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

SCRUTINITY REPORT 12  

1 FEBRUARY 2022
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**

**BILLS—NO COMMENT**

The Committee has examined the following bills and offers no further comment on them:

**CORRECTIONS MANAGEMENT AMENDMENT BILL 2021**

This Private Member’s Bill amends the *Corrections Management Act 2007* to extend the current offence of taking prohibited things into a correctional centre to include causing a prohibited thing to be taken into a correctional centre or given to a detainee. This is intended to extend the offence to include the unauthorised use of remote piloted aircraft to deliver packages to detainees.

**PUBLIC PLACE NAMES AMENDMENT BILL 2021**

This Private Member’s Bill amends the *Public Place Names Act 1989* and the matters the Minister must have regard to in determining the name of a public place by replacing reference to “colonisation” with “reconciliation”.

**BILLS—COMMENT**

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

**CRIMES (POLICING) LEGISLATION AMENDMENT BILL 2021**

This Bill is an omnibus bill which amends a range of legislation in the Minister for Police and Emergency Services’ portfolio. It makes amendments to the *Crimes (Child Sex Offenders) Act 2005*, *Crimes (Child Sex Offenders) Regulation 2005*, the *Firearms Act 1996*, and the *Firearms Regulation 2008* to:

- consolidate failure to report offences for child sex offenders into a single strict liability offence;
- enshrine a permanent amnesty for the surrender of firearms to police;
- provide a legislative basis for the destruction or disposal of those firearms by the Firearms Registrar without the need for a court order;
- introduce new, stricter safe storage requirements for security companies licensed to possess and use Category H guns; and
- introduce consequential amendments arising from updates to the numbering of provisions, and headings, of the *Crimes (Child Sex Offenders) Act 2005*.

*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)

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill will amend the *Crimes (Child Sex Offenders) Act 2005* to unify various offences relating to registrable offenders under the Act failing to report to police. The existing reporting offences will be amended and relabelled as reporting obligation provisions. A registrable offender will commit an offence if they are required to report under a reporting obligation provision, they are reckless about whether they are required to report, and they fail to report as required. Strict liability will apply to the third element of whether the registrable offender reports as required. It will be a defence where the registrable offender has a reasonable excuse for failing to report as required, with the court having to have regard to matters including the offender’s age, a relevant disability and the notice the registrable offender received informing them of their reporting obligations.

By placing strict liability on one element of the offence, the Bill will limit the matters having to be established in the prosecution of the offence and hence limit the protection of the presumption of innocence protected in section 22 of the HRA. Providing for an evidential burden on the defendant to establish the defence of reasonable excuse may also limit the presumption of innocence.

Requirements to report may have a disproportionate impact on persons for whom English is a second language or who may otherwise have an impediment to understanding the nature of the reporting requirements or the ability to report as required. By amending the circumstances in which such a person may be subject to an offence or have to establish a defence of reasonable excuse the Bill may limit the right to equality before the law in section 8 of the HRA. Reporting requirements may include having to divulge personal and otherwise private information or information about residential circumstances. The Bill may therefore limit the protection of privacy provided by section 12 of the HRA. Reporting requirements may burden or otherwise impede the ability to move across state and territory borders, hence the Bill may limit the right to freedom of movement in section 13 of the HRA. Finally, by imposing a possible penalty of up to five years’ imprisonment for breach of a reporting offence which in itself may not involve significant harm to the community the Bill may also limit the right to liberty and security of person protected by section 18 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limitations and provides a detailed justification for why they should be considered reasonable using the framework provided in section 28 of the HRA. The Committee refers this statement to the Assembly, noting the limitation of strict liability to only the act of reporting, the retention of the mental element of recklessness for whether the registrable offender was required to report (so the offence will only be established where they knew they were required, or there was a substantial risk that they were required, to report), and the availability of defences relating to reasonable excuse and mistake of fact.

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

**ELECTORAL AMENDMENT BILL 2021**

This Private Members’ Bill amends the *Electoral Act 1992* to reduce the age for eligible voters in ACT general elections to 16.
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)

The Bill will allow and make it compulsory for persons over the age of 16 to enrol to vote and vote in ACT general elections. Persons over 14 will be allowed to enrol to vote. Persons between 16 and 18 who fail to enrol to vote within 21 days of becoming entitled to vote, or who fail to vote despite being entitled to vote, will be subject to half the applicable maximum penalty (that is, 0.25 penalty units rather than 0.5 penalty units). The prescribed penalty for a default notice, which discharges any criminal liability for failing to vote, is also halved (that is, $10 or higher amount prescribed by regulation).

By discriminating based on age—in preventing persons under 14 from enrolling to vote and under 16 from voting and applying a differential penalty to persons under 18—the Bill may limit the right to equality before the law protected by section 8 of the HRA. The explanatory statement for the Bill includes a brief statement asserting that “[s]etting the minimum voting age at 16 years old would be consistent with contemporary understandings about the cognitive development and maturity of young people”. There is no justification given for setting the age for enrolment to vote at 14. The Committee refers that statement to the Assembly. The Committee is concerned that there is limited justification provided in the explanatory statement for why a distinction should be drawn at 14 and 16 years of age and requests further information from the Members as to why these ages were selected.1

Subjecting persons under 18 to penalties in relation to voting may limit the protection of family and children provided by section 11 of the HRA. The Committee notes the reference in the explanatory statement to a recommendation of the ACT Human Rights Commission that fines for non-voting for persons under 18 be automatically waived. The explanatory statement suggests such a systematic response would be contrary to the Proportional Representation (Hare-Clarke) Entrenchment Act 1994 which, in paragraph 4(1)(c), requires voting in an election to be compulsory. The Committee notes that it is not clear that allowing a notice to be issued discharging any liability for failure to vote on the basis of age would necessarily be inconsistent with this requirement. It may be possible, for example, for age to be expressly included as a fact to be considered in the issue of a discharge notice. The Committee notes that it is also possible for legislation to be passed which is inconsistent with the Proportional Representation (Hare-Clarke) Entrenchment Act through a 2/3 majority of the Assembly or a referendum held in accordance with the Referendum (Machinery Provisions) Act 1994.2

1 The Committee notes the recent decision in Make it 16 Inc v Attorney-General [2021] NZCA 681 where the New Zealand Court of Appeal held:

on the information before this Court in this case, the Attorney-General has not established that the limits on the right of 16 and 17 year olds to be free from age discrimination caused by the voting age provisions are reasonable limits that can be demonstrably justified in a free and democratic society. The decision rests not on a positive finding that discrimination on grounds of age cannot be justified but on what we have held to be a failure to attempt to justify the existing age limit

The Court in that case emphasised the need to justify why a particular age was selected, noting that the age discrimination under the New Zealand Bill of Rights Act was expressly limited to over 16 years of age.

2 See subsection 5(2) of the Proportional Representation (Hare-Clarke) Entrenchment Act and section 26 of the Australian Capital Territory (Self-Government) Act 1988 (Cth).
The Committee draws this matter to the attention of the Assembly, and asks the Members to respond prior to the Bill being debated.

**FINANCIAL MANAGEMENT AMENDMENT BILL 2021 (NO 2)**

This Bill amends the *Financial Management Act 1996* to provide for an insourcing framework which will be used to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider.

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

The Bill will insert a new Part 9A into the Act, requiring public sector entities to comply with an insourcing framework to be determined by the Chief Minister. The framework will be used to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider. Public sector entities are defined for the purpose of the proposed new part as a directorate, body established under territory legislation, an officer of the Assembly, Office of the Legislative Assembly, and entities prescribed by regulation. Territory-owned corporations, their subsidiaries or prescribed entities are not included in the definition of public sector agencies. The Bill will also make chief executive officers of such entities responsible for ensuring compliance with the framework, defining such officers respectively to mean the responsible director-general, person responsible for the affairs of bodies established under legislation or prescribed, individual officers of the Assembly or the Clerk of the Legislative Assembly.

The framework will be a notifiable instrument. Regulations may provide for an amount of the likely cost of services or works at which the framework will be applicable, but the insourcing framework may provide for how the likely cost of services or works is determined. There are no criteria set out in the Bill limiting the content or substantive effect of the framework or even considerations involved in its determination. The explanatory statement accompanying the Bill suggests the Bill is intended to give effect to policy commitments relating to preventing the outsourcing or privatisation of public sector jobs, and implementing a whole of government policy that government services will not be contracted out where they could be performed by public servants. However, these objectives are not referenced in the Bill, and there is no requirement in the Bill that the framework encourage greater use of public servants in the carrying out of services or works. The Committee also notes that the Financial Management Act provides for the Treasurer to make financial management guidelines for the Act which are disallowable instruments.

The Committee is concerned that there is limited justification for why the framework should be determined by a notifiable rather than disallowable instrument. The explanatory statement accompanying the Bill states that the use of notifiable instruments will provide the required flexibility to update or modify the framework as required. However, it is not clear to the Committee why a disallowable instrument would not provide sufficient flexibility while ensuring scrutiny by this Committee and the Assembly.

On 7 December 2021, the Committee received a letter from the Clerk of the Legislative Assembly raising objections to the application of the Bill to the Office of the Legislative Assembly. The letter references the potential inconsistency between the Bill and section 8 of the *Legislative Assembly (Office of the Legislative Assembly) Act 2012* which provides that the Clerk and the Office’s staff are not subject to direction by the Executive or any Minister in the exercise of their functions.

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3 This includes the Auditor-General, the Integrity Commissioner, and the Electoral Commissioner.
The Committee also notes similar provisions relating to the independence of the Auditor-General,\(^4\) Integrity Commission\(^5\) and Electoral Commission.\(^6\) In the Committee’s view, the potential of the Bill to act inconsistently with these provisions provides a further justification for the framework to be disallowable.

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

**PUBLIC HEALTH AMENDMENT BILL 2021 (NO 2)**

This Bill amends the *Public Health Act 1997* to establish a regulatory framework for protecting against the risks to public health presented by COVID-19 but which may not present a public health emergency.

**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)
- Protection from torture and cruel, inhuman or degrading treatment etc (Section 10 HRA)
- Right to privacy and reputation (Section 12 HRA)
- Right to freedom of movement (Section 13 HRA)
- Freedom of thought, conscience, religion and belief (Section 14 HRA)
- Peaceful assembly and freedom of association (Section 15 HRA)
- Right to liberty and security of person (Section 18)
- Right to humane treatment when deprived of liberty (Section 19)
- Rights in criminal proceedings (Section 22 HRA)
- Right to work and other work-related rights (Section 27B)

The Bill will introduce a new Part 6C into the Public Health Act to provide for a range of measures in response to the ongoing COVID-19 pandemic. They substantially replicate current measures in place under a public health emergency declaration provided for in section 119 of the Act. The new Part 6C will include substantial delegations of legislative and administrative authority which may significantly limit human rights protected under the HRA. The Bill includes existing and additional safeguards to limit the impact on human rights but remains premised on the urgent need to respond to the COVID-19 pandemic as it continues to evolve.

\(^4\) Section 7 of the *Auditor-General Act 1996*  
\(^5\) Section 22 *Integrity Commission Act 2018*  
\(^6\) Section 6B *Electoral Act 1992*
The Bill will enable a COVID-specific management declaration to be made where the executive has reasonable grounds for believing that COVID-19 presents a serious risk to public health, taking into account various listed factors. A COVID-19 management declaration is a disallowable instrument. It has to be remade or extended at least every six months. Advice from the Chief Health Officer must be provided every 60 days and before any extension, and only after seeking the advice of the Chief Health Officer on the risks presented by COVID-19. Advice of the Chief Health Officer must be made public within seven days.

While a COVID-19 management declaration is in place, the Bill will enable three types of directions to be made where they are considered necessary to prevent or alleviate the risk to the public health presented by COVID-19, namely:

- Ministerial directions relating to:
  - regulating entry to the ACT or areas within the ACT, public or private gatherings;
  - use of personal protective equipment such as masks;
  - carrying on of activities, businesses, or undertakings; and
  - requiring information or records be provided or retained.

- Chief Health Officer directions relating to:
  - requirements for medical examination or testing;
  - segregation or isolation (up to 14 days or returning a negative result for COVID-19) of a person; or
  - keeping or producing information or records.

- A vaccination direction made by the Executive relating to:
  - vaccination requirements to engage in particular work, work at a particular workplace, engage in a particular activity or access a particular place, but may not prevent or limit a person from being able to obtain an essential good or service;
  - requiring others to enforce vaccination requirements;
  - keeping or producing information or records.

A vaccination direction will be a disallowable instrument. Ministerial directions and Chief Health Officer directions, unless given to a particular person, will be notifiable instruments. They all have to be remade or extended every 90 days. Before making or extending a Ministerial direction, the Minister must seek advice from the Chief Health Officer and consult the Chief Minister. The Chief Health Officer must provide advice or review the ongoing justification for the direction every 30 days. Any advice must be made public within seven days. The Human Rights Commissioner must also be consulted about whether a direction or extension is consistent with human rights. Any direction or extension will be accompanied with a statement on consistency with human rights.

Ministerial and Chief Health Officer directions may include grounds on which individuals can apply for an exemption. Individuals may also be able to apply for an exemption on medical and compassionate grounds, subject to the direction in question. Exemption decisions are subject to internal review. Where the application relates to entry into the ACT on medical or compassionate grounds, or a segregation or isolation decision, the exemption decision may also be externally reviewed, with external reviewers having to be judicially qualified but not subject to Assembly consultation on their appointment. Vaccination directions can also include medical or other grounds on which a person may apply for an exemption. The Bill does not provide for internal or external review of vaccination exemption decisions.
Any grounds for exemption must comply with, and are subject to, Ministerial, Chief Health Officer and vaccination exemption guidelines made by the Minister, Chief Health Officer or the Executive respectively. The Chief Health Officer and Human Rights Commissioner must be consulted in making any guidelines. Exemption guidelines will be notifiable instruments.

The Bill will make it an offence to fail to comply with a direction, subject to a maximum penalty of 50 penalty units. Strict liability will apply to whether a direction is in force. A defence of having a reasonable excuse will be available. Authorised officers should also, if reasonably practicable, warn a person that failure to comply with a direction without a reasonable excuse is an offence. The Bill will also remove the various protections in Part 1C of the Crimes Act 1914 (Cth) generally incorporated by section 187(1) of the Crimes Act 1900 in the investigation and enforcement of criminal offences. Part 1C places various requirements on police when questioning possible offenders. The Bill will displace these requirements where a police officer believes that a person is over 18 years of age and has failed to comply with a COVID-19 direction but the police officer only intends to serve an infringement notice or take no further action in relation to the offence if established. Before asking whether the person has a reasonable excuse the police officer must still warn the person that they don’t have to respond but any response may be used in evidence.

The Bill will also amend the COVID-19 Emergency Response Act 2020 to remove provisions relating to the protection of information collected through the Check In CBR app inserted by the COVID-19 Emergency Response (Check-in information) Amendment Act 2021. These provisions will instead be inserted as a new Part 7A of the Public Health Act, including the imposition of strict liability offences relating to the collection and use of check-in information.

The Bill, by authorising the making of directions which will be enforceable through creation of new offences, may significantly impact a number of human rights:

- Restrictions on entry into or within the ACT, gatherings or the carrying on of a business, undertaking or activity could limit the right to freedom of movement protected under section 13 of the HRA, freedom to demonstrate religious beliefs protected under section 14 of the HRA, right to freedom of assembly and association protected in section 15 of the HRA, and the right to work protected by section 27B of the HRA.
- Restrictions on private gatherings or activities could limit the protection of privacy, family and home provided by section 12 of the HRA.
- Persons with a disability or medical condition may be adversely affected by requirements to wear protective equipment, isolate or be segregated from their supportive community, undertake testing or vaccination requirements, or otherwise be disproportionately affected by the directions in a way which limits the right to equality provided by section 8 of the HRA.
- Requirements to produce or maintain records or information may limit the protection of privacy.
- Requirements to be vaccinated and, to the extent that non-invasive testing may involve medical treatment, undertake testing for COVID-19 infection in the Bill may also limit the protection against subjecting someone to medical treatment without their consent protected by section 10 of the HRA.
- Vaccination requirements may also limit the right to equality in section 8 and the right to work protected by section 27B of the HRA.
- Segregation or isolation requirements may also limit the right to liberty protected by section 18 and right to humane treatment while deprived of liberty protected by 19 of the HRA.
• Imposition of strict liability as an element of the offence of failing to comply with a direction and providing for a defence of reasonable excuse may limit the protection of the presumption of innocence included within the rights in criminal proceedings protected by section 22 of the HRA. Use of strict liability offences in relation to check-in information may also limit this right.

• The exception to the application of subsection 187(1) of the *Crimes Act 1900* may also limit certain rights in criminal proceedings protected by section 22 of the HRA.

The explanatory statement accompanying the Bill recognises these potential impacts and provides a detailed and accessible justification for why they should be considered reasonable, setting out the various protections included within the Bill. The Committee refers that statement to the Assembly, subject to the comments on the use of notifiable instruments discussed below.

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

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

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

The Bill will establish COVID-19 management declarations and extensions and vaccination directions and extensions as disallowable instruments. Ministerial directions and extensions and Chief Health Officer directions and extensions (where the direction is not given to a particular person) are only notifiable instruments. Exemption guidelines for all three types of directions are also notifiable instruments.

The Bill requires that all directions include a statement outlining the grounds on which the direction is issued. Directions will generally be prepared only after consultation with the chief medical officer and the Human Rights Commissioner, and within seven days after issuing the direction any advice from the Chief Health Officer and how the direction or extension is consistent with human rights (unless the direction is only minor or technical or no-more restrictive) has to be made public. There are additional restrictions on Chief Health Officer directions relating to segregation or isolation in terms of the length of isolation or segregation involved.

The Bill also provides for the relevant standing committee—either the committee nominated by the speaker or the standing committee responsible for consideration of legal issues—to report to the Assembly about human rights issues raised by Ministerial directions and Chief Health Officer directions.

The explanatory statement accompanying the Bill includes the following statement outlining the reasons for the different approaches to disallowance of directions:

Ministerial and Chief Health Officer directions are notifiable instruments to provide a high degree of transparency of these measures. These directions are not considered suitable to be disallowable instruments as this may undermine the effectiveness of public health measures while a COVID-19 management declaration is in place.

A Vaccination Direction that may be made by the Executive is a disallowable instrument noting the significant way in which such a direction engages human rights. This provides a higher degree of scrutiny over such a measure.
The explanatory statement also includes a discussion of the differential treatment of disallowance of directions in outlining the proportionality of the different measures:

Directions issued by the Minister will be notifiable rather than disallowable to ensure that the detail of such a Direction is open and transparent. Whilst notifiable instruments do not ordinarily require an explanatory statement, an additional safeguard associated with a Direction by the Minister is a requirement for a statement to be published addressing the nature of the risk posed by COVID-19, the grounds on which the Minister believes the Direction will mitigate that risk or aspects of that risk, and the grounds on which exemptions will be available.

A further safeguard imposed in relation to Directions issued by the Minister are that in making or extending a Direction the Minister must ask for and take into consideration advice from the Chief Health Officer, consult the Chief Minister, and within 7 days of making or extending a Direction issue a public notice addressing the advice from the Chief Health Officer and explaining how the Direction or extension is consistent with human rights (unless the Direction is to remake an existing Direction to resolve minor or technical issues).

Similar safeguards are imposed for Directions issued by the Chief Health Officer ….

The Committee notes that there is no explicit requirement, in the Bill or other legislation, for disallowable instruments to include an explanatory statement or statement of consistency with human rights. The Committee acknowledges the current government practice of regularly addressing human rights compatibility in statements accompanying subordinate legislation and the role of the Committee in commenting on such statements and any human rights issues otherwise presented. However, the significance of the human rights issues potentially presented by COVID-19 management declarations and vaccination directions warrant express reference in the Bill to such statements being required.

The Committee welcomes the various requirements in the Bill for consultation and scrutiny of human rights considerations in relation to Ministerial and Chief Health Officer directions. However, the Committee is concerned about the limited ability of the Assembly to disallow such directions. Similarly, guidelines relating to exemptions, particularly in relation to vaccination directions, as notifiable instruments, are not subject to extended forms of scrutiny, despite the importance such exemptions may play in ameliorating the significant human rights effects of the directions.

The Committee therefore requests further information on why Ministerial and Chief Health Officer directions and exemption guidelines for all forms of directions are not disallowable instruments, and whether additional forms of consultation, consideration by the Assembly, and public scrutiny of exemption guidelines can be provided for in the Bill.

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

**Road Transport Legislation Amendment Bill 2021 (No 2)**

This Bill amends various legislation relating to road transport to improve road safety and improve the administration and efficiency of Territory’s road transport legislation. The amendments include requiring transfer of registration of vehicles kept in an ACT garage for more than three months, incorporating relevant amendments of the model Australian Road Rules relating to electric vehicles, and remaking section 24A of the *Road Transport (Alcohol and Drugs) Act 1977*. 
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)

The Bill amends the Road Transport (Road Rules) Regulation 2017 to introduce offences specifically relating to stopping in a parking area for electric-powered vehicles or the charging of electric powered vehicles. The Bill also amends section 206 of the regulation to allow a person who displays and complies with a current mobility parking scheme authority to park for an additional 30 minutes in electric vehicle parking spaces. Because this is less than the additional period for other non-electric parking spaces (two hours if the time limit is 30 minutes or less or unlimited otherwise) the amendment may impose a distinct burden on those with impaired mobility and hence limit the right to equality protected by section 8 of the HRA.

The explanatory memorandum recognises this potential limitation and provides a justification for why it 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 notes, however, that the justification relies in part on the small number of electric charging stations currently available. If, as is noted in the explanatory statement, further charging stations and electric vehicle parking spaces are created the proportionality of this restriction may need to be reconsidered.

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

Right to freedom of movement (section 13 HRA)

Right to liberty and security of person (section 18 HRA)

Section 24A of the Road Transport (Alcohol and Drugs) Act 1977 makes it an offence to drive or ride a bicycle, personal mobility device or animal-drawn vehicle or animal on a road, or be in charge of a vehicle or animal on a road, while under the influence of alcohol or a drug. This offence carries a maximum penalty of 50 penalty units or imprisonment for six months. The Bill will amend this offence to require a person be influenced by alcohol or drugs to such an extent that they are incapable of having proper control of the vehicle or animal. The maximum penalty is reduced to 30 penalty units or imprisonment for six months for first offenders, or 30 penalty units or imprisonment for up to 12 months for repeat offenders who committed the same offence in the previous five years. The Bill will also extend the amended offence to road-related areas, with a maximum penalty of 20 penalty units.

As the Bill extends the offence to include road-related areas and will increase the deterrent effect the Bill may limit the right to freedom of movement in section 13 of the HRA. By extending the potential period of imprisonment for repeat offenders in relation to road use the Bill may also limit the right to liberty in section 18 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.
RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

Under section 8 of the Road Transport (Road Rules) Regulation, offences against that regulation are strict liability offences. By introducing new offences in that regulation, relating to the time limits for parking and charging of electric vehicles, the Bill will introduce new strict liability offences. The amended section 24A is also expressly stated in the Bill to be a strict liability offence.

By creating strict liability offences which displace the need to establish the fault element in the prosecution of the offences the Bill may limit the right to the presumption of innocence protected by section 22 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 subject to the comments below.

The Committee is concerned with the application of strict liability to driving, riding or being in charge of an animal or vehicle on a road related area. “Road related area” is defined in the Road Transport (General) Act 1999 to include adjacent footpaths or nature strips, areas open to the public and designated for use by cyclists or animals, areas that are not roads but are open or used by the public for driving, riding or parking vehicles, and declared areas. It may not be clear to a person when they are riding or in control of a vehicle in a road adjacent area so as to commit the offence. The Committee therefore requests further information on how individuals will be informed about when they are using a road related area so as to be subject to the amended offence.

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

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

The Committee notes that the Bill will amend the Road Transport (Driver Licensing) Act 1999, the Road Transport (General) Act 1999, the Road Transport (Safety and Traffic Management) Act 1999 and the Road Transport (Vehicle Registration) Act 1999 to allow regulations to apply a publication of the National Transport Commission or any other instrument as in force from time to time. In doing so the Bill will remove outdated references in those Acts to the Australian Transport Council. The amended sections will continue to note that any instrument so applied will be a notifiable instrument under section 47 of the Legislation Act 2001.

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 has no comments on them:

- Disallowable Instrument DI2021-251 being the Motor Accident Injuries (Premiums) Guidelines 2021 (No 1) made under section 487 of the Motor Accident Injuries Act 2019 revokes DI2020-293 and makes the MAI Premium Guidelines.

• Disallowable Instrument DI2021-255 being the Territory Records (Advisory Council) Appointment 2021 (No 1) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.

• Disallowable Instrument DI2021-257 being the University of Canberra Council Appointment 2021 (No 2) made under section 11 of the University of Canberra Act 1989 re-appoints a specified person as a member of the University of Canberra Council.

• Disallowable Instrument DI2021-258 being the University of Canberra Council Appointment 2021 (No 3) made under section 11 of the University of Canberra Act 1989 appoints a specified person as a member of the University of Canberra Council.

• Disallowable Instrument DI2021-259 being the University of Canberra Council Appointment 2021 (No 4) made under section 11 of the University of Canberra Act 1989 appoints a specified person as a member of the University of Canberra Council.

• Disallowable Instrument DI2021-261 being the Board of Senior Secondary Studies Appointment 2021 (No 4) made under section 8 of the Board of Senior Secondary Studies Act 1997 repeals DI2019-241 and appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Association of Parents and Friends of the ACT Schools.

• Disallowable Instrument DI2021-262 being the Public Health (Fees) Determination 2021 (No 1) made under section 137 of the Public Health Act 1997 revokes DI2019-250 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2021-263 being the Tobacco and Other Smoking Products (Fees) Determination 2021 (No 1) made under section 70 of the Tobacco and Other Smoking Products Act 1927 revokes DI2010-299 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2021-264 being the Food (Fees) Determination 2021 (No 1) made under section 150 of the Food Act 2001 revokes DI2019-248 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2021-265 being the Health Records (Privacy and Access) (Fees) Determination 2021 (No 1) made under section 34 of the Health Records (Privacy and Access) Act 1997 revokes DI2020-300 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2021-266 being the Radiation Protection (Fees) Determination 2021 (No 1) made under section 120 of the Radiation Protection Act 2006 revokes DI2020-298 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2021-267 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2021 (No 1) made under section 197 of the Medicines, Poisons and Therapeutic Goods Act 2008 revokes DI2020-297 and determines fees payable for the purposes of the Act.
DISALLOWABLE INSTRUMENTS—COMMENT

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

FEES INSTRUMENTS / COVID-19-RELATED INSTRUMENT / RETROSPECTIVITY / HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-253 being the Construction Occupations (Licensing) (Fees) Determination 2021 (No 2) made under section 127 of the Construction Occupations (Licensing) Act 2004 revokes DI2021-74 and determines fees payable for the purposes of the Act.


The instruments mentioned above determine fees, for the 2021-22 financial year, for the Construction Occupations (Licensing) Act 2004 and the Nature Conservation Act 2014. In each case, section 2 of the instrument provides that the instrument commences on the day after the instrument’s notification day—4 November 2021 and 11 November 2021, respectively.

The Committee notes that the explanatory statement for the first instrument mentioned above indicates that the fees that it determines are affected by the COVID-19 pandemic:

As per the 2021-22 Budget Outlook, the Government is providing support to occupations that have been significantly affected during the COVID-19 pandemic by reducing licence renewal fees for construction occupational licences.

The Government will waive late renewal fees for the construction sector and provide a 20 per cent reduction in annual licence renewal fees for a range of construction occupational licences in 2021-22. These licences include:

- Builder;
- Building Surveyor;
- Building Assessor, Electrician, Gas Appliance Worker, Plumbing Plan Certifier or Work Assessor; and
- Drainer, Gasfitter and Plumber.

The Committee notes that various fees are also set at the same level as the previous financial year. However, the Committee notes that, while the “old” and “new” fees are identified, in line with the Committee’s expectations, no further explanation is provided in relation to the magnitude of the fees increases provided for by the instrument. The Committee has oft-stated that it expects such an explanation to be provided.

The Committee notes, with approval, that, while the instrument does not have a retrospective effect as such, the explanatory statement addresses retrospectivity issues:

The instrument commences on the day after its notification day, and retrospectively applies the 20 per cent reduction in annual licence renewal fees to the start of the 2021-22 financial year.

Section 76 (1) of the Legislation Act 2001 provides that a statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively. In this case, reducing certain annual licence fees by 20 per cent is non-prejudicial and does not operate
to the disadvantage of a person by adversely affecting the person’s rights or imposing liabilities on the person. The introduction of a 20 per cent fee reduction for certain annual licences is intended to benefit the construction sector that has been affected by the COVID-19 lockdown. The Government will arrange reimbursement to any person who had paid the previous (non-reduced) fee between 1 July 2021 and the commencement of this instrument.

The Committee notes that there is no equivalent statement in the explanatory statement for the second instrument, which would appear to have a similar (retrospective) application. Nor is there any explanation for the fees increases that are provided for (though the “old” and “new” fees are identified). Again, the Committee expects such an explanation to be provided.

The Committee notes that the only explanation provided in relation to the fees determined by the second instrument is as follows:

The instrument waives fees for holders of an annual pass for entry to Tidbinbilla Nature Reserve that expires in 2021 for a period of 3 months following the expiry of their pass. This is to account for the period when the reserve was closed during the COVID-19 lockdown period when annual pass holders could not access the reserve.

The instrument also gives certain officials within the Environment, Planning and Sustainable Development Directorate the power to waive fees under the Act if they reasonably believe it is in the public interest to do so. This fee waiver power could be used, for example, to waive fees otherwise payable by a volunteer group which is undertaking park care activities in a nature reserve.

The Committee seeks the Minister’s advice as to the reasons for the fees increases that are provided for by two instruments mentioned above.

The Committee draws the attention of the Legislative Assembly to the two instruments mentioned above, under paragraph (10)(d) of the Committee’s Resolution of Appointment, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before Wednesday, 9 February 2022, when the Legislative Assembly’s capacity to move to disallow the instruments will expire.

The Committee notes that the explanatory statements for both of the instruments mentioned above state that the relevant instrument does not engage human rights issues.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the first and second instruments mentioned above.

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

HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-256 being the Nature Conservation (Scientific Committee) Appointment 2021 (No 2) made under section 36 of the Nature Conservation Act 2014 revokes DI2021-208 and appoints specified persons as members of the Scientific Committee.
This instrument appoints specified persons as members of the Scientific Committee, under section 36 of the *Nature Conservation Act 2014*.

The Committee notes that the explanatory statement for the instrument indicates that it does not engage any human rights.

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.

**Human rights issues**

- **Disallowable Instrument DI2021-260 being the Public Place Names (Coombs) Determination 2021** made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Coombs.

This instrument determines the name of a public place, in the Division of Coombs, for section 3 of the *Public Place Names Act 1989*. The Committee notes that, consistent with similar instruments made under this section, the explanatory statement for the instrument discusses human rights issues engaged by the instrument. As the explanatory statement notes, the right engaged is the right to privacy and reputation, protected by section 12 of the *Human Rights Act 2004*. The Committee notes that the explanatory statement states that the right to privacy is not infringed by the 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.

**Human rights issues / Discussion of Committee’s scrutiny principles**


This instrument approves a Canberra Nature Park Reserve Management Plan 2021, for section 183 of the *Nature Conservation Act 2014*.

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

**Human Rights Act**

The plan positively engages the cultural rights of Aboriginal people, as provided by section 27 (2) of the *Human Rights Act 2004*, by strengthening the right for Aboriginal people to have their material and economic relationships with the land and other resources, with which they have a connection under traditional laws and customs, recognised and valued.

The Committee notes that this statement is reflected in statements at pp 18, 76, 240 and 255 of the Management Plan.
The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.

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

The Committee notes that the explanatory statement for the instrument also discusses the instrument, by reference to the scrutiny principles that operate as the Committee’s terms of reference:

**Scrutiny of Bills Committee Principles**

The disallowable instrument is in accordance with the Scrutiny of Bills Committee’s scrutiny principles.

The following addresses the Scrutiny of Bills Committee principles.

(a) is in accord with the general objects of the Act under which it is made;

The reserve management plan is in accord with the general objects of the Act. The main object of the Act is to protect, conserve and enhance the biodiversity of the ACT. In particular the objects of the Act are to be achieved by:

- protecting, conserving, enhancing, restoring and improving nature conservation
- promoting and supporting the management, maintenance and enhancement of biodiversity of local, regional and national significance; and
- promoting the involvement of, and cooperation between, Aboriginal and Torres Strait Islander peoples, landholders, other community members and governments in conserving, protecting, enhancing, restoring and improving biodiversity.

(b) unduly trespasses on rights previously established by law;

No rights, liberties or obligations are directly impacted by the reserve management plan.

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

The reserve management plan does not affect rights, liberties or obligations. The plan provides guidance and does not directly impose liabilities on the community.

(d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

It is appropriate that the matter be dealt with in a disallowable instrument rather than an Act of the Legislative Assembly. The preparation, consultation, approval and notification of such reserve management plans are provided for in the Act.

The Committee draws the attention of the Legislative Assembly to the discussion of the Committee’s scrutiny principles in the explanatory statement for this instrument.

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

**SUBORDINATE LAW—NO COMMENT**

The Committee has examined the following subordinate law and offers no comments on it:
• Subordinate Law SL2021-23 being the Motor Accident Injuries (Lawyer Information Collection) Regulation 2021 made under section 492 of the Motor Accident Injuries Act 2019 authorises the collection of information by the Motor Accident Injuries Commission from lawyers providing legal representation to injured parties.

SUBORDINATE LAWS—COMMENT

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

STRICT LIABILITY OFFENCES / HUMAN RIGHTS ISSUES

• Subordinate Law SL2021-24 being the Waste Management and Resource Recovery Amendment Regulation 2021 (No 1), including a regulatory impact statement, made under the Waste Management and Resource Recovery Act 2016 enables the introduction of a household Food Organics and Garden Organics service.

The Committee notes that the explanatory statement for this subordinate law states that its purpose is...

... to enable the introduction of a household Food Organics and Garden Organics (FOGO) service in the Australian Capital Territory by allowing food waste to be placed in territory organic recycling containers.

Other amendments to this Regulation include;
• modernised waste activity reporting;
• improved enforceability at waste facilities;
• simplified container deposit scheme administration;
• clarified and improve kerbside container management; and
• updated waste definitions and streamlined processes.

The Committee notes that, as indicated by the explanatory statement, the amendments made by the subordinate law include various, new strict liability offences – new sections 13, 14, 15, 24AE and 24AG. The offences in question relate to displaying certain signs at a waste facility, interfering with waste at a waste facility, the giving of information about the amount of waste and the waste category for the waste, the disposal of waste in contravention of signs at a waste facility and failure to comply with a reasonable direction from the operator of a waste facility. The maximum penalties for these strict liability offences are 5, 10 and 20 penalty units. The Committee notes that subsection 133(2) of the Legislation Act 2001 provides:

(2) A penalty unit is—
(a) for an offence committed by an individual—$160; or
(b) for an offence committed by a corporation—$810.

The Committee notes that it has always looked closely at provisions that create strict liability offences. In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps, the Committee stated:

STRICT AND ABSOLUTE LIABILITY OFFENCES

As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (i.e., intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the Explanatory Statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes that, for this subordinate law, the explanatory statement contains a detailed discussion of the new strict liability offences, by reference to the right to be presumed innocent, protected by subsection 22(1) of the Human Rights Act 2004. The justification set out is encapsulated in the following passage from the explanatory statement for the subordinate law:

Strict liability offences arise in a regulatory context where reasons such as public standards, environmental protection, safety, community wellbeing and the public interest in ensuring that regulatory schemes are observed require the sanction of criminal penalties. In particular, where a defendant can reasonably be expected to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded.

In relation to the proposed amendment, information is freely available to ensure that people know what the requirements of the law are. In relation to the material that can be placed in kerbside waste containers, the ACT Recyclopedia at https://www.cityservices.act.gov.au/recyclopaedia/home provides the details in a friendly and accessible website. The classifications relevant to each type of bin is well harmonised across different parts of Australia so that most of the knowledge people bring from other places is applicable also in the ACT. Further, a detailed communications plan is in place to support the proposed FOGO pilot and will be used to proactively inform and educate the public about the appropriate use of each bin. Evaluation of that communications program will inform whole-of-Canberra communication on appropriate bin usage to support the full roll-out at a later date. These communications materials can also inform people of the penalties that may apply for incorrect bin usage. The proposed strict liability offences for waste facilities will be communicated through signage placed prominently the facilities.

The rationale for inclusion of strict liability offences is to ensure that a sufficiently robust and consistent enforcement regime can operate as part of an escalating enforcement framework, without requiring prosecution in all cases, to meet the purpose of ensuring community wellbeing, environmental and safety standards. The issuing of infringement notices is guided by internal policy, where education and awareness is the primary mechanism used for compliance with the law.

The offences that are strict liability and intended to have infringement notices are designed to enable an effective response where parties have failed to meet obligations, and are intended to act to prevent a harm, being either a community wellbeing, environmental or public safety harm.
The framework is designed to encourage compliance, not disproportionately penalise those who fail to comply, and will work together with a comprehensive education and awareness package.

The Committee notes that further discussion of the strict liability offences appears in the regulatory impact statement for the subordinate law, especially at pages 28 and 41, under the heading “Consideration of human rights”.

The Committee notes that the explanatory statement for the subordinate law also discusses the right to privacy, protected by section 12 of the Human Rights Act:

The proposed new vehicle offences\(^8\) may impinge on the [Human Rights] Act’s s12 (a) provision that everyone has the right to not have their privacy interfered with unlawfully or arbitrability. The Amendment Regulation proposes to introduce a new capacity for regulators to identify owners of vehicles that are identified as being involved in non-compliance at waste facilities, however the administrative arrangements required to put these provisions into action would ensure that they could only be used to obtain personal information in response to clear offences, and not for arbitrary purposes. The right to privacy is removed from kerbside container management in relation to data-gathering incidents, such as waste collection vehicles capturing contents of waste through cameras. This does not engage the right to privacy as all data captured is de-identified and captured purely for statistical purposes.

The framework is designed to encourage compliance, not disproportionately penalise those who fail to comply, and will work together with a comprehensive education and awareness package.

Again, further discussion is set out in the regulatory impact statement for the subordinate law, especially at pages 28 and 41, under the heading “Consideration of human rights”.

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

This comment does not require a response from the Minister.

**Strict liability offences / Human rights issues**

- **Subordinate Law SL2021-25 being the Magistrates Court (Waste Management and Resource Recovery Infringement Notices) Amendment Regulation 2021 (No 1) made under the Magistrates Court Act 1930 amends the Waste Management and Resource Recovery Regulation 2017 to facilitate the administration of strict liability offences already contained in the regulation and any additional new ones.**

This subordinate law is made under Part 3.8 of the Magistrates Court Act 1930, which allows for offences prescribed by a regulation made under the Act to be dealt with by way of infringement notice. This subordinate law provides for new infringement notices, issued for the Waste Management and Resource Recovery Act 2016 and the Waste Management and Resource Recovery Regulation 2017, which “provide for responsible practices in waste management and resource recovery and related matters”.

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\(^8\) This would appear to refer to new sections 24AI, 25A and 25B.
The explanatory statement for the subordinate law discusses human rights issues:

**Human Rights Implications**

This regulation contains strict liability offences, as such, it might be seen to engage the presumption of innocence. In a strict liability offence, there is no requirement to establish a fault element, such as intention, knowledge, recklessness or negligence.

Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. Where a defendant can reasonably be expected to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. Section 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

This regulation does not create any new offences; it facilitates the administration of strict liability offences already contained in the *Waste Management and Resource Recovery Regulation 2017*, and additional new ones proposed through the amendments to the substantive regulation. Without the ability to issue infringements notices, the only option available to the regulating authority is to prosecute offences through the courts. This is a serious response, and this regulation provides a method to achieve the policy purpose that is less restrictive on human rights.

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

This comment does not require a response from the Minister.

**Strict liability offences / Human rights issues**

- **Subordinate Law SL2021-26** being the *Environment Protection Amendment Regulation 2021 (No 1)*, including a regulatory impact statement, made under the *Environment Protection Act 1997* updates the *Environment Protection Regulation 2005* by implementing agreed national harmonisation reforms for the use of agvet chemicals.

- **Subordinate Law SL2021-27** being the *Magistrates Court (Environment Protection Infringement Notices) Amendment Regulation 2021 (No 1)* made under the *Magistrates Court Act 1930* provides for the introduction of 12 new strict liability offences in the infringement notices scheme relating to the use of agvet chemical products.

The first subordinate law mentioned above amends the *Environment Protection Regulation 2005*. The explanatory statement for the subordinate law indicates that the amendments in question implement, for the ACT, reforms agreed between the Commonwealth and the States and Territories, in 2013, to “implement nationally consistent regulation” on the following issues relating to the use of agvet chemicals:

- minimum licensing requirements for chemical users;
- minimum competency requirements for chemical users;
• monitoring of chemical residues in produce and resulting traceback violations;

• minimum controls on access to chemicals at and after the point of retail sale, including restrictions on usage; and

• recordkeeping requirements for chemical sale and use and associated user audits.

The amendments made by the subordinate law include several, new strict liability offences—new sections 55, 55A, 55B, 55F, 55G, 55H, 55J, 55K and 55L. The offences in question relate to the storage and use of unregistered agvet products, record-keeping offences, and the use of various things without the appropriate qualifications, including declared liquid fumigants, declared vertebrate poisons, declared vehicles, declared industrial timber treatments, the use of a declared termiticide as a pre-construction termiticide, the use of a schedule 7 poison and the use of registered veterinary chemical products containing schedule 7 poisons. In each case, the maximum penalty for an offence is 10 penalty units (which equates to $1600 for an individual and $8100 for a corporation).

As noted earlier in this Scrutiny Report, the Committee has always looked closely at provisions that create strict liability offences. In essence, the Committee has always required that the explanatory statement for a subordinate law that involves strict or absolute liability expressly identify:

• the reasons a particular offence needs to be one of strict liability; and

• the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes that the explanatory statement for first subordinate law mentioned above contains the following discussion of the strict liability offences created by the subordinate law:

The application of strict liability engages the presumption of innocence under section 22 (1) of the Human Rights Act 2004 because it allows for an offence to be proven without the need to prove a fault element. The offences are intended to deter people from failing to comply with safe use and disposal practices, record keeping and training requirements in relation to agvet chemical products. These requirements are central in supporting the prevention of serious detriment to human health and the environment.

The use of strict liability offences is appropriate because the offences only apply to people who know or ought to know their legal obligations. Agvet chemical products must be registered under the Agvet Code and are used in an agricultural or veterinary setting in which a permit, training, qualification or authorisation is required. The regulatory framework for the use of agvet chemical products ensures that people who use such products in these settings are on notice that they must abide by certain laws, including in relation to prohibited behaviour under the Regulation.

In addition, Section 23 (1) (b) of the Criminal Code 2002 (the Criminal Code) provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.
A subsequent heading “human rights” refers to and relies on the above discussion.

The Committee notes that, in addition, the regulatory impact statement for the first subordinate law mentioned above discusses the new strict liability offences and human rights implications, especially in the discussion by reference to this Committee’s scrutiny principles, for paragraph 35(h) of the Legislation Act 2001 (see pp 11-2).

The second subordinate law mentioned above is made under Part 3.8 of the Magistrates Court Act 1930, which allows for offences prescribed by a regulation made under the Act to be dealt with by way of infringement notice. This subordinate law provides for new infringement notices, relating to the new offences created by the first subordinate law mentioned above.

The Committee notes that the explanatory statement for the second subordinate law states:

Human rights considerations for the introduction of the new strict liability offences are discussed in the Explanatory Statement to the Environment Protection Amendment Regulation 2021 (No 1).

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement and the regulatory impact statement for the first subordinate law mentioned above (referred to and relied upon by the explanatory statement for the second subordinate law mentioned above).

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- Subordinate Law SL2021-28 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2021 (No 2) made under the Medicines, Poisons and Therapeutic Goods Act 2008 supports the adoption of Canberra Script in the ACT to assist prescribers and pharmacists when they prescribe or dispense monitored medicines.

This subordinate law amends the Medicines, Poisons and Therapeutic Goods Regulation 2008 (MPTG Regulation) provides the detail for the regulatory framework established by the Medicines, Poisons and Therapeutic Goods Act 2008 (MPTG Act). The explanatory statement for this subordinate law states that the objective of the MPTG Act is ....

... to promote and protect public health and safety by minimising medicinal misadventure with, and diversion of, regulated substances, and the manufacture of regulated substances that are subject to abuse. The MPTG Act also provides for adoption of the Commonwealth Poisons Standard, which is used to categorise medicines and poisons for regulatory purposes as adopted by each State and Territory.

The explanatory statement goes on to state:

The [subordinate law] includes amendments to support the adoption of Canberra Script in the ACT. Canberra Script is a new online, real time prescription monitoring system being implemented in the ACT to assist prescribers (including medical practitioners and nurse practitioners) and pharmacists when they prescribe or dispense monitored medicines for consumers. Canberra Script is designed to reduce harm and preventable deaths in the community by supporting the safe and effective use of monitored medicines.
Canberra Script will replace the existing DAPIS Online Remote Access (DORA) real time prescription monitoring system which was implemented in 2019. Canberra Script forms part of the new national Real Time Prescription Monitoring (RTPM) system being implemented across Australia. Each Australian jurisdiction will implement their own local version of the national RTPM system with core features and functionality to enable national consistency.

The explanatory statement discusses human rights issues:

**Human rights considerations**

During the development of the [subordinate law], due regard was given to its compatibility with the *Human Rights Act 2004* (HR Act).

**Rights Engaged**

The [subordinate law] will support the purposes of the MPTG Act, in particular to promote and protect public health and safety by minimising:

- the diversion of regulated substances for abuse and
- harm from regulated therapeutic goods.

Ensuring the effective administration of the regulation of medicines and poisons in the ACT through the [subordinate law] as described in the outline above engages and promotes human rights under the HR Act including the right to privacy and the right to life.

The [subordinate law] does not limit any rights under the HR Act.

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

This comment does not require a response from the Minister.

**REGULATORY IMPACT STATEMENT—NO COMMENT**

The Committee has examined a regulatory impact statement for the following subordinate law and offers no comments on it:

- **Subordinate Law SL2021-26 being the Environment Protection Amendment Regulation 2021 (No 1).**

**REGULATORY IMPACT STATEMENT—COMMENT**

The Committee has examined a regulatory impact statement for the following subordinate law and offers these comments on it:

- **Subordinate Law SL2021-24 being the Waste Management and Resource Recovery Amendment Regulation 2021 (No 1).**

Section 35 of the *Legislation Act 2001* sets out the requirements for regulatory impact statements:

35  **Content of regulatory impact statements**

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the *proposed law*) must include the following information about the proposed law in clear and precise language:
The Committee notes that, while (as discussed earlier in this Scrutiny Report) the regulatory impact statement for this subordinate law contains a helpful discussion of issues relevant to the Committee’s scrutiny role (including human rights issues), there is no explicit discussion of the requirements of paragraph 35(h).

The Committee draws the attention of the Legislative Assembly to this subordinate law, under paragraph (10)(d) of the Committee’s Resolution of Appointment, on the basis that the regulatory impact statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before Wednesday, 9 February 2022, when the Legislative Assembly’s capacity to move to disallow the subordinate law will expire.
RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:


These responses can be viewed online.

- The Minister for Health, received 22 November 2021, in relation to comments made in Scrutiny Report 10 concerning Disallowable Instruments—
  - DI2021-205—Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 2); and
  - DI2021-207—Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 3).


These responses can be viewed online.

The Committee wishes to thank the Minister for Health, the Attorney-General, the Minister for Police and Emergency Services, the Special Minister of State, and the Minister for Transport and City Services for their helpful responses.

Jeremy Hanson MLA
Chair
1 February 2022

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OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

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

- **Report 7, dated 4 May 2021**
  - Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) [response required prior to the Bill being debated].