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

# Scrutiny Report 45

30 JUNE 2020

## 

## 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

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

1. consider 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):
   1. is in accord with the general objects of the Act under which it is made;
   2. unduly trespasses on rights previously established by law;
   3. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
   4. contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
2. 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 Committee;
3. consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
   1. unduly trespass on personal rights and liberties;
   2. make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   3. make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   4. inappropriately delegate legislative powers; or
   5. insufficiently subject the exercise of legislative power to parliamentary scrutiny;
4. report 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*; and
5. report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Table of Contents

[Bills 1](#_Toc44323930)

[Bill—No comment 1](#_Toc44323931)

[COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 2) 1](#_Toc44323932)

[Bills—Comment 1](#_Toc44323933)

[Employment and Workplace Safety Legislation Amendment Bill 2020 1](#_Toc44323934)

[Justice Legislation Amendment Bill 2020 6](#_Toc44323935)

[Proposed amendments 9](#_Toc44323936)

[Public Interest Disclosure Amendment Bill 2020 9](#_Toc44323937)

[Subordinate Legislation 9](#_Toc44323938)

[Disallowable Instruments—No comment 9](#_Toc44323939)

[Disallowable Instruments—Comment 9](#_Toc44323940)

[Regulatory impact statement—No Comment 17](#_Toc44323941)

[Responses 17](#_Toc44323942)

[Outstanding Responses 19](#_Toc44323944)

## Bills

### Bill—No comment

The Committee has examined the following bill and offers no comment on it:

#### COVID-19 Emergency Response Legislation Amendment Bill 2020 (No 2)

This Bill amends the *Electoral Act 1992* and the *Supreme Court Act 1933* relating to emergency measures in response to the COVID-19 emergency. The amendments relate to use of approved forms of on-line and telephone voting and extending access to pre-poll voting. Given the recommencement of jury trials in the Territory, the Bill will also remove provisions for jury-free trials against the wishes of the accused.

### Bills—Comment

The Committee notes that the following bills amend a number of pieces of legislation with limited common subject matter. As a general comment, the Committee notes that accessibility and scrutiny of legislation is enhanced where substantive amendments are contained in separate bills.

#### Employment and Workplace Safety Legislation Amendment Bill 2020

This Bill will make various amendments to the *Dangerous Goods (Road Transport) Act 2009, Public Sector Management Act 1994, Work Health and Safety Act 2011* and *Workers Compensation Act 1951*.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee terms of reference paragraph (3)(a)***

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

##### Right to privacy and reputation (section 12 HRA)

##### Rights in criminal proceedings (section 22 HRA)

###### Dangerous Goods (Road Transport) Act 2009

The Bill will amend the Dangerous Goods (Road Transport) Act to better align with the current version of the *Model Act on the Transport of Dangerous Goods by Road or Rail[[1]](#footnote-1)* developed under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport*.[[2]](#footnote-2)

Under the Bill, employers will be taken to have committed an offence where their employee, in the course of the employee’s employment, commits an offence against the Act. This deemed offence will not apply where the employer had no knowledge of their employee’s offence, and took reasonable precautions and exercised appropriate diligence to prevent its commission. As the employer will bear an evidential burden in relation to the exceptions the Bill may limit the right to

the presumption of innocence protected by section 22 of the HRA. The explanatory statement recognises this potential limitation and sets out why it should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers the Assembly to that statement.

The Bill will also create new offences relating to knowingly or recklessly making false or misleading statements to an authorised person (see proposed section 190A). Absolute liability applies to an element of the offence: the statement is made to an authorised person who is exercising a function under the Act. The knowledge or recklessness of the accused as to whether a person is an authorised person and exercising a function under the Act is therefore not relevant to the offence, and the defence of honest and reasonable mistake of fact is not available. For the purposes of the offence, an authorised person will include a person assisting the authorised person.

By imposing absolute liability for an element of the offence, the Bill may therefore limit the presumption of innocence protected under section 22 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation. In setting out why it should be considered reasonable, the explanatory statement references the need for authorised officers to rely on representations made to them, and that “It would be operationally burdensome and significant resources would have to be used in verifying the truthfulness of representations, if such certainty does not exist”. The explanatory statement also points out that authorised officers who are not police officers have to carry and show an identity card when exercising functions under the Act.

However, the Committee is concerned that there are no consequences provided in the Act for a failure to show an identity card. There is also no requirement to identify individuals who may be assisting an authorised person. A person liable for an offence may not always have the high degree of notice and awareness which would justify the use of absolute liability.

**The Committee therefore requests further information on why absolute liability is considered reasonable in these circumstances.**

The Bill will also amend the Dangerous Goods (Road Transport) Act by inserting a new paragraph in section 59. That section currently authorises an authorised person to direct a person to produce records required to be kept under the Act. It is a strict liability offence to fail to comply with such a direction without a reasonable excuse (see section 60). The Bill will extend the authorisation to include a direction to produce “a record, device or other thing that contains or may contain a record, in the person’s possession or under the person’s control relating to or indicating an offence.”

The Committee is concerned that extending the ability to direct the production of records, devices or other things may limit the protection against self-incrimination provided by section 22 of the HRA and the protection of privacy provided by section 12 of the HRA. Once produced in response to the direction, any records, devices and other things may be inspected, copied, have extracts taken, and be seized and removed in certain circumstances (see section 59). There is no express requirement that the direction relates to an offence under the Dangerous Goods (Road Transport) Act, or requirement that the link between the thing and the offence be reasonable. A direction may be given orally or in any other way (section 63). Section 61 already provides for the provision of information for compliance purposes, but it is limited to information about a vehicle and its load, including its location and journey.

A person is also not excused from complying with the direction on the basis that the requirement might incriminate the person or make them liable to a penalty (section 67). There is protection against statements made or information or answers provided in compliance with a direction, or further derived information, from being admitted in criminal proceedings (subsection 67(2), but this does not extend to documents produced (subsection 67(3)). Information obtained may also be given to a public authority of another jurisdiction (section 181).

The explanatory statement accompanying the Bill does not provide any justification for the potential limitations of the HRA of amendments to section 59. In outlining the provisions in the Bill, the explanatory statement describes the amendment to section 59 as “a consequential amendment that extends the section to include—a record, device or other thing that contains or may contain a record, in the person’s possession or under the person’s control relating to or indicating an offence.”

**The Committee therefore requests the Minister provide a justification for the amendment to section 59. Consideration should be given to amending the explanatory statement to include why any limitation to human rights by the amendment to section 59 should be considered reasonable using the framework set out in section 28 of the HRA.**

The Bill will also amend section 72 of the Dangerous Good (Road Transport) Act. That section provides a general power for authorised persons to enter premises and vehicles for compliance or other purposes under for the Act. The power of entry includes where the premises or vehicles are open to the public or at premises occupied or controlled by a person involved in the transport of dangerous goods. Under subsection 72(2), the power of entry does not include entry into a part of a premises that is being used for residential premises. This will be amended by the Bill to only restrict entry to parts of premises used predominantly for residential purposes, and the Bill makes it clear that temporary or casual accommodation is not protected against entry. Before entry into private premises, the authorised person must give the occupier reasonable notice unless notice would be reasonably likely to defeat the purpose of entry.

Section 72 also allows entry, including into residential areas, with a warrant or where entry without a warrant is necessary due to serious and urgent circumstances. Entry in those circumstances can be gained through the use of reasonable and necessary force and assistance. The Bill will extend the use of necessary assistance to all forms of authorised entry and removes the need for that assistance to be reasonable. Necessary assistance includes attendance of other people who have knowledge or skills that could assist in the carrying out the authorised person’s function. The use of force will only be permitted with a warrant (proposed subsection 72(5)).

By allowing entry into premises that might be being used for accommodation or other private purposes, and by extending the circumstances in which assistance can be used to gain entry, the Bill potentially limits the protection of privacy and reputation provided by section 12 of the HRA.

**Consideration should be given to amending the explanatory statement to include recognition of this potential limitation and a justification provided for why it should be considered reasonable using the framework set out in section 28 of the HRA.**

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

###### Workers Compensation Act 1951

The Bill will also amend the Workers Compensation Act to require providers of workers’ compensation insurance, including self-insurers, to be licenced. Under the Bill all insurance providers in applying for a licence may be required to provide information as set out in regulations or as required by the work health and safety commissioner. That information can include a person’s financial affairs, whether they have a history of compliance with workers’ compensation laws in another state or territory, and whether a pervious licence has been cancelled or suspended.

The explanatory statement accompanying the Bill recognises this potential limitation of the protection of privacy and reputation protected by section 12 of the HRA and provides a statement for why it should be considered reasonable using the framework set out 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.**

###### Work Health and Safety Act 2011

The Bill will amend the Work Health and Safety Act by extending rights of work health and safety entry permit-holders while at a workplace to include taking photographs, films, or audio, video or other recordings relevant to a suspected contravention of that Act. This will not extend to where doing so would result in a contravention of a law of the Commonwealth or State. The Bill will also allow an entry permit-holder to exercise these and other entry rights in relation to further contraventions of the Act which are encountered in the course of investigating an initial suspected contravention.

As these additional powers of inspection may allow personal and other private information to be recorded or accessed, the Bill may limit the protection of privacy and reputation provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit and sets out why any interference should be considered reasonable and therefore lawful and non-arbitrary using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

The Bill will also provide for prohibited asbestos notices to be issued where the regulator reasonably believes asbestos is present in the workplace, directing the relevant person to take specific measures in relation to the prohibited asbestos, including its management and removal. Not complying with the notice is an offence with a maximum penalty or $100 000 for an individual or $500 000 for a body corporate. Under section 12A of the Work Health and Safety Act strict liability will apply to each physical element of each offence.

Strict liability for any element of an offence may limit the presumption of innocence protected under section 22 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 set out in section 28 of the HRA. The statement recognises the severe nature of the penalties involved with the offence, and sets out the health and safety implications of non-compliance with the asbestos notice, the existing requirements on workplaces to alleviate risks of asbestos material, and the other protections included in the Act and Bill. The Committee refers the assembly to that statement.

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

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

###### Public Sector Management Act 1994

The Bill will also amend section 27 of the Public Sector Management Act. Under paragraph 27(1)(c) an officer can be transferred to a higher level vacant office for a period of up to three months without having to open the position to applications from other eligible persons. The Bill will extend this period to six months. The Bill will therefore restrict the opportunities for eligible persons to be employed to a public office and may limit the right to take part in public life protected by section 17 of the HRA. The explanatory statement 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.

**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 terms of reference paragraph 3(d)***

##### Henry VIII clause

The Bill will amend the Workers Compensation Act to provide for regulations to prescribe necessary or convenient transitional matters. Under proposed section 272, regulations may modify the chapter of the Act providing for transitional provisions (Chapter 21), including in relation to another Territory law, to make provision in relation to anything that, in the Executive’s opinion, is not adequately or appropriately dealt with in that chapter. Such a regulation has effect despite anything elsewhere in the Act or another territory Law. The proposed amendment therefore authorises regulations which have the effect of modifying primary legislation (termed a Henry VIII clause).

The explanatory statement accompanying the Bill, in outlining proposed section 272, includes the following:

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 explanatory statement also states:

“the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act’s purpose. … Also, any modification by regulation of chapter 21 of the Act has no ongoing effect after the expiry of that chapter.”

The Committee notes that the transitional chapter expires two years after it commences, and that any regulations introduced under the chapter will also expire after that time. However, any effect of the regulations, including modifications to other legislation, may continue to have an impact. The Committee is therefore concerned that the explanation provided could be applied to any amendments of a substantial nature, and requests further information for why transitional regulations that can have the effect of modifying the operation of the Workers Compensation Act and other Territory Laws are required for this amendment.

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

#### Justice Legislation Amendment Bill 2020

This Bill amends 27 acts and regulations for a variety of purposes.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—Committee terms of reference paragraph (3)(a)***

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

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

##### Right to privacy and reputation (section 12 HRA)

##### Right to freedom of movement (section 13 HRA)

##### Right to liberty and security of person (section 18 HRA)

##### Right to a fair trial (section 21 HRA)

##### Rights in criminal proceedings (section 22 HRA)

##### Right to work (section 27B HRA)

The various amendments introduced by the Bill may limit a number of rights protected under the HRA. The most substantive potential limits are described briefly below. The potential limitations are recognised in the explanatory statement accompanying the Bill, and a justification for why they should be considered reasonable is provided using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

###### Agents Act 2003

The Bill will enable the Commissioner for Fair Trading to disqualify a real estate agent from receiving a licence or being registered under the Agents Act on the basis of prior convictions for relevant offences. As this may exclude a person from working as a real estate agent or salesperson the amendments potentially limit the right to equality protected under section 8 of the HRA and the right to work protected under section 27B of the HRA.

###### Crimes (Sentence Administration) Act 2005

The Bill will make it clear that where a warrant is issued for an offender’s arrest, the period in which the warrant is outstanding is added to the term of the offender’s intensive correction order and sentence. As this may extend any period of imprisonment to be served the amendment may limit the right to liberty protected by section 18 of the HRA and, because it takes effect from the issue of the relevant warrant, the right to a fair hearing protected under section 21 of the HRA.

The Bill will also allow victims to make oral statements to the Sentence Administration Board and enhance the confidentiality of information provided to or obtained by the Board where disclosure of that information may endanger the victim, other members of the community or otherwise prejudice the public interest. This may limit the right to a fair hearing protected under section 21 of the HRA.

The Bill will also allow for a person to be held in remand during an adjournment of a Board hearing for an additional day (from seven to eight days) to avoid multiple adjournments. The Board may also issue a warrant for an offender appearing before the Board by remote means and who is not in custody. These amendments may limit the right to liberty under section 18 and the right to a fair hearing protected under section 21 of the HRA.

###### Domestic Animals Act 2000

The Bill will introduce strict liability offences relating to advertising, selling or giving away a dog or cat without providing a breeding licence number or rehoming and microchip identifier information, including the person’s ABN or name. This may limit the protection of privacy provided by section 12 of the HRA and, by including strict liability, the right to the presumption of innocence protected by section 22 of the HRA.

###### Human Rights Commission Act 2005

The Bill will remove the requirement that conciliation by the Commission be separate from, and independent of, consideration of a complaint. By allowing information disclosed during the conciliation to be used as part of the consideration of the complaint, the Bill potentially limits the protection of privacy provided by section 12 of the HRA.

Section 99A of the Act allows information sharing between Commissioners if that information is necessary for the effective exercise of a function under the Act. The section was introduced as part of the response to the COVID-19 pandemic and was due to expire after 12 months. The Bill will remove the expiry provisions, allowing information sharing to continue indefinitely. This may limit the protection of privacy provided by section 12 of the HRA.

*Road Transport (Alcohol and Drugs) Act 1977*

The Bill will amend the offence of driving, riding or being in charge of a bicycle, personal mobility device, animal-drawn vehicle, or animal on a road while under the influence of alcohol to include being under the influence of a drug (as listed in schedule 1 of the Act). The Bill will also include this amended offence in the definition of a serious offence under the *Motor Accident Injuries Act 2019* if the offence relates to driving under the influence of a drug. This may limit the right to freedom of movement protected under section 13 of the HRA and the right to liberty and security of person protected under section 18 of the HRA.

###### Spent Convictions Act 2000

After a sufficient crime-free period (10 years or five years in the case of non-adult offenders) a crime is deemed under the Spent Convictions Act to be spent, so that the convictions no longer have to be disclosed or included in a person’s criminal history. Currently, sexual offences cannot be spent in this way. The Bill will allow a person with a youth sexual offence conviction to apply for a court order that the conviction be spent. The court can make the order if it is considered to be in the public interest, taking into account a range of factors. This may potentially limit the right to equality protected by section 8 of the HRA and the protection of privacy provided by section 12 of the HRA. The hearing of an application in relation to a youth sexual offence can also be in private, having regard to the victim’s right to privacy, whether the identity of the applicant was protected and other relevant factors. This may limit the right to a public hearing protected by section 21 of the HRA.

***Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)***

##### Incorporation of Australian Standard

The Bill will amend the *Civil Law (Sale of Residential Property) Act 2003* by moving the definition and documents required in relation to the sale of adaptable housing dwellings to the regulations. The Bill will also amend the Civil Law (Sale of Residential Property) Regulation 2004 to define an adaptable housing dwelling and the documents required in relation to the sale of such dwellings through reference to Australian Standard AS 4299-1995 (Adaptable Housing). The explanatory statement accompanying the Bill includes the following justification for the amendment:

As the Australian Standard may change, it is appropriate that the documents be prescribed by regulation. A member of the public can access the Australian Standard by attending any government shopfront during business hours.

The Bill will also apply the new definition of adaptable housing dwelling to the *Residential Tenancies Act 1997.*

The Committee notes that the definition and documents required relating to adaptable housing dwellings was introduced by the *Unit Titles Legislation Amendment Act 2020* after amendments to the *Unit Titles Legislation Amendment Bill 2019* proposed by Ms Le Couteur MLA*.* The Committee, when commenting in its report 39 on those proposed amendments, noted that an explanation for the reference to an Australian Standard had not been provided. The Committee also noted that the effect of the amendments include the requirement that, when a unit which is an adaptable housing dwelling is being offered for sale, any contract for sale include documents and plans demonstrating compliance with that Standard. It would also be a strict liability offence (see section 23B) to advertise a unit which is an adaptable housing dwelling without including a statement to that effect. It was also not clear whether changes to the Australian Standard from time to time were intended to be incorporated into the definition. The Committee therefore requested a justification for defining adaptable housing dwelling through reference to an Australian Standard, which version of the Standard was intended to apply, and in particular why it could be considered reasonable to include compliance with the Standard as an element of a strict liability offence. There has been no response to the Committee’s request.

The amendments in the Bill will mean that the Australian Standard will continue to be relied upon in defining and prescribing the required documents in relation to adaptable housing dwellings. By not providing that the Australian Standard is to be incorporated as in force from time to time, the Regulation will only incorporate the current Standard. There will be no requirement for notification of the Standard or any changes in the future on the legislation register under subsection 47(6) of the *Legislation Act 2001*. While it is noted that the explanatory statement includes a statement on how the Australian Standard can be accessed by the public, in the Committee’s view a justification is still required for why reference to the Standard is warranted, particularly given its role in a strict liability offence.

The Committee is also concerned with how owners of existing premises, which may come within the definition of an adaptable housing dwelling, will be made aware of their future responsibilities under the proposed amendments.

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

### Proposed amendments

#### Public Interest Disclosure Amendment Bill 2020

On 19 June 2020, the Committee received proposed Government amendments to the Public Interest Disclosure Amendment Bill 2020. The amendments will affect how public interest disclosures are investigated where they relate to a Legislative Assembly entity (which includes Members or the Office of the Legislative Assembly, Members’ staff, and an officer of the Assembly, such as the Auditor-General, the Electoral Commissioner or the Ombudsman). Where the Integrity Commissioner receives a public interest disclosure, under the Bill the Commissioner may investigate the disclosure or refer the investigation to an investigating entity. The amendments will require public interest disclosures that relate to a Legislative Assembly entity, if they are referred, be referred to the Legislative Assembly commissioner for standards for investigation (the Commissioner for Standards appointed by the Speaker pursuant to a resolution of the Legislative Assembly).

The Committee has no comment on these amendments.

## Subordinate Legislation

### Disallowable Instruments—No comment

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

* **Disallowable Instrument DI2020-111 being the Land Titles (Verification of Authority) Rules 2020 section 48BF of the** *Land Titles Act 1925* **makes the Verification of Authority—Registrar‑General’s Rules.**
* **Disallowable Instrument DI2020-112 being the Land Titles (Verification of Identity) Rules 2020 section 48BE of the** *Land Titles Act 1925* **makes the Verification of Identity—Registrar-General’s Rules.**
* **Disallowable Instrument DI2020-113 being the Fisheries (Fishing Gear) Declaration 2020 made under section 17 of the** *Fisheries Act 2000* **prescribes fishing gear for use in the ACT.**
* **Disallowable Instrument DI2020-115 being the City Renewal Authority and Suburban Land Agency (Authority Board Chair) Appointment 2020 made under section 15** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as Chair of the City Renewal Authority Board.**

### Disallowable Instruments—Comment

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

Have the commencement requirements for these instruments been complied with?

* **Disallowable Instrument DI2020-109 being the Electronic Conveyancing National Law (ACT) Participation Rules 2020 section 23 and 25 of the** *Electronic Conveyancing National Law (ACT)* **determines the ACT Participation Rules for Electronic Conveyancing.**
* **Disallowable Instrument DI2020-110 being the Electronic Conveyancing National Law (ACT) Operating Requirements 2020 section 22 and 25 of the** *Electronic Conveyancing National Law (ACT)* **determines the ACT Operating Requirements for Electronic Conveyancing.**

Each of the instruments mentioned above is made under the *Electronic Conveyancing National Law (ACT)*. The first instrument mentioned above determines “participation rules for electronic conveyancing”. The formal parts of the instrument indicate that it is made under sections 23 and 25 of the Electronic Conveyancing National Law (ACT). Section 23 specifically provides for the making of “participation rules”. Section 25 provides for publication of “participation rules” and, also, “operating requirements” (which are dealt with by the second instrument mentioned above, discussed further, below). It provides:

**25 Publication of operating requirements and participation rules**

(1) An operating requirement or a participation rule—

(a) is a disallowable instrument; and

(b) must be notified at least 20 business days before the requirement or rule commences.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the [Legislation Act](http://www.legislation.act.gov.au/a/2001-14).

(2) However, if the Registrar is satisfied that an operating requirement or a participation rule must be made urgently because an emergency situation exists, the requirement or rule—

(a) may state that because of an emergency situation the requirement or rule commences on a stated day before the end of the 20 business days; and

(b) commences on the stated day.

(3) For subsection (2), an emergency situation exists if the Registrar considers that because of the occurrence of an event or the existence of particular circumstances, the operation, security, integrity or stability of an ELN or the titles register or land titles system is being, or is likely to be, jeopardised.

(4) If an operating requirement or a participation rule is notified less than 20 business days before its proposed commencement and subsection (2) does not apply—

(a) the requirement or rule is valid; but

(b) it commences on the 20th business day after its notification day.

(5) Subsection (1) (b) and (4) do not apply to an operating requirement or participation rule notified before the day this schedule commences.

(6) Subsection (5) and this subsection expire on 1 June 2021.

Subsection 2(1) of the first instrument mentioned above states that the instrument commences on the day after its notification day. The instrument was notified, on the ACT Legislation Register, on 25 May 2020. The title page for the substantive participation rules indicates that the rules are “to be in effect from 26 May 2020”.

The Committee notes that paragraph 25(1)(b) of the Electronic Conveyancing National Law (ACT) (set out, above) quite clearly provides that a participation rule “must be notified at least 20 business days before the requirement or rule commences”. The purported commencement of these particular participation rules seems to be contrary to that provision’ in that they were notified on 25 May 2020 and are stated to be “in effect” from 26 May 2020. However, the Committee notes that this general proposition does not apply if (a) an “emergency situation” exists (subsection 25(2)) or (b) if the relevant rules are “notified before the day this schedule commences” (subsection 25(5)). In the present context, “this schedule” appears to refer to the provisions of the Electronic Conveyancing National Law (ACT) (which has one Schedule, but section 25 is not contained within it).

The Committee notes that the ACT Legislation Register indicates that the Electronic Conveyancing National Law (ACT) is “effective” from 1 June 2020. This would tend to indicate that the subsection 25(5) exemption to the commencement requirement set out in paragraph 25(1)(b) applies to the first instrument mentioned above (ie since it was notified *before* 1 June 2020). However, the Committee notes that the explanatory statement for the first instrument does not address this issue. The Committee considers that the explanatory statement *should* have addressed the issue, especially given the complicated statutory requirements for commencement of such instruments.

The same issue arises in relation to the second instrument mentioned above, which determines “operating requirements for ELNOs [being Electronic Lodgement Network Operators]”. The formal parts of that instrument indicate that it is made under sections 22 and 25 of the Electronic Conveyancing National Law (ACT). Section 23 specifically provides for the making of “operating requirements for ELNOs”. The Committee has already discussed the relevance of section 25, above.

The second instrument mentioned above commences in the same way that the first instrument commences. Again, the Committee notes that the explanatory statement for the second instrument does not address the commencement issue. Again, the Committee considers that the explanatory statement should have addressed the issue, especially given the complicated statutory requirements for commencement of such instruments.

**The Committee draws the attention of the Legislative Assembly to each of the instruments mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.**

**This comment requires a response from the Minister.**

Human rights issues

**Disallowable Instrument DI2020-114 being the Public Place Names (Strathnairn) Determination 2020 (No 2) made under section 3 of the** *Public Place Names Act 1989* **determines the names of nine roads in the Division of Strathnairn.**

This instrument determines road names for the suburb of Strathnairn, under section 3 of the *Public Place Names Act 1989*. The Committee notes that the explanatory statement for the instrument discusses the human rights implications of the instrument, by reference to section 12 of the *Human Rights Act 2004*, which deals with the right to privacy and reputation.

**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.**

Retrospectivity / Drafting issues

* **Disallowable Instrument DI2020-117 being the Liquor (Fees) Determination 2020 made under section 227 of the** *Liquor Act 2010* **revokes DI2019-159 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-119 being the Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020 section 35 of the** *Liquor Regulation 2010* **waives fees payable for specified liquor licences due to the COVID-19 public health emergency.**
* **Disallowable Instrument DI2020-120 being the Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020 section 35 of the** *Liquor Regulation 2010* **revokes DI2020‑44 and waives fees payable for specified commercial liquor permits due to the COVID‑19 public health emergency.**

The first instrument mentioned above, made under section 227 of the *Liquor Act 2010*, determines fees, for that Act. Section 227 provides:

**227 Determination of fees**

(1) The Minister may determine fees for this Act.

*Note* The [Legislation Act](http://www.legislation.act.gov.au/a/2001-14) contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

(2) A fee determination for section 42 (Licence—application for renewal) commences—

(a) 3 months after its notification day; or

(b) if the determination provides for a later date or time—on that date or that time.

(3) A determination is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the [Legislation Act](http://www.legislation.act.gov.au/a/2001-14).

(4) In this section:

***Minister*** means the Minister for the time being administering the provision of the Act for which the fee, charge or other amount is determined.

Section 2 of the instrument provides for its commencement. It provides:

**2 Commencement**

(1) This instrument (except section 5(2) and the schedule, item 501) commences on 22 May 2020.

(2) Section 5(2) and the schedule, item 501 commence 3 months after this instrument’s notification day.

Subsection 5(2) revokes item 501 of the Schedule to the previous fees determination (ie DI2019‑159). The remainder of the previous determination is revoked by subsection 5(1). Item 501 of the Schedule to the determination determines fees for licences under section 42 of the Liquor Act. This means that subsection 227(2) of the Liquor Act applies, with the effect that any fee determination commences either (a) three months after the notification day for the instrument or (b) a later date or time, provided for by the instrument. Given that item 501 is subject to the three‑month-after-notification-day commencement provision, in the instrument, the instrument appears to comply with subsection 227(2) of the Liquor Act.

The Committee notes that the remaining provisions of the Schedule, which also determine fees for the Liquor Act, have a prospective effect, given that the first instrument mentioned above was notified on 21 May 2020 and commences on 22 May 2020.

The second and third instruments mentioned above were made on 22 May 2020. Section 2 of each instrument provides that the instruments commence on 22 May 2020. Each of the instruments waives certain fees (imposed by the first instrument mentioned above), subject to certain conditions. Schedule 1 to each instrument also indicates that the relevant waivers are to apply from 22 May 2020. However, the ACT Legislation Register entry for each instrument indicates that the relevant instrument is “effective” from **23** May 2020. This appears to be consistent with the general rule on commencement of “legislative instruments” (defined, in section 12 of the *Legislation Act 2001*, to include disallowable instruments, such as these instruments), set out in paragraph 73(2)(a) of the *Legislation Act 2001*, that such instruments commence on the day *after* their notification day.

Despite this general rule, there is a capacity in the Legislation Act (paragraph 73(2)(d)) for legislative instruments to commence *prior* to notification. However, this capacity is subject to the prohibition, set out in section 76 of the Legislation Act, on all but “non-prejudicial” retrospectivity in “statutory instruments” (defined in section 13 of the Legislation Act to include disallowable instruments, such as these instruments). This means that any retrospective operation must not operate to the disadvantage of any person, “other than the Territory or a territory authority or instrumentality”.

While the Committee acknowledges that, consistent with the approach demonstrated by SL2020-15, DI2020-44 and DI2020-45, discussed in *Scrutiny Report 42* of the *9th Assembly* (19 May 2020), which relate to waiver of various fees under the Liquor Act, it might be assumed that any retrospective application of the second and third instruments mentioned above can be assumed to be beneficial to the persons effected (ie because fees are being waived, rather than imposed), this is neither addressed in the explanatory statements for the instruments, nor evident, on the face of the instruments. The Committee notes that, in its document titled [*Subordinate legislation—Technical and stylistic standards—Tips/Traps*](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf),[[3]](#footnote-3) the Committee stated:

**RETROSPECTIVITY**

The Committee would generally prefer that subordinate legislation not have a retrospective operation. The Committee accepts, however, that retrospective application is occasionally required. Section 76 of the *Legislation Act 2001* provides (in simple terms) that only “non-prejudicial” retrospectivity is permissible. Subsection 76(4) provides that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Retrospectivity that is prejudicial to the Territory or to a territory authority, etc is permitted.

While the Committee may be entitled to assume that any provision that has a retrospective operation must not have a prejudicial operation (ie on the basis that the Committee is entitled to assume that legislation would not be drafted in breach of section 76), it assists the Committee (and the Legislative Assembly) if that issue is expressly dealt with in the Explanatory Statement. That is, it assists the Committee if there is a statement to the affect that “this legislation does not have a prejudicial operation”.

The Committee re-iterates that view, in the context of the second and third instruments mentioned above. In doing so, the Committee also acknowledges that any retrospective operation is very slight (ie one day). However, the Committee nevertheless stresses that it is its firm view that any retrospectivity issue should always be addressed, as suggested by the Committee’s *Tips/Traps* document.

Drafting issues

The Committee has also identified drafting issues, particularly in relation to the second and third instruments mentioned above, but also in relation to the explanation as to how the three instruments mentioned above operate, in relation to each other. The second and third instruments are evidently intended to refer to the operation of the first instrument. Section 3 of the second instrument refers to “[a] fee in the *Liquor (Fees) Determination 2020* [DI2020- ]” (ie the DI number is omitted). However, the explanatory statement for the instrument (correctly) refers to “the *Liquor (Fees) Determination 2020* [DI2020-117]” (ie the first instrument mentioned above). Section 3 of the third instrument mentioned above refers to “[a] fee in the *Liquor (Fees) Determination 2020* (DI2020-**XX**)” [emphasis added]. The explanatory statement for the third instrument refers to “the *Liquor (Fees) Determination 2020* [DI2020-**XXX**]” [emphasis added]. While these are, clearly, drafting errors, the Committee considers that it is relatively clear what is intended, by the relevant cross-references.

In addition, the Committee has already noted the interaction of the three instruments mentioned above. While the explanatory statements for the second and third instruments refer back to the first instrument, the explanatory statement for the first instrument does not refer to the second and third instruments. Given that the second and third instruments appear to waive fees imposed by the first instrument, the Committee considers that it could have been helpful if the interaction of the three instruments was addressed, in an explanatory statement. In the circumstances, it would probably have been of most assistance if this interaction was dealt with in the explanatory statement for the first instrument.

**The Committee draws the attention of the Legislative Assembly to each of the three instruments mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements for the instruments do not meet the technical or stylistic standards expected by the Committee.**

**This comment requires a response from the Minister.**

COVID-19-related instrument / Human rights issues

**Disallowable Instrument DI2020-118 being the Road Transport (General) Application Order 2020 (No 1) made under section 14 of the** *Road Transport (General) Act 1999* **orders that section 16G of the Road Transport (Offences) Regulation 2005 be varied for a period of 12 months in response to the COVID-19 emergency.**

This instrument is made under section 14 of the *Road Transport (General) Act 1999*, which allows the Minister to order that the operation of regulations made under the road transport legislation, or a provision of such regulations, is suspended for a stated period, or varied in the way stated in the order. This instrument varies paragraph 16G(2)(b) of the *Road Transport (Offences) Regulation 2005*. Section 16G relates to participation in an approved community work or social development program, as part of an alternative approach to compliance with an infringement notice or reminder notice for an infringement notice offence. The effect of the variation is to extend a three-month period within which something must occur to 12 months. The variation is explicitly made in the context of “the current health emergency” and is evidently to the benefit of persons seeking to participate in such programs.

The Committee notes that the explanatory statement for the instrument addresses possible human rights implications of the instrument. It states:

**Human rights implications**

There are no human rights 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.**

COVID-19-related instrument / Disapplication of subsection 47(6) of the *Legislation Act 2001*

**Disallowable Instrument DI2020-139 being the Gaming Machine (Emergency Community Purpose Contribution—Club Employees) Declaration 2020 section 166A of the** *Gaming Machine Act 2004* **provides for certain payments to club staff to be community purpose contributions for the purpose of providing relief or assistance to the community during a COVID-19 emergency.**

This instrument is made under section 166A of the *Gaming Machine Act 2004*, which allows the Minister, in the context of a “the COVID-19 emergency”, to declare that a “contribution”, by “a licensee that is a club”, is a “community purpose contribution”. The explanatory statement for the instrument states:

Part 12 of the *Gaming Machine Act 2004* (the Act)provides for community contributions. A licensee that is a club (a ‘club’) is required to make community purpose contributions of at least eight per cent of the net gaming machine revenue that the club receives in a reporting year.

Section 166A of the Act provides that the Minister may make an *emergency community purpose contribution declaration*.

Under an emergency community purpose contribution declaration, the Minister may declare that a contribution by a club is a community purpose contribution, despite anything else in the Act.

The explanatory statement goes on to explain the particular effect of the instrument:

This *Gaming Machine (Emergency Community Purpose Contribution—Club Employees) Declaration 2020* provides for certain payments to club staff to be community purpose contributions for the purpose of providing relief or assistance to the community in relation to a COVID-19 emergency.

The Committee notes that the instrument refers to (and relies upon) “the ***Registered and Licensed Clubs Award 2010***”, which is defined in subsection 3(4) of the instrument. The definition applies the relevant award “as in force from time to time”. This means that the general rule, set out in subsection 47(3) of the *Legislation Act 2001* that an (external to ACT law) instrument can only be applied as in force at a particular time, is displaced.

Section 4 of the instrument then provides:

**4 Disapplication of Legislation Act, s 47(6)**

The Legislation Act, section 47(6) does not apply to the *Registered and Licensed Clubs Award 2010* under this instrument.

*Note* The *Registered and Licensed Clubs Award 2010* does not need to be notified under the Legislation Act because s 47(6) does not apply (see Legislation Act, s 47(7)). The Award is available at the website noted above.

The relevant website address appears in the definition mentioned above.

The Committee notes that the effect of subsection 47(6) of the Legislation Actis to make any (external to ACT law) instrument applied “as in force from time to time”, and any amendments or revisions of such (external) instruments, “notifiable instruments”, as defined by section 10 of the Legislation Act. This, in turn, means that they must be published on the ACT Legislation Register. The disapplication of this requirement means that (in this case) neither the relevant award nor any amendments to it must be published on the ACT Legislation Register.

The Committee has consistently looked carefully at legislation that disapplies the publication requirements of section 47 of the Legislation Act. Those requirements are intended to ensure that all material relevant to the operation of legislation is readily available to a person who needs to access and understand the content of legislation, in order to work out how it applies (including how it applies to them). In its document titled [*Subordinate legislation—Technical and stylistic standards—Tips/Traps*](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf),[[4]](#footnote-4) the Committee stated:

The Committee accepts that there may be plausible reasons why the general rule of section 47 can be displaced. An example is where legislation incorporates an Australian Standard and where there is only a certain class of people that can be expected to be concerned by the requirements of the Standard. Australian Standards are generally copyrighted documents and the publishers of such Standards recoup the costs of publishing them by charging (often sizeable) fees for persons wishing to have access to the Standards. While still not an ideal situation, this is one in which the Committee generally considers that it may be acceptable to disapply section 47 of the Legislation Act.

That said, the Committee considers that legislation that disapplies section 47 of the Legislation Act should be accompanied by an explanation as to why it is considered to be necessary to disapply section 47. The Committee also considers that, in some circumstances, it is appropriate that legislation nevertheless provide that the general public may inspect a copy of the material that is incorporated by reference at a particular place (eg an ACT Government office), within certain hours.

In that context, the Committee notes that the explanatory statement for this instrument states:

Disapplication of *Legislation Act 2001*, section 47(6)

Section 47 of the *Legislation Act 2001* (the Legislation Act) provides that a statutory instrument may make provision about a matter by applying a law or an instrument of the ACT or another jurisdiction, including the Commonwealth.

The *Registered and Licensed Clubs Award 2010* (the Award) is incorporated into this instrument. The Legislation Act, section 47(6) provides that an incorporated document, and any amendment or replacement of such a document, are taken to be notifiable instruments. A notifiable instrument must be notified on the legislation register under the Legislation Act. However, the Legislation Act, section 47(6) may be displaced by the authorising law (the Act) or the incorporating instrument (this instrument) (see section 47(7)). The Legislation Act, section 47(6) is displaced here for the reasons outlined below.

The Award is a modern award under the *Fair Work Act 2009* (Cwlth). Under that Act, section 168 (Varied modern award must be published), the Fair Work Commission must publish on its website, or by any other means it considers appropriate, the Award as varied as soon as practicable.

As noted in the instrument, the Award is available at: <https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000058/default.htm>.

The Committee notes, with approval, that the statement, above, addresses the Committee’s concerns, in relation to the disapplication of the requirements of section 47 of the Legislation Act.

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

### Regulatory impact statement—No Comment

The Committee has examined the regulatory impact statement for the following disallowable instrument and offers no comments on it:

**Disallowable Instrument DI2020-113 being the Fisheries (Fishing Gear) Declaration 2020, including a regulatory-impact statement, made under section 17 of the** *Fisheries Act 2000* **prescribes fishing gear for use in the ACT.**

## Responses

### Government responses

The Committee has received responses from:

* The Minister for Health, dated 17 June 2020, in relation to comments made in Scrutiny Report 44 concerning the Public Health Amendment Bill 2020.
* The Minister for Community Services and Facilities, dated 22 June 2020, in relation to comments made in Scrutiny Report 43 concerning the Working with Vulnerable People (Background Checking) Amendment Bill 2020.

[**These responses**](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills)***[[5]](#footnote-5)* can be viewed online.**

* The Minister for Employment and Workplace Safety, dated 15 June 2020, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instrument DI2020-116—Long Service Leave (Portable Schemes) COVID-19 Emergency Leave Determination 2020 (No 1)
* The Minister for City Services, undated, in relation to comments made in Scrutiny Report 39 concerning Disallowable Instrument DI2019-286—Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2) (received via email on 16 June 2020).
* The Minister for Justice, Consumer Affairs and Road Safety, undated, in relation to comments made in Scrutiny Report 42 concerning Disallowable Instrument DI2020-28—Road Transport (Public Passenger Services) Independent taxi Service Operator—Service Standards 2020 (No 1) (received via email on 16 June 2020).
* The Minister for Climate Change and Sustainability, dated 29 June 2020, in relation to comments made in Scrutiny Report 43 concerning Disallowable Instrument DI2020-83—Commissioner for Sustainability and the Environment Appointment 2020 (No 2).

[**These responses**](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation)***[[6]](#footnote-6)* can be viewed online.**

The Committee wishes to thank the Minister for Health, the Minister for Community Services and Facilities, Minister for Employment and Workplace Safety, the Minister for City Services, the Minister for Justice, Consumer Affairs and Road Safety, and the Minister for Climate Change and Sustainability for their helpful responses.

Giulia Jones MLA

Chair

30 June 2020

## Outstanding Responses

### Bills/Subordinate Legislation

* **Report 27, dated 18 February 2019**
* Electoral Amendment Bill 2018 (Government Response).
* **Report 28, dated 12 March 2019**
* Electoral Amendment Bill 2018 (Private Member’s amendments).
* **Report 37, dated 19 November 2019**
* Domestic Animals (Disqualified Keepers Register) Amendment Bill 2019 (PMB).
* Planning and Development (Controlled Activities) Amendment Bill 2019 (Private Member’s amendments).
* **Report 38, dated 4 February 2020**
* Electoral Legislation Amendment Bill 2019 (Private Member’s amendments).
* **Report 39, dated 17 February 2020**
* Unit Titles Amendment Bill 2019 (Private Member’s amendments).
* **Report 41, dated 28 April 2020**
* COVID-19 Emergency Response Bill 2020.
* **Report 42, dated 19 May 2020**
* Crimes (Offences Against Vulnerable People) Amendment Bill 2020.
* **Report 44, dated 16 June 2020**
* Disallowable Instrument DI2020-93 Veterinary Practice (Fees) Determination 2020 (No 2).
* Disallowable Instrument DI2020-98 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 1).
* Disallowable Instrument DI2020-99 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 2).
* Disallowable Instrument DI2020-100 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 3).
* Disallowable Instrument DI2020-108 Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2020 (No 10).
* Residential Tenancies Amendment Bill 2020—Proposed amendments (Private Member).

1. Available from <https://www.pcc.gov.au/uniform_legislation_official_versions.html>. [↑](#footnote-ref-1)
2. Available from <https://www.transportinfrastructurecouncil.gov.au/publications>. [↑](#footnote-ref-2)
3. https://www.parliament.act.gov.au/\_\_data/assets/pdf\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf. [↑](#footnote-ref-3)
4. https://www.parliament.act.gov.au/\_\_data/assets/pdf\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf. [↑](#footnote-ref-4)
5. https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills. [↑](#footnote-ref-5)
6. https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/response-to-comments-on-subordinate-legislation. [↑](#footnote-ref-6)