



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 20

Legislative Assembly for the Australian Capital Territory
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

Approved for publication

10th Assembly
September 2022

About the committee

Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) on 2 December 2020.

The Committee is responsible for the following areas:

- (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;

You can read the full establishing resolution [on our website](#).

Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

Secretariat

Julia Agostino, Committee Secretary

Kathleen de Kleuver, Assistant Committee Secretary

Emma-Kate Weaver, Administration Officer

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

Contact us

Mail Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Legislative Assembly for the Australian Capital Territory
GPO Box 1020
CANBERRA ACT 2601

Phone (02) 6205 0171

Email scrutiny@parliament.act.gov.au

Website parliament.act.gov.au/parliamentary-business/in-committees

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.

Contents

About the committee	i
Establishing resolution	i
Committee members	ii
Secretariat	ii
Contact us	ii
Role of Committee	ii
1. Bills—Proposed Amendments	1
Bills—No comment	1
Appropriation (Office of the Legislative Assembly) Bill 2022-2023	1
Appropriation Bill 2022-2023	1
Bills—Comment	1
Climate Change and Greenhouse Gas Reduction (Natural Gas Transition) Amendment Bill 2022	1
Period Products and Facilities (Access) Bill 2022	3
Senior Practitioner Amendment Bill 2022	4
Urban Forest Bill 2022	5
Proposed Amendments	9
Climate Change and Greenhouse Gas Reduction Amendment Bill 2022	9
Health Legislation Amendment Bill 2022	9
Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022	10
2. Subordinate Legislation	12
Disallowable Instruments – No comment	12
Disallowable Instruments – Comment	14
Fees Determinations / Human Rights Issues / COVID-19-Related Instruments	14
Human rights issues/ Strict liability offences	25
Instruments of appointment – Consistency with Committee’s terms of reference	29
Subordinate Laws – Comment	36
Human Rights Issues / Strict liability offences	36
Human Rights Issues	37
Human Rights Issues	38
Determination of amounts of assistance to people affected by acts of violence	40
Human rights issues / Strict liability offences	41
Regulatory Impact Statements – Comment	43
National Regulations – Comment	46

3. Responses	49
Government responses – comment	49
Human Rights Issues in Subordinate Legislation	49
Government responses – no comment	50
Appendix A – Outstanding responses	51
Bills/Subordinate Legislation	51
Report 12, dated February 2022	51
Report 18, dated 26 July 2022	51

1. Bills—Proposed Amendments

Bills—No comment

Appropriation (Office of the Legislative Assembly) Bill 2022-2023

- 1.1. This Bill will appropriate money for expenditure in relation to the Office of the Legislative Assembly and officers of the Assembly for the financial year beginning on 1 July 2022. The Committee notes that the Bill commences retrospectively from 1 July 2022 but has no substantive effect on rights or obligations.

Appropriation Bill 2022-2023

- 1.2. This Bill will appropriate money for the purposes of the Territory for the financial year beginning on 1 July 2022. The Committee notes that the Bill commences retrospectively from 1 July 2022 but has no substantive effect on rights or obligations.

Bills—Comment

Climate Change and Greenhouse Gas Reduction (Natural Gas Transition) Amendment Bill 2022

- 1.3. This Bill will amend the *Climate Change and Greenhouse Gas Reduction Act 2010* to create a new regulation-making power that would enable new natural gas connections to be prohibited in prescribed circumstances. This will give effect to the Government’s intention to phase out new natural (fossil) gas connections and meet emissions reductions targets over the long term.

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

- 1.4. The Bill will enable regulations to prescribe areas, or stated premises in an area, in which new gas connections for natural gas will generally be prohibited. Compliance with the prohibition will be a condition of a gas distributor’s licence. A new gas connection will be defined to include providing a new gas connection to premises, including to vacant land, providing additional points of supply or reinstatement of previously removed connections. The Executive must seek and have regard to the advice of the Chief Planning Executive about any proposed regulation. The Bill does not, however, set out the basis on which areas or stated premises will be selected for inclusion in any prohibition of new gas connections.

1.5. The Bill will also enable regulations to modify two national laws: the National Energy Retail Law (ACT)¹; and the National Gas (ACT) Law². This provision will enable regulations for the purpose of giving effect to the prescription of areas or stated premises in which new gas connections are prohibited. This may include regulations requiring gas distributors to provide information about the distributor's compliance with the prohibition of on new gas connections, or setting out information that must be given to existing or potential customers. It is not clear whether any regulation made under this provision is limited to the extent it operates to modify the operation of the listed National laws as opposed to complementing or acting in addition to the operation of those laws. As this provision will enable the making of regulations which have the effect of modifying the operation of Territory laws, this provision is a form of Henry VIII Clause.

1.6. The explanatory statement accompanying the Bill states that the objective of the Bill is to give effect to the Government's intention to phase out new natural (fossil) gas connections and meet emissions reductions targets over the long term. However, there is no justification given for why the prohibition on new gas connections will be achieved through regulations, nor how areas in which new gas connections are prohibited will be selected to meet the objectives of the Bill. The use of regulations in this way may give rise to human rights concerns. As the explanatory statement suggests:

This regulation-making power has the potential to directly or indirectly affect particular groups on the basis of their accommodation status by preventing gas distributors from providing individuals in prescribed premises and areas with a new gas connection. 'Accommodation status' is a protected attribute under section 7 (1) (a) of the *Discrimination Act 1991*.

1.7. Enabling the modification of the two National laws is described in the explanatory statement as:

required to ensure that a gas distributor does not breach national energy laws by not offering or providing gas connection services in circumstances prescribed by a regulation made under this Act.

1.8. It is not clear to the Committee how the areas or stated premises in which new gas connection will be prohibited will be selected, and why it was not possible to include criteria governing that selection in the Bill rather than leave the power to make regulations unqualified. Similarly, it is not clear to the Committee why it is necessary to provide for modification of the two National laws in regulations rather than in the Bill itself. The Committee notes that section 3 of the National Energy Retail Law states:

This [National Energy Retail Law], the National Regulations and the Rules apply in this jurisdiction except to the extent provided by or under the application Act of this jurisdiction or any other Act of this jurisdiction.

¹ The National Energy Retail Law set out in the Schedule to the *National Energy Retail Law (South Australia) Act 2011 (SA)* is applied as if it was a law in the ACT, see *National Energy Retail Law (ACT) Act 2012*, s 6.

² The National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008 (SA)*, is applied as if it were a law in the ACT, see the *National Gas (ACT) Act 2008*, s.8.

This provision suggests that any amendment to the National Energy Retail Law is expected to be by way of enactment rather than regulations or other form of subordinate legislation.

- 1.9. The Committee therefore requests further information from the Minister on the justification for why the proposed prohibition of new gas connections and modification of the listed National laws requires the enablement of regulation making powers as provided 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.

Period Products and Facilities (Access) Bill 2022

- 1.10. This Private Members Bill will provide free access to period products and facilities, and information about menstruation.

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

Right to privacy and reputation (section 12 HRA)

- 1.11. The Bill will provide for access to period products in educational providers and suitable public places identified or approved by the Minister. Access arrangements will have to provide, in writing, for the range of period products available and how a person will be able to access a period product in a way that respects that person's dignity.
- 1.12. The Bill will also require ACT government public employees or employees in territory-funded workplaces to have access at their workplace to toilets, handwashing facilities and sanitary waste facilities. Access must be provided in a way which respects the dignity of the person accessing the facilities. Access must also comply with guidelines issued by the director-general about how to comply with obligations to respect the dignity of a person seeking access to period products and facilities.
- 1.13. The Bill notes in various places that the references to respecting the dignity of a person may include providing a reasonable amount of privacy for a person or student seeking access to period products or protecting their personal information. However, it is not clear to the Committee how these privacy protections will be enforced. The access arrangements are not notifiable instruments, although government schools must make their access arrangements public and other non-government schools must make their access arrangements available to students. There is no obligation for the access arrangements at suitable public places and education providers to comply with the guidelines issued by the director-general. It is not clear whether the obligation to respect the dignity of a person is merely reflective of or extends beyond obligations under the *Human Rights Act 2004* and other legislation protecting privacy. The explanatory statement included with the Bill merely states that no rights are limited by the Bill.

- 1.14. The Committee therefore requests further information on how the various forms of privacy protection included in the Bill are intended to be enforced and suggests the explanatory statement accompanying the Bill be amended to detail the privacy protection provided by the Bill.

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

Senior Practitioner Amendment Bill 2022

- 1.15. This Bill will amend the *Senior Practitioner Act 2018* to change the definition of restrictive practice to not explicitly include verbal directions, or gestural conduct, of a coercive nature. This is intended to prevent confusion about whether such practices might be approved as part of an authorised positive behaviour support plan. The Bill will also enable regulations to create offences and fix maximum penalties of not more than 30 penalty units.

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

- 1.16. The Senior Practitioner Act currently provides that the Executive may make regulations for this Act. The Bill will extend this authority to enable regulations to create offences and fix maximum penalties of not more than 30 penalty units. The explanatory statement accompanying the Bill states:

This amendment is made to increase the sanctions the Senior Practitioner may bring to bear to enforce regulations and to confirm the serious nature of certain practices or actions as they may be defined. These practices or actions may include those which are deemed to pose too great a risk to a person's life, safety or wellbeing.

- 1.17. This explanation is largely descriptive of the effect of allowing regulations to provide for offences. To the extent those offences are justified as prohibiting actions which pose too great a risk to a person's life, safety or wellbeing, there is no justification for why those offences cannot be included in the Act. The Committee therefore requests further information from the Minister on why this regulation making power is considered necessary in the context of the Senior Practitioner Act.

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

Urban Forest Bill 2022

- 1.18. This Bill will replace the *Tree Protection Act 2005* to protect trees on private and public land in the Territory under a single piece of legislation.

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)

- 1.19. The Bill may limit the protection of privacy provided by section 12 of the HRA. Authorised officers will have the authority to enter a premises. However, officers will only be able to enter into a part of a premises being used for residential purposes if they have the occupier's consent or entry is in accordance with a warrant issued by a magistrate. An authorised person may also enter land where a tree is located to carry out work under a tree protection directive. The Bill will also authorise the confiscation of personal property where the property is connected with an offence under the Bill, and require personal details to be disclosed, where they may assist in investigation of an offence.
- 1.20. The explanatory statement accompanying the Bill recognises the Bill's potential limitation on the protection of privacy and sets out why any such limitation should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.21. The Committee notes that the discussion in the explanatory statement of potential limitations on privacy includes reference to the power given to the director-general to carry out work to repair damage done to a protected tree, or remove or replace the tree, where a person fails to comply with a tree reparation directive. The director-general can recover the reasonable costs of carrying out the work (see proposed section 50). There is no express authority for the director-general, their delegate, or other authorised person to enter private property to carry out such repair work. This can be contrasted with proposed section 47 which provides for entry by authorised persons to take action set out in a tree protection direction. Under that provision, the reasonable costs of the work carried out is recoverable as a debt owing to the Territory, any damage caused in carrying out the work must be minimised, and compensation may be payable for any damage caused. The provision also requires written notice before entry and sets out the required content of that notice. The Committee asks the Minister for further information on why these protections were not similarly provided in the case of carrying out work under a tree reparation direction.

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

Right to take part in public life (section 17 HRA)

- 1.22. The Bill will establish a tree advisory panel to advise the conservator on the conservator's tree protection functions, including approval of activities that may damage protected trees or tree management plans, proposed registration of trees or cancellation of registration, and internal review decisions. The Bill requires panel members have extensive knowledge and experience in specified fields. By limiting who may be appointed to a public office the Bill may therefore limit the right to take part in public life protected by section 17 of the HRA.
- 1.23. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers this statement to the Assembly.
- 1.24. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Rights in criminal proceedings (section 22 HRA)

- 1.25. The Bill will also establish a wide range of offences which are strict liability offences or have strict liability as one of their elements. By displacing the need to establish the fault elements of an offence the Bill may therefore limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers this statement to the Assembly.
- 1.26. The Bill will also establish offences with a fault element of negligence: where a person is negligent about whether conduct would damage the tree (proposed subsection 16(4)) or prohibited groundwork is done within a protected trees protection zone or a declared site (proposed subsection 17(3)), or negligently fails to comply with a tree protection direction (proposed section 46).
- 1.27. Negligent, as a fault element, is established where a person's conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the physical element exists or will exist that the conduct merits criminal punishment (see *Criminal Code 2002* section 21). Culpability for the offence in such circumstances may rely only on assessment of objective circumstances rather than the individual's state of mind. These offences may therefore also potentially limit the presumption of innocence or otherwise limit the rights in criminal proceedings protected by section 22 of the HRA.
- 1.28. The explanatory statement accompanying the Bill does not provide any explanation for why inclusion of a negligence standard is included in the offences in question. The Committee recognises that, in proposed subsections 16(4) or 17(3), negligence is one of a graduated series of offences with penalties diminishing through intentional, reckless, negligent and strict liability. However, a justification for the inclusion of negligence as a fault element should generally be included in the explanatory statement.

- 1.29. The Committee therefore asks the Minister for information on why negligence is considered an appropriate standard for the offences in question and consider amending the explanatory statement to include this information.

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

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

Creation of offences by regulation

- 1.30. Clause 144 will authorise the making of regulations which create offences with a maximum penalty of not more than 10 penalty units. The explanatory statement accompanying the Bill does not provide any justification for why a power to create offences in regulations is required. The Committee therefore requests the Minister provide a justification for why regulations should be able to create offences, including why any likely offences can't be included in primary legislation or the scope of potential offences more closely defined.

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

Henry VIII clause

- 1.31. The Bill includes a transitional chapter, proposed Part 20, which authorises the making of transitional regulations. Regulations may prescribe transitional matters necessary or convenient to be prescribed because of the enactment. These regulations will, however, be subject to the Act or other Territory laws. The Bill will also allow regulations which modify the proposed new Part 20, allowing the Executive to make provision in regulations for anything that, in the Executive's opinion, is not adequately or appropriately dealt with in that Part. These regulations will have effect despite anything elsewhere in the Act.
- 1.32. The Committee notes that any transitional regulations are not expressed as having the effect of overriding other territory legislation. However, the provision remains a form of Henry VIII clause, allowing regulations to be made which may have the effect of overriding the primary enactment. The Committee also notes that the proposed Part 20, including the power to make transitional regulations, will expire 2 years after it commences, and under section 88 of the *Legislation Act 2001* regulations which amend the proposed Part 20 will also cease to have effect upon expiry of that chapter. However, the expiry of the Part and subsequent ongoing effect of the regulations may arguably itself be directly amended through regulations.
- 1.33. The explanatory statement accompanying the Bill includes reference to the power to make transitional regulations and their potential to override the Act and includes a justification for their inclusion:

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.

- 1.34. As the Committee has commented where this explanation has been used on previous occasions, the Committee is concerned that this explanation may be applied generally to any transitional regulations and does not provide a justification for why the power to make transitional regulations which may vary primary enactments are needed in the context of this particular Bill. The Committee therefore requests further information on why such a provision is considered necessary, particularly given the scope of the proposed transitional provisions already included in chapter 20, and what other options were considered to ensure an effective transition to the new arrangements under 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.

Displacement of section 47(6) of the Legislation Act 2001

- 1.35. Clause 142 of the Bill will allow a statutory instrument made under the proposed Act to apply, adopt or incorporate an instrument as in force from time to time. The Bill will also disapply subsection 47(6) of the *Legislation Act 2001* in relation to an Australian Standard applied, adopted or incorporated as a statutory instrument, with the result that any Australian Standard incorporated in statutory instruments, or any future amendment to that Standard, is not required to be notified on the Legislation Register. A note to the clause points out this consequence and the web site from where Standards may be purchased.
- 1.36. The explanatory statement accompanying the Bill does not justify why statutory instruments should be permitted to incorporate other instruments as amended from time to time, nor why any Australian Standard so incorporated should not be required to be notified on the legislation register. The Committee recognises that there may be copyright concerns with notification of Australian Standards. However, incorporated Australian Standards may be made available for public inspection, or their incorporation limited to circumstances where they are otherwise available at a low cost or likely to be readily available to those affected by their incorporation.
- 1.37. The Bill will allow incorporation of Australian Standards and displace obligations for notification in a wide range of statutory instruments, including registration directions, tree management plans, a code of practice for dealing with protected tree disputes, and criteria for determining approved activities, giving tree protection directions and making tree management plans. Many of these instruments may affect individuals with limited access to any incorporated Australian Standard. The Committee therefore asks the Minister for further information on why it is necessary to allow incorporation of instruments as in force

from time to time and why notification of incorporated Australian Standards has been displaced and requests the explanatory statement be amended to include this information.

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

Climate Change and Greenhouse Gas Reduction Amendment Bill 2022

- 1.38. On 5 September 2022, the Committee received proposed amendments to the Climate Change and Greenhouse Gas Reduction Amendment Bill 2022 from Elizabeth Lee MLA. The proposed amendments to the Bill would amend the *Climate Change and Greenhouse Gas Reduction Act 2010* to introduce a requirement for the Minister to report annually on the cost effectiveness (i.e. the expected cost of greenhouse gas abatement per tonne) of emissions reduction activities; the ability for the Climate Change Council to provide advice at their discretion to the minister on actions taken in the Territory to address climate change; and for all appointments to the Climate Change Council to first be considered by the relevant Legislative Assembly committee prior to being made. The Committee has no comment on these proposed amendments.

Health Legislation Amendment Bill 2022

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.39. On 6 September 2022, the Committee received proposed government amendments to the Health Legislation Amendment Bill 2022. This Bill will, among other things, amend the *Transplantation and Anatomy Act 1978* (TA Act) to enable the identity of a tissue donor to be disclosed to a next of kin for the purposes of including that information on the register of the donor's death. It was commented on by the Committee in its *Scrutiny Report 16*. The proposed amendment also relates to the disclosure of information which reveals the identity of a tissue donor. Under the TA Act, it is an exception to offences relating to the disclosure of a donor's personal information where the donor has consented to the disclosure. The proposed amendments will expand the range of persons who can consent to the disclosure to include parents, guardians, next of kin and legal representatives. This will allow, with appropriate consent, the stories of donors and donor families' to be shared by the clinical organ and tissue donation service (DonatLife ACT) to raise awareness of organ donation and commemorate donors' gifts without committing an offence under the TA Act.
- 1.40. The supplementary explanatory statement accompanying the proposed amendment recognises that the proposed amendment may limit rights relating to the criminal process

in section 22 of the HRA (by expanding exceptions to offences which the accused person bears an evidential onus to establish) and the protection of privacy in section 12 of the HRA. The Committee draws this statement to the attention of the Assembly and makes no further comment.

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

Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022

Right to privacy and reputation (section 12 HRA)

Right to humane treatment when deprived of liberty (section 19 HRA)

- 1.42. On 27 July 2022 the Committee received proposed government amendments to the *Terrorism (Extraordinary Temporary Powers) Amendment Bill 2022*. These proposed amendments were, in part, a response to the Committee's comments on the Bill raised in its *Scrutiny Report 16*. In that report, the Committee raised concerns with provisions in the Bill which would allow a police officer to take photographs or video recordings of a detainee under a preventative detention order, without the detainee's consent, to 'record any illness or injury that the person suffered while detained'. Identification material taken for this purpose could then be used in a complaint, an investigation or a proceeding that relates to the person's apprehension or detention. The Committee was concerned that collecting this material was at the discretion of the police officers involved and not necessarily made available for the detainee to use in relevant proceedings regarding their treatment while in detention.
- 1.43. The proposed amendments will remove the discretion and require identifying material to be collected where the police officer believes on reasonable grounds that the detainee has suffered an injury or illness. The detainee may request that the photograph or video be taken by a person of a particular sex and must be provided with a copy of the record of the injury or illness and any photograph or video. Any photograph or video must be taken in a way which provides reasonable privacy, involve minimal removal of clothing and visual inspection and be in the presence of as few people as possible. Material collected can only be used for the purpose of a complaint, investigation or proceeding that relates to the injury or illness suffered by the person while detained.
- 1.44. The supplementary explanatory statement accompanying the proposed amendments recognises that this provision may still limit the protection of privacy provided by section 12 of the HRA, and by requiring a detainee to have photographs or videos taken may also limit the right to humane treatment when deprived of liberty. The statement sets out why any such limitations should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly, noting in particular the primary aims of the proposed amendments of protecting the wellbeing of detainees and ensuring police accountability for any injury or illness a person detained in custody may suffer.

- 1.45. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**
- 1.46. The proposed amendments will also clarify that contact with a diplomatic representative is not in breach of section 49 of the *Terrorism (Extraordinary Temporary Powers) Act 2006*, and to require a written record where a detainee with impaired decision-making ability is refused contact with a person who was considered unacceptable by the police officer in question. The Committee has no comments on these proposed amendments.

2. Subordinate Legislation

Disallowable Instruments – No comment

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

- **Disallowable Instrument DI2022-87** being the Gaming Machine (Payment from Gambling Harm Prevention and Mitigation Fund—Minimum Community Contributions) Guidelines 2022 (No 1) section 163D (3) of the *Gaming Machine Act 2004* outlines the purposes for which payments can be made from the Gambling Harm Prevention and Mitigation Fund.
- **Disallowable Instrument DI2022-90** being the ACT Teacher Quality Institute Board Appointment 2022 (No 2) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.
- **Disallowable Instrument DI2022-93** being the Canberra Institute of Technology (CIT Board Deputy Chair) Appointment 2022 (No 1) made under section 9 of the *Canberra Institute of Technology Act 1987* and section 79 of the *Financial Management Act 1996* appoints a specified person as a non-elected member and deputy chair of the CIT Board, with expertise and knowledge of industry and business.
- **Disallowable Instrument DI2022-102** being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2022 (No 2) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2021-1 and determines the area within one metre of any selling terminal, owned and operated by Tabcorp ACT Pty Ltd and located within the places identified in the Schedule to this instrument, as a sports bookmaking venue.
- **Disallowable Instrument DI2022-108** being the Civil Law (Wrongs) Law Institute of Victoria Limited Professional Standards Scheme 2022 (No 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of Victoria's approval of the Law Institute of Victoria Limited Professional Standards Scheme.
- **Disallowable Instrument DI2022-109** being the Civil Law (Wrongs) Queensland Law Society Professional Standards Scheme 2022 (No 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of Queensland's approval of the Queensland Law Society Professional Standards Scheme.
- **Disallowable Instrument Disallowable Instrument DI2022-110** being the Civil Law (Wrongs) South Australian Bar Association Professional Standards Scheme 2022 (No 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of South Australia's approval of the South Australian Bar Association Professional Standards Scheme.

- **Disallowable Instrument DI2022-111** being the Civil Law (Wrongs) Law Society of South Australia Professional Standards Scheme 2022 (No 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of South Australia's approval of the Law Society of South Australia Professional Standards Scheme.
- **Disallowable Instrument DI2022-163** being the Official Visitor (Housing Assistance) Appointment 2022 (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 DI2022-165** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2021-286 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument Disallowable Instrument DI2022-166** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 3) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2020-8 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument DI2022-167** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2021-285 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument DI2022-168** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 4) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* appoints a specified person as Deputy Chair of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument DI2022-169** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 5) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument DI2022-170** being the Cultural Facilities Corporation (Governing Board) Appointment 2022 (No 6) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
- **Disallowable Instrument DI2022-173** being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2022 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2021-277 and

determines the conditions under which the Speaker may, on behalf of the Territory, employ staff and engage consultants or contractors.

- **Disallowable Instrument DI2022-174** being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2022 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2021-276 and determines the conditions under which non-executive members may, on behalf of the Territory, employ staff and engage consultants or contractors.
- **Disallowable Instrument DI2022-175** being the Heritage (Council Deputy Chairperson) Appointment 2022 made under section 17 of the *Heritage Act 2004* revokes DI2021-27 and appoints a specified person as deputy chairperson of the ACT Heritage Council.

Disallowable Instruments – Comment

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

Fees Determinations / Human Rights Issues / COVID-19-Related Instruments

- **Disallowable Instrument DI2022-65** being the Road Transport (General) (Pay Parking Area Fees) Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-274 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-66** being the Road Transport (General) (Parking Permit Fees) Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-108 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-70** being the Working with Vulnerable People Background Checking (Fees) Determination 2022 (No 1) made under section 68 of the *Working with Vulnerable People (Background Checking) Act 2011* revokes DI2021-202 and determines the fees for services provided by the Working with Vulnerable People Screening Unit.
- **Disallowable Instrument DI2022-71** being the Electoral (Fees) Determination 2022 made under section 340B of the *Electoral Act 1992* revokes DI2021-88 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-69** being the Health (Fees) Determination 2022 (No 1) made under section 192 of the *Health Act 1993* repeals DI2021-161 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-78** being the Labour Hire Licensing (Fee) Determination 2022 made under section 75 of the *Labour Hire Licensing Act 2020* revokes DI2021-81 and determines fees payable under the Act.
- **Disallowable Instrument DI2022-79** being the Machinery (Fees) Determination 2022 made under section 5 of the *Machinery Act 1949* revokes DI2021-102 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2022-80** being the Scaffolding and Lifts (Fees) Determination 2022 made under section 21 of the *Scaffolding and Lifts Act 1912* revokes DI2021-104 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-81** being the Work Health and Safety (Fees) Determination 2022 made under section 278 of the *Work Health and Safety Act 2011* revokes DI2021-105 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-82** being the Dangerous Goods (Road Transport) Fees and Charges Determination 2022 made under section 194 of the *Dangerous Goods (Road Transport) Act 2009* revokes DI2021-100 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-83** being the Dangerous Substances (Fees) Determination 2022 made under section 221 of the *Dangerous Substances Act 2004* revokes DI2021-101 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-88** being the Births, Deaths and Marriages Registration (Fees) Determination 2022 made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* revokes DI2021-112 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-89** being the Utilities (Technical Regulation) (Operating Certificate Fees) Determination 2022 made under section 110 of the *Utilities (Technical Regulation) Act 2014* revokes DI2019-204 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-91** being the Race and Sports Bookmaking (Fees) Determination 2022 made under section 97 of the *Race and Sports Bookmaking Act 2001* revokes DI2021-179 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-92** being the Firearms (Fees) Determination 2022 made under section 270 of the *Firearms Act 1996* revokes DI2021-114 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-100** being the Emergencies, Road Transport (General), Waste Management and Resource Recovery (Embassy and Diplomatic Residence Fees) Determination 2022 made under section 37 of the, section 201 of the, section 96 of the, and section 126 of the *Australian Capital Territory (Self-Government) Act 1988*, *Emergencies Act 2004*, *Road Transport (General) Act 1999* and *Waste Management and Resource Recovery Act 2016* determines fees payable, for the purposes of the Acts, in respect of services provided to an embassy or diplomatic residence.
- **Disallowable Instrument DI2022-101** being the Victims of Crime (Fees) Determination 2022 (No 1) made under subsection 50(1) of the *Victims of Crime Regulation 2000* revokes DI2021-160 and determines the fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-107** being the Juries (Payment) Determination 2022 made under sections 49 and 51 of the *Juries Act 1967* revokes DI2021-136 and determines payments made to jurors for the purposes of the Act.
- **Disallowable Instrument DI2022-104** being the Emergencies (Fees) Determination 2022 made under section 201 of the *Emergencies Act 2004* revokes DI2021-113 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2022-105** being the Court Procedures (Fees) Determination 2022 (No 2) made under section 13 of the *Court Procedures Act 2004* revokes DI2022-1 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-112** being the Planning and Development (Fees) Determination 2022 made under section 424 of the *Planning and Development Act 2007* revokes DI2021-126 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-113** being the Stock (Fees) Determination 2022 made under section 68 of the *Stock Act 2005* revokes DI2021-127 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-114** being the Stock (Levy) Determination 2022 made under section 6 of the *Stock Act 2005* revokes DI2021-128 and determines the levy amount per stock unit and the number of animals making up a stock unit.
- **Disallowable Instrument DI2022-115** being the Stock (Minimum Stock Levy) Determination 2022 made under section 7A of the *Stock Act 2005* revokes DI2021-129 and sets the minimum stock levy.
- **Disallowable Instrument DI2022-116** being the Surveyors (Fees) Determination 2022 made under section 80 of the *Surveyors Act 2007* revokes DI2021-130 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-117** being the Unit Titles (Fees) Determination 2022 made under section 179 of the *Unit Titles Act 2001* revokes DI2021-131 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-118** being the Architects (Fees) Determination 2022 made under section 91 of the *Architects Act 2004* revokes DI2021-72 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-119** being the Building (Fees) Determination 2022 made under section 150 of the *Building Act 2004* revokes DI2021-73 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-120** being the Construction Occupations (Licensing) (Fees) Determination 2022 made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2021-253 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-121** being the Electricity Safety (Fees) Determination 2022 made under section 64 of the *Electricity Safety Act 1971* revokes DI2021-75 and determines fees payable under the Act.
- **Disallowable Instrument DI2022-122** being the Environment Protection (Fees) Determination 2022 made under section 165 of the *Environment Protection Act 1997* revokes DI2021-76 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-123** being the Gas Safety (Fees) Determination 2022 made under section 67 of the *Gas Safety Act 2000* revokes DI2021-77 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-124** being the Heritage (Fees) Determination 2022 made under section 120 of the *Heritage Act 2004* revokes DI2021-78 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2022-125** being the Nature Conservation (Fees) Determination 2022 made under section 368 of the *Nature Conservation Act 2014* revokes DI2021-254 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-126** being the Water and Sewerage (Fees) Determination 2022 made under section 45 of the *Water and Sewerage Act 2000* revokes DI2021-80 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-127** being the Guardianship and Management of Property (Fees) Determination 2022 made under section 75 of the *Guardianship and Management of Property Act 1991* revokes DI2021-155 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-128** being the Public Trustee and Guardian (Fees) Determination 2022 made under section 75 of the *Public Trustee and Guardian Act 1985* revokes DI2021-156 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-129** being the Unit Titles (Management) (Fees) Determination 2022 made under section 119 of the *Unit Titles (Management) Act 2011* revokes DI2021-84 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-130** being the Associations Incorporation (Fees) Determination 2022 made under section 125 of the *Associations Incorporation Act 1991* revokes DI2021-139 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-131** being the Casino Control (Fees) Determination 2022 made under section 143 of the *Casino Control Act 2006* revokes DI2021-140 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-132** being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2022 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* revokes DI2021-241 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-133** being the Co-operatives National Law (ACT) (Fees) Determination 2022 made under schedule 1 of the *Co-operatives National Law (ACT) Act 2017* revokes DI2021-142 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-134** being the Gaming Machine (Fees) Determination 2022 made under section 177 of the *Gaming Machine Act 2004* revokes DI2021-151 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-135** being the Land Titles (Fees) Determination 2022 made under section 139 of the *Land Titles Act 1925* revokes DI2021-143 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-136** being the Liquor (Fees) Determination 2022 made under section 227 of the *Liquor Act 2010* revokes DI2021-144 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-137** being the Lotteries (Fees) Determination 2022 made under section 18A of the *Lotteries Act 1964* revokes DI2021-157 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2022-138** being the Water Resources (Fees) Determination 2022 made under section 107 of the *Water Resources Act 2007* revokes DI2021-71 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-139** being the Partnership (Fees) Determination 2022 made under section 99 of the *Partnership Act 1963* revokes DI2021-145 and determines the fee payable for an application for registration as an incorporated limited partnership.
- **Disallowable Instrument DI2022-140** being the Fisheries (Fees) Determination 2022 made under section 114 of the *Fisheries Act 2000* revokes DI2021-70 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-141** being the Registration of Deeds (Fees) Determination 2022 made under section 8 of the *Registration of Deeds Act 1957* revokes DI2021-146 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-142** being the Retirement Villages (Fees) Determination 2022 made under section 262 of the *Retirement Villages Act 2012* revokes DI2021-147 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-143** being the Traders (Licensing) (Fees) Determination 2022 made under section 52 of the *Traders (Licensing) Act 2016* revokes DI2021-148 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-144** being the Security Industry (Fees) Determination 2022 made under section 50 of the *Security Industry Act 2003* revokes DI2021-149 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-145** being the Sex Work (Fees) Determination 2022 made under section 29 of the *Sex Work Act 1992* revokes DI2021-150 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-146** being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2022 made under section 48 of the *Unlawful Gambling Act 2009* revokes DI2021-153 and determines the fee to accompany an application by a charitable organisation to conduct charitable gaming for the purposes of the Act.
- **Disallowable Instrument DI2022-147** being the Community Title (Fees) Determination 2022 made under section 96 of the *Community Title Act 2001* revokes DI2021-125 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-154** being the Taxation Administration (Amounts Payable—Land Rent) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* revokes DI2021-168 and determines the percentages and income threshold amounts for the purposes of the *Land Rent Act 2008*.
- **Disallowable Instrument DI2022-155** being the Taxation Administration (Amounts Payable—Duty) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* revokes DI2021-171 and determines differential rates of duty, or the method by which an amount of duty is payable under the *Duties Act 1999*.

- **Disallowable Instrument DI2022-156** being the Duties (Deferred payment of duty—Eligible property) Determination 2022 made under section 75A of the *Duties Act 1999* determines the amount of the property price threshold for the purposes of section 75A (1) (b) (ii) of the *Duties Act 1999*.
- **Disallowable Instrument DI2022-157** being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* revokes DI2021-172 and determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable.
- **Disallowable Instrument DI2022-158** being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* revokes DI2021-174 and determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable under the *Duties Act 1999*.
- **Disallowable Instrument DI2022-159** being the Taxation Administration (Amounts Payable—Disability Duty Concession Scheme) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-228 and determines, for the purposes of the Disability Duty Concession Scheme, the types of eligible property, determination of amounts and the eligibility requirements.
- **Disallowable Instrument DI2022-160** being the Taxation Administration (Betting Operations Tax—Rate) Determination 2022 made under section 139 of the *Taxation Administration Act 1999* determines a rate, from 1 July 2022, of 20 per cent to calculate the betting operations tax payable for the purposes of section 10 (3) (b) of the *Betting Operations Tax Act 2018*.
- **Disallowable Instrument DI2022-161** being the Rates, Land Tax, Land Rent and Duties (Certificate and Statement Fees) Determination 2022 made under section 252AB of the *Duties Act 1999*, section 32 of the *Land Rent Act 2008*, section 43 of the *Land Tax Act 2004* and section 78 of the *Rates Act 2004* revokes DI2021-170 and determines the fee payable to the Commissioner for ACT Revenue to apply for a certificate for the purposes of the Acts.
- **Disallowable Instrument DI2022-162** being the Taxation Administration (Amounts Payable—Rates) Determination 2022 made under paragraph 46(2)(f) of the and section 139 of the *Rates Act 2004 and Taxation Administration Act 1999* revokes DI2021-167 and DI2021-176, and determines charges for general rates, the Fire and Emergency Services Levy, the City Centre Marketing and Improvements Levy, and the Safer Families Levy.
- **Disallowable Instrument DI2022-164** being the Agents (Fees) Determination 2022 made under section 176 of the *Agents Act 2003* revokes DI2021-138 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2022-171** being the Cemeteries and Crematoria (Fees) Determination 2022 (No 1) made under section 128 of the *Cemeteries and Crematoria Act 2020* revokes DI2021-248 and determines fees payable for the purposes of the Act.

General Comment

- 2.3. Each of the (53) instruments mentioned above determines fees payable, under various Acts. At this time of the year, the Committee expects to scrutinise approximately 100 such instruments, as the Executive Government determines fees for the forthcoming financial year. The instruments mentioned above relate to fees determined (and, in the case of DI2022-107, the payments made to jurors) for the 2022-23 financial year.
- 2.4. The Committee's expectations, in relation to fees determinations (and other matters), are set out in its document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#).³ In that document, the Committee states:

Fees Determinations

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the "old" fee, the amount of the new fee, any percentage increase and also the reason for any increase (e.g., an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the Legislation Act 2001, which provides that a fees determination must provide:

- by whom the fee is payable; and
- to whom the fee is to be paid

- 2.5. In recent years, the Committee has been pleased to observe that the standard of fees determinations (and their explanatory statements) is much-improved (in terms of them meeting the Committee's long-held views about fees determinations) from, say, 10 years ago. This improvement is, again, evident, in this batch of instruments. The Committee notes that the requirement in relation to setting out the "old" and "new" fees has been consistently met. The Committee also notes that, in the batch of instruments mentioned above, there is a very high degree of consistency in the explanations provided for the various fees increases. In addition, there are some instruments that provide for different increases/explanations, in the circumstances of particular Acts. These issues are discussed below.

³ Legislative Assembly, Subordinate Legislation – Technical and Stylistic Standards, March 2022, https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf.

Consistency in explanations for fees increases

- 2.6. The first instrument mentioned above – the Road Transport (General) (Pay Parking Area Fees) Determination 2022 (No 1) [DI2022-65] – is a good example of the explanation that has been provided, for this year's fees increases. The explanatory statement states:

The disallowable instrument includes price increases based on indexation of wage price index (WPI) rounded to the nearest whole dollar amount. The projected WPI for the 2022-23 year is 3.25%. This annual fee increase framework was announced in the 2019-20 ACT Government Budget, to apply for four years 2019-20 to 2022-23. This decision balances the management of parking demand and pricing increases with cost-of-living pressures and impacts on lower income households.

In rounding the fees to whole dollar amounts, pay parking areas fees will stay the same as the 2021-22 rates with the exception of CIT student pre-paid all-day parking tickets, which increases from \$41 to \$42 for a semester.

In 2019-20 a review of pay parking to make the fee structure more straightforward and user friendly was implemented, and flat hourly rates were introduced under each item until the maximum fee for each item is reached. This allowed users to quickly estimate parking fees before payment. The 2022 Determination maintains this fee structure.

- 2.7. The Committee notes that the Race and Sports Bookmaking (Fees) Determination 2022 [DI2022-91] contains a slightly different explanation:

The new determination sets the fees that will apply beginning on 1 July 2022 and repeals the Race and Sports Bookmaking (Fees) Determination 2021 DI2021-179. It provides for fee increases in line with annual adjustments to the Wages Price Index (WPI) of 3.25%, rounded down to the nearest dollar for most fees, with the exception of fees that have been consecutively rounded down in previous years by more than \$1.00 in which case have been rounded up to the nearest dollar. This approach also aligns with the 2021 Treasury Guidelines for Fees and Charges. Explanatory notes in the determination list the fees previously determined to enable comparison.

- 2.8. The Committee notes that similar statements appear in the explanatory statements for the following instruments: DI2022-92, DI2022-129, DI2022-130, DI2022-131, DI2022-132, DI2022-133, DI2022-134, DI2022-135, DI2022-136, DI2022-137, DI2022-141, DI2022-142, DI2022-143, DI2022-144, DI2022-145, DI2022-146 and DI2022-164.

- 2.9. The Committee notes that the explanatory statement for the Health (Fees) Determination 2022 (No 1) [DI2022-69] contains a detailed explanation of the variations to the general 3.25% WPI increase, advising that:

- items on Attachment B, ... have increased by indexation rates as advised by the Commonwealth;
- items on Attachment C, ... have increased by other factors, such as a review of cost of delivery;

- 2.10. As examples of Act-specific explanations, the Committee notes the explanatory statements for the following instruments:

Building (Fees) Determination 2022 [DI2022-119]

Under section 28 of the Act, the building levy has been increased from 1.17% (class 1 and 2) and 1.07% (other classes) to 1.25% (class 1 and 2) and 1.14% (other classes) of total cost of works. This increase boosts resources for the Territory to address ongoing building quality matters and to respond to the increasing volume in the construction sector.

All fees in the determination, which applied in the 2021-22 financial years, have been increased by 3.25% for the 2022-23 financial year, based on the wage price index as per government's advice.

Construction Occupations (Licensing) (Fees) Determination 2022 [DI2022-120]

The Government provided a 20 per cent reduction in annual licence renewal fees for a range of construction occupational licences in 2021-22. These licences include:

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

As the above reduction was in response to the COVID-19 pandemic, the reduced annual licences renewal fee will be restored and indexed by 3.25% for the 2022-23 financial year.

All remaining fees determined, which applied in the 2021-2022 financial years, have been increased by 3.25% for the 2022-23 financial year, based on the wage price index as per government's advice.

Nature Conservation (Fees) Determination 2022 [DI2022-125]

Fees in the determination have been increased by 3.25% for the 2022-23 financial year based on the wage price index as per government's advice.

The instrument commences on 1 July 2022.

This instrument revokes the *Nature Conservation (Fees) Determination 2021 (No 3)* (DI2021-254). This previous instrument had applied a fee waiver for 2021 annual pass holders to Tidbinbilla Nature Reserve for a period of 3 months, to account for the time that the reserve had been closed during the COVID-19 pandemic. The clause applying this fee waiver has been revoked because it will have ceased to have effect by the commencement date of this new instrument.

Water Resources (Fees) Determination 2022 [DI2022-138]

The purpose of this instrument is to determine the fees for goods and services under the Act for the 2022-23 financial year and to provide a fee exemption to facilitate meeting commitments under the Basin Plan 2012 (Cwth).

The regulatory fees (excluding water abstraction charge) in the determination have been increased by 3.25% for the 2022-23 financial year based on the wage price index (WPI) and then appropriate rounding has been applied in relation to increases. The Government will index the Water Abstraction Charge (WAC) by 3.00% as per the decision in the 2016-17 Budget.

The instrument includes an exemption from the payment of the Grant of Water Access Entitlement (WAE) fee where the intended use of the water involves the Territory complying with commitments under the Basin Plan 2012 (Cwlth).

This exemption relates to the Grant of WAE fee where the entitlement would be granted (a) to provide the shared reduction amount for the southern Basin Australian Capital Territory zone and/or (b) to facilitate the Territory's participation in the Murray-Darling Basin Water Efficiency Program – ACT Led Efficiency Project.

Cemeteries and Crematoria (Fees) Determination 2022 (No 1) [DI2022-171]

This determination increases fees by approximately 7.17% for the majority of burial services provided. This increase incorporates costs incurred by the Authority due to a recent actuarial review of the Perpetual Care Trust (PCT) that will be required to meet ongoing maintenance obligations in perpetuity. This review resulted in a 8.2% PCT rate agreed to by the ACT Government. Also included in the 7.17% is an increase of 3.25% for Wage Price Index (WPI).

Fees have been developed for the Eternity Memorial Garden at Woden Cemetery (a new ashes garden opening in July 2022) and the Olive Grove at Gungahlin Cemetery (a new burial area due to become available in November 2022).

Fees for cremation services will increase by approximately 7.26%. This increase incorporates the 3.25% WPI increase and a 4% increase to cover gas costs. The cost of gas has more than doubled in the previous 12 months and is expected to double again over the coming year. 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.

The Gungahlin Crematorium Viewing Room fees have been altered to incorporate a new product structure – the Witness Cremation fee has increased to allow 90-minute bookings and is priced for cost recovery of staff preparation time and consultation with customers. A lower-priced option for 45-minute viewing room hire is now offered to customers who wish to have a service but not witness the cremation.

The increases proposed for revenue streams that do not attract Perpetual Care Trust contributions, have resulted from increased supplier charges for 2022/23. The majority of these are above the corresponding fee increase contained in the Fee Schedule. These revenue streams provide 18% of total revenues. These increases include:

- Plaques – 9.5% increase in supplier charges. Fee increase in Fees Schedule 7.17%
- Vaults – 4.33% increase in supplier charges for concrete and 8% in crane hire charges Fee increase in Fees Schedule 7.17%
- Monument/Vase – 8.66% increase in supplier charges for ledger removal and 10% increase in cost of raised granite blocks Fee increase in Fees Schedule 7.17%
- Memorial permits - Increased staff time and costs. Fee increase in Fees Schedule 7.17%

Reservation Panel Inscription Mausoleum – 5% increase in supplier charges and additional staff time. Fee increase in Fees Schedule 7.17%

Memorial Hall - increase input costs including electricity and staff time to prepare for function. Fee increase in Fees Schedule 7.17%

All fees are rounded for cash handling purposes.

2.11. The Committee notes that it is not unusual for the annual Cemeteries and Crematoria (Fees) Determination to increase fees differently to the standard 3.25% WPI (see, e.g., Scrutiny Report 11 of the 10th Assembly (19 November 2021), p 21).⁴

2.12. **The comments immediately above do not require a response from the relevant Ministers.**

Other deviations from the standard approach

2.13. The Committee notes that the explanatory statement for the Electoral (Fees) Determination 2022 [DI2022-71] states:

The fees for 2022/2023 financial year are determined by increasing the 2021/2022 fees, determined by DI2021-88, by the Wage Price Index (WPI) of 2.5%, rounded down to the nearest \$0.05.

The Committee seeks the Minister’s advice as to why a Wage Price Index increase of 2.5% (rather than the WPI increase of 3.25% used for other instruments discussed in this Scrutiny Report) is used for this instrument.

This comment requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly’s capacity to move to disallow the instrument will expire.

2.14. The Committee notes that the explanatory statement for the Working with Vulnerable People Background Checking (Fees) Determination 2022 (No 1) [DI2022-70] provides the following explanation for the fees increases provide for by the instrument:

Fees for registration and renewal will increase by 3% in 2022 in line with the forecast for the Consumer Price Index (CPI) in the Federal Budget 2022-23. Fees for

⁴ Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Scrutiny Report 11*, 19 November 2021, https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1903438/Report_11.pdf.

registrations and renewal for paid employment will be \$141. Fees charged for the issue of a duplicate card remain at \$22.

The fee for workers engaged in NDIS regulated activities will also be \$141.

- 2.15. Similarly, the explanatory statements for the Victims of Crime (Fees) Determination 2022 (No 1) [DI2022-101] and the Juries (Payment) Determination 2022 [DI2022-107] refer to the CPI increase, rather than the WPI increase.

The Committee seeks the relevant Minister's advice as to why a Consumer Price Index increase of 3.0% (rather than the WPI increase of 3.25% used for other instruments discussed in this Scrutiny Report) is used for this instrument.

This comment requires a response from the relevant Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly's capacity to move to disallow the instrument will expire.

Human Rights Issues

- 2.16. The Committee notes that the explanatory statement for the first instrument mentioned above (DI2022-65) addresses human rights implications for the instrument:

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.

- 2.17. The Committee notes that similar statements appear in the explanatory statements for the following instruments: DI2022-66, DI2022-68, DI2022-88, DI2022-89, DI2022-104, DI2022-112, DI2022-113, DI2022-114, DI2022-115, DI2022-116, DI2022-117, DI2022-118, DI2022-119, DI2022-120, DI2022-121, DI2022-122, DI2022-123, DI2022-124, DI2022-125, DI2022-126, DI2022-138, DI2022-140 and DI2022-147.
- 2.18. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned immediately above.**
- 2.19. **This comment does not require a response from the relevant Ministers.**

Human rights issues/ Strict liability offences

- **Disallowable Instrument DI2022-67** being the Plastic Reduction (Single-use Plastic Products) Exemption 2022 made under section 17 of the *Plastic Reduction Act 2021* exempts specified single-use plastic products, to allow certain prohibited single-use plastic products to be supplied in certain circumstances.

- **Disallowable Instrument DI2022-68** being the Plastic Reduction (Single-use Plastic Products—Special Circumstances) Exemption 2022 (No 1) made under section 17 of the *Plastic Reduction Act 2021* provides two exemptions, to allow certain prohibited single-use plastic products to be supplied in certain circumstances.
- **Disallowable Instrument DI2022-85** being the Plastic Reduction (Public Event) Declaration 2022 (No 2) made under section 15 of the *Plastic Reduction Act 2021* provides that certain single-use plastic products cannot be supplied at specified public events.

2.20. These instruments are made under the *Plastic Reduction Act 2021*. The second instrument mentioned above provides two exemptions, under section 17 of the Act, in relation to single-use plastic straws. The explanatory statement for the instrument states:

The instrument provides two exemptions to allow single-use plastic straws to be supplied in certain circumstances. The exemptions are designed so there are places where packets of straws can be displayed and supplied but also so that a straw can be supplied anywhere (e.g., a hospitality venue) if it is requested. This is so that, for example, a café could choose to stock and provide a single-use plastic straw to a customer, upon request, to enable them to consume a beverage. The exemption provides a general exemption for the supply of single-use plastic straws by a healthcare entity. It also provides that an individual straw can be supplied by anyone to anyone if requested. Neither of these exemptions creates a mandatory requirement for the exempted products to be stocked by any business.

2.21. The explanatory statement goes on to discuss (in detail) human rights issues, focusing on the rights protected by sections 8 (recognition and equality before the law), 12 (privacy and reputation) and 22 (presumption of innocence) of the *Human Rights Act 2004*:

Human rights

The creation of exemptions engages the right to be presumed innocent until proven guilty because it has the effect of reversing the onus of proof in the situation that conduct falls within an exemption. This conduct is not prohibited, but the onus of proving the exemption is on the defendant; the prosecution is not required to prove that the exemptions do not apply. However, this is justified and proportionate because the approach of making exemptions enables single-use plastic straws and cotton buds to continue to be supplied where needed, while otherwise prohibiting them. The exemptions are broadly worded and would therefore not be difficult to establish. The exemptions enable the purpose of the regulation to be achieved while also allowing access to prohibited plastic products where required.

This instrument supports human rights by ensuring that people who require straws can access them. This is to prevent potential discrimination that could result from banning straws. The inclusion of single-use plastic straws as a prohibited plastic product was delayed until tranche two of the ban to allow additional time to consider human rights issues and consult with affected stakeholders.

Consultation included a 12-week public consultation period inviting written submissions, meetings with relevant stakeholders including disability advocacy stakeholders, and meetings of the ACT Plastic Reduction Taskforce. This consultation, and consideration of the human rights and discrimination issues, has informed the design of the exemption so that it best meets the needs of those who require single-use plastic straws. The exemption has been designed to allow single-use plastic straws to be broadly available if required.

The Regulation [sic] engages the right to recognition and equality before the law, in s 8 of the Human Rights Act, which provides that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind and that everyone has the right to equal and effective protection against discrimination on any ground. Under s 7 of the Human Rights Act this Act is not exhaustive of the rights that an individual may have, including, for example, under the *Discrimination Act 1991*. The Discrimination Act creates obligations not to discriminate on the basis of disability.

Discrimination can include indirect discrimination, which is where a rule is the same for everyone but affects people differently.

Some people with disability or a medical need require single-use plastic straws because no alternative straw can exactly replicate all the properties of these straws. Unduly restricting access to these straws would therefore have a discriminatory effect. For this reason, the exemption has been designed so that, in addition to packets of straws being available at certain places, individual straws can also be supplied by any person, business or organisation, including at hospitality venues or other locations where they may be required. This may still result in straws being less readily available in some circumstances. However, it has been designed to make them as widely available as they can be in the context of a ban. Any less restrictive approach would effectively not ban straws and thus not achieve the Regulation's [sic] aim of reducing the environmental harm of single-use plastic products including straws.

In addition to the availability of single-use plastic straws, another potential human rights and discrimination issue is the possible stigma associated with asking for a straw. The negative reputation that plastic straws have, because of increasing awareness of their environmental harm, means there may possibly be stigmatisation associated with asking for a straw. To address this, the tranche two education and engagement will emphasise that some people have a need for single-use plastic straws. It will increase awareness of this and highlight that straws should be given out if requested without being questioned. The education and engagement for tranche two is an opportunity to promote messages related to accessibility and the important role that single-use plastic straws have as an accessibility tool.

Section 12 of the Human Rights Act contains the right to privacy and reputation. This includes that everyone has the right not to have his or her privacy, family, home, or correspondence interfered with unlawfully or arbitrarily.

The exemption to allow straws was designed so that potential limitations on the right to privacy are minimised. No evidence or proof of disability or a medical need is required to access a single-use plastic straw. Further, it is not required that someone say that they need a straw because of disability or medical need. Though this is the reason that the exemption exists, it has been designed to allow a straw to be supplied on request, without any requirement relating to the need the person requesting the straw has for it. This will protect the right to privacy because people will be able to be supplied single-use plastic straws without having to disclose information about the reason that they need a single-use plastic straw. This will be emphasised during the engagement and education for tranche two so that relevant businesses and organisations understand this, and the implementation of the exemption achieves this. This design of the exemption will also protect those supplying straws, including businesses and staff, by providing certainty that they will not be committing an offence by supplying a straw to someone who requests it.

- 2.22. The third instrument mentioned above, made under section 15 of the Act, declares that various single-use products (single-use plastic takeaway containers, single-use plastic plates and bowls, single-use plastic barrier bags for fruit and vegetables, plastic balloons and sticks and plastic confetti) cannot be used at various specified events. The explanatory statement states:

The events listed include all events organised by UCX Ltd at the University of Canberra, all events at Llewellyn Hall (ANU), the Haig Park Village Markets, Vegan State of Mind, Floriade 2022, Floriade NightFest 2022, Windows to the World 2022, Canberra Nara Candle Festival 2022, Handmade Canberra Markets, and New Year's Eve 2022.

UCX events, events at Llewellyn Hall, Vegan State of Mind and the Haig Park Village Markets are not government events so the requirements in section 15(2) of the Act apply, including that this declaration has been made not less than 3 months before these events.

Single-use plastic plates and bowls have been banned at all events. Single-use plastic takeaway containers have been banned at all events except for the Haig Park Village Markets. Single-use plastic barrier bags for fruit and vegetables have been banned at the Haig Park Village Markets. Plastic balloons and balloon sticks have been banned at Handmade Canberra Markets and UCX events, and plastic confetti has also been banned at the Handmade Canberra Markets. Prohibiting these plastic items from these events will reduce plastic waste. It will also provide a demonstration of the types of alternatives available to single-use plastics.

- 2.23. The explanatory statement goes on to discuss human rights issues, focusing on the presumption of innocence, protected by section 22 of the Human Rights Act:

Human rights

As a result of this instrument, certain conduct is made an offence under s 16 of the Act. This is a strict liability offence, which may be seen to engage the presumption of

innocence. The Explanatory Statement for the *Plastic Reduction Bill 2020* addressed the human rights considerations related to the creation of the offence.

- 2.24. **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.**
- 2.25. **The comment immediately above does not require a response from the Minister.**
- 2.26. The Committee notes that the first instrument mentioned above (i.e., the Plastic Reduction (Single-use Plastic Products) Exemption 2022 [DI2022-67] also provides an exemption under section 17 of the Plastic Reduction Act. However, unlike the second instrument mentioned above (i.e. DI2022-68), there is no discussion of potential human rights implications for the instrument.

The Committee seeks the Minister's advice as to why potential human rights implications are not addressed in the explanatory statement for DI2022-67.

This comment immediately above requires a response from the Minister. The Committee would be grateful if the Minister could respond before the Legislative Assembly's capacity to move to disallow the instrument will expire

Instruments of appointment – Consistency with Committee's terms of reference

- **Disallowable Instrument DI2022-72** being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2022 (No 1) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the Suburban Land Agency Board.
- **Disallowable Instrument DI2022-73** being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2022 (No 3) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the Suburban Land Agency Board.
- **Disallowable Instrument DI2022-74** being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2022 (No 2) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the Suburban Land Agency Board.
- **Disallowable Instrument DI2022-75** being the City Renewal Authority and Suburban Land Agency (Agency Board Deputy Chair) Appointment 2022 made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* revokes DI2019-189 and appoints a specified person as deputy chair of the Suburban Land Agency Board.
- **Disallowable Instrument DI2022-76** being the City Renewal Authority and Suburban Land Agency (Agency Board Chair) Appointment 2022 made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as chair of the Suburban Land Agency Board.

- **Disallowable Instrument DI2022-98** being the City Renewal Authority and Suburban Land Agency (Authority Board Deputy Chair) Appointment 2022 made under section 15 *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as Deputy Chair of the City Renewal Authority Board.
- **Disallowable Instrument DI2022-99** being the City Renewal Authority and Suburban Land Agency (Authority Board Member) Appointment 2022 made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the City Renewal Authority Board.

2.27. The instruments mentioned above appoint various specified persons as members (and, in some cases, also as chair or deputy chair) of either the City Renewal Authority Board or the Suburban Land Agency Board. The Committee notes that the explanatory statements for each instrument contain the following statement:

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

- 1) Is made under a ministerial power found in the Act (see section 45 of the Act and section 78 of the [*Financial Management Act 1989*]).
- 2) Is in accordance with the general objects of the Act under which it is made. The appointment of members to the board is integral to its operation and achieving the objects of the Act.
- 3) Does not unduly trespass on rights previously established by law.
- 4) Does not make rights, liberties and/or obligations unduly depended upon non-reviewable decisions. The instrument enables formal appointment of a member to the board.

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

COVID-19-related instrument

- **Disallowable Instrument DI2022-77** being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2022 (No 1) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2021-287 and provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.

2.29. In this instrument, made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, the Chief Health Officer authorises a pharmacist or an intern pharmacist to administer vaccines without a prescription, subject to compliance with Pharmacist Vaccination Standards set out in the instrument. The Committee notes that the explanatory statement for the instrument states:

Part A of the Vaccination Standards specifies the training requirements for pharmacists to be authorised to administer approved substance (vaccine) in the ACT.

These training requirements are considered to be consistent with the minimum training standards required in other Australian jurisdictions, being the completion of a training course that accords with the Australian Pharmacy Council *Standards for the Accreditation of Programs to Support Pharmacist Administration of Vaccines*.

Part B of the Vaccination Standards provides an outline of general administration; premises, staffing and equipment; and administration area requirements.

The 2022 amendment to the Vaccination Standards amends Part B, Section 1 Sub-clause (b) of the Pharmacist Vaccination Standards, which enables a pharmacist or intern pharmacist to administer an influenza vaccine in line with the Australian Immunisation Handbook (current online version) and not less than five years of age. This lowers the age for influenza vaccine from the previous Vaccination Standards from ten years of age. A minimum age of five years is consistent with the minimum age for a COVID-19 vaccine administered in community pharmacy and is therefore considered an appropriate primary health care setting for the administration of influenza vaccine for this age group.

The 2022 amendment to the Vaccination Standards also removes the requirement that pharmacists obtain written consent prior to administering a vaccine. Obtaining written consent is an unnecessary burden that is inconsistent with the evidence of consent outlined in the Australian Immunisation Handbook. Current practices in ACT Government vaccination clinics, within the primary care setting and the Medicines, Poisons and Therapeutic Goods (Nurse and Midwife Immunisers) Direction 2020 (No 1) (DI2020-290) allow for written or verbal consent.

The publication of *Information for health care providers to help consumers make informed decisions about the COVID-19 AstraZeneca vaccine* and supporting *Consent form for COVID-19* vaccination by the Australian Government at the time of notification of these Standards is expected to support pharmacists administer AstraZeneca vaccines in accordance with ATAGI clinical guidance.

Part C of the Vaccination Standards sets out recording keeping requirements for pharmacists and pharmacies. This section requires pharmacists to consult and record all vaccination events on the Australian Immunisation Register (AIR).

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

Human Rights Issues

- **Disallowable Instrument DI2022-84** being the Public Place Names (Whitlam) Determination 2022 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of public places in the Division of Whitlam.

2.31. This instrument, made under section 3 of the *Public Place Names Act 1989*, determines the names of streets in the Division of Whitlam. The Committee notes that the explanatory statement for the instrument discusses human rights issues:

Human rights

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

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

- 2.32. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.33. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Disallowable Instrument DI2022-86** being the Legal Aid (Disclosure of Information) Guidelines 2022 (No 1) made under section 92AA(4) of the *Legal Aid Act 1977* determines guidelines to be followed by the CEO of the Legal Aid ACT Commission in assessing disclosure requests under subsections 92AA(2) and (3) of the Act.
- 2.34. This instrument, made under subsection 92AA(4) of the *Legal Aid Act 1977*, determines guidelines to be followed by the CEO of the Legal Aid ACT Commission in assessing requests under subsections 92AA(2) and (3) of the Act for disclosure of information. The disclosure of information in these circumstances operates by way of exception to the secrecy obligations that otherwise apply, under sections 13 and 92 of the Legal Aid Act.

Human rights

Under section 28 of the [*Human Rights Act 2004*], human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. The Guidelines recognise that the disclosure of data or information about the Commission's work and client affairs, even where the data or information is de-identified, can present a risk of identification. The risk of a client being identified is a limit on a person's right to privacy under section 12 of the HR Act.

However, in some situations, disclosing de-identified data or information about clients can be important to enable research, which contribute to improving Australia's legal system and access to justice outcomes. Improving access to justice is important to enabling everyone's participation in the legal system, as it gives effect to the right of recognition and equality before the law (section 8 of the HR Act).

The Guidelines therefore require the CEO to consider sensitivities and safeguards around identification and be satisfied that the limit on human rights must be proportionate to the purpose of the request for disclosure. The greater the limit on

the right to privacy or other human rights, the greater the justification for the restriction for disclosure.

- 2.35. The explanatory statement goes on to discuss the application of the Australian Privacy Principles:

Privacy Principles

The meaning of ‘Commonwealth entities’ and ‘Australian Privacy Principles’ are defined in subsection 92AA(6). The *Information Privacy Act 1988* (Cth) and the APP Guidelines set out which Commonwealth entities the APPs are binding upon and their rights and obligations around the collection and disclosure of data.

Where the requesting entity is an entity in which the APPs do not apply, the Guidelines direct the CEO to determine which privacy legislation, if any, is binding upon the entity seeking disclosure. For example, a State or Territory’s legislation or regulation, such as the ACT’s Territory Privacy Principles (TPPs), may bind an entity.

- 2.36. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.37. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Disallowable Instrument DI2022-94** being the Climate Change and Greenhouse Gas Reduction (Council Member and Chair) Appointment 2022 made under sections 20 and 21 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member and chair of the Climate Change Council, representing the community's interest in climate change.
- **Disallowable Instrument DI2022-95** being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2022 (No 1) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.
- **Disallowable Instrument DI2022-96** being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2022 (No 2) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.
- **Disallowable Instrument DI2022-97** being the Climate Change and Greenhouse Gas Reduction (Council Member) Appointment 2022 (No 3) made under section 20 of the *Climate Change and Greenhouse Gas Reduction Act 2010* appoints a specified person as a member of the Climate Change Council, representing the community's interest in climate change.
- **Disallowable Instrument DI2022-103** being the Utilities (ACT Retail Electricity— Transparency and Comparability Code) Variation 2022 made under sections 61 and 63 of

the *Utilities Act 2000* varies the ACT Retail Electricity (Transparency and Comparability) Code 2021 by removing clauses 3.3 to 3.4 of part 3 of the Code.

- **Disallowable Instrument DI2022-148** being the Agents Act (Qualifications and Experience for Registration—Assistant Property Agents) Declaration 2022 (No 1) made under section 50 of the *Agents Act 2003* declares the qualifications and experience necessary for an individual to be eligible to be registered as an assistant agent.
- **Disallowable Instrument DI2022-149** being the Agents (Qualifications and Experience for Licences) Declaration 2022 (No 1) made under section 25 of the *Agents Act 2003* declares the qualifications and experience necessary for an individual to be eligible to be licensed as an agent.
- **Disallowable Instrument DI2022-150** being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2022, including a regulatory impact statement made under section 7 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the energy savings targets for a specified compliance period.
- **Disallowable Instrument DI2022-151** being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2022, including a regulatory impact statement made under section 11 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the energy savings contribution for a specified compliance period.
- **Disallowable Instrument DI2022-152** being the Energy Efficiency (Cost of Living) Improvement (Shortfall Penalty) Determination 2022, including a regulatory impact statement made under section 22 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the shortfall penalty for a specified compliance period.
- **Disallowable Instrument DI2022-153** being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2022, including a regulatory impact statement made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* revokes DI2016-63, and determines the priority household target for a specified period.
- **Disallowable Instrument DI2022-172** being the Animal Diseases (Varroa Mite Import Restriction) Declaration 2022 made under section 15 of the *Animal Diseases Act 2005* declares a specified area to be an import restriction area in response to the detection of varroasis in that area on 22 June 2022.

- 2.38. The Committee notes that the explanatory statements for each of the instruments mentioned above state that there are no human rights issues arising from the relevant instrument.
- 2.39. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned immediately above.**
- 2.40. **This comment does not require a response from the relevant Ministers.**

Human Rights Issues

- **Disallowable Instrument DI2022–106** being the Road Transport (General) Application of Road Transport Legislation Declaration 2022 (No 5) made under section 13 of the *Road Transport (General) Act 1999* determines that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, participating in a special stage of the LCCC Blue Range Rally Sprint 2022.
- 2.41. The instrument 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. The instrument declares that the *Motor Accident Injuries Act 2019* and various specified provisions of the road transport legislation do not apply (in certain circumstances) to the LCCC Blue Range Rally Sprint, taking place on 2 July 2022.
- 2.42. The Committee notes that the explanatory statement for the first instrument contains the following discussion of human rights issues, focussing on the right to move freely within the ACT, protected by section 13 of the *Human Rights Act 2004*:

Human Rights

Due regard has been given to the effect of this instrument and the operation of the event 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.

This instrument does not of itself restrict a person's freedom of movement within the Territory, however the operation of the event will close to members of the general public the parts of the forest in which the event will be conducted. This will restrict the free movement of people in that area of the Territory during the event. As parts of the road transport legislation 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 the safety of non-participants and represents the least restrictive approach that enables the event to proceed.

- 2.43. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.44. **This comment does not require a response from the Minister.**

Subordinate Laws – Comment

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

Human Rights Issues / Strict liability offences

- **Subordinate Law SL2022–7** being the Plastic Reduction Regulation 2022, including a regulatory impact statement made under the *Plastic Reduction Act 2021* prescribes two single-use plastic products and one non-compostable plastic product, with effect that these products are prohibited and cannot be supplied in the ACT, except in accordance with any exemptions that apply.
- 2.46. This subordinate law, made under section 7 of the *Plastic Reduction Act 2021*, prescribes two single-use plastic products (a single-use plastic drinking straw and a cotton bud with a single-use plastic stick or stem) and one non-compostable degradable plastic product (a product made of oxo-degradable plastic) at “prohibited plastic products”. The effect is that the supply of these products is a strict liability offence, under section 10 of the Plastic Reduction Act.
- 2.47. The Committee notes that the explanatory statement (and the regulatory impact statement) for the subordinate law contains a detailed discussion of the human rights implications of the subordinate law, focusing on the rights protected by sections 8 (recognition and equality before the law), 12 (privacy and reputation) and 22 (presumption of innocence) of the *Human Rights Act 2004*. The Committee notes that the discussion reflects the justifications mentioned above, in the context of the Plastic Reduction (Single-use Plastic Products—Special Circumstances) Exemption 2022 (No 1) [DI2022-68].
- 2.48. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.49. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Subordinate Law SL2022-8** being the Road Transport (Offences) Amendment Regulation 2022 (No 1) made under sections 23 and 233 of the *Road Transport (General) Act 1999* amends road transport legislation to increase infringement notice penalty amounts for most offences and to make minor technical amendments to road transport regulations.

2.50. This (348 page) subordinate law amends the *Road Traffic (Offences) Regulation 2005*. The overall effect of the subordinate law is to increase penalty amounts, for that Regulation. The explanatory statement for the subordinate law states:

Schedule 1 of the *Road Transport (Offences) Regulation 2005* (the offences regulation) lists the offences contained in each Act and Regulation that form part of the road transport legislation. If an offence may be dealt with by infringement notice, the schedule prescribes the infringement notice penalty amount that is payable. Most road transport infringement notice penalties other than those relating to parking offences and most offences against the *Heavy Vehicle National Law (ACT)* (HVNL) include a component, not identified separately, accounting for the Victim Services Levy (VSL) applicable to the offence. The VSL is currently set at \$60.

Most infringement notice penalties, excluding the amount of the VSL, are being increased by the estimated 2021-22 Wage Price Index (WPI).

The reason for indexation of infringement penalty amounts is to maintain the value of those penalties in real terms in order to preserve their deterrent effect. Any variation to that indexation is outlined below.

Government policy is that, in general, the infringement notice penalty for an offence should not exceed 20% of the maximum fine that may be imposed by a court for that offence (the 20% limit). The 20% limit is based on the existing penalty unit amount of \$160 for an offence committed by an individual.

Where an existing infringement notice penalty is not approaching the 20 percent limit the indexation has been undertaken by deducting \$60 from the existing infringement penalty amount, indexing that amount by 2.75% and then adding \$60.

Where an existing infringement notice penalty amount is near the 20% limit the indexation has been undertaken by deducting \$60 from the existing infringement penalty amount, indexing that amount by 2.75 percent, applying the 20 percent limit and then adding the VSL amount of \$60.

Where the existing infringement notice penalty, minus the VSL amount, for an offence is already at or above the 20 percent limit, the infringement notice penalty has not been increased.

For offences to which the VSL does not apply the infringement penalty amounts are indexed as above except for the VSL amounts.

All infringement notice penalty amounts are rounded down to the nearest dollar.

For offences against the Heavy Vehicle National Law (HVNL), maximum court-imposed penalties and infringement penalty amounts are indexed by provisions of the HVNL and the Heavy Vehicle (General) National Regulation (NSW) and published on the National Heavy Vehicles Regulator's (NHVR's) website. This amendment regulation does not adjust those amounts and the offences regulation directs readers to the NHVR's website.

- 2.51. The child rate infringement notice penalty amounts of \$75 for public passenger ticketing and conduct offences under the *Road Transport (Public Passenger Services) Regulation 2002* have not been increased. This amount continues to represent an appropriate deterrence for these offences.

The infringement penalty amount relating to section 236(4A) of the *Road Transport (Road Rules) Regulation 2017* about pedestrians engaging in commercial activities, such as window washing, at designated intersections has not been increased. This amount continues to represent an appropriate deterrence for these offences.

- 2.52. The explanatory statement states that the subordinate law also makes minor technical amendments and effects some re-numbering.

- 2.53. The Committee notes that the explanatory statement goes on to discuss human rights issues:

Human Rights Implications

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

The offences regulation does not, of itself, impose restrictions or limitations on a person's human rights. The proposed amendments to the offence's regulation increase most infringement notice penalty amounts under the road transport legislation to maintain the value of those penalties in real terms and preserve their deterrence effect. The amendments do not change the infringement notice arrangements under the road transport legislation that offers people a choice of accepting a lesser penalty without admitting the offence or remaining liable for prosecution and diverts people away from the criminal justice system.

As such the amendments are not considered to be limiting any human rights.

- 2.54. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.55. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Subordinate Law SL2022-9** being the Agents (Transitional Provisions) Regulation 2022 made under the *Agents Act 2003* introduces transitional provisions to support the implementation of the *Fair Trading and Other Justice Amendment Act 2022*.

- **Subordinate Law SL2022-10** being the Agents Amendment Regulation 2022 (No 1) made under the Agents Act 2003 amends the *Agents Regulation 2003* to provide that the Act does not apply to Community Housing Canberra Incorporated (CHC) when carrying on business as a real estate agent, or a person employed by CHC who provides a real estate service, to the extent that business or service is provided when managing a community housing asset.

2.56. The first subordinate law mentioned above (according to the explanatory statement) “introduces transitional provisions to support the implementation of the [*Fair Trading and Other Justice Amendment Act 2022*].” The explanatory statement for the subordinate law states:

The introduction of an auctioneer licence

The Fair Trading Amendment Act inserts a new class of licence: a land auctioneer licence. From 1 July 2022, any person who wishes to conduct auctions in the ACT is required to hold this licence.

This new class of licence recognises that inherently, conducting a sale by auction will pose greater risks to consumers. A sale by auction is often unconditional and will not attract a cooling-off period. This licence, and the qualification and training requirements it attracts, will ensure that auctioneers have obtained qualifications to equip them with the knowledge and skill to perform their duties lawfully.

However, to ensure that the industry is afforded an appropriate period of time to comply with this new licensing requirement, these Regulations allows registered real estate salespersons and registered stock and station salespersons (due to be renamed as “assistant agents” under the new licensing framework) to continue to conduct auctions until 1 July 2023.

This exemption is consistent with that provided to licensed real estate agents and licensed stock and station agents in new section 21(2).

2.57. The explanatory statement goes on to discuss human rights issues:

Human Rights Implications

This Regulation does not limit rights under the *Human Rights Act 2004* (the Human Rights Act).

The Regulation supports the right to work in section 27B of the Human Rights Act by empowering the Commissioner for Fair Trading to decide that a higher, equivalent, or substantially equivalent qualification satisfies the additional training requirements under section 230 (3) or section 231 (3). This measure ensures licensed agents who hold relevant higher qualifications can continue to work in the industry without having to complete further training if they have already obtained suitable qualifications.

This Regulation also supports the right to work by allowing registered real estate and stock and station salespersons to continue conducting auctions until 1 July 2023. The Fair Trading Amendment Act introduced substantial changes to the licensing and

compliance frameworks for this industry and by allowing registered salespersons an appropriate period of transition, disruptions to both work and income will be reduced.

- 2.58. The second subordinate law mentioned above amends the *Agents Regulation 2003*. The explanatory statement for the subordinate law states:

The [subordinate law] amends the *Agents Regulation 2003* to provide that the *Agents Act 2003* (Agents Act) does not apply to Community Housing Canberra Incorporated (CHC) when carrying on business as a real estate agent, or a person employed by CHC who provides a real estate service, to the extent that business or service is provided when managing a community housing asset. In practice, this will conditionally exempt CHC from having to obtain a real estate agent licence for the purpose of managing community housing assets as a registered community housing provider. It will extend that exemption to any person who, as an employee of CHC, provides or offers to provide a real estate agent service when managing community housing assets. The exemption is limited as the requirement to remain appropriately licensed when providing commercial real estate services will remain.

- 2.59. The explanatory statement goes on to discuss human right issues:

Human Rights Implications

This Regulation engages but does not limit rights under the *Human Rights Act 2004*.

Exemption from the Agents Act will support CHC to sustainably manage community housing assets for lease by individuals and families in the ACT. The Regulation indirectly supports the right to protection of the family and children and the right to family and home under sections 11 and 12 of the Human Rights Act respectively.

The Regulation engages and supports the right to work in section 27B of the Human Rights Act by enabling the commissioner for fair trading to allow registered assistant property agents to work while completing the required qualification for registration and to accept a qualification higher than, equivalent to, or substantially equivalent to the additional qualification declared under new section 10AA of the Regulation.

This measure ensures those who hold relevant higher qualifications can enter the industry without having to complete a further qualification if it is not necessary.

- 2.60. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the subordinate laws mentioned above.**
- 2.61. **This comment does not require a response from the Minister.**

Determination of amounts of assistance to people affected by acts of violence

- **Subordinate Law SL2022-11** being the Victims of Crime (Financial Assistance) Amendment Regulation 2022 (No 1) made under the *Victims of Crime (Financial*

Assistance) Act 2016 amends the Victims of Crime (Financial Assistance) Regulation 2016 to bring the payment amounts for victims of crime in line with the All Groups CPI (Canberra) for March 2021-March 2022.

- 2.62. This subordinate law amends the *Victims of Crime (Financial Assistance) Regulation 2016*. The Committee notes that the explanatory statement for the subordinate law states:

... the *Victims of Crime (Financial Assistance) Regulation 2016* ... prescribes payment amounts and limitations for victims of crime under the *Victims of Crime (Financial Assistance) Act 2016* (the Act).

Section 25 of the *Victims of Crime (Financial Assistance) Act 2016* requires yearly Consumer Price Index (CPI) increases for payments provided to victims under four sections:

- a) maximum total financial assistance (section 24),
- b) recognition payment for primary victim (section 28),
- c) recognition payment for class A related victim (section 29), and
- d) recognition payment for class B related victim (section 30).

This regulation will bring payment amounts under these sections in line with the All Groups CPI (Canberra) for March 2021-March 2022 (as issued by the Australian Statistician) at 5.4 %.

Section 97 of the *Victims of Crime (Financial Assistance) Act 2016* requires yearly Wage Price Index (WPI) increases for limitations on lawyers legal costs under Section 96.

The amendments to the regulation will bring limitation amounts under this section into line with the WPI for Australia over a 5-year period. Annual WPI rates since 2017-2018 have been 2.10 percent, 2.30 percent, 2.20 percent, 1.50 percent and 2.40 percent. This change ensures that the maximum payments are at the proper prescribed level taking into account those annual WPI rates.

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

Human rights issues / Strict liability offences

- **Subordinate Law SL2022-12** being the Work Health and Safety Amendment Regulations 2022 (No 1), including a regulatory impact statement, made for section 276 of the *Work Health and Safety Act 2011*, makes a number of amendments to the *Work Health and Safety Regulation 2011*.

- 2.64. This subordinate law makes a number of amendments to the *Work Health and Safety Regulation 2011*, relating to asbestos licensing, the Globally Harmonized System of Classification and Labelling of Chemicals and Respirable Crystalline Silica.

- 2.65. The Committee notes that both the explanatory statement for the subordinate law and the accompanying regulatory impact statement contain a detailed discussion of the human rights implications of the subordinate law. In short, the explanatory statement indicates that the subordinate law engages and promotes the right to work, under section 27B of the *Human Rights Act 2004* but also engages and “may” limit rights in criminal proceedings that are protected under section 22 of that Act. The latter limitation relates to strict liability offences that are created by the subordinate law, as a result of section 12A of the *Work Health and Safety Act 2011*, which makes all offences under that Act strict liability offences. The explanatory statement concludes by stating:

The application of strict liability is reasonable to protect the health and safety of workers. Strict liability is only applied to particular elements of the uncontrolled dry cutting of silica containing materials offence under sections 418C, 418D and 418E of the regulation through sections 276(1) and 276(2) of the [Work Health and Safety] Act. It ensures those who hold responsibility for a health or safety duty uphold that responsibility and cannot escape liability by claiming ignorance of the duty or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* remains available to any accused for any strict liability provisions. The requirement to which the offences apply are not burdensome or out of alignment with the WHS framework; they relate to ensuring the safety of workers as well as the broader ACT community.

The application of strict liability to uncontrolled dry cutting and to PCBUs who do not take all reasonably practicable measures to address exposure risks associated with silica containing materials; and for failing to ensure workers are trained in silica awareness, complements the existing scheme regulating WHS and is supported by increasing evidence of the substantial risk of inhalation of silica dust.

The application of strict liability and the penalties imposed are in line those applied to asbestos duties under the [Work Health and Safety] Regulation. The penalty amount applied is also consistent with penalties applied for breach of duty relating to asbestos under chapter 8 of the WHS regulation. The strict liability offence applied in the silica chapter of the regulation acts as an incentive for duty holders and officers to observe their duties under the regulation.

The [subordinate law] places the least restrictive limitation on the right to presumption of innocence, as it does not apply strict liability to information that is known by an accused, and that may be revealed to prove or disprove the defence.

- 2.66. **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.**
- 2.67. **This comment does not require a response from the Minister.**

Regulatory Impact Statements – Comment

- 2.68. The Committee has examined regulatory impact statements for the following instruments and subordinate law and has these comments on them:
- **Disallowable Instrument DI2022-150** being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2022, including a regulatory impact statement made under section 7 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the energy savings targets for a specified compliance period.
 - **Disallowable Instrument DI2022-151** being the Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2022, including a regulatory impact statement made under section 11 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the energy savings contribution for a specified compliance period.
 - **Disallowable Instrument DI2022-152** being the Energy Efficiency (Cost of Living) Improvement (Shortfall Penalty) Determination 2022, including a regulatory impact statement made under section 22 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines the shortfall penalty for a specified compliance period.
 - **Disallowable Instrument DI2022-153** being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2022, including a regulatory impact statement made under section 8 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* revokes DI2016-63, and determines the priority household target for a specified period.
 - **Subordinate Law SL2022-7** being the Plastic Reduction Regulation 2022, including a regulatory impact statement made under the *Plastic Reduction Act 2021* prescribes two single-use plastic products and one non-compostable plastic product, with effect that these products are prohibited and cannot be supplied in the ACT, except in accordance with any exemptions that apply.
 - **Subordinate Law SL2022-12** being the Work Health and Safety Amendment Regulations 2022 (No 1), including a regulatory impact statement, made for section 276 of the *Work Health and Safety Act 2011*, makes a number of amendments to the *Work Health and Safety Regulation 2011*.
- 2.69. The four instruments mentioned above are made under various provisions of the *Energy Efficiency (Cost of Living) Improvement Act 2012*, determining various matters for that Act. A regulatory impact statement has been provided for the instruments.
- 2.70. Section 35 of the *Legislation Act 2001* sets out the requirements for regulatory impact statements:

Content of regulatory impact statements

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the proposed law) must include the following information about the proposed law in clear and precise language:

- a) the authorising law;

- b) a brief statement of the policy objectives of the proposed law and the reasons for them;
- c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
- d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
- e) if the proposed law is inconsistent with the policy objectives of another territory law—
- f) a brief explanation of the relationship with the other law; and
- g) a brief explanation for the inconsistency;
- h) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
- i) a brief assessment of the benefits and costs of implementing the proposed law that—
- j) if practicable and appropriate, quantifies the benefits and costs; and
- k) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);
- l) **a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.**

2.71. The first three instruments mentioned above share a regulatory impact statement. The Committee notes that the regulatory impact statement for DI2022-150 states:

Assessment of the consistency of the proposed law with Scrutiny of Bills Committee principles

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) must consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly:

- 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 matters which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

- v. The position in relation to each term of reference is as follows.
- vi. is in accord with the general objects of the Act under which it is made
- vii. As noted above, the proposed settings are in accordance with the general objects of the Act.
- viii. unduly trespasses on rights previously established by law
- ix. The proposed settings do not unduly trespass on rights previously established under law.
- x. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions
- xi. The proposed settings do not make rights, liberties and/or obligations unduly dependent upon nonreviewable decisions.
- xii. contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly
- xiii. The proposed settings do not require further amendments to an Act and the subject matter is appropriate for disallowable instruments.

2.72. The Committee notes that the regulatory impact statement also indicates that the instruments do not engage any human right set out in the *Human Rights Act 2004*.

2.73. The Committee notes that similar statements appear in the regulatory impact statement for the other instrument – DI2022-153.

2.74. The first subordinate law mentioned above (i.e. SL2022-7) is also accompanied by a regulatory impact statement. The Committee notes that, in addition to a detailed discussion of human rights issues (discussed in more detail above), the regulatory impact statement contains the following statement:

Consistency with Legislative Scrutiny Principles

The proposed regulation is consistent with the legislative scrutiny principles considered by the Standing Committee on Justice and Community Safety on the basis that the proposed regulation:

- Is in general accordance with the objects of the Act;
- Does not unduly trespass on rights previously established by law, including consideration of rights prescribed by the HR Act; and
- Does not make rights, liberties and/or obligations unduly dependent on non-reviewable decisions.

The proposed Regulation engages with a number of human rights as discussed in the human rights analysis component of this RIS. To reduce the extent to which the proposed Regulation will impinge these rights, exemptions for medical, scientific or health requirements have been provided for. While the reform will introduce additional strict liability offences, the offences are intended to deter people from

failing to comply with the Act and are considered necessary to achieve the objectives of the reform.

- 2.75. The Committee notes that this statement is also reflected in the explanatory statement for the instrument.
- 2.76. The Committee notes that the second subordinate law mentioned above (ie SL2022-12) is also accompanied by a regulatory impact statement and that the regulatory impact statement addresses in detail the requirements of paragraph 35(h) of the Legislation Act.
- 2.77. **This comment does not require a response from the Minister**

National Regulations – Comment

- 2.78. Rail Safety National Law National Regulations (Reporting Requirements) Amendment Regulations 2022 (2021 No 85—South Australia) made under section 264 of the Rail Safety National Law.
- 2.79. Rail Safety National Law National Regulations (Fees and FOI) Amendment Regulations 2022 (2022 No 23—South Australia), made under section 264 of the Rail Safety National Law.
- 2.80. The National Regulations mentioned above were made under section 264 of the *Rail Safety National Law (South Australia) Act 2012* (SA). They were tabled in the Legislative Assembly on 4 August 2022. They apply in the ACT as a result of section 6 of the *Rail Safety National Law (ACT) Act 2014*. The Committee notes, with approval, that both National Regulations are accompanied by a detailed explanatory statement, that includes helpful information about the authority for making, publication and commencement of the National Regulations. This is very useful to both the Committee and the Legislative Assembly.
- 2.81. The Committee notes that the explanatory statement for the first National Regulations mentioned above states:

The Rail Safety National Law National Regulations (Reporting Requirements) Amendment Regulations 2022 amends clauses to implement new reporting requirements in the Rail Safety National Law National Regulations 2012. These amendments were developed in consultation with industry and enhance the quality, accessibility, and timeliness of national rail safety data in line with the National Rail Safety Data Strategy.

- 2.82. The Committee notes, with approval, that the explanatory statement goes on to address human rights issues (despite there being no formal requirement, under the Rail Safety National Law, to do so):

Human rights and climate change implications

There are no human rights or climate change implications arising from this regulation.

- 2.83. The Committee notes that the explanatory statement for the second National Regulations mentioned above states:

The Rail Safety National Law National Regulations (Fees and FOI) Amendment Regulations 2022 amends Schedule 3 of the Rail Safety National Law regulations.

- 2.84. The notes on clauses go on to state:

Clause 4 Amendment of regulation 37 - Modifications of FOI Act for purposes of national rail safety scheme

Substitutes Regulation 37(ea) to amend the definition of Rail Safety National Law (RSNL) to ensure it includes RSNL as it applies in a state or territory and is not confined to the “Rail Safety National Law set out in the Schedule to the *Rail Safety National Law (South Australia) Act 2012*”.

Though the Regulation is only making a minor and technical amendment to the definition, this is intended to support the operation of provisions in the National Regulations that protect individual’s information provided to the Regulator under compulsion (as per Section 20 of RSNL).

Section 20 of RSNL gives the Regulator power to compel information in relation to possible contraventions of the RSNL, or information that will assist to monitor or enforce compliance. Previous amendments were made to the Regulation and clarified that any document provided to the Regulator under this section was exempt from being produced under an FOI request.

The amendment in this Regulation supports this provision, and the associated protections on the right to privacy, by further clarifying that this exemption applies in all jurisdictions, not just under the South Australian legislation. This engages and supports the right to privacy codified in section 12 of the *Human Rights Act 2004* (ACT).

Clause 5 Amendment of Schedule 3 - Fees

This clause provides an increase in the annual fees payable by a rail transport operator, in accordance with the cost recovery model agreed by the Infrastructure and Transport Ministers Meeting (ITMM).

- 2.85. The Committee notes, with approval, that the explanatory statement for the second National Regulations goes on to address human rights issues (despite there being no formal requirement, under the Rail Safety National Law, to do so):

Human rights and climate change implications

There are no human rights or climate change implications arising from this regulation.

- 2.86. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for these National Regulations.**

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

- 2.88. The Committee notes that the formal parts of the explanatory statements for both of the National Regulations mentioned above state that they are made under section 55 of the *Rail Safety National Law (ACT) Act 2014*. That is the regulation-making power for that (ACT) Act. However, the text of the explanatory statements states that the National Regulations are made under section 264 of the Rail Safety National Law, set out in Schedule 1 to the *Rail Safety National Law (South Australia) Act 2012* (i.e., the South Australian law that is applied in the ACT by the *Rail Safety National Law (ACT) Act 2014*). The Committee notes that section 264 is the correct empowering provision.
- 2.89. **In making this comment, the Committee notes that the purported reliance on an incorrect empowering provision does not invalidate a law, as long as a valid empowering provision exists. That is the case here.**
- 2.90. **The comment immediately above does not require a response from the Minister.**

3. Responses

Government responses – comment

Human Rights Issues in Subordinate Legislation

- 3.1. On 12 July 2021, the Committee wrote to the Minister for Human Rights about human rights issues in subordinate legislation. In essence, the Committee sought the Minister’s support in formalising its scrutiny of human rights issues in subordinate legislation.
- 3.2. The Committee noted that, under section 38 of the *Human Rights Act 2004*, the Committee has a formal statutory role only in relation to “human rights issues raised by bills presented to the Assembly” but no formal, statutory role in relation to human rights issues raised by *subordinate* legislation presented to the Assembly. The Committee went on to note that, nevertheless, it had, in recent years, been pleased to note that explanatory statements for subordinate legislation considered by the Committee have increasingly included a discussion of human rights issues, despite the absence of any statutory requirement to address such issues for subordinate legislation, unlike the requirement imposed by section 37 of the *Human Rights Act 2004* to provide a “compatibility statement” in relation to the consistency of bills with human rights. The Committee noted that, among other things, the provision of human rights analysis (in relation to subordinate legislation) assists the Committee in its role under principle (10)(c)(ii) of the Committee’s terms of reference, which requires the Committee to consider whether subordinate legislation may unduly trespass on rights previously established by law.
- 3.3. The Committee concluded by seeking the Minister’s support in resolving the situation and suggesting the following possible options for achieving this:
- amend section 37 of the *Human Rights Act 2004*, to include a legal requirement to prepare a compatibility statement in relation to subordinate legislation, and amend section 38 of the *Human Rights Act 2004*, to give the Committee a formal, statutory jurisdiction in relation to human rights issues arising from subordinate legislation;
 - amend Standing Orders, to give the Committee a formal jurisdiction in relation to human rights issues arising from subordinate legislation;
 - amend the Committee’s resolution of establishment, to give the Committee a formal jurisdiction in relation to human rights issues arising from subordinate legislation.
- 3.4. The Minister for Human Rights responded to the Committee on 29 June 2022. The Minister stated:

I acknowledge the potential benefits of amending the *Human Rights Act 2004* (HRA) to formalise the Committee’s mandate to scrutinise and report on the human rights impact of subordinate legislation presented to the Assembly. While the Committee

already provides valuable commentary on these issues in its reports, it would be beneficial for this role to be specifically recognised in the Human Rights Act.

While there are strong arguments for broadening the Committee's remit, the potential benefits of requiring a compatibility statement in respect of all subordinate legislation are less clear. Such a requirement could have significant resourcing implications in requiring centralised internal scrutiny of all delegated legislation.

I note that the existing Human Rights Act framework already ensures that human rights are considered as part of the development of subordinate legislation, and that human rights analysis is generally included in explanatory statements for subordinate legislation.

I intend to progress consideration of amendments to enhance the Committee's mandate to consider human rights in subordinate legislation. While the Government does not intend to introduce a requirement for compatibility statements for subordinate legislation at this point, I have written to remind Ministers there is an expectation that explanatory statements include human rights analysis.

In the meantime, I thank the Committee for raising these issues and supporting enhanced human rights scrutiny in the Territory.

3.5. The Committee thanks the Minister for this helpful response.

Government responses – no comment

- Drugs of Dependence (Personal Use) Amendment Bill 2021
- Subordinate Law SL2022-5 being the Confiscation of Criminal Assets Amendment Regulation 2022 (No 1)
- Education Amendment Bill 2022

The responses can be viewed [online](#).

The Committee wishes to thank the Ministers for the helpful responses.

Peter Cain MLA
Chair
13 September 2022

Appendix A – Outstanding responses

Bills/Subordinate Legislation

Report 12, dated February 2022

- Electoral Amendment Bill 2021
- Financial Management Amendment Bill 2021 (No 2)

Report 18, dated 26 July 2022

- Integrity Commission Amendment Bill 2022 [response required prior to the Bill being debated]
- Workplace Legislation Amendment Bill 2022 [response required prior to the Bill being debated]