



## **Legislative Assembly for the Australian Capital Territory**

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

# **Scrutiny Report 21**

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

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10th Assembly  
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# About the committee

## Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 2 December 2020.

The Committee is responsible for the following areas:

- (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;

You can read the full establishing resolution [on our website](#).

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Kathleen de Kleuver, Committee Secretary

Emma-Kate Weaver, Administration Officer

Daniel Stewart, Legal Adviser (Bills)

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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.



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# 1. Bills—Proposed Amendments

## Bills—No comment

### Freedom of Information Amendment Bill 2022 [No 2]

- 1.1. This private member’s Bill will amend the *Freedom of Information Act 2016* to provide for the proactive release of records created for or provided to Cabinet, including a Cabinet committee or subcommittee, or official records of Cabinet. Cabinet records must generally be published within 30 days of being considered by Cabinet. This time limit would not apply in various circumstances, including where publication could endanger the life or physical safety of a person, would be an unreasonable limitation on a person’s rights under the *Human Rights Act 2004*, or would significantly prejudice an ongoing criminal investigation.

## Bills—Comment

### Aboriginal and Torres Strait Islander Children and Young People Commissioner Bill 2022

- 1.2. This Bill establishes an Aboriginal and Torres Strait Islander Children and Young People Commissioner as an independent statutory authority to:
  - a) advocate for the rights of Aboriginal and Torres Strait Islander children and young people, individually and collectively;
  - b) identify and examine issues that affect the human rights and wellbeing of Aboriginal and Torres Strait Islander children and young people; and
  - c) make recommendations to government and non-government agencies on legislation, policies, practices, and services that affect Aboriginal and Torres Strait Islander children and young people.

### 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 take part in public life (section 17 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.3. The Bill provides for the Commissioner to be appointed by the Executive. The Commissioner must be an Aboriginal person, or a Torres Strait Islander person, or both. By

placing restrictions on who may be appointed the Bill may limit the right to take part in public life protected by section 17 of the HRA.

- 1.4. The Commissioner will have extensive information gathering and sharing powers, including the power:
  - a) to require a person to give information or produce a document or thing the Commissioner considers necessary in the exercise of their advocacy, intervention and inquiry functions;
  - b) to require a person to attend and provide evidence believed to be relevant to an inquiry conducted by the Commission; and
  - c) to disclose information obtained in the exercise of a function under the Bill to a member of the ACT Human Rights Commission where relevant to that member's functions. Information about an individual can generally only be disclosed with that person's consent or if disclosure is believed necessary to allow a coordinated approach to a matter affecting an Aboriginal or Torres Strait Islander child or young person or advocate effectively on their behalf.
- 1.5. The Bill will also protect against civil or criminal liability, including for breach of confidence, for giving information honestly and without recklessness to the Commissioner, the Commissioner's staff or others who exercise functions under the Act.
- 1.6. The Bill will also amend the *Children and Young People Act 2008*, *Human Rights Commission Act 2005* and *Official Visitor Act 2012* to allow the Commissioner access to personal information that has been obtained or disclosed under those Acts.
- 1.7. To the extent the information involved in these various powers includes personal or otherwise private information, the Bill may limit the protection of privacy provided by section 12 of the HRA.
- 1.8. The Bill will enforce the information gathering powers of the Commissioner through a range of offences with penalties up to 50 penalty units. These offences include an exception where the person has a reasonable excuse for failing to produce the information, document or thing, or for failing to attend. As the defendant has an evidential burden in relation to these exceptions, their inclusion may limit the presumption of innocence protected as a right in criminal proceeding by section 22 of the HRA.
- 1.9. The Bill will abrogate the privilege against self-incrimination, also protected by section 22 of the HRA, by requiring a person to answer a question or provide information which may tend to incriminate that person or expose them to a penalty.
- 1.10. Each of these potential limitations on human rights is recognised in the explanatory statement accompanying the Bill and a justification providing 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, noting in particular the protections accorded by the Bill, including restricting the collection and disclosure of identifying information and limiting the range of uses of any information subject to the abrogation against self-incrimination.

- 1.11. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Freedom of Information Amendment Bill 2022

- 1.12. This Bill will amend the *Freedom of Information Act 2016* to make various amendments to processing requirements, including:
- a) all information subject to legal professional privilege will be included as contrary to the public interest information (and hence information which can be withheld from release);
  - b) the range of information that is contrary to the public interest to release will be extended to include information held by the Inspector of Correctional Services relating to an examination or review by the inspector;
  - c) an applicant's identity, circumstances and reason for seeking access to another person's personal information will be included as relevant to whether it is in the public interest to release information;
  - d) the period in which an access application is suspended pending clarification of the scope of the application after which it may be no longer dealt with, will be reduced from three months to six weeks;
  - e) the period in which third parties can object to disclosure of their third-party information will be reduced from 15 to 10 working days;
  - f) the time in which an access application must be decided will be extended from 20 working days to 30 working days, and this will not include time waiting for an applicant's response to a proposed refusal to deal with the application or Christmas shutdown days;
  - g) an application can be dealt with after 12 months, but not more than 24 months, after the access application is received, where the applicant agrees, and the application is dealt with progressively; and
  - h) access to government information can be provided in a form that is different to the form requested by the applicant where it is not reasonably practical to give access in the form requested and the applicant can still receive the information.

## 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)

Freedom of expression (section 16 HRA)

- 1.13. The Bill includes various provisions which will further limit the right of access to government information currently provided by section 12 of the Act. These include extending the period in which an agency can respond to an access application (from 20 to 30 working days) and the circumstances which further extend this period, and allowing an access application to no longer be dealt with after a clarification request has not been responded to for six weeks. The Bill will also allow information to be provided in a way different to that requested by the applicant.
- 1.14. These provisions may impinge on a person's 'freedom to seek, receive and impart information and ideas of all kinds ... [in a] way chosen by him or her' as part of the freedom of expression protected by section 16 of the HRA. Placing greater emphasis on a person to respond to an agency's request for clarification or proposed refusal may also disproportionately impact on persons who are not readily contactable due to homelessness, incarceration, or illness. Providing information in an alternative form may impact vulnerable persons with limited digital or other access. The Bill may therefore limit the right to equality before the law protected by section 8 of the HRA.
- 1.15. The Bill will also allow a person's identity, circumstances, and reasons for seeking access to information to be taken into account which considering if it is in the public interest to refuse to disclose the information. This may further restrict access to information, as well as potentially limiting a person's privacy protected under section 12 of the HRA.
- 1.16. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework provide by section 28 of the HRA. The Committee refers that statement to the Assembly. The Committee notes the statement characterises restrictions on the timeliness of access to information as being minor, and in part to avoid other administrative burdens associated with seeking, agreeing, and granting extensions of time. The overall effect of the Bill on the timeliness of access to information is uncertain. Similarly other amendments are justified on the basis that they may permit administrative efficiencies to better promote the overall objectives of the Act. The Committee leaves to the Assembly any assessment of these claims relating to the practical impact of the Bill on access to government information.
- 1.17. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Guardianship and Management of Property Amendment Bill 2022

- 1.18. This Bill will amend the *Guardianship and Management of Property Act 1991* to explicitly introduce the concept of supported decision-making as a consideration in decisions relating to the appointment of guardians and managers, and as a decision-making principle for guardians and managers, to encourage the use of supported decision-making where possible.

### 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 protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

- 1.19. The Guardianship and Management of Property Act provides for the appointment of guardians and managers to make various decisions relating to the health or welfare of someone with impaired decision-making ability. Decisions by guardians and managers must be in accordance with the decision-making principles in section 4 of the Act. The Bill will add to these decision-making principles by requiring a decision-maker to provide support necessary for the protected person to understand the decision to be made, participate in the decision-making, and communicate their wishes.
- 1.20. Under the Act, the ACT Civil and Administrative Tribunal (ACAT), when appointing and determining the powers of guardians and managers, must be satisfied that a person's needs will not be met or their interests significantly adversely affected if a guardian, or manager, is not appointed. This Bill will add a requirement for ACAT to consider whether that assessment would change if support was provided which was necessary for the person to make, participate in and communicate their own decisions, along with whether it is reasonably likely that such support can be provided.
- 1.21. The explanatory statement accompanying the Bill recognises the potential impact on human rights of these amendments. It states that these amendments will:
- not replace the current framework of substitute decision-making established under the ... Act and therefore it may be suggested that the measures as a whole may still limit human rights as they do not fully address inequality in recognition of legal capacity of persons with a disability".
- 1.22. Similarly, the explanatory statement recognises that amendments will continue to authorise decisions involving and impacting a person's health, welfare, or private life generally. Further reforms are foreshadowed to redress significant systemic issues and structural barriers to adequately facilitating universal supported decision-making.
- 1.23. The explanatory statement then sets out its discussion of the ongoing impacts of the Act, as amended by the Bill, on the rights of equality protected by section 8 of the HRA, right to

protection of family and children protected by section 11 of the HRA, and right to privacy protected by section 12 of the HRA. The Committee refers the Assembly to that statement.

- 1.24. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Planning Bill 2022

- 1.25. This Bill will replace the existing *Planning and Development Act 2007* to improve the operation of the planning system and development outcomes.

### 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)

- 1.26. The Act provides for the granting of leases by the territory planning authority by auction, tender, ballot, or direct sale. Under proposed section 261, the authority may restrict the people eligible for the grant of a lease under section 259 by stating, in the relevant notice, that a class of people is eligible or ineligible for the grant of a lease. By providing for distinctive treatment of people or classes of people the Bill may limit the right to equality before the law protected by section 8 of the HRA.
- 1.27. The explanatory statement accompanying the Bill does not recognise this potential limitation in discussing the human rights implications of the Bill. The outline states the provision will “promote equality by allowing people who otherwise would not be able to purchase a lease to be able to, for example, under the affordable home purchase scheme with eligibility criteria based on income thresholds”. The Committee notes, however, that the proposed provision is not expressly limited in any way.
- 1.28. **The Committee therefore requests further information from the Minister on why any limitation of the right to equality in the granting of leases should be considered reasonable using the framework set out in section 28 of the HRA, and recommends that the explanatory statement be amended 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.

##### Right to privacy and reputation (section 12 HRA)

- 1.29. The Bill provides various powers and authorisations which may limit the protection of privacy provided by section 12 of the HRA. Inspectors have power to enter and inspect premises, including the power to enter without the consent of the occupier in areas not used for residential purposes or with a search warrant. The Bill includes the power to take samples or otherwise seize things on entry under a warrant and require a name and

address be provided. Reasonable force can be used to gain entry, including, by police officers, on persons. Directions can be given to enter property and carry out rectification work.

- 1.30. The authority can require information be provided which may be reasonably required to administer or enforce the Bill. There are also provisions for the requesting and providing of information to other agencies, including the commissioner for revenue, and in making referrals. There is provision for a public register containing identification information.
- 1.31. The Bill will also restrict a homeowner or resident's ability to deal with their property and home as they choose. Leases, including residential leases, may be cancelled as a consequence of breach of proposed provisions within chapter 12.
- 1.32. The explanatory statement accompanying the Bill recognises these potential limitations, sets out the various protections included in the Bill and why any remaining limitations 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.
- 1.33. Part 12.2 of the Bill makes provision for complaints about controlled activities. Controlled activities are set out in Schedule 5 of the Bill or as prescribed in regulations, and involve breaches of various requirements in the Bill including failing to comply with a lease provision, keeping a leasehold clean, or undertaking development without approval. A complaint must be in writing and include the name and address of the complainant. The Territory Planning Authority may require a complainant provide further information. The authority can investigate a complaint, and as a result take a range of regulatory action, including referring the complaint to another entity. A copy of the complaint is provided to other persons or entities in a range of circumstances, including a referral to another entity or the issue to an occupier of a notice to make a controlled activity order following the complaint.
- 1.34. The Committee is concerned that there may be circumstances where the complainant does not wish to have their identity provided to other entities or the occupier or person who is carrying out the controlled activity being complained of. The Committee recognises that the Territory Planning Authority can proceed with a complaint where the identity of the complainant is not included. However, this may prevent the complainant being informed of the action taken in response to their complaint and may restrict third party rights in the ACT Civil and Administrative Appeals Tribunal (ACAT). The Committee also recognises that, in circumstances where the complainant is identified, the Bill includes protections against victimisation (proposed section 406) and information can be excluded from being made available to the public where publication would endanger life or physical safety or lead to damage or theft of property. This protection may not, however be sufficient to encourage potential complainants to come forward knowing their identity may be disclosed to others.
- 1.35. **The Committee therefore requests further information on whether it would be possible for the complainant to identify themselves but request that their identity, and information which may reasonably lead to them being identified, not be disclosed further without their consent.**

The Committee draws these matters to the attention of the Assembly and asks the Minister to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

#### Right to take part in public life (section 17 HRA)

- 1.36. The Bill will establish a Design Review Panel to provide design advice to proponents of development proposals. The Minister may make rules for the panel, including the panel's constitution. These rules must be published on the authority website. As these rules may restrict the qualifications or expertise of panel members, the Bill may limit the right to take part in public life protected by section 17 of the HRA.
- 1.37. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.38. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

#### Rights in criminal proceedings (section 22 HRA)

- 1.39. The Bill will introduce eight strict liability offences or offences with strict liability elements. By affecting the presumption of innocence these offences may limit the rights in criminal proceedings protected by section 22 of the HRA. These offences are set out in the explanatory statement accompanying the Bill, and a justification for why the use of strict liability should be considered reasonable is provided. Subject to the following comment the Committee refers that statement to the Assembly.
- 1.40. Six of the proposed strict liability offences have a maximum penalty of 60 penalty units, namely:
- undertaking development without approval under section 399;
  - undertaking prohibited development under section 400;
  - undertaking development other than in accordance with approval under section 402;
  - contravening a controlled activity order under section 428;
  - contravening a direction to undertake rectification work under section 434; and
  - contravening a prohibition order under section 449.
- 1.41. The explanatory statement recognises that a maximum penalty of 60 penalty units is slightly higher than the 50 penalty units recommended in the Guide to Framing Offences,<sup>1</sup> and justifies that difference “because these offences are intended to cover relatively serious regulatory offending for the purposes of financial gain”.

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<sup>1</sup> Available at <https://www.justice.act.gov.au/guide-framing-offences>.

- 1.42. The Committee is concerned that there is insufficient justification provided for imposing a penalty for strict liability offences higher than 50 penalty units. The Committee recognises these offences are intended to deter conduct that, if not detected, could lead to significant financial gain. However, the Committee notes that offences in proposed sections 399 and 400 are part of a graduated series of offences with significant potential penalties. The other strict liability offences generally relate to failing to comply with notices issued or in circumstances where enforcement of the underlying condition is otherwise provided.
- 1.43. **The Committee therefore requests further information for why an increase in the maximum penalty above 50 penalty units is considered necessary in order to achieve the objectives of the Bill.**

The Committee draws these matters to the attention of the Assembly and asks the Minister to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

### Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?— Committee Resolution of Appointment paragraph (10)(a)(iii)

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

##### Right to a fair trial (section 21 HRA)

- 1.44. The Bill places restrictions on review rights, including judicial and administrative review, as well as limiting procedural fairness rights. These may limit the right to a fair trial protected by section 21 of the HRA.
- 1.45. Chapter 5 of the Bill provides for the development and amendment of the territory plan. The Territory, a Minister or the Territory Authority must act consistently with this plan. The chapter includes criteria for the outcomes of the Territory Plan, including that the plan promote principles of good planning and be consistent with the planning strategy and district strategies provided for earlier in the Bill. The content of the Territory Plan includes requirements and outcomes against which development proposals are assessed. Proposed major amendments to the plan must generally go through a process of consultation, submissions to which must be considered in any revision of the proposed amendments. Proposed major amendments must also be considered by an Assembly Committee and presented to and possibly rejected by the Assembly. Transition provisions in Part 20.3 also contain requirements in relation to preparation of a draft Territory Plan within 6 months of commencement.
- 1.46. Proposed section 80 limits any challenge to the validity of a provision of the Territory Plan to having to be brought within 3 months from the commencement of the provision or an amendment to the provision.
- 1.47. Chapter 8 of the Bill provides for territory priority projects. These projects include developments related to light rail, or projects jointly declared by the Chief Minister and

Minister on the basis they will provide significant benefit to the people of the ACT or substantially facilitate planning outcomes. The proposed chapter includes notification and consultation requirements, including presentation to the Assembly. However, the validity of a declaration is not affected by a failure to present the statement (presumably to the Assembly, though this is not set out explicitly) within the required time. A declaration for a territory priority project is a notifiable instrument. Development applications for territory priority projects are decided by the Minister, and may be approved even if contrary to the advice of the conservator of flora and fauna. Third parties are not able to seek review in the ACT Civil and Administrative Tribunal (see proposed Schedule 7).

- 1.48. Under proposed section 216, any proceeding in a court in relation to a decision to make a territory priority project declaration must be brought within two months after notification of the declaration. Questioning the validity of provisions in a Territory Plan inserted for a territory priority project, and proceedings in relation to decisions relating to environmental impact assessments, development assessment and approvals and leases and licences which relate to a territory priority project, also will have to be commenced within two months.
- 1.49. The explanatory statement accompanying the Bill recognises that these time limitations on any challenge to the validity of provisions of the Territory Plan and court proceedings relating to territory priority projects may limit the right to a fair trial protected under section 21 of the HRA. The statement sets out why these limits 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.
- 1.50. The Committee notes that there may be some uncertainty over the Constitutional validity of imposing strict time limits, without the scope for judicial discretion, on the ability to challenge the validity of decisions made under the Bill.<sup>2</sup> The Committee is also concerned that the explanatory statement does not provide a justification for why removing challenges to the validity of the Territory Plan should be considered proportionate. The explanatory statement suggests that the restriction on court challenges is to ensure development can occur in a timely manner. It is not clear to the Committee why some residual discretion should not be provided for the court to accept challenges to the validity of these decisions in appropriate circumstances, taking into account the need for timeliness and finality in the making of planning decisions.
- 1.51. **The Committee therefore requests further information on what alternatives to the restrictions on judicial review rights presented by the Bill were considered, and why those restrictions without any residual judicial discretion should be considered proportionate.**

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<sup>2</sup> The Committee notes the invalidity of the time limits imposed without judicial discretion considered in *Bodruddaza v Minister for Immigration and Multicultural Affairs (2007)* 228 CLR 651, and the application of analogous reasoning, in relation to review of jurisdictional errors, to State Supreme Courts in *Kirk v Industrial Court (NSW) (2010)* 239 CLR 531.

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

- 1.52. Proposed section 500, along with Schedules 6 and 7, provides for notification and review of decisions by the ACAT. Schedule 6 sets out the range of decisions under the Bill which may be reviewed by ACAT, the eligible person who is able to apply to ACAT for review of the decision, and interested persons who, along with the eligible person, must be provided with a reviewable decision notice informing them of the decision and availability of review. For example, in a decision under proposed section 182 to approve or refuse a development application the eligible entities include the applicant for development approval and, in most cases, those who made a representation about the application, or had a reasonable excuse not to make a representation, and who will suffer some material detriment should the development application go ahead.
- 1.53. Schedule 7 sets out the subset of matters exempt from third party ACAT review, where the only eligible person who can apply for review is an applicant for a development application. These exempt matters include territory priority projects, non-significant developments in designated areas such as town centres or industrial zones, developments in non-residential zones provided certain conditions are met, demolition of a building in connection with a development, some public works, and putting up signs or advertisements.
- 1.54. Time limits for third parties (i.e., someone who is not the development applicant) seeking review by ACAT in relation to a development application are also restricted, generally from 28 to 20 days.
- 1.55. The explanatory statement accompanying the Bill recognises that these provisions limit the scope of review rights which could otherwise have been made available or available under legislation which will be repealed by the Bill. The statement includes why these review rights should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.56. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**
- 1.57. The Bill will also impact on the procedural fairness rights of persons affected by rectification directions and prohibition notices. Proposed Part 12.4 of the Bill will allow the territory planning authority to direct the lessee or occupier to undertake work to rectify the effects of controlled activities. Where the work is not completed within the period set out in the notice, which can be as short as five working days, the authority may authorise someone else to undertake the work with reasonable costs of the work to be paid as a debt to the territory. Contravening a direction will also be a strict liability offence with a maximum penalty of 60 penalty units. There is no requirement to give notice of either the issue of a rectification direction, nor authorising a person to enter premises and undertake uncompleted rectification work.

- 1.58. Proposed Part 12.5 will allow the Territory Planning Authority to issue a prohibition notice preventing an entity from starting or continuing development which is prohibited, requires development approval, or does not comply with conditions of approval. There are strict liability offences with maximum penalty of 60 penalty units for breaching a prohibition order. The authority is not required to provide notice of its intention to give a prohibition notice.
- 1.59. By not requiring notice of an intention to issue a direction, authorisation or notice, the Bill may be limiting the procedural fairness of those affected protected as part of the right to a fair trial in section 21 of the HRA. The explanatory statement does not provide any justification for why providing notice may not be appropriate in some circumstances.
- 1.60. **The Committee therefore requests further information on why procedural fairness rights are not being limited in these contexts, or why any limitation 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 with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

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

### Creation of offences by regulation

- 1.61. Proposed section 519 empowers the Executive to make regulations, including regulations which create offences with a maximum penalty of 30 penalty units. The explanatory statement accompanying the Bill does not mention this power to create offences through regulations.
- 1.62. **The Committee therefore requests the Minister provide a justification for why it is appropriate for offences to be created by regulations, and recommends that the explanatory statement be amended 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.

### Henry VIII clause

- 1.63. Proposed chapter 20 of the Bill includes some 47 provisions dealing with transitional matters. Proposed section 601 makes provision for transitional regulations in the following forms:
- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.

- (2) A regulation may modify this chapter (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this chapter.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

1.64. As this provision allows regulations to modify primary legislation and other territory laws it is a form of Henry VIII clause. The explanatory statement accompanying the Bill includes a discussion of this clause in outlining the transitional chapter:

The transitional provisions in this Act will enable the making of regulations which may modify this Act – a form of Henry VIII clause. It is acknowledged that these clauses are generally not preferable. In developing this Act, every attempt has been made to foresee issues arising in the transition. However, it is considered that this provision is necessary in this Bill as there is no practical alternative available to ensure that any unforeseen matters which might arise during the implementation of this Act’s provisions can be addressed expediently. This power is limited by time and is confined to the purpose of supporting the enactment of this Act.

1.65. The explanatory statement also outlines proposed subsection 601(2) as:

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

1.66. As the Committee has previously commented in response to Henry VIII clauses which have been justified in these same terms, a justification must be provided for why the Henry VIII clause is considered necessary, even as a form of transitional provision, in the particular Bill in question and in light of that Bill’s development and intended operation. Proposed subsection 601(1) provides for regulations to deal with transitional matters. As the explanatory statement recognises, this allows for regulations to deal with transition matters within “the same sphere of operation as the amended Act, be strictly ancillary to the operation of this Act and not widen the Act’s purpose”. Given the carefully considered scope of the Bill and the transition provisions already included, it is not clear to the Committee why it would be necessary, and appropriate, to widen the Act’s purpose to provide for measures not strictly ancillary to its operation. The Committee also notes that the transitional chapter, and consequently any amendments through regulation to that chapter, is due to expire in three years. However, as part of the transitional chapter, the period of expiry and subsequent effect of any amendments may be itself be amended through regulations.

1.67. **The Committee therefore asks for further information on why it was considered necessary to include the Henry VIII clause, and in particular what alternatives were considered and why they were not considered sufficient in the context of this particular Bill.**

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

## Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny? – Committee Resolution of Appointment paragraph (10)(a)(v)

### Incorporation of instruments and displacement of section 47(6) of the *Legislation Act 2001*

1.68. The proposed section 48 of the Bill will allow a Territory Plan to apply, adopt or incorporate a law of another jurisdiction or an instrument as in force from time to time, unless the territory plan provides otherwise. Subsection 47(6) of the *Legislation Act 2001* is disapplied, resulting in any instrument so incorporated not having to be made available on the Legislation Register as a notifiable instrument.

1.69. The explanatory statement accompanying the bill outlines the displacement as “necessary as the instruments issued under this section are regularly updated and it’s not appropriate to notify the instruments and all accompanying amendments on the ACT Legislation Register”. In summarising the Bill, the explanatory statement provides that disapplication of subsection 47(6):

would allow for the incorporation of instruments that may be subject to another organisation’s copyright. Any instruments incorporated would be continually monitored by on the Environment, Planning and Sustainability Directorate (EPSDD) and any relevant amendments communicated to applicants and the broader community. The Territory Plan is developed by EPSDD and is available on the EPSDD website and the legislation register to ensure transparency

1.70. Proposed section 96 similarly allows for the incorporation of an instrument as in force from time to time, and for the disapplication of subsection 47(6) of the *Legislation Act* as it might otherwise apply to any such instruments. The explanatory statement, in summarising the Bill, suggests:

Section 96(3) of the Bill was drafted to allow for the incorporation of instruments that may be required from time to time to guide the Design Review Panel’s functions. Instruments currently incorporated into the Panel’s terms of references include the CABI Design Review Best Practice Guidance, developed by the UK Design Council of Urban Design, the Urban Design Protocol for Australian Cities, and the Design Principles for the ACT. The disapplication of subsection 47(6) of the *Legislation Act* is necessary as these instruments are regularly updated and it would not be appropriate to notify the instruments and all accompanying amendments on the ACT legislation register. The disapplication of subsection 47(6) of the *Legislation Act* also allows for the incorporation of instruments that may be subject to another organisation’s copyright, although it is noted that no such instruments are currently incorporated. Any instruments incorporated will be continually monitored by EPSDD

and any relevant amendments will be communicated to Panel members, applicants and the broader community. The Design Principles for the ACT are developed by EPSDD and are available on the EPSDD website. To ensure transparency, reference is made in the Panel's rules, which are published on the EPSDD's website, to any instrument that is incorporated under section 96(2).

- 1.71. It is not clear to the Committee why it is considered not appropriate to notify these and other incorporated instruments and all accompanying amendments on the ACT legislation register – if anything their regular updating would increase the need to notify current versions and maintain the availability of previous versions and when they were applicable. The Committee also acknowledges that copyright may prevent the notification of some instruments. However, as the Committee has commented previously, copyright concerns may not apply to all instruments which may be incorporated under future regulations and hence would not justify the displacement of subsection 47(6) for all such instruments. The Committee has also suggested that, where copyright prevents notification of an incorporated instrument, that it be made available for public inspection or otherwise generally accessible.
- 1.72. The Committee also notes that the regulation-making power in proposed section 519 allows regulations to make provision about a matter by applying, adopting, or incorporating (with or without change) an instrument, or a provision of an instrument, as in force from time to time. Subsection 47(6) is displaced to such instruments. Proposed subsection 519(5) makes clear that instrument includes an Australian Standard of Australian/New Zealand Standard. There is no explanation provided in the explanatory statement for why it is considered necessary to provide for regulations to incorporate instruments as in force from time to time, and why subsection 47(6) is displaced for all incorporated instruments. It is also not clear to the Committee why instrument is defined to include Australian Standards in this proposed section but not in others.
- 1.73. The Committee also notes that proposed section 243 provides for the incorporation of instruments in offset management plans, but does not provide for the displacement of subsection 47(6). There is no explanation in the explanatory statement for why it is considered necessary to incorporate instruments as in force from time to time in offset management plans, but the continued application of subsection 47(6) is to be commended.
- 1.74. **The Committee therefore requests further information from the Minister on why it is considered necessary to provide for the incorporation of instruments as in force from time to time in each of proposed sections 48, 96, 243 and 519, and, where relevant, to displace subsection 47(6). The Committee also requests information on what other alternatives were considered before providing for the displacement of subsection 47(6), including why it is not sufficient to allow regulations which in turn may displace subsection 47(6) in relation to particular instruments where copyright or other reasons prevent notification, subject to review by this Committee. The Committee recommends that the explanatory statement be amended to include this information.**

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

## Transport Canberra and City Services Legislation Amendment Bill 2022

1.75. This Bill will make minor or technical updates to various legislation relating to city services, including the *Cemeteries and Crematoria Act 2020*, *Litter Act 2004*, *Plastic Reduction Act 2021*, and *Veterinary Practice Regulation 2018*.

### 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)

- 1.76. The Bill will amend, either directly or consequently, various strict liability offences in three Acts, namely:
- *Cemeteries and Crematoria Act*: the Bill will amend strict liability offences relating to failing to maintain a register with details of burial, cremation and interment, etc. Details of who collected cremation remains will have to be kept in a secure electronic database, but will no longer have to be made available to the public;
  - *Litter Act*: exemptions to current strict liability offences relating to littering and illegal dumping will be clarified to only permit depositing materials at public landfills or waste facilities in accordance with the requirements for dumping litter at that location. The offence of failing to properly secure a load in a moving vehicle will also be clarified to apply to failing to secure any part of the load; and
  - *Veterinary Practice Regulation*: the Bill proposes to expand the existing list of restricted acts of veterinary science in Schedule 1, Part 1.2 of the Regulation, which, under section 10 of the *Veterinary Practice Act 2018*, can give rise to the strict liability offence of carrying out a restricted act of veterinary science on an animal without being a registered veterinarian.
- 1.77. The explanatory statement accompanying the Bill recognises that these amendments may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA, and provides for why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.78. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Proposed Amendments - Comment

### Drugs of Dependence (Personal Use) Amendment Bill 2021

Right to recognition and equality before the law (section 8 HRA)

Right to take part in public life (section 17 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.79. The Committee has received proposed amendments to the *Drugs of Dependence (Personal Use) Amendment Bill 2021* and the proposed government amendments to the Bill from Johnathan Davis MLA. These proposed amendments to the Bill would create an exception for persons over the age of 18 to the Bill's offences of possessing less than the personal possession limit of a drug of dependence or a prohibited substance. The proposed amendments would also increase the personal possession limits for the drugs of dependence listed in the Bill and provide for a review into the operation of the Bill after the second year of operation. The proposed amendments to the proposed government amendments would allow attendance requirements for an approved drug diversion program to be met through attending the first session of the program.
- 1.80. By creating an exception to offences in the Bill which places an evidential burden on the defendant, the proposed amendments may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA. Limiting the exception to persons over the age of 18 may also limit the right to equality before the law which is protected by section 8 of the HRA. By requiring the review into the operation of amendments contained in the Bill be carried out by someone with expertise in relation to people who use drugs or substances to which the Act applies and who is not a public servant, the proposed amendments may limit the right to take part in public life protected by section 17 of the HRA.
- 1.81. The explanatory statement accompanying the proposed amendments includes a general description of the purpose and background of the proposed amendments. However, in the Committee's view, recognition of the potential human rights limitations and why they should be consideration reasonable should also be included.
- 1.82. The Committee therefore requests further information from the Member as to the nature of the rights limited by the proposed amendments and why any limitations should be considered reasonable using the framework in section 28 of the HRA. The Committee also requests that consideration be given to including this information in the explanatory statement accompanying the proposed amendments.

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

## 2. Subordinate Legislation

### Disallowable Instruments – No comment

- 2.1. The Committee has examined the following disallowable instruments and has no comments on them:
- **Disallowable Instrument DI2022-176** being the Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment Revocation 2022 (No 1) made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* and section 208 of the *Legislation Act 2001*.
  - **Disallowable Instrument DI2022-182** being the Board of Senior Secondary Studies Appointment 2022 (No 4) made under section 8 of the *Board of Senior Secondary Studies Act 1997*.
  - **Disallowable Instrument DI2022-184** being the Official Visitor (Disability Services) Appointment 2022 (No 2) made under paragraph 10(1)(c) of the *Official Visitor Act 2012*.
  - **Disallowable Instrument DI2022-186** being the Children and Young People (Death Review Committee) Chair Appointment 2022 (No 1) made under section 727E of the *Children and Young People Act 2008*.

### Disallowable Instruments – Comment

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

#### Human Rights Issues

- **Disallowable Instrument DI2022-177** being the Road Transport (General) Application of Road Transport Legislation Declaration 2022 (No 6) made under section 13 of the *Road Transport (General) Act 1999*.
- 2.3. The instrument 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. The instrument declares that the *Motor Accident Injuries Act 2019* and also various specified provisions of the road transport legislation do not apply (in certain circumstances) to the Motor Neurone Disease Research Australia – Canberra Rally 2022, taking place on 30 and 31 July 2022.
- 2.4. The Committee notes that the explanatory statement for the first instrument contains the following discussion of human rights issues, focussing on the right to move freely within the ACT, protected by section 13 of the *Human Rights Act 2004*:

#### Human rights implications

Due regard has been given to the effect of this instrument and the operation of the event 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.

This instrument does not of itself restrict a person's freedom of movement within the Territory, however the operation of the event will close to members of the general public the parts of the forest in which the event will be conducted. This 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 the safety of non-participants and represents the least restrictive approach that enables the event to proceed.

- 2.5. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.6. **This comment does not require a response from the Minister.**

## **Disapplication of subsection 47(5) of the *Legislation Act 2001* / Human Rights Issues**

- **Disallowable Instrument DI2022-178** being the Children and Young People (Work Experience) Standards 2022 (No 1) made under section 887 of the *Children and Young People Act 2008*.
- 2.7. This instrument makes standards, under section 887 of the *Children and Young People Act 2008*. The explanatory statement for the instrument states that the standards “provide the framework for work experience programs conducted by schools and educational institutions in the ACT”.

- 2.8. Section 4 of the instrument disapplies subsection 47(5) of the *Legislation Act 2001*. The Committee notes that the effect of this is addressed in the explanatory statement for the instrument, which states:

**Disapplication of Legislation Act, s 47(5)**

The ACT Education Directorate’s Workplace Learning Program Guidelines and Requirements 2018 are incorporated into this instrument (see s 4). The Legislation Act, s 47(5) provides that such incorporated material is taken to be a notifiable instrument.

A notifiable instrument must be notified on the legislation register under the Legislation Act. However, the Legislation Act, s 47(5) may be displaced by the authorising law (the Act) or the incorporating instrument (this instrument) (see Legislation Act, s 47(7)).

The Legislation Act, s 47(5) is displaced here because ACT Education Directorate’s Workplace Learning Program Guidelines and Requirements 2018 is accessible on the Directorate’s website, therefore, there is no need to publish the guidelines on the legislation register.

- 2.9. **The comment immediately above does not require a response from the Minister.**

- 2.10. The Committee notes that the explanatory statement for the instrument does not address potential human rights implications of the instrument, including not containing a statement that there are *no* human rights implications. Given the subject matter – students, including issues such as the supervision of students and the duty of care owed to students – the Committee is surprised that human rights issues, including the protection of the family and children and the right to education, protected by sections 11 and 27A of the *Human Rights Act 2004*, respectively, are not addressed in the explanatory statement for the instrument.

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

**This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly’s capacity to move to disallow the instrument expires.**

## Displacement of subsection 47(6) of the *Legislation Act 2001*

- **Disallowable Instrument DI2022-179** being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2022 made under section 139 of the *Taxation Administration Act 1999*.
- 2.12. This instrument, made under section 139 of the *Taxation Administration Act 1999*, determines differential amounts of duty payable on the application to register a motor vehicle. The explanatory statement for the instrument states:

### Vehicle Emission Reduction Scheme

The Vehicle Emission Reduction Scheme (VERS) charges duty based on four rating categories (A, B, C and D). The rating category of a motor vehicle depends on its environmental performance as measured by the grams of carbon dioxide (CO<sub>2</sub>) emitted by the vehicle per kilometre.

The focus on CO<sub>2</sub> emissions allows consumers to better understand the environmental impact of a new vehicle.

- 2.13. The Committee notes that section 5 of the instrument displaces subsection 47(6) of the *Legislation Act 2001*. This is addressed in the explanatory statement for the instrument, which states:

#### **Displacement of *Legislation Act 2001*, section 47(6)**

As the CO<sub>2</sub> emissions of motor vehicles under this instrument are ascertained by reference to the [Green Vehicle Guide], this instrument incorporates those details as in force from time to time.

Section 47(6) of the *Legislation Act 2001* (Legislation Act) provides that an incorporated instrument, and any amendment or replacement of such an instrument, are taken to be notifiable instruments. A notifiable instrument must be notified on the legislation register under the Legislation Act.

However, for the purpose of determining a rate for motor vehicle duty, section 208 (3) permits a determination under section 139 of the TAA to apply, adopt or incorporate an instrument as in force from time to time.

As the GVG is amended frequently (whenever a new vehicle model becomes available for sale, which can be as frequent as two to three times per week), section 5 of this instrument displaces section 47 (6) of the Legislation Act.

If section 47 (6) of the Legislation Act were not displaced, the text of the GVG would have to be remade as a new notifiable instrument every time the GVG is amended.

The displacement ensures that the current version of the GVG always applies for the purposes of the instrument, removing the need to remake it as a notifiable instrument whenever it is amended by the Commonwealth.

- 2.14. **The Committee notes that it is increasingly concerned about the disapplication of subsection 47(6) of the *Legislation Act 2001*, generally, and has written to the Attorney-General, to raise those concerns. In the light of those concerns, the Committee requests further information from the Minister as to why it is considered necessary to subsection 47(6). The Committee also requests information on what other alternatives were considered before providing for the displacement of subsection 47(6). The Committee recommends that the explanatory statement be amended to include this information.**

**This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly's capacity to move to disallow the instrument expires.**

## Human Rights Issues

- **Disallowable Instrument DI2022-180** being the Road Transport (General) (Pay Parking Area Fees) Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
  - **Disallowable Instrument DI2022-189** being the Road Transport (General) Vehicle Registration and Related Fees Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
  - **Disallowable Instrument DI2022-190** being the Road Transport (General) Driver Licence and Related Fees Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
  - **Disallowable Instrument DI2022-191** being the Road Transport (General) Numberplate Fees Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
  - **Disallowable Instrument DI2022-192** being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
  - **Disallowable Instrument DI2022-193** being the Road Transport (General) (Parking Permit Fees) Determination 2022 (No 2) made under section 96 of the *Road Transport (General) Act 1999*.
- 2.15. The Committee notes that the explanatory statements for each of the instruments mentioned above contains a statement to the effect that there are no human rights issues arising from the instrument.
- 2.16. The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned above.
- 2.17. **This comment does not require a response from the Minister.**

## Retrospectivity / Disapplication of subsections 47(5) and (6) of the Legislation Act 2001 / Human Rights Issues

- **Disallowable Instrument DI2022-181** being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2022 made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*.

- 2.18. This instrument is made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*. That Act establishes the Australian Capital Territory’s Energy Efficiency Improvement Scheme (EEIS), which (according to the explanatory statement for the instrument) “aims to encourage the efficient use of energy; reduce greenhouse gas emissions associated with energy use in the Territory; reduce household and small-to-medium sized business energy use and costs; and increase opportunities for priority households to reduce energy use and costs.” The explanatory statement for the instrument goes on to state:

The EEIS establishes a Territory-wide Energy Savings Target (EST), defined as a proportion of a retailer’s total electricity sales in the ACT.

The Act requires individual electricity retailers to achieve energy savings by delivering eligible activities to households and small-to-medium enterprises. The purpose of the Determination is to establish the eligible activities that can be undertaken by energy retailers to achieve the EST. The Determination is a disallowable instrument made under the Act, section 10.

This Determination retains the suite of EEIS Eligible Activities previously legislated but contains the following amendment to clauses 3.1 and 3.2 of Schedule 1 ...

- 2.19. The explanatory statement then lists the amendments, in a table. The explanatory statement sums up the effect of the amendment as follows:

The amendment is to adjust the minimum Small-scale Technology Certificates (STCs) required under the Determination in line with the Renewable Energy (Method for Solar Water Heaters) Determination 2016 (the Regulation) to reinstate appropriate eligibility and achievement of Energy Savings Factors (ESFs). The Regulation was updated by the Clean Energy Regulator in December 2021 (with the changes coming into effect on 1 January 2022) to implement an incremental reduction in the deeming period (number of years of operation the technology is credited for) for Solar Water Heaters and Air Source Heat Pumps for all systems installed after 1 January 2022. This change will reduce the number of STCs that systems are eligible for. This does not reflect any decline in the efficiency of these systems. Several commonly installed hot water heat pumps (HWHP) that were previously eligible under this activity are currently excluded due to the reduction in STCs credited to HWHP to reflect the decreased deeming period. There has been no change to the performance of these systems nor their ability to provide energy savings under the EEIS. In addition to revising the minimum STCs required under the Determination in the line with the Regulation, this amendment revises the method for calculating ESFs for affected activities to ensure the ESFs acquired for undertaking a specified activity are restored to eligible amounts as were achieved prior to the amended Regulation.

- 2.20. Section 2 of the instrument provides that the instrument (which was made on 2 August 2022) is taken to have commenced on 1 January 2022. This retrospective operation –

which is generally prohibited by section 76, unless “non-prejudicial” – is addressed in the explanatory statement, which states:

To ensure consistency with the Commonwealth legislation and to avoid unreasonable negative impacts on retailers delivering the activities, the Determination is taken to have commenced on 1 January 2022.

2.21. The Committee notes that while the issue of non-prejudicial operation is not expressly addressed (which would have been preferable), the content of the explanatory statement indicates that it is either beneficial or of no effect to those to whom the instrument applies.

2.22. **The comment immediately above does not require a response from the Minister.**

2.23. The Committee notes that section 4 of the instrument disapplies subsections 47(5) and (6) of the *Legislation Act 2001*. This is addressed in the explanatory statement for the instrument, which states:

Clause 4 disapplies the *Legislation Act 2001*, section 47(5) and (6). This section is disapplied because it stipulates that any external text which is to be applied as law in the ACT needs to be republished as a notifiable instrument. It is not possible to republish text contained in Australian Standards documents as they are protected by copyright. It is not practical to republish information in the National Construction Code as it contains over 400 pages of information across 4 volumes.

2.24. **The Committee notes that it is increasingly concerned about the disapplication of subsection 47(6) of the *Legislation Act 2001*, generally, and has written to the Attorney-General, to raise those concerns. In the light of those concerns, the Committee requests further information from the Minister as to why it is considered necessary to subsection 47(6). The Committee also requests information on what other alternatives were considered before providing for the displacement of subsection 47(6). The Committee recommends that the explanatory statement be amended to include this information.**

**This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly’s capacity to move to disallow the instrument expires.**

2.25. The Committee notes that the explanatory statement states that the instrument “does not engage the *Human Rights Act 2004*”.

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

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

## Retrospectivity / Human Rights Issues

- **Disallowable Instrument DI2022-183** being the Plastic Reduction (Single-use Plastic

Products—Special Circumstances) Exemption 2022 (No 2) made under section 17 of the *Plastic Reduction Act 2021*.

2.28. This instrument is made under section 17 of the *Plastic Reduction Act 2021*, which allows the Minister to exempt persons or products from the general prohibition on single use plastic products if satisfied of various matters, including that “it is not practicable or in the public interest for the person to comply with the [prohibition]”, “it is not consistent with the person's human rights for the person to comply with the [prohibition]” and “noncompliance with the [prohibition] will not have any significant adverse effect on public health, property or the environment.” This instrument exempts the use of single use cutlery in certain health circumstances.

2.29. The explanatory statement for the instrument states:

This instrument acknowledges that alternatives to single-use plastic cutlery such as wood or bamboo can be more readily weaponised. In certain settings, this may impact on the right to life under the *Human Rights Act 2004*.

This instrument provides an exemption to allow single-use plastic cutlery to be supplied in certain settings where the use of alternatives may present a risk to safety. Specifically, it exempts persons employed or otherwise engaged at detainee facing settings and mental health service settings from the prohibition on supplying single-use plastic cutlery. The effect of this instrument is to continue an existing exemption (see the Plastic Reduction (Single-use Plastic Cutlery – Special Circumstances) Exemption 2021 (No 1), which expired on 30 June 2022). The new instrument does not explicitly refer to some of the settings referred to in the previous instrument. This is to reflect the fact that single-use plastic cutlery is no longer routinely used in these settings.

It is not practicable for the persons exempted to comply with the provision because the alternatives to single-use plastic cutlery have different physical characteristics, which means they can present a risk to safety.

Noncompliance with the provision will not have an adverse effect on property. It will not have an adverse effect on public health and will have a positive effect on health as it exists to prevent harm that could arise were the exemption not in place.

Allowing single-use plastic cutlery to be supplied in certain situations will not have a significant effect on the environment because the number of plastic cutlery items supplied in these situations is small compared to the overall quantity of plastic in the ACT.

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

2.31. **The comment immediately above does not require a response from the Minister.**

2.32. The Committee notes that section 2 of the instrument provides that the instrument (which was made on 3 August 2022) is taken to have commenced on 1 July 2022. This retrospective operation – which is generally prohibited by section 76, unless “non-prejudicial” – is addressed in the explanatory statement, which states:

The instrument is taken to have commenced on 1 July 2022. Part 17(5) of the Act provides that an exemption may commence on a day earlier than its notification day. The exemption provisions are not prejudicial as they do not operate to the disadvantage of a person by adversely affecting the person's rights or imposing liabilities on the person. They operate to the advantage of persons because they exempt certain persons from certain offence provisions.

2.33. **The comment immediately above does not require a response from the Minister.**

## Minor drafting issue

- **Disallowable Instrument DI2022-185** being the Legal Aid (Commissioner—Specialist Assistance) Appointment 2022 made under section 16 of the *Legal Aid Act 1977*.
- **Disallowable Instrument DI2022-187** being the Legal Aid (Commissioner—Financial Management) Appointment 2022 made under paragraph 16(1)(c)(v) of the *Legal Aid Act 1977*.
- **Disallowable Instrument DI2022-188** being the Legal Aid (Commissioner—Bar Association Nominee) Appointment 2022 made under section 16 of the *Legal Aid Act 1977*.

2.34. Each of the instruments mentioned above appoints a specified person as a member and commissioner of the Board of the Legal Aid Commission. Section 3 of each instrument appoints the specified person as “a part-time member and commissioner” of the Board.

2.35. The appointments are made under section 16 of the *Legal Aid Act 1977*. The Committee notes that there is no reference in section 16 to appointing “part-time members” – only “members”. As the Committee has pointed out, several times, in relation to previous appointments under this provision, the only reference to “part-time” is in subsection 16(4), which provides that “[a] person appointed as a member by the Minister is appointed on a part-time basis”. However, in a formal sense, this does not mean that persons are appointed as “a part-time member”.

**This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly's capacity to move to disallow the instrument expires.**

## Government Responses - Comment

### Workplace Legislation Amendment Bill 2022

- 2.36. The Committee commented on the *Workplace Legislation Amendment Bill 2022* in its Scrutiny Report 18 and asked for the Minister to respond to a number of concerns raised. The Minister responded to the Committee's requests in a letter received by the Committee on 26 September 2022. The Committee thanks the Minister for his detailed response.
- 2.37. In its report, the Committee raised concerns over the potential impact of amendments to the *Work Health and Safety Act 2011* on the protection of privacy. The Bill would add a requirement to notify a sexual assault incident to the regulator. The Committee acknowledged the range of protections included in the Bill against disclosing the identity of any person involved in the incident, but raised concerns that these may not prevent disclosure and recording of information that may reasonably be used to identify the persons involved in the sexual assault. The range of protections reiterated by the Minister in his response do not clearly address this distinction between direct and indirect identification.
- 2.38. The Minister points out that guidance from Safe Work Australia suggests records of a sexual assault incident, which must be kept for at least five years under the offence in subsection 38(7), may lawfully be limited to a record of the notification provided to the regulator. Even accepting this interpretation, it does not extend to preventing more extensive records from being kept which include the identity of the persons involved in the incident.
- 2.39. The Committee remains concerned about the limited protections that may be provided by other legislation. Small business operators (with an annual turnover of less than \$3,000,000) are generally not included in the organisations subject to the *Privacy Act 1988* (Cth). The *Information Privacy Act 2014* applies only to ACT public sector agencies. The *Health Records (Privacy and Access) Act 1997* applies to the collection of health records and health services providers.
- 2.40. In its report, the Committee also raised concerns over clause 50 of the Bill. This clause will amend the *Work Health and Safety Regulation 2011* to require logbooks of amusement devices include the name and address of the operator and details of the training they have received and their instructor. The Committee considered that this amendment may potentially limit the protection of privacy provided by section 12 of the HRA and therefore the explanatory statement accompanying the Bill should include a discussion of why any limit should be considered reasonable using the framework set out in section 28 of the HRA. The Committee thanks the Minister for the justification provided in response to the Committee's comments, but the Committee remains concerned that this information is not included in the explanatory statement accompanying the Bill.
- 2.41. The Committee's concerns about clause 44 of the Bill, and the insertion of proposed section 271A which will provide for additional ways in which the regulator may use and share information, has not been addressed in the Minister's response.

- 2.42. The Committee also raised concerns in its report over the lack of explanation for the Bill's inclusion of some offences with strict liability elements and the use of negligence as a fault element. The use of strict liability and negligence as a fault element may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. The Committee thanks the Minister for the detailed description in his response of the background and justification for the use of these elements in the offences.
- 2.43. The Committee also raised concerns in its report with the sufficiency of the outline of provisions in the explanatory statement. The Committee commented that the outline of provisions should include a general description of the clause and its impact on the Act being amended to assist the reader to understand why the clause has been included in the Bill, how it relates to other provisions of the Bill and existing legislation, and what impact the clause is likely to have. This is particularly important in an omnibus Bill such as this which makes amendments across a number of Acts and Regulations for a variety of purposes.
- 2.44. The Minister has responded by suggesting that the detail provided in the outline section provides a sufficient explanation about the changes when read in conjunction with the Bill. The Committee remains concerned that, far from providing a sufficient explanation, the outline of many provisions does not provide any explanation at all.
- 2.45. The Committee recognises the Minister's comments that, given his response will be publicly available on the Legislation Register, in his view there was no need to amend the explanatory statement to include the additional justification for the Bill's potential limit on rights in criminal proceedings. However, the Committee remains of the view that this justification, along with the recognition and justification for the Bill's various impacts on privacy, should generally be included in the explanatory statement accompanying the Bill. Together with the need to amend the outline of provisions the Committee recommends that further consideration be given to providing an amended explanatory statement.
- 2.46. The Committee therefore requests a further response from the Minister on why the amendments to section 38 of the Work Health and Safety Act included in the Bill could not be extended, where possible, to protect against disclosure of information which could reasonably be used to identify persons involved in the incident in question, and to make it clear that any record maintained of the incident must not include information identifying the persons involved. The Committee also requests that further consideration be given to providing an amended explanatory statement.

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

## Government responses – no comment

- Integrity Commission Amendment Bill 2022

The responses can be viewed [online](#).

The Committee wishes to thank the Ministers for the helpful responses.

Peter Cain MLA  
Chair  
4 October 2022

# Outstanding responses

## Bills/Subordinate Legislation

### Report 12, dated February 2022

#### Bills

- Electoral Amendment Bill 2021
- Financial Management Amendment Bill 2021 (No 2)

### Report 20, dated 13 September 2022

#### Bills

- Climate Change and Greenhouse Gas Reduction (Natural Gas Transition) Amendment Bill 2022 [response required prior to the Bill being debated]
- Period Products and Facilities (Access) Bill 2022 [response required prior to the Bill being debated]
- Senior Practitioner Amendment Bill 2022 [response required prior to the Bill being debated]
- Urban Forrester Bill 2022 [response required prior to the Bill being debated]

#### Subordinate Legislation

- Disallowable Instrument DI2022-67 being the Plastic Reduction (Single-use Plastic Products) Exemption 2022 [response required before Legislative Assembly's capacity to move to disallow instrument expires]
- Working with Vulnerable People Background Checking (Fees) Determination 2022 (No 1) [DI2022-70] [response required before Legislative Assembly's capacity to move to disallow instrument expires]
- Electoral (Fees) Determination 2022 [DI2022-71] [response required before Legislative Assembly's capacity to move to disallow instrument expires]
- Victims of Crime (Fees) Determination 2022 (No 1) [DI2022-101] [response required before Legislative Assembly's capacity to move to disallow instrument expires]
- Juries (Payment) Determination 2022 [DI2022-107] [response required before Legislative Assembly's capacity to move to disallow instrument expires]