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

# Scrutiny Report 47

28 JULY 2020

##

## The Committee

### Committee Membership

Mrs Giulia Jones MLA (Chair)

Ms Bec Cody MLA (Deputy Chair)

Mr Deepak-Raj Gupta MLA

### Secretariat

Mr Andrew Snedden (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

Mr Daniel Stewart (Legal Adviser—Bills)

Ms Sophie Milne (Chamber Support)

### Contact Information

Telephone 02 6205 0199

Facsimile 02 6205 3109

Post GPO Box 1020, CANBERRA ACT 2601

Email scrutiny@parliament.act.gov.au

Website www.parliament.act.gov.au

### 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.

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## Subordinate Legislation

### Disallowable Instruments—No comment

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

* **Disallowable Instrument DI2020-140 being the Retirement Villages (Fees) Determination 2020 made under section 262 of the** *Retirement Villages Act 2012* **revokes DI2019-119 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-141 being the Co-operatives National Law (ACT) (Fees) Determination 2020 made under schedule 1 of the** *Co-operatives National Law (ACT) Act 2017* **revokes DI2019-121 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-142 being the Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2020 made under section 67 of the** *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* **revokes DI2018-142 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument** **DI2020-143 being the Agents (Fees) Determination 2020 made under section 176 of the** *Agents Act 2003* **revokes DI2019-123 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-144 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2020 (No 2) made under subsection 21(1) of the** *Race and Sports Bookmaking Act 2001* **determines the area within one metre of any selling terminal, owned and operated by Tabcorp ACT Pty Ltd and located within the places identified in the Schedule as a sports bookmaking venue.**
* **Disallowable Instrument DI2020-146 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2020 (No 2) made under subsections 10(3) and 20(4) of the** *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2020-149 and determines the conditions under which a non-executive member may employ staff and engage consultants or contractors, including salary allocations for the 2020-2021 financial year.**
* **Disallowable Instrument DI2020-148 being the Electoral (Fees) Determination 2020 made under section 340B of the** *Electoral Act 1992* **revokes DI2019-71 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-149 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2020 (No 1) made under subsections 10(3) and 20(4) of the** *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2019-79 and determines the conditions under which non-executive members may employ staff and engage consultants or contractors, including salary allocations for the 2020-2021 financial year.**
* **Disallowable Instrument DI2020-150 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2020 (No 1) made under subsections 5(3) and 17(4) of the** *Legislative Assembly (Members' Staff) Act 1989* **revokes DI2019-80 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors, including a revised salary allocation for the 2020-2021 financial year.**
* **Disallowable Instrument DI2020-151 being the Public Trustee and Guardian (Fees) Determination 2020 made under section 75 of the** *Public Trustee and Guardian Act 1985* **revokes DI2019-162 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-152 being the Associations Incorporation (Fees) Determination 2020 made under section 125 of the** *Associations Incorporation Act 1991* **revokes DI2019-165 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-153 being the Guardianship and Management of Property (Fees) Determination 2020 made under section 75 of the** *Guardianship and Management of Property Act 1991* **revokes DI2019-163 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-154 being the Court Procedures (Fees) Determination 2020 (No 2) made under section 13 of the** *Court Procedures Act 2004* **revokes DI2020-13 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-155 being the Unit Titles (Management) (Fees) Determination 2020 made under section 119 of the** *Unit Titles (Management) Act 2011* **revokes DI2019-168 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-156 being the Race and Sports Bookmaking (Fees) Determination 2020 made under section 97 of the** *Race and Sports Bookmaking Act 2001* **revokes DI2019-160 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-157 being the Casino Control (Fees) Determination 2020 made under section 143 of the** *Casino Control Act 2006* **revokes DI2019-157 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-158 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2020 made under section 48 of the** *Unlawful Gambling Act 2009* **revokes DI2019-161 and determines the fee to accompany an application by a charitable organisation to conduct charitable gaming for the purposes of the Act.**
* **Disallowable Instrument DI2020-159 being the Animal Welfare (Fees) Determination 2020 (No 1) made under section 110 of the** *Animal Welfare Act 1992* **revokes DI2019-110 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-160 being the Domestic Animals (Fees) Determination 2020 (No 1) made under section 144 of the** *Domestic Animals Act 2000* **determines fees payable under the Act.**
* **Disallowable Instrument DI2020-161 being the Public Unleased Land (Fees) Determination 2020 (No 2) made under section 130 of the** *Public Unleased Land Act 2013* **revokes DI2020-11, determines fees payable under the Act, and allows for some fees to be waived under specific circumstances.**
* **Disallowable Instrument DI2020-162 being the Tree Protection (Fees) Determination 2020 (No 1) made under section 109 of the** *Tree Protection Act 2005* **revokes DI2019-107 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-163 being the Waste Management and Resource Recovery (Fees) Determination 2020 (No 1) made under section 126 of the** *Waste Management and Resource Recovery Act 2016* **revokes DI2019-184 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-166 being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2020 (No 1) made under section 45 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person, an expert in property development, as member of the Suburban Land Agency Board.**
* **Disallowable Instrument DI2020-167 being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2020 (No 2) made under section 45 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person, an expert in social inclusion and community building, as member of the Suburban Land Agency Board.**
* **Disallowable Instrument DI2020-168 being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2020 (No 3) made under section 45 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person, an expert in social work and affordable housing, as member of the Suburban Land Agency Board.**
* **Disallowable Instrument DI2020-169 being the Domestic Animals (Accredited Assistance Animal Public Access Standards) Determination 2020 made under section 95 of the** *Domestic Animals Act 2000* **determines the minimum standard of behaviour and hygiene for assistance animals accessing public places in the ACT.**
* **Disallowable Instrument DI2020-170 being the Domestic Animals (Assistance Animal Accreditation) Guidelines 2020 made under section 95 of the** *Domestic Animals Act 2000* **provides guidelines for the accreditation of assistance animals in the ACT, in particular the two year time frame for accreditation, the recognition of existing accreditation by jurisdictions and organisations that meet the ACT's standards, and the requirements for assistance animal trainers and assessors to be registered to accredit assistance animals in the ACT.**
* **Disallowable Instrument DI2020-172 being the Victims of Crime (Fees) Determination 2020 (No 1) made under section 50(1) of the** *Victims of Crime Regulation 2000* **revokes DI2019-173 and determines the fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-173 being the Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 3) made under section 9 of the and section 78 of the** *Canberra Institute of Technology Act 1987 and Financial Management Act 1996* **appoints the Chair of the CIT Student Association Council to be the Student Member of the CIT Board.**
* **Disallowable Instrument DI2020-177 being the Taxation Administration (Amounts Payable—Land Tax) Determination 2020 made under section 139 of the** *Taxation Administration Act 1999* **revokes DI2019-145 and determines the fixed charge and percentage rates for land tax and a flat percentage rate for the foreign ownership surcharge.**
* **Disallowable Instrument DI2020-178 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2020 made under section 139 of the** *Taxation Administration Act 1999* **extends the Pensioner Duty Concession Scheme, which assists eligible pensioners to move accommodation by reducing the duty payable on their new purchase of a residential home, or residential vacant land.**
* **Disallowable Instrument DI2020-179 being the Duties (Pensioner Duty Deferral Scheme) Determination 2020 made under section 75AG of the** *Duties Act 1999* **extends the opportunity to defer the payment of duty to all pensioners acquiring a property as a principal place of residence.**
* **Disallowable Instrument DI2020-182 being the Financial Management (Territory Authorities) Guidelines 2020 made under section 133 of the** *Financial Management Act 1996* **revokes DI2019-257 and prescribes the entities that are Territory authorities for the purposes of the Act.**
* **Disallowable Instrument DI2020-183 being the Financial Management (Territory Authorities prescribed for Outputs) Guidelines 2020 made under section 133 of the** *Financial Management Act 1996* **revokes DI2017-65 and prescribes certain Territory authorities for output reporting for the purposes of the Act.**
* **Disallowable Instrument DI2020-184 being the Dangerous Goods (Road Transport) Fees and Charges Determination 2020 made under section 194 of the** *Dangerous Goods (Road Transport) Act 2009* **revokes DI2019-81 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-185 being the Dangerous Substances (Fees) Determination 2020 made under section 221 of the** *Dangerous Substances Act 2004* **revokes DI2019-83 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-186 being the Machinery (Fees) Determination 2020 made under section 5 of the** *Machinery Act 1949* **revokes DI2019-84 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-187 being the Scaffolding and Lifts (Fees) Determination 2020 made under section 21 of the** *Scaffolding and Lifts Act 1912* **revokes DI2019-85 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-188 being the Work Health and Safety (Fees) Determination 2020 made under section 278 of the** *Work Health and Safety Act 2011* **revokes DI2019-87 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-189 being the Workers Compensation (Fees) Determination 2020 made under section 221 of the** *Workers Compensation Act 1951* **revokes DI2019-88 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-190 being the Adoption (Fees) Determination 2020 (No 1) made under section 118 of the** *Adoption Act 1993* **repeals DI2019-150 and determines fees payable for services provided by Child and Youth Protection Services, Community Services Directorate.**
* **Disallowable Instrument DI2020-193 being the Rates, Land Tax, Land Rent and Duties (Certificate and Statement Fees) Determination 2020 made under section 252AB of the** *Duties Act 1999,* **section 78 of the** *Rates Act 2004,* **section 32 of the** *Land Rent Act 2008* **and section 43 of the** *Land Tax Act 2004* **revokes DI2019-144 and determines the fee payable to the Commissioner for ACT Revenue to apply for a certificate, for the purposes of the Acts.**
* **Disallowable Instrument DI2020-194 being the Taxation Administration (Amounts Payable—Land Tax) Determination 2020 made under section 139 of the** *Taxation Administration Act 1999* **revokes DI2019-143 and determines the standard, discount, and relevant percentages, as well as the income threshold amounts, for leases, for the purposes of the Act.**
* **Disallowable Instrument DI2020-195 being the Health (Fees) Determination 2020 (No 2) made under section 192 of the** *Health Act 1993* **repeals DI2020-55 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-196 being the Victims of Crime (Victims Advisory Board) Appointment 2020 (No 3) made under section 22D of the** *Victims of Crime Act 1994* **revokes specified clauses of DI2017-197 and DI2019-148 and appoints specified persons as members of the Victims Advisory Board.**
* **Disallowable Instrument DI2020-197 being the Environment Protection (Fees) Determination 2020 made under section 165 of the** *Environment Protection Act 1997* **revokes DI2019-124 and determines fees payable for the purposes of the Act.**

### Disallowable Instruments—Comment

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

Is this a disallowable instrument?

**Disallowable Instrument DI2020-145 being the Canberra Institute of Technology (CIT Board Member) Appointment 2020 (No 2) made under section 9 of the** *Canberra Institute of Technology Act 1987* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the CIT Board for a period of three years.**

This instrument appoints a specified person as a member of the Canberra Institute of Technology Board. The appointment is made by disallowable instrument.

The Committee notes that section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions, by Ministers. It provides:

**227 Application—div 19.3.3**

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or

(c) a person to a statutory position if the only function of the position is to advise the Minister.

In the light of paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is **not** a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled [*Subordinate legislation—Technical and stylistic standards—Tips/Traps*](https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf),[[1]](#footnote-1) the Committee stated:

Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that there is no such statement, in the explanatory statement for this instrument.

**The Committee seeks the Minister’s confirmation that the specified person appointed by this instrument is not a public servant.**

**The Committee draws the attention of the Legislative Assembly to the instrument, under principle (2) of the Committee’s terms of reference, 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.**

Instrument addressing issues previously identified by the Committee / Retrospective application

**Disallowable Instrument DI2020-147 being the Animal Welfare (Advisory Committee) Establishment 2020 (No 1) made under section 109 of the** *Animal Welfare Act 1992* **establishes the Animal Welfare Advisory Committee, establishes rules relating to procedures and membership, and revokes NI2015-219.**

This instrument, made under section 109 of the *Animal Welfare Act 1992*, establishes the Animal Welfare Advisory Committee and, in addition, sets out the rules and procedures for the Committee. The Committee notes that the establishment, etc is (now) being done by disallowable instrument. This is being done in the light of issues originally raised by the Committee in *Scrutiny Report 37* of the 9th Assembly (19 November 2019), in relation to the Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1) (DI2019-216), then dealt with again in *Scrutiny Report 39* of the 9th Assembly (17 February 2020), by reference to a further instrument, the Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2) (DI2019-286). In short, the issue was that the appointments made by the earlier instruments were made by reference to an “establishment instrument” that was a *notifiable* instrument, rather than a *disallowab*le instrument, as required by subsection 109(4) of the Animal Welfare Act.

In *Scrutiny Report 45* of the *9th Assembly* (30 June 2020), the Committee noted that a response (undated) had been received from the Minister for City Services, undated, in relation to comments made in *Scrutiny Report 39*. The Committee had earlier received a response from the Minister, in relation to its comments in *Scrutiny Report 37*. Though the Committee did not comment on the contents of either response, the Committee was pleased that the Minister’s responses addressed its earlier concerns.

In his most recent response, the Minister stated:

As indicated in my response to *Scrutiny Report 37*, the *Animal Welfare Act 1992* was amended in October 2019 to change the instrument of establishment of the Animal Welfare Advisory Committee from a Notifiable Instrument to a Disallowable Instrument. I confirm that NI2015-219 being the Animal Welfare (Advisory Committee) Establishment 2015 will be remade as a disallowable instrument and will include a transitionary clause to ensure that appointments including those made in the instrument continue to apply.

The current instrument carries out the Minister’s undertaking to re-make the “establishment instrument”.

The Committee notes that, as foreshadowed by the Minister, this instrument contains a “transitory clause”, the purpose of which is “to ensure that appointments including those made in the [earlier] instrument continue to apply. Section 17 of the current instrument provides:

**17 Transitional—members of advisory committee**

The *Animal Welfare (Advisory Committee Member) Appointment 2019 (No 1)* DI2019-216 and the *Animal Welfare (Advisory Committee Member) Appointment 2019 (No 2)* DI2019-286 are taken to be made under section 4 of this instrument.

The Committee has a minor concern that the transitional provision might be seen as having a retrospective effect, in its application to the earlier appointments. Of course, any retrospective effect could only be “non-prejudicial” to individuals, etc, or it fall foul of section 76 of the *Legislation Act 2001*. The Committee considers that, if only out of an abundance of caution, the explanatory statement for this instrument ought to have addressed the issue of the potential retrospective application of the instrument. It does not.

**The Committee seeks the Minister’s assurance that there is no (prejudicial) retrospective application of this instrument, contrary section 76 of the *Legislation Act 2001*.**

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

Drafting issue

* **Disallowable Instrument DI2020-164 being the City Renewal Authority and Suburban Land Agency (Agency Board Chair) Appointment 2020 made under section 45 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified as chair of the Suburban Land Agency Board.**
* **Disallowable Instrument DI2020-165 being the City Renewal Authority and Suburban Land Agency (Agency Board Deputy Chair) Appointment 2020 made under section 45 of the** *City Renewal Authority and Suburban Land Agency Act 2017* **appoints a specified person as deputy chair of the Suburban Land Agency Board.**

The instruments mentioned above appoint specified persons as chair and deputy chair of the Suburban Land Agency, respectively. The formal parts of both instruments refer to section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017*, for legislative authority. In terms of the establishment of boards, by legislation, section 45 is a relatively “bare” provision. It provides:

**45 Establishment of governing board for agency**

The governing board of the agency is established.

*Note 1* An appointment of a governing board member is an appointment under this section (see [*Financial Management Act 1996*](http://www.austlii.edu.au/au/legis/act/consol_act/fma1996164/), s 78 (7) (b)).

*Note 2* For agency board meeting arrangements see the [*Financial Management Act 1996*](http://www.austlii.edu.au/au/legis/act/consol_act/fma1996164/), div 9.4.

The provision is relatively “bare”, in the sense that it relies on the over-arching provisions of the *Financial Management Act 1996*, which deal in detail with the appointment of members of governing boards of Territory authorities, in the absence of specific provisions in the relevant legislation. This is reflected in the explanatory statements for both instruments, which refer to section 78 of the Financial Management Act, which deals with the appointment of governing board members, generally. However, in the case of these particular instruments, the Committee considers that either the formal parts of the instruments or the explanatory statements for the instruments should also have referred to section 79 of the Financial Management Act, which deals specifically with the appointments of chairs and deputy chairs of boards.

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

Fees determination / Instrument being re-made soon after being made

**Disallowable Instrument DI2020-171 being the** **Lotteries (Fees) Determination 2020 (No 2) made under section 18A of the** *Lotteries Act 1964* **revokes DI2020-132 and determines fees payable for the purposes of the Act.**

This instrument determines fees for the *Lotteries Act 1964*. It revokes and replaces the Lotteries (Fees) Determination 2020 (No 1) (DI2020-132), which the Committee commented on in *Scrutiny Report 46* of the *9th Assembly* (21 July 2020). In that *Scrutiny Report*, the Committee drew the attention of the Legislative Assembly to the earlier instrument, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument did not meet the technical or stylistic standards expected by the Committee. The particular issue was that the explanatory statement for the instrument did not meet the Committee’s expectations for fees determinations, in terms of identifying the “old” fee, the new fee, the percentage of any increase and, also, the reasons for any increase.

The Committee notes that the earlier instrument was made on 26 May 2020. The current instrument was made on 16 June 2020. No explanation is provided as to why it was necessary to revoke and re-make the earlier instrument so soon after it was made.

Unlike the earlier instrument, which appeared to maintain the previous financial year’s level of fees (though, as the Committee observed in *Scrutiny Report 46*, this issue was not addressed in the explanatory statement for the previous instrument), the current instrument increases the relevant fees. The explanatory statement for the current instrument states:

This instrument increases fees by Wage Price Index of 2.0 percent in accordance with Government policy regarding regulatory fee increases for 2020-2021. Rounding to the nearest dollar has occurred in relation to the increases. A comparative table indicating the previous and revised fees is included as an Attachment to this Explanatory Statement.

The Committee notes, with approval, that (unlike the previous instrument) the explanatory statement for the current instrument addresses the Committee’s expectations in relation to fees determinations. However, the Committee seeks the Minister’s advice as to why it was necessary to revoke and re-make the previous instrument, so soon after it was made.

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

Human rights issues

**Disallowable Instrument DI2020-174 being the Electricity Feed-in (Large-scale Renewable Energy Generation) FiT Support Payment Assessment Method 2020 made under section 17A of the** *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011* **approves an assessment method that sets a payment of zero dollars when spot price values for eligible electricity drop below negative twenty dollars.**

This instrument approves an “assessment method”, for section 17A of the *Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011*,that is to be applied to “FiT entitlements”. “FiT” refers to a “feed-in tariff”. FiTs represent a guaranteed price for the energy created by renewable energy generators. A “FiT entitlement” is a right for the holder of a FiT entitlement to receive FiT support payments under Part 4 of the Electricity Feed-in (Large-scale Renewable Energy Generation) Act.

The Committee notes that the explanatory statement addresses possible human rights implications of the instrument, stating:

**Human Rights**

This instrument does not engage with or limit any human rights.

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

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

COVID-19-related instrument / Retrospectivity

**Disallowable Instrument DI2020-175 being the Road Transport (General) Certificate of Inspection Application Order 2020 (No 1) made under section 14 of the** *Road Transport (General) Act 1999* **extends the period for which a certificate of inspection is in force under subsection 146(3) of the *Road Transport (Vehicle Registration) Regulation 2000* from one month to three months.**

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 subsection 146(3) of the *Road Transport (Vehicle Registration) Regulation 2000*. The effect is to extend the period of time—from 1 month to 3 months—that a certificate of inspection (for a vehicle) remains in force. The variation is made retrospectively, to 1 March 2020.

The Committee notes that the explanatory statement for the instrument states:

This order provides for retrospective application from 1 March 2020.

The retrospective application is non-prejudicial and is necessary to ensure that the holder of a certificate of inspection is not disadvantaged, as a result of the declaration of a public health emergency. The reforms order provides that applicants will not need to obtain another Certificate of Inspection to support registration transactions that are unable to be completed within a month of obtaining a Certificate of Inspection.

The Committee notes, with approval, that the retrospectivity issue has been addressed, in the explanatory statement, in the context of the limitations set out in section 76 of the *Legislation Act 2001*.

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

The Committee notes that the explanatory statement also addresses possible human rights implications of the instrument, stating:

**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

**Disallowable Instrument DI2020-176 being the Taxation Administration (Amounts Payable—Rates) Determination 2020 made under paragraph 46(2)(f) of the** *Rates Act 2004* **and section 139 of the** *Taxation Administration Act 1999* **revokes DI2019-272 to include a range of rates relief measures, including to general rates, the Fire and Emergency Services Levy, the City Centre Marketing and Improvements Levy, and the Safer Families Levy.**

This instrument is made under section 139 of the *Taxation Administration Act 1999* and under paragraph 46(2)(f) of the *Rates Act 2004*. Under section 139, the Minister can determine, by disallowable instrument, amounts and rates applicable for the Rates Act. Under paragraph 46(2)(f) of the Rates Act, the Minister may also determine, by disallowable instrument, the amounts and rates payable for the deferral of general rates for eligible non-pensioners.

The explanatory statement for the instrument states:

The *Taxation Administration (Amounts Payable – Rates) Determination 2020* (the Rates Determination) is a consolidated determination of various amounts in relation to the following taxes and levies levied under the Act:

* general rates, including deferral and rebate amounts;
* Fire and Emergency Services Levy (FESL), including rebate amounts;
* City Centre Marketing and Improvements Levy (CCMIL); and
* Safer Families Levy.

The Committee notes that the explanatory statement goes on to state:

In March and April 2020, the Government announced two economic stimulus packages to support business, industry and our community affected by the COVID-19 pandemic. As part of the stimulus packages, the Government will provide rates assistance to residential and commercial property owners to provide cashflow support.

The Rates Determination replaces the *Taxation Administration (Amounts Payable—Rates) Determination 2019 (No 2)*, DI2019-272 to include a range of rates relief measures, including:

* a $150 rebate to all residential properties;
* FESL freeze at the 2019-20 rate; and
* a reduction of CCMIL by 50 per cent.

Fixed charges and percentage rates (marginal rating factors) are updated for general rates. Different amounts are now specified for commercial rates based on the average unimproved value (AUV) of parcels of land.

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

Human rights issues

* **Disallowable Instrument DI2020-180 being the Clinical Waste (Fees) Determination 2020 made under section 40 of the** *Clinical Waste Act 1990* **revokes DI2019-103 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-181 being the Architects (Fees) Determination 2020 made under section 91 of the** *Architects Act 2004* **revokes DI2019-111 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-198 being the Heritage (Fees) Determination 2020 made under section 120 of the** *Heritage Act 2004* **revokes DI2019-126 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-199 being the Nature Conservation (Fees) Determination 2020 (No 2) made under section 368 of the** *Nature Conservation Act 2014* **revokes DI2020-91 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-200 being the Water Resources (Fees) Determination 2020 made under section 107 of the** *Water Resources Act 2007* **revokes DI2019-128 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-201 being the Stock (Fees) Determination 2020 made under section 68 of the** *Stock Act 2005* **revokes DI2019-129 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2020-202 being the Stock (Minimum Stock Levy) Determination 2020 made under section 7A of the** *Stock Act 2005* **revokes DI2019-130 and sets the minimum stock levy.**
* **Disallowable Instrument DI2020-203 being the Stock (Levy) Determination 2020 made under section 6 of the** *Stock Act 2005* **revokes DI2019-131 and determines the levy amount per stock unit and the number of animals making up a stock unit.**
* **Disallowable Instrument DI2020-204 being the Surveyors (Fees) Determination 2020 made under section 80 of the** *Surveyors Act 2007* **revokes DI2019-134 and determines fees payable for the purposes of the Act.**

The instruments mentioned above determine fees, or levies, for the *Clinical Waste Act 1990*, the *Architects Act 2004*, the *Heritage Act 2004*, the *Nature Conservation Act 2014*, the *Water Resources Act 2007*, the *Stock Act 2005* (three instruments) and the *Surveyors Act 2007*, respectively. The Committee notes that the explanatory statement for the first instrument mentioned above contains the following statement:

**Human Rights**

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. In this case, no human rights are impacted.

The explanatory statements for the second, third, fourth, fifth, sixth, seventh, eighth and ninth instruments mentioned above contain an equivalent statement.

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

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

Human rights issues

* **Disallowable Instrument DI2020-191 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 4) made under section 13 of the** *Road Transport (General) Act 1999* **provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, while participating in a special stage of the Active Rally Sport Test Day taking place on 2 July 2020.**
* **Disallowable Instrument DI2020-192 being the Road Transport (General) Application of Road Transport Legislation Declaration 2020 (No 5) made under section 13 of the** *Road Transport (General) Act 1999* **provides that certain parts of the road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, while participating in a special stage of the High Country Motorsport Rally Test Day taking place on 1 July 2020.**

The instruments mentioned above are made under section 13 of the *Road Transport (General) Act 1999*. In each case, the instrument provides that certain parts of the ACT road transport legislation do not apply to a designated vehicle, or the driver of a designated vehicle, while participating in a special stage of the Active Rally Sport Test Day (taking place on 2 July 2020) and the High Country Motorsport Rally Test Day (taking place on 1 July 2020), respectively.

The Committee notes that the explanatory statements for both instruments discuss the potential human rights implications of the instrument, by reference to the right to move freely within the ACT, as provided for by section 13 of the *Human Rights Act 2004*. The Committee notes that the explanatory statement for the first instrument mentioned above states:

The declarations in this instrument do not of itself restrict a person’s freedom of movement within the Territory, however the operation of the rally in closing parts of the forest in which the rally 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 law are being disapplied for the event to operate as intended, vehicles will be travelling in parts of the forest in excess of the usual speed limits and in a manner not consistent with the road rules. As such, the restriction on the free movement of people in those parts of the forest at those times is considered reasonable and proportionate to ensure safety of non-participants and represents the least restrictive approach that enables the event to proceed.

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

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

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

COVID-19-related instrument / Retrospectivity / Human rights issues

**Disallowable Instrument DI2020-205 being the Taxation Administration (Owner Occupier Duty) COVID-19 Exemption Scheme Determination 2020 made under section 137E of the** *Taxation Administration Act 1999* **determines a scheme for concession (by way of exemption) from conveyance duty for eventual owner-occupiers on the purchase of prescribed new homes for agreements entered into during the period 4 June 2020 to 30 June 2021, as part of a plan to support local construction jobs.**

The Committee notes that this instrument is part of the legislative response to the COVID-19 pandemic. The explanatory statement for the instrument states:

As part of ACT Government’s COVID-19 Recovery Plan to support local construction jobs, the *Taxation Administration (Owner Occupier Duty) COVID-19 Exemption Scheme Determination 2020* (the **Owner Occupier Duty Exemption Determination**) determines a scheme for a concession (by way of exemption) from conveyance duty for eventual owner-occupiers on the purchase of prescribed new homes for agreements entered into during the period 4 June 2020 to 30 June 2021.

The instrument was made on 30 June 2020. However, section 2 of the instrument provides that it is “taken to have commenced” on 4 June 2020. This means that it has a retrospective effect. While the retrospective operation is acknowledged in the explanatory statement for the instrument (see further below), there is no discussion of this retrospective operation, by reference to the prohibition, set out in section 76 of the *Legislation Act 2001*, on all but “non-prejudicial” retrospectivity in “statutory instruments” (defined in section 13 of the Legislation Act to include disallowable instruments, such as this instrument). The effect of section 76 is 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 notes that it is entitled to assume, given the context of the instrument, that it is actually beneficial to the persons effected (ie because it involves a concession/exemption), this is neither addressed in the explanatory statement for the instrument, nor evident, on the face of the instrument. 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),[[2]](#footnote-2) 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 has consistently taken the view that any retrospectivity issue should always be addressed, in the explanatory statement for an instrument or subordinate law, as suggested by the Committee’s *Tips/Traps* document.

**The Committee draws the attention of the Legislative Assembly to the instrument, under principle (2) of the Committee’s terms of reference, 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 notes that the explanatory statement goes on to address the potential human rights implications of the instrument:

**Human Rights Act 2004**

This instrument provides a concession to conveyance duty and does not limit, and is consistent with, human rights. By providing exemption to purchases of properties that require construction work, it promotes the right to work (section 27B of the *Human Rights Act 2004*) by supporting jobs for the property and construction industry.

In accordance with the legislation, the Owner Occupier Duty Exemption Determination includes a statement about whether, in my opinion as the Minister, the scheme is consistent with human rights.

In addition, the ACT Human Rights Commission has been consulted to ensure the Owner Occupier Duty Exemption Determination is consistent with human rights.

The Owner Occupier Duty Exemption Determination is to commence retrospectively on 4 June 2020, to align with the announcement of the initiative and ensure that there is no incentive to delay property purchase decisions.

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

**The comment immediately above does not require a response from the Minister.**

Are these appointments validly made?

* **Disallowable Instrument DI2020-206 being the University of Canberra Council Appointment 2020 (No 1) made under section 11 of the** *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**
* **Disallowable Instrument DI2020-207 being the University of Canberra Council Appointment 2020 (No 2) made under section 11 of the** *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**
* **Disallowable Instrument DI2020-208 being the University of Canberra Council Appointment 2020 (No 3) made under section 11 of the** *University of Canberra Act 1989* **appoints a specified person as a member of the University of Canberra Council.**

The instruments mentioned above appoint three specified persons as members of the University Council. The appointments are made under section 11 of the *University of Canberra Act 1989*.

The Committee notes that subsection 11A(5) of the University of Canberra Act sets out limitations on the appointment of persons to the Council. It provides:

(5) The Chief Minister must not appoint to the council—

(a) a member of—

 (i) the Commonwealth parliament; or

 (ii) a State parliament; or

 (iii) the Legislative Assembly; or

 (iv) the legislature of another territory; or

(b) a member of the academic staff or general staff of the university; or

(c) a student of the university.

Section 12 of the University of Canberra Act sets out further limitations:

**12 Qualifications for membership of council**

(1) A person is not qualified to become or remain a member of the council if the person—

(a) is under 18 years old; or

(b) is disqualified from managing corporations under the Corporations Act, part 2D.6 (Disqualification from managing corporations); or

(c) is convicted, in the ACT, of an offence punishable by imprisonment for at least 1 year; or

(d) is convicted outside the ACT, in Australia or elsewhere, of an offence that, if it had been committed in the ACT, would be punishable by imprisonment for at least 1 year.

(2) Disqualification under subsection (1) (c) or (d) ends on the later of the following:

(a) 5 years after the date of the person's conviction;

(b) 5 years after the date of the person's release from prison.

Bearing these limitations on appointment in mind, the Committee notes that the explanatory statement for the first instrument mentioned above states:

Sections 11A(5) and 12 of the UC Act prohibit the appointment of certain persons to the UC Council, to include elected officials, staff and students of UC, persons disqualified from running corporations, and persons convicted of certain offences.

The explanatory statements for the second and third statements mentioned above contain similar statements.

While it might be assumed that the appointments would not have been made if the limitations on appointment did not apply to any of the specified persons (especially given that the explanatory statements for the instruments refer to these limitations and, also, given that the appointments have apparently been considered by the Standing Committee on Education, Employment and Youth Affairs), the Committee considers that it is preferable that the application or non-application of any statutory requirements or limitations be expressly addressed, in the explanatory statement for an instrument of appointment.

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

### Subordinate Laws—Comment

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

Human rights issues

**Subordinate Law SL2020-21 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2020 (No 2) made under the** *Medicines, Poisons and Therapeutic Goods Act 2008* **provides clarity on record keeping requirements concerning faxed or electronically submitted prescriptions during a “Commonwealth special arrangement” as notified under section 100 of the *National Health Act 1953* (Cth).**

This subordinate law amends the *Medicines, Poisons and Therapeutic Goods Regulation 2008*. The explanatory statement for the subordinate law states that the intended effect of the amendments is

… to provide clarity on record keeping requirements concerning faxed or electronically submitted supply authorities (prescriptions) during a ‘Commonwealth special arrangement’ as notified under Section 100 of the *National Health Act 1953* (Cwth). This amendment regulation seeks to recognise the record keeping obligations of a faxed prescription as detailed by a Commonwealth special arrangement, as in force from time to time. The incorporation of a Commonwealth special arrangement has the effect of varying existing record keeping requirements for pharmacists and prescribers regarding the keeping of an original prescription following its transmission to a pharmacy.

The explanatory statement goes on to discuss potential human rights implications of the subordinate law:

The changes proposed by this amendment regulation are not considered to engage the *Human Rights Act 2004* as they only seek to adopt or incorporate aspects of the *National Health Act 1953* (Cwth) to enable access to pharmaceutical benefits under the PBS*.*

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

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

Human rights issues

**Subordinate Law SL2020-22 being the Road Transport (Offences) Amendment Regulation 2020 (No 2) made under sections 23 of the** *Road Transport (General) Act 1999* **identifies infringement notice penalty amounts for offences under the Heavy Vehicle National Law and associated regulations.**

This subordinate law amends the *Road Transport (Offences) Regulation 2005*, to prescribe infringement notice penalty amounts for offences under the Heavy Vehicle National Law (**HVNL**) and associated regulations. The explanatory statement for the subordinate law discusses potential human rights implications of the subordinate law:

**Human rights implications**

There are no human rights implications associated with this regulation.

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

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

Indexation of certain prescribed amounts / Human rights issues

**Subordinate Law SL2020-23 being the Victims of Crime (Financial Assistance) Amendment Regulation 2020 (No 1) made under the** *Victims of Crime (Financial Assistance) Act 2016* **amends payment amounts provided to victims under specified sections to align the payments with the Consumer Price Index.**

This subordinate law amends the *Victims of Crime (Financial Assistance) Regulation 2016*, to increase prescribed payment amounts for victims of crime, as provided for by the *Victims of Crime (Financial Assistance) Act 2016.* The explanatory statement for the subordinate law states:

Section 25 of the *Victims of Crime (Financial Assistance) Regulation 2016* requires yearly Consumer Price Index (CPI) increases for payments provided to victims under four sections:

* 1. maximum total financial assistance (section 24),
	2. recognition payment for primary victim (section 28),
	3. recognition payment for class A related victim (section 29), and
	4. recognition payment for class B related victim (section 30).

This regulation will bring payment amounts under these sections in line with the All Groups CPI (Canberra) for March 2019-March 2020 (as issued by the Australian Statistician) at 2%.

The explanatory statement for the subordinate law discusses potential human rights implications of the subordinate law:

**Human rights considerations**

This regulation supports the human rights of victims of crime by bringing financial assistance payments in line with CPI.

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

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

COVID-19-related legislation

**Subordinate Law SL2020-24 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2020 (No 3) made under the** *Medicines, Poisons and Therapeutic Goods Act 2008* **makes amendments to the Act to ensure that persons who are prescribed buprenorphine or methadone for opioid dependency treatment (ODT) are able to access their ODT during emergency situations by allowing an agent to deal with the prescribed ODT on their behalf.**

This subordinate law amends the *Medicines, Poisons and Therapeutic Goods Regulation 2008*. According to the explanatory statement for the subordinate law, the intention of the subordinate law is

 … to allow the Minister to exempt certain people dealing with buprenorphine or methadone from the MPTG Act. It also exempts certain people from the MPTG Act during the COVID-19 emergency. These exemptions are proposed to ensure that persons who are prescribed buprenorphine or methadone for opioid dependency treatment (ODT, as known as Opioid Maintenance Treatment or OMT) are able to access their ODT during emergency situations by allowing an agent to deal with the prescribed ODT on their behalf.

The Committee notes that subordinate law is made in the context of the COVID-19 pandemic. The explanatory statement states:

During a public health emergency (including the COVID-19 pandemic) or other event ODT patients may be unable to attend their usual ODT centre for supervised doses or to collect take away doses. This may put ODT patients at risk of overdose and, in turn, drug-related death if they are unable to access their ODT and attempt to source other drugs as an alternative. Conversely, without adequate contingency arrangements, ODT patients may seek to attend an ODT centre and thereby create other risks (e.g. if the ODT patient should be in isolation due to a COVID-19 diagnosis, regular attendance at an ODT centre may put the community at increased risk of COVID-19 exposure or transmission). As such, contingency arrangements may provide for an agent to be able to obtain, possess and supply ODT, subject to any conditions.

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

Human rights issues

**Subordinate Law SL2020-25 being the Security Industry Amendment Regulation 2020 (No 1) made under the** *Security Industry Act 2003* **implements new minimum security operations qualification requirements, determined by Australian Skills Quality Authority, for various subclasses of employee licenses.**

This subordinate law amends the *Security Industry Regulation 2003*, “to implement new minimum security operations qualification requirements determined by Australian Skills Quality Authority (**ASQA**), the national regulator for Australia’s vocational education and training sector”. The explanatory statement for the subordinate law indicates that the new minimum requirements arise from a “strategic review into security training programs” that was initiated by AQSA in 2016.

The explanatory statement for the subordinate law contains a detailed discussion of potential human rights implications of the subordinate law, by reference to the right to life and the right to recognition and equality before the law, protected by sections 9 and 8 of the *Human Rights Act 2004*, respectively.

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

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

Human rights issues

**Subordinate Law SL2020-26 being the Building (General) Amendment Regulation 2020 (No 1) made under the** *Building Act 2004* **enacts regulations which requires building surveyors to provide the Constructions Occupations Registrar with stage inspection information shortly after the inspection is complete.**

This subordinate law amends the *Building (General) Regulation 2008*. The amendments give effect to a recommendation of the ACT Government’s *Improving the ACT Building Regulatory System* reforms, announced in 2016. The amendment requires “stage inspection information” to be given to the Constructions Occupations Registrar, shortly after the inspection is complete. The intent is for building surveyors who undertake building certification work to supply information to the Registrar quickly, following staged inspections.

The Committee notes that the explanatory statement for the subordinate law discusses potential human rights implications of the subordinate law:

**Human Rights**

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. There are no human rights impacts related to this regulation. The regulation does not engage with human rights under the *Human Rights Act 2004*.

The Committee notes that the explanatory statement for the subordinate law goes on to address the consistency of the subordinate law with the scrutiny principles against which the Committee scrutinises legislation:

**Scrutiny Committee Principles**

The regulation is consistent with Scrutiny Committee (the Committee) principles.

* Although the Building Act does not include objects, the regulation accords with the general purpose of the Act by matching the intention of the law regarding advancing safety in building and construction in the Territory.
* The regulation does not unduly trespass on rights previously established by law. The regulation improves information available to the Registrar to support safety in building and construction in the Territory.
* The regulation does not contain matters which should properly be dealt with in an Act of the Legislative Assembly. The Act includes powers to provide for information to be provided by a certifier following a stage inspection.

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

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

Human rights issues

* **Subordinate Law SL2020-27 being the Work Health and Safety Amendment Regulations 2020 (No 1) made under the** *Work Health and Safety Act 2011* **adopts amendments to the nationally agreed model Work Health and Safety laws.**

This subordinate law amends the *Work Health Safety Regulation 2011*, to adopt recent amendments made to the National model Work Health and Safety Regulations and make other amendments. The explanatory statement for the subordinate law states:

This Amendment Regulation makes amendments to the WHS Regulation to:

* facilitate the adoption of the recent republication of exposure limits published by Safe Work Australia in the *Workplace Exposure Standard for Airborne Contaminants* as agreed by jurisdictions under the model WHS framework;
* align the WHS Regulation with recent amendments to the blood lead level thresholds adopted in the nationally agreed model WHS laws;
* align the WHS Regulation with technical amendments to diving provisions to correct outdated references to training courses as adopted in the nationally agreed model WHS laws; and
* establish a public register of infringement notices issued on WHS licence holders under the WHS laws.

The Committee notes that the explanatory statement for the subordinate law contains a detailed discussion of potential human rights issues arising from the subordinate law, by reference to rights in criminal proceedings (and the use of strict liability offences) and the right to privacy and reputation, protected by sections 22 and 12 of the *Human Rights Act 2004*, respectively.

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

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

## Fees instruments

### General comment

As is to be expected at this time of the year, the Committee has considered, for this Scrutiny Report, over 30 instruments that determine fees, for the purposes of various Acts. The Committee’s expectations, in relation to fees determinations (and other matters), are set out 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) In that document, the Committee states:

**FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:

• by whom the fee is payable; and

• to whom the fee is to be paid

In recent years, the Committee has been pleased to observe that the standard of fees determinations (and their explanatory statements) is much-improved (in terms of them meeting the Committee’s long-held views about fees determinations) from, say, 10 years ago. This improvement is, again, evident, in this batch of instruments. However, there is still a (relatively minor) level of inconsistency, in the explanations provided, for the various fees increases. In addition, there are some instruments that provide different increases/explanations, in the circumstances of particular Acts. These issues are discussed below.

### Consistency in explanations for fees increases

In the explanatory statements for this year’s batch of fees determinations, the Committee has identified the following examples of what might be regarded as “standard” wording, appearing in multiple instruments, explaining the reasons for the relevant fees increases:

* **Retirement Villages (Fees) Determination 2020—DI2020-140**

Fees in the 2020-21 financial year have been increased from fees in the previous financial year by a Wage Price Index (WPI) forecast of 2.0%. Calculations are rounded down to the nearest dollar, with the exception of fees that have remained static for over three years, in which case calculations are rounded up to the nearest dollar. This gives effect to the Government’s policy decision to limit growth in government fees and charges for households to no more than the ACT’s forecast Wage Price Index for 2020-21. This approach also aligns with the 2018 Treasury Fees and Charges Policy and Guidelines.

* **Agents (Fees) Determination 2020—DI2020-143**

Fees for the 2020-21 financial year have been increased from fees in the previous financial year by a Wage Price Index (WPI) forecast of 2.0%. Calculations are rounded down to the nearest dollar, with the exception of fees that have remained static for over three years, in which case calculations are rounded up to the nearest dollar. This gives effect to the Government’s policy decision to limit growth in government fees and charges for households to no more than the ACT’s forecast Wage Price Index for 2020-21.

* **Animal Welfare (Fees) Determination 2020 (No 1)****—DI2020-159**

This determination increases fees contained in DI2019-110 by forecast Wage Price index (WPI) 2% as per Budget Memo 2020/07, rounded for cash handling and other purposes.

* **Clinical Waste (Fees) Determination 2020—DI2020-180**

The regulatory fees in the determination have been increased by 2% for the 2020-21 financial year based on the wage price index as per government’s advice, appropriate rounding has been made in relation to increases.

* **Architects (Fees) Determination 2020—DI2020-181**

The regulatory fees in the determination have been increased by 2% for the 2020-21 financial year, based on the wage price index as per government’s advice, Administration fees relating to refunds are increased by 2% (the Wage Price Index), as per the government’s Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

The Committee understands that “Budget Memo 2020/07”, “the government’s Fees and Charges Policy and Guidelines” and “the 2018 Treasury Fees and Charges Policy and Guidelines” are all documents that are “internal” Government documents and are not publicly available. As the Committee also observed in *Scrutiny Report 33* of the 9th Assembly (6 August 2019), in relation to last year’s batch of fees instruments, while a greater consistency in wording, ie in referring to these sources of authority, would be preferable, the Committee notes that the gist of the explanations, quoted above, is that the relevant fees have been increased (as in previous years) on the basis of a Budget-related decision, referencing changes to the Wage Price Index. The Committee considers these explanations to be acceptable.

The Committee also notes that another “standard” explanation, appearing in a small number of instruments, actually indicates that certain fees are not being increased:

* **Domestic Animals (Fees) Determination 2020 (No 1)—DI2020-160**

This determination maintains 2019-20 fees as per Budget Memo 2020/07.[[4]](#footnote-4)

### Act-specific explanations for fees increases

In addition to the explanations discussed above, the Committee notes that what appear to be subject-matter-specific justifications for fees increases appear, for example, in the following fees determinations:

* **Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2020—DI2020-142**

The fee structure has changed to reduce the annual fee for each license category and the monthly license fees have been reduced in line with this change.

Fees in the 2020-21 Financial Year have been reduced to:

ensure that a regulatory framework continues to exist to ensure safe distribution of X 18+ films to adult consumers and to filter content that is harmful and offensive;

assist to minimise the risk of an underground DVD and video pornographic market, which distributes unclassified films that potentially contain very high impact content;

ensure the ACT Government continues to accrue some revenue from the X 18+ film industry despite industry decline; and

support growth in the industry and potentially encourage new licensees.

The licence fees allow for the recovery of costs associated with the licensing and regulation of the industry and also for some additional revenue to be collected.

The reduced licence fees allow some financial relief to current licensees thereby supporting the operation and sustainability of their businesses, while also making it viable for new business owners to enter the market, in line with the ACT Government priority of economic development and diversification.

* **Electoral (Fees) Determination 2020—DI2020-148**

These fees are revoked and remade at the beginning of every financial year.

Revenue received by the Electoral Commission is a function of client demand for services and fluctuates from year to year.

The fees for 2020/2021 financial year are determined by increasing the 2019/2020 fees, determined by DI2019-71, by the Wage Price Index (WPI) of 2%, rounded down to the nearest $0.05.

This determination of fees revokes and replaces the determination of electoral fees made under DI2019-71.

*Electoral Officer Services—salary component*

Paragraph 7(1)(g) of the Electoral Act empowers the Electoral Commission to provide services to persons or organisations for a determined fee. The provision of services includes assisting bodies such as universities and government agencies to conduct elections. The Commission is empowered to determine fees for these services under section 340B of the Electoral Act.

This instrument determines hourly fees for services provided by four categories of electoral officers:

Electoral Officer (equivalent to Administrative Service Officer Class 5 employed under the Public Sector Management Act 1994);

Senior Electoral Officer (equivalent to Senior Officer Grade C employed under the Public Sector Management Act);

Electoral Casual Officer (equivalent to a casual officer employed under the Electoral Act); and

Senior Electoral Casual Officer (equivalent to a casual officer in charge employed under the Electoral Act).

The fees include different hourly rates for the above 4 categories of officers depending on the time of the provision of services, and reflect the various applicable standard and overtime rates applying to officers employed to assist the Electoral Commissioner under the Public Sector Management Act and the Electoral Act. The hourly fees incorporate overhead costs and salary costs.

*Electoral goods and services*

The instrument also determines a fee for goods purchased by the Electoral Commission for the purposes of providing goods to persons or organisations under paragraph 7(1)(g) of the Electoral Act. This fee simply allows the Commission to be reimbursed for any costs incurred by the Commission in providing goods such as printing ballot papers for an election. These costs could also include postage and mailing house costs, for example.

In addition, this instrument determines a fee for the provision of electronic voting services to organisations under paragraph 7(1)(g) of the Electoral Act. This fee allows for the development and maintenance cost of electronic voting services software incurred by the Electoral Commission to be passed on to purchasers of services.

*Provision of copies of documents*

This instrument sets fees for obtaining copies of the specified categories of documents.

Subsection 243(4) of the Electoral Act provides that a person is entitled, on payment of a determined fee, to obtain a copy of a return referred to in subsection 243(1). These returns include returns showing disclosure of donations, returns showing disclosure of electoral expenditure and annual returns submitted by registered political parties, MLAs, associated entities and donors.

Sections 88 and 91 of the Electoral Act provide that various documents related to registration of political parties are required to be made available for public inspection. From time to time members of the public have asked for copies of these documents. To cover the costs of providing such copies, this instrument provides that the Electoral Commission may provide persons with copies of these documents for the determined fee.

Section 333 of the Electoral Act states that voting statistics shall be published and that a person may obtain copies of the statistics in electronic form for a fee.

* **Guardianship and Management of Property (Fees) Determination 2020—DI2020-153**

Fees in the 2020-21 financial year have been increased from fees in the previous financial year by a Wage Price Index (WPI) forecast of 2.0%. Calculations are rounded down to the nearest dollar. This gives effect to the Government’s policy decision to limit growth in government fees and charges for households to no more than the ACT’s forecast Wage Price Index for 2020-21. This approach also aligns with the 2018 Treasury Guidelines for Fees and Charges.

The fee for the hourly rate for the examination of accounts maintained by an external financial manager is GST exempt and, when rounded, would have been $265. As this service is subsidised by Community Service Obligation funding, the Public Trustee and Guardian applies a 25% rebate to the fee. With the rebate applied, the fee would be $198.00. Adjustments to this rebate can be made by the Public Trustee and Guardian under fee reductions and waivers provision in the [*Public Trustee and Guardian Act 1985*].

* **Victims of Crime (Fees) Determination 2020 (No 1)—DI2020-172**

Under section 50 of the *Victims of Crime Regulation 2000*, the Minister may, in writing, determine fees that are payable for services provided to an eligible victim under the regulation by a service provider.

The Minister delegated this function to the Director-General under his express delegation power in section 254A of the *Legislation Act 2001*, limited to the extent that the Director-General may determine fees only as commensurate with the Consumer Price Index (CPI) (instrument NI2018‑337).

The fees payable which applied previously are listed in italic in Schedule 1, column 3 of the instrument. ACT Treasury has forecast a CPI increase of 1.5% for 2020-21. This rate has been applied to calculate the fees payable for the 2020-21 period. The new amounts for 2020-21 are set out in Schedule 1, column 4 of the instrument.

Fees payable have been increased based on the aforementioned CPI rate and rounded to the nearest dollar.

* **Health (Fees) Determination 2020****—DI2020-195**

This Determination of Fees revokes and replaces the Determination of Fees DI2020-55, dated 23 April 2020.

The Determination comes into effect on 1 July 2020 and reproduces Determination DI2020-55 except for:

items on Attachment A, which have increased by the Wage Price Index of 2.0% (subject to rounding);

items on Attachment B, which have increased by indexation rates as advised by the Commonwealth;

items on Attachment C, which have either been removed or added to the fee determination;

minor wording and numbering changes; and

the date of effect.

* **Water Resources (Fees) Determination 2020—DI2020-200**

The regulatory fees (excluding water abstraction charge) in the determination have been increased by 2% for the 2020-21 financial year based on the wage price index and then appropriate rounding has been applied in relation to increases. The Government will index the Water Abstraction Charge (WAC) by 3% as per the decision in the 2016-17 Budget.

The Committee considers the Act-specific explanations mentioned above to be both informative and acceptable.

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

## Responses

### Government responses

The Committee has received responses from:

* The Minister for Justice, Consumer Affairs and Road Safety, dated 22 July 2020, in relation to comments made in Scrutiny Report 45 concerning the Justice Legislation Amendment Bill 2020.
* The Minister for Justice, Consumer Affairs and Road Safety, dated 23 July 2020, in relation to comments made in Scrutiny Report 46 concerning the Victims Rights Legislation Amendment Bill 2020.
* The Attorney-General, dated 23 July 2020, in relation to comments made in Scrutiny Report 46 concerning the Royal Commission Criminal Justice Legislation Amendment Bill 2020.

[**These response**](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)**s*[[5]](#footnote-5)* can be viewed online.**

The Committee wishes to thank the Minister for Justice, Consumer Affairs and Road Safety, and the Attorney-General, for their responses.

These responses will be considered by the Committee as its next meeting.

Giulia Jones MLA

Chair

28 July 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 (Private Member’s amendments).
* **Report 45, dated 30 June 2020**
* Disallowable Instrument DI2020-109 Electronic Conveyancing National Law (ACT) Participation Rules 2020.
* Disallowable Instrument DI2020-110 Electronic Conveyancing National Law (ACT) Operating Requirements 2020.
* Disallowable Instrument DI2020-117 Liquor (Fees) Determination 2020.
* Disallowable Instrument DI2020-119 Liquor (COVID-19 Emergency Response—Licence Fee Waiver) Declaration 2020.
* Disallowable Instrument DI2020-120 Liquor (COVID-19 Emergency Response—Permit Fee Waiver) Declaration 2020.
* **Report 46, dated 21 July 2020**
* Disallowable Instrument DI2020-130 Gambling and Racing Control (Governing Board) Appointment 2020 (No 2).
* Disallowable Instrument DI2020-131 Gambling and Racing Control (Governing Board) Appointment 2020 (No 1) .
* Disallowable Instrument DI2020-132 Lotteries (Fees) Determination 2020 (No 1).
* Subordinate Law SL2020-20 Court Procedures Amendment Rules 2020 (No 3) .
1. https://www.parliament.act.gov.au/\_\_data/assets/pdf\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf. [↑](#footnote-ref-1)
2. https://www.parliament.act.gov.au/\_\_data/assets/pdf\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf. [↑](#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. This statement also appears in the explanatory statement for DI2020-163. [↑](#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)