the Legislation Act, since that provision only relates to the disapplication of subsections 47(5) and (6) (ie there is no reference to subsection 47(3)).

The effect of disapplying subsection 47(6) is that the documents in question, and any amendments to them, do not have to be published on the ACT Legislation Register, as notifiable instruments, again, contrary to the general rule that such documents be published on the Register.

The Committee also notes that it has always taken a keen interest in the disapplication of subsection 47(6), in particular, since the general rule of requiring that external documents referred to and relied upon be published assists in ensuring that those affected by such documents have free access to them. The Committee has generally taken the view that any disapplication of this requirement should be justified, usually in the explanatory statement for the instrument.

The Committee notes that the explanatory statement for this instrument does not address the subsection 47(6) issue. This is not ideal. However, the Committee also notes that both a Note to section 3 of the instrument and the explanatory statement indicates that the documents are “freely available” from the ARPANSA website, an address for which is provided. That being so, the Committee does not press this point. However, it is preferable that the subsection 47(6) issue be addressed, in the explanatory statement, in line with the Committee’s oft-stated preference.

The Committee notes that the explanatory statement for the instrument goes on to discuss human rights issues:

Human Rights Considerations

Approval of the Radiation Protection Series does not directly engage the *Human Rights Act 2004* (HRA). However, should the Radiation Council reference relevant aspects of the Radiation Protection Series as a condition of licence or registration, then that particular licence would inform existing strict liability offences for failure to comply with a condition of licence or registration. Strict liability offences are considered to engage the right to fair trial under the HRA.

The Radiation Protection Series’ engagement with the HRA is limited and conditional on licensing and registration decisions under the [Radiation Protection Act]. The Radiation Protection Series documents are evidence-based codes of practice that are aimed at achieving legitimate safety aims in accordance with the 2001 [Australian Health Ministers Council] agreement and align with the objective of the [Radiation Protection Act]. The absence of the

Radiation Protection Series as approved reference documents would significantly diminish the ACT's ability in determining whether a person has complied with a safety duty and any related regulatory response for failure to comply with a safety duty. The ability to impose licence conditions associated with a strict liability offence is included as a legislative example within section 19 of [Radiation Protection Act] and has previously been considered compatible with the HRA as introduced by the Radiation Protection Bill 2006. On balance, any HRA engagement arising from approval of the Radiation Protection Series is considered to be reasonable and necessary to maintain public confidence, public safety and regulatory controls associated with ionising radiation.

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2021-287 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 4) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2021-207 and provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.**

This instrument is made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, which authorises the chief health officer to give directions in relation to the administration of a vaccine to a person, without prescription, by a pharmacist or intern pharmacist. Under subsections 352(1) and (2), a pharmacist or an intern pharmacist is only authorised to administer a vaccine to a person, without prescription, if the pharmacist or intern pharmacist administers the vaccine in accordance with these directions, made by the chief health officer. This instrument makes such guidelines.

The Committee notes that the instrument revokes and re-makes the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 2) (DI2021-205), which the Committee commented on in *Scrutiny Report 10* of the 10th Assembly (2 November 2021).⁸ The Committee notes that the explanatory statement for the instrument states:

The preceding instrument DI2021-207 includes clause 5 that was a temporary amendment to Schedule 1, Part A- Pharmacist Training requirements. This amendment considered a pharmacist or intern pharmacist to meet the training requirements of Schedule 1, Part A, Items (4) and (5) if they held a first aid qualification or Cardiopulmonary Resuscitation Certificate that expired between 16 March 2020 and 31 August 2021.

DI2021-207 also includes clause 6 which was the expiry for clause 5. Clause 5 expired on 1 September 2021.

⁸ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/1891912/Report_10.pdf, p 2.

Clause 5 and 6 were initially required as it was difficult for pharmacists and interim pharmacists to complete their first aid qualifications and Cardiopulmonary Resuscitation Certificates during the initial COVID-19 lockdown in the ACT. This Direction omits clauses 5 and 6 as the effect of these clauses has expired and are no longer relevant. Pharmacists and interim pharmacists have now had sufficient time to meet their first aid and cardiopulmonary resuscitation requirements.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-288 being the Public Place Names (Whitlam) Determination 2021 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of a public place in the Division of Whitlam.**

This instrument, made under section 3 of the *Public Place Names Act 1989*, names a park – Blue Poles Park – in the division of Whitlam. The Committee notes that the explanatory statement for the instrument includes a discussion of human rights issues:

Human Rights

Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation. This determination does not have the potential to infringe this right because it does not name any places after people.

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENTS

- **Disallowable Instrument DI2021-294 being the Liquor (Permit Fee Refund) Determination 2021 (No 2) made under section 227 of the *Liquor Act 2010* provides for a full refund of a liquor permit fee, under specified circumstances, for an event that has been cancelled due to the COVID-19 public health emergency.**
- **Disallowable Instrument DI2021-295 being the Liquor (Permit Fee Refund) Determination 2021 (No 1) made under section 227 of the *Liquor Act 2010* provides for a full refund of a liquor permit fee for an event held between 25 March 2020 and 24 March 2021 that has been cancelled due to the COVID-19 public health emergency.**

The two instruments mentioned above are made under section 227 of the *Liquor Act 2010*, which allows the Minister to determine fees for that Act. As the explanatory statement for each instrument notes, the instrument should be read with section 56 of the *Legislation Act 2001*, which includes a power (in paragraph 56(5)(g)) to make a determination about “waiving, postponing, or refunding [a] fee (completely or partly)”.

Both instruments allow for the refund of liquor permit fees (on certain conditions), in the context of the COVID-19 pandemic. The refunds relate to events that were cancelled due to the COVID-19 pandemic.

This comment does not require a response from the Minister.

SUBORDINATE LAW—COMMENT

The Committee has examined the following subordinate law and offers these comments on it:

INCORPORATION OF MATERIAL BY REFERENCE / DISAPPLICATION OF SUBSECTION 47(6) OF THE LEGISLATION ACT 2001

- **Subordinate Law SL2021-29 being the Workers Compensation Amendment Regulation 2021 (No 1) made under the *Workers Compensation Act 1951* facilitates a further short-term extension to 31 May 2022 for current insurers and self-insurer licences.**

The Committee notes that the explanatory statement for this subordinate law states, under the heading “purpose and outline”:

The purpose of this Regulation is to amend the *Workers Compensation Regulation 2002* (the WC Regulation) to facilitate a further short-term extension to 31 May 2022 for current insurers and self-insurers.

The extensions are required following the introduction of a new licensing framework that commenced under the *Workers Compensation Act 1951* (WC Act) from 9 January 2021.

Workers’ compensation insurers and self-insurers that were approved/exempted as to operate prior to 9 January 2021 have been extended to 31 December 2021 under the *Workers Compensation Amendment Regulation 2020* (No 1) [SL2020-40] and are taken to be licensees under the WC Act. This was to allow time for the supporting instruments for the new licensing framework to be made. These supporting instruments, including amending Regulations have not yet been finalised. Consequently, and until the supporting instruments are implemented, this Regulation supports a further extension of the current arrangements for ACT workers’ compensation insurers and self-insurers for a further period to 31 May 2022.

The amendments will establish a mechanism to extend current insurer and self-insurer licenses to 31 May 2022 to ensure they continue to meet their obligations under the WC Act. To allow the extension to operate, technical amendments are also made by this Regulation to update terminology in the WC Regulation to align with the WC Act, by replacing references to *approval/exemption* with *licence* and placing the licensing functions with the regulator.

The Committee notes that section 5 of the subordinate law substitutes Parts 9, 10 and 10A of the (then) existing *Workers Compensation Regulation 2002* with new Parts 9, 10 and 10A. Included in the new Part 10 is a new section 86, which relies on an external document – AS/NZS 4801, an Australian / New Zealand Standard. “AS/NZS 4801” is defined in new subsection 86(7):

AS/NZS 4801 means AS/NZS 4801 (Occupational health and safety management systems—Specification with guidance for use), as in force from time to time.

Note AS/NZS 4801 may be purchased at www.standards.org.au.

New subsection 86(6) provides:

- (6) The Legislation Act, section 47(6) does not apply to AS/NZS 4801.

Note AS/NZS 4801 does not need to be notified under the Legislation Act because s 47(6) does not apply (see Legislation Act, s 47(7)).

As already noted in this *Scrutiny Report*, the effect of disapplying subsection 47(6) is that the document in question, and any amendments to it, do not have to be published on the ACT Legislation Register, as notifiable instruments, contrary to the general rule that such documents be published on the Register.

The Committee notes that it has always taken a keen interest in the disapplication of subsection 47(6), in particular, since the general rule of requiring that external documents referred to and relied upon be published assists in ensuring that those affected by such documents have free access to them. The Committee has generally taken the view that any disapplication of this requirement should be justified, usually in the explanatory statement for the instrument. The Committee notes that the explanatory statement for this subordinate law contains no such justification.

A further issue, here, is that (as the note to the definition indicates) AS/NZS 4801 is not *freely* available but must be purchased. It appears that the current cost of AS/NZS 4801 is \$115.38.⁹

The Committee dealt extensively with the issue of *free* access to Australian Standards, etc in the Ninth Assembly, corresponding with the Chief Minister and also the Commonwealth Minister for Industry, Science and Technology. This correspondence (and the Committee's views) is captured in a paper titled *Access to Australian Standards adopted in legislation—Correspondence*.¹⁰ The Committee concluded the paper by stating:

Access to legislation has always been an especially important issue for the Committee. As indicated above, the reliance on standards can operate to undermine access to the content of legislation, unless those standards are available, free-of-charge, to users of legislation, especially those who cannot afford—or do not have a large enough commercial incentive or financial capacity—to purchase such standards. The Committee will continue to monitor this important issue.

The Committee retains this view. The Committee considers that, at the very least, this issue should have been addressed, in the explanatory statement for this subordinate law.

In making this comment, the Committee acknowledges that, as it existed prior to the amendments made by this subordinate law, section 86 of the *Workers Compensation Regulation 2002* was in similar terms, relying on AS/NZS 4801 and disapplying subsection 47(6) of the Legislation Act. However, the Committee does not consider that this precludes the Committee from making a comment, at this time.

The Committee draws the attention of the Legislative Assembly to this subordinate law, under paragraph (10)(d) of the Committee's Resolution of Appointment, on the basis that the regulatory impact statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before 5 April 2022, when the Legislative Assembly's capacity to move to disallow the subordinate law will expire.

⁹ See <https://store.standards.org.au/product?designationId=AS%2fNZS+4801-2001>.

¹⁰ Available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1609068/Access-to-Australian-Standards-adopted-in-legislationCorrespondencePaper.pdf.

RESPONSES

GOVERNMENT RESPONSES

- The Minister for Transport and City Services, dated 4 February 2022, in relation to comments in Scrutiny Report 12 concerning SL2021-24—Waste Management and Resource Recovery Amendment Regulation 2021 (No 1).
- The Minister for Sustainable Building and Construction and Minister for the Environment, dated 11 February 2022, in relation to comments made in Scrutiny Report 12 concerning Disallowable Instruments—
 - DI2021-253—Construction Occupations (Licensing) (Fees) Determination 2021 (No 2); and
 - DI2021-254—Nature Conservation (Fees) Determination 2021 (No 3).

[These responses](#)¹¹ can be viewed online.

The Committee wishes to thank the Minister for Transport and City Services, the Minister for Sustainable Building and Construction and Minister for the Environment for their helpful responses.

Dr Marisa Paterson MLA
Deputy Chair

15 March 2022

¹¹ https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny/response-to-comments-on-subordinate-legislation.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
 - Drugs of Dependence (Personal Use) Amendment Bill 2021
- **Report 7, dated 4 May 2021**
 - Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) [response required prior to the Bill being debated]
- **Report 12, dated 1 February 2022**
 - Electoral Amendment Bill 2021
 - Financial Management Amendment Bill 2021 (No 2)
 - Public Health Amendment Bill 2021 (No 2)
 - Road Transport Legislation Amendment Bill 2021 (No 2)