

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

SCRUTINY REPORT 4

4 MAY 2021



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

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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

### BILL—NO COMMENT

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

#### **UTILITIES AMENDMENT BILL 2021**

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This Bill amends the *Utilities Act 2000* to enable the Minister and Treasurer to determine a representative consumption level and reference price, and require electricity retailers provide small customers with a comparison between the price offered or charged to that customer and the reference price.

### BILLS—COMMENT

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

#### **COURTS AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2021**

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This Bill amends nine Acts relating to criminal justice, primarily to improve the efficiency of Courts and Tribunal processes.

#### ***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 PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO A FAIR TRIAL (SECTION 21 HRA)

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

The Bill proposes various amendments to the following Acts which may limit rights protected by the HRA:

- The *ACT Civil and Administrative Tribunal Act 2008* will be amended to allow the ACT Civil and Administrative Tribunal (ACAT) to deal with non-attendance at any stage in an application where the Tribunal has required a party to appear before it. This provision extends the current provisions which apply only to a failure to appear at a hearing of the application. By allowing matters to be determined in the absence of one or other parties to the application this amendment may limit the right to a fair trial protected by section 21 of the HRA.
- The *Common Boundaries Act 1981* will be amended to allow ACAT to determine the line where a fence should be erected when the fence is being repaired. By extending the powers of ACAT to determine the boundaries of residential property this may potentially limit the right to privacy and reputation protected by section 12 of the HRA, which includes the right to not have a person's family or home interfered with unlawfully or arbitrarily.

- The *Supreme Court Act 1933* will be amended to provide for a judge or associate judge to continue to hold office after retirement for the purpose of finalising proceedings before them. As a judge or associate judge is not entitled to additional remuneration for this work the Bill may engage the right to work and other work-related rights protected by section 27B of the HRA, which includes the right to the enjoyment of just and favourable conditions of work.

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

Currently, section 23 of the ACT Civil and Administrative Tribunal Act authorises ACAT to decide its own procedures in dealing with an application if no procedure is prescribed under the Act or an authorising law (ie a law that provides for an application to be made to ACAT). The Bill will amend section 23 to allow ACAT, on ACAT's own initiative or application by a party or other person, to dispense with the application of a provision of the rules to a particular proceeding on any conditions it considers appropriate. The Committee notes that section 24 of the Act provides for ACAT to make rules in relation to the practice and procedure of the Tribunal by notifiable instrument and after providing the rule-making committee under the *Court Procedures Act 2004* with a copy. Rules may extend the time for doing things provided for under the Act or, unless otherwise provided for, in an authorising law (section 25). Any procedure under an authorising law for dealing with an application prevails over the procedures set out in the Act or the rules to the extent of any inconsistency (section 27).

The amendment to section 23 will authorise ACAT to depart from procedures set out in the rules, and possibly set out in authorising legislation, to the possible detriment of one or more parties before it. The explanatory statement accompanying the Bill outlines this amendment as providing the "tribunal with the flexibility to manage its own practices and procedures for individual matters, allowing the tribunal to dispense with the application of the ACAT Rules to a particular proceeding on any conditions it considers appropriate." The Committee recognises that in exercising functions under the Act ACAT must observe the principles of natural justice and procedural fairness (section 7). However, the Committee is concerned with the potential scope of the amendment and ACATs power to determine the procedure to be applied in dealing with an application. The Committee therefore requests further information on the intended operation of the amendment to section 23, the extent to which it is intended to authorise departures from procedures set out in the rules or as provided by authorising legislation. As the amendment potentially limits the protection of the right to a fair trial protected by section 21 of the HRA consideration should be given to amending the explanatory statement to include why the amendment should be considered reasonable using the framework set out in section 28 of the HRA.

**The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.**

#### RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill will amend the *Judicial Commissions Act 1994* to allow information acquired under that Act by members, staff or lawyers assisting the Judicial Council or Commission to be recorded, used or disclosed under the *Integrity Commission Act 2018*. The Judicial Commissions Act includes various requirements to produce information and limits the protection of privileges against self-incrimination and exposure to a penalty (see section 32).

By permitting disclosure of what may include personal or prejudicial information the Bill may limit the protection of privacy and reputation protected by section 12 of the HRA, right to a fair trial protected by section 21 of the HRA and rights in criminal proceedings protected by section 22 of the HRA. Consideration should be given to amending the explanatory statement accompanying the Bill to include recognition of the possible limitations of these rights and why any limitations should be considered reasonable set out using the framework in section 28 of the HRA.

**The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.**

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

CULTURAL AND OTHER RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES AND OTHER MINORITIES (SECTION 27 HRA)

FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF (SECTION 14 HRA)

The Bill will amend the *Public Trustee and Guardianship Act 1985* to provide the Public Trustee and Guardian with the power to dispose of the remains of unclaimed bodies and the ability to investigate and administer the deceased person's estate. The amendments will only apply to an unclaimed deceased person where the executor or next of kin has not been found despite reasonable inquiries by the police, or the executor or next of kin is unwilling or unable to make funeral arrangements for the person.

The explanatory statement accompanying the Bill states that this amendment does not engage any human rights, given any rights apply only where a person is living. However, the Committee is concerned that the rights of other surviving members of the deceased's family or kinship group may be affected by this amendment. The rights limited may include the right to equality protected by section 8 of the HRA, the cultural and other rights protected by section 27 of the HRA, and freedom of thought, conscience, religion and belief protected by section 14 of the HRA.

Under the proposed amendments, the Minister will be able to make guidelines which must be complied with by the public trustee and guardian in exercising their new functions. The explanatory statement suggests that guidelines will ensure reasonable inquiries have been made to locate the next of kin prior to this power being invoked. Guidelines will also "facilitate disposal of the person's body in a respectful way, and, where possible, in a way consistent with their cultural or religious beliefs". The Committee recognises that, as disallowable instruments, any guidelines made by the Minister will be subject to scrutiny by this Committee and the Assembly. However, there is no obligation to produce guidelines under the proposed amendment and no requirement that they include measures ameliorating any potential impact on rights protected by the HRA. Consideration should therefore be given to amending the explanatory statement accompanying the Bill to acknowledge any potential limitation on rights protected under the HRA and why they should be considered reasonable using the framework in section 28 of the HRA.

**The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.**

## **CRIMES (STEALTHING) AMENDMENT BILL 2021**

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This Private Member's Bill will amend the *Crimes Act 1900* to negate consent for the purposes of various sexual offences where the consent is caused by an intentional misrepresentation about the use of a condom.

### ***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)

FREEDOM OF EXPRESSION (SECTION 16 HRA)

Subsection 67(1) of the Crimes Act provides grounds on which consent is negated for the purposes of various sexual offences (namely the offences of sexual intercourse without consent, sexual intercourse with young person and act of indecency with young people). The grounds can also be the basis of attributing knowledge of the lack of consent to the perpetrator of the offences (subsection 67(3)). Without limiting other grounds on which consent may be negated, subsection 67(1) includes infliction or the threat of infliction of violence, extortion, humiliation, mistaken belief as to a person's identity, the effect of intoxicating liquor, abuse of position or influence, and a person's physical helplessness or mental incapacity. The grounds in subsection 67(1) also include where consent is caused by "a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person" (paragraph 67(1)(g)).

The Bill will insert a new ground where consent is caused "by an intentional misrepresentation by the other person about the use of a condom". The explanatory statement accompanying the Bill states that the intention of this amendment is to cover the practice of 'stealthling' or the removal of a condom without consent. It is intended that the new ground:

would ensure that where consent is given on the basis that a condom be used during intercourse, and the alleged offender either removes the condom or does not put on a condom at all, and intentionally does not inform the other person, then the other person's consent is taken to be negated.

As this intended application of the provision would generally apply to males, the Bill potentially limits the right to equality protected by 8 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and provides a justification using the framework in section 28 of the HRA. The Committee refers this statement to the Assembly.

In justifying potential unequal application of the Bill, the explanatory statement describes the purpose of the Bill as a clarification of the existing consent provisions. However, the Committee is concerned about the extent to which the operation of the proposed amendment will be affected by existing provisions, and in particular the negating of consent caused by fraudulent misrepresentations of any fact provided for in paragraph 67(1)(g). Justice Refshauge in *R v Tamawiyw (No 2)*,<sup>1</sup> in reviewing the history and policy behind the introduction of paragraph 67(1)(g), saw no reason to impose a restrictive or common law view on its application. On this approach

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<sup>1</sup> [2015] ACTSC 302.

paragraph 67(1)(g) would include the examples provided in the explanatory statement of the intended operation of the provisions.

In *Tamawiwiy*, Justice Refshauge warned, however, of the potential need to limit the “apparently boundless width of any relevant fraudulent misrepresentation” which may fall within paragraph 67(1)(g).<sup>2</sup> Any such limitation is likely to be based on the meaning of fraudulent incorporating objective standards of whether the statement is considered dishonest in the view of ordinary members of the community. The Committee is concerned that the omission of “fraudulent” in the proposed ground and replacement with “intentional” may broaden the scope of the proposed ground beyond that intended. This may also be considered a potential limitation of the right to freedom of expression protected by section 16 of the HRA. Alternatively it may restrict the operation of the existing paragraph 67(1)(g) to limit its potential application to other forms of misrepresentation.

The Committee therefore requests further information on how the intended ground is intended to augment or extend the current protection offered by paragraph 67(1)(g). Consideration should be given to amending the explanatory statement to include reference to the potential limitation of the right to freedom of expression and its justification.

**The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.**

## **STATUTE LAW AMENDMENT BILL 2021**

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This Bill makes minor or technical amendments to a wide range of statutes as part of continuing efforts to make the ACT’s statute book simpler, more consistent and coherent, and up-to-date.

***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 PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will amend the *Mental Health Act 2015* by making it possible for a registered affected person (ie a person registered as having suffered harm because of an offence committed, or alleged to have been committed, by a forensic patient, a forensic patient being a person who is the subject of a forensic mental health order or who may be required by an order of a court to have their mental capacity reviewed) to attend a proceeding on a mental health order, forensic mental health order or review of detention under a court order. This will allow the registered affected person to have access to various personal and highly sensitive information relating to the forensic patient, potentially limiting the forensic patient’s privacy and reputation protected by section 12 of the HRA.

The explanatory statement accompanying the Bill recognises this potential limitation and provides a statement setting out why it should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers this statement to the Assembly.

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

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<sup>2</sup> At [59].

***Do any provisions of the Bill inappropriately delegate legislative powers?—Committee Resolution of Appointment paragraph (10)(a)(iv)******Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny?—Committee Resolution of Appointment paragraph (10)(a)(v)***

## DISPLACEMENT OF SECTIONS 47(3) AND 47(6) OF THE LEGISLATION ACT 2001

The Bill will amend the *Public Sector Management Act 1994* to displace the operation of subsections 47(3) and 47(6) of the *Legislation Act 2001* for Commonwealth laws or an ACT enterprise agreement applied, adopted or incorporated in a management standard. Management standards may be created by the Head of Service, with the Chief Minister's written approval, to prescribe public sector members subject to the Act and set out various management functions and powers under the Act. Under section 47(3) of the Legislation Act, any management standard would only be able to apply a law of another jurisdiction (including the Commonwealth), or an instrument such as an ACT enterprise agreement, as in force only at a particular time. By displacing subsection 47(3), the Bill will allow laws of another jurisdiction or instruments to be incorporated as in force from time to time. Under subsection 47(6) of the Legislation Act, any law or instrument so incorporated, and along with any amendments made in the future, must be registered as a notifiable instrument. The displacement of subsection 47(6) by the Bill means that any laws or instruments so incorporated or their amendments in the future will not need to be registered.

Subsections 47(3) and 47(6) act to prevent inappropriate delegation of legislative powers and ensure the transparency and accessibility of the laws governing the Territory. Their displacement therefore requires a justification. The explanatory note accompanying the provision in the Bill states that management standards "incorporate the terms of ACT enterprise agreements in relation to superannuation and other entitlements of certain public servants and statutory office-holders" which may vary from time to time. Subsection 47(6) is displaced "because both Commonwealth laws and ACT enterprise agreements are readily accessible on the internet and the ACT government intranet, and there is therefore no need for them to be published on the Legislation Register." The Committee notes that a note to the amended provision will indicate the internet address where Commonwealth laws and ACT enterprise agreements are available.

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

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2021-42 being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2021 (No 4) 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 for a specified area when designated matches of the Australian Football League are held at Manuka Oval between 6 March and 21 August 2021.**

- **Disallowable Instrument DI2021-44 being the Gambling and Racing Control (Governing Board) Appointment 2021 (No 1) made under sections 11 and 12 of the and section 78 of the *Gambling and Racing Control Act 1999* and *Financial Management Act 1996* appoints a specified person as a member of the ACT Gambling and Racing Commission Governing Board.**
- **Disallowable Instrument DI2021-46 being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2021 made under section 139 of the *Taxation Administration Act 1999* revokes DI2020-37 and determines the rate for section 8 of the *Utilities (Network Facilities Tax) Act 2006*.**
- **Disallowable Instrument DI2021-48 being the Official Visitor (Disability Services) Appointment 2021 (No 1) made under paragraph 10(1)(c) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the *Disability Services Act 1991*.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### *Human rights issues*

- **Disallowable Instrument DI2021-41 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 3) 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 while being used to participate in a special stage of the Light Car Club of Canberra Blue Range Rallysprint 2021.**
- **Disallowable Instrument DI2021-45 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 4) 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 while being used to participate in a special stage of the Innate Motorsport and Events Test Days in March and April 2021.**
- **Disallowable Instrument DI2021-47 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 5) 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 while being used to participate in a special stage of the National Capital Rally 2021.**
- **Disallowable Instrument DI2021-50 being the Road Transport (General) Application of Road Transport Legislation Declaration 2021 (No 6) 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 while being used to participate in a special stage of the National Capital Rally 2021.**

Each of the four instruments mentioned above is 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 mentioned above, section 3 of the declaration provides that the *Motor Accident Injuries Act 2019* does not apply in relation to the Light Car Club Canberra Blue Range Rallysprint 2021, taking place on 6 March 2021. Section 4 then

disapplies various other requirements of the road transport legislation, including licensing requirements, using a vehicle without a numberplate, speed limits, obeying road signs, etc. The second, third and fourth instruments mentioned above make similar declarations in relation to the following rallies and motor vehicle-related events:

- the Innate Motorsport and Events Test Days, taking place on 17, 19 and 29 March 2021 and 8 April 2021;
- the National Capital Rally 2021, taking place from 23 to 28 March 2021;
- the National Capital Rally 2021, taking place from 7 to 11 April 2021.

The Committee notes that the explanatory statement for the first instrument mentioned above discusses 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 themselves 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 disapplied for the event to operate as intended, vehicles will be travelling in parts of the forest in excess of the usual speed limits and in a manner not consistent with the road rules. As such, the restriction on the free movement of people in those parts of the forest at those times is considered reasonable and proportionate to ensure safety of non-participants and represents the least restrictive approach that enables the event to proceed.

A similar statement appears in the explanatory statements for the second, third and fourth instruments mentioned above.

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

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

*Human rights issues*

- **Disallowable Instrument DI2021-43 being the Public Place Names (Beard) Determination 2021 made under section 3 of the Public Place Names Act 1989 determines the new names of a road in the division of Beard.**

This instrument, made under section 3 of the *Public Place Names Act 1989*, revokes an instrument that previously named a street in the suburb of Beard and re-makes the instrument, naming what was previously “Copper Crescent” as “Copper Close” and “Tantalum Street”. 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.**

*Is this appointment validly made?*

- **Disallowable Instrument DI2021-49 being the Racing Appeals Tribunal (Assessor) Appointment 2021 made under section 42 and Schedule 2, section 2.1 of the *Racing Act 1999* appoints a specified person as an Assessor of the Racing Appeals Tribunal.**

This instrument, made under section 42 of the *Racing Act 1999*, appoints a specified person as “assessor” of the ACT Racing Appeal Tribunal. An assessor can be appointed to “assist and advise” the Tribunal in relation to an appeal, under the Racing Act.

The appointment is also made by reference to requirements in Schedule 2 to the Racing Act. The formal part of the instrument refers to section 2.1 of Schedule 2, which provides:

**2.1 Assessors—appointment**

Assessors are to be appointed by the Minister from among people who the Minister is satisfied have special knowledge of or experience in the racing industry.

*Note 1* For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

*Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).

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

The Committee notes that the explanatory statement for the instrument states:

Schedule 2, subsection 2.1(1), of the Act provides that assessors of the Tribunal are to be appointed by the Minister from among people who the Minister is satisfied have special knowledge of or experience in the racing industry.

The Committee notes that there is no “subsection 2.1(1)” in the Racing Act.

In terms of the section 2.1 requirement, the Committee notes that, while it recites the requirement, the explanatory statement for the instrument does not expressly state that Minister is satisfied that the specified person *has* the “special knowledge of or experience in the racing industry” that is required, for appointment. While it may be assumed that the Minister would not have appointed the specified person *without* that satisfaction, the Committee has always considered that it is preferable that all the formal requirements are expressly addressed, usually in the explanatory statement for an instrument of appointment. The Committee reminds the Minister of this preference.

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

*Human rights issues*

- **Disallowable Instrument DI2021-51 being the Surveyors (Surveyor-General) Practice Directions 2021 (No. 1) made under section 55 of the *Surveyors Act 2007* revokes DI2013-217 and issues the Surveyor-General Practice Directions 2021 (No. 1).**

This instrument makes surveyor-general practice directions, for section 55 of the *Surveyors Act 2007*. It revokes and re-makes previous directions. The explanatory statement for the instrument states:

The new instrument makes the following amendments to the earlier Directions:

Changes identified below are primarily designed to:

1. Modernise the Directions to reflect current best practice and surveying techniques.
2. Improve the clarity of the wording in some of the previous Directions.
3. Remove the previous Subdivisions C and D and Schedule 1, relating to Units Plans, and place them into a new Surveyor-General Guideline No. 17.

The explanatory statement for the instrument contains a discussion of human rights issues:

**Human Rights**

This disallowable instrument does not affect any human rights 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.**

## SUBORDINATE LAWS—COMMENT

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

*Human rights issues*

- **Subordinate Law SL2021-2 being the Security Industry Amendment Regulation 2021 (No 1) made under the *Security Industry Act 2003* updates the qualification requirements of a person seeking a licence to work as a crowd controller.**

This subordinate law makes a minor amendment to the Security Industry Regulation 2003, to “update” the qualification requirements for a person who seeks a licence to work as a crowd controller. The explanatory statement for the subordinate law states:

Table 8 sets out the prescribed training courses for employee licences. Column 4 of Item 7 of the table provides that to obtain an employee licence subclass to “act as crowd controller” (referencing s 13(1)(h) of the Act), the mandatory training course for an applicant to a licence is either a Certificate II in Security Operations with an elective about managing conflict and security; or a Certificate III in Security Operations; and a Certificate in first aid.

The Amendment Regulation resolves an unintended consequence affecting the licensing of crowd controllers in the ACT. The complication has arisen as Registered Training Organisations in the ACT and neighbouring jurisdictions are not offering an elective about managing conflict and security as a standalone unit.

This Amendment Regulation updates the qualification requirements in Column 4 of Item 7 in Table 8 of the Regulation so that the additional elective in relation to managing conflict and security is no longer a mandatory training course for a person seeking a licence to work as a crowd controller. The intended effect of this is that a person will be able to be licenced and work as a crowd controller if they have completed either a Certificate II or Certificate III in Security Operations. This standard will align with the equivalent mandatory training requirements for crowd controllers who are licenced in neighbouring jurisdictions of New South Wales and Victoria.

The explanatory statement goes on to discuss human rights issues:

**Human rights compatibility**

During the development of this Amendment Regulation, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

This Amendment Regulation engages and may promote the right to work under section 27B of the HRA. Section 27B provides that everyone has the right to work, including the right to choose their occupation or profession freely.

The removal of the additional elective about managing conflict and security will support newly qualified security officers to obtain employment as crowd controllers in the ACT. Aligning the ACT’s mandatory training requirements for crowd controllers with our neighbouring jurisdictions of New South Wales and Victoria will also promote the mobility of security officers across jurisdictions, allowing security officers to access greater employment opportunities.

**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 SL2021-3 being the Taxation (Government Business Enterprises) Amendment Regulation 2021 (No 1) made under the *Taxation (Government Business Enterprises) Act 2003* makes several amendments to the Taxation (Government Business Enterprise) Regulation 2003.**

This subordinate law amends the Taxation (Government Business Enterprise) Regulation 2003. The explanatory statement for the subordinate law notes that, under the *Taxation (Government Business Enterprises) Act 2003*, all Territory entities are required to pay income tax equivalents and/or Territory taxes and charges. The Taxation (Government Business Enterprise) Regulation then prescribes those Territory entities that are to be subject to the national tax equivalent regime and

those Territory entities that are to be subject to Territory taxes and charges. The explanatory statement indicates that this subordinate law amends references to various Territory entities that are referred to in the Taxation (Government Business Enterprise) Regulation that have changed trading names and/or been subject to significant structural changes.

The explanatory statement goes on to discuss human rights issues:

#### **HUMAN RIGHTS**

This regulation does not have any human rights implications.

**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 SL2021-4 being the Bail Amendment Regulation 2021 (No 1) made under the Bail Act 1992 puts in place provisions for more flexible and contemporary methods of service for bail continuation notices.**

This subordinate law amends the Bail Regulation 1992. According to the explanatory statement for the subordinate law, the amendments ...

... will put in place clear provisions for more flexible and contemporary methods of service for bail continuation notices to support the amendments to section 34 of the Act proposed by the Crimes Legislation Amendment Bill 2020.

The explanatory statement indicates that these amendments are in response to the decision of the Chief Magistrate in *Elder v Metyang* [2020] ACTMC 24.

The Committee notes that it discussed the Crimes Legislation Amendment Bill 2020 in Scrutiny Report 2 of the 10<sup>th</sup> Assembly (24 March 2021). In that discussion, the Committee mentioned that amendments to the Bail Regulation were foreshadowed. The Committee stated:

The Committee is concerned that any dilution of the current requirement to provide notice in person may give rise to significant human rights concerns. The proposed amendments leave the method of providing notice to the Regulations with no explicit restrictions. Reliance on section 30 of the HRA will only increase the uncertainty over whether any Regulations will comply with the requirements of the Bail Act, and whether any decision on the method of service will in turn be consistent with the Regulations. The Committee recognises that elements of the method of service may involve technical details suitable for inclusion in regulations, and that any regulations will be subject to scrutiny by the Committee and the Assembly. However, in the Committee's view, the significant human rights concerns raised by the potential amendments make it appropriate for explicit restrictions on possible methods of service to be included in amendments to the Bail Act.

The Committee notes that, in a response to the Committee's comments, dated 29 March 2021, the Attorney-General provided the Committee with an advance copy of this (proposed) subordinate law, indicating that the proposed a copy of the proposed subordinate law had been amended, "to take account of the Committee's comments."

The Committee notes that the *Crimes Legislation Amendment Act 2021* was passed by the Legislative Assembly, with amendments, on 31 March 2021, and notified on the ACT Legislation Register on 8 April 2021.

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

### **Human Rights**

Service of bail continuation notices may engage rights under the *Human Rights Act 2004* (HR Act), including section 18 (Right to liberty and security of person), section 21 (Right to a fair trial) and section 22 (Rights in criminal proceedings), if a person is subsequently prosecuted for failing to answer bail under section 49 of the Act. Section 30 of the HR Act requires that all Territory laws be interpreted in a way that is compatible with human rights. The court, in considering the service methods in section 4 of the amended Regulation, should adopt a method that is compatible with the rights of the accused person. The method adopted may vary with the particular circumstances of each accused person and consideration may be given to factors such as whether the accused person is legally represented or attended court on the previous occasion.

In the event of any prosecution for the offence of failing to answer bail, there is a defence of reasonable excuse available to the accused person and the opportunity to raise non-receipt of a bail continuation notice as a reasonable excuse. Whether the court accepts this excuse will be a matter of evidence.

A more detailed analysis of the human rights implications is set out in the explanatory statement to the *Crimes Legislation Amendment Bill 2020*.

**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 SL2021-5 being the Legal Profession (Barristers) Rules 2021 made under subsection 579(1) of the *Legal Profession Act 2006* repeals SL2014-21 and makes the Legal Profession (Barristers) Rules.**

This subordinate law makes Legal Profession (Barristers) Rules, for subsection 579(1) of the *Legal Profession Act 2006*. The subordinate law revokes and re-makes existing Rules. The explanatory statement for the subordinate law indicates that the substantive changes to the relevant Rules involve rule 122 which (in the previous form) deals with “discrimination and sexual harassment”. The new rule 122 deals with “discrimination, sexual harassment and bullying”.

The explanatory statement for the subordinate law states:

The amendment to rule 122 is designed to:

- (i) ensure the heading to rule 122 properly reflects its content;
- (ii) ensure consecutive numbering of the sub-rules;
- (iii) include a sub-rule specifically dealing with bullying (which is not presently covered in rule 122);
- (iv) remove the sub-rule covering vilification (which is a form of discrimination and therefore already covered by the sub-rule dealing with discrimination);
- (v) remove the complaint procedure from rule 122 (as complaint handling procedures are better dealt with in the ACT Bar Association’s policies and procedures) and refer

to the relevant procedure contained in the ACT Bar Association's policies on discrimination, sexual harassment and bullying.

The explanatory statement goes on to discuss human rights issues:

The amendment to rule 122 has the following human rights consequences:

1. The right to just and favourable conditions of work enshrined in section 27B(2) of the *Human Rights Act 2004* is promoted by having rules prohibiting workplace discrimination, bullying and sexual harassment.
2. Similarly, the right to equality enshrined in section 8 of the *Human Rights Act 2004* is broadly promoted by having rules prohibiting workplace discrimination, bullying and sexual harassment.
3. There is the potential for procedures that deal with complaints of workplace discrimination, bullying and sexual harassment to engage with fair and public hearing rights as enshrined in section 21 of the *Human Rights Act 2004*, but as the procedures for dealing with such complaints will be dealt with in separate ACT Bar Association policies, there is only a limited engagement with this right.
4. While the amendment does remove the express rule prohibiting vilification, there is no resulting lessening of protections because vilification is a form of discrimination and discrimination remains expressly prohibited.

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

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

*COVID-19-related instrument / Human rights issues*

- **Subordinate Law SL2021-6 being the Magistrates Court (Public Health (COVID-19) Infringement Notices) Amendment Regulation 2021 (No 1) made under the *Magistrates Court Act 1930* provides for infringement notices under the Act as an alternative to prosecution when a person fails to comply with a direction of the Chief Health Officer where it is deemed that an infringement notice imposing a monetary fine is a sufficient penalty.**

This subordinate law is made under Part 3.8 of the *Magistrates Court Act 1930*, which allows for offences prescribed by a regulation made under the Act can be dealt with by way of infringement notice. The explanatory statement for this subordinate law states that the Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020 (the original regulation) was promulgated in order to enable infringement notices to be issued for an offence contrary to subsection 120(4) of the *Public Health Act 1997*. The substantive effect of this measure was that the failure (without reasonable excuse) to comply with a direction given by the Chief Health Officer, in the context of the "emergency declaration" under the *Public Health Act 1997*, given in the context of the COVID-19 pandemic, is an offence that is punishable by infringement notice scheme, rather than by prosecution.

The explanatory statement for this subordinate law states:

The infringement notice scheme created by [the original] regulation [provides] an alternative to prosecution when a person fails to comply with a direction of the Chief Health Officer where it is deemed that an infringement notice imposing a monetary fine is a sufficient penalty. The purpose of the scheme is to encourage compliance with the directions of the Chief Health Officer in relation to the COVID-19 emergency.

The infringement notice scheme will only apply to an offence where it involves a failure to comply with a Chief Health Officer direction made in relation to a COVID-19 emergency declaration. Such offences are not framed as strict liability offences, but it is considered that these offences are appropriate to be dealt with by infringement notice in the context of the COVID-19 emergency.

The penalty payable for an infringement notice offence under the regulation is \$1000 for an individual and \$5000 for a corporation. In addition, an infringement notice under the regulation may only be issued against a person who is 18 years or older.

The issue addressed by this subordinate law is the expiry of the period during which the definition of **COVID-19 emergency**, a crucial definition for this and other COVID-19-related legislative measures, is in effect.

The explanatory statement for this subordinate law states:

This instrument amends the expiry period for the [original] regulation. The regulation, which currently expires on 3 April 2021, will be amended to remain temporary and to expire at the end of a 12-month period during which no COVID-19 public health emergency declaration has been in force.

Amending the expiry provision in this way will ensure that issuing an infringement notice remains an enforcement option through the emergency response period for the COVID-19 pandemic. This is also consistent with the approach taken with respect to other temporary emergency response measures passed by the ACT Legislative Assembly in 2020 and recently amended through the *COVID-19 Emergency Response Legislation Amendment Act 2021*.

As referred to in Explanatory Statement for the Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020, the issuing of infringement notices are subject to the oversight of the Access Canberra Regulatory Complaint Assessment Committee (RCAC) to inform any decisions taken by an authorised officer.

The explanatory statement goes on to discuss human rights issues:

#### **Human rights implication**

Authorised officers and police officers must consider relevant human rights in making a decision as required under the *Human Rights Act 2004*, section 40B (Public authorities must act consistently with human rights).

[This subordinate law] engages and may promote the following rights under the *Human Rights Act 2004* including:

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

[This subordinate law] supports these rights by extending the operation of the Regulation so that in dealing with an alleged failure to follow a direction under the *Public Health Act 1997*, an authorised officer or police officer retains the option of issuing an infringement notice rather than commencing a proceeding in the ACT Magistrates Court.

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

Additionally, extending the infringement notice scheme may engage and promote the right to life and the right to work and other work-related rights. Extending the infringement notice scheme allows the regulation to stay in the statute book, to continue to act as a deterrent for individuals and businesses, and to continue to be used by authorised officers to enforce compliance with public health directions to ensure a safe place of business to protect the lives of the ACT community while the COVID-19 pandemic is active.

**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 RESPONSES

The Committee has received responses from:

- The Chief Minister, in relation to comments made in Scrutiny Report 1 concerning the COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 3).
- The Chief Minister, in relation to comments made in Scrutiny Report 2 concerning Disallowable Instruments DI2021-10 Taxation Administration (Payroll Tax—Businesses Not Permitted to Operate) COVID-19 Exemption Scheme Determination 2021 and DI2021-11 Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2021.

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

The Committee wishes to thank the Chief Minister for his helpful response.

Jeremy Hanson MLA  
Chair

4 MAY 2020

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<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 3, dated 14 April 2021**
  - Domestic Animals Legislation Amendment Bill 2021
  - Disallowable Instrument DI2021-4 Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1)