

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

SCRUTINY REPORT 42

19 MAY 2020

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

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

- (1) consider 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):
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) 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 Committee;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report 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*; and
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

BILLS—NO COMMENT

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

PLANNING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2020

This Bill is an omnibus bill to enable minor legislative amendments related to the portfolio responsibilities of the Environment, Planning and Sustainable Development Directorate.

PLANNING LEGISLATION AMENDMENT BILL 2020

This Private Member's Bill will amend the *Planning and Development Act 2007* and *Planning and Development Regulation 2008* to increase public access to information on development applications, increase scrutiny of proposals that may impact on meeting climate change and greenhouse gas emission targets, restore appeal rights relating to removal of registered trees for the purpose of the *Tree Protection Act 2005*, expand consultation in newer suburbs, and various other amendments. The Bill will also amend the *Residential Tenancies Act 1997* to require older energy efficiency disclosure ratings to be disclosed in advertising.

BILLS—COMMENT

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

COVID-19 EMERGENCY RESPONSE LEGISLATION AMENDMENT BILL 2020

This Bill will give urgent effect to Commonwealth agreements as well as ensure immediate operational requirements are able to come into effect to allow the Government to adapt to additional and extraordinary measures implemented as a result of the COVID-19 pandemic.

This Bill was presented to the Legislative Assembly on 7 May 2020 and passed on the same day. It was notified on 13 May 2020. The Committee was presented with a draft of the Bill and an explanatory statement on 1 May 2020 and invited to provide any comments prior to the Bill's introduction. The Committee provided its comments in a letter to the Attorney-General, with copies to all members of the Assembly, on 6 May 2020. The Committee raised various concerns with the draft Bill, including the justification for the different periods of operation and expiry, the appropriateness of use of notifiable instruments, the possible limitation on the right to equality before the law in amendments to the *Human Rights Commission Act 2005*, and the use of strict liability offences and possible retrospective operation.

In a letter to the Committee provided on 7 May 2020, the Attorney-General outlined the range of changes reflected in the Bill and explanatory statement presented to the Assembly in response to the Committee's comments, as well as indicating other substantive changes. The Committee thanks the Attorney-General for that response and the Attorney-General's willingness to engage with the Committee's concerns in making changes to the draft Bill and explanatory statement. Apart from the comment below, the changes made have addressed the Committee's concerns.

One of the concerns raised by the Committee on the draft explanatory statement related to the extension of jurisdiction of the ACT Human Rights Commission to investigate complaints about the treatment of vulnerable people. The Committee commented that further justification was needed to justify the restriction, in part, of the definition of vulnerable people to those over 60 years of age. The explanatory statement which accompanied the Bill presented to the Assembly contains such a justification. The Committee notes that the explanation is in similar terms to that provided in the explanatory statement accompanying the Crimes (Offences Against Vulnerable People) Legislation Amendment Bill 2020. The Committee's remaining concerns about the use of 60 years of age is a discriminant as discussed below in relation to that Bill.

The Committee has no further comment.

Correspondence with the Attorney-General regarding the Draft COVID-19 Emergency Response Legislation Amendment Bill 2020 is available on the Committee's website.¹²

CRIMES (OFFENCES AGAINST VULNERABLE PEOPLE) LEGISLATION AMENDMENT BILL 2020

This Bill amends the *Crimes Act 1900* and the *Crimes (Sentencing) Act 2005* to introduce offences committed against vulnerable people.

Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?— Committee terms of reference paragraph (3)(a)

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

RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 8 HRA)

The Bill creates offences relating to the treatment of vulnerable people. A vulnerable person is defined for this purpose as an adult who has a disability within the meaning of the *Disability Services Act 1991*, or who is at least 60 years old and either: suffers from disturbed behaviour due to a disorder, illness or disease; has an impairment which reduces their capacity to communicate, learn or be mobile; or for any other reason is socially isolated or unable to participate in the life of their community. By drawing a distinction based on age and other attributes of a person the offences in question may limit the right to equality before the law protected by section 8 of the HRA.

The explanatory statement accompanying the Bill recognises this potential limitation. The Human Rights Act discussion in the explanatory statement includes a justification for vulnerable persons not including children (due to the availability of other forms of protection) and non-vulnerable adults (due to the lack of a power imbalance or relationship of dependence). In outlining the offences, the explanatory statement references 65 as the age of an older person used in a range of contexts (such as statistics on age maintained by the Australian Bureau of Statistics). As there are some groups that may experience age-related vulnerabilities earlier, 60 years or older was chosen as "an age that is widely accepted to be appropriate for application to the broad community".

¹ https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/1549033/Draft-COVID-19-Emergency-Response-Legislation-Amendment-Bill-2020-correspondence-to-the-Attorney-General.pdf

² https://www.parliament.act.gov.au/__data/assets/pdf_file/0008/1549034/Draft-COVID-19-Emergency-Response-Leg-Am-Bill-Letter-from-the-AG.pdf

The Committee is concerned that claims of community attitudes towards what may be accepted as a vulnerable older person is not sufficient to justify the limitation on the right to equality under the Human Rights Act. The explanatory statement refers to the Australian Law Reform Commission report into Elder Abuse³ which recognised that Aboriginal and Torres Strait Islander people have a lower life expectancy than the general population, and the diverse experience of social isolation experienced by other groups in our community. That report recommended that efforts to address elder abuse take into account the different experiences and needs of older persons with respect to gender, sexual orientation, disability, and cultural and linguistic diversity, as well as older Aboriginal and Torres Strait Islander people and older people living in rural and remote communities.⁴

The Committee recognises that any new offences, particularly those that include a potential penalty of imprisonment, should be sufficiently accessible, precise and foreseeable in its application so as to protect the rights of those prosecuted for its breach. However, the Committee requests further information on why a limit on the age of vulnerable persons is considered necessary in defining the scope of protection provided by the offences.

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

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill will make it an offence to abuse a vulnerable person. It will be a defence if the defendant proves that their conduct was reasonable in all the circumstances or the conduct happened as a result of circumstances beyond the defendant's control. Where the defendant is associated with a relevant institution, such as being employed by or acting for a facility that provides aged care services, it is also a defence if the defendant's conduct complied with the institution's procedures and practices or a direction of a person in authority in that institution. The Bill will also establish an offence of neglect of vulnerable persons, subject to the same defences.

As the defendant has a legal burden to establish these defences on the balance of probabilities,⁵ the Bill potentially limits the right of the defendant to the presumption of innocence under section 22 of the HRA. The explanatory statement accompanying the Bill recognizes this potential limitation. In justifying the limitation as the least restrictive possible, the explanatory statement describes the information required to prove or disprove the defences as only known by the defendant.

The Committee is concerned that it may not be within the defendant's capacity to prove that they were complying with an institution's procedures and practices or a direction of a person in authority. It is not clear to the Committee why an evidential standard of proof as provided by section 58 of the *Criminal Code 2002* is not appropriate in those circumstances.⁶

³ Australian Law Reform Commission, 2017, Australian Law Reform Commission *Report 131 Elder Abuse—A National Legal Response*,

⁴ See recommendation 3-4 for example.

⁵ See section 59 *Criminal Code 2002*

⁶ In correspondence received by the Committee from the ACT Human Rights Commission on 11 May 2020, the Committee was referred to s 44 of the *Crimes Act 1900 (NSW)* (offence for failing to provide the necessities of life) as an example of where an evidential burden has been considered sufficient in an analogous context.

In outlining the offences, the explanatory statement refers to the policy intent of the defences is ensuring “that the ‘person’ held accountable for the conduct causing the harm, is the institutional entity ... responsible for providing the care” and that workers are not held accountable for results of their actions that are beyond their ability to control. However, it is not clear to the Committee why mere compliance with procedures and practices entails a lack of control by the defendant, and whether the Defendant will have to establish they were required by those policies and procedures to carry out the conduct in question before the defence is available.

The explanatory statement includes the example of:

while a residential aged care institution’s policies or procedures may theoretically require certain levels of care to be provided by staff, rostering and staffing levels may mean it is physically impossible for the staff to comply with those requirements. In those circumstances, the staff member should not be held accountable for the results of actions and decisions outside their control. The appropriate entity to hold accountable is the corporation.

It is not clear to the Committee why a defence based on compliance with an institution’s practices or procedures would be available in the circumstances presented by this example. There is no distinction drawn in the defence between procedures that can only theoretically be complied with, or suggestion that compliance with some but not all procedures is sufficient. The defendant in those circumstances would have to rely on establishing that their conduct was reasonable in the circumstances, or the result of circumstances beyond their control.

The Committee therefore requests further information on the nature of the information that a defendant would be expected to be able to provide to establish a defence under the proposed offences, and why it is considered necessary to place the burden on the defendant to establish circumstances in which another entity should be held accountable for the conduct in question.

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

RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 12 HRA)

The Committee is also concerned with some potential ambiguities in the operation of the proposed offences. Proposed section 36B will make it an offence for a person in authority in a relevant institution to recklessly or negligently fail to take action. The offence applies where the person in authority is aware that there is a substantial risk that a serious offence will be committed against a vulnerable person under the institution’s care, supervision or control, where the offence will be committed by a person associated with the institution or by another person in authority in the institution. A person is defined as associated with a relevant institution if: they own, manage or control the institution; they are an employee or volunteer; they engage in an activity with or for the institution; or they are in any other position of authority in relation to the institution.

It is not clear to the Committee whether the reference to “any other position of authority in relation to the institution” in proposed paragraph 36B(3)(e) is intended to limit the preceding categories in paragraphs 36B(3)(a) – (d) to where the person is in a position of some authority, or refers to an ability to influence the institution in some other way. It is also not clear when, for the purposes of proposed paragraph 36B(1)(b), a person is “another person in authority in the institution” and not “a person associated with the institution”. The Committee therefore asks for further information on when a person is regarded as being “in authority” so as to be subject to the proposed offence or whose conduct may give rise to a substantial risk that may enliven the proposed offence.

Proposed section 36C will make it an offence to neglect a vulnerable person by recklessly or negligently failing to provide the vulnerable person with “the necessities of life that are a necessary part of the care the person is responsible for providing to the vulnerable person”. The offence only applies where a person exercises control over any aspect of the care needed by the vulnerable person, and where necessities of life include adequate food, clothing, shelter, hygiene and health care. It is not clear to the Committee when such necessities of life will be a “necessary part of the care the person is responsible for providing”.

The explanatory statement, in outlining the proposed offence, states that a defendant only commits an offence if their failure to provide the necessities of life was within the scope of the care which they exercised control over. However, it is not clear whether it is sufficient that the carer was required to provide a necessity of life as part of the arrangements under which they provided care, or that it was possible for the carer to provide the necessity due to their ability to control that aspect of the care provided.

The Committee therefore requests further information on the intended operation of these offences.

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2020-25 being the Motor Accident Injuries (Authorised IME Provider) Guidelines 2020 made under section 487 of the *Motor Accident Injuries Act 2019* makes the Authorised IME Provider Guidelines.**
- **Disallowable Instrument DI2020-27 being the Road Transport (Public Passenger Services) Hire Car Service—Service Standards 2020 (No 1) made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2018-68 and sets the Service Standards for Hire Car Services (including restricted hire car services).**
- **Disallowable Instrument DI2020-30 being the Road Transport (Public Passenger Services) Taxi Service—Service Standards 2020 (No 1) made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2018-67 makes the Service Standards for Taxi Services.**
- **Disallowable Instrument DI2020-31 being the Road Transport (Public Passenger Services) Transport Booking Service—Service Standards 2020 (No 1) made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2016-203 and makes the Service Standards for Transport Booking Services.**
- **Disallowable Instrument DI2020-33 being the Canberra Institute of Technology (CIT Board Member) Appointment 2020 made under section 9 of the *Canberra Institute of Technology Act 1987* and section 78 of the *Financial Management Act 1996* appoints a specified person as a non-elected member of the CIT Board, with expertise and knowledge of industry and business.**

- **Disallowable Instrument DI2020-34 being the Canberra Institute of Technology (CIT Board Deputy Chair) Appointment 2020 made under section 9 of the *Canberra Institute of Technology Act 1987* and section 79 of the *Financial Management Act 1996* appoints a specified person as a non-elected member and deputy chair of the CIT Board, with expertise and knowledge of industry and business.**
- **Disallowable Instrument DI2020-35 being the Road Transport (General) Driver Licence and Related Fees Determination 2020 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2019-265 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2020-36 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2020 (No 1) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2019-42 and provides that a pharmacist or intern pharmacist may administer vaccines to a person without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.**
- **Disallowable Instrument DI2020-37 being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2020 made under section 139 of the *Taxation Administration Act 1999* revokes DI2019-28 and determines a new rate for the calculation of Utilities Network Facilities Tax payable under the *Utilities (Network Facilities Tax) Act 2006*.**
- **Disallowable Instrument DI2020-40 being the Road Transport (Safety and Traffic Management) Airservices Australia Emergency Worker Declaration 2020 (No 1) made under section 73(2) of the *Road Transport (Safety and Traffic Management) Regulation 2017* revokes DI2012-242 and declares that employees of Airservices Australia, who are members of the Rescue and Firefighting Service, are emergency workers when driving an emergency vehicle to respond to an emergency at or near an airport.**
- **Disallowable Instrument DI2020-41 being the ACT Teacher Quality Institute Board Appointment 2020 (No 1) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member, nominated by the Archdiocese of Canberra and Goulburn Catholic Education Office, of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2020-43 being the Official Visitor (Disability Services) Appointment 2020 (No 1) made under paragraph 10(1)(c) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the *Disability Services Act 1991*.**
- **Disallowable Instrument DI2020-47 being the Domestic Violence Agencies (Council—Chairperson) Appointment 2020 made under section 6A of the *Domestic Violence Agencies Act 1986* revokes DI2019-63 and appoints a specified person as chairperson of the Domestic Violence Prevention Council.**
- **Disallowable Instrument DI2020-48 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 6) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2019-62 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**
- **Disallowable Instrument DI2020-49 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 5) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2017-35 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**

- **Disallowable Instrument DI2020-50 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 4) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2017-35 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**
- **Disallowable Instrument DI2020-51 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 3) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2019-61 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**
- **Disallowable Instrument DI2020-52 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 2) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2019-60 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**
- **Disallowable Instrument DI2020-53 being the Domestic Violence Agencies (Council—Community Member) Appointment 2020 (No 1) made under paragraph 6(2)(a) of the *Domestic Violence Agencies Act 1986* revokes DI2019-59 and appoints a specified person as a community member of the Domestic Violence Prevention Council.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2020-26 being the Public Place Names (Strathnairn) Determination 2020 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of six roads in the Division of Strathnairn.**
- **Disallowable Instrument DI2020-42 being the Public Place Names (Taylor) Determination 2020 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Taylor.**
- **Disallowable Instrument DI2020-54 being the Public Place Names (Taylor) Determination 2020 (No 3) made under section 3 of the *Public Place Names Act 1989* determines the name of five roads in the Division of Taylor.**

Each of the instruments mentioned above is made under section 3 of the *Public Place Names Act 1989*, which allows the Minister to determine the names of public places, in the ACT. The first instrument determines road names in the suburb of Strathnairn. The second and third instruments determine names for a public place and roads in Taylor, respectively.

The Committee notes that the explanatory statement for the first instrument contains the following discussion of the human rights implications of the instrument:

Human Rights

Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation.

Conceivably, the naming of a place has the potential to infringe the right to privacy and reputation of a person after whom a place is named. In this case the process through which places are named ensures that this right is not infringed and that only appropriate information is included in a determination. This process includes the consultation described above.

Additionally, in relation to places named after people, only the names of deceased persons are determined.

The explanatory statement for the third instrument mentioned above contains a similar statement. The explanatory statement for the second instrument contains the following, abbreviated, version of the statement:

Human Rights

Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation.

In this case the process through which places are named ensures that this right is not infringed and that only appropriate information is included in a determination. This process includes the consultation described above.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for these instruments.

This comment does not require a response from the Minister.

DRAFTING ISSUE

Disallowable Instrument DI2020-28 being the Road Transport (Public Passenger Services) Independent Taxi Service Operator—Service Standards 2020 (No 1) made under section 20B of the Road Transport (Public Passenger Services) Regulation 2002 revokes DI2016-205 and makes the Service Standards for Independent Taxi Service Operators.

This instrument, made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002*, determines service standards for independent taxi service operators. The standards determined by the instrument relate to vehicle servicing and maintenance, safety, record keeping and customer service. The substantive standards are set out in Schedule 1 to the instrument.

Clause 1.1 of Schedule 1 to the instrument provides:

1.1 The operator and any driver of an independent taxi service must comply with the current service standards for taxi services except in relation to:

- (1) clause 3.1;
- (2) clause 3.2; and
- (3) clause 4.2.

The Committee notes that there is no clause 3.2 and no clause 4.2.

The Committee seeks the Minister’s advice as to what is intended by subclauses 1.1(2) and (3) of this instrument.

This comment requires a response from the Minister.

MINOR DRAFTING ISSUE

Disallowable Instrument DI2020-29 being the Road Transport (Public Passenger Services) Rideshare Service—Service Standards 2020 (No 1) made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2018-65 and makes the Service Standards for Rideshare Services.

This instrument, made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002*, determines service standards for “rideshare services”, as defined by section 60A of the *Road Transport (Public Passenger Services) Act 2001*. The standards determined by the instrument relate to vehicle servicing and maintenance, safety, record keeping and customer service. The substantive standards are set out in Schedule 1 to the instrument.

Clause 2.1 of Schedule 1 to the instrument provides:

2.1 The driver of a rideshare service must comply with procedures set by the relevant affiliated TBS for a hiring in relation to:

- (1) customer inquiry, feedback and complaints;
- (2) lost property procedures.

The Committee notes that the abbreviation “TBS”—which evidently means “taxi booking service”—is not defined in the instrument, the explanatory statement for the instrument, the regulation under which the instrument is made or the *Road Transport (Public Passenger Services) Act*. The Committee considers that, in the interests of readers of the instrument, the concept of “TBS” should have been defined, preferably in the instrument (as it is, for example, in clause 1.1 of Schedule 1 to the *Road Transport (Public Passenger Services) Transport Booking Service—Service Standards 2020 (No 1)*, DI2020-31).

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTIONS 47(5) AND (6) OF THE LEGISLATION ACT 2001

Disallowable Instrument DI2020-32 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020, including a regulatory impact statement, made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* describes eligible activities intended to reduce the consumption of energy in accordance with the Act.

This instrument, made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*, determines “eligible activities”, for that section. Such an activity is one that “is intended to reduce the consumption of energy”.

Sections 4 and 5 of the instrument provide:

4 Disapplication of Legislation Act, s47 (5) and 47 (6)

The *Legislation Act 2001*, sections 47 (5) and 47 (6) do not apply in relation to an instrument applied, adopted or incorporated under this instrument.

5 Referenced documents

- 1) Australian Standards are available for purchase at www.standards.org.au
- 2) A copy of the National Construction Code, which incorporates the Building Code of Australia and the Plumbing Code of Australia, is freely available for inspection at www.abcb.gov.au.

The Committee notes that the Dictionary to the instrument indicates that 20 different Australian Standards (**AS**) and Australian/New Zealand Standards (**AS/NZS**) are referenced and relied upon, by the instrument.

The Committee notes that the effect of subsection 47(5) of the *Legislation Act 2001* is to make any law of another jurisdiction, or an instrument, that is applied by a subordinate law or by a disallowable instrument, as in force from time to time (ie rather than as it exists at the time that the subordinate law or disallowable instrument is made), a “notifiable instrument”. The effect of subsection 47(6) of the *Legislation Act* is to make an any instrument applied “as in force from time to time” and any amendments or revisions of such (external) instruments, etc *also* notifiable instruments.

The effect of making an instrument a “notifiable instrument” is to require that it be published on the ACT Legislation Register. Publication of such material operates to enhance public access to the external material on which legislation sometimes relies. Disapplication of the publication requirement, obviously, limits public access to that material. While, in the past, the Committee has been prepared to accept that there are justifications for the disapplication of the publication requirement—the reference to copyright material and the need to respect the rights of copyright owners is the obvious example—the Committee has also required that a justification be provided. Further, the Committee has generally looked for a mechanism to be provided that allows public access to relevant documents, in a way that also protected the rights of copyright owners (eg making a copy available for public inspection, at a particular location, during office hours).

The Committee notes that the explanatory statement for this instrument states:

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

Clause 5 indicates that the referenced documents are the Australian Standards and the National Construction Code, and the clause also informs readers where copies of these documents may be obtained.

In addition, the following (much more detailed) discussion appears in the regulatory impact statement that accompanies this instrument, under the heading “Assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles”:

In previous [Energy Efficiency Improvement Scheme – **EEIS**] instrument updates, the Scrutiny of Bills Committee has drawn attention to the instruments on the basis that they disapply sections 47(5) and (6) of the *Legislation Act 2001*, which provide that any instrument that is applied as law in the ACT is taken to be a notifiable instrument. Consistent with EPSDD’s [ie the Environment, Planning and Sustainable Development Directorate’s] previous advice to the

Committee, the reason for disapplying the application of section 47(5) to these instruments is to avoid breaching copyright. The copyright in Australian Standards is owned by a non-government organisation, Standards Australia.

While it may be prohibitive for EEIS stakeholders to purchase all of the standards referred to in the instruments, there are several factors that minimise undue expense in the case of these standards. In particular, most interested parties will already have copies of the relevant standards, and copies of many standards are available at the National Library of Australia (NLA).

The committee has previously suggested two options for improving public access to the documents, but unfortunately, neither of these options provide a practical solution.

First, the committee suggested that the directorate might list specific standards that are available at the NLA. This would be problematic, as the instruments intentionally refer to “the relevant parts of ... standards ... as in force from time to time” so that any updates of the standards are automatically applied. As standards are updated, this would render inaccurate any advice provided about which standards are available in the NLA.

The committee’s second suggestion was that the standards might be made available for viewing through the Access Canberra shopfront. This option is unfortunately unavailable due to copyright restrictions which do not apply to the National Construction Code (NCC). That code is freely available online at www.abcb.gov.au/ncc-online/NCC. In contrast, the conditions of use for the ACT Government’s access to Australian Standards provide that all copies of standards supplied are only for use within the organisation and may not be shared or distributed. Access Canberra Building Services shopfront staff can source the NCC and relevant Australian Standards to assist the public accordingly.

The Committee notes this comprehensive discussion of the Committee’s oft-stated concerns in relation to the disapplication of subsections 47(5) and (6) of the Legislation Act. In particular, the Committee notes the statement that “Access Canberra Building Services shopfront staff can source the [National Construction Code] and relevant Australian Standards to assist the public accordingly.”

The Committee draws the attention of the Legislative Assembly to the discussion in the explanatory statement for this instrument of the Committee’s oft-stated concerns in relation to the disapplication of subsections 47(5) and (6) of the *Legislation Act 2001*.

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTION 47(6) OF THE LEGISLATION ACT 2001

- **Disallowable Instrument DI2020-38 being the Road Transport (Safety and Traffic Management) Protective Helmet for Bicycle Riders Approval 2020 (No 1) made under paragraph 73(1)(a) of the *Road Transport (Safety and Traffic Management) Regulation 2017* revokes DI2002-4 and approves protective helmets for bicycle riders that comply with Australian Standard AS/NZS 2063:2008—Bicycle Helmets, have an identifying mark certifying compliance with the Standard, and are in good repair and proper working order and condition.**
- **Disallowable Instrument DI2020-39 being the Road Transport (Safety and Traffic Management) Booster Seat, Child Restraint and Child Safety Harness Approval 2020 (No 1) made under paragraphs 73(1)(b), (c) and (d) of the *Road Transport (Safety and Traffic Management) Regulation 2017* revokes DI2017-203 and approves booster seats, child restraints and child safety harnesses complying with the relevant Australian Standard.**

The instruments mentioned above are made under section 73 of the *Road Transport (Safety and Traffic Management) Regulation 2017*. The first instrument approves standards for protective bicycle helmets. The second instrument approves standards for booster seats, child restraints and child safety harnesses. The first instrument refers to and relies upon an Australian/New Zealand Standard (**AS/NZS**). The second instrument relies on a combination of Australian Standards (**AS**) and AS/NZS.

Section 5 of the first instrument mentioned above provides:

5 Disapplication of Legislation Act, s 47(6)

The *Legislation Act 2001*, section 47(6) does not apply to an instrument applied, adopted or incorporated under this instrument.

Note: This means the relevant Australian Standard does not need to be notified under the *Legislation Act 2001*. The relevant Australian Standard can be purchased from SAI Global Limited <http://www.standards.org.au/SearchandBuyAStandard/Pages/default.aspx>.

A copy of the relevant Australian Standard can be viewed by contacting roadtransportregulation@act.gov.au to arrange a time to view during business hours.

Section 6 of the second instrument is in similar terms.

The effect of subsection 47(6) of the *Legislation Act* is to make an any instrument applied “as in force from time to time” and any amendments or revisions of such (external) instruments, etc *also* notifiable instruments.

The effect of making an instrument a “notifiable instrument” is to require that it be published on the ACT Legislation Register. Publication of such material operates to enhance public access to the external material on which legislation sometimes relies. Disapplication of the publication requirement, obviously, limits public access to that material. While, in the past, the Committee has been prepared to accept that there are justifications for the disapplication of the publication requirement—the reference to copyright material and the need to respect the rights of copyright owners is the obvious example—the Committee has also required that a justification be provided. Further, the Committee has generally looked for a mechanism to be provided that allows public access to relevant documents, in a way that also protected the rights of copyright owners (eg making a copy available for public inspection, at a particular location, during office hours).

The Committee notes that the explanatory statement for the first instrument mentioned above states:

... this instrument disapplies the provisions of section 47 of the *Legislation Act 2001* which would otherwise require notification of instruments applied by reference (in this case the Australian/New Zealand Standards referred to in clause 3). The Standard referenced is technical in nature and describes performance standards with which a protective bicycle helmet must comply. As noted above all bicycle helmets sold in Australia must comply with this Standard and be labelled with an Australian Standards sticker indicating it complies with AS/NZS 2063:2008.

The Standards are regularly updated and are copyright. The ACT Government’s access to the Standards is regulated by terms and conditions that govern how they can be used and disclosed. AS/NZS 2063:2008 (referenced in clause 3) can be purchased from the publisher SAI Global in either electronic or paper version through the Standards Australia website (www.standards.org.au) or on 131 242. Alternatively, a copy of the relevant Australian Standards can be viewed by contacting roadtransportregulation@act.gov.au to organise a viewing time during business hours.

The explanatory statement for the second instrument mentioned above contains a similar statement. Importantly, it contains the same statement that:

Alternatively, a copy of the relevant Australian Standards can be viewed by contacting roadtransportregulation@act.gov.au to organise a viewing time during business hours.

The Committee draws the attention of the Legislative Assembly to the discussion in the explanatory statements for these instruments that addresses the Committee’s oft-stated concerns in relation to the disapplication of subsections 47(6) of the *Legislation Act 2001*.

This comment does not require a response from the Minister.

RETROSPECTIVE OPERATION—POSITIVE COMMENT

- **Disallowable Instrument DI2020-44 being the Liquor (Public Health Emergency—Permit Fee Waiver) Declaration 2020 made under section 35 of the *Liquor Regulation 2010* waives fees payable for a specified permit fee in response to Notifiable Instrument NI2020-181, being the Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020.**
- **Disallowable Instrument DI2020-45 being the Liquor (Public Health Emergency—Licence Fee Waiver) Declaration 2020 made under section 35 of the *Liquor Regulation 2010* waives fees payable for specified licence fees in response to Notifiable Instrument NI2020-181, being the Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020.**

Each of the instruments mentioned above waive fees, using the power contained in section 35 of the *Liquor Regulation 2010*. The Committee notes that section 35 is inserted into the *Liquor Regulation* by the *Liquor Amendment Regulation 2020 (No 1) (SL2020-15)*, discussed elsewhere in this *Scrutiny Report*.

The waivers are made in the context of the Novel Coronavirus 2019 (2019-nCoV). The explanatory statement for the first instrument states:

The waivers are made in response to the *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020* (the closure direction) [NI2020-181]. The closure direction, made on 23 March 2020 directed the closure of

- Businesses that supply liquor for consumption ON the premises but not including any part of those businesses that sell liquor for consumption OFF the premises as defined by the *Liquor Act 2010*;
- hotels, whether licensed or unlicensed, but not to the extent that they provide accommodation, takeaway meals or a meal delivery service, or a bottleshop;
- a casino;
- cinemas, nightclubs or entertainment venues of any kind;
- restaurants or cafes, other to than to the extent that they provide takeaway meals or a meal delivery services.

The direction was made in relation to the *Public Health (Emergency) Declaration 2020 (No 1)* [NI2020-153] to prohibit the operation of non-essential business and undertakings to limit the spread of Novel Coronavirus 2019 (2019-nCoV).

The explanatory statement for the second instrument mentioned above contains a similar explanation for the waivers provided for by that instrument.

Section 2 of the first instrument (which was made on 20 April 2020) states that it is taken to have commenced on 25 March 2020, meaning that the instrument has a retrospective operation. The Committee notes, with approval, that the explanatory statement for the instrument states:

This instrument is taken to have commenced on 25 March 2020. The retrospective commencement of this declaration is non-prejudicial and is necessary to allow waivers to mitigate the adverse financial impact of the closure declaration on businesses carried on under the permit.

The Committee notes, with approval, that this statement addresses issues in relation to the prohibition, in section 76 of the *Legislation Act 2001*, on all but “non-prejudicial” retrospectivity (in statutory instruments).

Section 2 of the second instrument mentioned above (which was also made on 20 April 2020) provides that it is taken to have commenced on 1 April 2020, meaning that it also has a retrospective operation. Again, the Committee notes, with approval, that the explanatory statement for the instrument addresses the retrospective operation issue, in similar terms to the explanatory statement for the first instrument.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES / RETROSPECTIVITY

Disallowable Instrument DI2020-46 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 made under section 156 of the *Residential Tenancies Act 1997* provides 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 is made under section 156 of the *Residential Tenancies Act 1997*, which allows the Minister to make certain declarations, in the context of the “COVID-19 emergency response”.

The Committee notes that the text of section 156 relies on the concept of “the COVID-19 pandemic”, which is not defined in the Residential Tenancies Act. However, it is relatively clear what is intended by the provision.

The explanatory statement for the instrument provides the following background information on the instrument:

On 29 March 2020 the Prime Minister announced the National Cabinet Decision to implement a 6-month moratorium on evictions for those unable to meet their commitments under a residential tenancy agreement due to the impact of coronavirus (COVID-19).

To implement this measure in the ACT, this Declaration introduces a moratorium for 3 months and allows for the Minister to extend that period up to a further 3 months.

The Committee notes that the explanatory statement contains the following discussion of the human rights implications of the instrument:

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).

Enabling parties to a residential tenancy agreement or an occupancy agreement to reduce the rent or occupancy fee payable because of the COVID-19 pandemic, and introducing a moratorium on evictions due to rent arrears for COVID-19 impacted households, promotes the right to protection of family and children in section 11 of the HRA. 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 in that the definition of a household “impacted” by the COVID-19 pandemic in clause 6 may require tenants to provide personal information to their real estate agents or landlords 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 landlords may reasonably expect tenants to demonstrate that the reason they require a rent reduction or are in arrears is due to the pandemic. This ensures that landlords 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 also notes that the explanatory statement also addresses the potential for the instrument to have a retrospective “impact”:

While the Declaration is not retrospective as to commencement, certain measures in the Declaration have impacts on actions that may have already occurred in accordance with existing requirements under the RTA and residential tenancy agreements (retrospective impact). Specifically, the moratorium to prevent landlords from taking measures to evict COVID-19 impacted households which are in rental arrears will apply even where the household was in rental arrears prior to the commencement of the moratorium period (including where the landlord had previously issued a termination notice, or ACAT had previously made an order in relation to unpaid rent, in respect of the household). This approach is proposed because the effects of COVID-19 may have impacted households’ ability to pay rent prior to the moratorium commencing, and because it is also recognised that COVID-19 impacted households may be in a particularly vulnerable situation if forced to seek new rental accommodation while the pandemic is ongoing.

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.

RETROSPECTIVITY / POSITIVE COMMENT

Disallowable Instrument DI2020-55 being the Health (Fees) Determination 2020 (No 1) made under section 192 of the *Health Act 1993* repeals DI2019-261 and determines fees payable for the purposes of the Act.

This instrument determines fees for the *Health Act 1993*. The Committee notes that section 2 of the instrument (which was made on 23 April 2020) is taken to have commenced on 21 January 2020. This means that the instrument has a retrospective operation.

The Committee notes, with approval, that the explanatory statement for the instrument states:

The Determination comes into effect retrospectively on 21 January 2020. This retrospectivity only adversely affects the Territory.

The Committee notes, with approval, that this statement addresses issues in relation to the prohibition, in section 76 of the *Legislation Act 2001*, on all but “non-prejudicial” retrospectivity (in statutory instruments).

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-56 being the Building (General) Emergency Hospital Exemption 2020 (No 1) made under section 7 of the *Building (General) Regulation 2008* exempts the temporary emergency hospital department being constructed at Garran from compliance with specified parts of the *Building Act 2004* for a period of not longer than one year.

This instrument, made under section 7 of the *Building (General) Regulation 2008*, exempts a temporary emergency hospital department, being constructed in Garran, from certain specified requirements of the *Building Act 2004*. The explanatory statement for the instrument states:

As part of the ACT Government’s response to the emergency, a temporary emergency hospital department is being constructed on Block 9, Section 33, Garran. The short timeframe in which to complete the building does in support of the public health emergency not allow for complete compliance with the *Building Act 2004* (the Building Act).

The Building Act states, amongst other things, that building work must not be carried out unless a building approval (BA) and commencement notice have been issued by a building certifier (Division 3.3 of the Building Act).

A BA cannot be issued unless the application meets the requirements of the *Building (General) Regulation 2008* (the Building Regulation). This includes, but is not limited to, compliance with the National Construction Code, Building Code of Australia, the prescribed minimum documentation guidelines, and payment of the associated building fees.

Section 7 of the Building Regulation states the Minister may exempt a building from the application of the Act, conditionally or otherwise, for a stated period of not longer than one year.

This instrument exempts the building work from compliance with specific parts of the Building Act for a stated period of not longer than one year. The building work remains subject to all other building laws.

The explanatory statement for the instrument goes on to address the human rights implications of the instrument. It states:

Human Rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. There are no negative human rights impacts related to this instrument. It provides for an exemption from compliance with certain provisions of the Building Act to enable the urgent construction of an emergency hospital as part of a public health emergency response to treat persons who may be infected by COVID-19.

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.

SUBORDINATE LAWS—NO COMMENT

The Committee has examined the following subordinate laws and offers no comments on them:

- **Subordinate Law SL2020-9 being the Court Procedures Amendment Rules 2020 (No 2) made under the *Court Procedures Act 2004* amends the Court Procedures Rules to allow a Registrar, in consultation with the Heads of Jurisdiction, to open or close the registry outside of standard operating times.**
- **Subordinate Law SL2020-10 being the Motor Accident Injuries (ACAT Costs Orders) Regulation 2020 made under the *Motor Accident Injuries Act 2019* provides a mechanism to assess the level of a costs order the ACAT can make in relation to an application for external review of an MAI insurer's decision.**
- **Subordinate Law SL2020-11 being the Motor Accident Injuries (Premiums and Administration) Amendment Regulation 2020 (No 1) made under the *Financial Management Act 1996*, *Motor Accident Injuries Act 2019*, *Road Transport (General) Act 1999* and *Road Transport (Public Passenger Services) Act 2001* prescribes treatment and care requirements for a person to be taken to have a whole person impairment level of 10 per cent, a definition of medical treatment for a future treatment payment, costs for mandatory final offers for motor accident claims, and other administrative matters.**
- **Subordinate Law SL2020-13 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2020 (No 1) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* removes from the Medicines, Poisons and Therapeutic Good Regulation the age restriction with respect to whom pharmacists could lawfully administer vaccines.**

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-12 being the Magistrates Court (Public Health (COVID-19) Infringement Notices) Regulation 2020 made under the *Magistrates Act 1930* provides for infringement notices under the Act as an alternative to prosecution when a person fails to comply with a direction of the Chief Health Officer where it is deemed that an infringement notice imposing a monetary fine is a sufficient penalty.

The effect of this subordinate law is to allow infringement notices to be issued in relation to an offence under subsection 120(3) of the *Public Health Act 1997*. The relevant offence relates to a failure to comply with a direction from the chief health officer, under section 120 of the Public Health Act. Those directions can be made while an “emergency declaration” is in force, as is currently the case, under the COVID-19 pandemic.

Under this subordinate law, the penalty for the offence, if imposed by way of an infringement notice, is \$1000 for individuals and \$5000 for corporations (see section 8). The capacity to issue an infringement notice is provided for as an alternative to prosecution for an offence. Under section 120 of the Public Health Act, the maximum penalty, for a person (including a corporation) that is not a “utility” (as defined in the *Utilities Act 2000*), is 50 penalty units (\$8000 for individuals and \$40 500 for corporations) and, for a “utility”, 2000 penalty units (\$320 000 for individuals and \$1 620 000 for corporations).

Infringement notices are provided for by Part 3.8 of the *Magistrates Court Act 1930*. Section 118 of that Act provides:

118 Purpose and effect of pt 3.8

- (1) The purpose of this part is to create a system of infringement notices for certain offences as an alternative to prosecution.
- (2) This part does not—
 - (a) require an infringement or reminder notice to be served on a person; or
 - (b) affect the liability of a person to be prosecuted for an offence if—
 - (i) an infringement or reminder notice is not served on the person for the offence; or
 - (ii) the person does not comply with an infringement or reminder notice served on the person for the offence; or
 - (iii) an infringement notice served on the person for the offence is withdrawn; or
 - (c) prevent the service of 2 or more infringement notices on a person for an offence; or
 - (d) limit or otherwise affect the penalty that may be imposed by a court on a person for an offence.

Regulations such as the current subordinate law are provided for by section 119 of the Magistrates Court Act:

119 Regulations about infringement notice offences

- (1) A regulation may prescribe an offence for the definition of "infringement notice offence" in section 117 by—
 - (a) stating the offence; or
 - (b) referring to the provision creating the offence; or
 - (c) providing that all offences, or all offences except for stated offences, against an Act or subordinate law are infringement notice offences.
- (2) Subsection (1) does not limit the way that a regulation may prescribe an offence for that definition.
- (3) A regulation may, for the definition of infringement notice penalty in section 117, prescribe—
 - (a) an amount as the penalty payable by anyone for an offence if it is dealt with under this part; or
 - (b) different amounts as the penalties payable for different offences if they are dealt with under this part; or
 - (c) different amounts as the penalties payable for the same kind of offence committed by different people or in different circumstances if the offence is dealt with under this part.
- (4) However, an infringement notice penalty prescribed for a person for an offence must not exceed the maximum fine that could be imposed by a court on the person for the offence.
- (5) Subsection (3) does not limit the way that a regulation may prescribe an amount for that definition.

The Committee notes that it considers subordinate laws such as the subordinate law mentioned above on a regular basis. As legislation creates new offences, new offences are added to the body of offences that can be dealt with by infringement notice. In *Scrutiny Report 39* of the 9th Assembly (17 February 2020), the Committee considered a similar subordinate law, the Magistrates Court (Long Service Leave Infringement Notices) Regulation 2020 (SL2020-2), which provides for infringement notices for offences against the *Long Service Leave (Portable Schemes) Act 2009*. In *Scrutiny Report 39*, the Committee noted that, for that subordinate law, the explanatory statement contained the following discussion of the human rights implications of that subordinate law.

HUMAN RIGHTS IMPLICATIONS

As it concerns a strict liability offence, the Regulation 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. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, 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 *Long Service Leave (Portable Schemes) Act 2009*. Without the ability to issue infringement notices, the only option available to the Registrar of the Long Service Leave is to apply to ACAT for an order to enforce an obligation under the Act. 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 drew the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for that subordinate law.

The Committee notes that the Magistrates Court (Long Service Leave Infringement Notices) Regulation 2020 and the subordinate law mentioned above appear to be similar in effect. That being so, the Committee seeks the Minister's advice as to why a discussion of the human rights implications was not included in the explanatory statement for the subordinate law mentioned above.

The Committee notes that it made a similar comment in *Scrutiny Report 41* (28 April 2020), in relation to the Magistrates Court (Heritage Infringement Notices) Regulation 2020 (SL2020-5). The Committee notes that it has not yet received a response in relation to those comments.

In making this comment (again), the Committee notes the discussions that the Committee has previously had, with various Ministers, about the Committee's role in relation to scrutinising subordinate legislation by reference to the *Human Rights Act 2004*, given that section 38 of the Human Rights Act gives the Committee formal jurisdiction only in relation to human rights issues raised by bills. The Committee continues to be aware of that formal limitation. However, the Committee has noted (with approval) an increasing tendency of explanatory statements for subordinate legislation to include discussion of any human rights issues involved in the subordinate legislation. A recent example of that increasing tendency is demonstrated by the discussion, earlier in this *Scrutiny Report*, of three instruments (DI2020-26, DI2020-42, DI2020-54) made under made under section 3 of the *Public Place Names Act 1989*. The Committee has only recently identified the inclusion of a discussion of human rights implications in explanatory statements for such instruments. The Committee considers that this (and the increasing tendency, overall) is a positive development. It is in that context that the Committee raises the issue with the subordinate law mentioned above.

This comment requires a response from the Minister.

RETROSPECTIVE APPLICATION / POSITIVE COMMENT

- **Subordinate Law SL2020-14 being the Road Transport (Driver Licensing) Amendment Regulation 2020 (No 1) made under the Road Transport (Driver Licensing) Act 1999 ensures that licence holders are not disadvantaged during the current public health emergency due to the necessary suspension of Government and other services.**

This subordinate law amends the Road Transport (Driver Licensing) Regulation 2000, including to extend the operation of motorcycle learner licences and to extend the time within which the holder of a non-ACT driver licence who moves to the ACT to reside is required to obtain an ACT driver licence. The amendments are explicitly made in the context of the Government’s response to the current COVID-19 public health emergency.

The explanatory statement for the subordinate law states:

This Regulation makes amendments to the [principal] regulation which are necessary to respond to the current public health emergency. The reforms ensure that licence holders are not disadvantaged at this time due to the necessary suspension of Government and other Services.

These reforms will apply retrospectively to a person who holds a current learner car licence or a motorcycle learner licence. The retrospective application is non-prejudicial and is necessary to ensure that the holder of such a licence is not disadvantaged, as a result of the declaration of a public health emergency.

The Committee notes, with approval, the above explanation.

This comment does not require a response from the Minister.

RETROSPECTIVE COMMENCEMENT / HUMAN RIGHTS ISSUES

Subordinate Law SL2020-15 being the Liquor Amendment Regulation 2020 (No 1) made under the Liquor Act 2010 provides that the Commissioner for Fair Trading may waive a fee payable in relation to a licence or permit if an emergency declaration under the Public Health Act is in force, or was in force at any time during the preceding 12 months, and the Commissioner considers the waiver is appropriate because of the financial impact of the emergency declaration on the business carried on under the licence or permit.

This subordinate law amends the *Liquor Regulation 2010*, to insert a new section 35, that gives the Commissioner for Fair Trading the power to waive a fee that is payable in relation to a liquor licence or permit. The subordinate law is explicitly made in relation to the current COVID-19 public health emergency. The Committee notes that DI2020-44 and DI2020-45, discussed elsewhere in this *Scrutiny Report*, are made under section 35.

The explanatory statement for the subordinate law states:

This amendment regulation provides that the commissioner may waive a fee payable in relation to a licence or permit if—

- (a) an emergency declaration under the *Public Health Act 1997*, section 119 (Emergency declarations):
 - (i) is in force; or
 - (ii) was in force at any time during the preceding 12 months; and
- (b) the commissioner considers the waiver is appropriate because of the financial impact of the emergency declaration on the business carried on under the licence or permit.

The *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020* [NI2020-181] (the closure direction) on 23 March 2020 directed the closure of:

- Businesses that supply liquor for consumption ON the premises but not including any part of those businesses that sell liquor for consumption OFF the premises as defined by the Liquor Act;
- hotels, whether licensed or unlicensed, but not to the extent that they provide accommodation, takeaway meals or a meal delivery service, or a bottleshop;
- a casino;
- cinemas, nightclubs or entertainment venues of any kind;
- restaurants or cafes, other to than to the extent that they provide takeaway meals or a meal delivery services.

The direction followed and was made in relation to the *Public Health (Emergency) Declaration 2020 (No 1)* [NI2020-153], to prohibit the operation of non-essential business and undertakings to limit the spread of Novel Coronavirus 2019 (2019-nCoV).

In order to slow the spread of 2019-nCoV, clubs and other licensed premises will not be able to open and provide their normal services to the community. While this is necessary from a public health perspective, it will have a financial impact on the club industry and other licensed businesses.

This amendment regulation supports the ability of the Government to implement a fee waiver to assist in mitigating those impacts.

Section 2 of the subordinate law provides that the subordinate law (which was made on 16 April 2020) is taken to have commenced on 25 March 2020. This means that it has a retrospective operation. The Committee notes, with approval, that the retrospectivity issue is addressed in the explanatory statement for the subordinate law, which states:

The retrospective commencement of this Regulation is non-prejudicial and is necessary to mitigate the adverse financial impacts of the closure direction on businesses carried on under the licence or permit.

The Committee notes, with approval, that this statement addresses issues in relation to the prohibition, in section 76 of the *Legislation Act 2001*, on all but “non-prejudicial” retrospectivity (in statutory instruments).

The Committee notes that the explanatory statement also addresses the potential human rights implications of the subordinate law:

HUMAN RIGHTS IMPLICATIONS

The Regulation does not engage any 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 instrument.

This comment does not require a response from the Minister.

NATIONAL REGULATIONS—COMMENT

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

EXPLANATORY STATEMENTS / POSITIVE COMMENT

- **Heavy Vehicle National Amendment Regulation 2019, made under the Heavy Vehicle National Law as applied by the *Heavy Vehicle National Law Act 2012 (Qld)* and by the law of States and Territories.**
- **Heavy Vehicle National Legislation Amendment Regulation 2020, made under the Heavy Vehicle National Law as applied by the *Heavy Vehicle National Law Act 2012 (Qld)* and by the law of States and Territories.**

Each of the National Regulations mentioned above is made under the Heavy Vehicle National Law, which applies in the ACT as a result of section 7 of the Heavy Vehicle National Law (ACT) Act 2013. The Committee notes, with approval, that each of the National Regulations is accompanied by an explanatory statement.

The explanatory statement for the first National Regulation mentioned above states:

While not required, the Minister for Justice, Consumer Affairs and Road Safety has agreed that an explanatory statement would be provided in support of any national amendment regulation tabled in the Legislative Assembly.

A similar statement appears in the explanatory statement for the second National Regulation mentioned above.

The Committee re-iterates its view that while there is no formal, legal requirement for an explanatory statement for these National Regulations, principle (2) of the Committee’s terms of reference, which gives the Committee an obligation to consider whether any explanatory statement, etc, associated with legislation meets the technical or stylistic standards expected by the Committee, assumes that there will *be* an explanatory statement for any legislation that the Committee considers. This operates in addition to the broader proposition that it is important that the Committee (and the Legislative Assembly) have access to the kind of background information and explanation that is generally set out in an explanatory statement.

In the case of these particular explanatory statements, the Committee notes, with approval, that the explanatory statements address key issues for the Committee’s consideration of the National Regulations in question, including as to the authority for the National Regulations and information about their making, publication and commencement, as well as the human rights implications of the National Regulations.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the regulatory impact statement to the following instrument and offers no comments on it:

Disallowable Instrument DI2020-32 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2020.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Health, dated 13 May 2020, in relation to comments made in Scrutiny Report 41 concerning the Public Health (Emergencies) Amendment Bill 2020.

[This response⁷](#) can be viewed online.

- The Minister for Education and Early Childhood Development, dated 29 April 2020, in relation to comments made in Scrutiny Report 40 concerning the Education and Care Services National Amendment Regulations 2019.
- The Minister for Transport, undated, in relation to comments made in Scrutiny Report 40 concerning the Rail Safety National Law National Regulations (Application of Law) Variation Regulations 2019.

[These responses⁸](#) can be viewed online.

The Committee wishes to thank the Minister for Health, the Minister for Education and Early Childhood Development and the Minister for Transport for their helpful responses.

Giulia Jones MLA
Chair

19 May 2020

⁷ <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>.

⁸ <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation>.

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
 - Electoral Amendment Bill 2018 (Government Response).
- **Report 28, dated 12 March 2019**
 - Electoral Amendment Bill 2018 (Private Member’s amendments).
- **Report 37, dated 19 November 2019**
 - Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
 - Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s amendments).
- **Report 38, dated 4 February 2020**
 - Electoral Legislation Amendment Bill 2019 (Private Member’s amendments).
- **Report 39, dated 17 February 2020**
 - Disallowable Instrument DI2019-286—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2).
 - Unit Titles Amendment Bill 2019 (Private Member’s amendments).
- **Report 40, dated 24 March 2020**
 - Confiscation of Criminal Assets (Unexplained Wealth) Amendment Bill 2020.
 - Labour Hire Licensing Bill 2020.
 - Residential Tenancies Amendment Bill 2020.
- **Report 41, dated 28 April 2020**
 - COVID-19 Emergency Response Bill 2020
 - Electronic Conveyancing National Law (ACT) Bill 2020—Government response
 - Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020—Government response
 - Public Interest Disclosure Amendment Bill 2020—Government response
 - Subordinate Law SL2020-5 Magistrates Court (Heritage Infringement Notices) Regulation 2020