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

SCRUTINY REPORT 11

19 November 2021
THE COMMITTEE

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ROLE OF COMMITTEE

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

(10) the Standing Committee on Justice and Community Safety is also to perform a legislative scrutiny role of bills and subordinate legislation by:

(a) considering whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
   (i) unduly trespass on personal rights and liberties;
   (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   (iv) inappropriately delegate legislative powers; or
   (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny; and
   (vi) consider whether any explanatory statement associated with legislation meets the technical or stylistic standards expected by the Assembly;

(b) reporting to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the Human Rights Act 2004;

(c) considering whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
   (i) is in accord with the general objects of the Act under which it is made;
   (ii) unduly trespasses on rights previously established by law;
   (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
   (iv) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; and

(d) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Assembly;
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BILLS

BILLS—NO COMMENT

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

CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) AMENDMENT BILL 2021

This Private Member’s Bill will amend the Civil Law (Sale of Residential Property) Act 2003 to restrict the ability of sellers of residential units who entered into a contract for the unit before the unit plan was registered (an off-the-plan contract) to rescind the contract. Rescission of the contract due to registration of the units plan (or another event prescribed by regulation) failing to occur before a particular date can only occur after notice has been provided to each buyer of the unit, and either each buyer consents to the rescission or the Supreme Court has made an order allowing the rescission on the basis that it is just and equitable in the circumstances. The new provisions will only apply to off-the-plan contracts entered into after notification and commencement of the Bill.

REMUNERATION TRIBUNAL AMENDMENT BILL 2021

This Private Member’s Bill amends the Remuneration Tribunal Act 1995 to add to the list of officers declared for the purposes of the Australian Capital Territory (Self-Government) Act 1988 (Cth), section 73 (1) so as to include the “Whip in the Legislative Assembly of a registered party (other than the party to which the Chief Minister or Leader of the Opposition belongs) if at least 4 members of the Legislative Assembly are members of the party”. This will have the effect of requiring the Remuneration Tribunal to inquire into, and determine, the remuneration and allowances to be paid, and other entitlements to be granted to a Member of the Legislative Assembly arising from the member holding that particular office.

BILLS—COMMENT

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

CIVIL LAW (SALE OF RESIDENTIAL PROPERTY) AMENDMENT BILL 2021

This Government Bill will amend the Civil Law (Sale of Residential Property) Act 2003 to insert a new Part 2A. This Part will condition contracts for the sale of residential units, dwellings and land prior to the unit plan being registered, certificate of occupancy issued, or crown lease registered respectively (off-the-plan contracts). Provisions that allow for rescission of the contract, and hence avoid other obligations arising under the contract, in the event of delay or specified sunset events will not be able to be used to rescind the contract without the consent of all the buyers or order of the Supreme Court.

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

RETROSPECTIVE OPERATION

The Bill will be taken to have commenced on the day the Bill was presented to the Legislative Assembly, namely 9 November 2021. Clause 8 of the Bill will also insert new transitional provisions into the Act to apply the new Part 2A to an off-the-plan contract in force immediately before the day the new part commences. If the Bill is enacted, any attempt to rescind the contract from
9 November 2021, or prior to enactment of the Bill, will be restricted. Any seller wishing to rescind an off-the-plan contract after 9 November 2021 due to delay or the expiry of a sunset date will have to provide notice to the buyers and obtain their consent or satisfy the Supreme Court that it is just and equitable to allow the rescission. The amendments will apply to all existing contracts and not just new contracts entered into after that date.

To the extent that the Bill will take effect prior to its commencement it will operate retrospectively. The explanatory statement includes a statement justifying this retrospective effect due to:

- the need for urgent consumer protections to respond to real-time changes within the property market. The Government will ensure that industry notification is conducted so that stakeholders are aware of the commencement of the proposed reforms. The parties to off-the-plan contracts will be on notice of the reforms from the date of introduction of these changes. Commencement of the amendments from the date of introduction is necessary to protect buyers who are party to current off-the-plan contracts. Retrospective commencement will prevent rescissions under sunset and delay clauses from occurring during the period of time between introduction and notification of the amendments.

The explanatory statement goes on to discuss the impact of the Bill on existing contracts:

The proposed amendments will apply to an off-the-plan contract that are in force on commencement of the Bill. The proposed amendments do not change the rights and liabilities that the parties to the contract had prior to commencement of the amendments. The proposed amendments do not have retrospective operation, instead they change the legislative framework within which existing contractual rights operate. This is done in a prospective way that governs the future operation of the contract.

The Committee notes that the explanatory statement does not distinguish between delay events which occur, or a sunset date passing, prior to the commencement of the Bill and those which occur after commencement but before notification. In the former circumstances, a seller may be considered to have a form of accrued right that will be extinguished by commencement of the Bill. By providing for retrospective commencement, the Bill will not allow sellers in those circumstances to exercise their rights under the contract. This may include circumstances where the seller has taken all necessary steps to rescind the contract but the rescission has not formally occurred prior to commencement of the Bill. The Committee therefore seeks further information from the Minister on whether consideration was given to distinguishing contracts where the conditions for a rescission provision had been met prior to commencement of the Bill.

The Committee also notes that a rescission provision is defined in the Bill as a provision that allows the contract to be rescinded if a sunset event does not happen before a sunset date, a delay event happens, or as prescribed in regulation. It is not clear whether a provision that is conditional on one of these circumstances, but includes additional conditions, would come within the definition of a rescission provision. In those circumstances, it is also not clear whether those additional conditions, which may provide further protection for the buyer, would have to be met before an order allowing rescission could be sought from the Supreme Court. The Committee notes that the Court would only have to consider the terms of the contract in deciding whether it is just and equitable to make such an order. The Committee therefore seeks further information from the Minister on whether rescission provisions are intended to be exclusive of additional conditions allowing for rescission.

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond prior to the Bill being debated.
EMERGENCIES AMENDMENT BILL 2021

This Bill amends the Emergencies Act 2004 to implement the recommendations of the Report of the Review of the operation of the Emergencies Act 2004, which was tabled in the Legislative Assembly on 16 September 2021, and makes other consequential amendments.

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

HENRY VIII CLAUSE

The Bill will insert a new Chapter 12 into the Act to deal with transitional matters. Proposed section 225 will authorise the making of transitional regulations which may modify the new Chapter 12 “to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in [that Chapter]”. Such a regulation has effect despite anything elsewhere in the Act or another Territory law (proposed subsection 225(3)).

The Committee generally requires a justification be provided for such provisions – known as a Henry VIII clause – which authorise regulations which will have the effect of overriding other Territory laws. The explanatory statement accompanying the Bill provides only a general description of the use of such clauses:

A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

The Committee notes that any such regulation can only modify the operation of the new Chapter 12 where the executive is of the opinion that a transitional issue is not adequately or appropriately dealt with, and that the transitional provisions in the Chapter are intended to expire 12 months after the day they commence. However, the scope of the Henry VIII clause is otherwise unrestricted. Given the limited nature of the amendments otherwise included in Bill, it is not clear to the Committee why a Henry VIII clause of this nature is needed, or why it is not limited to matters necessary to be prescribed because of the enactment of the Bill. The Committee therefore requests further justification for the inclusion of subsections 225(2) and (3).

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

GOVERNMENT PROCUREMENT AMENDMENT BILL 2021

This Bill amends the Government Procurement Act 2001 and the Government Procurement Regulation 2007 to give effect to the relevant recommendations from the Secure Local Jobs Advisory Council’s Review of the Operation of the Secure Local Jobs Code, including by providing for access and inspection powers of authorised persons.
Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee Resolution of Appointment paragraph (10)(a)(i)

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

Right to Privacy and Reputation (Section 12 HRA)

Right to Work and Other Work-related Rights (Section 27B)

The Government Procurement Act requires entities (which may include individuals) tendering or entering into contracts for Territory-funded work to hold a secure local jobs code certificate. This in turn requires those entities to comply with the secure local jobs code (Code). The Code establishes various workplace standards including providing local employment and fair treatment of workers. The Bill will enable a certificate to be suspended, for a reasonable period, if the registrar has reasonable grounds to suspect that an entity may have failed to comply with the Code. This will restrict the ability of a person to enter into contracts with the Territory while their certificate is suspended, and hence potentially limit the right to work protected by section 27B of the HRA.

The Bill will also introduce a power allowing authorised persons to access and inspect premises, including requiring the provision of information or documents, where the holder of a secure local jobs code certificate carries out or holds records relating to Territory-funded work. Information, documents or other things obtained during that inspection may be given by the registrar to other entities, including Commonwealth or State entities, which are responsible for administration of laws relating to workplace standards. As these amendments may therefore involve access and inspection of personal information they may limit the protection of privacy provided by section 12 of the HRA.

The explanatory statement accompanying the Bill recognises these potential limitations on human rights and provides a justification for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, subject to the following comment.

In justifying the Bill’s potential limits on the protection of privacy, the explanatory statement provides that the rights of access and inspection and sharing of information are for the purpose of investigating non-compliance or possible non-compliance with the Code. However, the Committee notes that entry to premises that are open to the public or with the occupier’s consent is not restricted by having to suspect that there is non-compliance with the Code. The powers on entry are also not restricted to having to relate to establishing possible non-compliance with the Code. The disclosure of information or documents obtained during an inspection are also not restricted to bodies responsible for enforcement of standards necessarily analogous to those set out in the Code. The Committee recognises that the power of access and inspection does not extend to entering residential premises without consent, and that the Information Privacy Act 2014 will apply to the collection and use of information and documents by the registrar or authorised persons. However, the Committee requests further information from the Minister on why access to premises and personal information under the new provisions for access and entry are not explicitly restricted to the purpose of investigating possible non-compliance with the Code.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond prior to the Bill being debated.
JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

This Bill amends a range of legislation, primarily in the Attorney-General’s portfolio.

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

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

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

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

The Bill will amend the Births, Deaths and Marriages Registration Act 1997 in relation to the registration of a change of name. Currently where a parent or person with parental responsibility applies to the Registrar-General to change the name of their child, and the child is at least 14 years old, the child must consent to the change of name or be unable to understand the implications and meaning of the change. That Act also provides for children between 12 and 16 to apply to the ACT Civil and Administrative Tribunal (ACAT) for leave to apply to the register for a change of any of their given names. The Bill will extend the requirement for parents seeking to change the given names of their child to obtain the consent of children under 14 where the child have themselves been granted leave by ACAT. By requiring a parent to obtain the consent of their child, the Bill may limit the exercise of parental responsibility protected by the right in section 11 of the HRA to protection of the family and children. By providing for differential treatment of children the Bill may also limit the right to equality protected by section 8 of the HRA. The explanatory statement accompanying the Bill recognises these potential limitations and provides a justification for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The Legal Aid Act 1977 protects against the disclosure of information about the affairs of another person acquired in the course of an office or employment, or in fulfilling a function, under that Act (section 92). There are currently three general exceptions to these secrecy provisions: for the purpose of investigating or prosecuting offences under the Act; with consent of the person involved; or in response to various forms of subpoena. The Bill will add two further exceptions allowing disclosure:

- to Commonwealth entities for the purpose of complying with a national agreement in relation to the provision of legal assistance services; and
- to any entity for the purpose of conducting research in relation to improving access to justice or the provision of legal assistance services.

In both cases the disclosure must be authorised by the Chief Executive Officer under disclosure guidelines developed by the Minister under the Bill. The disclosure guidelines will be a disallowable instrument. Disclosure to Commonwealth entities is only permitted where the entity is required to apply the Australian privacy principles set out in Schedule 1 of the Privacy Act 1988 (Cth). The new exceptions will only apply to disclosure of information collected, or documents produced, after 1 July 2021.
As these new exceptions will permit the disclosure of personal and often sensitive information, the Bill may limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit and provides a justification for why it should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the following comments the Committee refers that statement to the Assembly.

The explanatory statement describes the purpose of the new exceptions as improving access to justice outcomes for vulnerable members of the ACT community by enabling reporting obligations to be fulfilled under national legal assistance funding schemes and supporting research enabling a better understanding of areas of legal need in both the Territory and across Australia. It is not clear to the Committee why both of those purposes may not be met by providing anonymised or de-identified information which may better protect the privacy of individuals.

The privacy of individuals will also be supported through compliance with disclosure guidelines to be developed by the Minister. As the explanatory statement suggests:

> it is intended that the guidelines will require the [Legal Aid] Commission to be satisfied that the external organisation requesting the data has a clear end project with a legitimate objective relating to increasing access to justice. The use and presentation of the data must have a rational connection to the objective and be proportionate to the limitation on the right to privacy. The Commission must further be satisfied that any sensitivities or potential breaches of privacy are addressed. The Commission must then be satisfied that the external organisation has appropriate data security safeguards and protocols in place to protect the data and consider any further limitations or conditions upon the disclosure of the data necessary to ensure its safe, proportionate, and appropriate use.

The Committee recognises that the guidelines will be disallowable instruments and subject to scrutiny by this Committee and the Assembly. However, it is not clear to the Committee, particularly given the sensitivity of the information in question, why the privacy protections proposed to be set out in the guidelines could not be explicitly included in the Bill. In particular, it is not clear why disclosure to non-Commonwealth entities should not also be subject to having to comply with the equivalent of the requirements in the Commonwealth APPs or, alternatively, the Territory Privacy Principles set out in Schedule 1 of the Information Privacy Act 2014. The Committee therefore seeks further information from the Minister on why additional privacy protections cannot be included in the Bill.

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

**PUBLIC HEALTH AMENDMENT BILL 2021**

This Bill amends the Public Health Act 1997 to create a new temporary offence of failure to comply with a COVID-19 direction.

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

*Report under section 38 of the Human Rights Act 2004 (HRA)*
RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Public Health Act, during a public health emergency, authorises the Chief Health Officer to make any direction they consider necessary or desirable to alleviate the emergency. There is no formal requirement that a direction be notified on the Legislation Register. It is currently an offence under subsection 120(4) of the Act for a person, without reasonable excuse, to fail to comply with a direction, subject to a maximum penalty for a person of 50 penalty units.

The Bill will distinguish COVID-19 directions made while an emergency declaration due to COVID-19 is in effect. Any COVID-19 directions signed by the Chief Health Officer after the commencement of the Bill will now have to be notified as a notifiable instrument. The offence in subsection 120(4) will no longer apply to COVID-19 directions. Instead, a new offence will be inserted, making it an offence if a COVID-19 direction is in force and a person fails to comply with the direction, subject to the same maximum penalty of 50 penalty units. Strict liability will apply to whether a COVID-19 direction is in force, and it will be a defence if the person has a reasonable excuse to not comply with the direction. An authorised officer must, if reasonably practicable, warn a possible offender that failure to comply with a direction without a reasonable excuse is an offence, though a failure to warn does not affect any prosecution or infringement notice given for the offence.

The Bill will also exclude the operation of subsection 187(1) of the Crimes Act 1900 in certain circumstances. Under that subsection, an offence such as that to be introduced by the Bill is subject to the provisions of Part 1C of the Commonwealth Crimes Act 1914 (Cth). This part in turn includes powers of detention for persons under arrest, and various protections for persons who are arrested or suspected of having committed an offence. These protections include that the suspect: be cautioned that they do not have to answer but anything they do say may be used in evidence; is able to have the assistance of a relative, friend, lawyer, or representative from an Aboriginal legal assistance organisation; and can have access to tape recordings of any caution and statements made. The Bill will exclude the operation of Part 1C when a police officer questions a person believed to be over 18 about whether they have a reasonable excuse for not complying with the COVID-19 direction, provided the police officer cautions the person first and intends to only issue an infringement notice or not take further action rather than prosecute the person for the offence.

As these provisions will affect the presumption of innocence by applying strict liability to a part of the offence, placing the evidential burden on the accused of establishing a defence, and reducing the protections provided in relation to charges being laid, the Bill may limit the rights in criminal proceedings protected by section 22 of the HRA. The explanatory statement accompanying the Bill recognises these potential limitations and provides a justification for why they should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the following comment, the Committee refers that statement to the Assembly.

The new offence of failing to comply with a COVID-19 direction applies to all directions given while a COVID-19 emergency declaration was in force, whether the direction was given before, on or after the commencement of the Bill. Similarly, the exclusion of Part 1C of the Commonwealth Crimes Act applies to a failure to comply with any COVID-19 direction, regardless of when the direction was given. The Committee is concerned that this may give rise to liability for a strict liability offence in relation to a direction which did not have to be notified on the legislation register. The Committee therefore seeks confirmation from the Minister that all directions currently in force that may potentially fall within the meaning of COVID-19 direction for the purpose of the new offence have been registered on the ACT Legislation Register.

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2021

In a letter to the Committee dated 15 November 2021, the Government provided in confidence proposed Government amendments to the Justice and Community Safety Legislation Amendment Bill 2021 and provided a supplementary explanatory statement. The amendments will amend the defence of mental impairment provided in section 28 of the *Criminal Code 2002*. Subsection 28(1) provides:

A person is not criminally responsible for an offence if, when carrying out the conduct required for the offence, the person was suffering from a mental impairment that had the effect that—

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong; or

(c) the person could not control the conduct.

Subsections 28(4) and (5) provide that a person is presumed not to have been suffering from a mental impairment, and that presumption is displaced only if it is proved on the balance of probabilities (by the prosecution or defence) that the person was suffering from a mental impairment.

The interpretation of these provisions was recently considered in the case of *R v Yeaman* 1. In that case, the ACT Supreme Court held that, to establish a person was not criminally responsible for an offence, subsection 28(1) required establishing at least two elements: that the person suffered from a mental impairment; and that the mental impairment had the effects set out in paragraphs (a) to (c). If the accused wanted to rely on the defence of mental impairment, subsections 28(4) and (5) had the effect of placing the legal onus on them to establish, on the balance of probabilities, that they had a mental impairment. However, those subsections did not apply to the effects of that mental illness. Instead, sections 58 and 59 of the Criminal Code, which provide for the burden and standard of proof in interpreting various defences under that Code, had the effect of applying an evidential burden of proof on the effects of the mental impairment. As a result, an accused only had the onus of establishing a reasonable possibility that their mental impairment had the effects in paragraphs (a) to (c), with the prosecution then having to disprove that effect beyond a reasonable doubt. 2

The proposed amendments will amend subsections 28(4) and (5) to include the effects of the mental impairment. An accused seeking to raise the defence of mental impairment will therefore have to establish, on the balance of legal probabilities, that they both suffered from a mental impairment and that impairment had one of the effects set out in paragraphs (a) to (c).

As the proposed amendment will require the accused to establish additional matters in their defence and reduce the matters which need to be established by the prosecution in establishing guilt, the amendment potentially limits the presumption of innocence protected as one of the rights in criminal proceedings in section 22 of the HRA. The supplementary explanatory statement

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1 [2021] ACTSC 252
2 *R v Yeaman* [2021] ACTSC 252 at [103] - [123].
provided to the Committee to accompany the proposed amendment recognises this potential limitation and provides a justification for why it might be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly and makes no further comments.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- Disallowable Instrument DI2021-221 being the Radiation Protection (Council Member, Chair and Deputy Chair) Appointment 2021 (No 1) made under sections 68 and 70 of the Radiation Protection Act 2006 appoints specified persons as chair, deputy chair and members of the Radiation Council of the ACT.

- Disallowable Instrument DI2021-228 being the Utilities (NERL retailers—Application of Industry Codes) Determination 2021 made under sections 56A and 63 of the Utilities Act 2000 determines the industry codes energy retailers authorised under the National Energy Retail Law must comply with in the ACT.

- Disallowable Instrument DI2021-230 being the Domestic Animals (Exercise Areas) Declaration 2021 (No 1) made under section 40 of the Domestic Animals Act 2000 revokes DI2015-336 and declares specified locations as dog exercise areas.

- Disallowable Instrument DI2021-231 being the Domestic Animals (Prohibited Areas) Declaration 2021 (No 1) made under section 41 of the Domestic Animals Act 2000 revokes DI2015-337 and declares specified locations to be areas where dogs are prohibited.

- Disallowable Instrument DI2021-232 being the Emergencies (Bushfire Council Members) Appointment 2021 (No 1) made under section 129 of the Emergencies Act 2004 appoints specified persons as chairperson, deputy chairperson and members of the ACT Bushfire Council.

- Disallowable Instrument DI2021-233 being the Tree Protection (Advisory Panel) Appointment 2021 (No 1) made under section 69 of the Tree Protection Act 2005 appoints specified persons as members of the Tree Advisory Panel.

- Disallowable Instrument DI2021-234 being the Tree Protection (Advisory Panel) Appointment 2021 (No 2) made under section 69 of the Tree Protection Act 2005 appoints specified persons as members of the Tree Advisory Panel.

- Disallowable Instrument DI2021-235 being the Veterinary Practice (Board) Appointment 2021 (No 1) made under section 93 of the Veterinary Practice Act 2018 appoints specified persons, who have been registered veterinary practitioners for a continuous period of at least three years before the day of appointment, as members of the Veterinary Practitioners Board.


• Disallowable Instrument DI2021-242 being the Gambling and Racing Control (Governing Board) Appointment 2021 (No 2) made under sections 11 and 12 of the Gambling and Racing Control Act 1999 and section 78 of the Financial Management Act 1996 appoints a specified person as deputy chair and a member of the ACT Gambling and Racing Commission Governing Board.

• Disallowable Instrument DI2021-249 being the Official Visitor (Children and Young People) Appointment 2021 (No 1) made under paragraph 10(1)(a) of the Official Visitor Act 2012 appoints a specified person as official visitor for the purposes of the Children and Young People Act 2008.

DISALLOWABLE INSTRUMENTS—COMMENT

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

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

• Disallowable Instrument DI2021-222 being the Road Transport (General) (COVID-19 Emergency Response) Application Order 2021 (No 1) made under section 14 of the Road Transport (General) Act 1999 varies sections of the Road Transport (Vehicle Registration) Regulation, Road Transport (Driver Licensing) Regulation, and Road Transport (Offences) Regulation so that members of the community are not disadvantaged as a result of COVID-19 lockdown restrictions.

• Disallowable Instrument DI2021-223 being the Road Transport (General) Application of Road Transport Legislation (COVID-19 Parking Arrangements) Declaration 2021 (No 1) made under section 12 of the Road Transport (General) Act 1999 provides that certain parts of the Road Transport (Road Rules) Regulation applying to specified parking areas and the Road Transport (General) (Pay Parking Area Fees) Determination 2021 (No 1) do not apply for the duration of the COVID-19 lockdown.

• Disallowable Instrument DI2021-236 being the Road Transport (General) Application of Road Transport Legislation (COVID-19 Parking Arrangements) Declaration 2021 (No 2) made under section 12 of the Road Transport (General) Act 1999 disapplies certain parts of the Road Transport (Road Rules) Regulation applying to specified parking areas and the Road Transport (General) (Pay Parking Area Fees) Determination 2021 (No 1) for an additional two weeks to provide the community and essential workers with a transitional period to adjust to any new COVID-19 restrictions implemented.

The instruments mentioned above are made under sections 14 and 12 of the Road Transport (General) Act 1999, respectively. The explanatory statements for all instruments indicate that they are made in the context of the COVID-19 pandemic. The first instrument provides that various provisions of the Road Transport (Vehicle Registration) Regulation 2000, Road Transport (Driver Licensing) Regulation 2000 and the Road Transport (Offences) Regulation 2005 are varied, in response to COVID-19 pandemic, until 31 March 2022. The substantive variations extend the times within certain things must be done, in the context of learner licences, infringement notices, participation in “approved programs”
and certificates of inspection. The explanatory statement for the first instrument states that these variations are intended “to ensure members of the community are not disadvantaged at this time due to the necessary suspension of Government and other Services.”.

The Committee notes that various of the variations have a retrospective effect. The Committee notes, with approval that this retrospective effect is addressed in the explanatory statement for the first instrument, which states:

**RETROSPECTIVITY**

Various elements of the instrument will apply retrospectively and remain in effect until the instrument expires on 31 March 2022, or when it is revoked, whichever is earlier. The expiry date of 31 March 2022 aligns with the expiry date of the Road Transport (Driver Licensing) Amendment Regulation 2020 (No 1) (SL2020-14), which came into effect at the start of the COVID-19 response.

The retrospective application is in the most part non-prejudicial and is necessary to ensure that people are not disadvantaged at this time due to the necessary suspension of Government and other Services.

The Committee is concerned by the proposition that any retrospective operation is only “in the most part non-prejudicial”. The Committee notes that, under subsection 76(2) of the Legislation Act 2001, unless that subsection is displaced, by or under an Act, a statutory instrument (such as this instrument) cannot commence retrospectively if it is “prejudicial” (ie if it adversely affects the rights of a person or imposes liabilities on a person).

The Committee seeks the Minister’s advice as to any prejudicial retrospectivity in the first instrument mentioned above.

The comment immediately above requires a response from the Minister. The Committee would be grateful if the Minister could respond before 30 November 2021, when the Legislative Assembly’s capacity to move to disallow the instrument will expire.

The Committee notes that the explanatory statement for the first instrument goes on to address the human rights implications of the instrument, stating that “[t]he 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 the first instrument mentioned above.

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

The second instrument mentioned above provides that certain parts of the Road Transport (Road Rules) Regulation 2017 applying to specified parking areas and the Road Transport (General) (Pay Parking Area Fees) Determination 2021 (No 1) [DI2021-109] do not apply for the duration of the lockdown. The effect is to pause pay parking in ACT Government-owned car parks, from 12 August to 17 September 2021. The explanatory statement for the instrument states:

The ACT Government has initiated a temporary pause on paid parking in ACT Government owned car parks for the duration of the [COVID-19-related] lockdown and has paused the need for a commuter parking permit to use park and ride facilities. Safety related matters and time limits on parking spaces will continue to be enforced.
The Committee notes that the second instrument was made on 3 September 2021 and notified on the ACT Legislation Register on that same day. However, section 2 of the instrument provides that it “is taken to have applied from 5pm on 12 August 2021. This means that it has a retrospective effect.

The Committee notes, with approval, that the retrospective effect is addressed in the explanatory statement for the second instrument:

The retrospective application is non-prejudicial and is necessary to support the temporary pause on paid parking in ACT Government owned car parks and the pause on the need for a commuter parking permit to use park and ride areas.

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

The Committee notes that the third instrument mentioned above extends the pause in pay parking in ACT Government-owned car parks, from 18 September to 15 October 2021

The Committee notes that the explanatory statements for the second and third instruments mentioned above go on to address the human rights implications of the instruments, in each case stating that “[t]he 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 statements for the second and third instruments mentioned above.

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

HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-224 being the Medicines, Poisons and Therapeutic Goods (Monitored Medicine) Declaration 2021 (No 1) made under section 97A of the Medicines, Poisons and Therapeutic Goods Act 2008 declares specified medicines, in all forms and strengths, to be monitored medicines.

This instrument is made under section 97A of the Medicines, Poisons and Therapeutic Goods Act 2008, (MPTG Act) which allows the Minister to declare a medicine to be a “monitored medicine”. The supply of a monitored medicine is subject to certain limitations, under the MPTG Act (see, eg, section 31). This instrument adds certain medicines (including tramadol) to the list of monitored medicines. The explanatory statement for the instrument indicates that the declaration of these particular medicines is in response to the findings of a 2019 inquest.

The explanatory statement for the instrument addresses human rights implications arising from the instrument, stating:

Prescribing certain Schedule 4 medicines as monitored medicines engages the Human Rights Act 2004 (HRA). This instrument engages and supports the right to life (HRA, section 9) by providing a framework for the safe and effective administration of the medicines in accordance with the purposes of the monitored medicines framework under section 97C of the MPTG Act.

This instrument also engages and limits the right to privacy and reputation under the HRA, section 12 in that it extends approval and other requirements for the prescribing and dispensing of certain schedule 4 medicines. It is considered the limitations on the right to privacy are reasonable and proportionate given the public health benefits of monitoring these medicines.
Safeguards are also available under the MPTG Act and the *Health Records (Privacy and Access) Act 1997* to ensure that approval and reporting processes protection a person’s privacy and to ensure personal health information is only disclosed for a lawful purpose.

A more detailed assessment of the impacts of the monitored medicines framework on the right to privacy is included in the Explanatory Statement for the Medicines, Poisons and Therapeutic Goods Amendment Bill 2018 which was passed by the ACT Legislative Assembly on 7 June 2018.

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

This comment does not require a response from the Minister.

**Retrospectivity?**

- **Disallowable Instrument DI2021-225 being the Electoral (Commission Chairperson) Appointment 2021 made under section 12 of the Electoral Act 1992** appoints a specified person as chairperson of the ACT Electoral Commission.

This instrument, made by the Speaker of the Legislative Assembly under section 12 of the Electoral Act 1992, appoints a specified person as chairperson of the ACT Electoral Commission. The Committee notes that the explanatory statement for the instrument states:

> The appointment is taken to have commenced on 10 September 2021 and ends on 9 September 2026 and is non-prejudicial.

The Committee notes that the reference to the instrument’s “non-prejudicial” operation might tend to indicate that the instrument has a retrospective effect. However, the Committee notes that the instrument was made on 9 September 2021 and notified on the ACT Legislation Register on that same day, meaning that it has no retrospective operation.

The Committee notes, with approval, that the explanatory statement of the instrument addresses the pre-requisites for appointment, set out in sections 12 and 12C of the Electoral Act.

This comment does not require a response from the Speaker.

**Human rights issues**


The instruments mentioned above, made under sections 22 and 25 and sections 23 and 25 of the Electronic Conveyancing National Law (ACT), determine ACT Operating Requirements for Electronic Conveyancing and ACT Participation Rules for Electronic Conveyancing, respectively.
The Committee notes that the explanatory statements for both instruments address human rights implications arising from the instrument. In both cases, the human right that is referred to is the right to privacy, protected by section 12 of the Human Rights Act 2004. The Committee notes that, for both instruments, the explanatory statement indicates that the instrument positively engages the right to privacy, as the substantive changes made by the instrument “strengthen privacy and security safeguards to ensure greater protection of personal information”.

The Committee notes that the explanatory statement for the second instrument mentioned above goes on to state:

The disallowable instrument also proposes changes to the requirements for “good character”, to confirm a mortgagor is a legal person and verification of identity processes. These changes engage and limit the right to privacy. However, any limitations on the right to privacy resulting from these changes are reasonably justified under section 28 of the HRA as they are consistent with the objective of ensuring the integrity of electronic conveyancing within the Territory and will still be subject to other privacy and security measures that limit access to personal information on the ELN to required users and subscribers with a legitimate business objective.

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

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT / HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-229 being the Road Transport (General) (COVID-19 Emergency Response—Taxi Industry) Application Order 2021 (No 1) made under section 14 of the Road Transport (General) Act 1999 varies section 32B of the Road Transport (Vehicle Registration) Regulation to temporarily extend the maximum taxi vehicle age and use requirements for standard and wheelchair accessible taxis for two years.**

This instrument is made under section 14 of the Road Transport (General) Act 1999, which allows the Minister to order that the operation of regulations made under the road transport legislation (or a provision of those regulations) are suspended for a stated period or varied in a way specified. This instrument varies section 32B of the Road Transport (Vehicle Registration) Regulation 2000, “in response to the current health emergency”. The explanatory statement for the instrument states:

COVID-19 has seen a significant decline in taxi customers and as such, registered taxi vehicles are being used less often than they usually would.

The explanatory statement goes on to state:

In light of the current COVID-19 health emergency, the current legislative requirement [limiting the age of wheelchair accessible taxis (WATs)] has resulted in a situation where vehicles that reach their respective maximum age or use limit during the COVID-19 health emergency are unable to continue to operate notwithstanding the decline in their use since the beginning of the public health emergency declaration.

This instrument temporarily extends the maximum taxi vehicle age and use requirements for standard taxis and WATs under section 32B of the Road Transport (Vehicle Registration) Regulation 2000 for two years. This additional 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 12 September 2022, after which the vehicle will need to be replaced with a vehicle that has not reached the maximum age or use limit.
This temporary extension is not designed to encourage vehicles being registered as a taxi that are unsafe to the community and all applications to register a vehicle as a standard taxi or WAT remain subject to existing powers to refuse an application for registration under section 32(1) (Deciding applications for registration general) and section 68 (Renewal of registration) of the Road Transport (Vehicle Registration) Regulation 2000. Where applicable, an annual roadworthy inspection will also remain required for an application to register a vehicle as a standard taxi or WAT.

The Committee notes that the explanatory statement for the instrument goes on to address the human rights implications of the instrument, stating that “[t]he 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 DI2021-237 being the Utilities (Licensing) Exemption 2021 (No 2) made under section 22 of the Utilities Act 2000 exempts Capital Battery Pty Ltd from the requirement for a licence in relation to the capacity to generate 30MW or more of power connected to an electricity network.**

This instrument, made under section 22 of the Utilities Act 2000, exempts a specified entity from the requirement in section 21 of the Utilities Act that a “utility service” be provided only in accordance with a licence. The exemption provided by the instrument relates to the operation of a 100MW/2 hour stand-alone battery energy storage system at Rural Block 187 Jerrabomberra. The exemption is provided subject to a condition, set out in section 5 of this instrument, that the entity hold an operating certificate under section 46 of the Utilities (Technical Regulation) Act 2014 prior to commencing construction of the relevant facility.

The Committee notes that the explanatory statement for the instrument mentions human rights implications and the Committee’s legislative scrutiny role. The Committee notes that the explanatory statement states:

**Human rights and Scrutiny of Committee Terms of Reference [sic]**

This instrument does not engage or limit any person’s human rights.

The instrument is consistent with the Legislative Assembly’s Scrutiny of Bills Committee Terms of Reference. In particular, the instrument:

- is made under a ministerial power found in the Act;
- is in accordance with the general objects of the Act under which the instrument is made;
- does not unduly trespass on rights previously established by law; and
- does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions.

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

This comment does not require a response from the Minister.
HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-239 being the Public Health (Health Care Facility) Risk Declaration 2021 (No 1) made under section 18 of the Public Health Act 1997 makes the operation of a health care facility a licensable public health risk activity; declares specified procedures to be non-licensable public health risk procedures; and declares that health care facilities owned and operated by the ACT Government are not required to hold a public health risk activity licence.

This instrument is made under section 18 of the Public Health Act 1997, which allows the Minister to declare an activity that may result in the transmission of disease, or that may otherwise adversely affect the health of individuals in the context of the wider health of the community, to be a “public health risk activity”. The explanatory statement for the instrument states:

The intent of this Declaration is to ensure better safety and quality of care for patients undergoing procedures that may pose a risk to health. It provides a legislative framework to govern Health Care Facilities in the ACT, including capturing accreditation requirements and incorporating recommendations made by the Hospitals Principal Committee (HPC) Standardising Safety and Quality in Private Health Facilities report that was endorsed by the Australian Health Minister’s Advisory Council in 2016. This Declaration revokes the public health risk activity declaration that was made for health care facilities in 2001 (the 2001 Declaration).

The explanatory statement goes on to state that the instrument:

- makes the operation of a health care facility a “licensable public health risk activity”;
- updates the public health risk procedures that should be restricted to health care facilities due to their associated public health risks;
- better aligns the ACT with other jurisdictions in restricting those procedures to health care facilities, by seeking the licencing of health care facilities, rather than by operating in relation to “declared public health risk procedures”;
- defines a “health care facility” as any premises where a declared public health risk procedure is performed or provides overnight inpatient services under the care of a registered medical professional; and
- declares public health risk procedures, as described in Schedule 1, noting that the declaration broadly aligns with the [Hospitals Principal Committee] recommendations and also that “a key change introduced by this Declaration is to restrict the availability of cosmetic procedures to health care facilities.”

The Committee notes that the explanatory statement for the instrument discusses the human rights implications of the instrument, stating:

3 Report to the Hospitals Principal Committee (May 2016, O056-07). Standardising Safety and Quality in Private Health Facilities Greater consistency in the definition of Private Health Facility and the regulation of facilities that carry out cosmetic surgery.
Part 3 of the *Public Health Act 1997* includes offences for conducting a public health risk activity without a licence, or in contravention of a licence. There are no strict liability offences associated with this public health risk activity declaration. All current health care facility licence holders are corporations.

The operation of a health care facility requires the collection and storage of health records, which engages the right to individual privacy and reputation under the *Human Rights Act 2004*. This engagement is already addressed through other laws of the Territory and Commonwealth Government and this declaration is not considered to unduly infringe on an individual’s human rights within the *Human Rights Act 2004*.

This Declaration, together with the Public Health (Health Care Facility) Code of Practice 2021 (No 1) (Code of Practice 2021), engages and supports the *Human Rights Act 2004* right to life under section 9. Together, this [Declaration] and the Code of Practice 2021 support an effective framework for health care facilities to maintain high standards of quality to ensure the safety of the community. They do this by achieving a stronger alignment with the Australian Health Service Safety and Quality Accreditation Scheme (the Scheme). Information about the Scheme is available on the Australian Commission on Safety and Quality in Health Care website at www.safetyandquality.com.au.

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(3) and (6) of the Legislation Act 2001 / Human rights issues**

- Disallowable Instrument DI2021-240 being the Public Health (Health Care Facility) Code of Practice 2021 (No 1) made under section 133 of the *Public Health Act 1997* revokes DI2001-187 and determines the Health Care Facility Code of Practice to be a code of practice in relation to the operation of a health care facility as a declared public health risk activity.

This instrument determines the *Health Care Facility Code of Practice 2021*, under section 133 of the *Public Health Act 1997*. The Committee notes that section 5 of the instrument disappplies subsections 47(3) and (6) of the *Legislation Act 2001* in relation to three documents that are referred to and relied upon by the Code. The effect of disapplying subsection 47(3) is that the documents in question are adopted as they exist, from time to time, contrary to the general rule that such documents can only apply as they exist at a particular time. The effect of disapplying subsection 47(6) is that the documents in question, and any amendments to them, do not have to be published on the ACT Legislation Register, as notifiable instruments, again, contrary to the general rule that such documents be published on the Register.

The Committee notes that subsection 47(3) is, in effect, disappplied by subsection 133(5) of the Public Health Act, which provides that a determination under section 133 “may apply, adopt or incorporate an instrument as in force from time to time”.

The Committee also notes that it has always taken a keen interest in the disapplication of subsection 47(6), in particular, since the general rule of requiring that external documents referred to and relied upon be published assists in ensuring that those affected by such documents have free access to them. The Committee has generally taken the view that any disapplication of this requirement should be justified.
The Committee notes that the explanatory statement for the instrument states:

Displacing s47(6) of the Legislation Act ensures that the latest versions of the external documents (including any subsequent updates) are automatically adopted by the Code in order to assist [Health Care Facilities] to in [sic] the safe delivery of health care. Section 133(5) of the Act provides that a Code of Practice may adopt or incorporate an instrument as in force from time to time as outlined by section 47 of the Legislation Act.

These updates are driven by a Government need to have a high quality, strong health care sector to complement the territory-funded public health system. The updates also seek to address market failures associated with health care sectors including market asymmetry and ability to act on public safety concerns.

The Committee also notes that the Notes to section 5 of the instrument indicate that each of the documents referred to are “freely available” and that webpage addresses are provided in relation to each of the documents. As a result, the Committee is satisfied that those affected by the instrument can freely access the relevant documents.

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

The Committee notes that the explanatory statement for the instrument goes on to address “human rights considerations”:


The Code seeks to address the public health risks presented by [Health Care Facilities] whilst operating in a manner that is the least restrictive for an individual’s liberty and privacy. This approach is consistent with the objectives of the Act.

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

**COVID-19-related instrument**

- **Disallowable Instrument DI2021-243 being the Planning and Development (Remission of Lease Variation Charges—Construction Sector Recovery) Amendment Determination 2021 (No 1) made under section 278 of the Planning and Development Act 2007 amends DI2021-13 to extend the period in which construction must commence until 31 January 2022.**

This instrument is made under section 278 of the Planning and Development Act 2007, which allows the Minister to determine circumstances in which an amount of a lease variation charge for a chargeable variation of a nominal rent lease must be remitted. A lease variation charge (LVC) is applied when a lease holder receives permission from the Government to vary their lease, to enable new or additional development.
This instrument amends an earlier instrument, Planning and Development (Remission of Lease Variation Charges—Construction Sector Recovery) Determination 2021 [DI2021-13], which provided for a reduction in the LVC by 25% of the amount payable (up to $125,000). The explanatory statement for the instrument states:

The 25 per cent reduction was available for LVC amounts deferred (excluding previously paid or deferred amounts) from 24 December 2020 until 30 June 2021, with a requirement that construction must commence by 30 September 2021 (amended to 31 January 2022) regardless of when the development application was lodged or approved.

As indicated by the above paragraph, this instrument extends the end of the period within which construction must have commenced from 30 September 2021 to 31 January 2022.

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

Reducing the LVC provided an incentive for builders to begin construction activity that might not have otherwise occurred during the COVID-19 recovery phase and create more jobs for the local industry.

This comment does not require a response from the Minister.

COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2021-244 being the Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2021 (No 4) made under section 35 of the Liquor Regulation 2010 provides economic support to liquor licensees with an on licence and liquor permit-holders with disrupted events.**

This instrument, made under section 35 of the Liquor Regulation 2010, waives certain application fees, for licensees under the Liquor Act 2010. Section 35 of the Liquor Regulation expressly allows the Commissioner for Fair Trading to waive or reduce fees in relation to licences or permits, if the Commissioner considers that the waiver or reduction “is appropriate because of the financial impact of the COVID-19 emergency on the business carried on under the licence or permit”. The explanatory statement for the instrument indicates that the instrument is made “in light of the evolving public health situation in the Australian Capital Territory”. The explanatory statement particularly refers to the Public Health (Lockdown Restrictions) Emergency Direction 2021 (No 9) [NI2021-555], operational from 11.50 pm on 17 September 2021 to 11.59 pm on 15 October 2021.

The explanatory statement states:

This instrument provides economic support to licensees selling liquor for consumption on premises and liquor permit-holders with disrupted events. Economic support is provided through the waiver of application fees which allow on licensees to receive a commercial permit to sell liquor for takeaway consumption and commercial and non-commercial permit-holders to amend their permits to reschedule event dates.

The Committee notes that the instrument extends the waiver provided for in a series of previous instruments (DI2021-183, DI2021-189, DI2021-209).

This comment does not require a response from the Minister.
HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-245 being the Public Place Names (Franklin) Determination 2021** made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Franklin.

- **Disallowable Instrument DI2021-246 being the Public Place Names (Gungahlin District) Determination 2021** made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the District of Gungahlin.

The instruments mentioned above, made under section 3 of the *Public Place Names Act 1989*, determine the names of places in Franklin and the Gungahlin District, respectively. The Committee notes that the explanatory statement for the first instrument discusses human rights issues. It states:

**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.

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

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

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2021-247 being the Road Transport (Offences) Application to Holiday Period Declaration 2021 (No 1)** made under subsection 21(3) of the *Road Transport (Offences) Regulation 2005* declares that section 21 of the Regulation does not apply during the holiday period relating to the Labour Day public holiday, and additional demerit points will not be applied for offences committed during the period 1 October to 4 October 2021 inclusive.

This instrument is made under subsection 21(3) of the *Road Transport (Offences) Regulation 2005*. Section 21 provides that double demerit points apply if certain traffic offences are committed within a holiday period. However, subsection 21(3) provides that the Minister may declare that this section does not apply to all or part of a holiday period. This instrument disappplies the general rule in relation to demerit points for the 1-4 October 2021 Labour Day public holiday period.

The Committee notes that the explanatory statement for the instrument discusses human rights implications for the instrument.

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

The declaration in the instrument are not considered to restrict a person’s human rights.
The declaration in the instrument does not amend or disapply the road rules or other road transport laws, apart from the provision that would usually require additional demerit points to be applied for offences committed during holiday periods, applicable to motor vehicle drivers. As such it does not affect motor vehicle drivers who do not commit offences during the holiday period.

Motor vehicle drivers who commit demerit point offences during the holiday period will attract fewer demerit points than otherwise would be the case, and therefore have a lower risk of having their driver licence suspended which may limit the right to move freely within the ACT provided by section 13 of the HRA.

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.

FEES DETERMINATION

- **Disallowable Instrument DI2021-248 being the Cemeteries and Crematoria (Fees) Determination 2021 (No 1) made under section 128 of the** Cemeteries and Crematoria Act 2020 **revokes DI2020-308 and determines fees payable for the purposes of the Act.**

This instrument, made under section 128 of the Cemeteries and Crematoria Act 2020, determines fees payable for the purposes of that Act.

The Committee notes that the explanatory statement for the instrument provides the following explanation for the new fees:

This determination increases fees by approximately 4.75% for the majority of burial services provided. This increase incorporates costs incurred by the Authority due to a recent actuarial review of the PCT which noted that significant increases in the contribution from the Authority into the PCT will be required to meet the ongoing maintenance obligations. Also included in the 4.75% is an increase of 1.75% for Wage Price Index (WPI) which the Treasurer determined for 2021-22 (Treasury Budget Memo 2021/08).

However, fees for Christ the Redeemer Mausoleum (Mausoleum) and plaque services will only increase by the WPI increase. This is to support sales of high end Mausoleum products and because revenue from plaque services do not attract contributions to the Trust.

Fees for burials in the Babies Rose Gardens (perinatal cases) will decrease. This is at the request of community groups sympathetic to families who are young and may have limited means given the purchase is unplanned.

Fees for crematorium services, and in particular services for children aged 1 to 17 years, will increase. These fees are based on a cost recovery pricing model that has been endorsed by the Independent Competition and Regulatory Commission as being compliant with the ACT Competitive Neutrality Policy.

All fees are rounded for cash handling purposes.
The Committee also notes, with approval, that for each of the services for which the instrument determines a fee, the body of the instrument sets out the “old” and “new” fee and also the percentage increase or decrease, in each instance.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

- Disallowable Instrument DI2021-250 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2021 (No 2) made under subsection 33(2) of the Road Transport (Safety and Traffic Management) Regulation 2017 declares the person from time to time occupying the position of Executive Branch Manager of the National Arboretum Canberra to be a parking authority for the area of Rural Block 73 (National Arboretum Canberra) in the division of Molonglo Valley.

This instrument, made under subsection 33(2) of the Road Transport (Safety and Traffic Management) Regulation 2017 declares the person occupying a specified position (in the National Arboretum, Canberra) to be a “parking authority” for a specified area (the National Arboretum). Being declared as a parking authority gives the relevant person certain powers, etc under Division 7.2 of the Regulation, which deals with ticket parking schemes.

The Committee notes that the explanatory statement for the instrument states that “[n]o rights contained in the Human Rights Act 2004 are impacted by this instrument.”

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

This comment does not require a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:


- The Special Minister of State, dated 3 November 2021, in relation to comments made in Scrutiny Report 9 concerning Disallowable Instruments—
  - DI2021-186—Racing Appeals Tribunal Appointment 2021 (No 1); and
  - DI2021-187—Racing Appeals Tribunal Appointment 2021 (No 2).

- The Minister for Education and Youth Affairs, dated 9 November 2021, in relation to comments made in Scrutiny Report 9 concerning Disallowable Instruments—
  - DI2021-196—ACT Teacher Quality Institute Board Appointment 2021 (No 1); and
  - DI2021-197—ACT Teacher Quality Institute Board Appointment 2021 (No 2).
The Committee wishes to thank the Attorney-General, the Special Minister for State and the Minister for Education and Youth Affairs for their helpful responses.

Jeremy Hanson MLA
Chair

19 November 2021
OUTSTANDING RESPONSES

BILL/SUBORDINATE LEGISLATION

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

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

- **Report 10, dated 2 November 2021**
  - Disallowable Instrument DI2021-207 Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2021 (No 3) [response required before 25 November 2021, when the Legislative Assembly’s capacity to move to disallow the instruments will expire].