

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

SCRUTINY REPORT 15

27 APRIL 2022



# THE COMMITTEE

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## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

# TABLE OF CONTENTS

THE COMMITTEE .....	I
Committee Membership .....	i
Secretariat .....	i
Contact Information .....	i
Role of Committee .....	i
RESOLUTION OF APPOINTMENT .....	II
BILLS .....	1
Bills—Comment .....	1
DOMESTIC VIOLENCE AGENCIES AMENDMENT BILL 2022 .....	1
EDUCATION AMENDMENT BILL 2022 .....	1
FAIR TRADING AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2022 .....	5
RADIATION PROTECTION AMENDMENT BILL 2022 .....	8
PROPOSED AMENDMENTS .....	9
PUBLIC HEALTH AMENDMENT BILL 2021 (No 2) .....	9
GOVERNMENT RESPONSES — COMMENT .....	10
PUBLIC HEALTH AMENDMENT BILL 2021 (No 2) .....	10
SUBORDINATE LEGISLATION .....	13
Disallowable Instruments—No comment .....	13
Disallowable Instruments—Comment .....	14
Subordinate Laws—No Comment .....	18
Subordinate Laws—Comment .....	18
RESPONSES .....	19
OUTSTANDING RESPONSES .....	20



# BILLS

## BILLS—COMMENT

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

### **DOMESTIC VIOLENCE AGENCIES AMENDMENT BILL 2022**

This Bill amends the *Domestic Violence Agencies Act 1986* to update the objectives and functions of the Domestic Violence Prevention Council to reflect changes in domestic and family violence policy and services. The Bill will also abolish the office of the Domestic Violence Project Coordinator which has been effectively replaced by the Office of the Coordinator-General for Family Safety.

***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)**

##### **TAKING PART IN PUBLIC LIFE (SECTION 17 HRA)**

The Bill provides for the membership of the Council, the qualifications of persons who may be appointed by the Minister, and the circumstances in which the appointment of a member may be ended. By circumscribing the conditions for membership of the Council the Bill may limit access, on general terms of equality, for appointment to a public office as protected by the right to take part in public life in section 17 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why any limitation should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

### **EDUCATION AMENDMENT BILL 2022**

This Bill amends the *Education Act 2004* and the *Education Regulation 2005* to revise the registration and registration review requirements for non-government schools, and clarify the definitions of suspensions, transfers, expulsion and exclusions, and reporting requirements for all school sectors.

***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)**

The explanatory statement accompanying the Bill recognises the following rights as being possibly limited by the Bill and provides a justification for why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the comments below, the committee refers that statement to the Assembly.

##### **RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)**

The Bill authorises the suspension, transfer, expulsion or exclusion of a student where their behaviour has been unsafe or noncompliant. The Bill expressly includes unsafe or non-compliant

behaviour which does not happen on school premises or during school hours. The Bill may therefore condition behaviour which might be considered private.

The Bill will also provide regulatory enforcement powers involving the right of entry for authorised persons, including authority to take photos, videos and make copies of documents. An occupier or person at registered or public premises, proprietors or members of staff of non-government schools, or any other person who has access to information or documents which might be reasonably required by an authorised person to assess a registered schools compliance with the Act, may also be required to provide information or answer questions.

The Bill will also require information, including personal information to be provided and maintained in a register of enrolments and attendances and a student movement register.

#### RIGHT TO TAKE PART IN PUBLIC LIFE (SECTION 17 HRA)

The Bill provides for the establishment of a Registration Standards Advisory Board to, for example, advise the Minister on applications for registration and establishing standards for registration. The Bill will establish criteria for Ministerial appointment to the Board, limiting the range of persons who may be eligible for appointment.

#### RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill will establish nine strict liability offences relating to enforcement of requirements relating to registration and provision of information to authorised persons. By limiting the elements required to be established in the prosecution of these offences, the Bill may limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the HRA.

The Bill will also remove the privilege against self-incrimination in relation to information or documents required to be provided under powers of authorised persons to enforce registration standards for non-government schools. Any information, document or thing obtained, directly or indirectly, is not admissible in evidence in civil or criminal proceedings other than in relation to offences of providing false or misleading information. A warning, including the limited protection against self-incrimination, must be given before requiring a person to comply with a requirement to provide information.

#### RIGHT TO EDUCATION (SECTION 27A HRA)

The Bill amends the conditions and procedures permitting a student to be suspended, transferred, expelled from a particular school, or excluded from any government or Catholic system school. Such action can only be taken where behaviour of a student is unsafe or non-compliant, either because the behaviour is persistently or disruptively noncompliant in a way which reduces the safety or effectiveness of the learning environment at the school, or otherwise poses an unacceptable risk to safety and wellbeing of other students, staff or others involved in the school's operation. Any suspension, transfer, expulsion or exclusion generally also requires notice and an opportunity for the student and their parents to take part in the decision-making process, other options to be exhausted, and the action taken to be reasonable, proportionate and justifiable. Schools have to ensure that a suspended student is given materials and support to continue their education, and in some circumstances an opportunity to attend counselling. Any reasonable adjustments under the *Disability Standards for Education 2005* (Cwlth) (as made under the *Disability Discrimination Act 1992* (Cwlth)) also have to be reviewed and adjusted as needed.

**The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**



## RETROSPECTIVE OPERATION AND RETROSPECTIVE CRIMINAL LAWS (SECTION 25 HRA)

Section 3, Part 2 (dealing with suspension, transfer, expulsion and exclusion of students) and section 61 (which inserts provisions relating to the student movement register into the Education Regulations), are stated to commence on 1 July 2022, with the remaining provisions to commence on 1 January 2023. There is no explanation in the explanatory statement accompanying the Bill as to why the Bill will commence on a fixed date. The Committee is concerned that providing for commencement on a fixed date may result in the retrospective operation of the Bill if the Bill is passed by the Assembly and registered after that date. In particular, the Committee is concerned that strict liability offences may apply retrospectively if the Bill is registered after 1 January 2023, limiting the right against retrospective criminal laws provided by section 25 of the HRA. The Committee therefore requests further information on why fixed dates for commencement are provided for in the Bill and how the commencement of the Bill will be affected if it is not enacted prior to those dates.

**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)***

#### HENRY VIII CLAUSE

The Bill will insert a new Part 10.2 into the Act providing for transitional regulations. Regulations may prescribe transitional matters necessary or convenient to be prescribed because of the Bill's enactment. These regulations will, however, be subject to the Act or other Territory laws. The Bill will also allow regulations which modify the other transitional provisions in the new chapter 10 of the Act to be inserted by the Bill. The Bill will allow the Executive to make provision in regulations for anything that, in the Executive's opinion, is not adequately or appropriately dealt with in that chapter of the Bill. These regulations will have effect despite anything elsewhere in the Act or another territory law. This provision is therefore a form of Henry VIII clause, allowing regulations to be made which may have the effect of overriding other territory laws. The Committee notes that the proposed chapter 10, including the power to make transitional regulations, will expire 12 months after the commencement of the Bill, and under section 88 of the *Legislation Act 2001* regulations which amend chapter 10 will also cease to have effect upon expiry of that chapter. However, the expiry may arguably be directly amended through regulations.

The explanatory statement accompanying the Bill does not include reference to transitional regulations nor their potential scope. The Committee therefore requests a justification be provided on why regulations which may have effect despite anything elsewhere in the Act or another territory law, even if limited to transitional provisions, are needed, and what other options have been considered to ensure an effective transition to the new arrangements provided under the Bill. An amended explanatory statement should also be provided.

**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 insufficiently subject the exercise of legislative power to parliamentary scrutiny? – Committee Resolution of Appointment paragraph (10)(a)(v)***

#### DISPLACEMENT OF SECTION 47(6) OF THE LEGISLATION ACT 2001

Clause 38 of the Bill will substitute a new regulation-making power into the Act, allowing a regulation to apply, adopt or incorporate an instrument as in force from time to time. In doing so the Bill expands the current provision for regulations to incorporate Australian Standards as in force from time to time to any instrument so in force. The Bill will also amend the Regulations to include reference to various Australian Standards<sup>1</sup> as well as the National Principles for Child Safe Organisations. A note is included in the Bill for where to find a copy of the instrument in question, however the Committee notes that the Australian Standards referred to are currently not freely available.

The Bill will also continue to disapply subsection 47(6) of the *Legislation Act 2001*, with the result that any instrument incorporated in regulations, or any future amendment to that instrument, is not required to be notified on the Legislation Register.

The explanatory statement accompanying the Bill does not include any justification for why regulations should be permitted to incorporate instruments as amended from time to time, and why any such instruments should not be required to be notified on the legislation register. The Committee notes that incorporated Australian Standards subject to copyright protection may be made available for public inspection. The National Principles for Child Safe Organisations incorporated in the regulations is licensed under a Creative Commons Attribution 4.0 International Licence allowing it to be reproduced without cost.<sup>2</sup>

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

***Whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee—Committee Resolution of Appointment paragraphs (10)(a)(vi) and (10)(d)***

The Committee notes that while the explanatory statement accompanying the Bill provides an extensive and accessible overview of the Bill and human rights statement, the outline of the provisions in the Bill are unhelpfully brief. As already noted, there are a number of provisions in the Bill which raise concerns within the terms of reference for this Committee but which are not outlined in sufficient detail. Most of the substantive provisions of the Bill are included in new or substituted chapters inserted by clauses outlined only by brief description of the chapter as a whole. For example, the new chapter 2A which will insert over 30 sections into the Act is outlined as:

This clause inserts a new chapter relating to the suspension, transfer, expulsion and exclusion of a student from a government, Catholic system or independent school (where applicable), including the reasons these sections can be enacted and the process to be followed.

Other clauses are described only as omitting certain provisions, requiring the reader to refer to the Act to identify the relevance of the provision and infer the reason for the omission.

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<sup>1</sup> Namely AS 5725:2015 (Boarding Standard for Australian schools and residences); and AS 3745:2010 (Planning for emergencies in facilities).

<sup>2</sup> The principles are available for download at <https://childdsafe.humanrights.gov.au/national-principles/download-national-principles>.

The Committee recognises that in lengthy amendments the outlining of individual sections to be inserted can be a resource-intensive process. In this Bill, the explanation for many individual sections may be found in the more general description of the Bill provided earlier in the statement. However, the Committee expects an outline of the individual provisions to generally inform the Assembly, and the public generally, as to the reason for the inclusion of the provision in the Bill, including its substantive effect and its relationship with other provisions in the Bill and existing legislation. The Committee therefore requests the explanatory statement be amended to include a more substantive description of the provisions 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.**

## **FAIR TRADING AND OTHER JUSTICE LEGISLATION AMENDMENT BILL 2022**

This Bill amends various legislation in the Minister for Consumer Affairs portfolio and Special Minister of State's portfolio, primarily relate to consumer protection. The amendments include a new licencing framework for real estate agents and requiring gambling machine suppliers and sports bookmakers to be incorporated.

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

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

#### **RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)**

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

The Bill will amend the *Agents Act 2003* to extend the range of licencing and other requirements on real estate agents, introducing a specific land auctioneering licence, restricting the activities assistant agents can undertake and requiring existing licensees to complete additional training as a transition to the new arrangements. These changes may mean a person is excluded from working as a licenced agent or registered assistant agent or otherwise restrict the activities they can engage in under the new licencing framework, possibly limiting the right to work protected by section 27B of the HRA.

The amendments to the licencing framework will be enforced through the introduction of new strict liability offences relating to carrying on a business without the appropriate licence. Some of these offences include exceptions or defences where the defendant carries an evidential burden. These offences may therefore limit the presumption of innocence protected as one of the rights in criminal proceedings under section 22 of the HRA.

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. In particular, the explanatory statement recognises that several strict liability offences have a penalty of 100 penalty units, higher than the 50 penalty units generally accepted as proportionate under the ACT Guide to Framing Offences.<sup>3</sup> The explanatory statement describes the higher penalty as ensuring the penalty has a sufficient deterrent effect to prevent it being incorporated as a 'cost of doing business'. The explanatory statement also references the clear nature of the liability imposed

<sup>3</sup> The Guide to Framing Offences is available at <https://justice.act.gov.au/guide-framing-offences>.

and the limited range of persons who will be subject to the requirements. The Committee refers that statement to the Assembly.

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

#### RETROSPECTIVE CRIMINAL LAWS (SECTION 25 HRA)

The provisions in the Bill which will amend the Agents Act and the *Agents Regulation 2003* will commence on 1 July 2022. There is no explanation in the explanatory statement accompanying the Bill as to why these substantive provisions in the Bill should be taken to commence on a fixed date. The Committee is concerned that providing for commencement on a fixed date may result in the retrospective operation of the Bill if the Bill is passed by the Assembly and registered after Commencement. In particular, the Committee is concerned that strict liability offences may apply retrospectively if the Bill is registered after 1 July 2022, limiting the right against retrospective criminal laws provided by section 25 of the HRA.

The Committee notes that several strict liability offences include exceptions which will expire on a particular date, including 30 June 2023 (see proposed sections 75A) or 30 June 2024 (see proposed section 21). These exemptions relate to deeming provisions which depend on the status of a person on the commencement day. For example, proposed section 75A will prohibit a registered assistant property agent signing agency agreements. However, this will not apply to persons taken to be registered assistant property agents under proposed section 234. Proposed section 234 in turn refers to a person's status on the commencement day. The explanatory statement accompanying the Bill states that this will allow for a transition period to allow existing agents to continue their current activities or undertake additional training. However, it is not clear to the Committee why these requirements have been fixed to a specific date rather than a period of time following commencement.

The Committee therefore requests further information on why a fixed date for commencement is included in the Bill and how the commencement and operation of the Bill will be affected if it is not enacted prior to those dates.

**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)***

#### HENRY VIII CLAUSE

The Bill will insert a new section 238 into the *Agents Act 2003* providing for transitional regulations. Regulations may prescribe transitional matters necessary or convenient to be prescribed because of the Bill's 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 22 of the Act dealing with transitional provisions generally. The Bill will allow the Executive to make provision in regulations to anything that, in the Executive's opinion, is not adequately or appropriately dealt with in that chapter of the Bill. These regulations will have effect despite anything elsewhere in the Act or another territory law. This provision is therefore a form of Henry VIII clause, allowing regulations to be made which may have the effect of overriding other territory laws. The Committee notes that the proposed Part 22, including the power to make transitional regulations, will expire on 30 June 2025, and under section 88 of the *Legislation Act 2001* regulations which amend the proposed Part 22 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.

The explanatory statement accompanying the Bill includes reference to the power to make transitional regulations and their potential to override Territory laws 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.

The Committee is concerned that this explanation may be applied generally to transitional regulations of this scope and does not provide a justification for why they are needed in the context of this Bill. It therefore requests further information on why such a provision is considered necessary, particularly given the length of time before expiry of the transitional provisions, 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.**

***Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny? – Committee Resolution of Appointment paragraph (10)(a)(v)***

DISPLACEMENT OF SECTION 47(6) OF THE LEGISLATION ACT 2001

The Bill provides for the Commissioner for Fair Trading to declare, in a disallowable instrument, the qualifications and experience required for an agent or assistant property agent licence or renewal, or each class of property agent licence (clauses 15 and 36). Such a declaration may apply, adopt or incorporate a law of another jurisdiction or instrument as in force from time to time. However, subsections 47(5) and 47(6) of the *Legislation Act 2001* are expressly disappplied, so that any law or instrument need not be notified on the legislation register.

The explanatory statement accompanying the Bill states that:

The intention of this provision is to provide a mechanism for declaring the qualification and experience requirements of agents that supports the flexible modification and updating of these requirements while also maintaining an avenue for appropriate oversight and scrutiny by the Legislative Assembly.

The statement goes on to state that subsections 47(5) and 47(6) are expressly 'displaced here as those instruments are usually readily available'. The Committee is concerned that, while laws of another jurisdiction as defined in the Legislation Act may be readily available, that description may not apply to other instruments which may be incorporated. The Committee is also concerned that incorporation of changes from time to time without notification requirements may result in substantive changes to licencing and renewal requirements without sufficient, or indeed any, notice to those affected by the changes. The Committee therefore requests further information on why it is considered necessary to displace notification requirements for laws or instruments incorporated in these declarations.

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

## **RADIATION PROTECTION AMENDMENT BILL 2022**

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This Bill amends the *Radiation Protection Act 2006* and the *Radiation Protection Regulation 2007* to amend the licensing and regulation of radiation sources.

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

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

RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

RIGHT TO LIBERTY AND SECURITY (SECTION 18 HRA)

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 22 HRA)

The Bill will establish a public register of owners of, and persons licenced to deal with, regulated radiation sources. Applications to register a radiation source or for a licence to deal with radiation sources may include a range of personal information as prescribed by regulation or required by the Chief Health Officer, including a person's full name and address and any previous disciplinary action taken against them. Once registered, the register will include names, unique identifying numbers, terms and conditions, and any disciplinary action taken against the licensee or registered owner. The Chief Health Officer may make the information on the register available for public inspection if satisfied doing so is in the public interest. The Bill may therefore limit the protection of privacy provided by section 12 of the HRA.

The Bill will establish offences relating to the unauthorised communication of use of information disclosed or obtained while exercising a function under the Act. The maximum penalty for breach of these offences will include imprisonment for up to 6 months where a person is reckless about whether the use is protected, or up to 3 years where a person intends to endanger another person or damage property or the environment. By providing for a term of imprisonment the Bill may limit the right to liberty protected by section 18 of the HRA.

The Bill will also include three strict liability offences relating to failures to notify the Chief Health Officer of changes including changes to a licensee's or owner's name or address or disposal of a radiation source. By removing the fault element from these offences the Bill may therefore limit the presumption of innocence protected by section 22 of the HRA.

The explanatory statement accompanying the Bill recognises each of these potential rights 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.

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

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

***Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny? – Committee Resolution of Appointment paragraph (10)(a)(v)***

Under the Bill, any application to register a radiation source must include a radiation management plan about how to safely deal with a radiation source. It is a condition of registration that a radiation management plan is in place and at least one radiation safety officer is employed to minimise potential hazards, provide training, monitor safety and security and otherwise give effect to the plan. The Chief Health Officer may determine what qualifications are needed to be a radiation safety officer. Any such determination is a notifiable instrument, and may apply, adopt or incorporate a law of another jurisdiction or an instrument as in force from time to time.

The potential impact of a determination by the Chief Health Officer is not made clear in the Bill. The Committee is concerned that, by determining necessary qualifications for radiation safety officers, the Chief Health Officer will amend the requirements for all registered owners of radiation sources. Any new determination may lead to a breach of a condition of registration where a radiation safety officer does not hold the relevant qualification. A determination which changes the required qualifications may in turn require existing radiation management plans to be amended.

Given the potential substantive effects of a determination by the Chief Health Officer, the Committee is concerned that a determination by the Chief Health Officer is only a notifiable instrument and not subject to scrutiny by the Assembly or this Committee. Any determination setting out qualifications of radiation safety officers may also incorporate a law of another jurisdiction or an instrument as in force from time to time. Therefore, the required qualifications will change along with any change to an incorporated law or instrument. The explanatory statement accompanying the Bill does not provide a justification for why determinations are not disallowable instruments, nor why it is considered necessary to permit the incorporation of laws or instruments as in force from time to time. The Committee requests this information be provided, and consideration be given to amending the explanatory statement.

As a determination by the Chief Health Officer is a statutory instrument, any incorporated law or instrument or future amendment is taken to be a notifiable instrument (subsection 47(6) of the *Legislation Act 2001*) and hence must itself be notified on the legislation register. Under sections 177 and 178 of the Radiation Protection Act, any incorporated instrument or amendment must also be accompanied by an incorporated document notice prepared by the director-general which sets out details of any incorporated instrument or amendment, date of effect, and how to access the instrument or amendment and obtain copies. Neither the Bill nor the explanatory statement references the effect of section 47(6) of the Legislation Act or section 177 and 178 of the Radiation Protection Act. The Committee therefore requests consideration be given to amending the Bill and explanatory statement to note the effects of these provisions.

**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

### PUBLIC HEALTH AMENDMENT BILL 2021 (No 2)

On 30 March 2022, the Committee received proposed government amendments to the Public Health Amendment Bill 2021 (No 2) and a supplementary explanatory statement. The amendments include:

- Technical amendments to the definition of vaccination direction;

- Reducing the duration of COVID-19 management declarations and extensions from 6 months to 90 days and the period in which the Chief Health Officer must advise the executive on the continuing health risks from every 60 days to every 30 days;
- Requiring the Chief Health Officer to provide a copy of a segregation or isolation direction issued to an individual to the public advocate;
- Providing for decisions not to exempt a person from a vaccination direction or to impose conditions on an exemption to be subject to internal review; and
- Clarify that the Bill is not intended to interfere with the exercise of a function by an entity that involves visiting a place of detention under another territory law. However, a person visiting a place of detention is required to comply with any direction in relation to the place or the person visiting the place of detention.

On Friday 22 April 2022 at 5.08 pm the Committee received an updated draft of proposed amendments. This draft added, in addition to the amendments outlined above, two additional substantive amendments:

- Specifying the Director-General as the relevant decision-maker when deciding whether or not to exempt a person from a vaccination direction; and
- Allowing the Minister, in the case of a Ministerial direction, or Chief Health Officer, in the case of a Chief Health Officer direction, to exempt a class of people from complying with the direction. A standing exemption must comply with the requirements in the relevant exemption guidelines, may be subject to conditions, and is a notifiable instrument.

#### RIGHT TO PRIVACY AND REPUTATION (SECTION 12 HRA)

The proposed amendments include requiring the Chief Health Officer, when they issue a direction to a particular individual requiring them to segregate or isolate, to provide a copy of the direction to the public advocate. As the direction may include the personal information of the individual concerned, or other individuals (for example, who have been in close contact with the named individual), this proposed amendment may limit the protection of privacy provided by section 12 of the HRA. The supplementary explanatory statement included with the proposed amendments includes recognition of this potential limit and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly and, subject to the comments below in relation to this Bill in government responses, has no further comment on the proposed amendments.

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

## GOVERNMENT RESPONSES—COMMENT

### PUBLIC HEALTH AMENDMENT BILL 2021 (No 2)

In Scrutiny Report 12, the Committee raised concerns in relation to the *Public Health Amendment Bill 2021 (No 2)*. In particular, the Committee was concerned about the use of notifiable instruments for Ministerial and Chief Health Officer directions and exemption guidelines while allowing disallowance of vaccination directions. The Committee noted the statement in the explanatory statement accompanying the Bill that Ministerial and Chief Health Officer Directions were not considered suitable to be disallowable instruments as this may undermine the effectiveness of



public health measures while a COVID-19 management declaration is in place. The Committee commented:

The Committee welcomes the various requirements in the Bill for consultation and scrutiny of human rights considerations in relation to Ministerial and Chief Health Officer directions. However, the Committee is concerned about the limited ability of the Assembly to disallow such directions. Similarly, guidelines relating to exemptions, particularly in relation to vaccination directions, as notifiable instruments, are not subject to extended forms of scrutiny, despite the importance such exemptions may play in ameliorating the significant human rights effects of the directions.

The Committee therefore requests further information on why Ministerial and Chief Health Officer directions and exemption guidelines for all forms of directions are not disallowable instruments, and whether additional forms of consultation, consideration by the Assembly, and public scrutiny of exemption guidelines can be provided for in the Bill

The Committee received a response from the Minister on 21 March 2022. The Minister, after pointing out the various consultation and scrutiny of human rights considerations included in the Bill, stated:

The COVID-19 Management Declaration is a disallowable instrument, and while it remains in force, it would be concerning for a Ministerial or Chief Health Officer Direction made under the declaration to be disallowed. The potential for disallowance of these directions, which are implemented to reduce the serious risk presented by COVID-19, has the capacity to be inconsistent with the objectives of the *Public Health Act 1997*.

The Minister then indicated that the government would be proposing amendments to the Bill to reflect the Government's response to the recommendations of the Standing Committee on Health and Community Wellbeing Report on its inquiry into the Bill. The Committee has received a copy of those proposed amendments (as discussed above under Proposed Amendments). The amendments do not substantively address this issue.

The Standing Committee on Health and Community Wellbeing Report on its inquiry into the Bill, also commented on the use of notifiable instruments:

The Committee recognises the time-critical nature of public health directions in a pandemic situation. However, making a notifiable direction a disallowable instrument would not hold up public health measures, but would give the Assembly the opportunity to scrutinise it when it next sits.

It is the Committee's view that making a notifiable direction a disallowable instrument would provide an appropriate balance between public health outcomes and scrutiny of the Executive's use of these significant powers.

The Standing Committee recommended that the COVID-19 declaration and other notifiable directions be disallowable instruments (recommendation 2).

The government, in its response to the Standing Committee report,<sup>4</sup> stated that the government “did not support public health directions, whether made by the Minister for Health or Chief Health Officer, to be subject to disallowance”. The response continued:

The Bill contains several safeguards to ensure scrutiny of the public health directions, including requirements for the Chief Health Officer to provide formal advice, consultation requirements (including with the Human Rights Commission) and regular review requirements and public notification.

The Bill also provides that the relevant standing committee must report to the Assembly about human rights issues raised by Ministerial and Chief Health Officer Directions in section 118ZQ(1).

The Committee remains concerned with the limited ability of the Assembly to disallow Ministerial and Chief Health Officer directions and exemption guidelines generally. It is not clear to the Committee why the potential for disallowance by the Assembly would raise concerns over the issue of a COVID-19 management declaration or be ‘inconsistent with the objectives’ of the Public Health Act as stated by the Minister in her response to the Committee. The Committee reiterates its view that Ministerial and Chief Health Officer directions are not sufficiently distinct from vaccination directions as to warrant a different approach to disallowance by the Assembly. The Committee also notes that the Minister’s response does not directly consider the disallowance of guidelines about exemptions for vaccination directions, a concern which is heightened given the proposed amendments require applications for exemptions from vaccination directions and decisions on internal review to conform with the vaccination exemption guidelines (see proposed amendment inserting section 118ZJB), and requiring standing exemptions to be subject to exemption guidelines (see proposed amendment inserting section 118ZCA).

The Bill delegates substantial legislative power to the Minister and Chief Health Officer to issue directions where necessary to prevent or alleviate the risk presented by COVID-19. These directions may have significant human rights limiting effects. Exemption guidelines similarly may limit the ability of individuals to gain exemptions from the various COVID-19 management directions which may otherwise ameliorate those human rights impacts. Disallowance is crucial to the Assembly’s ability to ensure the measures taken remain proportionate to the serious risks to public health posed by the ongoing pandemic, and to legitimate the significant delegation of legislative power presented by the Bill. In the absence of further justification for why disallowance of Ministerial and Chief Minister directions and all exemption guidelines should not be disallowable the Committee considers that the Bill insufficiently subjects the exercise of legislative power to parliamentary scrutiny under the Committee’s Resolution of Appointment paragraph (10)(a)(v).

**The Committee remains concerned about this approach and refers this matter to the Assembly for its consideration.**

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<sup>4</sup> Government Response to the Standing Committee on Health and Community Wellbeing – Report 4 – Inquiry into the Public Health Amendment Bill 2021 (No 2), 22 March 2022.

# SUBORDINATE LEGISLATION

## DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- Disallowable Instrument DI2022-13 being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2022 (No 2) made under section 12 of the *Road Transport (General) Act 1999* determines that section 205 of the *Road Transport (Road Rules) Regulation 2017* does not apply to a specified area during the 2022 Australian Football League fixtures at Manuka Oval.
- Disallowable Instrument DI2022-15 being the Board of Senior Secondary Studies Appointment 2022 (No 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with business and industry representative organisations.
- Disallowable Instrument DI2022-16 being the Board of Senior Secondary Studies Appointment 2022 (No 2) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with the Catholic Education Commission.
- Disallowable Instrument DI2022-17 being the Board of Senior Secondary Studies Appointment 2022 (No 3) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior Secondary Studies, after consultation with Unions ACT.
- Disallowable Instrument DI2022-18 being the Food (Regulated events) Declaration 2022 (No 1) made under section 91 of the *Food Act 2001* revokes DI2015-286 and declares specified events to be regulated events for the purposes of the Act.
- Disallowable Instrument DI2022-19 being the Public Health (Reporting of Notifiable Conditions) Code of Practice 2022 made under section 133 of the *Public Health Act 1997* revokes DI2020-230 and determines the Reporting of Notifiable Conditions Code of Practice 2022.
- Disallowable Instrument DI2022-20 being the Public Health (Notifiable Conditions) Determination 2022 (No 1) made under section 100 of the *Public Health Act 1997* revokes DI2020-229 and determines specified diseases as notifiable conditions.
- Disallowable Instrument DI2022-24 being the Veterinary Practice (Board) Appointment 2022 (No 1) made under section 93 of the *Veterinary Practice Act 2018* appoints specified persons as members of the Veterinary Practitioners Board.
- Disallowable Instrument DI2022-25 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2022 (No 4) made under section 79E of the *Long Service Leave (Portable Schemes) Act 2009* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Long Service Leave Governing Board, representing employee organisations.
- Disallowable Instrument DI2022-26 being the Veterinary Practice (Board) Appointment 2022 (No 2) made under section 93 of the *Veterinary Practice Act 2018* appoints a specified person as a member of the Veterinary Practitioners Board.
- Disallowable Instrument DI2022-27 being the Race and Sports Bookmaking (Sports

**Bookmaking Venues) Determination 2022 (No 1)** made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* determines the area within one metre of any selling terminal, owned and operated by Tabcorp ACT Pty Ltd and located within a specified area within the Thoroughbred Park premises, as a sports bookmaking venue.

- **Disallowable Instrument DI2022-28** being the **Cemeteries and Crematoria (Determination of Trustee) Determination 2022 (No 1)** made under section 105 of the *Cemeteries and Crematoria Act 2020* determines that the Public Trustee and Guardian is the trustee for an authority perpetual care trust.

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-12** being the **Senior Practitioner (Disability Support Providers) Implementation Guideline 2022 (No 1)** made under section 27 of the *Senior Practitioner Act 2018* makes the **Implementation Guideline for Disability Support Providers**.

This instrument, made under section 27 of the *Senior Practitioner Act 2018*, makes an “implementation guideline” for Disability Support Providers. The explanatory statement for the instrument states:

The *Senior Practitioner Act 2018* (‘the Act’) provides a formal framework for the reduction and elimination of restrictive practices by service providers in the ACT.

A ‘restrictive practice’ is defined under Section 7(1) of the Act to mean a practice that is used to restrict the rights or freedom of movement of a person for the primary purpose of protecting the person or others from harm. It includes:

- chemical restraint;
- environmental restraint;
- mechanical restraint;
- physical restraint;
- seclusion; or
- verbal directions, or gestural conduct, of a coercive nature.

The Act enshrines the principle that providers should only use restrictive practices in very limited circumstances – as a last resort, for the shortest period possible in the circumstances, and in the least restrictive way to prevent harm to the person or others.

The explanatory statement goes on to state:

The ACT was the first State or Territory in Australia to adopt a legislative charter of human rights in the Human Rights Act 2004 and is now one of three Australian jurisdictions with legislation that imposes binding human rights obligations on public authorities. Any limits on human rights will only be justified where there is a lawful basis for the limitation, and it is the least restrictive way of achieving a legitimate purpose, such as protecting the safety and rights of others.

While the Senior Practitioner Act establishes a legislative scheme for regulating the use of restrictive practices, it coexists with existing obligations or legislative schemes established under other Acts.

It goes on:

The legislative framework aligns with international human rights obligations articulated in the United Nations Convention on the Rights of the Child (1990), the United Nations Convention on the Rights of Persons with Disabilities (2006), and the Australian NDIS providers' obligations under the National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector.

The Committee notes that Attachment C of the instrument itself identifies provisions of the *Human Rights Act 2004* that are "relevant legislation" for the instrument, as well as identifying the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child 1990 as "relevant legislation".

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

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

#### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-14 being the Road Transport (General) Application of Road Transport Legislation Declaration 2022 (No 2) 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, participating in a special stage of the LCCC Blue Range Rally Sprint.**
- **Disallowable Instrument DI2022-23 being the Road Transport (General) Application of Road Transport Legislation Declaration 2022 (No 3) 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, participating in a special stage of the RSEA ARC Pre-Season Launch 2022.**

The instruments mentioned above are 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 first instrument declares that the *Motor Accident Injuries Act 2019* does not apply in relation to the Blue Range Rally Sprint, scheduled to be held on 5 March 2022. The second instrument makes a similar declaration, in relation to the RSEA ARC Pre-Season Launch, scheduled to be held on 8 March 2022.

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

#### **Human rights implications**

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

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

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

- a) the nature of the right affected

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

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

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

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

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

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

#### HUMAN RIGHTS ISSUES / MINOR DRAFTING ISSUE

- **Disallowable Instrument DI2022-21 being the Road Transport (General) Concession Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-83 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.**

This instrument, made under section 96 of the *Road Transport (General) Act 1999* revokes an earlier instrument DI2021-83 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing. The explanatory statement for the instrument states that the instrument "has the effect of determining the method to be used to work out a fee payable by persons eligible for a concession in relation to fees payable for vehicle registration and driver licensing". The explanatory statement goes on to identify the changes made by the instrument to the earlier instrument.

The Committee notes that the explanatory statement states that "[t]here are no adverse human rights or climate change implications arising from this instrument."

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

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

The Committee notes that the explanatory statement also states:

The preference of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) is that Instruments or Explanatory Statements identify the amount of the old and new fee, any percentage increase and also the reason for any increase in the Instrument or the Explanatory Statement.

While this statement is correct, the Committee notes that neither the instrument itself nor the explanatory statement actually identifies or discusses fees increases. It appears that the statement

was included in error.

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

#### COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2022-22 being the Motor Accident Injuries (Quality of Life Benefit) Guidelines 2022 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2019-246 and DI2020-94 and makes the Quality of Life Benefit Guidelines.**

This instrument, made under section 487 of the *Motor Injuries Act 2019*, makes “Quality of Life Benefit” guidelines, for that Act. The explanatory statement for the instrument states:

The guidelines provide guidance to insurers about their obligations to provide information and support to potential applicants for quality of life benefits and persons eligible to make a motor accident claim, and to arrange whole person impairment assessment.

The instrument revokes 2 earlier instruments. The Committee notes that the explanatory statement states:

The 2019 guidelines were made before the [Motor Accident Injuries] Scheme commenced. The updates are intended to ensure operations of the scheme are optimal. The 2019 guidelines will be revoked on the commencement of the new guidelines.

The instrument also revokes guidelines made in connection with the COVID-19 pandemic in 2020. Though the Public Health Emergency declaration remains in effect, four MAI guidelines have been updated to accommodate emergency provisions and thus a separate guideline specifically for COVID-19 is no longer required.

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

#### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-31 being the Taxation Administration (Off the Plan Unit Duty Exemption Scheme) Determination 2022 made under section 137E of the *Taxation Administration Act 1999* revokes DI2021-173 and determines an exemption scheme and, for the purposes of the scheme, determines the type of eligible property, the eligibility requirements, and the concession amounts.**

This instrument, made under section 137E of the *Taxation Administration Act 1999*, determines an exemption scheme, applicable to duty payable to off the plan units. The explanatory statement for the instrument states:

The Determination continues to provide for the operation of a duty concession for certain off the plan units but with an increased property value threshold. From 1 April 2022, off the plan residential unit purchases (including apartments and townhouses) valued at less than or equal to \$600,000 are exempt from duty. This compares to a threshold value of \$500,000 under the previous determination.

The Committee notes that section 9 of the instrument provides:

#### **9 Human Rights Act 2004**

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

The explanatory statement for the instrument also states:

**Human Rights Act 2004**

This instrument provides an exemption to duty and does not limit, and is consistent with, human rights. The exemption promotes affordable housing and in doing so the freedom to choose a residence (section 13 of the *Human Rights Act 2004*).

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

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

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

**SUBORDINATE LAWS—NO COMMENT**

The Committee has examined the following subordinate law and offers no comments on it:

- **Subordinate Law SL2022-2 being the Court Procedures Amendment Rules 2022 (No 1) made under section 7 of the *Court Procedures Act 2004* makes amendments to the Court Procedures Rules after a consultative review by the Courts and the Joint Rules Advisory Committee.**

**SUBORDINATE LAWS—COMMENT**

The Committee has examined the following subordinate law and offers these comments on it:

**HUMAN RIGHTS ISSUES**

- **Subordinate Law SL2022-3 being the Planning and Development Amendment Regulation 2022 (No 1) made under the *Planning and Development Act 2007* introduces new sections 19A and 25AA to prescribe amounts of expected annual operational greenhouse gas emissions for the purposes of the Act.**

This subordinate law amends the *Planning and Development Regulation 2008*. The explanatory statement for the subordinate law states:

The [subordinate law] amends chapter 3 of the *Planning and Development Regulation 2008* (the **regulation**). Chapter 3 of the regulation provides for development approvals under the *Planning and Development Act 2007* (the **Act**).

In 2020, a range of changes were made to the Act (the *Planning Legislation Amendment Act 2020* - the **amendment Act**) in response to a private member's bill.

Among the changes enacted by the amendment Act included the need for expected annual amount of operational greenhouse gas emissions to be disclosed in an expected greenhouse gas emissions statement as part of a development application (**DA**), where the emissions exceed an amount prescribed by regulation.

Through amendments to schedule 4, part 4.3 of the Act, the amendment Act also established the requirement for development proposals to require an environmental impact statement (**EIS**) where the expected annual amount of operational greenhouse gas emissions exceeds an amount prescribed by regulation.

The amendment regulation introduces sections 19A and 25AA to prescribe these amounts.



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

**CONSISTENCY WITH HUMAN RIGHTS**

As above, the amendment Act was subject to detailed consideration through the parliamentary process, including scrutiny by the Standing Committee on Justice and Community Safety for compatibility with the *Human Rights Act 2004*. There are no human rights impacts related to the amendment regulation.

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

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

## RESPONSES

### PRIVATE MEMBERS RESPONSE

- Ms Clay, dated 7 April 2022, in relation to comments made in Scrutiny Report 14 concerning the Road Transport Legislation Amendment Bill 2021.

The Committee wishes to thank Ms Clay for her helpful response.



Peter Cain MLA  
Chair

27 April 2022

## OUTSTANDING RESPONSES

### BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021
- **Report 7, dated 4 May 2021**
  - Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) [response required prior to the Bill being debated]
- **Report 12, dated 1 February 2022**
  - Electoral Amendment Bill 2021
  - Financial Management Amendment Bill 2021 (No 2)
- **Report 13, dated 15 March 2022**
  - Crimes (Consent) Amendment Bill 2022
- **Report 14, dated 29 March 2022**
  - Disallowable Instrument DI2022-1—Court Procedures (Fees) Determination 2022.