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

SCRUTINY REPORT 7

27 JULY 2021
THE COMMITTEE

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ROLE OF COMMITTEE

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

(10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:

(a) considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
   (i) unduly trespass on personal rights and liberties;
   (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   (iv) inappropriately delegate legislative powers; or
   (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
   (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;

(b) reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the Human Rights Act 2004;

(c) considering whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
   (i) is in accord with the general objects of the Act under which it is made;
   (ii) unduly trespasses on rights previously established by law;
   (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
   (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and

(d) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly;
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BILLS

BILL—NO COMMENT

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

SENIOR PRACTITIONER AMENDMENT BILL 2021

This Bill amends the Senior Practitioner Act 2018. Currently, the Act must be reviewed and a report presented to the Minister as soon as practicable after the Act’s third year of operation (ie after 1 September 2021). The Bill will delay that report until after the Act’s fifth year of operation (ie after 1 September 2023). The explanatory statement accompanying the Bill states that the delay is intended to allow for a more robust review to be carried out using data collected from embedded practices in the ACT.

BILL—COMMENT

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

CARERS RECOGNITION BILL 2021

This Private Members Bill will establish principles relating to the treatment of people in care relationships and require care, and require carer support agencies to uphold and report on compliance with those principles.

*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 RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill generally applies to carers and care relationships. A carer will be defined as someone who cares for another person for various reasons, including that the other person has a disability, mental illness, ongoing medical condition, or is aged and frail, or the carer is a kinship or foster carer for a child or young person. The care relationship principles include reference to whether the carer is a child or young person, Aboriginal or Torres Strait Islander person, LGBTIQ+, culturally or linguistically diverse, or has a disability. The Bill will therefore draw a distinction between carers and non-carers, and within carers. However, it is not clear to the committee whether this will provide any advantage to carers included by the Bill or disadvantage others who may similarly be in need of recognition.

The Bill places obligations on care and carer support agencies. These are defined to include public sector entities—including Ministers, statutory office-holders, and territory authorities—that are responsible for the assessment, planning, delivery, management and review of support services, programs or policies in relation to people in care relationships. Other entities, funded by such public sector entities, which are responsible for providing a support service or program that directly impacts on people in care relationships, or contracted or funded by such entities to
provide a support service, are also included. These care and carer support agencies will have various obligations placed on them in relation to the care relationship principles set out in the Bill. These include taking all practicable measures to ensure that the agency’s employees and agents and those receiving support services are aware of the principles, and that the agency and its employees and agents uphold those principles. The principles must also be considered when developing the agency’s internal human resources policies. An agency must also consult with carers receiving support services from the agency and an entity representing carers when planning or reviewing support services and programs.

It is not made clear in the explanatory statement why the principles should only apply while developing internal human resources policies to care and carer support agencies. Similarly, it is not clear why obligations of consulting with carers is included in circumstances where the person being cared for, or others potentially affected by the planning or review, may not have to be consulted.

However, it is also not clear how the obligations imposed by the Bill are intended to be enforced. The Bill includes various provisions limiting the obligations imposed by the Bill. Proposed subsection 10(3) makes it clear that agencies will not be required to provide financial assistance or services to people in care relationships. Under proposed section 12, there is no intention to create in any person any legal right or give rise to any civil cause of action. Under proposed section 13, other territory legislation will prevail over any inconsistent provisions in the Bill (other than provisions relating to reporting). Public sector agencies have to include a report on promotion and compliance with the care relationship principles in their annual report, and funded support agencies have to similarly report publicly in some way. However, secondary funded agencies just have to consider making the report publicly available. It is therefore not clear to whom, if anyone, the agencies are reporting to, and what consequences follow from not reporting as required.

It is also not clear how the obligations on agencies may affect their legal authority in relation to provision of support services, including whether upholding the principles may result in the invalidity of decisions taken under other legislation in circumstances where the principles may not be considered inconsistent with that legislation.

The obligation to uphold the care relationship principles and report on compliance may also require an agency to inquire about potential carers and persons who they are caring for. There is no requirement for the agency to be providing carer support services to the person being cared for or to already have access to information about the carer. The Bill may therefore potentially limit the protection of privacy protected by section 12 of the HRA.

The Committee therefore requests further information from the Member on how the obligations included in the Bill are intended to be enforced, and the extent to which those obligations will extend to collecting potentially sensitive personal information.

The Committee draws this matter to the attention of the Assembly, and asks the Member to respond.
CRIMES LEGISLATION AMENDMENT BILL 2021

This Bill amends various Acts relating to criminal justice to improve their clarity and effectiveness.

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)

RIGHT TO FREEDOM OF MOVEMENT (SECTION 13 HRA)

The Crimes (Child Sex Offenders) Act 2005 includes various restrictions and reporting requirements for registrable offenders. Registrable offenders are generally offenders who have committed sexual offences involving children. Registration is intended to prevent future harms by informing police, and preventing certain forms of employment or engaging in conduct that presents a risk to children. Registration requires initial and ongoing reporting requirements including personal information, movements into and out of the Territory, and the nature and changes to employment. It also involves the recording of personal information and possible public disclosure in situations where there has been a failure to report. The Act includes various entry and search powers to enforce requirements relating to registration, and authorises the issue of orders prohibiting conduct which poses a risk to lives or sexual safety of children.

The Bill will add the Commonwealth offence of possessing child-like sex dolls\(^1\) to the list of class 2 offences which can lead to registration under the Act. By adding to the range of offences which can give rise to registration, the Bill therefore limits the right to equality protected by section 8 of the HRA, protection of privacy provided by section 12 of the HRA, and right to freedom of movement protected by section 13 of the HRA. The explanatory statement recognises these potential limitations and provides a justification 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 reference in the explanatory statement to evidence indicating that the offence of possessing child-like dolls can be the first of potentially escalating steps leading to harm to children, and inclusion in the Bill of an exception to registration where the court considers that the person does not pose a risk to the lives or sexual safety of children.

The Committee notes that registrable offenders may be restricted in the employment they can pursue, including being prohibited from being in a stated employment or kind of employment that is likely to bring the person into contact with children (see from example section 132F). The amendments may therefore limit the right to work protected by section 27B of the HRA. Consideration should be given to amending the explanatory statement to include reference to this potential limitation and its justification.

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

The Bill will amend the *Crimes (Surveillance Devices) Act 2010* to authorise the use of body-wound cameras by police officers in the course of their duties. The cameras must be used when dealing with members of the public, subject to exceptions including where use is not reasonably practicable, would be a risk to a person’s safety or would unreasonably limit a person’s privacy. The use must be overt except where used when the officer draws or uses a firearm or taser, or would be a risk to safety. The cameras must be used in accordance with guidelines issued by the Chief Police Officer. These guidelines must include requirements for the storage, use and disposal of recordings from the cameras and how those recordings may be accessed under any applicable laws, guidance on when cameras may or must be used, and how human rights have been considered in making the guidelines as well as any other relevant matter. Guidelines will be a disallowable instrument.

The Bill will also amend the *Listening Devices Act 1992* to include authorisation by any law in force in the ACT as an exception to offences relating to the use of listening devices in private conversations and communication of recordings made.

By allowing use of body-worn cameras by police officers in the course of their official duties, the Bill will significantly limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this limitation and provides a justification for why any interference with privacy should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the following comment, the Committee refers that statement to the Assembly.

The Committee recognises the privacy protections included in the Bill, but is concerned that substantial protections will also be included in the guidelines. Details of the guidelines have not been included in the Bill nor provided to the Committee. The explanatory statement does not provide a justification for why it is necessary for the substantive protections included in the guidelines to not be included in the Bill rather than developed by the Chief Police Officer through a disallowable instrument.

The Committee also notes that the Bill does not provide for additional means of enforcement of the guidelines. The explanatory statement refers to the guidelines possibly including “expectations on complaints processes and reporting” and regular review of complaints regarding use of the cameras. In particular, it is not clear how accountability of police officers will be ensured through, for example, providing appropriate access to the recordings. The Committee is also concerned that the use of body worn cameras will be compatible with the right to a fair trial protected by section 21 of the HRA, noting that the recordings obtained through the use of body worn cameras will generally not be subject to the protections and exceptions set out in division 5.1 of the Crimes (Surveillance Devices) Act and Part 6 of the Commonwealth *Surveillance Devices Act 2004* (Cth).

The Committee therefore requests further information on why the substantive protections to privacy and other human rights affected by the use of body-worn cameras have not been included in the Bill.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond before the Bill is debated.
RIGHT TO HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY (SECTION 19 HRA)

The Bill will also amend the Inspector of Correctional Services Act 2017. The inspector of correctional services carries out inspections of correctional centres and detention places. Currently, each place has to be inspected every two years. The Bill will extend this to every three years for the second and subsequent inspections. As this may extend the period in which human rights concerns may be identified and corrected, it may limit the right to humane treatment when deprived of liberty protected under section 19 of the HRA.

The explanatory statement accompanying the Bill recognises this potential limitation and provides a justification for why it should be considered reasonable. In particular, the explanatory statement refers to the amendment coming at the request of the inspector, “informed by experience from the first years of operation of the Inspectorate, to ensure that an appropriate period of time is allowed for the full implementation of recommendations before the commencement of a subsequent cyclical review”. The Committee refers that statement to the Assembly.

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

The Bill will also amend the Terrorism (Extraordinary Temporary Powers) Act 2006 to extend its operation for an additional 12 months. The Terrorism (Extraordinary Temporary Powers) Act substantively commenced on 19 November 2006, and is due to expire on 19 November this year. This will be the third such amendment.2

The Act provides extraordinary temporary powers to prevent and respond to terrorist acts, including the issue of preventive detention orders which permit detention of a person for up to 14 days to prevent an imminent terrorism act or preserve evidence of a past terrorism act, and special authorisations of extensive search and entry powers. Extending the operation of the Act may therefore limit numerous human rights protected under the HRA.

The explanatory statement accompanying the Bill recognises this potential limitation, but merely refers to the justification provided in the original explanatory statement accompanying introduction of the Act. There is no justification given for the extension of 12 months. The Committee notes that a report on the operation and effectiveness of the Act was originally due to be presented to the Assembly before the end of the Act’s 14th year of operation. This was extended by the COVID-19 Emergency Response Legislation Amendment Act 2020 to allow the report to be presented no later than 19 May 2021. The report on the statutory review of the Act was tabled in the Assembly on 13 May 2021.3 That report concluded:

4.1 No specific amendments were proposed by stakeholders, though the ongoing concern by stakeholders about the importance of preventing rights intrusions was clear. Given that extension of the Act was not universally supported and noting the extraordinary nature of the powers in the Act, it is appropriate to give further consideration to opportunities for change that might enhance the right to personal liberty while still ensuring the safety and security of the community.

2 The Act was originally intended to operate for five years: see Terrorism (Extraordinary Temporary Powers) Amendment Act 2011 s 10 and Terrorism (Extraordinary Temporary Powers) Amendment Act 2016 s 5.

4.2 That work will include careful consideration of any protections afforded in the legislation of other jurisdictions and be undertaken before the sunsetting of the Act, later this year.

The Committee therefore requests further information on why it is considered necessary and proportionate to extend the operation of the Act for an additional year, and consideration be given to including that information in the explanatory statement.

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

DOMESTIC VIOLENCE AGENCIES AMENDMENT BILL 2021

This Bill amends the Domestic Violence Agencies Act 1986 to establish the role of the Domestic and Family Violence Review Coordinator to identify preventative measures to reduce family violence, increase recognition of the impact of family violence and the context in which it occurs, and make recommendations to the Minister.

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 provides for the establishment of a register of incidents resulting in death or serious harm in circumstances involving family violence in the ACT or involving ACT residents. The register will include personal identifying information, circumstances of the incidents, health information relevant to family violence, criminal history, history of family violence, and interactions with community-based service. The coordinator will also be able to ask information of relevant entities including police, Territory administrative units and community-based services, and can require, by written notice, information from anyone where that information is necessary for the coordinator to exercise their functions. Information collected by the coordinator can be shared with advisory committees, independent advisers, other public servants delegated functions under the Act, corresponding State entities and with the Coroner’s Court. The coordinator must also produce reports, at least biennially, about domestic and family violence incidents which will be tabled in the Assembly.

The Bill will therefore limit the protection of privacy provided in section 12 of the HRA. The explanatory statement accompanying the Bill provides a comprehensive justification for why these limits should be considered reasonable using the framework in section 28 of the HRA, noting in particular the various protections limiting the use and disclosure of personal information collected under the Act. The Committee commends the Minister on the thoroughness of that statement and, subject to the following comments, refers that statement to the Assembly.

Under proposed section 16O, the coordinator will be empowered to ask, in writing, a relevant entity to give the coordinator information they hold which is considered reasonably necessary to determine whether an incident of domestic or family violence has taken place or otherwise exercise the coordinator’s functions. They generally need the consent of the person harmed in the incident. A relevant entity must comply within no more than 15 working days unless they provide a reasonable excuse. Relevant entities include community-based services. The meaning of “community-based service” is not defined, and there is no express means of enforcing these obligations. The Committee also notes that proposed section 16X provides the coordinator, and persons acting under their
direction, with immunity from civil liability for honestly and without recklessness exercising functions under this Act. It is not clear if this is intended to protect relevant entities, or indeed other persons, providing information to the coordinator in response to a request or requirement to provide information.

The Bill will also provide for the coordinator to prepare biennial and other reports. These reports must not disclose the identity of persons involved in registered incidents or allow the identity of such persons to be easily worked out. It is not clear to the Committee why the requirements to de-identify information in these reports does not extend to any personal information collected by the coordinator in the exercise of their functions under the Act not otherwise publicly available. Restrictions on disclosure should at least extend to not allowing the identity of the person to be reasonably identifiable as provided for in the Information Privacy Act 2014.

The Committee therefore asks for further information on the meaning of community-based service, the extent the obligation to provide information under proposed section 16O will be enforced in the absence of a requirement to provide information issued under proposed section 16P, the scope of the protection offered by proposed section 16X, and the reasons for the limited restrictions against disclosing identifying information in reports by the coordinator.

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

Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2)

This Private Members’ Bill amends the Road Transport (Safety and Traffic Management) Act 1999 to introduce an offence of negligent driving which causes harm to vulnerable road users.

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)

The Bill will introduce an offence of driving a motor vehicle on a road or road related area which causes harm to a vulnerable road user, with a maximum penalty of 50 penalty units. It will apply the definition of vulnerable road user currently in section 7A, namely a road user other than the driver of, or passenger in, an enclosed motor vehicle, to the Act as a whole, including this new offence.

Two elements of the proposed offence, that the driving caused harm to another person, and that the other person is a vulnerable road user, will have strict liability applied to them. As strict liability reduces the fault elements that have to be established by the prosecution, and places the onus on the defendant to establish any defences available, the Bill may limit the rights in criminal proceedings, including the presumption of innocence, protected by section 22 of the HRA.

The explanatory statement accompanying the Bill recognizes this potential limitation and provides a justification for why it should be considered reasonable. This includes the statement that drivers should always consider the risk to vulnerable road users, and that alternative offences involve penalties which are either too low to recognize the culpability of the driver’s actions or involve a degree of culpability or complexity which inhibits enforcement.
The Committee notes that the current offence of negligent driving (section 6 of the *Road Transport (Safety and Traffic Management) Act 1999*) provides for increased penalties where the driving occasions death or grievous bodily harm. There is no fault-element associated with the level of harm—where the driving can objectively be considered negligent the prosecution must only establish that the accused was intending to drive the car in the way they did.4 Negligent driving is established where the accused “drove a motor vehicle in a manner involving departure from standard care for other users of the road to be expected of ordinary prudent drivers in the circumstances”.5 The court must have regard to all the circumstances of the case, including the nature, condition and use of the road and actual and expected amount of traffic6 (see subsection 6(2)). This use of graduated penalties is also used in the offence of furious, reckless or dangerous driving (section 7), which includes the aggravated offence of driving in a way that puts at risk the safety of a vulnerable road user.

In contrast, section 29 of the *Crimes Act 1900* provides that a person who, by the culpable driving of a motor vehicle, causes the death of another person is guilty of an offence punishable, on conviction, by imprisonment for 14 years. Culpable driving relevantly includes driving negligently, which is in turn defined for this purpose as “fails unjustifiably and to a gross degree to observe the standard of care that a reasonable person would have observed in all the circumstances of the case” (Subsection 29(7)). Negligence, in this context, remains an objective standard for which the driver’s state of mind, particularly their view as to the likely risk of harm, is not directly in issue.7

The proposed offence, however, adopts a different approach, providing for the element of harm and nature of the person harmed as separate physical elements to which strict liability applies. The Bill will also apply Chapter 2 of the Criminal Code to this offence (see clause 4). Section 21 of Chapter 2 of the Criminal Code defines the fault element of negligence as conduct meriting criminal punishment for the offence because it involves both falling short of the standard of care that a reasonable person would exercise in the circumstances and a high risk that the physical element exists or will exist. If that definition was intended to apply in the proposed offence, however, it is not clear to which physical element the test of negligence might apply. For example, the apparent intention of the offence is to apply in broader circumstances than where the defendant is negligent as to whether they are driving on a road or road related area. However, it is not clear to what extent the objective risk of harm to others, and in particular the objective risk of harm to vulnerable road users, is intended to be considered in determining whether the negligence standard has been met.

The Committee therefore asks for further information on how the standard of negligence is intended to be applied to the proposed offence, noting it has been drafted in a way distinct from analogous sections despite the apparent intention of the proposed offence being to introduce a moderated penalty in circumstances where negligent driving has resulted in harm to a vulnerable road user which doesn’t rise to the standard of grievous bodily harm.

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

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4 See *R v Tang (No 2)* [2019] ACTSC 21 at [3].
6 The Committee notes that Traffic for this purpose is defined as including vehicle and pedestrian traffic; see *Road Transport (General) Act 1999*, s 8 and Dictionary.
7 See *R v Lavender* [2005] HCA 37; (2005) 222 CLR 67 at [58].
WORK HEALTH AND SAFETY AMENDMENT BILL 2021

This Bill removes the offence of industrial manslaughter from the Crimes Act 1900 and inserts an amended offence for industrial manslaughter into the Work Health and Safety Act 2011 (WHS Act) based on a breach of a health and safety duty.

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 LIFE (SECTION 9 HRA)

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 18 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The offence of industrial manslaughter inserted into the WHS Act generally applies to persons, or their officers, who conduct a business or undertaking. Under section 247 of that Act, a Minister of a State or the Commonwealth, acting in that capacity, is not included in the definition of an officer for the purposes of the WHS Act. Ministers, acting in their official capacity, are currently able to be charged with industrial manslaughter as senior officers under the Crimes Act 1900. By removing the offence of industrial manslaughter from the Crimes Act, the Bill may therefore limit the extent to which the offence of industrial manslaughter promotes the right to life provided by section 9 of the HRA, and right to liberty and security provided by section 18 of the HRA. The Committee notes that the ACT government, to the extent to which it represents the Crown in right of the Territory, is included as a person who conducts a business or undertaking and therefore will be subject to the new offence.

The offence of industrial manslaughter inserted by the Bill will carry a maximum penalty of imprisonment for 20 years for individuals or $16 500 000 for corporations. The Bill will also provide for defendants to be convicted of alternative offences under the WHS Act which also carry with them terms of imprisonment (with category 1 offences under that Act attracting a maximum penalty of five years). The Bill also amends the Bail Act 1992 to remove the presumption of Bail for a person accused of industrial manslaughter under the WHS Act. The Bill therefore limits the right to liberty and security of person protected by section 18 of the HRA.

The Bill also provides for strict liability in relation to two elements of the industrial manslaughter offence, namely: that the person conducts a business or undertaking or is an officer of a person who conducts a business or undertaking; and the person has a health and safety duty under the WHS Act. By limiting the elements that must be established by the prosecution and placing the emphasis on the Defendant to establish any defence available, the Bill will therefore limit the rights in criminal proceedings, including the presumption of innocence, protected by section 22 of the HRA.

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

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

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- Disallowable Instrument DI2021-86 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 1) made under section 9 of the Canberra Institute of Technology Act 1987 and section 79 of the Financial Management Act 1996 appoints a specified person to be a member of the CIT Board for a period of 12 months.

- Disallowable Instrument DI2021-87 being the Canberra Institute of Technology (CIT Board Member) Appointment 2021 (No 2) made under section 9 of the Canberra Institute of Technology Act 1987 and section 79 of the Financial Management Act 1996 appoints a specified person to be a member of the CIT Board for a period of 12 months.

DISALLOWABLE INSTRUMENTS—COMMENT

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

FEES DETERMINATIONS

- Disallowable Instrument DI2021-85 being the Public Trustee and Guardian (Fees) Determination 2021 made under section 75 of the Public Trustee and Guardian Act 1985 revokes DI2020-151 and determines fees payable for the purposes of the Act.


The instruments mentioned above determine fees, for the Public Trustee and Guardian Act 1985 and the Electoral Act 1992, respectively. The Committee notes that, for the first instrument mentioned above, the explanatory statement for the instrument indicates that the fees increases are framed by reference to the particular circumstances of the Public Trustee and Guardian Act, stating that the instrument ....

... provides for fee increases to reflect the changing nature of the Public Trustee and Guardian’s work, including increased workload, increased complexity, the higher number of clients seeking subsidies or concessions and increasing need for qualified specialists.

The particular increases are then summarised. In line with the Committee’s expectations, explanatory notes appear in the instrument itself, indicating the “old” and “new” fees, etc.

The Committee notes that, for the second instrument mentioned above, the explanatory statement states:
The fees for 2021/2022 financial year are determined by increasing the 2020/2021 fees, determined by DI2020-148, by the Wage Price Index (WPI) of 1.75%, rounded down to the nearest $0.05.

The Committee notes that this explanation is consistent with the explanation provided in relation to the majority of fees instruments discussed in Scrutiny Report 6 of the 10th Assembly (15 June 2021). The Committee also notes that the “old” and “new” fees are indicated, in the instrument itself.

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

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

**Disallowable Instrument DI2021-89 being the Road Transport (General) Applications for Registration—Written-off Vehicles Declaration 2021 (No 1) made under subsection 13(1) of the Road Transport (General) Act 1999 provides for registration in the ACT of interstate vehicles where those vehicles were damaged in the hailstorm on 20 January 2020 without the need for them to be registered in the ACT at the time they became a written-off vehicle.**

This instrument extends an exemption from certain registration conditions, applicable to interstate vehicles, set out in the Road Transport (Vehicle Registration) Regulation 2000. The existing exemption was provided by the Road Transport (General) Applications for Registration—Written-off Vehicles Declaration and Order 2020 (No 1) [DI2020-128]. The explanatory statement for the instrument mentioned above states:

Exemptions are currently provided for under DI2020-128 for consideration of registration in the ACT of interstate vehicles damaged in the January 2020 hailstorm without the need for these vehicles to be re-registered in the jurisdiction in which they were registered at the time they became a written-off vehicle. These exemptions provided an immediate relief in response to the impact of the January 2020 hailstorm and subsequent global health pandemic.

The explanatory statement goes on to state:

DI2020-128 is set to expire on 29 May 2021. At present the Government is considering whether permanent amendments are necessary to section 32A of the Road Transport (Vehicle Registration) Regulation 2000. However, these considerations have been delayed as a result of the ongoing effects of the current global health pandemic. The purpose of this declaration is to provide an additional 12-month extension to the exemptions provided for under DI2020-128 while permanent amendments to section 32A of the Road Transport (Vehicle Registration) Regulation 2000 are evaluated.

The Committee notes that the explanatory statement for the instrument addresses human rights implications, stating:

There are not considered to be any human rights implications arising from this instrument.

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

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

GOVERNMENT RESPONSES

The Committee has received responses from:


  This response\(^8\) can be viewed online.


  This response\(^9\) can be viewed online.

The Committee wishes to thank the Minister for Transport and City Services for his helpful responses.

GOVERNMENT RESPONSE—COMMENT

Disallowable Instrument DI2020-287 being the Litter (Amenity Impact) Code of Practice 2020 (No 1)

The Committee commented on this instrument in Scrutiny Report 2 of the 10\(^{th}\) Assembly (24 March 2021). The Committee noted that the instrument, made under section 24ZA of the Litter Act 2004, deals with “amenity impacts caused by hoarding” at an “open private place (property)”, and that the Code of Practice made by the instrument referenced human rights implications of the Code and the Human Rights Act 2004. The Committee noted that despite the evident relevance of the Human Rights Act to the Code, the explanatory statement for the instrument does not substantively address human rights issues.

While acknowledging the limitations of its jurisdiction, under section 38 of the Human Rights Act, the Committee indicated that, given the clear indication that the instrument engaged (unspecified) human rights, the Committee considered that (despite the absence of any express Human Rights Act jurisdiction, for the Committee, in this instance) the explanatory statement for this instrument ought to have substantively addressed the human rights issues engaged by the Code. As a result, the Committee drew the attention of the Legislative Assembly to the instrument, under principle (10)(c)(ii) of the Committee’s terms of reference, on the basis that the instrument may unduly trespass on rights previously established by law. The Committee also drew the attention of the Legislative Assembly to the instrument, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument did not meet the technical or stylistic standards expected by the Committee.

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This Committee sought a response from the Minister. The Minister for Transport and City Services has responded to the Committee’s comments, in an undated letter. The Minister’s response attaches a revised explanatory statement for the instrument, providing detail on the relevant human rights concerned and also on how potential limitations on these rights are addressed. The Minister’s covering letter also summarises the substance of the amendments to the explanatory statement.

The Committee is grateful to the Minister for addressing its concerns.

This commend does not require any further response from the Minister.

Jeremy Hanson MLA
Chair

27 July 2021
OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021

- **Report 4, dated 4 May 2021**
  - Crimes (Stealthing) Amendment Bill 2021.

- **Report 6, dated 15 June 2021**
  - Disallowable Instrument DI2021-56 Public Trustee and Guardian (Investment Board) Appointment 2021 (No 1) [response required before 4 August 2021].
  - Disallowable Instrument DI2021-69 Children and Young People (Drug Testing) Standards 2021 (No 1) [response required before 4 August 2021].