

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

SCRUTINY REPORT 17

6 JUNE 2022



# THE COMMITTEE

## COMMITTEE MEMBERSHIP

Mr Peter Cain MLA (Chair)  
 Dr Marisa Paterson MLA (Deputy Chair)  
 Mr Andrew Braddock MLA

## SECRETARIAT

Ms Janice Rafferty (Acting Secretary)  
 Ms Sophie Milne (Acting Assistant Secretary)  
 Mr Stephen Argument (Legal Adviser—Subordinate Legislation)  
 Mr Daniel Stewart (Legal Adviser—Bills)

## CONTACT INFORMATION

Telephone	02 6205 0171
Facsimile	02 6205 3109
Post	GPO Box 1020, CANBERRA ACT 2601
Email	<a href="mailto:scrutiny@parliament.act.gov.au">scrutiny@parliament.act.gov.au</a>
Website	<a href="http://www.parliament.act.gov.au">www.parliament.act.gov.au</a>

## ROLE OF COMMITTEE

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

## RESOLUTION OF APPOINTMENT

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

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## BILLS – PROPOSED AMENDMENTS

### RADIATION PROTECTION AMENDMENT BILL 2022

The Government has proposed amendments to the *Radiation Protection Amendment Bill 2022* and provided a supplementary explanatory statement to the Committee. The proposed amendments will amend section 11 of the *Public Health Act 1997* to enable the Chief Health Officer to delegate any of their functions under the *Radiation Protection Act 2006* to any person. The Committee has no further comment on this proposed amendment.

### EDUCATION AMENDMENT BILL 2022

The Government has provided draft proposed amendments to the *Education Amendment Bill 2022* and provided a supplementary explanatory statement. These proposed amendments will shift commencement of the Bill from the current proposed commencement date of 1 July 2022 to 20 December 2022. Provisions in the Bill relating to unsafe or non-compliant behaviour will be amended to only apply where the behaviour reduces the safety or effectiveness of the learning environment at the school. A definition of reasonable alternatives is also proposed, with amendments to various provisions relating to suspension, transfers, expulsions and exclusions to refer to this definition or otherwise clarify their operation.

The proposed amendments will also require any concerns raised with the registrar about a registered school's compliance with the Act to be reported by the registrar to the registration standards advisory board. Information identifying the person who raised the concern or would allow the identity of that person to be worked out can only be included with the person's consent.

Proposed amendments to the transition provisions in the Bill will prevent any action from being taken against a school for failing to comply with a condition on registration after commencement of the Bill. Requirements to be added to the *Education Regulation 2005* for schools to consult about the operation of school policies and procedures will also be amended to only require consultation on policies relating to enrolment, complaints and behaviour management.

The impact of these proposed amendments on the protection of privacy provided by section 12 of the HRA and the right to education protected by section 27A of the HRA is recognised in the supplementary explanatory statement provided with the proposed amendments and a justification provided using the framework set out in section 28 of the HRA.

**The Committee refers that supplementary statement to the Assembly and, subject to the comments below in relation to government responses, makes no further comment about the proposed amendments.**

## GOVERNMENT RESPONSES—COMMENT

### EDUCATION AMENDMENT BILL 2022

In its *Scrutiny Report 15*, dated 27 April 2022, the Committee raised various concerns about the *Education Amendment Bill 2022*. The Minister provided a response to the Committee in a letter dated 19 May 2022 along with draft proposed amendments to the Bill and a draft supplementary explanatory statement. The Committee thanks the Minister for the response and notes in particular

the amendments to the Bill and explanatory statement which respond to the Committee's comments relating to the commencement of the Bill and providing a more detailed outline of the clauses in the Bill.

In its report, the Committee raised concerns about transitional provisions in the Bill which will enable the making of regulations which may modify the Act – a form of Henry VIII clause. The Bill will insert a new Chapter 10 in the Act with transitional provisions relating to the enactment of the Bill. These include a is will include proposed subsection 312(2) which will authorise regulations which modify chapter 10 of the Act, including in relation to another territory law, to make provision in relation to anything that, in the executive's opinion, is not, or is not adequately or appropriately, dealt with in this chapter. Under subsection 312(3), such a regulation has effect despite anything elsewhere in the Act or another territory law. The Committee asked for a justification for why such a provision had been included in the Bill.

In her letter to the Committee, the Minister states:

[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.

This statement is also included in the draft supplementary explanatory statement. The Committee is concerned that this statement may be applicable to almost any Bill presented to the Assembly. While the Committee recognises that the Bill provides for extensive amendments to the Act which may have unintended or unforeseen consequences, the nature of these amendments only broadens the scope for regulations of a transitional nature, including regulations which may have significant impacts on human rights and liberties. While the Bill provides for the expiry of transitional provisions in Chapter 10 within 12 months of the commencement of the chapter, this provision is included within Chapter 10 and may itself be modified by regulations. The Committee therefore remains concerned about the potential breadth of the Henry VIII clause and requests further justification from the Minister for why a more restrictive transitional regulation-making power has not been included in the Bill.

In its report, the Committee also raised concerns about provisions allowing regulations to apply, adopt or incorporate any instrument as in force from time to time and the displacement of subsection 47(6) of the *Legislation Act 2001* as it applies to such instruments. This will have the effect of expanding the range of instruments that can be incorporated without having to be notified on the legislation register. The Committee asked for a 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.

In response, the Minister has provided a justification for the incorporation and lack of notification of particular instruments (Australian Standard AS 5725:2015 – *Boarding Standard for Australian schools and residences* and the *National Principles for Child Safe Organisations* as endorsed by members of the Council of Australian Governments). The Minister has also described how these instruments may be obtained by those likely to be affected by them, including by being provided free of charge to prospective schools upon request or freely available on the internet. This information was also included in the draft supplementary explanatory statement.

However, the Committee is concerned that, while Australian Standards may not be able to be notified on the legislation register for copyright reasons, the National Principles are not similarly restricted. Even where particular instruments are currently freely available on the internet, their



availability may be restricted in the future. The version of an instrument applicable at any particular point of time and notification of amendments may also not be readily available. The Committee therefore considers that even freely available instruments should be notified on the legislation register unless there are other legitimate reasons preventing their exclusion.

The Committee is also concerned that the Bill will provide for a general displacement of section 47(6) rather than allowing regulations to provide for displacement where that is considered necessary. Where it is considered suitable to displace the requirement of subsection 47(6) in relation to a particular instrument, that can be provided for in an amendment to the regulations and subject to scrutiny by this Committee and the Assembly.

The Committee notes, however, that the Minister has indicated passing of the Bill is considered urgent to ensure schools have sufficient time to implement the changes for the 2023 school year. In the absence of an amendment to the Bill, the Committee requests an assurance that any incorporation of particular instruments in the future will be accompanied by a justification in the accompanying explanatory statement for both the incorporation of the instrument as in force from time to time and why the instrument and any amendments should not be notified on the legislation register.

**The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.**

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2022—38 being the University of Canberra Council Appointment 2022 (No 1) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**
- **Disallowable Instrument DI2022-40 being the Tobacco and Other Smoking Products (Fees) Determination 2022 (No 1) made under section 70 of the *Tobacco and Other Smoking Products Act 1927* revokes DI2021-263 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2022-41 being the ACT Teacher Quality Institute Board Appointment 2022 (No 1) made under sections 14 and 15 of the and sections 78 and 79 of the *ACT Teacher Quality Institute Act 2010* and *Financial Management Act 1996* appoints a specified person as a member of the Board of the ACT Teacher Quality Institute.**
- **Disallowable Instrument DI2022-42 being the Official Visitor (Children and Young People) Appointment 2022 (No 1) made under paragraph 10(1)(a) of the *Official Visitor Act 2012* appoints a specified person as official visitor for the purposes of the *Children and Young People Act 2008*.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-39 being the Utilities (Greenpower obligations) Exemption 2022 made under section 75G of the *Utilities Act 2000* exempts National Energy Retail Law (NERL) retailers operation within the ACT from having to comply with section 75E (1) (a) of the Utilities Act 2000.**

This instrument, made under section 75G of the *Utilities Act 2000*, exempts National Energy Retail Law (NERL) retailers operating within the ACT from having to comply with paragraph 75E(1)(a) of the Utilities Act. The latter provision requires a NERL retailer to “first offer a greenpower product to a person who proposes to purchase electricity for premises from the retailer”. A “greenpower product” is defined in subsection 75E(4) of the Utilities Act, by reference to the National GreenPower Accreditation Program: Program Rules.

The explanatory statement for the instrument states:

Under section 75E(1)(a) (Greenpower Obligations – general) of the *Utilities Act 2000* (the **Act**) retailers are required to first offer a Greenpower product to a prospective customer prior to any other electricity products.

This provision was made prior to the ACT Government achieving 100 per cent renewable electricity in 2020, to which an average Canberra household made, on average, \$300 contribution for the 2021-22 year.

The purpose of the disallowable instrument is to make an exemption under section 75G of the Act from compliance with section 75E(1)(a) of the Act if the Minister is satisfied on reasonable grounds that the exemption is in the public interest.

This disallowable instrument requires NERL electricity retailers to continue to offer Greenpower products to customers but not as a first offer.

GreenPower products purchased by ACT consumers are not counted towards the ACT’s 100 per cent renewable electricity target. GreenPower products do, however, contribute to reducing Australia’s overall greenhouse gas emissions and therefore still provide benefits to decarbonising Australia’s energy system.

The proposed change is reflective of the ACT electricity consumers’ contribution to the Territory’s 100 per cent renewable electricity target and avoid any perception of duplicated payment for renewable electricity in the ACT.

The proposed change will also give consumers greater clarity about the difference between their voluntary purchase of Greenpower product and their contribution to the ACT’s 100 per cent renewable electricity target.

ACT consumers will continue to have a choice to purchase Greenpower products which add to the renewable energy generation to the grid.

The Committee notes that, while the explanatory statement does not expressly state that the Minister is satisfied, on reasonable grounds, that the exemption is in the public interest, as required by subsection 75G(1), the discussion above would tend to indicate that this is the case.

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

### Human rights

There are no human rights implications arising from this instrument. The instrument does not engage any rights under the *Human Rights Act 2004*.

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

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

### FEES DETERMINATION/COVID-19-RELATED INSTRUMENT

- **Disallowable Instrument DI2022-43 being the Veterinary Practice (Fees) Determination 2022 (No 1) made under section 144 of the *Veterinary Practice Act 2018* determines fees payable for the purposes of the Act and revokes DI2021-53.**

This instrument determines fees, under section 144 of the *Veterinary Practice Act 2018*. The Committee notes, with approval, that the instrument, and its explanatory statement, sets out the “old” and “new” fees, the magnitude of the fees increases and the reasons for the increases. The Committee notes that some of the fees increases are related to the COVID-19 pandemic. The explanatory statement for the instrument states:

Fees relating to premises registration have been increased by 10%, with the main reason for the increase being to recover associated premises inspection costs.

Fees relating to specialist practitioner registration have been maintained at 2021-22 levels to fall in line with other jurisdiction fees.

All other fees have been increased by 5%. The main reason for the increase is to continue to make up for the freeze to fees in 2020-21 which were maintained at 2019-20 levels due to the impact of COVID-19.

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

### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-44 being the Electronic Conveyancing National Law (ACT) Operating Requirements 2022 made under sections 22 and 25 of the *Electronic Conveyancing National Law (ACT)* revokes DI2021-226 and determines the ACT Operating Requirements for Electronic Conveyancing.**

This instrument determines Operating Requirements for Electronic Conveyancing, for the ACT, for sections 22 and 25 of the *Electronic Conveyancing National Law (ACT)*. Section 22 of that Act allows the Registrar to define “operating requirements” for an Electronic Lodgment Network (ELN) or an Electronic Lodgment Network Operator (ELNO). Section 25 makes a determination a disallowable instrument and also requires that a determination be notified, at least 20 business days before the requirement commences.

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

### Human Rights

Section 12 of the *Human Rights Act 2004* (HRA) provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked. The proposed disallowable instrument introduces changes to the Operating Requirements of the ELN by

ELNOs. As the ELN contains individual's personal information for the purpose of lodging land title registry instruments and other documents, the changes engage the right to privacy under section 12.

The proposed change to the Operating Requirements is minor and relate solely to the fee setting capacity of ELNOs, and as such neither limit nor positively engage these rights.

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

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

#### FEES DETERMINATIONS/HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-45 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-64 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2022-46 being the Road Transport (General) Driver Licence and Related Fees Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-63 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2022-47 being the Road Transport (General) Numberplate Fees Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-62 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2022-48 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-61 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2022-49 being the Road Transport (General) Fees for Publications Determination 2022 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2021-60 and determines fees payable for various kinds of road transport publications.**

Each of the instruments mentioned above determines fees, for various provisions of the road transport legislation, under section 96 of the *Road Transport (General) Act 1999*. The Committee notes, with approval, that, in each case, the instrument, and its explanatory statement, sets out the "old" and "new" fees, the magnitude of the fees increases and the reasons for the increases.

The Committee also notes that, for each instrument, the explanatory statement states that "there are no 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 statements for the instruments mentioned above.**

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

#### HUMAN RIGHTS ISSUES

- **Disallowable Instrument DI2022-50 being the Public Places Names (Kenny) Determination 2022 made under section 3 of the *Public Place Names Act 1989* determines the name of a specified road in the Division of Kenny.**

- **Disallowable Instrument DI2022-51 being the Public Place Names (Taylor) Determination 2022 made under section 3 of the *Public Place Names Act 1989* determines the name of one park in the Division of Taylor.**

The instruments mentioned above, made under section 3 of the *Public Place Names Act 1989*, determine place names in the Divisions of Kenny and Taylor, respectively. The Committee notes that the explanatory statement for the first instrument mentioned above contains a discussion of human rights issues:

#### **Human Rights**

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

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

The explanatory statement for the second instrument mentioned above 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.**

#### **REVOCATION OF INSTRUMENT**

- **Disallowable Instrument DI2022-52 being the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines Revocation 2022 made under section 23F of the *Official Visitor Act 2012* revokes DI2019-147.**

The Committee notes that the sole purpose of this instrument is to revoke an earlier instrument the Official Visitor (Children and Young People Services) Visit and Complaint Guidelines 2019 (No 1) (DI2019-147). The explanatory statement for the instrument states:

Section 23F of the *Official Visitor Act 2012* (the Act) provides that the Minister may, after consulting the operational Minister for a visitable place, make guidelines about a range of matters including visits by an official visitor for the visitable place, and the inspection of records relating to entitled people at a visitable place by an official place.

The *Official Visitors Guidelines 2020* consolidated and replaced previous guidelines which regulated official visitors in particular operational areas. The *Official Visitor (Children and Young People) Visit and Complaint Guidelines 2019 (No 1)* were inadvertently not revoked at the time the new, consolidated guidelines came into force.

This instrument corrects that oversight by revoking the *Official Visitor (Children and Young People) Visit and Complaint Guidelines 2019 (No 1)*. This fulfils the intent of consolidating the *Official Visitor Guidelines* to regulate official visitors to all operational areas, including visitable places under the *Children and Young People Act 2008*.

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

## SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2022-6 being the Court Procedures Amendment Rules 2022 (No 2), 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, requiring leave of the Court to be obtained before subpoenas for an appellate proceeding are issued.**

## SUBORDINATE LAWS—COMMENT

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

### HUMAN RIGHTS ISSUES

- **Subordinate Law SL2022-5 being the *Confiscation of Criminal Assets Amendment Regulation 2022 (No 1)*, made under the *Confiscation of Criminal Assets Act 2003*, amends the *Confiscation of Criminal Assets Regulation 2003*, to make the laws of various jurisdictions “corresponding laws” for the confiscation of criminal assets scheme provided for by the Act.**

This subordinate law amends the *Confiscation of Criminal Assets Regulation 2003*, to make various provisions of various NSW, NT, Queensland, South Australian, Tasmanian and Western Australian laws “corresponding laws”, for the purposes of the *Confiscation of Criminal Assets Act 2003*. The explanatory statement for the subordinate law states:

The *Confiscation of Criminal Assets Amendment Regulation 2022 (No 1)* amends the *Confiscation of Criminal Assets Regulation 2003* (the Regulation) which supports the *Confiscation of Criminal Assets Act 2003* (the Act). The Act provides the ACT with a legal framework for a confiscation of criminal assets scheme. The confiscation of criminal assets scheme includes restraining orders, conviction forfeiture orders, automatic forfeiture orders, civil forfeiture orders and penalty orders. Unexplained wealth orders were also introduced into the scheme by the *Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020*.

Part 11 of the Act provides that interstate orders made under prescribed corresponding laws can be registered in the ACT. Once an order is registered, it is taken to be a relevant order under the Act and can be enforced in the ACT. The amendments to the Regulation introduce new section 9A which prescribes corresponding law orders for the purpose of interstate unexplained wealth orders. The amendments also update, where appropriate, the corresponding law orders that are prescribed for other types of confiscation of criminal assets orders.

The explanatory statement goes on to state:

The amendments do not engage human rights.

Given that the amendments made by this subordinate law relate to “restraining orders, conviction forfeiture orders, automatic forfeiture orders, civil forfeiture orders and penalty orders”, the Committee queries whether, without further explanation, it can be strictly correct that “the amendments do not engage human rights”. In this regard, the Committee notes that the explanatory statement for the Crimes (Surveillance Devices) Amendment Regulation 2022 (No 1) (SL2022-1), which the Committee considered in *Scrutiny Report 14* (29 March 2022). The effect of that subordinate law was to make amendments that made provisions of certain South Australian

laws “corresponding laws”, for the *Crimes (Surveillance Devices) Act 2010*. The Committee notes that, while the effect of these earlier amendments were of a similar, arguably technical, effect, the explanatory statement for the Crimes (Surveillance Devices) Amendment Regulation 2022 (No 1) nevertheless discussed human rights implications of the amendments.

**The Committee seeks the Minister’s advice in relation to the potential human rights implications of this subordinate law. The Committee would be grateful if the Minister could respond before 3 August 2022, when the Legislative Assembly’s capacity to move to disallow the subordinate law will expire.**

## RESPONSES

### GOVERNMENT RESPONSES

- Ms Berry (Minister for Education and Youth Affairs), dated 19 May 2022, in relation to comments made in Scrutiny Report 15 concerning the Fair Trading and Other Justice Legislation Amendment Bill 2022.
- Mr Rattenbury (Attorney-General), dated 24 May 2022, in relation to DI2022-1 being the Court Procedures (Fees) Determination 2022-additional response.

**[These responses](#)<sup>1</sup> can be viewed online.**

The Committee wishes to thank the Minister for Education and the Attorney-General for their helpful responses.

Peter Cain MLA  
Chair  
6 June 2022

<sup>1</sup> [https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny/responses-to-comments-on-bills](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny/responses-to-comments-on-bills).

## OUTSTANDING RESPONSES

### BILLS/SUBORDINATE LEGISLATION

- **Report 2, dated 24 March 2021**
  - Drugs of Dependence (Personal Use) Amendment Bill 2021
- **Report 12, dated 1 February 2022**
  - Electoral Amendment Bill 2021
  - Financial Management Amendment Bill 2021 (No 2)
- **Report 16, dated 19 May 2022**
  - Health Legislation Amendment Bill 2022 [response required prior to the Bill being debated]
  - Terrorism (Extraordinary Temporary Powers) Act 2006 [response required prior to the Bill being debated]