

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

SCRUTINY REPORT 1

2 February 2021

THE COMMITTEE

COMMITTEE MEMBERSHIP

Mr Jeremy Hanson MLA (Chair)
Dr Marisa Paterson MLA (Deputy Chair)
Ms Jo Clay MLA

SECRETARIAT

Ms Julia Agostino (Secretary)
Ms Sophie Milne (Assistant Secretary)
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)
Mr Daniel Stewart (Legal Adviser—Bills)

CONTACT INFORMATION

Telephone 02 6205 0171
Facsimile 02 6205 3109
Post GPO Box 1020, CANBERRA ACT 2601
Email scrutiny@parliament.act.gov.au
Website www.parliament.act.gov.au

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 10th ACT Legislative Assembly appointed the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 2 December 2020.

Specifically, the resolution of 2 December 2020 establishing the Standing Committees of the 10th Assembly as it relates to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) states:

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

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BILLS

BILLS—COMMENT

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

CRIMES LEGISLATION AMENDMENT BILL 2020

This Bill seeks to amend a number of criminal justice laws to address minor or technical issues, including amending the *Confiscation of Criminal Assets Act 2003* to restrict exclusion orders for property possibly subject to an unexplained wealth order, the definition of threatening act for the offence of serious vilification in the *Criminal Code 2002*, and the *Magistrates Court Act 1930*, to allow defendants to appeal against their conviction up to 28 days after they have been sentenced rather than after their conviction was entered.

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

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

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

The Bill's amendments to the *Crimes (Sentence Administration) Act 2005* will potentially limit the right to liberty protected by section 18 of the HRA. Offenders convicted with terms of imprisonment of less than 4 years can currently be sentenced to serve their term in the community in what is termed an Intensive Correction Order (ICO). Under section 65 of the *Crimes (Sentence Administration) Act*, where a person is convicted of another offence punishable by imprisonment committed while serving an ICO, the sentencing court that issued the original order must cancel that order unless they consider it in the interests of justice not to do so. The Bill will amend the *Crimes (Sentence Administration) Act* to amend the process by which the person is brought before the sentencing court, including by a corrections officer, police officer under warrant, or the Sentencing Appeals Board. Where the original ICO was issued by a Magistrates Court, but the new conviction is imposed by the Supreme Court, the Supreme Court will be able to cancel the ICO. Where the original order was imposed by the Supreme Court, but the new conviction is imposed by the Magistrates Court, the cancellation of the ICO must be considered by the Supreme Court.

In order to be brought before the sentencing court for cancellation of an intensive corrections order under section 65 a person can be arrested. Where the sentencing court is not sitting, the person must be brought before a Magistrate as soon as practicable for a decision in relation to bail. Similarly, where an intensive correction order was issued by the Supreme Court and the Magistrates Court imposes a new conviction, the Magistrates Court can order the offender be remanded in custody until they can be brought before the Supreme Court to consider cancelling the order. The Bill may therefore authorize a deprivation of liberty.

The explanatory statement accompanying the Bill sets out why the effect of the Bill on the right to liberty should be considered reasonable, using the framework set out in section 28 of the HRA. The purpose of arrest or remand is to protect the safety of the community and ensure the integrity of the intensive correction order scheme. The ability to place a person in custody only arises where a person has recommitted while serving an intensive correction order, the person has to be brought

before the sentencing court or Magistrates Court as soon as practicable, and the usual requirements of the *Bail Act 1992* will apply. The Committee refers this statement to the Assembly.

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2020

This Bill is an omnibus Bill amending 17 Acts and Regulations relating to Justice and Community Safety. The amendments are generally technical or minor in nature.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO WORK AND OTHER WORK-RELATED RIGHTS (SECTION 27B HRA)

The Bill may potentially limit the right to privacy protected by section 12 of the HRA. The Bill will amend provisions relating to enduring powers of attorney in the *Guardianship and Management of Property Act 1991* and the *Powers of Attorney Act 2006* to extend requirements for record keeping and access to records where the principal does not have impaired decision-making capacity. These records may include details of personal and sensitive matters. The Bill will also amend the *Public Trustee and Guardian Act 1985* to extend the power of the public trustee and guardian to require information relevant to the exercise of their powers from any individual, which might include personal and sensitive information.

The Bill will also amend the *Legal Profession Act 2006* to require disclosure and consideration, for the purpose of whether a person is fit and proper to be admitted as a legal practitioner in the Act, of whether the person was a director of an incorporated legal practice which is or has been under external administration. By imposing additional requirements on admission to practice, this amendment may limit the right to work protected by section 27B of the HRA.

The explanatory statement accompanying the Bill recognises these potential limitations of the right to privacy and right to work and provides a justification for why they should be considered reasonable under the framework in section 28 of the HRA. The Committee refers these statements to the Assembly.

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

COVID-19 EMERGENCY RESPONSE LEGISLATION AMENDMENT BILL 2020 (No 3)

This Bill extends certain existing COVID-19 legislative measures adopted with the *COVID-19 Emergency Response Act 2020* and *COVID-19 Emergency Response Legislation Amendment Act 2020* to ensure that the ACT Government continues to meet the needs of the community in the context of the COVID-19 pandemic.

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

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

RIGHT TO PROTECTION OF THE FAMILY AND CHILDREN (SECTION 11);

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

RIGHT TO HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY (SECTION 19);

RIGHT TO A FAIR TRIAL (SECTION 21);

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22); AND

RIGHT TO PROHIBITION AGAINST RETROSPECTIVE CRIMINAL LAWS (SECTION 25).

The Bill will amend 16 Acts and Regulations to further extend amendments relating to the COVID-19 pandemic. Some Acts are amended by reference to a particular date or period (For example, provisions in the *Associations Incorporation Act 1991* relating to the holding of meetings and period to meet certain obligations will expire on 8 October 2021. Amendments to the *Supreme Court Act 1933* extend the COVID-19 emergency period until 30 June 2021). The majority of the amendments extend the operation of the relevant provisions until the expiry of the *COVID-19 Emergency Response Act 2020*, which, under section 5 of that Act, will be 12 months after any COVID-19 declaration is no longer in force.

The explanatory statement accompanying the Bill recognizes that the amendments will continue potential limitations on a wide range of rights protected under the HRA due to the continuing need to respond to the COVID-19 pandemic. As the explanatory statement notes, although most amendments will now expire 12 months after the end of a COVID-19 emergency, the underlying measures can only be used while an emergency declaration is in force. The explanatory statement otherwise generally refers to the justifications given for the reasonableness of the rights impacts of the original measures given when they were originally introduced. The Committee refers the Assembly to these statements.

The Committee notes that the Bill will also amend the *COVID-19 Emergency Response Act 2020* to allow reports on the application of legislative amendments made in the *COVID-19 Emergency Response Legislation Amendment Act 2020* to be made quarterly instead of every month. The explanatory statement provides that this amendment will support continuing scrutiny by the Assembly of COVID-19 emergency response measures without affecting the substantive reporting requirement. However, no justification is given for the change to the reporting frequency. Given the significant potential rights impacts that many of these measures may have, the Committee is concerned over the decreased frequency of reporting and requests further information from the Minister on why the decrease is considered necessary.

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

PLANNING AND UNIT TITLES LEGISLATION AMENDMENT BILL 2020

This Bill amends various legislation relating to unit title and community concessional lease provisions.

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

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

RIGHT TO TAKE PART IN PUBLIC LIFE (SECTION 17);

The Bill will amend the *Unit Titles Management Act 2011* in relation to proxy voting which might limit the right to take part in public life protected by section 17 of the HRA, which includes the right to participate in the conduct of public affairs, directly or through freely chosen representatives. Currently, there are restrictions on the number of proxy votes that can be exercised by a person at a general meeting of a unit plan with more than 20 units. The amendments would exempt the Chairperson from these restrictions, and also require the Chairperson to exercise any excess proxy votes. This will prevent proxy votes from going unexercised where the person nominated to exercise the proxy vote has reached the limit. However, it may also mean that a person may not be able to participate in the general meeting through their chosen representative.

The explanatory statement accompanying the Bill recognises the potential limitation on the right to take part in public life protected by section 17 of the HRA, and provides a justification for why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers the Assembly to that statement.

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

PLASTIC REDUCTION BILL 2020

This Bill will regulate the use of plastic in the ACT, particularly single-use plastic, by prohibiting the supply of single-use plastic items, establishing a framework for adding other restricted products in the future, and absorbing the existing plastic shopping bag ban. A regulatory impact statement was tabled along with the Bill and explanatory statement.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—
Committee terms of reference paragraph (10)(3)(a)***

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Bill will provide authority for authorised persons to monitor and enforce compliance with the prohibitions on prohibited plastic products. Clauses 31 and 32 will make it a strict liability offence to refuse to provide your name and address to an authorised person upon request. The explanatory statement recognises these clauses may operate to limit the protection of privacy provided by section 12 of the HRA 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 enforcement powers set out in the Bill include the ability of authorised persons to enter private premises and take photographs or video recordings or require the occupant to provide information, documents or anything else. An authorised officer may enter private premises without consent in accordance with a search warrant or if they believe on reasonable grounds that an offence provided for in the Bill is being, or is likely to be, committed on the premises. Private residential premises may be entered where the premises are also a place from which a business is conducted. The Bill will also require certain persons to take reasonable steps to provide information reasonably required by an authorised officer (see clause 27), potentially including names and contact details of customers or suppliers. Clause 33 will also allow an authorised officer who enters premises under the *Fair Trading (Australian Consumer Law) Act 1992* or the *Food Act 2001* to also exercise powers set out in the Bill.

These enforcement measures in the Bill therefore also authorise intrusion into a person's private affairs, potentially limiting the protection of privacy provided by section 12 of the HRA. While the Committee recognises the limited basis on which any intrusion may occur, recognition of the potential and a justification for why any intrusion is considered reasonable should be provided in the explanatory statement. The Committee asks that such a justification be provided and included in the explanatory statement accompanying the Bill.

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 potentially limit rights in criminal proceedings protected by section 22 of the HRA by introducing a number of strict liability offences and removing the privilege against self-incrimination.

Many of the main offences created by the Bill are strict liability offences. These include: supplying a prohibited plastic product; failing to comply with a notice to dispose of a prohibited plastic product; supplying a declared single-use plastic product at a declared public event; breaching a condition of an exemption; interfering with something seized by an authorised person; and failing to comply with a direction to give your name and address. Strict liability removes the need to prove the fault elements of the offence – the prosecution only needs to establish the physical elements, and the defendant then has a burden to establish a defence such as reasonable and honest mistake. This shift in the burden of proof limits the presumption of innocence protected by subsection 22(1) of the HRA.

The explanatory statement accompanying the Bill 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. In particular, the explanatory statement emphasises the regulatory context of the offences and their role in an efficient enforcement regime, including the use of education and infringement notices without requiring prosecution in all cases. Education and use of notices will mean that a defendant can reasonably be expected to know what the requirements of the law are prior to being exposed to any penalty.

The Bill will also abrogate the privilege against self-incrimination. Clause 28 provides that a person is not excused from answering a question or providing information or a document under Part 6 of the Bill on the ground that doing so may tend to incriminate them or expose them to a penalty. The privilege against self-incrimination is generally considered an essential element of the right to the presumption of innocence protected by subsection 22(1) of the HRA. However, as the explanatory statement sets out, the abrogation of the principle by the Bill will be limited by conferring what is known as 'use immunity' – any information, document or thing obtained, even indirectly, can't be

used as evidence against the person in a civil or criminal proceeding, other than for an offence arising out of the false or misleading nature of the answer, information or document provided. The abrogation can therefore be considered reasonable given the nature of the enforcement powers conferred by the Bill.

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 terms of reference paragraph (10)(a)(iv)

INCORPORATION OF INSTRUMENTS

Prohibited plastic products, as set out in clause 7 of the Bill, include non-compostable single-use plastic shopping bags. Compostable, in relation to plastic bags, is defined as a plastic bag which is designated as compostable in accordance with Australian Standards AS 4736-2006 and AS 5810-2010, as in force from time to time. There is no requirement for the standards to be made publicly available. As the note to clause 7 states, that the standards may be purchased at www.standards.org.au. The explanatory statement recognises that copyright in the standards is owned by a non-government organisation, Standards Australia, and that it may be prohibitive to purchase access. However, the Committee acknowledges that, as the explanatory statement suggests, the only parties likely to be materially affected by the cost of access are compostable plastic bag manufacturers, for which complying with the standard would be part of their core business.

The Bill will also enable the making of regulations which may apply, adopt or incorporate an instrument as in force from time to time. Given the regulations may be used to extend the definition of prohibited plastic product, and hence define the main element of various offences under the Act, the incorporation of instruments as in force from time to time allows important elements of offences to be delegated to the author of the instruments in question.

The explanatory statement accompanying the Bill suggests that this power of incorporation has been included so that the Act will be robust and can deal appropriately with changes in technology as they occur without additional legislative change. The Committee notes that any regulation incorporating an instrument will be subject to scrutiny and potential disallowance by the Assembly. Any instrument applied, adopted or incorporated will also be taken to be a notifiable instrument under section 47 of the *Legislation Act 2001* which requires the up to date text of the instrument to be available on the legislation register. However, the Committee is concerned that allowing the incorporation of instruments as in force from time to time will undermine the operation of other elements of the Bill, including the need for public consultation before any regulation defining a prohibited plastic product is made, and the recognition in the explanatory statement that such regulations may impose significant regulatory burdens, requiring the production of a regulatory impact statement, and have important human rights implications. The Committee therefore requests further information from the Minister on why the authority to incorporate instruments as in force from time to time in regulations is warranted.

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

PROPOSED AMENDMENT

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2020

The Government has proposed amendments to the *Justice and Community Safety Legislation Amendment Bill 2020* and provided a Supplementary Explanatory Statement. The amendments will amend the *Civil Law (Wrongs) Act 2002* to remove requirements under the *Legislation Act 2001* for the Attorney-General to consult the Committee on interstate appointments to the ACT Professional Standards Council. This amendment will reflect the intergovernmental agreement that each state and territory will appoint one member to a common Professional Standards Council to operate nationwide. The proposed amendments will also make various technical amendments to the *Administration and Probate Act 1929* to ensure consistency in language throughout the Act with other amendments to be introduced in the Bill. Finally, the proposed amendments will amend the *Crimes Act 1900* to expand the circumstances where a murder can be taken to have been provoked and hence reduced to manslaughter. Under section 12 of the Crimes Act, a person can commit murder where they cause the death of another with either the intention to cause death to any person; reckless indifference to the chance they might cause death to any person, or the intention to cause serious harm to any person. Currently under section 13 provocation only applies where the deceased's conduct could have induced an ordinary person in the position of the accused to have lost self-control and formed in intent to kill the deceased or to be recklessly indifferent to that probability. The proposed amendments will mean provocation will also be available where the conduct of the deceased could have induced a reasonable person in the position of the accused to have lost self-control so as to have formed an intention to have caused serious harm to the deceased.

The Committee has no further comment on these amendments.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2020-228 being the Board of Senior Secondary Studies Appointment 2020 (No 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the ACT Council of Parents and Citizens Associations, for a period of three years.**
- **Disallowable Instrument DI2020-229 being the Public Health (Notifiable Conditions) Determination 2020 made under section 100 of the *Public Health Act 1997* revokes DI2017-210 and DI2020-18 and determines specified diseases as notifiable conditions.**
- **Disallowable Instrument DI2020-230 being the Public Health (Reporting of Notifiable Conditions) Code of Practice 2020 made under section 133 of the *Public Health Act 1997* revokes DI2017-211 and determines the Reporting of Notifiable Conditions Code of Practice 2020.**

- **Disallowable Instrument DI2020-231 being the Tree Protection (Advisory Panel) Appointment 2020 (No 1) made under section 69 of the *Tree Protection Act 2005* appoints specified persons as members of the Tree Advisory Panel.**
- **Disallowable Instrument DI2020-234 being the Long Service Leave (Portable Schemes) ACT Council of Social Service Employer Declaration 2020 made under section 12 of the *Long Service Leave (Portable Schemes) Act 2009* declares the ACT Council of Social Service to be an employer for the community sector industry.**
- **Disallowable Instrument DI2020-235 being the ACT Teacher Quality Institute Board Appointment 2020 (No 6) made under section 14 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as chair of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2020-236 being the Liquor (Fees) Determination 2020 (No 2) section 227 of the *Liquor Act 2010* revokes DI2020-117 and determines fees payable under the Act**
- **Disallowable Instrument DI2020-237 being the Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020 (No 2) section 35 of the *Liquor Regulation 2010* revokes DI2020-120 and waives fees payable for specified liquor permits due to the COVID-19 public health emergency.**
- **Disallowable Instrument DI2020-240 being the Architects Board Appointment 2020 (No 1) made under section 70 of the *Architects Act 2004* appoints a specified person to the Australian Capital Territory Architects Board as the academic architect member.**
- **Disallowable Instrument DI2020-242 being the Cemeteries and Crematoria Code of Practice 2020 made under sections 123 *Cemeteries and Crematoria Act 2020* determines standards of operational activities undertaken by cemeteries and crematoria and provides guidance to licensees of these facilities.**
- **Disallowable Instrument DI2020-243 being the Cemeteries and Crematoria (Cemetery Fees) Determination 2020 (No 1) made under subsection 128 of the *Cemeteries and Crematoria Act 2020* determines fees payable to the Cemeteries and Crematoria Authority.**
- **Disallowable Instrument DI2020-246 being the Architects Board Appointment 2020 (No 2) made under section 70 of the *Architects Act 2004* appoints a specified person to the Australian Capital Territory Architects Board as the member nominated by a representative body.**
- **Disallowable Instrument DI2020-247 being the Architects Board Appointment 2020 (No 3) made under section 70 of the *Architects Act 2004* appoints a specified person to the Australian Capital Territory Architects Board as the commercial lawyer member.**
- **Disallowable Instrument DI2020-248 being the Architects Board Appointment 2020 (No 4) made under section 70 of the *Architects Act 2004* appoints a specified person to the Australian Capital Territory Architects Board as the registered architect member.**

- **Disallowable Instrument DI2020-251 being the Legislative Assembly (Members' Staff) Deemed Date of Termination of Employment of Members' Staff Direction 2020 (No 1) made under subsection 13(5) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2015-76 and provides the period of deemed continued employment of a specific class of employees after polling day.**
- **Disallowable Instrument DI2020-255 being the Energy Efficiency (Cost of Living) Improvement (Priority Households) Determination 2020 made under section 7A of the *Energy Efficiency (Cost of Living) Improvement Act 2012* describes priority households.**
- **Disallowable Instrument DI2020-256 being the Waste Management and Resource Recovery (Environment Protection—Used Packaging Materials) Code of Practice 2020 made under the *Waste Management and Resource Recovery Act 2016* approves the Environment Protection (Used Packaging Materials) Code of Practice.**
- **Disallowable Instrument DI2020-257 being the Long Service Leave (Portable Schemes) Volunteering Australia Employer Declaration 2020 made under section 12 of the *Long Service Leave (Portable Schemes) Act 2009* declares Volunteering Australia to be an employer for the community sector industry.**
- **Disallowable Instrument DI2020-258 being the Long Service Leave (Portable Schemes) Families ACT Employer Declaration 2020 made under section 12 of the *Long Service Leave (Portable Schemes) Act 2009* declares Families ACT to be an employer for the community sector industry.**
- **Disallowable Instrument DI2020-260 being the Official Visitor (Housing Assistance) Appointment 2020 (No 1) made under section 10(1)(d) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the Housing Assistance Act 2007.**
- **Disallowable Instrument DI2020-261 being the Territory Records (Advisory Council) Appointment 2020 (No 1) made under section 44 of the *Territory Records Act 2002* revokes DI2019-217 and appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.**
- **Disallowable Instrument DI2020-268 being the Long Service Leave (Portable Schemes) Alcohol Tobacco and Other Drug Association ACT Employer Declaration 2020 made under section 12 of the *Long Service Leave (Portable Schemes) Act 2009* declares the Alcohol Tobacco and Other Drug Association ACT to be an employer for the community sector industry.**
- **Disallowable Instrument DI2020-274 being the Public Unleased Land (Fees) Determination 2020 (No 3) made under section 130 of the *Public Unleased Land Act 2013* revokes DI2020-161, determines fees payable under the Act, and allows for some fees to be waived under specific circumstances.**
- **Disallowable Instrument DI2020-275 being the Government Agencies (Campaign Advertising) Exemption 2020 (No 1) made under section 23 of the *Government Agencies (Campaign Advertising) Act 2009* determines campaigns exempt from the Act.**
- **Disallowable Instrument DI2020-277 being the Land Tax (Affordable Community Housing) Determination 2020 made under paragraph 13A(5)(a) of the *Land Tax Act 2004* revokes DI2019-228 and determines the eligibility criteria that an owner of a parcel of land must satisfy to be eligible for an exemption under section 13A of the Act.**

- **Disallowable Instrument DI2020-278 being the Government Procurement (Secure Local Jobs) Code 2020 made under subsection 22M(1) of the *Government Procurement Act 2001* makes the secure local jobs code.**
- **Disallowable Instrument DI2020-280 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2020 (No 2) made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2020-16 and prescribes a method for measuring greenhouse gas emissions.**
- **Disallowable Instrument DI2020-281 being the Civil Law (Wrongs) Professional Standards Council Appointment 2019 (No 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.**
- **Disallowable Instrument DI2020-282 being the Civil Law (Wrongs) Professional Standards Council Appointment 2019 (No 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the Professional Standards Council.**
- **Disallowable Instrument DI2020-285 being the Unit Titles (Management) Certificate Determination 2020 made under section 119 of the *Unit Titles (Management) Act 2011* revokes DI2012-31 and prescribes the information that must be provided with a unit title certificate.**
- **Disallowable Instrument DI2020-286 being the Long Service Leave (Portable Schemes) ACT Shelter Employer Declaration 2020 made under section 12 of the *Long Service Leave (Portable Schemes) Act 2009* declares the ACT Shelter to be an employer for the community sector industry.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-227 being the Public Place Names (Canberra Central) Determination 2020 made under section 3 of the *Public Place Names Act 1989* determines the names of public places specified in the schedule in Canberra Central.

This instrument, made under section 3 of the *Public Place Names Act 1989*, names a locality – the Dairy Flat Bridge. The Committee notes that the explanatory statement for the instrument includes a discussion of human rights issues:

Human Rights

Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation. This determination does not have the potential to infringe this right because it does not name any places after people.

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 DI2020-232 being the Nature Conservation (Fees) Determination 2020 (No 3) made under section 368 of the *Nature Conservation Act 2014* revokes DI2020-199 and determines fees payable for the purposes of the Act.

This instrument, made under section 368 of the *Nature Conservation Act 2014*, determines fees for that Act. The Committee notes that the explanatory statement for the instrument includes a discussion of human rights issues:

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. In this case, no human rights are impacted.

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.

COVID-19-RELATED INSTRUMENT / MINOR DRAFTING ISSUE

Disallowable Instrument DI2020-238 being the Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020 (No 2) section 35 of the *Liquor Regulation 2010* revokes DI2020-119 and DI2020-45 and waives fees payable for specified liquor licences due to the COVID-19 public health emergency.

This instrument, made under section 35 of the *Liquor Regulation 2010*, waives fees that would otherwise be payable in relation to liquor licences and permits under the *Liquor Act 2010*. The waiver of fees relates to the COVID-19 pandemic. The instrument revokes and replaces an earlier instrument – Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020 [DI2020-120] – which provided a similar waiver of fees. That earlier instrument (which also revoked and replaced an earlier instrument, with similar effect) was expressed to expire on 21 May 2021.

Section 5 of the new instrument states that it expires on 24 March 2021. However, the Committee notes that the explanatory statement for the instrument states:

This instrument commences on the commencement of the *Justice Legislation Amendment Act 2020*, part 20 (*Liquor Act 2010*). It expires on **24 March 2020** to ensure that the fee waiver, which commenced in the previous instrument [DI2020-44], is in place for 12 months.
[emphasis added]

The Committee notes that the reference to “24 March 2020”, above, would appear to be incorrect.

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT

Disallowable Instrument DI2020-239 being the Public Health (Quarantine Fees) Determination 2020 made under section 100 of the *Public Health Act 1997* revokes DI2017-210 and DI2020-18 and determines a quarantine fee scheme.

This instrument, made under section 137 of the *Public Health Act 1997*, determines a “quarantine

fee scheme” in relation to the COVID-19 pandemic. Section 137 provides:

137 Determination of fees

- (1) The Minister may determine fees for this Act.

Note The Legislation Act contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

- (2) A fee (a **quarantine fee**) may be determined in relation to costs incurred, or to be incurred, by the Territory in relation to a requirement for a person to quarantine at a place other than the person's home because of the coronavirus disease 2019 (COVID-19) caused by the novel coronavirus SARS-CoV-2.

Note Power to make a statutory instrument (including a determination) about a particular matter does not limit power to make a determination about any other matter (see Legislation Act, s 44 (3)).

- (3) If a person required to pay a quarantine fee asks for payment of the fee to be in instalments, deferred or waived, in considering the request, the Minister must take into account the person's circumstances, including whether they are suffering financial hardship.

- (4) A determination is a disallowable instrument.

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

The Committee notes that the explanatory statement for the instrument contains the following table, that sets out the quarantine fees determined by the instrument:

Table 1: Quarantine fees

Class of person	Quarantine fee amount
An adult not in a family group	\$3 000
For a family group:	
○ first adult	\$3 000
○ each additional adult	\$1 000
○ each child aged 3 years or older	\$500

The Committee also notes that the explanatory statement draws attention to the note to subsection 7(2) of the instrument which, in turn, references the capacity in subsection 137(3) of the *Public Health Act* for a person required to pay a quarantine fee to ask for the fee be paid in instalments, or to be deferred or waived, and the requirement that the Minister must take into account the person's

circumstances, including whether they are suffering financial hardship, in considering the person's request.

This comment does not require a response from the Minister.

HAS THIS APPOINTMENT BEEN VALIDLY MADE?

Disallowable Instrument DI2020-241 being the Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 4) 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 to be a member of the CIT Board for a period of three years.

This instrument, made under section 9 of the *Canberra Institute of Technology Act 1987* (the *CIT Act*) and section 78 of the *Financial Management Act 1996*, appoints a specified person to the Board of the Canberra Institute of Technology. Section 9 of the *CIT Act* formally establishes the Board. Section 78 of the *Financial Management Act* is an over-arching provision, dealing with the appointment of the members of the governing board of a territory authority other than the Chief Executive Officer. It sets out matters such as the criteria for appointment and requirements in relation to the appointment of public servants to boards.

In the particular case on the CIT Board, the Committee notes that section 11 of the *CIT Act* sets out matters in relation to eligibility for appointment:

11 CIT board members—eligibility for appointment

- (1) The Minister may appoint a person as the staff member only if the person—
 - (a) is a member of the staff of the CIT; and
 - (b) has been nominated by the members of staff to be a member of the CIT board.
- (2) The Minister may appoint a person as the student member only if the person—
 - (a) is a student at the CIT; and
 - (b) has been nominated by the students at the CIT to be a member of the CIT board; and
 - (c) is not a public servant.
- (3) In appointing the members of the CIT board, the Minister must, as far as practicable, ensure that the CIT board has expertise and knowledge in the following:
 - (a) industry, business and finance;
 - (b) vocational education and training;
 - (c) education pedagogy;
 - (d) social policy issues;
 - (e) governance;
 - (f) infrastructure.

The Committee notes that the explanatory statement for this instrument does not address the issues raised by subsection 11(1), paragraphs 11(2)(a) or (b) or subsection 11(3). All that the explanatory statement discloses is that the specified person is not a public servant (which is relevant for paragraph 11(2)(c)).

While it may be assumed that the Minister would not have made the appointment *unless* the

relevant requirements had been met, the Committee has consistently expressed its preference that the explanatory statement for an instrument of appointment expressly address any eligibility, etc requirements (and any disqualifying factors) set out in the empowering legislation.

The Committee seeks the Minister’s assurance that the specified person appointed by this instrument meets all the formal eligibility requirements set out in section 11 of the *CIT Act*.

The Committee draws the attention of the Legislative Assembly to this instrument, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2020-244 being the Legal Aid (Commissioner - Bar Association Nominee) Appointment 2020 made under section 16 of the *Legal Aid Act 1977* appoints a specified person as a part-time member and commissioner of the board of the Legal Aid Commission.**
- **Disallowable Instrument DI2020-245 being the Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2020 made under section 16 of the *Legal Aid Act 1977* appoints a specified person, nominated by the executive committee of the ACT Council of Social Services, as a part-time member and commissioner of the board of the Legal Aid Commission.**

Each of the instruments mentioned above appoints a specified person as a member and commissioner of the Board of the Legal Aid Commission. Section 3 of each instrument appoints the specified person as “a part-time member and commissioner” of the Board.

The appointments are made under section 16 of the *Legal Aid Act 1977*. The Committee notes that there is no reference in section 16 to appointing “part-time members” – only “members”. The only reference to “part-time” is in subsection 16(4), which provides that “[a] person appointed as a member by the Minister is appointed on a part-time basis”. However, in a formal sense, this does not mean that persons are appointed as “a part-time member”.

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-253 being the Road Transport (General) Application Order 2020 (No 2) made under section 14 of the *Road Transport (General) Act 1999* temporarily extends the maximum taxi vehicle age and use requirements by one year for a period of 12 months.

This instrument is made under section 14 of the *Road Transport (General) Act 1999*, which allows the Minister to suspend or vary the operation of provisions of the road transport legislation, for a stated period. The instrument varies the operation of provisions of the *Road Transport (Vehicle Registration) Regulation 2000* and the *Road Transport (Driver Licensing) Regulation 2000*, “in response to the current health emergency”. In particular, it:

- Temporarily extends the maximum taxi vehicle age and use requirements for standard taxis and wheelchair accessible taxis (WATs), under section 32B of the *Road Transport (Vehicle Registration) Regulation*, by one year, for a period of 12 months. This temporary extension allows vehicles that reach the maximum age or use limit during the COVID-19 health emergency

to be eligible for registration and continue to operate up until August 2021. The explanatory statement for the instrument states that this measure is in response to the significant decline in taxi customers, during the COVID-19 pandemic, with the effect that registered taxi vehicles are being used less often than they usually would.

- Further extend the period within which the holder of a non-ACT driver licence or a foreign driver licence can drive on ACT roads without obtaining an ACT driver licence. The temporary extension is in response to the suspension of driver assessments (necessary for the transfer to an ACT licence) between 23 March and 9 August 2020, as a result of the COVID-19 pandemic.

The Committee notes that the explanatory statement for the instrument includes a discussion of human rights issues:

HUMAN RIGHTS IMPLICATIONS

The instrument 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.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2020-254 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 6) made under section 13 of the *Road Transport (General) Act 1999* provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, while participating in a special stage of the Light Car Club Canberra Blue Range Rallysprint 2020 taking place on 5 September 2020.**
- **Disallowable Instrument DI2020-272 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 7) made under section 13 of the *Road Transport (General) Act 1999* provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, while participating in a special stage of the Southern Automotive Test Day Kowen taking place on 15 September 2020.**

Each of the instruments mentioned above is made under section 13 of the *Road Transport (General) Act 1999*, which allows the Minister to declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration. For the first instrument, the declaration provides that the *Motor Accident Injuries Act 2019* does not apply in relation to the Light Car Club Canberra Blue Range Rallysprint 2020, taking place on 5 September 2020. For the second instrument, the declaration provides that the *Motor Traffic Injuries Act* does not apply in relation to the Southern Automotive Test Day Kowen, taking place on 15 September 2020.

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

Human rights implications

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

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

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

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

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

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

A similar statement appears in the explanatory statement for the second instrument.

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

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-259 being the Official Visitor Guidelines 2020 made under section 23F of the *Official Visitor Act 2012* revokes DI2018-269, DI2014-286 and DI2019-146, and makes the Official Visitor Guidelines.

This instrument makes "Official Visitor Guidelines", under section 23F of the *Official Visitor Act 2012*. The Guidelines indicate that they "refer to the visit processes and handling of complaints by official visitors under the *Official Visitors Act 2012*", for "visitable places", under various Acts. "Visitable places" include detention places, correctional centres and mental health facilities.

The Committee notes that the explanatory statement for the instrument contains a detailed discussion headed "Human Rights" on human rights issues arising from the instrument. The human rights issues discussed relate to the right to privacy (section 12 of the *Human Rights Act 2004*), engaged by the fact that, under the Guidelines, an official visitor can access records relating to a person. The explanatory statement states:

Human Rights

Powers to inspect records relating to an entitled person without [*sic*] engage and reasonably limit the right to privacy. These provisions were introduced to serve an important and legitimate purpose of safeguarding the welfare of entitled people in visitable places in situations where they are not able to communicate or raise concerns about their treatment. This is particularly relevant in situations where entitled people have severe or profound

intellectual disability, or are experiencing acute mental illness, and are not able to provide consent. In such circumstances it may be important for an official visitor to inspect records without consent to ensure that there are no systemic concerns and that entitled people are being treated appropriately.

The Act includes a range of safeguards around the exercise of this power, and the guidelines provide further detail and guidance about the effect of these provisions to ensure that any limitation on the right to privacy is proportionate and tightly constrained.

The Guidelines confirm that taking reasonable steps to seek the consent of a person would usually require the official visitor to meet and ask the entitled person for consent to inspect their records and to assess whether the person is able to communicate. The Guidelines require official visitors to ensure that any special communication needs of the person are accommodated, for example if the official visitor is aware of any technology or supports that the person uses to communicate, the official visitor must ensure that these are utilised.

The Guidelines confirm that a young person under 18 may be able to consent to the inspection of their own records, depending on their level of maturity and understanding of the decision. This must be assessed on an individual basis as there is no fixed age limit for this decision.

Particular provisions of the guidelines apply where records are health records, and the guidelines confirm that the privacy principles under the *Health Records (Privacy and Access) Act 1997* will apply where an official visitor makes a copy of a health record.

The Guidelines also provide guidance about how official visitors can inform entitled people about the inspection of their records, particularly in situations where an entitled person may have fluctuating capacity and may later be able to understand that an inspection has occurred.

These provisions of the Guidelines have been carefully considered to ensure that the powers will be exercised in a way that is proportionate and consistent with 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.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-267 being the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) made under section 156 of the *Residential Tenancies Act 1997* revokes DI2020-216 and implements transitional measures to support residential tenants and lessors at the end of the COVID-19 eviction moratorium.

This instrument is made under section 156 of the *Residential Tenancies Act 1997*. According to the explanatory statement, it “implements a number of transitional measures to provide support to residential tenants and lessors at the end of the COVID-19 eviction moratorium”. Among other things, the instrument implements a “transitional period”, commencing on 23 October 2020, “to protect tenants who were COVID-19 impacted during the moratorium period from being evicted for rental arrears accrued before or during the moratorium period”. The moratorium period ended on 22 October 2020.

The explanatory statement for the instrument contains a discussion of human rights issues:

COMPATIBILITY WITH HUMAN RIGHTS

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

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

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

The Declaration also engages and may limit the right to privacy as the definition of a household “impacted” by the COVID-19 pandemic in clause 8, and the early termination by tenants provision in clause 13, may require tenants to provide personal information to their real estate agents or lessors to demonstrate a loss of income and/or that they have been diagnosed with COVID-19 or are caring for someone who has.

This limitation is reasonable and proportionate in accordance with the test in section 28 of the HRA. The measures in the Declaration have an important purpose, which is to mitigate the risk of homelessness arising from financial stress due to the COVID-19 pandemic. The limitation on the right to privacy is necessary, as lessors may reasonably expect tenants to demonstrate the reason they need to terminate their fixed term tenancies, require a rent reduction or are in arrears is due to the pandemic. This ensures that lessors may otherwise exercise their normal statutory rights under residential tenancy law, if circumstances extraneous to the pandemic permit. There are no other reasonably available and less restrictive alternatives that would not require the tenant to provide personal information to a third party.

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

This comment does not require a response from the Minister.

DISAPPLICATION OF SUBSECTIONS 47(5) AND (6) OF THE LEGISLATION ACT 2001 / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-269 being the Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2020 made under section 126A of the *Construction Occupations (Licensing) Act 2004* revokes DI2016-242 approves the Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice.

This instrument approves a Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2020, for section 126A of the *Construction Occupations (Licensing) Act 2004*. In short, the instrument relates to energy efficiency ratings (EERs) for residential premises offered for sale or lease.

Section 4 of the instrument provides:

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.

The Committee notes that, without section 4, any “external” instrument that is relied upon (ie by being “applied, adopted or incorporated”) by this instrument would have to be published on the ACT Legislation Register, as a “notifiable” instrument (for section 10 of the *Legislation Act 2001*). This, in turn, ensures that users of legislation have free access to all the material that they need, in order to understand the full scope and effect of an instrument such as this. The Committee has always taken a strong view that such access is important. As a result, the Committee generally does not look favourably on the disapplication of subsections 47(5) and (6) of the *Legislation Act* and seeks an explanation as to why disapplication is necessary, in a particular case.

For this instrument, the explanatory statement states:

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

The code of practice makes reference to specific provisions of the Building Code of Australia published by the Australian Building Codes Board and proprietary calculation methods and documents (software user instructions), for which the ACT does not own the copyright and cannot lawfully reproduce in legislative instruments.

Versions of the Building Code of Australia are available for free online for people who register at <https://ncc.abcb.gov.au/>. This information is included in notes to sections 15, 16 and 18.

User instructions are generally located in files accompanying or within the relevant software and are available to users of the software

The Committee notes the explanation above and also notes with approval the information provided as to how, nevertheless, users of the instrument can access the relevant material free of charge.

The Committee also notes that section 4 of this instrument would appear to be unnecessary, given the combined effect of subsections 126A(2) and (4) of the *Construction Occupations (Licensing) Act* (which have the same effect).

This comment does not require a response from the Minister.

MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2020-270 being the Government Procurement (Non-Public Employee Member) Appointment 2020 (No 2) made under section 12 of the *Government Procurement Act 2001* appoints a specified person as a part-time non-public employee member of the Government Procurement Board.**
- **Disallowable Instrument DI2020-271 being the Government Procurement (Non-Public Employee Member) Appointment 2020 (No 1) made under section 12 of the *Government Procurement Act 2001* appoints a specified person as a part-time non-public employee member of the Government Procurement Board.**

Each of the instruments mentioned above appoints a specified person as a “part-time non-public employee member” of the Government Procurement Board. The appointments are made under section 12 of the *Government Procurement Act 2001*. The Committee notes that section 12 provides only for the appointment of “members”. The Committee notes that the concept of members being “part-time” comes from section 11 of the Act.

This comment does not require a response from the Minister.

RETROSPECTIVITY

Disallowable Instrument DI2020-273 being the Financial Management (Territory Authorities) Guidelines 2020 (No 2) made under section 133 of the *Financial Management Act 1996* revokes DI2020-182 and prescribes the entities that are territory authorities for the purposes of the Act.

This instrument, made under section 133 of the *Financial Management Act 1996*, provides that various entities are to be “classed” as “territory authorities”, for section 54 of the *Financial Management Act*. The effect is that Part 8 of the *Financial Management Act* – which sets out “financial provisions for territory authorities” – applies to those entities.

Section 2 of the instrument states that it is “taken to have commenced on 23 August 2020”. As the instrument was not made until 5 September 2020, this means that the instrument has a retrospective operation.

Section 76 of the *Legislation Act 2001* provides that, for “statutory instruments” (defined in section 13 of the *Legislation Act* to include a disallowable instrument, such as this instrument), only a “non-prejudicial” provision can commence retrospectively. That concept is, in turn, defined in subsection 76(4) of the *Legislation Act*, which provides:

(4) In this section:

“**non-prejudicial provision**” means a provision that is not a prejudicial provision.

“**prejudicial provision**” means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—

- (a) adversely affecting the person's rights; or
- (b) imposing liabilities on the person.

Given this statutory prohibition on “prejudicial retrospectivity” in statutory instruments, the Committee has consistently required that, for subordinate legislation with a retrospective effect, there be an indication, usually in the explanatory statement, that the retrospectivity is “non-prejudicial”, for section 76 of the *Legislation Act*.

For this instrument, the Committee notes that the explanatory statement states:

This guideline has been updated to replace the ‘ACT Public Cemeteries Authority’ with the ‘Cemeteries and Crematoria Authority’. This change is as a result of the *Cemeteries and Crematoria Act 2020* which commenced on 23 August 2020. The effect of this Act is that the ACT Public Cemeteries Authority no longer exists and provides that on commencement (23 August 2020), the *Cemeteries and Crematoria Act 2003* and all associated legislative instruments will be repealed. The commencement of this instrument is retrospective due to an unforeseen consequence of the change in legislation for the Authority.

While it might be assumed that no prejudicial effect flows from the retrospective operation of this instrument, the Committee would prefer the issue to be explicitly addressed.

The Committee draws the attention of the Legislative Assembly, under principle (10)(c)(ii) of the Committee's terms of reference, on the basis that it may unduly trespass on rights previously established by law, and under principle (10)(d) of the Committee's terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2020-276 being the Taxation Administration (Payroll Tax) COVID-19 Exemption Scheme Determination 2020 made under section 137E of the *Taxation Administration Act 1999* determines a scheme to exempt wages paid or payable to eligible apprentices or trainees.**
- **Disallowable Instrument DI2020-279 being the Taxation Administration (Payroll Tax— Businesses Not Permitted to Operate) COVID-19 Exemption Scheme Determination 2020 made under section 137E of the *Taxation Administration Act 1999* determines a scheme to exempt wages paid or payable by eligible employers whose businesses are not permitted to operate due to ACT Government restrictions.**

Each of the instruments mentioned above, made under section 137E of the *Taxation Administration Act 1999*, determines a scheme to exempt wages paid or payable from payroll tax. The first instrument relates to wages paid or payable to eligible apprentices or trainees. The explanatory statement states that it is part of a "Youth Support Package", intended "to address the economic impacts of COVID-19 on young people". The explanatory statement for the second instrument also references a Government announcement about extending support to businesses "to address the economic impacts of COVID-19 on young people", but specifically applies to "employers whose businesses are not permitted to operate due to ACT Government restrictions over the period 1 September 2020 to 30 November 2020".

Section 6 of the first instrument states:

6 Human Rights Act 2004

In my opinion, as the Minister, this instrument is consistent with human rights. This instrument is non-prejudicial because it does not limit existing rights.

Section 7 of the second instrument is in similar terms.

The explanatory statement for the first instrument also addresses human rights issues:

Human Rights Act 2004

This instrument provides an exemption to payroll tax and does not limit, and is consistent with, human rights. By providing exemption to wages paid or payable to eligible employees, it promotes the right to work (section 27B of the *Human Rights Act 2004*) by supporting jobs for the ACT community, especially young people, including apprentices and trainees, who have been disproportionately affected by the COVID-19 pandemic.

In accordance with the legislation, the Payroll Tax Exemption Determination includes a statement about whether the scheme is consistent with human rights.

The ACT Human Rights Commission has been consulted on the Payroll Tax Exemption Determination.

The explanatory statement for the second instrument contains a similar statement.

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

Disallowable Instrument DI2020-283 being the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No 2) made under section 177 of the *Leases (Commercial and Retail) Act 2001* revokes DI2020-92 and adopts the National Code of Conduct for small to medium enterprises commercial leasing principles during COVID-19.

This instrument is made under section 177 of the *Leases (Commercial and Retail) Act 2001*.

Section 177 allows the Minister to make a declaration, in the context of the COVID-19 pandemic:

- (a) prohibiting the termination of a lease to which this Act applies by a lessor in stated circumstances;
- (b) prohibiting the recovery of possession of premises under the lease by the lessor in stated circumstances;
- (c) changing any period under the lease or this Act in which someone must or may do something;
- (d) changing, limiting or preventing the exercise or enforcement of any other right of the lessor under the lease or this Act in stated circumstances; or
- (e) exempting a tenant or lessor, or class of tenant or lessor, from the operation of a provision of this Act, a lease to which this Act applies or any other agreement relating to the lease of the premises.

The instrument revokes an earlier, similar instrument (the Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 [DI2020-92]), which was considered by the previous Committee, in *Scrutiny Report 43* of the 9th Assembly (2 June 2020). The Committee made no substantive comment on the earlier instrument.

The explanatory statement for this instrument contains a detailed explanation of the instrument and, in particular, the changes from the earlier instrument. The explanation refers to the mandatory code of conduct (National Code of Conduct) for small to medium enterprises (SMEs) that was agreed to by National Cabinet in relation to commercial leasing principles during the COVID-19 pandemic. The new version of the National Code of Conduct, contained in the new instrument, makes adjustments to the earlier version, including in relation to the amended operation of the Commonwealth Government's JobKeeper scheme, from 28 September 2020.

The explanatory statement for the instrument also discusses human rights issues:

HUMAN RIGHTS COMPATIBILITY

The measures in the new Declaration may engage and potentially limit the right to privacy in the *Human Rights Act 2004*. There may be circumstances where the tenant who is party to a commercial lease arrangement is an individual rather than a commercial entity. Where an individual is an impacted tenant under the new Declaration, a tenant may be required to provide sufficient and accurate information (which may include personal information) to their landlord to demonstrate a loss of income.

Such information would include qualification under the Commonwealth JobKeeper program so as to ensure that the parties can engage in good faith negotiations around leasing

arrangements including the possible reduction in rent, based on the extent to which the tenant has suffered a loss of turnover. Exchanging sufficient and accurate information is one of the overarching principles set out in the National Code of Conduct for SME Commercial Leasing Principles.

The requirement in the new Declaration that a lessor engages in good faith negotiations with an impacted tenant prior to the landlord being allowed to exercise their right to terminate the lease or taking adverse action for a prescribed breach has an important purpose. It ensures leases cannot be terminated without the parties having had the opportunity to discuss how they can help each other in the current climate.

By mandating 'in good faith' negotiations in these circumstances, the new Declaration is designed to ensure tenants have the best chance to make it through the COVID-19 period.

Exchanging sufficient and accurate information is necessary because landlords may reasonably expect tenants to demonstrate that they are suffering financial hardship because of the economic impact of COVID-19 in the context of engaging in good faith negotiations. It also ensures that there can be a reasonably proportionate response by the landlord to the level of impact of the COVID-19 pandemic experienced by the tenant in their business capacity.

The overarching principles represent expectations that lessors and tenants should meet but are not legal obligations. Individual tenants may decide not to share information if it is not necessary for the purposes of engaging in good faith negotiations.

Thus, there is no limitation of the right to privacy because there are no legal requirements for tenants to provide information, and tenants retain control as to what information is to be shared.

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.

IS THIS A DISALLOWABLE INSTRUMENT?

Disallowable Instrument DI2020-284 being the Commissioner for Sustainability and the Environment Appointment 2020 (No 3) made under section 4 of the *Commissioner for Sustainability and the Environment Act 1993* appoints a specified person as Commissioner for Sustainability and the Environment.

This instrument, made under section 4 of the *Commissioner for Sustainability and the Environment Act 1993*, appoints a specified person as Commissioner for Sustainability and the Environment. The explanatory statement for the instrument makes clear that, in fact, the instrument re-appoints the previous holder of the position, for reasons that are explained, in the explanatory statement for the instrument.

The appointment is made by disallowable instrument, bringing it within the Committee's scrutiny role.

The Committee notes that section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions by Ministers. It provides:

227 Application—div 19.3.3

- (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
- (2) However, this division does not apply to an appointment of—
 - (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
 - (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
 - (c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the *Legislation Act*, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*,¹ the Committee stated:

Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that the explanatory statement for the instrument mentioned above contains no such statement.

The Committee notes that it made a similar comment in relation to the instrument that previously appointed the specified person (and is revoked by this instrument) – the Commissioner for Sustainability and the Environment Appointment 2020 (No 2) [DI2020-83].² In response to the Committee’s comment, the (then) Minister subsequently assured the Committee that the specified person was not a public servant. In all the circumstances, it might be reasonably be assumed that the specified person is, still, not a public servant. However, the Committee considers that it is always preferable that this issue be addressed, explicitly, in the explanatory statement for an instrument of appointment.

The Committee draws the attention of the Legislative Assembly to the instrument mentioned above, under principle (10)(d) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister’s confirmation that the person appointed by the instrument mentioned above is not a public servant.

This comment requires a response from the Minister.

¹ https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf.

² The comment was made in *Scrutiny Report* 43 of the 9th Assembly (2 June 2020).

SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2020-29 being the Education Amendment Regulation 2020 (No 1) made under the *Education Act 2004* determines conditions for registration of home education.**
- **Subordinate Law SL2020-30 being the Firearms Amendment Regulation 2020 (No 2) made under the *Firearms Act 1996* temporarily relieves holders of certain firearms licences from requirements to comply with provisions of the *Firearms Regulation 2008*.**
- **Subordinate Law SL2020-31 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2020 (No 4) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* authorises a nurse or midwife, in specific circumstances, to administer a vaccine without a prescription.**
- **Subordinate Law SL2020-34 being the Court Procedures Amendment Rules 2020 (No 4) made under the *Court Procedures Act 2004* determines a process for the bringing of contempt proceedings by the ACT Integrity Commission.**
- **Subordinate Law SL2020-36 being the Planning and Development Amendment Regulation 2020 (No 3) made under the *Planning and Development Act 2007* determines what discretion can be exercised by the planning and land authority when granting a community concessional lease.**
- **Subordinate Law SL2020-38 being the Gene Technology Amendment Regulation 2020 (No 1) made under the *Gene Technology Act 2003* determines which organisms developed using a range of new technologies are subject to regulation as GMOs.**
- **Subordinate Law SL2020-41 being the Civil Law (Property) Amendment Regulation 2020 (No 1) made under the *Civil Law (Property) Act 2006* defines matters for disclosure statements for off-the-plan contracts.**
- **Subordinate Law SL2020-43 being the Unit Titles (Management) Amendment Regulation 2020 (No 2) made under the *Unit Titles (Management) Act 2011* defines persons deemed to be qualified to audit the financial records of the owners corporation.**

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-32 being the Road Transport (Public Passenger Services) Amendment Regulation 2020 (No 1) made under the *Road Transport (Public Passenger Services) Act 2001* permits accredited assistance animals to travel in public passenger vehicles.

This subordinate law makes amendments to the *Road Transport (Public Passenger Services) Regulation 2002*, to explicitly allow accredited assistance animals to travel in public passenger vehicles.

The explanatory statement for the subordinate law discusses human rights issues:

HUMAN RIGHTS IMPLICATIONS

The Regulation does not engage any human rights in the *Human Rights Act 2004*.

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

This comment does not require a response from the Minister.

LIMITATION OF REVIEW RIGHTS / HUMAN RIGHTS ISSUES

Subordinate Law SL2020-33 being the Planning and Development Amendment Regulation 2020 (No 2) made under the *Planning and Development Act 2007* expands the exemptions for rural lease developments.

This subordinate law amends Schedule 1 to the *Planning and Development Regulation 2008*. Schedule 1 deals with exemptions from the development approval (DA) process. One of the effects of including a type of development in Schedule 1 is to make the development immune to the review process that also applies to developments, under Division 7.3.10 of the *Planning and Development Act 2007*. On its face, such an exemption raises an issue under principle (10)(c)(iii) of the Committee's terms of reference, which requires the Committee to consider whether a subordinate law "makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions".

The explanatory statement for this subordinate law states:

Building or altering buildings and structures on rural leases

Changes are made to the exemption for building works carried out on rural leases so that a greater proportion of farm buildings and structures with low impacts can be carried out without requiring a development approval.

Currently, section 1.85 of schedule 1 of the Regulation limits the exemptions for building or structures on rural leases to 100m² in plan area. This unnecessarily disqualifies a range of buildings and structures built on rural lands such as grain silos, sheds and greenhouses, which are typically required to be larger than 100m² in plan area to be functional.

This means that development applications are required for these low impact proposals. This unnecessarily complicates the planning system and contributes to the inefficient allocation of public resources.

Increasing the exemption limit to 216m² for buildings or structures on rural leases will:

- encourage private investment on rural leases that will operate to improve productivity and resilience of the rural sector;
- enable leaseholders to respond to opportunities such as government funding initiatives to build resilience during drought and at the same time improve efficacy of such government expenditures to assist the rural sector; and
- simplify the assessment and approvals process and reduce the regulatory burden for these low impact developments.

The relevance of the exemption to the scrutiny principles applied by the Committee is explicitly addressed in the regulatory impact statement that accompanies this subordinate law, in accordance

with what is required by paragraph 35(h) of the *Legislation Act 2001* (ie that a regulatory impact statement contain a brief assessment of the consistency of a proposed law with the Committee's scrutiny principles).

The regulatory impact statement states:

.... the amending regulation will result in the exemption of a small number of additional developments. Therefore, the proposals in the amending regulation will not be subject to public notification, and the possibility of third-party review in the [ACT Civil and Administrative Tribunal].

However, as the amending regulation is specific, not general in its application, only a limited amount of additional development types will be exempt. Additionally, without this amendment regulation, a development application submitted for these types of development would very likely receive development approval based on the minimal potential impacts. It should also be noted that these are minor increases to existing categories of exemptions for these development types. On this basis, the amendment regulation is not considered to unduly trespass on the statutory rights to comment on a [Development Application] and seek merits review, as the minor increases are reasonable and justified.

In relation to principle (10)(c)(iii) of the Committee's terms of reference, the regulatory impact statement states:

The proposed amending regulation does not make rights, liberties and/or obligations unduly dependent upon non reviewable decisions. The amending regulation will exempt some developments from requiring approval, thereby removing the ability of the public to comment and potential third-party appeal rights. However, this decision is made in the context that these developments are unlikely to affect the general public or adjoining lessees, therefore there is no planning or development rationale to require development approval.

The explanatory statement for the subordinate law also discusses human rights issues:

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 human rights impacts related to the amendment regulation.

Human rights issues are also discussed in the regulatory impact statement for the subordinate law:

3.3 Human Rights analysis

The amendment regulation potentially engages the right of taking part in public life, in particular the right and/or opportunity to take part in the conduct of public affairs, being the development application and approval process. The right is defined in Section 17(a) of the *Human Rights Act 2004*. However, the approach proposed is considered to be the least restrictive way of achieving the desired outcome. This is discussed in more detail in the Explanatory Statement.

The Committee draws the attention of the Legislative Assembly to the discussion in the regulatory impact statement for this subordinate law to the subordinate law's compliance with principle (10)(c)(iii) of the Committee's terms of reference.

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 this subordinate law.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-35 being the Planning and Development (Community Consultation) Amendment Regulation 2020 (No 1) made under the *Planning and Development Act 2007* adds estate development plan DAs within existing suburbs and limits areas excepted from pre-DA consultation to greenfield areas with no existing communities.

This subordinate law amends the *Planning and Development Regulation 2008*. Section 138AE of *Planning and Development Act 2007* requires a proponent of a prescribed development to consult the community prior to lodging a development application (DA). The prescribed development types are outlined in section 20A of the *Planning and Development Regulation*. Sections 4 and 5 of this subordinate law make minor additions to section 20A. Section 7 replaces Schedule 1B to the *Planning and Development Regulation*, which identifies areas and land where pre-DA community consultation is not required.

The explanatory statement for this subordinate law indicates that the amendment is made in response to an ACT Government review of the community consultation process, finalised in November 2019. The explanatory statement for the subordinate law states:

The review, which was finalised in November 2019, found that pre-DA consultation is generally implemented in accordance with the minimum requirements of the Guidelines. The review also made observations and recommendations, this included a recommendation to update the triggers and exceptions of pre-DA consultation to ensure the scope of development captured meets the intent of the Guidelines. Specifically, the review recommended:

- adding estate development plan (EDP) DAs within existing suburbs and all development that are required to be reviewed by the National Capital Design Review Panel (NCDRP) to undergo pre-DA consultation
- review and revise the areas excepted from pre-DA consultation to limit them to greenfield areas with no existing communities.

The amendment regulation revises Section 20A and Schedule 1B of the Regulation to action the above recommendations.

In relation to the additions to section 20A of the *Planning and Development Regulation*, the explanatory statement for this subordinate law states:

Clause 4 of the amendment regulation inserts section 20A (1) (f). Section 20A (1) (f) prescribes EDP [estate development plan] proposals to undertake pre-DA consultation. The intention of this provision is to only capture EDP DAs within established suburbs. This is supported by s 20B (2) which exempts applications in industrial areas and greenfield areas identified by the updated maps in Schedule 1B.

Clause 5 of the amendment regulation also inserts section 20A (1A). Section 20A (1A) prescribes development proposals required to consult with the NCDRP [National Capital Design Review Panel] to also undertake pre-DA consultation. The intention of this provision is to capture the developments prescribed by regulation or required to by the Minister to obtain advice from the NCDRP and not those who voluntarily refer their application to the NCDRP for advice.

As already indicated, Schedule 1B to the Planning and Development Regulation identifies areas and land where pre-DA community consultation is not required. Section 7 of this subordinate law replaces Schedule 1B. The explanatory statement states:

Clause 7 of the amendment regulation substitutes updated maps identifying greenfield areas where development proposals are not required to undergo pre-DA community consultation. The revised maps ensure proposals for a prescribed development in an area with established communities are required to undergo pre-DA consultation, while also exempting current and upcoming greenfield areas from this requirement.

The explanatory statement for the subordinate law then discusses the human rights issues arising from the subordinate law:

CONSISTENCY WITH HUMAN RIGHTS

The amending regulation potentially engages the right of taking part in public life, in particular the right and/or opportunity to take part in the conduct of public affairs. The right is defined in Section 17(a) of the *Human Rights Act 2004*:

Every citizen has the right, and is to have the opportunity, to—

- a) take part in the conduct of public affairs, directly or through freely chosen representatives.

Under section 138AE of the *Planning and Development Act 2007*, prescribed development proposals are required to undertake community consultation before lodging a development application. This amendment regulation does not remove this right, it seeks to expand its operations to capture additional significant types of development and reduce the areas where development proposals do not need to undertake this requirement.

The amending regulation does not propose any changes that are considered to impede or limit a citizen's ability to take part in this process. Instead, it provides further opportunities for involvement through expanding the consultation requirement criteria. Furthermore, the revisions to the areas excepted from pre-DA community consultation has been revised to reflect only those areas with no existing community. This will increase the number of development proposals that will be required to undertake pre-DA community consultation in established suburbs, thereby facilitating further community involvement.

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.

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-37 being the Liquor Amendment Regulation 2020 (No 3) made under the Liquor Act 2010 makes Veterans Park a permanent alcohol-free place.

This subordinate law amends subsection 31(1) of the Liquor Regulation 2010, which prescribes permanent alcohol-free places. The amendment made by this subordinate law adds Veterans Park, in the Canberra Central district, to the list of permanent alcohol-free places.

The explanatory statement to the subordinate law contains a detailed, 3-page discussion of the consistency of the subordinate law with human rights. The human rights discussed are the right to non-discrimination and equality under subsection 8(3) of the *Human Rights Act 2004* and to the

rights in criminal proceeding, protected by section 22 of the Human Rights Act. In relation to the application of section 22, the explanatory statement particularly discusses the relevance of the strict liability offence, in section 199 of the *Liquor Act 2010*, that would apply if a person drank alcohol in (the newly-prescribed) Veterans Park, in contravention of its status as a permanent alcohol-free place. The explanatory statement concludes:

If the offence were prosecuted, the prosecution has the legal burden of proving every physical element of s 199 beyond reasonable doubt. The prosecution also has the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof on the defendant (s 56 *Criminal Code 2002*). The continued operation of the legal burden with respect to the physical elements of s 199 ensures the right at s 22 (1) is upheld.

The maximum penalty that may be imposed under section 199 is proportionate to its objective and mitigated by the availability of the infringement notice penalty. The application of this offence to Veterans Park reflects a proportionate approach which will protect the memorials and the character of the park without infringing protected 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.

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-39 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2020 (No 5) made under the Medicines, Poisons and Therapeutic Goods Act 2008 authorities medical radiation practitioners to deal with scheduled medicines.

This subordinate law amends the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, to authorise medical radiation practitioners to deal with scheduled medicines as part of their employment and within their professional scope of practice.

The explanatory statement for the subordinate law includes this (brief) discussion of human rights issues:

This regulation is not considered to limit civil protections afforded by the *Human Rights Act 2004*.

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

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Subordinate Law SL2020-40 being the Workers Compensation Amendment Regulation 2020 (No 1) made under the Workers Compensation Act 1951 provides a 12 month extension of workers' compensation insurer approvals and self-insurer exemptions.

This subordinate law amends the *Workers Compensation Regulation 2002*, by inserting to insert temporary provisions that provide a 12-month extension of workers' compensation insurer approvals and self-insurer exemptions. The explanatory statement for the subordinate law states:

The extensions are required following the introduction of a new licensing framework *Workers Compensation Act 1951* (WC Act), as amended by the *Employment and Workplace Safety Legislation Amendment Act 2020* (EWSLA Act). These amendments will commence on 9 January 2021. However, as current workers' compensation insurer approvals and self-insurer exemptions will expire in December 2020, this amendment Regulation will provide a temporary short-term extension to current approvals/exemptions to allow sufficient time to implement the new licensing framework.

The amendments will establish a mechanism for granting a short-term, 12 month extension based on the provision of streamlined application information by insurers and self-insurers to ensure they continue to meet their obligations under the WC Act.

The explanatory statement for the subordinate law goes on to discuss human rights issues:

CONSISTENCY WITH HUMAN RIGHTS

These amendments do not engage the *Human Rights Act 2004* (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.

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

Subordinate Law SL2020-42 being the Civil Law (Sale of Residential Property) Amendment Regulation 2020 (No 1) made under the *Civil Law (Sale of Residential Property) Act 2003* requires that a copy of the Australian standard be made available for inspection by the public free of charge.

This subordinate law amends the *Civil Law (Sale of Residential Property) Regulation 2004*. It substitutes a new section 6. The new subsection 6(1) provides:

- (1) The Legislation Act, section 47 (6) does not apply to AS 4299-1995, AS 4349.1 and AS 4349.3 under this regulation.

Note Australian standards do not need to be notified under the Legislation Act because s 47 (6) does not apply (see Legislation Act, s 47 (7)). The standards may be purchased at www.standards.org.au

AS 4299-1995, AS 4349.1 and AS 4349.3 are Australian Standards that are relied upon by the Civil Law (Sale of Residential Property) Regulation. The version of section 6 that is replaced, by this subordinate law, was similar in effect but did not include a reference to AS 4299-1995.

The Committee notes that (as is reflected in the Note, above), without section 6, the Australian Standards referred to and relied upon by the Civil Law (Sale of Residential Property) Regulation would have to be published on the ACT Legislation Register, as a "notifiable" instrument (for section 10 of the *Legislation Act 2001*). This, in turn, ensures that users of legislation have free access to all the material that they need, in order to understand the full scope and effect of an instrument such as this. The Committee has always taken a strong view that such access is important. As a result, the Committee generally does not look favourably on the disapplication of subsections 47(6) of the Legislation Act and seeks an explanation as to why disapplication is necessary, in a particular case.

For this subordinate law, the Committee notes, with approval, that new subsection 6(2) provides:

- (2) The director-general must ensure that an Australian standard mentioned in subsection (1) is available for inspection free of charge to the public during ordinary business hours at the office of an administrative unit administered by the director-general.

The Committee notes, with approval, that this means that users of the subordinate law can access the relevant Australian Standards, free of charge.

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 has no comments on it:

Subordinate Law SL2020-33 being the Planning and Development Amendment Regulation 2020 (No 2) made under the *Planning and Development Act 2007* expands the exemptions for rural lease developments.

Jeremy Hanson MLA
Chair

2 February 2021