



# Legislative Assembly for the Australian Capital Territory

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

## Scrutiny Report 28

Legislative Assembly for the Australian Capital Territory  
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

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Approved for publication

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10th Assembly  
May 2023



# 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 (until 28 April 2023)

Kate Mickelson, Acting Committee Secretary (from 1 May 2023)

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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

## Bills—Comment

### Human Rights Commission Amendment Bill 2023

- 1.1. This Bill will amend the *Human Rights Commission Act 2005* and establish a new Regulation to implement the National Code of Conduct for Health Care Workers in the ACT. The amendments will set minimum standards of conduct and practice for workers providing a health care service that are not otherwise registered under a National Registration and Accreditation Scheme. Registered teachers who provide a health service while teaching will also be excluded. Complaints about breaches of the Code of Conduct will be able to be made to the Human Rights Commission. The Commission will be able to place conditions on or prohibit the provision of a health service or make public statements to protect the public from a serious risk to their health and safety. A separate process for managing complaints in relation to ACT public servants will be established.

### 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 977 1 (HRA)

- 1.2. The Bill may limit the following rights protected under the HRA. Each of these potential limitations is recognised in the explanatory statement accompanying the Bill and a statement provided why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

- 1.3. The Bill will provide for a separate process for dealing with complaints about the provision of a health service by an ACT public servant in the course of their employment. Complaints will be dealt with under a process to be determined by the Executive by relevant public service entities instead of by the Human Rights Commission. The process will be set out in a disallowable instrument. The Commission will also be able to disclose any information relevant to a complaint against a health service provided by an ACT public servant to the relevant public service entity. The differential treatment of public service complaints is intended to prevent duplication given the various procedures in place to regulate behaviour of ACT public servants.
- 1.4. Health care workers regulated under the Code with a transmissible condition will be required to seek advice from a health practitioner about how to avoid transmitting the condition to a client and will have to provide a health service in a way that does not transmit the condition. Similarly, the Code of Conduct will require a health care worker with a physical or mental impairment, disability, condition or disorder (including an addiction), to ask a relevant health practitioner how they should minimise the risk of harm to a client and follow the advice of the health practitioner.

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

- 1.5. The Code of Conduct introduced by the Bill will not apply to registered teachers carrying out teaching duties. By not applying to teachers who are delivering a health service, the Bill does not provide the protection of the code of conduct to children in a teaching setting. The explanatory statement sets out the various other ways in which teachers are regulated when teaching, including registration under the *ACT Teachers Quality Institute Act 2010* and *Education and Care Services National Law Act 2010*.

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

- 1.6. The Bill will enable the Commission to take various enforcement actions in response to a breach of the code of conduct or conviction of an offence under various Commonwealth and Territory legislation. These include making a public statement or issuing orders imposing a condition on, or prohibiting, the provision of a health service on an interim (up to 8 weeks) or final basis. The Commission must believe on reasonable grounds that there is a serious risk to the health and safety of the public before taking enforcement action.
- 1.7. In making an interim or final prohibition or control order, the Commission may provide the order to any relevant professional body, or, if it is in the interest of the health and safety of the public, to any person. Similarly, a public statement can include the identity of the health care worker, and information about them, the health service they provide, and any provider of a health service they are connected with.
- 1.8. The Bill will also require the Commission to keep a register of prohibition and condition orders, which is accessible free of charge on an approved website. The Commission may also exchange information with a board of registration where a health care worker is registered as a health practitioner, or an entity responsible for upholding a corresponding law in another State or territory. Information about a complaint relating to the provision of a health care service by an ACT public servant may also be shared with the public service standards commissioner or the head of a public service entity.

## Freedom of thought, conscience, religion and belief (section 14 HRA)

### Freedom of expression (section 16 HRA)

- 1.9. The code of conduct included in the Bill will place various requirements relating to the provision of health care. Where health care is provided within the context of, or pursuant to the requirements of, a specific set of beliefs or religion, the code of conduct may limit the freedom of religion and belief protected in section 14 of the HRA, and the freedom of expression protected in section 16 of the HRA. As set out in the explanatory statement accompanying the Bill, relevant provisions of the code of conduct include the requirement to:
  - a) provide health services in the manner sensible to the cultural needs of a client (s.8(i), Regulations);
  - b) not promise to cure cancer or another terminal illness (s10, Regulations);



- c) not give false, misleading or deceptive information, or information which has not been substantiated (s11, Regulations); and
- d) allow a client to make informed choices, to co-operate with other entities in the clients' best interests, and not attempt to dissuade a client from seeking or continuing medical treatment (s12, Regulations).

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

- 1.10. The Bill will authorise the Commission to issue a prohibition or condition order or make a public statement based on information before the Commission. In making such orders, the Commission will be bound by the rules of natural justice, and there are various provisions for the review and correction of such orders, including review by the ACT Civil and Administrative Tribunal. However, the Commission must also act with as little formality as possible and is not bound by the rules of evidence.
- 1.11. The Bill will also provide for establishing a separate process to consider complaints about ACT public servants involved in the provision of health care services. That process may include delaying the making of a final prohibition or condition order while a misconduct procedure is being conducted and extending any interim orders in force, possibly affecting the expeditious resolution of a complaint.

#### Right to work and other work-related rights (section 27B HRA)

- 1.12. The Bill will establish offences for not complying with a prohibition or condition order or corresponding orders from other States and territories, potentially preventing a health care worker from practicing their profession. Health care workers with transmissible conditions or a mental or physical impairment may also be restricted from practicing where this may affect the health and safety of their clients.
- 1.13. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

#### Right not to be tried or punished more than once (section 24 HRA)

- 1.14. A final prohibition or control order may be made by the Commission, even without any complaint being made or finding that there has been a breach of the code of conduct, where the health care worker has been convicted of an offence relating to their provision of a health care service under various Acts, namely: the *Competition and Consumer Act 2010* (Cth); the *Fair Trading (Australian Consumer Law) Act 1992*; section 127 of the *Health Act 1993*; the *Health Practitioner Regulation National Law (ACT)*, part 7, division 10; and the *Public Health Act 1997*.
- 1.15. A final order may only be made where the Commission is satisfied on reasonable grounds that there would be a serious risk to the health or safety of the public if the health care worker continued to provide a health service. A final order also only lasts as long as reasonably required to protect the health and safety of the public. However, the Committee is concerned that there is no necessary link between the concern for public safety and the circumstances of the offence which conditions the authority to issue the order.

- 1.16. A public statement about the health care worker or health service may also be made following conviction of an offence under the same various Acts. However, in contrast to a prohibition or control order, a public statement can only be made where the serious risk to the health and safety of the public relates to the health care worker being convicted.
- 1.17. The Committee is concerned that the difference in wording may permit a prohibition and control order being made where there is no direct relation between the circumstances giving rise to the threat to public safety and the offences which enliven the Commission's power to make an order. Commission of the offence may therefore be sufficient in itself to give rise to the perceived risk to public safety. Any final order may in those circumstances constitute an additional source of penalty, potentially limiting the right not to be tried or punished more than once protected by section 24 of the HRA.
- 1.18. The Committee therefore requests further information from the Minister on why exposure to a final prohibition or control order on the basis of conviction for various offences should not be considered a limitation of section 24 of the HRA.**

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

## Modern Slavery Legislation Amendment Bill 2023

- 1.19. This Private Member's Bill will require government agencies to volunteer to submit modern slavery statements under the Commonwealth *Modern Slavery Act 2018* (Cth) and prevent the Territory tendering with entities which have not complied with their requirements under that Act. To be considered for tenders over \$25,000, all tenderers, unless exempted, will have to provide a statement setting out the risks of modern slavery in their provision of goods or services to the Territory and explain specifically what steps they have taken to eliminate modern slavery in their supply chains. The Bill will also establish a new Anti-Slavery Commissioner to monitor, report on and promote requirements relating to modern slavery.

**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 977 1 (HRA)

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.20. The Bill includes various provisions to increase the transparency of the risks of modern slavery in the provision of goods and services to and by the Territory. These include a requirement that the Anti-Slavery Commissioner be notified of any exemption allowing an excluded tenderer to not comply with their requirements under the Commonwealth Modern Slavery legislation, and the details of the exemption published on a public register. The Anti-Slavery Commissioner may also require any person to provide information the

Commissioner believes on reasonable grounds that the person can provide and which is relevant to any of the Commissioner's functions. Failure to comply constitutes an offence with a penalty of up to 50 penalty units. Where the Anti-Slavery Commissioner suspects on reasonable grounds that a person is subject to, or at risk of, modern slavery, the Commissioner may give any information relating to the allegation to an appropriate statutory office-holder, including by making a report under the *Children and Young People Act 2008*.

- 1.21. By providing for the collection and sharing of information which may include the personal information of individuals, including children, the Bill may potentially limit the protection of privacy and reputation provided by section 12 of the HRA.
- 1.22. The Committee notes that the requirements in the Bill to provide and publish information do not expressly abrogate the common law privileges against self-incrimination and exposure to the imposition of a civil penalty. As a note to the offence suggests, section 170 of the *Legislation Act 2001* would generally apply, requiring the Bill be interpreted to preserve the common law privileges. The Committee is concerned, however, that it may not be possible to interpret the Bill to avoid any abrogation. For example, non-compliance with requirements under the Commonwealth Modern Slavery legislation may have to be disclosed when reporting on the grant of an exemption allowing the award of tenders to excluded tenderers. The Bill may therefore limit the privilege against self-incrimination protected as a right in criminal proceedings in section 22 of the HRA.
- 1.23. The explanatory statement accompanying the Bill does not recognise any potential limitation of human rights.
- 1.24. **The Committee therefore requests information on why the Bill should be considered to not limit the rights described above. Consideration should be given to amending the explanatory statement to include this information, 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 Member to respond prior to the Bill being debated.

## Unit Titles Legislation Amendment Bill 2023

- 1.25. This Bill will amend various legislation relating to unit titles as stage two of the Unit Titles Reform Project initiated in 2016. It seeks to further streamline and improve the legislative processes that relate to the development and management of unit plans.

## 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 1998 (HRA)

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

- 1.26. The Bill will amend the *Unit Titles (Management) Act 2011* to allow for a sublease to be granted over common property in a unit title. The owners corporation will be able to sublet its interest in any part of the common property for up to 5 years provided the use of the common property does not unreasonably interfere with the reasonable use or enjoyment of any part of a unit or the common property, and the sub-lessee of the common property takes out public liability insurance. The name and correspondence details of the sub-lessee will be registered in the corporate register and made available to any eligible persons, and subject to requirements under the *Privacy Act 1988* (Cth).
- 1.27. By providing for the owners corporation to allow use of common property which may have impact on the use and enjoyment of one or more of the residential units in a unit plan, the Bill may interfere with the protection of privacy and the home provided by section 12 of the HRA.
- 1.28. The Bill will also amend the default rules for an owners corporation Unit in the *Titles (Management) Regulation 2011* to include two additional examples of when permission may be reasonably withheld for the construction of sustainability infrastructure in or on a unit or the common property, namely financial considerations, and equity of access to common property, easements, facilities or utility services. Under section 132 of the Legislation Act, an example of this form is not exhaustive and can extend, but not limit, the meaning of the provision to which it relates. By possibly extending the grounds on which permission to construct sustainability infrastructure can be withheld by the owners corporation, the Bill may limit the ability of unit owners to construct sustainability infrastructure on or around their units and hence potentially limit the protection of privacy and home provided by section 12 of the HRA.
- 1.29. The explanatory statement recognises these potential limitations of the protection of privacy and provides why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.30. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Variation in Sex Characteristics (Restricted Medical Treatment) Bill 2023

- 1.31. This Bill will establish a new statutory oversight scheme for restricted surgical or medical procedures which make changes to a person's sex characteristics. Non-urgent treatment plans which will permanently affect the sex characteristics of a child, or adult who lacks the capacity to make decisions for themselves, will require approval by an assessment board.

Approval may generally only be given for treatment which is reasonably likely to avoid significant physical or psychological harm and which is no more restrictive of future decisions about sex characteristics than alternative treatment options.

## 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 1998 (HRA)

Right to protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

Right to freedom of movement (section 13 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.32. A proposed treatment plan for a child can only be approved if there is sufficient evidence that, without treatment, the child would be likely to suffer significant physical or psychological harm. In making this assessment, the assessment committee must disregard any evidence that the treatment needs to be undertaken to reduce discrimination or stigmatisation or a perceived risk of discrimination or stigmatisation.
- 1.33. By limiting the circumstances in which medical treatment can be provided to a child the Bill may limit the protection of family and children provided by section 11 of the HRA. The explanatory statement accompanying the Bill includes a detailed consideration of why it is considered medically unnecessary to address discrimination or stigmatisation through a permanent medical procedure in the absence of the consent of the person affected.
- 1.34. The Bill will provide for approval, oversight and information sharing in relation to restricted medical treatments of children and adults who lack decision-making capacity. In this way the Bill may limit the protection of privacy provided by section 12 of the HRA.
- 1.35. Medical treatment which will have permanent effects on the sex characteristics of a prescribed person will require approval. Urgent, approved or exempted restricted medical treatments will have to be reported by doctors to the president of the Assessment Board. An assessment committee, in considering an application for approval of a treatment plan, may consult various bodies, including health professional bodies, entities representing or supporting people with a variation in sex characteristics, the public advocate, and the children and young people commissioner. The assessment committee may identify the prescribed person or disclose information that would allow the person to be identified, provided they have the consent of the prescribed person's parent or guardian. Public consultation about a proposed general treatment plan must also not include details allowing a prescribed person or their decision-maker to be identified. Any submissions received about a proposed general treatment plan will be published but must not, without it being the prescribed person's will and preference, allow a prescribed person's identity to be worked out, or include information considered sensitive or prejudicial to an individual.
- 1.36. The Committee notes that the Bill will also require a relevant medical record created in relation to a restricted medical treatment to be retained for a longer period than currently

required under the *Health Records (Privacy and Access) Act 1997* or the *Territory Records Act 2002*. This is intended to provide a person access to their medical treatment history when they are seeking to have children.

- 1.37. The Bill will create an offence of arranging or authorising travel outside of the Territory for the purpose of having restricted medical treatment without approval of an assessment committee. This may limit the right to freedom of movement in section 13 of the HRA.
- 1.38. The Bill will also create an offence of undertaking a restricted medical treatment without complying with an approved treatment plan. Both offences include an exception for urgent restricted medical treatment, with the evidential burden placed on the defendant to establish that the medical treatment was urgent to avoid the offences. Placing an evidential burden on the defendant may limit the presumption of innocence protected as a right in criminal proceeding in section 22 of the HRA.
- 1.39. These limitations are recognised in the explanatory statement along with a detailed discussion of why they should be considered reasonable using the framework in section 28 of the HRA. The Committee commends the detail of the statement, including the consideration of available evidence, views of relevant international and domestic bodies, and consideration of alternative approaches to regulation. The Committee refers that statement to the Assembly.
- 1.40. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Water Resources Amendment Bill 2023

- 1.41. This Bill will amend the *Water Resources Act 2007* to modify administrative responsibilities for water resource management by allocating policy functions to the director-general of the relevant directorate and providing for the Environment Protection Authority to retain responsibility for regulatory functions. The role of the ACT and Region Catchment Management Coordination Group will also be clarified.

## 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 977 1 (HRA)

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

- 1.42. Existing right of entry powers under the Act authorising the Authority to enter land for water resource monitoring and assessment will be transferred to the director-general. The current conditions of not being able to enter residential land without permission and having to provide authorisation details upon request will be retained. The current potential limitations on the protection of privacy provided by section 12 of the HRA will therefore continue to apply.

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

## 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 DI2023-21 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 1)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-22 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 2)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-23 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 3)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-24 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 4)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-25 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 5)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-26 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 6)** made under section 78 of the *Education Act 2004*
  - **Disallowable Instrument DI2023-27 being the Education (Registration Standards Advisory Board) Appointment 2023 (No 7)** made under section 78 of the *Education Act 2004*

### Disallowable Instruments – Comment

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

## No Human Rights Issues

- **Disallowable Instrument DI2023-14 being the Utilities (ACT Retail Electricity—Transparency and Comparability Code) Variation 2023** made under sections 61 and 63 of the *Utilities Act 2000*
  - **Disallowable Instrument DI2023-16 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2023 (No 1)** made under section 96 of the *Road Transport (General) Act 1999*
  - **Disallowable Instrument DI2023-18 being the Road Transport (General) Concession Determination 2023 (No 1)** made under section 96 of the *Road Transport (General) Act 1999*
- 2.3. The first instrument mentioned above, made under sections 61 and 63 of the *Utilities Act 2000*, revokes and re-makes the ACT Retail Electricity (Transparency and Comparability) Code 2021. The substantive effect is to remove clauses 3.3 to 3.4 of part 3 of the Code. The amendments are technical, extending a deadline provided for in the original Code.
- 2.4. The second instrument mentioned above determines registration fees, for section 96 of the *Road Transport (General) Act 1999*.
- 2.5. The third instrument mentioned above determines the method to be used to work out the fee payable by persons eligible for a concession in relation to fees payable for vehicle registration and driver licensing, for section 96 of the *Road Transport (General) Act*.
- 2.6. The Committee notes that the explanatory statements for each of the instruments mentioned above state that there are no human rights implications arising from the instrument.
- 2.7. **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.**
- 2.8. **This comment does not require a response from the Minister.**

## Is this instrument validly made?

- **Disallowable Instrument DI2023-15 being the Domestic Animals (Temporary Variation of Prohibited Areas—Glebe Park) Declaration 2023** made under section 41 of the *Domestic Animals Act 2000*
- 2.9. This instrument indicates that it is made under section 41 of the *Domestic Animals Act 2000*, which provides:
- 41 Prohibited areas**
- (1) The Minister may declare an area of land or water to be an area where dogs are prohibited.
  - (2) An area declared under subsection (1) may include all or part of an exercise area for stated animals.
  - (3) A declaration is a disallowable instrument.



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

(4) If the Minister declares a prohibited area, the Minister must erect a sign or signs identifying the area as a prohibited area.

(5) A person must not take a dog into a prohibited area.

Maximum penalty: 5 penalty units.

(6) An offence against this section is a strict liability offence.

(7) In a proceeding for an offence against subsection (5), a sign is taken to have been erected with the Minister's authority unless the contrary is proved.

- 2.10. The substantive provision of the instrument (section 3) provides that an existing instrument – the Domestic Animals (Prohibited Areas) Declaration 2021 (No 1) [DI2021-231] – does not apply to the area marked in red on the map in Schedule 1 to the instrument (that is, Glebe Park) – for the period beginning at 1.00 am and ending at 11.59 pm on 11 March 2023. The explanatory statement for the instrument explains that the relevant time period relates to a family dog friendly event, to be held in Glebe Park, at that time.
- 2.11. While the existing instrument is a little hard to decipher, on-line, it is apparent that Glebe Park is one of the areas made a ‘prohibited’ area, under that (earlier) instrument.
- 2.12. The Committee can identify no power in the Domestic Animal Act to vary an instrument made under section 41. The Committee notes that section 43 provides the registrar with a power to permit a person to take a particular dog into a particular prohibited area at the times stated in the permit:

#### **43 Prohibited areas—permits**

(1) The registrar may permit a person mentioned in the permit to take a particular dog into a particular prohibited area at the times stated in the permit.

(2) In making a decision under subsection (1), the registrar must consider the opinion of the conservator of flora and fauna about the impact on the environment if the permit were issued.

(3) Subsection (2) does not limit the matters that the registrar may consider.

(4) A permit may be issued on conditions.

(5) A permit—

(a) takes effect on the day stated in the permit; and

(b) unless sooner revoked, remains in force for the period of not longer than 1 year stated in the permit.

- 2.13. This instrument does not exercise that power.
- 2.14. In the absence of a relevant power in the Domestic Animals Act, the Committee considers that section 46 of the *Legislation Act 2001* may apply:

#### **46 Power to make instrument includes power to amend or repeal**

- (1) Power given under an Act or statutory instrument (the "authorising law") to make a statutory instrument includes power to amend or repeal the instrument.
- (2) The power to amend or repeal the instrument is exercisable in the same way, and subject to the same conditions, as the power to make the instrument.

#### Examples

- 1 If the instrument is a disallowable instrument, an amendment or repeal of the instrument is also a disallowable instrument.
  - 2 If the instrument is a notifiable instrument, an amendment or repeal of the instrument is also a notifiable instrument.
  - 3 If notice of the making of the instrument must be published in a newspaper, notice of an amendment or repeal of the instrument must also be published in the newspaper.
- (3) Despite subsection (1), a form that is a legislative instrument may be repealed or repealed and remade (with or without changes), but may not be amended.
- (4) This section is a determinative provision.

*Note* See s 5 for the meaning of determinative provisions, and s 6 for their displacement.

- 2.15. The problems with this proposition are that (a) section 46 of the Legislation Act is not referred to, in the instrument or its explanatory statement and (b) the power in section 46 is to 'amend or repeal' an existing instrument, not to *vary* an instrument.
- 2.16. **The Committee seeks the Minister's advice as to the validity of the instrument.**
- 2.17. **The Committee draws the attention of the Legislative Assembly to this instrument, under subparagraph (10)(c)(i) of the Committee's Resolution of Appointment, on the basis that it may not be in accord with the general objects of the Act under which it is made.**

**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.**

## COVID-19-related instrument

- **Disallowable Instrument DI2023-17 being the Public Health (COVID-19 Management) Declaration and Extension Revocation 2023** made under section 118O of the *Public Health Act 1997*
- 2.18. The Committee notes that this instrument revokes two existing COVID-19-related declarations – the Public Health (COVID-19 Management) Declaration 2022 [DI2022-224] and the Public Health (COVID-19 Management) Declaration Extension 2022 [DI2022-267] –

which were commented on by the Committee in *Scrutiny Report 23* (15 November 2022)<sup>1</sup> and *Scrutiny Report 26* (14 March 2023)<sup>2</sup> of the 10<sup>th</sup> Assembly, respectively.

- 2.19. The Committee notes that the explanatory statement for the instrument states:

#### Section 3 - Revocation

This section outlines that the Executive declares that, having considered the advice of the Chief Health Officer (dated 10 February 2023), it is a proportionate response for the COVID-19 Management Declaration to be revoked. In forming this belief, the Executive has considered the matters prescribed by s118O(2)(b) of the *Public Health Act 1997*.

- 2.20. Section 2 of the instrument provides that the revocation takes effect at midnight on 28 February 2023.

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

## Human Rights Issues

- **Disallowable Instrument DI2023-19 being the Road Transport (General) Application of Road Transport Legislation Declaration 2023 (No 2)** made under section 12 of the *Road Transport (General) Act 1999*
- **Disallowable Instrument DI2023-28 being the Road Transport (General) Application of Road Transport Legislation Declaration 2023 (No 3)** made under section 12 of the *Road Transport (General) Act 1999*

- 2.22. Each of the instruments mentioned above is made under section 12 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:

- (a) applies to an area that is open to or used by the public; or
- (b) does not apply to a road or road related area.

- 2.23. The instruments declares that the *Motor Accident Injuries Act 2019* and specified provisions of the *Road Transport (Driver Licensing) Act 1999*, the *Road Transport (Vehicle Registration) Act 1999*, the *Road Transport (Vehicle Registration) Regulation 1999*, the *Road Transport (Safety and Traffic Management) Act 1999* and the *Road Transport (Road Rules) Regulation 2017* do not apply in relation to the IME Test Day 2023, scheduled for 8 March 2023 and the LCCC Blue Range Rally Sprint 2023, scheduled for 18 March 2023, respectively.

- 2.24. The Committee notes that the explanatory statement for the first instrument mentioned above discusses human rights issues:

#### Human rights implications

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<sup>1</sup> [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0010/2107288/Scrutiny-Report-No-23-15-November-2022.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/2107288/Scrutiny-Report-No-23-15-November-2022.pdf).

<sup>2</sup> [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0019/2191222/Scrutiny-Report-No-26.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0019/2191222/Scrutiny-Report-No-26.pdf).

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

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

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

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

Section 13 of the HRA provides a right for people to move freely within the ACT.

The declarations in this instrument do not of itself restrict a person's freedom of movement within the Territory, however the operation of the event in closing parts of the forest in which the event will be conducted to members of the public will restrict the free movement of people in that area of the Territory during the event. As parts of the road transport legislation are being disapplied for the event to operate as intended, vehicles will be travelling in parts of the forest in excess of the usual speed limits and in a manner not consistent with the road rules. As such, the restriction on the free movement of people in those parts of the forest at those times is considered reasonable and proportionate to ensure safety of non-participants and represents the least restrictive approach that enables the event to proceed.

- 2.25. The explanatory statement for the second instrument mentioned above contains a similar statement.
- 2.26. **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.**
- 2.27. **This comment does not require a response from the Minister.**

## Human Rights Issues

- **Disallowable Instrument DI2023-20 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2022 (No 1)** made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*
- 2.28. In this instrument, the Acting Chief Health Officer gives directions for the administration of a vaccine, without prescription, under the power given by section 352 of the *Medicines*,

*Poisons and Therapeutic Goods Regulation 2008*. As noted in both the instrument and the explanatory statement, the regulation is made by reference to paragraph 37(1)(b) of the *Medicines, Poisons and Therapeutic Goods Act 2008*, which prohibits a person from administering a substance covered by the Act without authorisation. Section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation* authorises a pharmacist to administer a vaccine to a person without prescription if the pharmacist administers the vaccine in accordance with a direction by the chief health officer. Subsection 352(3) gives the power to issue such directions.

- 2.29. The instrument revokes and re-makes an earlier instrument – the *Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2022 (No 1) [DI2022-77]*. After outlining and explaining the effect of the new instrument, the explanatory statement for the instrument states:

This instrument enables pharmacists to administer additional vaccines that have been previously prohibited. The instrument also makes minor structural and grammatical updates to assist readers in understanding the Vaccination Standards.

Changes imposed by this instrument create greater harmonisation with neighbouring jurisdictions, promotes consumer access to health services and related health service competition. This instrument does not operate to the disadvantage of any person or impose additional liabilities on a person.

- 2.30. The explanatory statement goes on to discuss human rights implications, by reference to the right to life and the right to privacy, protected by sections 9 and 12 of the *Human Rights Act 2004 (HR Act)*, respectively:

Right to Life

The right to life is concerned with preventing the arbitrary deprivation of life and is relevant to the delivery of medical treatment, including immunisation services. As this instrument enables consumer access to vaccination services, this instrument is considered to engage and promote the right to life under the HR Act. The Vaccination Standards are not considered to impose any new limitations on an individual's right to life as described by the HR Act.

Right to Privacy

The right to privacy and reputation protects against unlawful or arbitrary interference with personal information.

Part C of the Vaccination Standards require immunising pharmacists to collect and maintain up to date records and patient information regarding administered vaccines and report information about administered vaccines to the AIR. The collection, storage and use of sensitive personal health information, such as vaccine history, medical conditions, and contact details engages the right to privacy. Any engagement with the right to privacy as it relates to health records is already limited by the *Health Records (Privacy and Access) Act 1997 (ACT)*, *Information Privacy Act 2014 (ACT)* and *Australian Immunisation Register Act 2015 (Cwth)* which establish

clear rules and limitations on the collection, use and disclosure of personal information, including how a person can access their personal information stored by an immunisation service provider.

The Vaccination Standards have also removed an obligation that a pharmacist must obtain and report on a person's Aboriginal and Torres Strait Islander status as a condition of their authorisation to supply and administer vaccinations without a prescription. While all health service providers are strongly encouraged to ask if a person self-identifies as Aboriginal or Torres Strait Islander in origin, the reporting of this information should remain voluntary and not be linked to a pharmacists' authority to supply and administer vaccines.

Removal of this mandatory record keeping requirement supports a person's right to privacy and right to life under the HRA by ensuring health consumers can access pharmacist-led immunisation services without the need to disclose if they identify as Aboriginal and Torres Strait Islander in origin. ACT Health will continue to promote the voluntary collection of information relating to Aboriginal and Torres Strait Islander health to assist in the delivery of culturally specific and appropriate health, social, emotional and wellbeing services. Immunising pharmacists are also prompted record if patients self-identify as Aboriginal or Torres Strait Islander origin as part of submitting data to the AIR and using pharmacy software systems.

Health consumers are also reasonably made aware of their human rights with regard to pharmacy services. In accordance with section 95 of the *Human Rights Commission Act 2005* (ACT), all health service providers are required to prominently display information about how complaints may be made to the ACT Human Rights Commission or appropriate regulatory agency.

The Vaccination Standards are therefore considered to engage with the right to privacy under the HRA, but do not operate as to arbitrarily or unlawfully interfere or otherwise limit an individual's right to privacy or reputation as described by the HR Act.

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

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

## COVID-19-related instrument / Human Rights Issues

- **Disallowable Instrument DI2023-29 being the Road Transport (General) Application of Road Transport Legislation (Deciding Applications for Registration - Taxi) Declaration 2023 (No 1)** made under section 13 of the *Road Transport (General) Act 1999*

2.33. This instrument 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. Subsection 3(1) of the instrument declares that

subsection 32B(1) of the *Road Transport (Vehicle Registration) Regulation 2000* (which, among other things, prevents the registration of taxis that are more than six years old) does not apply to vehicles that are six or seven years old, if the conditions in section 5 of the instrument are met. The conditions, in essence, are that the owner of the taxi has ordered a new vehicle but the delivery of the vehicle has been delayed. Subsection 3(2) of the instrument declares that subsections 32B(2) to (5) of the *Road Transport (Vehicle Registration) Regulation 2000* (which impose similar limitations to subsection 32B(1) but specifically to standard taxis, single capacity wheelchair-accessible taxis and dual capacity wheelchair-accessible taxis, respectively) do not apply to taxi vehicles mentioned in section 4 of this instrument, if the conditions in section 5 of the instrument are met. Section 4 of the instrument sets out age requirements, in relation to standard taxis, single capacity wheelchair-accessible taxis and dual capacity wheelchair-accessible taxis, respectively.

2.34. The explanatory statement for the instrument states:

Taxis provide an essential service to the ACT community, especially for our vulnerable community members including people with disability and the elderly.

One of the requirements to be registered as a taxi in the ACT is that vehicles must meet maximum use or age requirements in section 32B of the *Road Transport (Vehicle Registration) Regulation 2000*.

The ACT taxi industry continues to be impacted by COVID-19, including by the global supply chain issues causing a worldwide shortage of new vehicles.

The motor vehicle industry is experiencing global manufacturer supply issues, which has resulted in many taxi operators being unable to secure new vehicles, in order to meet the age and use requirements under section 32B of the *Road Transport (Vehicle Registration) Regulation 2000*.

2.35. The explanatory statement goes on to discuss human rights implications, focussing on the right to work, protected by section 27B of the *Human Rights Act 2004*:

#### **HUMAN RIGHTS IMPLICATIONS**

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

##### ***The right to work and other work-related rights***

This instrument promotes the right to work and other work-related rights (section 27B).

Section 27B of the HRA provides that everyone has the right to work, including:

- (1) the right to choose their occupation or profession freely;
- (2) the right to the enjoyment of just and favourable conditions of work;

(3) the right to form or join a work-related organisation, including a trade union, with the objective of promoting or protecting their economic or other social interests;

(4) the right to protection against acts of anti-union discrimination in relation to their employment;

(5) everyone is entitled to enjoy these rights without discrimination.

Progressing the instrument to extend the time limit during which existing vehicles can continue to be used as taxis supports the right of the operators of these taxis to work.

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

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

## Responses

No comment

- DI2022-252 - Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2022 (No 1)
- DI2022-255 - Waste Management and Resource Recovery (Fees) Determination 2022 (No 2)
- DI2022-257 - Adoption (Fees) Determination 2022, No 1
- DI2022-259 - Heritage (Council Member) Revocation 2022 (No 1)
- DI2022-260 - Heritage (Council Member) Revocation 2022 (No 2)
- DI2022-261 - Heritage (Council Member) Revocation 2022 (No 3)
- DI2022-262 - Heritage (Heritage Council) Appointment Revocation 2022 (No 4).
- DI2022-263 - Taxation Administration (Amounts Payable–Ambulance Levy) Determination 2022
- DI2022-265 - Building and Construction Industry Training Levy (Government Board) Appointment 2022 (No 1)
- SL2022-19 being the Court Procedures Amendment Rules 2022 (No 3) made under section 7 of the Court Procedures Act 2004.

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

The Committee wishes to thank the Chief Minister, Minister for Health, the Minister for Heritage, Minister for Transport and City Services, the Minister for Skills and the Attorney-General for their helpful responses.



# Outstanding responses

## Bills/Subordinate Legislation

### Report 12, dated 1 February 2022

#### Bills

- Electoral Amendment Bill 2021

### Report 26, dated 14 March 2022

#### Bills

- Motor Accident Injuries Amendment Bill 2023
- Work Health and Safety Amendment Bill 2022 (further information requested in respect of the Government response received on 23 February 2032)

### Report 27, dated 27 March 2022

#### Subordinate Legislation

- **Disallowable Instrument DI2023-7** being the Lifetime Care and Support (Catastrophic Injuries) (Home Modifications) Guidelines 2023 made under section 93 of the *Lifetime Care and Support (Catastrophic Injuries) Act 2014* [response required before the Legislative Assembly's capacity to move to disallow the instrument expires]

Peter Cain MLA  
Chair  
May 2023