



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 23

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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

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Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

Secretariat

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Role of Committee

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

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1. Bills

Bills—Comment

Animal Management and Welfare Legislation Amendment Bill 2022

- 1.1. This Bill amends legislation about animal management and welfare to require renewal of multiple cat licences every two years, extend offences for breeding dogs or cats to include males, and other technical or minor amendments.

Report under section 38 of the Human Rights Act 1977 1 (HRA)

Right to recognition and equality before the law (section 8 HRA)

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.2. The Bill will require applicants for a multiple cat licence (for keeping four or more cats) to include their name and the address of the premises where the cats will be kept. This may potentially limit the protection of privacy provided by section 12 of the HRA.
- 1.3. The Bill will also require the renewal of a multiple cat licence every two years. By requiring the payment of a renewal fee every two years the Bill may have a disproportionate impact on vulnerable members of the ACT community who may face difficulty meeting the costs of renewal, which may limit the right to equality under section 8 of the HRA.
- 1.4. Section 72 of the *Domestic Animals Act 2000* provides for a strict liability offence relating to breeding a litter from a female dog or cat without a licence. The Bill will amend this section to include the role of male dogs and cats. By extending the scope of a strict liability offence the Bill may limit the presumption of innocence protected as a right in criminal proceeding in section 22 of the HRA.
- 1.5. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly and makes no further comment.
- 1.6. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Background Checking Legislation Amendment Bill 2022

- 1.7. This Bill amends the *Children and Young People Act 2008* (CYP Act) and the *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act) to:
 - extend the range of disqualifying offences to include interstate and historic offences declared by the Minister;

- to allow the Director-General to defer registration requirements under the WWVP Act in exceptional circumstances by relying on an existing registration under the CYP Act; and
- make other technical and operational amendments.

Report under section 38 of the Human Rights Act 1977 (HRA)

Right to recognition and equality before the law (section 8 HRA)

Right to privacy and reputation (section 12 HRA)

Right to work and other work-related rights (section 27B)

Right to a fair trial (section 21 HRA)

- 1.8. The Bill may extend the range of offences which may disqualify a person from gaining registration under the WWVP Act by allowing the Minister to declare that a law of another State that substantially corresponds to a disqualifying law in the Territory, or a provision of a law which has been omitted or remade with changes, to be a disqualifying law. By extending the circumstances in which a person may be refused registration the Bill may limit the right to equality before the law under section 8 of the HRA, the protection of privacy and reputation protected by section 12 of the HRA, and, given registration under the WWVP Act may be needed for certain occupations, the right to work under section 21 of the HRA.
- 1.9. The explanatory statement accompanying the Bill includes a statement setting out why any limitation should be considered reasonable under the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.10. A person who has an adult conviction for what is termed under the Act as a class A disqualifying offence is not eligible to be registered under the WWVP Act. They are not able to seek merits review in the ACT Civil and Administrative Tribunal (ACAT) when their registration is refused. The Bill notes that the right to ACAT review in these circumstances was taken away in previous amendments to the WWVP Act¹. A renumbering of the provision in the Consolidated versions of the Act on the ACT Legislation Register did not, however, reflect this amendment in the Schedule 2 table of reviewable decisions. The Consolidated versions have subsequently been reissued to reflect the effect of the amendment. The explanatory statement accompanying this Bill identifies this change and reiterates why removal of ACAT review, and any limitation of the right to a fair trial in section 21 of the HRA, is justified under the framework in section 28 of the HRA. The Committee also refers this to the Assembly and thanks for the Minister for including that information in the Bill.
- 1.11. **The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

¹ See the *Working with Vulnerable People (Background Checking) Amendment Act 2020*.

Electricity Safety Legislation Amendment Bill 2022

- 1.12. This Bill amends the *Construction Occupations (Licensing) Act 2004* and the *Electricity Safety Act 1971* to allow the Minister to exempt a regulated utility from having to comply with various requirements under those Acts. The Minister must be reasonably satisfied that the utilities are adequately regulated under another Territory or Commonwealth law and the exemption will not increase the risk to public safety. The Bill is intended to allow the Minister to avoid duplicating the regulation of electrical wiring work on the next stages of light rail construction, and to adapt to new developments in electrical technologies.

Report under section 38 of the Human Rights Act 977 1 (HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.13. Sections 84 and 85 of the *Construction Occupations (Licensing) Act* create offences for providing a construction service, which includes carrying on the work of an electrician, or engaging someone to provide such a service, without a licence. Section 84 is a strict liability offence. The Bill will provide for an exception to these offences for regulated utilities which are granted an exemption under the amendments to the *Electricity Safety Act*.
- 1.14. By providing for an exception to offences and shifting the evidential burden on to the defendant the Bill may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. The explanatory statement recognises this potential limit and provides for why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly and makes no further comment.
- 1.15. **The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

Integrity Commission Amendment Bill 2022 (No 2)

- 1.16. This Bill will amend the *Integrity Commission Act 2018* for the purpose of enabling an investigator to apply for a warrant to intercept telecommunications, in accordance with Part 2-5 of the *Telecommunications (Interception and Access) Act 1979* (Cwlth), for the investigation and exposure of corrupt conduct.

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 977 1 (HRA)

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.17. To the extent the Bill will facilitate or otherwise make it possible for the Commission to apply for a warrant under Part 2-5 of the Commonwealth Act which will authorise the interception of communications passing over a telecommunications system, the Bill may substantially limit the protection of privacy provided under section 12 of the HRA.

However, the Bill does not, in itself, authorise the interception of telecommunications nor provide for an application to be made under the Commonwealth Act for a warrant allowing an interception before a judge of a Commonwealth court or nominated member of the Commonwealth Administrative Appeals Tribunal. That would require an amendment of the Commonwealth Act.

- 1.18. The Bill sets out the role of the Inspector of the Commission in relation to any application for a telecommunications service warrant, including notification requirements and entitling the Inspector to appeal and make submissions at the hearing for a warrant. The Bill also provides for records to be kept in connection with the issue of a warrant and any telecommunications interceptions and provided to the Speaker and by the Speaker to the Commonwealth Minister. These records may be inspected by the Commonwealth Minister and Inspector prior to destruction. The Bill also provides for the inspection by the Inspector of the Integrity Commission's records in relation to telecommunications service warrant applications and exercise, including the power to exchange information with the Commonwealth Ombudsman.
- 1.19. The Committee notes that under the Commonwealth Act, only eligible authorities of States and the Northern Territory can be declared by the Commonwealth Minister to be an agency able to apply for a warrant under Part 2-5 of the Commonwealth Act. There are substantial preconditions which must be satisfied before such a declaration can be made, primarily in relation to record keeping and reporting, and an agreement to meet the costs connected with the issue of a warrant. It is not clear to the Committee whether the Bill is intended to satisfy some or all of these preconditions so as to facilitate a future declaration of the Territory Integrity Commission as an agency able to apply for a warrant, or is intended to impose additional protections against any undue interferences with privacy which future telecommunications interceptions might present.
- 1.20. The Committee also notes that the Commonwealth Act contains specific provisions for Queensland and Victorian public interest monitors to present submissions and ask questions in an application for a warrant. Although the Bill makes provision for the inspector to appeal at a hearing to test the validity of an application by asking questions and making submission, it is not clear to the Committee whether these would be effective to provide the right to appear in the absence of amendment to the Commonwealth Act.
- 1.21. The Bill may also limit various rights in criminal proceedings protected under section 22 of the HRA. The Bill contains offences relating to failing to comply with an inspection requirement and disclosing protected information. These offences include various exceptions where an evidential burden is placed on the defendant to establish the availability of the exception. The Bill also provides for the abrogation of any privilege (except parliamentary privilege) or secrecy requirement under Territory law in relation to the inspector's role in an application for a warrant. A request for information from the inspector when inspecting interception warrant records will not be able to be refused on the grounds of self-incrimination, requirement under another territory law or the public interest. However, information provided in response to such an information request is not admissible in evidence against the person except in limited circumstances.

- 1.22. The explanatory statement accompanying the Bill includes the following statement in relation to the human rights impacts of the Bill:

Recognition under the [Commonwealth] Act would enable the commission to lawfully intercept telecommunications materials, aiding their investigative processes. This practice would be subject to robust oversight mechanisms, including through the Inspector of the ACT Integrity Commission (the inspector), and a number of ministerial reporting requirements, including to a specified Commonwealth minister. These oversight mechanisms are described in detail in the clause notes below.

- 1.23. The Committee is concerned that this statement neither identifies the various human rights which may be engaged and limited by recognition under the Commonwealth Act or by the Bill, nor suggests why such limitations should be considered reasonable under the framework set out in section 28 of the HRA. **The Committee therefore requests further information on the nature of the Bill and its intended impacts on rights protected under the HRA.** To the extent the Bill merely contains oversight mechanisms protecting against rights' limitations associated with an authority to apply for an interception warrant under the Commonwealth Act, a more substantial analysis is required for why those protections, along perhaps with other protections in the Commonwealth Act, would be sufficient under the framework in section 28 of the HRA.

The Committee draws this matter to the attention of the Assembly and asks the Member to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

Multiculturalism Bill 2022

- 1.24. This Bill will establish the *Multiculturalism Act 2022* to promote multiculturalism in the Territory by:
- establishing and promoting a charter for multiculturalism which must be taken into account and reported on by public sector administrative units in carrying out their functions;
 - establishing the Ministerial Advisory Council for Multiculturalism (the council) to advise the Minister and consult with the community on promoting multiculturalism; and
 - provide a framework for review and development of the government's promotion of multiculturalism.

Report under section 38 of the Human Rights Act 1977 (HRA)

Right to privacy and reputation (section 12 HRA)

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

- 1.25. In appointing a person to the council established under the Bill, the Minister must be satisfied that the person meets various requirements and take all practicable steps to ensure as diverse membership of the council, including by having regard to gender identities, age, immigration status and family immigration history. By requiring consideration of personal characteristics in limiting who can be appointed to the council, the Bill may limit the protection of privacy provided by section 12 of the HRA and the right to take part in public life in section 17 of the HRA.
- 1.26. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable under the framework in section 28 of the HRA. The Committee refers that statement to the Assembly and makes no further comment.
- 1.27. **The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

Sexual Assault Reform Legislation Amendment Bill 2022

- 1.28. This Bill amends legislation about sexual assault to implement some recommendations of the *Listen. Take Action to Prevent, Believe and Heal* Report² and correct unintended consequences arising from the *Crimes (Consent) Amendment Act 2022*.

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 1977 (HRA)

Right to freedom of movement (section 13 HRA)

Right to liberty (section 18 HRA)

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

Right to work and other work-related rights (section 27B)

- 1.29. The Bill will amend the *Bail Act 1992* to remove the presumption of bail applying to offences involving sexual intercourse with a young person under 16 or under special care, and persistent sexual abuse of a child or young person under special care.

² Final Report of the Steering Committee established to commence the Sexual Assault Prevention and Response Reform Program, December 2021, available at <https://www.communityservices.act.gov.au/sexual-assault-prevention-and-response>.

- 1.30. The Bill will bring the assessment of bail for these offences in line with the approach for other serious offences involving sexual assault to provide a consistent approach in prosecuting and considering bail applications for these offences and attempt to improve criminal justice outcomes. The legislative criteria for the exercise of discretion involved in the grant of bail will continue to apply. By limiting the presumption against bail, the Bill may increase the likelihood of a person being denied bail, limiting the right to freedom of movement under section 13 of the HRA and the right to liberty under section 21 of the HRA.
- 1.31. The Bill will also amend the *Crimes Act 1900* in relation to the role of intoxication in forming consent. In proceedings for an offence against a sexual assault provision, the Bill will prevent the accused's intoxication being considered when deciding if the accused knew, believed or was reckless about whether another person consented. This will clarify and extend the current treatment of intoxication in the *Criminal Code 2002*. By limiting the role which intoxication can play in establishing the elements of an offence, the Bill may limit the right to a fair trial in section 21 of the HRA, and by providing for a fault element to be established without considering the actual state of mind of the accused the Bill may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA.
- 1.32. The Bill will also amend the *Evidence (Miscellaneous Provisions) Act 1991* to allow evidence of family violence to be admissible where it provides context for a fact in issue in the proceeding. Family violence may include a single act or a pattern of behaviour going to the history of the relationship between family members or involve evidence relating to various impacts of family violence generally. The amendment will codify the position at common law. However, it may create confusion as to when and for what purpose prior family and domestic violence evidence may be adduced, potentially limiting the right to a fair trial in section 21 of the HRA. By allowing evidence of prior offences the Bill may also limit the presumption of innocence protected as a right in criminal proceeding in section 22 of the HRA.
- 1.33. Finally, the Bill will amend the *Personal Violence Act 2016* in relation to interim protection orders. Currently interim protection orders are generally limited to 12 months. The Bill will allow special interim protection orders with a duration beyond 12 months where the respondent continues to face an outstanding related charge. Making a special interim order delays the hearing to decide whether to grant a final protection order until after all related charges are finalised. The amendments will permit any police investigation into related charges to take its course while avoiding possible traumatisation associated with the applicant having to attend a hearing to decide a final order.
- 1.34. By extending the duration of an interim order, the Bill will extend the period in which a respondent to the order is prohibited from being near a specified place, potentially limiting the right to movement in section 13 of the HRA. A special interim order may also prevent a person from attending their place of work, potentially limiting the right to work in section 27B of the HRA. By protracting the time before an application for a final protection order is

heard, the Bill may also potentially limit the right to be tried without unreasonable delay, one of the rights in criminal proceedings protected by section 22 of the HRA.

- 1.35. The explanatory statement accompanying the Bill contains an extensive statement setting out why these potentially substantial limitations on human rights should be considered reasonable in the context of their intended purpose and protections offered. The Committee refers that statement to the Assembly.
- 1.36. **The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

Work Health and Safety Amendment Bill 2022

- 1.37. This Bill will amend the *Work Health and Safety Act 2011* to remove any doubt about the application of that Act to the Legislative Assembly as a workplace where work is carried out as an undertaking of the Territory.

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 1977 (HRA)

Retrospective Criminal Laws (section 25 HRA)

- 1.38. The Bill will insert a provision into the Act which states:

To remove any doubt, work carried out by a member of the Legislative Assembly in the exercise of the member's functions, and work carried out by other people to support the member in the exercise of the member's functions, is work carried out in an undertaking for this Act.

- 1.39. The Bill is stated to commence on the day the Bill was presented to the Assembly, that is prior to its enactment or retrospectively. The Committee generally requires a justification be provided for any retrospective operation of legislation, especially where personal rights and liberties might be affected. Where the Bill will extend the scope or penalty associated with an offence, the potential limit of the right against retrospective criminal laws in section 25 of the HRA should be justified using the framework in section 28 of the HRA.

- 1.40. The explanatory statement accompanying the Bill, in discussing the consistency of the Bill with human rights, states:

The protection against retrospective criminal laws in s 25 of the *Human Rights Act 2004* is not limited by the Bill as the amendment is only clarifying in nature.

The common law has a general protection against the retrospective application of law. The purpose of this protection includes fairness as it seeks to protect the expectations of those who assume that the quality of their past acts would be assessed on the basis of the law as it then stood. The amendment in the Bill is clarifying in nature, consistent with the longstanding policy view that the intention of the WHS Act to secure the health and safety of all workers and workplaces in the

ACT, including the ACT Legislative Assembly. It is therefore not considered to alter the expectations, rights and liabilities of those to whom the WHS Act applies.

- 1.41. The consequence of the Bill is to ensure that the place where work is carried out by Members of the Assembly and support staff is a workplace as defined in section 8 of the Act. Members of the Assembly and their support staff may also come within the definition of worker as defined in section 7 of the Act. The various rights and obligations imposed by the Act on persons conducting an undertaking, officers, workers and other persons at the workplace, obligations of consultation, representation and participation, powers of entry and inquiry by WHS entry permit-holders, and extensive powers of the regulator to enter, inspect and issue remedial notices are all generally applicable to workplaces and workers.
- 1.42. Given the broad implications of including the Assembly and the work of Members in the scope of the Act against the nature of Members and the Assembly as separate from the executive and subject to its own powers, privileges and immunities, it is at least arguable that the Act would be interpreted as not applying to the Assembly generally or a proceeding of the Assembly including its committees, at least in the absence of express works such as those provided by the Bill. While it may have been the longstanding policy view that the intention of the Act is to apply to the Assembly, it is not clear that view is reflected in the Act itself.
- 1.43. It is therefore possible that the amendments included in the Bill will extend the operation of the Act. In this way, the retrospective operation of the Bill may affect rights and liberties and require a more substantive justification than that provided in the explanatory statement.
- 1.44. The Committee regards this as a very serious matter. The Committee therefore requests further information from the Chief Minister on why the Bill will not have any substantive effect on the interpretation and application of the Act, and in any event why it was considered necessary to have the Bill commence prior to enactment.

The Committee draws this matter to the attention of the Chief Minister and asks the Chief Minister to respond with sufficient time to allow the Committee to consider the response prior to the Bill being debated.

Proposed Amendments – No comment

Work Health and Safety Amendment Bill 2022

- 1.45. The Committee has received proposed amendments to the *Work Health and Safety Amendment Bill 2022* from the Speaker in a letter dated 20 October 2022. The proposed amendments will restrict the operation of the Act as amended to not limiting any power, privilege or immunity given under section 24 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) to the Assembly, its committees, or members. This will extend to not allowing the regulator or anyone exercising a function under the *Work*

Health and Safety Act 2011 to interrupt a proceeding of the Assembly or its committees. The Committee notes that this amendment will alleviate some of the concerns raised in the Committee's above comments on the Bill. The Committee has no comments on the proposed amendment.

Responses – No Comment

- Financial Management Amendment Bill 2021 (No 2)
- Senior Practitioner Amendment Bill 2022
- Workplace Legislation Amendment Bill 2022

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

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

2. Subordinate Legislation

Disallowable Instruments – No Comment

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

- **Disallowable Instrument DI2022-225** being the Health (Interest Charge) Determination 2022 (No 1) made under section 193 of the *Health Act 1993*.
- **Disallowable Instrument DI2022-226** being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2022 made under section 20 of the *Remuneration Tribunal Act 1995*.
- **Disallowable Instrument DI2022-227** being the Public Sector Management Amendment Standards 2022 (No 1) made under section 251 of the *Public Sector Management Act 1994*.
- **Disallowable Instrument DI2022-229** being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2022 (No 3) made under section 12 of the *Road Transport (General) Act 1999*.

Disallowable Instruments – Comment

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

COVID-19-Related Instrument / Human Rights Issues

- **Disallowable Instrument DI2022-224** being the Public Health (COVID-19 Management) Declaration 2022 made under section 118O of the *Public Health Act 1997*.

2.3. This instrument is made under section 118O of the *Public Health Act 1997*, which provides:

118O COVID-19 management declaration—general

(1) The Executive may make a declaration (a COVID-19 management declaration) if the Executive has reasonable grounds for believing that COVID-19 presents a serious risk to public health.

(2) In forming a belief on reasonable grounds that COVID-19 presents a serious risk to public health, the Executive must—

(a) consider whether a material risk of substantial injury or prejudice to the health of people has happened or may happen because of COVID-19; and

(b) take into account the following:

(i) the number of people likely to be affected;

(ii) the location, immediacy and seriousness of the threat to the health of people;

- (iii) the nature, scale and effect of any harm, illness or injury that may happen;
- (iv) the availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce any risk to the health of people.

(3) For subsection (2), it does not matter that the rate of community transmission of COVID-19 in the ACT is low or that there have been no cases of COVID-19 in the ACT, either at all or for a period of time.

(4) Nothing in this part prevents the Minister declaring a public health emergency in relation to COVID-19 under section 119 or taking any other action under this Act in relation to COVID-19.

(5) A COVID-19 management declaration is a disallowable instrument.

- 2.4. The effect of a COVID-19 management declaration is to give the Minister the power to make certain directions (section 118R), the Chief Health Officer the power to make certain directions (section 118U) and the Executive the power to make certain directions (in relation to vaccination – section 118Z). Ministerial and Chief Health Officer directions are “notifiable” but not disallowable. The Committee notes that this is contrary to the recommendations of the Standing Committee on Health and Community Wellbeing, in its report titled *Inquiry into the Public Health Amendment Bill 2021 (No 2)* (28 February 2022)³. This Committee also raised concerns about this issue in its Report 12 and Report 15⁴. However, the Committee notes that vaccination directions (and, obviously, directions such as this one), *are* disallowable (see subsections 118O(5) and 118Z(7)).
- 2.5. Subsection 118P(2) allows the Executive to extend the duration of a COVID-19 management declaration.
- 2.6. Subsection 118P(3) requires the Chief Health Officer, at least every 30 days during which a COVID-19 management declaration is in force, advise the Executive about the status of the risk presented by COVID-19.
- 2.7. Section 118Q imposes obligations on the Executive to consult the Chief Health Officer on the making or extending of a COVID-19 management declaration and also requirements to give public notice of the making or extension of such a declaration
- 2.8. The explanatory statement for the instrument states:

Overview

The Public Health (COVID-19 Management) Declaration (the Declaration) is made under section 118O of the *Public Health Act 1997* as the Executive has reasonable

³ Standing Committee on Health and Community Wellbeing 2021 (No 2), *Inquiry into the Public Health Amendment Bill 2021 (No 2)*, 28 February 2022. [4. Inquiry into Public Health Amendment Bill 2021 \(No 2\) - ACT Legislative Assembly](#)

⁴ Standing Committee on Justice and Community Safety (Legislative Scrutiny), Report 12, 1 February 2022, p 5. [Scrutiny Report 12—1 February 2022 \(act.gov.au\)](#); Report 15, 27 April 2022, p 10, at https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/1992647/Report-15-27-April-22.pdf.

grounds to believe that COVID-19 continues to present a serious public health risk to the Territory. The Executive has considered the advice of the Chief Health Officer in making the Declaration.

This Declaration provides the ability for the Executive, Minister for Health and the Chief Health Officer to make COVID-19 Management Directions relating to implementation of vaccination, public health social measures (PHSMs), and test, segregation or isolation requirements that operate to alleviate the public health risk presented by COVID-19.

The Declaration creates an environment in which Directions may be made and implemented under *Public Health Act 1997* in a timely and effective way to manage the rate of transmission and mitigate the risk to public health, including severe illness or death.

In making the Declaration, the Executive has considered whether a material risk of substantial injury or prejudice to the health of people has happened or may happen because of COVID-19. In addition, the following has been considered, in accordance with 118O of the *Public Health Act 1997*:

- The number of people likely to be affected.
- The location, immediacy and seriousness of the threat to the health of people.
- The nature, scale and effect of any harm, illness or injury that may happen.
- The availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce any risk to the health of people.

Specifically, the Executive has reviewed the Chief Health Officer Advice – Public Health (COVID-19 Management) Declaration 2022 (No. 1), consistent with section 118T of the *Public Health Act 1997* and is satisfied that this advice appropriately addresses each item required under section 118O of the Act.

The Executive has also taken account of the fact that there remains significant uncertainty and complexity relating to the evolution of the COVID-19 pandemic, which is likely to continue over the coming months. A number of significant decisions will need to be taken at a national level in relation to the remaining baseline public health measures, including isolation and quarantine requirements. The ACT continues to transition the COVID-19 response to the endemic management of COVID-19, similar to other notifiable diseases.

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

Consistency with Human Rights

Limits placed on human rights by the Declaration are a proportionate and reasonable response to the public health risk presented by COVID-19 in the ACT. As at 9 September 2022, there have been 125 COVID-19 related deaths since the start

of the pandemic and 594 active cases across the Territory. Active outbreaks and exposures are currently being managed across the Territory in a range of residential aged-care and disability care settings. The ACT's hospitals continue to care for large numbers of patients affected by COVID-19, although the number of patients requiring intensive care and ventilation remain low and stable. At 9 September 2022, the total number of patients in hospital was 86 (includes active and cleared cases) and one patient was in ICU.

The Declaration is time limited and subject to the Disallowance of the Assembly. It requires the provision of regular published advice by the Chief Health Officer, every 30 days. These mechanisms work to ensure that the Executive can continue to review whether COVID-19 continues to present a serious risk to public health, based on expert advice, and whether any resulting Directions therefore remain appropriate.

The Declaration promotes the right to life under section 9 of the *Human Rights Act 2004* by providing the necessary settings to enable the issuing of Executive, Ministerial and Chief Health Officer Directions that prevent or limit virus transmission and, by extension, mitigates the serious risk to health and life posed.

Issuing Directions during the Declaration period may limit other human rights including but not limited to, the right to recognition and equality before the law (s 8), freedom of movement (s 13), and the right to work (s27B).

The Directions are subject to safeguards, including a requirement for the Executive to consider advice of the Chief Health Officer and to consult with the Human Rights Commissioner, and transparency in relation to publication of material that is relied upon in making the Directions, including human rights considerations.

Ministerial (Division 6C.3) and Chief Health Officer (Division 6C.4) Directions are notifiable instruments that must be presented to the Legislative Assembly and therefore offer a high degree of transparency. Vaccination Directions (Division 6C.5) may be made by the Executive and are disallowable instruments that may be disallowed by the Assembly, providing a further degree of scrutiny as they may act to limit a worker's right to engage in particular work, at a particular place or in a particular activity.

- 2.10. The Committee notes that the instrument is also accompanied by a regulatory impact statement, which contains similar statements about human rights issues (discussed below).
- 2.11. **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 instrument.**
- 2.12. **This comment does not require a response from the Minister.**

Should this appointment be made by disallowable instrument?

- **Disallowable Instrument DI2022-228** being the Animal Welfare (Advisory Committee Member) Appointment 2022 (No 2) made under section 109 of the *Animal Welfare Act 1992*.
- 2.13. This instrument, made under section 109 of the *Animal Welfare Act 1992* and the Animal Welfare (Advisory Committee) Establishment 2020 (No 1) [DI2020-147] appoints a specified person as a member of the Animal Welfare Advisory Committee. The explanatory statement states that the specified person is a person nominated by a community-based organisation involved in animal welfare, other than the RSPCA ACT, as provided for by subsection 5(7) of the Animal Welfare (Advisory Committee) Establishment 2020 (No 1).
- 2.14. The appointment is made by disallowable instrument, bringing it within the Committee's scrutiny role.
- 2.15. The Committee notes that section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions by Ministers. It provides:
- 227 Application—div 19.3.3**
- This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
- However, this division does not apply to an appointment of—
- (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
 - (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
 - (c) a person to a statutory position if the only function of the position is to advise the Minister.
- 2.16. In the light of paragraph 227(2)(a) of the *Legislation Act*, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*⁵, the Committee stated:
- Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an

⁵ https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf.

instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

- 2.17. The Committee notes that the explanatory statement for the instrument mentioned above contains no such statement.
- 2.18. **The Committee draws the attention of the Legislative Assembly to the instrument mentioned above, under paragraph (10)(d) of the Committee’s Resolution of Appointment, on the basis that the regulatory impact statement for the instrument does not meet the technical or stylistic standards expected by the Committee.**
- 2.19. **The Committee seeks the Minister’s confirmation that the person appointed by the instrument mentioned above is not a public servant.**

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

COVID-19-Related Instrument / Human Rights Issues

- **Disallowable Instrument DI2022-230** being the Road Transport (General) Application of Road Transport Legislation (Deciding Applications for Registration - Taxi) Declaration 2022 (No 1) section 13 of the *Road Transport (General) Act 1999*.
- 2.20. 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 section 32B of the Road Transport (Vehicle Registration) Regulation 2000 “is not applied to a number of specified taxi vehicles”. Section 32B provides for applications for the registration of a registrable vehicle as a taxi. The explanatory statement for the instrument states:

The ACT taxi industry continues to be impacted by COVID-19, including by the global supply chain issues causing a worldwide shortage of new vehicles.

The motor vehicle industry is experiencing global manufacturer supply issues, which has resulted in many taxi operators being unable to secure new vehicles, in order to meet the age and use requirements under section 32B of the Road Transport (Vehicle Registration) Regulation 2000.

Three taxi operators have demonstrated exceptional circumstances in relation to vehicles they have contracted to purchase. These operators’ current vehicles are identified in clause five of this Disallowable Instrument.

The explanatory statement goes on to discuss human rights issues:

HUMAN RIGHTS IMPLICATIONS

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

The right to work and other work-related rights

This instrument promotes the right to work and other work-related rights (section 27B).

Section 27B of the HRA provides that everyone has the right to work, including:

- (1) the right to choose their occupation or profession freely;
- (2) the right to the enjoyment of just and favourable conditions of work;
- (3) the right to form or join a work-related organisation, including a trade union, with the objective of promoting or protecting their economic or other social interests;
- (4) the right to protection against acts of anti-union discrimination in relation to their employment;
- (5) everyone is entitled to enjoy these rights without discrimination.

Progressing the instrument to extend the time limit during which existing vehicles can continue to be used as taxis supports the right of the operators of these taxis to work.

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

Regulatory Impact Statements – Comment

- 2.1. The Committee has examined a regulatory impact statement for the following disallowable instrument and offers these comments on it:
 - **Disallowable Instrument DI2022-224** being the Public Health (COVID-19 Management) Declaration 2022 made under section 118O of the *Public Health Act 1997*.
- 2.2. As mentioned above, this instrument is made under section 118O of the *Public Health Act 1997*, which provides for COVID-19 management declarations. The instrument is accompanied by a detailed and helpful regulatory impact statement that discusses, among other things, human rights issues, the policy objectives of the instrument and reasonable alternatives to the approach adopted in the instrument. However, the statement has a significant defect.
- 2.3. Section 35 of the *Legislation Act 2001* sets out the requirements for regulatory impact statements:

35 Content of regulatory impact statements

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

- (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—
 - (i) a brief explanation of the relationship with the other law; and
 - (ii) a brief explanation for the inconsistency;
- (f) 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;
- (g) a brief assessment of the benefits and costs of implementing the proposed law that—
 - (i) if practicable and appropriate, quantifies the benefits and costs; and
 - (ii) 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);
- (h) 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.**

2.4. The Committee notes that, while (as discussed earlier in this Scrutiny Report) the regulatory impact statement for this subordinate law contains a helpful discussion of issues relevant to the Committee’s scrutiny role (including human rights issues), there is no explicit discussion of the requirements of paragraph 35(h).

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

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

Responses – No Comment

- Disallowable Instrument DI2022-101 Victims of Crime (Fees) Determination 2022 (No 1)
- Disallowable Instrument DI2022-107 Juries (Payment) Determination 2022
- Disallowable Instrument DI2022-178 being the Children and Young People (Work Experience) Standards 2022 (No 1)
- Disallowable Instrument DI2022-179 being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2022
- Disallowable Instrument DI2022-181 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2022
- Disallowable Instrument DI2022-185 being the Legal Aid (Commissioner—Specialist Assistance) Appointment 2022
- Disallowable Instrument DI2022-187 being the Legal Aid (Commissioner—Financial Management) Appointment 2022
- Disallowable Instrument DI2022-188 being the Legal Aid (Commissioner—Bar Association Nominee) Appointment 2022

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

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

Peter Cain MLA
Chair
November 2022

Outstanding responses

Bills

Report 12, dated February 2022

Bills

- Electoral Amendment Bill 2021

Report 20, dated 13 September 2022

Bills

- Climate Change and Greenhouse Gas Reduction (Natural Gas Transition) Amendment Bill 2022 [response required prior to the Bill being debated]
- Period Products and Facilities (Access) Bill 2022 [response required prior to the Bill being debated]
- Urban Forrester Bill 2022 [response required prior to the Bill being debated]

Report 21, dated 4 October 2022

Bills

- Freedom of Information Amendment Bill 2022 [response required prior to the Bill being debated]
- Planning Bill 2022 [response required prior to the Bill being debated]