

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

SCRUTINY REPORT 5

26 MAY 2021



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

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## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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## BILLS

### BILLS—COMMENT

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

#### **CIVIL LAW (WRONGS) AMENDMENT BILL 2021**

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This Bill amends the *Civil Law (Wrongs) Act 2002* to enact the Model Defamation Amendment Provisions agreed to by the Council of Attorneys-General at their meeting on 27 July 2020 as stage one of proposed defamation reforms.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will amend the cause of action for defamation available in the Territory. By adding to the requirements to successfully seek redress for defamation the Bill may limit the right to protection of reputation provided in section 12 of the HRA. The amendments to the cause of action for defamation in the Bill include:

- The Bill will increase the level of harm required in an action for defamation to require that publication of defamatory matter has caused, or is likely to cause, serious harm to the reputation of the person, or serious financial loss to a corporation. This may be determined by the judge at any time, including before the trial commences.
- A concerns notice, setting out particulars of the alleged defamatory imputations and harm suffered as a result of the publication, will generally be required at least 14 days prior to commencing proceedings to permit the publisher to make an offer to make amends;
- Once defamation proceedings are commenced, whether in the Territory or elsewhere, leave of the court is required to bring additional defamation proceedings that relate to the publication of the same or like material.
- It will be a defence to the publication of defamatory matter if the defendant proves that one or more of the imputations in the publication are substantially true and any other defamatory imputations, due to their link to the imputations proved true, do not further harm the plaintiff's reputation.
- It will be a defence to the publication of defamatory matter if the defendant proves that the matter concerns an issue of public interest and the defendant reasonably believes that the publication of the matter was in the public interest. In determining that the defence is established the court may take various factors into account, including whether the publication distinguished between suspicions, allegations and proven facts, the need for expeditious publication, reason for any confidentiality of the source, and the matter

included a response from the person harmed or there were other attempts to verify the information.

- The Bill will include various factors to be considered by the court in determining whether it was reasonable to publish material to a recipient who has an interest in having information on the subject. The factors include whether the publication distinguished between suspicions, allegations and proven facts, the nature of the business environment in which the defendant operates, the need for expeditious publication, and attempts to verify the information.
- It will be a defence to the publication of defamatory matter, if the defendant proves that the matter was published in a scientific or academic journal after independent review by people with expertise in the scientific or academic issue involved. Any assessment of the matter in the same journal, or fair summary of the matter, is also protected. The plaintiff can defeat this defence by establishing the matter or assessment was not published honestly for the information of the public or the advancement of education.
- The Bill will amend where an opinion is based on proper material so as to give rise to the defence of publishing honestly held opinions related to a matter of public interest. The material on which the opinion is based must be set out, notorious, accessible from a link or otherwise apparent.
- The Bill clarifies that maximum damages are only to be awarded in a most serious case, and that aggravated damages are awarded separately to damages for non-economic loss.

The explanatory statement accompanying the Bill sets out the various amendments to the cause of action for defamation, recognizing the potential limitation of these amendments on the protection of reputation provided by section 12 of the HRA, and 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, noting the justifications provided for each of the amendments and their attempt to balance the impact on reputation with protecting freedom of expression, particularly in the discussion of issues of public interest.

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

## **ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT BILL 2021**

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This Bill amends the *Road Transport (Safety and Traffic Management) Act 1999* and the *Road Transport (Safety and Traffic Management) Regulation 2017* and other legislation relating to offences for use of mobile devices, operation of mobile device and other traffic offence detection devices and sharing of de-identified data for road safety research purposes.

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

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

## RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will allow for the use of mobile device detection cameras to be used in detecting and enforcing illegal mobile device use while driving within the Territory. The explanatory statement accompanying the Bill recognizes that these amendments will potentially limit the protection of privacy provided by section 12 of the HRA:

The right to privacy is engaged and limited by these provisions as these amendments deal with the collection, use, storage and disclosure of personal information by mobile device detection cameras as part of the ACT's road safety camera program. This is because the mobile device detection cameras will detect the driver of a vehicle using a mobile device while driving and at this time collect images of the vehicle and images of the driver of the vehicle for the purposes of facilitating the enforcement of the ACT's road transport legislation and protecting the community.

This data is personal information because the information collected can identify the driver and contains the vehicle's details such as numberplate or model and may contain details of a person's travel such as direction, location and time.

The explanatory statement includes a discussion of why this limitation should be considered reasonable using the framework set out in section 28 of the HRA. That includes a detailed discussion of the evidence relating to the potential harms caused by mobile phone use and effectiveness of mobile detection cameras in deterring such use. The Committee refers that discussion to the Assembly, subject to the concerns noted below.

Currently, under section 24C of the Act, camera detection devices and average speed detection systems may only be approved for use if they take an image of the vehicle from the rear or, if that is impracticable or dangerous, from the front but not so as to take an image of the vehicle's driver. The Bill will amend this requirement by allowing approval of devices or systems which detect or take images of the driver of a vehicle (see proposed sections 13 and 15 of the Regulation). Under proposed section 15(2) of the Regulation, images taken by a traffic offence detection device designed to take an image of the driver must, as far as practicable, only show the person in contravention of a provision of the road transport legislation. The explanatory statement accompanying the Bill, in outlining this provision, provides that this is a privacy safeguard specific to the use of mobile device detection cameras.

The Committee is concerned that the Bill will allow traffic offence detection devices which will capture the image of the driver of the vehicle to be approved for use other than in detecting mobile phone use. It is also not clear to the Committee why the limitation to only show as much of the driver as is necessary to show the person in contravention of a provision of the road transport legislation would not be interpreted as allowing capture of the identifying features of the driver *who is* in contravention rather than showing the act, such as going through a red light or using the mobile phone, which constitutes the contravention.

The Bill will also amend the current requirement that an approved average speed detection system must delete images within 14 days. Proposed section 15(4) of the Regulation will require an image to be destroyed as soon as possible, but only where it does not show a contravention of a provision of the road transport legislation. As discussed below, the explanatory statement refers to the use of artificial intelligence and trained personnel to detect use of mobile phones in images, but it is not clear to the Committee how long that process may take before destruction is required.

Images may also not be destroyed if they are collected for research relating to improving road safety and transport efficiency, but only if identifying information about people cannot be ascertained from the data (see proposed paragraph 29(1)(d) of the Act and subsection 15(5) of the Regulation). Again, it is not clear to the Committee how long images may be kept for the purposes of possible de-identification. The Committee recognises that an image and any data associated with an image taken by a traffic offence detection device must be encrypted, but requests information on why clearer limitations will not be imposed on the period in which images may be retained prior to destruction.

Images can only be used for research purposes when identifying information about people cannot be ascertained from the data conveyed in the image. The Committee is concerned that this may allow use of information which may still be considered private even though it does not identify the individual concerned. Information which, in itself, may not identify the person may also be used in connection with other information from other sources to make identification possible. The Committee therefore requests further information on why de-identification does not extend to removal of information which relates to an identified or identifiable individual.

The Bill will place restrictions on the use, storage and sharing of data collected in relation to a traffic offence detection device, which will also apply to any person to whom such data has been disclosed. However, the Committee is concerned that the permitted uses are very broad. Data can be used in connection with the enforcement of road transport legislation, where it is reasonably necessary for the enforcement of the criminal law or a law imposing a monetary penalty, or if the use or disclosure is required or authorized by a law of the Territory or Commonwealth or court order. The Committee asks for further information on why images of a driver taken to capture mobile phone use can be used without establishing a connection with offences relating to that use.

The Bill will retain the current requirement that an average speed detection system must display signs indicating that the system is in use (see current section 23C of the Act and proposed section 20 of the Regulation). However, there is no requirement for signage relating to use of mobile phone detection cameras. Given the primary justification for use of such cameras is to deter the use of mobile phones while driving, the Committee requests further information on why signage informing drivers of the potential use of mobile phone cameras in a particular area will not be required.

The Committee therefore requests further information or clarification of the intended operation of the Bill in relation to:

- whether traffic offence detection devices which can capture an image of the driver can only be used to capture the driver's use of a mobile phone;
- why images of a driver captured by traffic offence detection devices should be used in proceedings not involving offences relating to the use of mobile phones while driving;
- the timely destruction of images captured by traffic offence detection devices;
- whether the requirements for de-identification can be expanded to include information relating to an identified or identifiable individual; and
- why signs indicating use of traffic offence detection systems which can capture an image of the driver are not required.

**The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.**

The Bill will also shift requirements relating to images taken by a traffic offence detection device from the Act to the Regulation. The explanatory statement recognises that this may potentially limit the protection of privacy provided by section 12 of the HRA due to the possibility of regulations being amended to reduce privacy protections proposed in the Bill. This is discussed further below in considering whether the shift to regulations is an inappropriate delegation of legislative power.

*Rights in criminal proceedings (section 22 HRA)*

The Bill will amend sections 300 and 300AA of the *Road Transport (Road Rules) Regulation 2017* (Road Rules Regulation). Those provisions make it an offence for the driver of a vehicle to use a mobile device while the vehicle is moving, or is stationary but not parked, subject to a variety of exceptions which vary depending on the form of licence held by the driver. Use of a mobile phone is currently defined to include holding the device in the driver's hand except while passing the device to a passenger in the vehicle. The Bill will amend these offences to remove the exception for passing the device to a passenger.

As both sections 300 and 300AA are strict liability offences (see section 8 of the Road Rules Regulation), the Bill will potentially limit the rights in criminal proceedings protected by section 22 of the HRA, which includes the right to the presumption of innocence. The explanatory statement accompanying the Bill recognises this potential limitation and provides a statement setting out why use of strict liability offences should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement.

The Bill will also amend section 25 of the Act. Section 25 provides for the issue of certificates relating to the use of a traffic offence detection device which can then be used as evidence in offences against the Act (and related regulations) involving a vehicle. The Bill will amend the section to provide for images which indicate the use of a mobile device by the driver of the vehicle to be used as evidence that the vehicle was moving or stationary, but not parked, when the image was taken. As the explanatory statement accompanying the Bill recognises, this amendment potentially engages and limits the right to the presumption of innocence, as the provision requires a defendant to disprove the fact or provide evidence sufficient to raise a reasonable possibility that the vehicle, at the time of the alleged offence, was parked.

The explanatory statement sets out why any potential limit on the right to the presumption of innocence should be considered reasonable using the framework in section 28 of the HRA. That statement indicates that there will be significant safeguards built into the mobile device detection camera process prior to the issue of an infringement notice, including the use of artificial intelligence camera technology and trained and authorised individuals to identify images that show mobile phone use while driving. The explanatory statement suggests that it would be unreasonable for the prosecution to prove that a person was not parked as being parked is uniquely within the knowledge of the defendant. The explanatory statement also suggests that the cameras will operate in areas where it is unlikely that vehicles will be parked, and that it is critical to maintain public confidence in the mobile device detection camera system and to enable infringements to be issued.

The Committee notes that park is defined in the Road Rules Regulation, as, for a driver, includes stop and allow the driver's vehicle to stay (whether or not the driver leaves the vehicle). The Bill will amend the offences relating to mobile phone use while driving to make it clear that a vehicle may be parked even though the key is in the ignition or the engine is running. It is not clear to the Committee why it is unreasonable for a prosecution to disprove whether a vehicle is parked, given the possibility of providing evidence relating to the location and use of the traffic offence detection device and possibly a series of images showing the duration and circumstances of the vehicle's

position. Evidence of the artificial intelligence process used to identify relevant images should also be provided. The Committee therefore requests further information on the intended use of traffic offence detection devices which may be used to capture mobile phone use and the ways in which an individual captured on such a device may prove to the required standard that they were parked.

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

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

The Bill will relocate significant privacy-protecting provisions of the Act to the Regulation, including requirements for approval of devices designed to take images of drivers, what images are required or prevented from being taken by such devices, the use, disclosure and retention of data collected by the device and requirements relating to signage. The explanatory statement accompanying the Bill, in setting out why any limitations on privacy that may be permitted by this relocation should be considered reasonable, states the relocation:

simplifies the Territory’s road transport legislation to improve the efficiency of the regulatory framework for traffic offence detection devices while maintaining its integrity and enforceability”. ...The simplified approach will allow the Government to more readily respond to and improve road safety as new issues emerge and new technology becomes available ...

It is not clear to the Committee how relocating provisions from the Act to Regulations achieves these objectives, other than facilitating ready amendment through subordinate legislation. In the Committee’s view, the restrictions on the collection, use and disclosure of private information should be protected through provision in the Act. Regulations may be appropriate to further limit privacy intrusions of new technology, but only where they are clearly authorised by and enhance protections provided by primary legislation.

The Committee applauds the government’s commitment, referred to in the explanatory statement, to include an explanatory statement considering human rights compatibility for any future amendments to the Regulation or disallowable instruments. The Committee also recognises that any amendments in subordinate legislation will be subject to scrutiny by this Committee and the Assembly. The Committee notes that the explanatory statement also refers to a requirement under section 37 of the HRA for the Attorney-General to issue a compatibility statement, despite that section only referring to bills presented to the Assembly. However, the Committee requests further consideration be given to including provisions providing protection against undue limitations of privacy in the Act rather than relocated to the Regulation.

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

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—COMMENT

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

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

**Disallowable Instrument DI2021-55 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2021 made under section 156 of the *Residential Tenancies Act 1997* revokes DI2020-267 and continues measures which provide for a temporary reduction in rent or occupancy fees, and a moratorium of terminations, rent increases, etc, for those impacted by COVID-19 and unable to meet their commitments under a residential tenancy agreement.**

This instrument, made under section 156 of the *Residential Tenancies Act 1997* (which allows the Minister to make determinations in relation to various matters, in response to the COVID-19 pandemic). Under section 3 of the instrument, the instrument extends (at least in part) the operation of a series of earlier instruments, until the earlier of:

- the end of the “transitional period”, defined in section 7 of the instrument; and
- either the first day that no COVID-19 emergency is in force or a later day determined by the Minister (on the basis that a later end-date is justified – though the later day cannot be more than 3 months after 30 June 2021).

Section 7 provides, in part:

***transitional period*** means the period beginning on 23 October 2020 and ending—

- (a) on 30 June 2021; or
- (b) if the period is extended under section 13—at the end of the extended period.

Section 13 of the instrument provides that the Minister may extend the transitional period but, again, for not more than 3 months.

The end-date mechanism reflected in the second dot-point above reflects the limitation provided for in subsection 156(3) of the *Residential Tenancies Act*.

The particular measures extended by this instrument are:

- modification of the operation of subparagraph 8(1)(a)(i) of the *Residential Tenancies Act*, with the effect that tenants under a fixed term residential tenancy agreement that began before 6 April 2020 gain the benefit of an amendment to the *Residential Tenancies Act* that commenced on 6 April 2020, limiting the amount of rent that a lessor can require in advance to 2 weeks’ rent, unless the tenant nominates a longer period;
- providing lessors and tenants with the capacity to vary existing agreements to allow for temporary rent reductions, ensuring that there is no impediment to rents reverting to their previous rates, after an agreed period for rent reduction has ended;

- a continuation of the post-moratorium transitional period, which provides tenants who were COVID-19 impacted during the moratorium period with a longer timeframe to work towards clearing any rental debt before they could face eviction on the basis of arrears that accrued before or during the moratorium period;
- modification of the operation of section 49 of the Residential Tenancies Act, with the effect that the ACT Civil and Administrative Tribunal is required to consider the making of a payment order as an alternative to making a termination and possession order for a tenant who was a member of an impacted household during the moratorium period;
- prohibiting landlords or agents from adding tenants to a residential tenancy database due to a breach of a residential tenancy agreement for failure to pay rent during the moratorium period, where the tenant is a member of a COVID-19 impacted household; and
- allowing a COVID-19 impacted household to terminate a fixed-term tenancy agreement during the transitional period without penalty, by providing a lessor with 3 weeks' notice (with limitations to ensure that this measure is not misused by those who are not actually impacted by COVID-19 impacted).

The Committee notes that explanatory statement for the instrument discusses human rights issues:

#### **COMPATIBILITY WITH HUMAN RIGHTS**

The measures in the Declaration positively engage the right to protection of family and children and the right to privacy in the *Human Rights Act 2004* (HRA).

A number of measures under the Declaration promote the right to protection of family and children in section 11 of the HRA. These measures enable parties to a residential tenancy agreement to reduce the rent payable because of the COVID-19 pandemic, require ACAT to consider payment orders for COVID-19 impacted households and continue the transitional period to prohibit evictions due to rent arrears accrued before or during the moratorium period for COVID-19 impacted households. These measures prevent evictions and work to keep the family unit together during a period of considerable stress, providing time for families to improve their financial situation or consider their alternative options. The measures also promote the right to privacy and home in section 12 of the HRA.

The Declaration also promotes the right to informational privacy which protects the storing, use and sharing of personal and confidential information. Preventing tenants from impacted households from being placed on residential tenancy databases due to a failure to pay rent during the moratorium period protects their privacy and prevents them from later being treated adversely in the rental market because of COVID-19 pressures that were out of their control.

The Declaration also engages and may limit the right to privacy as the definition of a household "impacted" by the COVID-19 pandemic in clause 8, and the "early termination by tenants" provision in clause 12 may require tenants to provide personal information to their real estate agents or lessors to demonstrate a loss of income and/or that they have been diagnosed with COVID-19 or are caring for someone who has.

This limitation is reasonable and proportionate in accordance with the test in section 28 of the HRA. The measures in the Declaration have an important purpose, which is to mitigate

the risk of homelessness arising from financial stress due to the COVID-19 pandemic. The limitation on the right to privacy is necessary, as lessors may reasonably expect tenants to demonstrate the reason they need to terminate their fixed term tenancies, require a rent reduction or are in arrears due to the pandemic. This ensures that lessors may otherwise exercise their normal statutory rights under residential tenancy law, if circumstances extraneous to the pandemic permit. There are no other reasonably available and less restrictive alternatives that would not require the tenant to provide personal information to a third party.

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

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

## SUBORDINATE LAWS—COMMENT

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

*COVID-19-related subordinate law / Retrospectivity / Human rights issues*

**Subordinate Law SL2021-7 being the Liquor Amendment Regulation 2021 (No 1) made under the Liquor Act 2010 provides that the Commissioner for Fair Trading may make declarations to reduce a fee payable in relation to a licence or permit, in addition to a complete fee waiver.**

This subordinate law amends section 35 of the *Liquor Regulation 2010*, to allow the Commissioner for Fair Trading to make declarations to *reduce* fees payable in relation to a licence or permit under the *Liquor Act 2010*. Section 35 was inserted into the Liquor Regulations as part of the legislative response to the COVID-19 pandemic, allowing the Commissioner to make declarations to waive fees, in order to mitigate the impacts of the COVID-19 pandemic on businesses. The amendment made by this subordinate law adds a power to reduce those fees.

Section 2 of the subordinate law provides that the subordinate law “is taken to have commenced on 1 April 2021”. Given that the subordinate law was notified on the ACT Legislation Register on 13 April 2021, this means that the subordinate law has a retrospective effect. The Committee notes, with approval, that the retrospective effect is addressed in the explanatory statement for the subordinate law:

### RETROSPECTIVE COMMENCEMENT

Section 76 of the *Legislation Act 2001* (the Legislation Act) provides that non-prejudicial provisions may commence retrospectively. Section 76 (4) of the Legislation Act notes that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Section 76 (4) further provides that retrospectivity that is prejudicial to the Territory or to a territory authority or instrumentality is permitted.

The Amendment Regulation is taken to have commenced on 1 April 2021 notwithstanding its notification date. This legislative instrument commences retrospectively on 1 April 2021 pursuant to section 76 of the Legislation Act to give effect to the Commissioner for Fair Trading’s declaration (also due to commence retrospectively from 1 April 2021) in relation to a 50% fee reduction of annual licence fees for certain liquor licence holders.

The declaration by the Commissioner of Fair Trading will provide fee waivers and fee reductions for eligible liquor licensees in aid of their business recovery and is justifiably non-

prejudicial in accordance with section 76 of the Legislation Act. It is a measure that is beneficial in nature to licensees.

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

The Committee notes that the explanatory statement also addresses human rights issues:

#### **HUMAN RIGHTS COMPATIBILITY**

This Amendment Regulation does not engage human rights set out in the *Human Rights Act 2004*.

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

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

## RESPONSES

### GOVERNMENT RESPONSE

The Committee has received a response from:

- The Minister for Transport and City Services, in relation to comments made in Scrutiny Report 3 concerning Domestic Animals Legislation Amendment Bill 2021.

**[This response<sup>1</sup>](#) can be viewed online.**

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

### RESPONSE—COMMENT

**Disallowable Instrument DI2021-4 being the Working with Vulnerable People (Background Checking) Risk Assessment Guidelines 2021 (No 1) made under section 27 of the *Working with Vulnerable People (Background Checking) Act 2011* repeals DI2018-223 and makes the Working with Vulnerable People Commissioner's Risk Assessment Guidelines.**

The Committee commented on the instrument mentioned above in *Scrutiny Report 3* of the 10<sup>th</sup> Assembly (14 April 2021). The instrument makes “risk assessment guidelines”, under section 27 of the *Working with Vulnerable People (Background Checking) Act 2011*. Referring to the substance of the guidelines made by the instrument, the Committee noted that it was evident that the subject matter of the guidelines had a human rights element, in terms of both the vulnerable persons who are intended to be protected and in terms of persons seeking to be registered to work with vulnerable people. The Committee also noted that the explanatory statement for the instrument contained a broad discussion of human rights implications of the guidelines, by reference to the explanatory material for the 2019 and 2020 amendments to the Working with Vulnerable People (Background Checking) Act, on which the guidelines were premised. However, the Committee questioned whether the human rights implications of this particular instrument might have been more directly addressed, in the explanatory statement for this instrument, by reference to the provisions of the instrument rather than the Act amendments.

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<sup>1</sup> <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>.

In making this comment, the Committee acknowledged the formal limitations on its jurisdiction (under section 38 of the *Human Rights Act 2004*) in relation to subordinate legislation, referring also to earlier comments, in *Scrutiny Report 2* of the 10<sup>th</sup> Assembly (24 March 2021), in relation to the Litter (Amenity Impact) Code of Practice 2020 (No 1) [DI2020-287].

The Committee drew the instrument to the attention of the Legislative Assembly, 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, and 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.

The Committee sought a response from the Minister.

The Minister has responded to these comments, in a letter dated 11 May 2021.

The Minister states:

I acknowledge that the Committee considers that the Explanatory Statement for the Instrument could have more directly addressed human rights matters. I also note the Committee's reflection that in recent years Explanatory Statements for subordinate legislation, such as this Instrument, have increasingly addressed human rights issues to the Committee's satisfaction.

In light of the Committee's comments, I will ensure that explanatory statements for future instruments for which I have responsibility more clearly address human rights issues. In the interim, I have attached a further analysis of the Instrument.

The Committee thanks the Minister for this helpful response (including the further analysis of the human rights issues arising from the instrument) and for the undertaking to ensure that explanatory statements for future instruments for which the Minister has responsibility more clearly address any human rights issues.

Jeremy Hanson MLA  
Chair

MAY 2020

## OUTSTANDING RESPONSES

### BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021
  - Disallowable Instrument DI2020-287 Litter (Amenity Impact) Code of Practice 2020 (No 1)