



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 26

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About the committee

Establishing resolution

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

The Committee is responsible for the following areas:

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

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

Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

Secretariat

Kathleen de Kleuver, Committee Secretary

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Role of Committee

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

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1. Bills

Bills—No Comment

Appropriation (Office of the Legislative Assembly) Bill 2022-2023 (No 2)

- 1.1. This Bill will appropriate additional money for expenditure in relation to the Office of the Legislative Assembly and officers of the Assembly for the financial year that began on 1 July 2022.

Appropriation Bill 2022-2023 (No 2)

- 1.2. This Bill will appropriate additional money for the purposes of the Territory for the financial year that began on 1 July 2022.

Planning and Environment Legislation Amendment Bill 2023

- 1.3. This Bill amends:
- a) the *City Renewal Authority and Suburban Land Agency Act 2017* to allow the City Renewal Authority to carry out repair work on the Melbourne or Sydney buildings with the consent of the building owner;
 - b) the *Dangerous Substances Act 2004* to amend the requirement for the Minister to report on asbestos in buildings from those built or started to be built prior to 1985 to those prior to 1990; and
 - c) the *Government Agencies (Land Acquisition Reporting) Act 2018* to prevent the reporting of identifying particulars when land is acquired by the government from a registered community housing provider;
- along with other consequential or technical amendments.

Bills—Comment

Motor Accident Injuries Amendment Bill 2023

- 1.4. This Bill will amend the *Motor Accident Injuries Act 2019* to impose a financial penalty regime on licenced MAI insurers as part of the regulatory tools available to the MAI Commission, and make a number of miscellaneous and technical amendments to address issues identified during the implementation and operation of the legislation without intending to change the substance of the provisions.

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

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

Right to privacy and reputation (section 12 HRA)

- 1.5. Clause 55 of the Bill will require a person to consent to the relevant insurer referring them to an authorised independent medical examiner for a significant occupational impact (SOI) assessment. By undergoing the assessment, an injured person may be able to satisfy the requirements for being able to make a motor vehicle claim and other benefits. A SOI assessment includes the provision of sensitive personal information, including health information and work and financial details.
- 1.6. Although the amendment will allow for the person to consent to the assessment, by conditioning entitlement to benefits on the consent of the injured person to disclosure of personal information the Bill may limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit and 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.
- 1.7. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

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

- 1.8. The Act provides for the relevant insurer to develop a recovery plan for a person entitled to treatment and care benefits following a motor vehicle accident. The plan must include a statement that the injured person's entitlement to treatment and care benefits or income replacement benefits may be suspended if they fail to undergo the care stated in the recovery plan. However, there is no provision in the Act for any such suspension.
- 1.9. The Bill will insert a new section (proposed section 124A) to allow for the suspension of benefits if an injured person fails, without a reasonable excuse, to undergo the care stated in their recovery plan. If they decide to suspend the benefit, the insurer must provide a suspension notice at least two weeks before the suspension takes effect setting out the reasons for the suspension, what action may be taken to avoid the benefits being suspended, the date the suspension takes effect, and the ability of the injured person to seek internal review of the suspension. The MAI guidelines (a disallowable instrument made by the MAI Commission) may provide for matters that must be taken into consideration by an insurer in deciding whether to suspend any benefits.
- 1.10. The Committee is concerned that the potential suspension of treatment and income replacement benefits may disproportionately impact on injured persons whose disability or incapacity, access to transport or ability to attend treatment appointments may affect their ability to comply with a recovery plan. The provision may therefore limit the right to equality before the law protected by section 8 of the HRA. While the new provision provides that for a reasonable excuse for failing to comply with the recovery plan, it is not

clear what opportunities, if any, will be provided for the injured person to establish that excuse. The MAI Guidelines may, or may not, provide for such a circumstance.

- 1.11. The explanatory statement accompanying the Bill does not refer to any potential human rights limitation by this proposed provision. The explanatory statement generally refers the reader to the statement accompanying the *Motor Accident Injuries Bill 2019*, but that statement also does not provide for any potential limitation associated with the suspension of benefits in these circumstances.
- 1.12. **The Committee therefore requests further information from the Minister on the matters that will be required to be taken into account by insurers before a suspension decision is made, including whether any decision will take into account the circumstances and vulnerabilities of the injured person in being able to comply with their plan. The Committee also recommends that the explanatory statement accompanying the Bill be amended to provide for why any unequal impact of this provision should be considered reasonable using the framework in section 28 of the HRA.**

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

Proposed Amendments - Comment

Residential Tenancies Legislation Amendment Bill 2022

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

Right to privacy and reputation (section 12 HRA)

- 1.13. On 1 March 2023, the Committee received proposed government amendments to the Residential Tenancies Legislation Amendment Bill 2022. These proposed amendments will insert a transition provision to make it clear that notices to vacate tenanted premises relying on clause 94 of the standard residential tenancy terms (termination of tenancy without cause) served prior to the Bill's commencement day will continue in force. The standard residential tenancy terms relating to termination of tenancy without cause will also continue to apply to such a notice. This will ensure that without cause notices to vacate issued before the commencement of the Bill will continue to have legal effect.
- 1.14. By extending the opportunity for lessors to terminate a tenancy without cause, the proposed amendments may allow an arbitrary interference with a person's home, potentially limiting the protection of privacy and reputation provided by section 12 of the HRA. The proposed supplementary explanatory statement which accompanied the proposed amendments 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 and has no further comments on the proposed amendment.

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

Urban Forest Bill 2022

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

Right to privacy and reputation (section 12 HRA)

- 1.16. On 6 March 2023 the Committee received proposed government amendments to the Urban Forest Bill 2022. These amendments include responses to the Committee's comments on the Bill in Report 20 and the recommendations of the Standing Committee on Planning, Transport and City Services in their Report on the Inquiry into the Bill. The proposed amendments include delaying the commencement of the Bill until 1 January 2024, providing for notice of urgent circumstances applications to be notified to the applicant as soon as practical, providing for utility service provision and other exceptions to tree damaging offences, and other technical amendments.
- 1.17. The proposed amendments will also remove powers in the Bill to incorporate Australian Standards without notification on the Legislation Register, to make regulations containing offences, and to make transitional regulations that modify the transitional part of the Bill. The Committee commends the Minister for being responsive to Committee comments and removing these powers.
- 1.18. The proposed amendments will also authorise entry by the Director-General or delegated officers onto premises to issue a tree reparation direction or undertake work to fulfil a tree reparation direction where there has been a failure to comply with the direction. This power will not authorise entry to a part of the premises used only for residential purposes. This proposed amendment may limit the protection of privacy provided by section 12 of the HRA. The supplementary explanatory statement provided with the proposed amendments 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 and makes no further comment on the proposed amendments.
- 1.19. The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Government Responses - Comment

Work Health and Safety Amendment Bill 2022

- 1.20. On 23 February 2023, the Committee received a response from the Chief Minister on the Committee's comments on the Work Health and Safety Amendment Bill 2022 made in its *Scrutiny Report 23*. The Committee thanks the Chief Minister for his response.
- 1.21. In its report, the Committee raised concerns over the retrospective effect of the amendments proposed in the Bill. The Bill was stated to commence on the day the Bill was presented to the Assembly. In the Committee's view, it was at least arguable that the Bill would have a substantive impact on the rights and obligations imposed by the *Work Health and Safety Act 2011* (WHS Act), including potentially enlivening offences under that Act. Any retrospective effect would therefore require justification, possibly including why any impact on human rights protected under the Human Rights Act should be considered reasonable using the framework in section 28 of that Act.
- 1.22. In his response, the Chief Minister reiterated the statements in the explanatory statement accompanying the Bill that the Bill is only clarifying in nature, and does not alter or expand the current scope of the WHS Act. The Chief Minister also referred to various evidence of the custom and practice of the Assembly to operate with the intention that it is a workplace captured under the WHS Act, including the 2021 Workplace Injury Prevention Policy. In discussing the retrospective commencement of the Bill, the Chief Minister states:
- This is not considered to be materially impactful on obligation bearers because the commencement is from the date of introduction in the Assembly, when the amendment in the Bill became publicly known. This is notwithstanding that it is a clarifying amendment that applies narrowly to people doing or directing work in the Legislative Assembly.
- 1.23. The Committee remains concerned with the limited explanation for the retrospective commencement of the Bill. If the Bill has no substantive impact on rights and obligations under the WHS Act, then it is not clear why there is a need for the Bill to have retrospective effect. Introduction of the Bill in the Assembly would seem sufficient to have enhanced awareness of the operation of the WHS Act on the work of Members of the Assembly. To the extent the date of commencement of the Bill is important due to the substantive effect commencement of the Bill may have, a justification for that retrospective commencement should be provided.
- 1.24. **The Committee would therefore request further information on why it is considered necessary for the Bill to commence prior to its enactment.**

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

Government Responses – No comment

1.25. The Committee has received responses on comments it made on the following Bills and makes no further comment at this time:

- a) Planning Bill 2022
- b) Residential Tenancies Legislation Amendment Bill 2022
- c) Urban Forest Bill 2022

2. Subordinate Legislation

Disallowable Instruments – No comment

- 2.1. The Committee has examined the following disallowable instruments and has no comments on them:
- **Disallowable Instrument DI2022-253** being the Workers Compensation (Fees) Revocation 2022 (No 1) made under section 221 of the *Workers Compensation Act 1951*
 - **Disallowable Instrument DI2022-256** being the Official Visitor (Corrections Management) Appointment 2022 (No 1) made under paragraph 10(1)(b) of the *Official Visitor Act 2012*
 - **Disallowable Instrument DI2022-258** being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2022 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010*

Disallowable Instruments – Comment

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

Fees Determinations/Human Rights Issues

- **Disallowable Instrument DI2022-252** being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2022 (No 1) made under section 60 of the *Road Transport (Public Passenger Services) Act 2001*
- **Disallowable Instrument DI2022-255** being the Waste Management and Resource Recovery (Fees) Determination 2022 (No 2) made under section 126 of the *Waste Management and Resource Recovery Act 2016*
- **Disallowable Instrument DI2022-257** being the Adoption (Fees) Determination 2022 (No 1) made under section 118 of the *Adoption Act 1993*
- **Disallowable Instrument DI2022-263** being the Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2022 made under section 139 of the *Taxation Administration Act 1999*

- 2.3. The first instrument mentioned above, made under subsection 60(1) of the *Road Transport (Public Passenger Services) Act 2001*, determines fares, and ways of calculating fares, for hiring or using a taxi. The instrument increases various fares. The Committee notes, with approval, that the magnitude of the increases is identified and that the explanatory statement for the instrument provides the following explanation for the increases:

This instrument increases the ACT's maximum taxi fare. The fare increases in this instrument have been based on the Consumer Price Index (CPI) for the ACT. Any increase in maximum regulated fares in this instrument are based on a CPI increase in 2021-22 of 6.3% and rounded to the nearest five cents.

- 2.4. The second instrument mentioned above, made under section 126 of the *Waste Management and Resource Recovery Act 2016*, determines fees and rates of interest for that Act. Again, the Committee notes, with approval, that the magnitude of the increases is identified and that the explanatory statement for the instrument provides the following explanation is provided for the increases:

This determination increases fees contained in DI2022-63 by 1.75% as per the 2022-23 Budget Outlook, page 199, rounded for cash handling and other purposes.

Fees for Waste Facility Licences and Registration of a Waste Transporter are unchanged.

- 2.5. The third instrument mentioned above made under section 118 of the *Adoption Act 1993*, determines fees for that Act. Again, the Committee notes, with approval, that the magnitude of the increases is identified and that the explanatory statement for the instrument provides the following explanation for the increases:

Child and Youth Protection Services last increased these ongoing fees and charges for the 2020-2021 financial year by 2 per cent of the previous determination (DI-2019/150), in line with the Wage Price Index (WPI).

Child and Youth Protection Services did not increase these fees for the 2021-2022 financial year.

Child and Youth Protection Services is increasing these ongoing fees and charges for the 2022-2023 financial year by the WPI of 3.25 per cent of the previous determination (DI 2020/190). The WPI reflects the minimum increase in the cost of administering the underlying activity.

- 2.6. The Committee notes that the explanatory statement for the third instrument mentioned above also goes on to discuss human rights issues:

Human Rights

Determinations must be compatible with the *Human Rights Act 2004* (HRA). The compatibility of this determination with the HRA was considered during its development.

Section 28(1) of the HRA provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) of the HRA contains a framework that is used to determine the acceptable limitations that may be placed on human rights.

The limitations in this determination on rights protected in the HRA are considered demonstrably justifiable pursuant to section 28 of the HRA.

The right to protection of family and children is engaged by this determination by virtue of the subject matter being adoption. The fees are considered a reasonable and justifiable limitation on this right, given that the fees are nominal and only partially fund the infrastructure necessary to maintain an overseas adoption

program. Further, the fees are not applicable to known adoptions, when the child or young person is in out of home care and a range of alternative options are available to step-parents of children through Family Law provisions.

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

- 2.8. The fourth instrument mentioned above, made under section 139 of the *Taxation Administration Act 1999*, determines an “RA”, for section 1.4 of Schedule 1 to the *Emergencies Act 2004*. “RA” is a component in the calculation of the ambulance levy. The Committee notes, with approval, that the explanatory statement for the instrument provides the following explanation for the increase in the RA:

This instrument determines RA for the reference months January 2023 to December 2023 as \$2.92 (increased from \$2.83). The increase to the determined amount follows a regular indexation of the ambulance levy, which is based on the change from the corresponding September quarter of the previous year’s Wage Price Index as published by the Australian Bureau of Statistics. The change is 3.1 per cent (rounded to the nearest cent).

- 2.9. **The Committee notes that, despite the four instruments mentioned above being made within four weeks of each other, with effect from about the same time, a wide variety of increases are provided for, with varying justifications for the increases. The Committee seeks the advice of the relevant Ministers as to the reasons for this variation.**

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

Human Rights Issues

- **Disallowable Instrument DI2022-254** being the Public Place Names (Denman Prospect) Determination 2022 made under section 3 of the *Public Place Names Act 1989*
- 2.10. This instrument, made under section 3 of the *Public Place Names Act 1989*, names 13 roads in the suburb of Denman Prospect. The Committee notes that the explanatory statement for the instrument includes 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.

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

Drafting issue

- **Disallowable Instrument DI2022-259** being the Heritage (Council Member) Revocation 2022 (No 1) made under section 17 of the *Heritage Act 2004*
- **Disallowable Instrument DI2022-260** being the Heritage (Council Member) Revocation 2022 (No 2) made under section 17 of the *Heritage Act 2004*
- **Disallowable Instrument DI2022-261** being the Heritage (Council Member) Revocation 2022 (No 3) made under section 17 of the *Heritage Act 2004*
- **Disallowable Instrument DI2022-262** being the Heritage (Heritage Council) Appointment Revocation 2022 (No 4) made under section 17 of the *Heritage Act 2004*

- 2.13. Each of the instruments mentioned above revokes an earlier instrument, appointing a specified person as a member of the Heritage Council. All instruments were made, by the Minister, on 6 December 2022. The instruments are identical in substance, but for the application to the particular appointments.

- 2.14. The explanatory statement for the first instrument mentioned above states:

Under section 208(1)(b) of the *Legislation Act 2001*, an appointer's power to make an appointment includes the power to end the appointment. That is, section 208 deems the Minister's power to make an appointment to the council in section 17 of the Act to include the power to end the appointment.

Appointment revocation

This instrument has been made by the Minister for Heritage. Following a review into the workings of the council and its supporting government agency (the ACT Heritage Unit), the Minister for Heritage has decided to dissolve the current council.

This instrument revokes the Heritage (Council Member) Appointment 2021 (No 2) [DI2021-29], which appointed [the specified person] to be a member of the council for the period 2 March 2021 to 1 March 2024.

- 2.15. A similar statement appears in the other three explanatory statements.
- 2.16. The Committee notes that the fourth instrument mentioned above is named slightly differently to the other three instruments (and not just simply by the numbering). There is no apparent reason for this. The Committee notes that, despite the different name, the fourth instrument appears on the annual list of disallowable instruments on the ACT

Legislation Register with a similar name to the other 3 instruments.¹ The page for the instrument, similarly, uses the similar name.² However, the authorised version linked to the page uses the (different) name reflected above.

- 2.17. While the Committee does not envisage this issue as giving rise to any legal issues, the Committee seeks the Minister's explanation for what is set out above.

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

Human Rights Issues

- **Disallowable Instrument DI2022-264** being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2022 (No 1) made under section 13 of the *Road Transport (General) Act 1999*

- 2.18. This instrument is made under section 13 of the *Road Transport (General) Act 1999*, which allows the Minister to declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration. The instrument declares that the *Motor Accident Injuries Act 2019* and also various provisions of the *Road Transport (Safety and Traffic Management) Act 1999*, the *Road Transport (Vehicle Registration) Act 1999*, the Road Transport (Vehicle Registration) Regulation 2000 and the Road Transport (Driver Licensing) Regulation 2000 and do not apply (in certain circumstances) to the Summernats 35 Car Festival 2023, taking place between 5 and 8 January 2022.
- 2.19. The Committee notes that the explanatory statement for the 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 Summernats 35 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

¹ See

<https://legislation.act.gov.au/results?category=cDis&classifier=&status=By+Year&alpha=&query=&year=2022&action=browse>.

² <https://legislation.act.gov.au/di/2022-262/>.

- 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 themselves restrict a person's freedom of movement within the Territory, however the operation of the event in closing parts of EPIC in which Summernats 35 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 Summernats 35 to operate as intended, highly modified vehicles will be travelling in parts of EPIC in a manner not consistent with the road rules. As such, the restriction on the free movement of people in parts of EPIC 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.

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

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

Human Rights Issues

- **Disallowable Instrument DI2022-266** being the Waste Management and Resource Recovery (Processing Refund Protocol) Determination 2022 made under section 64L of the *Waste Management and Resource Recovery Act 2016*
- 2.22. This instrument, made under section 64L of the *Waste Management and Resource Recovery Act 2016*, determines a "Processing Refund Protocol". The new Protocol determined by the instrument replaces an earlier Protocol, that commenced on 1 January 2020. The explanatory statement for the instrument states:
- Amendments to the Processing Refund Protocol were required due to new technology in the ACT Container Deposit Scheme (CDS) network stream. The changes that have been made from the 2020 edition are outlined in this statement.
- 2.23. The explanatory statement then (helpfully) outlines the changes made by the new instrument.
- 2.24. The explanatory statement for the instrument goes on to discuss human rights issues:
- Human rights**
- As a result of this instrument, only minor administrative changes have been made which do not impact on human rights.

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

Is this instrument of appointment validly made?

- **Disallowable Instrument DI2022-265** being the Building and Construction Industry Training Levy (Governing Board) Appointment 2022 (No 1) made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and sections 78 and 79 of the *Financial Management Act 1996*

- 2.27. This instrument, made under section 7 of the *Building and Construction Industry Training Levy Act 1999* and section 78 of the *Financial Management Act 1996*, appoints a specified person as “Chairperson” of the Building and Construction Industry Training Fund Board. Section 7 of the Building and Construction Industry Training Levy Act provides:

7 Governing board members

- (1) The governing board has 6 members.

Note A chair of the governing board must be appointed under the *Financial Management Act 1996*, s 79.

- (2) Two of the governing board members must be appointed to represent the interests of employers in the building and construction industry.

- (3) Two of the governing board members must be appointed to represent the interests of employees in the building and construction industry.

- (4) The chair must not be a representative mentioned in subsection (2) or (3).

- (5) The chief executive officer is a non-voting member of the governing board.

Note The *Financial Management Act 1996*, s 95 (2) and s 96 (1) deal with non-voting members of governing boards.

- 2.28. Sections 78 and 79 of the Financial Management Act apply generally to appointments to the governing board of a territory authority. Section 79 allows for the publication of chairs and deputy chairs, when not specifically provided for (or prevented) by the specific Act.
- 2.29. The Committee notes that, under subsection 7(4) of the Building and Construction Industry Training Levy Act, the chair of the Board must not be a member “appointed to represent the interests of employers in the building and construction industry” or a member “appointed to represent the interests of employees in the building and construction industry”.
- 2.30. The Committee notes that the explanatory statement for the instrument states:
- This instrument appoints [the specified person] as Chair of the Board representing the building and construction industry until 31 December 2025.

- 2.31. While it might be assumed that the Minister would not have appointed the specified person if they were excluded by subsection 7(4), the Committee would have preferred if it was made clear that the specified person is not a member “appointed to represent the interests of employers in the building and construction industry” or a member “appointed to represent the interests of employees in the building and construction industry”.
- 2.32. **The Committee draws the attention of the Legislative Assembly to this instrument, under paragraph (10)(d) of the Committee’s Resolution of Appointment, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.**

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

COVID-19-related instrument / Human Rights Issues

- **Disallowable Instrument DI2022-267** being the Public Health (COVID-19 Management) Declaration Extension 2022 made under section 118P **of the *Public Health Act 1997***

- 2.33. This instrument extends the operation of the Public Health (COVID-19 Management) Declaration 2022 [DI2022-224] by 90 days, with effect from 29 December 2022. The instrument is made under subsection 118P(2) of the *Public Health Act 1997* (though the Committee notes that the formal part of the explanatory statement for the instrument indicates that it is made under section 118O). Section 118P provides:

118P COVID-19 management declaration—duration

(1) A COVID-19 management declaration—

(a) comes into force immediately after it is made, or at a later time stated in the declaration; and

(b) remains in force for the period, not longer than 90 days, stated in the declaration.

(2) The Executive may extend the period for which a COVID-19 management declaration is to remain in force on 1 or more occasions, for the period, not longer than 90 days on each occasion, stated in the extension.

(3) The chief health officer must, at least every 30 days during which a COVID-19 management declaration (including as extended) is in force, advise the Executive about the status of the risk presented by COVID-19.

(4) A failure by the chief health officer to comply with subsection (3) does not affect the validity of the COVID-19 management declaration.

(5) A COVID-19 management declaration must be revoked if the Executive decides, after taking into account any advice of the chief health officer, that the declaration is no longer justified.

(6) An extension of a COVID-19 management declaration is a disallowable instrument.

- 2.34. The Committee notes that it considered the declaration that is extended by this instrument in *Scrutiny Report 23* of the 10th Assembly (15 November 2022).³
- 2.35. The explanatory statement for the new instrument contains a detailed justification for the extension of the earlier declaration:

Overview

The Public Health (COVID-19 Management) Declaration (the Declaration) is made under section 118O of the *Public Health Act 1997* as the Executive has reasonable grounds to believe that COVID-19 continues to present a serious public health risk to the Territory. The Executive agreed to extend the Declaration, in accordance with section 118P, following its consideration of the advice of the Chief Health Officer.

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

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

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

The number of people likely to be affected.

The location, immediacy, and seriousness of the threat to the health of people.

The nature, scale and effect of any harm, illness or injury that may happen.

The availability and effectiveness of any precaution, safeguard, treatment or other measure to eliminate or reduce any risk to the health of people.

Specifically, the Executive has reviewed the Chief Health Officer Advice – Public Health (COVID-19 Management) Declaration Extension 2022 and associated COVID-19 Management Directions, consistent with section 118Q of the *Public Health Act*

³ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/2107288/Scrutiny-Report-No-23-15-November-2022.pdf.

1997 and is satisfied that this advice appropriately addresses each item required under section 118O of the Act.

The Executive has also taken account of the fact that there remains uncertainty and complexity relating to the evolution of the COVID-19 pandemic, which is likely to continue over the coming months. The ACT continues to transition the COVID-19 response to the endemic management of COVID-19, similar to other notifiable diseases.

- 2.36. The explanatory statement also indicates that the Chief Health Officer has been consulted and has offered advice on the current situation of COVID-19 within the ACT.
- 2.37. The explanatory statement goes on to discuss human rights issues, referring to the right to life, under section 9 of the *Human Rights Act 2004* (which is promoted) and the right to recognition and equality before the law (section 8), freedom of movement (section 13) and the right to work (section 27B) (which may be limited):

Consistency with Human Rights

Limits placed on human rights by the Declaration are a proportionate and reasonable response to the public health risk presented by COVID-19 in the ACT. As at 9 December 2022, there have been 132 COVID-19 related deaths since the start of the pandemic. The ACT, like other jurisdictions, is actively transitioning to the management of COVID-19 like other notifiable diseases. However, community transmission is likely to persist in a cyclical fashion over coming months, in response to emerging variants and waning immunity. The Declaration enables the Government to respond appropriately to the public health risk presented by COVID-19.

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

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

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

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

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

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

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

Subordinate Laws –Comment

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

Human Rights Issues

- **Subordinate Law SL2022-18** being the Motor Accident Injuries (Premiums and Administration) Amendment Regulation 2022 (No 1) made under s 492 of the *Motor Accident Injuries Act 2019*

2.41. This subordinate law, made under section 492 of the *Motor Accident Injuries Act 2019*, inserts a new vehicle class into section 1 of Schedule 1 to the *Motor Accident (Premiums and Administration) Regulation 2019*, dealing with the premium classes that a Motor Accident Injuries (MAI) insurer is permitted to charge a premium for a motor accident injury insurance policy. A new vehicle class is inserted into the regulation, providing for a fourth category of vehicle in the conditional vintage, veteran and historic registration arrangements.

2.42. The Committee notes that the explanatory statement for the subordinate law discusses human rights issues;

Human Rights Implications

No human rights implications have been identified.

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

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

Explanation for fees increases

- **Subordinate Law SL2022-19** being the Court Procedures Amendment Rules 2022 (No 3) made under section 7 of the *Court Procedures Act 2004*

2.45. This subordinate law amends the Court Procedures Rules 2006. The explanatory statement for the subordinate law is very brief. It states (in full):

The Rule-Making Committee (currently comprising the Chief Justice McCallum, Justice Kennett, Chief Magistrate Walker and Magistrate Theakston) may make rules in relation to the practice and procedure of the ACT Courts and their registries pursuant to section 7 of the *Court Procedures Act 2004*. The Courts and the Joint Rules Advisory Committee have conducted a consultative review of the rules which has resulted in the amendments contained in the *Court Procedures Amendment Rules 2022 (No 3)*.

The amendment provides for electronic signatures to be applied to a range of court documents and an increase in the scale of allowable costs.

- 2.46. The Committee notes that no information is provided in relation to the magnitude of any increases, nor the reasons for any increases. While increases in a scale of costs are obviously different to increases in fees, they nevertheless have an effect on what those who are involved in the legal process may end up having to pay. That being so, the Committee considers that some further explanation for the increases would be appropriate.
- 2.47. **The Committee draws the attention of the Legislative Assembly to this instrument, under paragraph (10)(d) of the Committee's Resolution of Appointment, on the basis that the explanatory statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee.**

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

Regulatory impact statements – No comment

- 2.48. The Committee has examined a regulatory impact statement for the following instruments and offers no comments on them:
- **Disallowable Instrument DI2022-266** being the Waste Management and Resource Recovery (Processing Refund Protocol) Determination 2022 made under section 64L of the *Waste Management and Resource Recovery Act 2016*
 - **Disallowable Instrument DI2022-267** being the Public Health (COVID-19 Management) Declaration Extension 2022 made under section 118P of the *Public Health Act 1997*

Responses

Government responses:

- Planning Bill 2022
- Work Health and Safety Amendment Bill 2022
- Residential Tenancies Legislation Amendment Bill 2022

- Urban Forest Bill 2022

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

The Committee wishes to thank the Chief Minister, the Minister for Planning and Land Management, the Attorney-General and the Minister for Transport and City Services for their helpful responses.

Peter Cain MLA
Chair
March 2023

Outstanding responses

Bills/Subordinate Legislation/Regulatory Impact Statements

Report 12, dated 1 February 2022

Bills

- Electoral Amendment Bill 2021

Report 25, dated 31 January 2022

Bills

- Long Service Leave (Portable Schemes) Amendment Bill 2022 [response required prior to the Bill being debated]
- Professional Engineers Bill 2022 [response required prior to the Bill being debated]

Subordinate Legislation

- **Subordinate Law SL2022-16** being the Residential Tenancies Amendment Regulation 2022 (No 1) made under the *Residential Tenancies Act 1997*. [response required before the Legislative Assembly's capacity to move to disallow the subordinate law expires.]
- **Subordinate Law SL2022-17** being the Gambling and Racing Control (Code of Practice) Amendment Regulation 2022 (No 1), including a regulatory impact statement, made under the *Gambling and Racing Control Act 1999*. [response required before the Legislative Assembly's capacity to move to disallow the subordinate law expires.]

Regulation Impact Statements

- **Subordinate Law SL2022-16** being the Residential Tenancies Amendment Regulation 2022 (No 1) made under the *Residential Tenancies Act 1997*. [response required before the Legislative Assembly's capacity to move to disallow the subordinate law expires.]