



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 34

Legislative Assembly for the Australian Capital Territory
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

Approved for publication

10th Assembly
September 2023

About the committee

Establishing resolution

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

The Committee is responsible for the following areas:

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

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

Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

Secretariat

Hamish Finlay, Committee Secretary

Frieda Scott, Minutes and Legislation Officer

Erin Liet, Papers/Administration Officer

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

Contact us

Mail Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Legislative Assembly for the Australian Capital Territory
GPO Box 1020
CANBERRA ACT 2601

Phone (02) 6205 0171

Email scrutiny@parliament.act.gov.au

Website parliament.act.gov.au/parliamentary-business/in-committees

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.

Contents

About the committee	i
Establishing resolution	i
Committee members	ii
Secretariat	ii
Contact us	ii
Role of Committee	ii
1. Bills	1
Bills—Comment	1
Building (Swimming Pool Safety) Legislation Amendment Bill 2023	1
Children and Young People Amendment Bill 2023	4
Circular Economy Bill 2023	7
Gaming Machine Amendment Bill 2023	11
Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023	12
Victims of Crime Amendment Bill 2023	13
Responses—No Comment	14
2. Subordinate Legislation	15
Disallowable Instruments—No comment	15
Disallowable Instruments—Comment	16
Minor Drafting Issue	16
No Human Rights Issues	16
Human Rights Issues	17
Subordinate Laws—Comment	18
Human Rights Issues	18
Government Response—Comment	20
3. Outstanding responses	26
Bills	26
Report 28, dated 3 May 2023	26
Report 29, dated 23 May 2023	26
Report 33, dated 4 September 2023	26

1. Bills

Bills—Comment

Building (Swimming Pool Safety) Legislation Amendment Bill 2023

- 1.1. This Bill amends the *Building Act 2004*, Building (General) Regulation 2008 and other related legislation to regulate compliance of residential swimming pools with prescribed safety standards.

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

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

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

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.2. The Bill will require the owner to ensure that all swimming pools on their premises comply with safety standards unless they are subject to a standing or ministerial exemption. This may unduly impact individuals who require access to the pool in a way which does not comply with those standards. The Bill may therefore limit the right to equal protection as provided for in section 8 of the HRA.
- 1.3. A person with a disability or who otherwise wishes to have an exemption from having to comply with pool safety standards has to apply for an exemption. This will require the provision of personal information relating to the owner and occupiers of the premises. Owners will also be required to provide various information when lodging compliance certificates. By adding to the circumstances in which authorised persons will have access to premises to inspect unapproved works, the Bill will also permit entry onto residential premises. The Bill may therefore limit the protection of privacy provided in section 12 of the HRA.
- 1.4. The Bill also includes various strict liability offences or offences in which an exception or defence is available. By displacing the burden on the prosecution to establish the elements of the offence the Bill may therefore limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the HRA.
- 1.5. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. Subject to the following comments the Committee refers that statement to the Assembly.
- 1.6. Proposed section 83D provides for an owner to apply to the Minister for their pool to be exempt from all or part of the safety standards. The circumstances in which the Minister may grant an exemption are prescribed in regulations. The Bill will amend the Building

(General) Regulation to provide for various circumstances in which an exemption may be granted, including where compliance is impractical, requires approval under the *Tree Protection Act 2005* to remove a tree, adversely affects registration under the *Heritage Act 2004*, or there are plans to demolish the pool. The circumstances also include where the occupier of premises is a person with disability, compliance with the standards would substantially impede access to the pool, and the owner of the premises agrees to adopt alternative safety measures where available. Failing to notify the Minister of a change in circumstances which affects a ground on which the exemption was granted is a strict liability offence (proposed section 83J).

1.7. It is not clear to the Committee why the circumstances which may lead to an exemption, particularly those relating to the occupier being a person with a disability, could not have been provided-for directly in the amendments to the Act. The explanatory statement refers to exemptions for persons with disabilities as part of the Bill's compliance with the Human Rights Act. A change in the circumstances as set out in the regulations are also the basis for the possible commission of a strict-liability offence. In the Committee's view, the content of that exemption, or at least a requirement that an exemption of that nature be included in the regulations, should be included in primary legislation.

1.8. The Committee therefore requests further information on why it was considered necessary for the circumstances in which an exemption may be granted to be set out in regulations rather than in primary legislation.

1.9. The Bill will extend the circumstances in which a building inspection may be authorised to include where 'a circumstance prescribed by regulation exists'. The explanatory statement accompanying the Bill states:

This amendment supports the registrar to address issues of safety and building quality in a timely manner by allowing for emerging issues to be incorporated into the regulatory system in a timely manner.

1.10. It is not clear to the Committee why it is necessary to include such a broad provision, particularly given the privacy implications of extending the circumstances in which a building inspection can be carried out. The Committee therefore requests further information from the Minister on why this provision was considered necessary, and that consideration be given to amending the explanatory statement to include this justification in discussing the limitation of the protection of privacy by the HRA.

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

Right to a fair trial (section 21 HRA)

1.11. The Bill will also provide for the Minister, on their own initiative, to be able to revoke an exemption if satisfied that:

- a) The owner has failed to comply with a condition of exemption;
- b) The owner used false or misleading information in the application for an exemption,

- c) There are no circumstances that justify an exemption; or
 - d) There is an immediate and serious risk to the health or safety of a person.
- 1.12. In all but the last circumstance, notice has to be given to the owner and any response considered before revoking the exemption. The revocation takes effect 90 days after the notice is given to the owner or another day stated in the notice, or, in the case of a serious risk to health and safety, immediately.
- 1.13. The Committee notes that the Bill as drafted suggests that any revocation generally takes effect from the date of the notice, inviting submissions from the owner. Presumably, if the Minister considers the submissions and forms the view that the exemption should not be revoked, then they would inform the owner. In those circumstances there would be no revocation to, in the words of the Bill, 'take effect'. If the Minister decides to revoke the exemption, then the owner has until the revocation takes effect to try to bring the swimming pool up to the required standard or be subject to a strict liability offence. However, the pool owner may be informed that their exemption is revoked only a short time, if at all, before the revocation takes effect.
- 1.14. The 90 day period may also be intended to limit the time taken by the Minister to consider any submissions provided by the owner in response to the notice. After the 90 day period the Minister may be taken to have revoked the exemption and the owner can then seek review of that decision in the ACT Civil and Administrative Tribunal. However, in these circumstances the owner is subject to a strict liability offence in circumstances where they have not been informed of the revocation and are forced to commence proceedings in the Tribunal and attempt to stay the effects of the revocation. To the extent it provides for revocation without consideration of any submissions by the owner, the Bill may limit procedural fairness requirements included within the right to a fair trial in section 21 of the HRA.
- 1.15. The Committee is also concerned with the effect of a revocation of an exemption on the compliance certificate which may have been issued to the pool owner on the basis of their exemption. It is unclear whether that compliance certificate would still apply, for example, for the purposes of the offence of failing to obtain a compliance certificate under proposed section 83OB.
- 1.16. The Committee therefore requests further information on how the reference to the 90 day time period is intended to operate.**

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

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

Displacement of section 47(6) of the Legislation Act 2001

- 1.17. The Bill amends the Building (General) Regulations to prescribe safety standards for regulated swimming pools built before 1 May 2023 by reference to the building code applicable under the Act as well as two Australian Standards.¹ Section 152 of the Act provides:

The Legislation Act, section 47 (6) does not apply in relation to an Australian Standard, or an Australian/New Zealand Standard, applied, adopted or incorporated as in force from time to time under the regulations.

- 1.18. As a consequence, the Australian standard incorporated in the amendment to the regulations will not be subject to notification requirements.
- 1.19. The Bill includes a note that the standards may be purchased at www.standards.org.au. The explanatory statement accompanying the Bill outlines the provision and states:

Australian Standards are subject to copyright, so cannot be published by way of a notifiable instrument. Australian Standards may be purchased at www.standards.org.au and are available for viewing at the National Library of Australia.

- 1.20. The Committee refers to previous correspondence that it has received from the National Library that not all Australian Standards are available at the National Library. The Committee has also pointed out that, especially in circumstances where compliance with Australian Standards form an integral element of strict liability offences (such as proposed section 83N), that access to the standards may be otherwise provided for, including by making them available in a publicly accessible place.
- 1.21. The Committee therefore requests confirmation from the Minister that the standards in question are available from the National Library, and why it is not possible to make the standards more readily available in some form.**

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

Children and Young People Amendment Bill 2023

- 1.22. This Bill will amend the *Children and Young People Act 2008* to amend various fundamental parameters and definitions while further detailed reform work is completed. These include:

¹ AS 1926.1 (2012) (Swimming pool safety, Part 1: Safety barriers for swimming pools); AS 1926.2 (2007) (Swimming pool safety, Part 2: Location of safety barriers for swimming pools)

- a) Adjusting the legislation and functions of the director-general to provide, or assist in providing, services to strengthen and support the safety, welfare and wellbeing of children and young people and their families;
- b) Recognising the importance of self-determination for Aboriginal and Torres Strait Islander peoples and inserting the five elements of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) – prevention, partnership, placement, participation and connection – and including them as 'best interests' considerations for decisions about children and young people;
- c) Replacing reference to concepts of abuse and neglect with an overarching concept of 'significant harm', including strengthening the concepts of sexual abuse and domestic violence, revising the term neglect, and explicitly enabling consideration of cumulative harm;
- d) Requiring that, when making a decision about the 'best interests' of a child, the decision-maker must always consider the child's risk of significant harm, in addition to other best interest factors where relevant; and
- e) Implementing recommendations of the Children and Young People Death Review Committee.

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

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

Right to protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

Freedom of thought, conscience, religion and belief (section 14 HRA)

1.23. The Bill will replace the concept of when a child or young person is at risk of abuse or neglect with the concept of significant harm. Currently the Act defines when a person is at risk of abuse or neglect as:

For the care and protection chapters, a child or young person is at risk of abuse or neglect if, on the balance of probabilities, there is a significant risk of the child or young person being abused or neglected.

1.24. Abuse and neglect are defined separately. The Bill will replace these concepts with a section defining what is meant by significant harm. Significant harm to a child or young person will mean "any detrimental effect of a significant nature on the safety, welfare or wellbeing of the child or young person". When compared to the current approach:

- a) there is no longer any reference to the balance of probabilities;
- b) the examples of significant risk go beyond those previously included in the meaning of abuse to include grooming and sexual exploitation;

- c) the examples of neglect are changed from a failure to provide a necessity of life to where the child or young person’s basic physical, emotional, developmental or psychological needs are not being met;
 - d) existing requirements that a child must have seen or heard incidences of physical, sexual or psychological abuse is changed to being exposed to family violence as defined in the *Family Violence Act 2016*; and
 - e) a combination or accumulations of acts, omissions or circumstances can be taken into account.
- 1.25. Each of these changes is described in the explanatory statement accompanying the Bill as in some way a broader, less prescriptive or more flexible approach to defining when and how statutory child protection services can and should support families. ‘It also allows for greater flexibility to divert families earlier to non-statutory support services, where appropriate to do so’.
- 1.26. Under the Bill, the concept of significant harm will be used:
- a) in determining when a person can or must report a belief or suspicion that a child or young person is at risk of serious harm (see proposed changes to offences in sections 354 and 356), including mandatory reporting of information communicated to the member of the clergy during a religious confession;
 - b) When the director-general must carry out an assessment, they consider necessary to decide whether the child or young person is at risk (see proposed section 360);
 - c) In prenatal reporting of anticipated risk (see proposed changes to division 11.1.3);
 - d) In the power of the director-general to carry out a care and protection appraisal (see proposed changes to section 368);
 - e) As an example of safety and wellbeing information that can be shared with various information sharing entities (see proposed changes to Division 25.3.2); and
 - f) In determining when a child or young person is in need of care and protection, which in turn is then used in the Act as a requirement to be able to apply for appraisal orders and care and protection orders and taking emergency action under chapter 13.
- 1.27. The introduction of the concept of significant risk therefore has significant consequences for the availability and operation of other provisions of the Act, each of which in turn may limit various rights protected under the HRA. These rights include but are not limited to the right to protection of the family and children under section 11, protection of privacy and reputation under section 12, and freedom of religious belief under section 14.
- 1.28. The explanatory statement states the Bill does not impose any limitations on human rights. The Committee is concerned that, to the extent that the Bill (through the use of the concept of significant risk) will broaden the circumstances in which various powers and obligations under the Act are enlivened, the Bill will extend the limitation of a number of human rights, potentially in a significant way.

- 1.29. **These potential limitations should be identified and why they should be considered reasonable should be provided using the framework set out in section 28 of the HRA. Consideration should also be given to amending the explanatory statement to include this information.**

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

Circular Economy Bill 2023

- 1.30. This Bill will provide a framework to require businesses to have a waste reduction plan in place and to sort, dispose of, and arrange for the collection of waste in certain ways. It will repeal the *Plastic Reduction Act 2021* and incorporate the provisions of that Act. The Bill will also expand the products which will be able to be prescribed as prohibited to include any products that are harmful to the natural or built environment or for which alternatives that better promote the circular economy exist.

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

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

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

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.31. The Bill will continue the current prohibition in the *Plastic Reduction Act 2021* of supply of single use plastic products. The Bill will also allow other prescribed products to be prohibited from supply on the basis that they are harmful to the natural or built environment or human health or there are reasonably available and affordable alternative products that better promote a circular economy. The prohibition of the supply of these products may have a disproportionate impact on some people.
- 1.32. For example, the current prohibition on plastic straws may have a disproportionate impact on persons with a disability who require a plastic straw to drink some beverages. The Bill will maintain the ability of the Minister to exempt products or persons from having to comply with provisions of the Act, including where the Minister is satisfied that the exemption is in the public interest or it is not consistent with the person's human rights for them to comply with the provision (see proposed section 23). The equivalent provision has been used by the Minister to exempt the supply of plastic drinking straws upon request. This exemption was intended to allow straws to be used by a person with a disability without having to disclose the nature of their disability. It is intended that declarations of this type will continue in new instruments made under the Bill once enacted.

- 1.33. However, as there is no requirement that exemptions or other provisions will mitigate all disproportionate impact of prohibitions under the Bill, the Bill may limit the right to equality before the law protected by section 8 of the HRA.
- 1.34. The Bill contains enforcement provisions enabling authorised persons to enter private premises in limited circumstances. These include being able to enter private premises if the authorised person believes on reasonable grounds that an offence against the Bill may be committed or there is an urgent and serious risk to the environment or public health. However, residential parts of a premises may only be entered with consent or a warrant. A person may also be compelled under the Bill to provide their name and address. The Bill will also provide for an authorised person to approve the removal and disposal of prohibited products. These provisions may limit the protection of privacy provided by section 12 of the HRA.
- 1.35. The Bill will provide for strict liability relating to a range of regulatory offences. These include maximum penalties of up to 50 penalty units. There are also offences where a defence or exclusion places an evidential burden on the defendant to establish. Proposed section 28 will also abrogate the privilege against self-incrimination by providing that a person is not excused from answering a question or providing information or a document under Part 5 of the Bill on the ground that doing so may tend to incriminate them or expose them to a penalty. However, any information, document or thing obtained, even indirectly, can't be used as evidence against the person in a civil or criminal proceeding, other than for an offence arising out of the false or misleading nature of the answer, information or document provided.
- 1.36. By displacing the presumption of innocence these offences and abrogation of the privilege against self-incrimination may limit the rights in criminal proceedings set out in section 22 of the HRA.
- 1.37. The explanatory statement accompanying the Bill recognises these potential limitations and provides for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.38. The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

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

Creation of offences by regulation

- 1.39. The Bill will allow regulations to create offences and fix maximum penalties of up to 50 penalty units. The explanatory statement recognises that this maximum penalty exceeds the 20 penalty units, or 30 penalty units in exceptional circumstances, provided for in the ACT Guide for Framing Offences.² In outlining the regulation making power, the explanatory statement includes:

² At pp 29-31. Available at <https://www.justice.act.gov.au/publications/guide-for-framing-offences>.

The power to create offences with a maximum of 50 penalty units, while higher than the standard, is required as the waste management space is unique in its fast-evolving and technical nature. As shown by the now repealed *Plastic Shopping Bags Ban Act 2010* and proposed repeal of the *Plastic Reduction Act 2021* by this Bill, there is a clear need for subordinate legislation that can adapt to the fast-evolving waste reduction landscape.

The specific regulatory actions are entirely dependent on moving factors such as available technologies and service providers. For example, the nature of waste processing requirements will evolve over time, including the businesses to which it applies and what waste streams must be processed separately. It is not best practice to establish broad offences in the primary legislation where it is not yet clear how they may be applied in future. This lends itself towards a heavier reliance on offences being constructed in a Regulation.

Penalties must be sufficient to deter businesses from committing the offence and should be proportionate to the offence and to other offences. The existing *Plastic Reduction Act 2021* offences, being replicated by this Bill, have a maximum penalty of 50 penalty units. A reduction or inconsistency would undermine efforts around behaviour modification in the industry.

Safeguards also exist to limit the power to make Regulations. The Bill provides strict consultation and decision-making requirements that must be followed before a Regulation can be made. This requirement exists in addition to the requirement for a Regulation to be accompanied by a publicly released Regulatory Impact Statement. This will ensure that new Regulations are appropriate and justified. Further, the ACT Legislative Assembly has oversight of all Regulations and has the power to disallow a Regulation.

- 1.40. Similar comments are made in relation to the penalties applicable to offences created by regulations in discussing any limitations of the rights in criminal proceedings protected by section 22 of the HRA.
- 1.41. The Committee considers that this is an inadequate justification for the provision for maximum penalties for offences created in regulations of up to 50 penalty units. As the Guide for Framing Offences points out, a maximum penalty of over 30 penalty units should only be available for serious offences, and serious offences should be provided for in primary legislation after debate by the Assembly. The mere provision for disallowance of subordinate legislation is not sufficient in such circumstances.
- 1.42. The Bill already provides for substantial penalties for offences which are, in substantial part, defined through regulations. The Bill provides in broad terms for prohibited products, including prohibited plastic products, to be prescribed through regulations. Supplying a prohibited product is a strict liability offence subject to a maximum penalty of 50 penalty units. Supplying a prohibited product and intentionally or recklessly representing that the product is not prohibited is also subject to an offence of 50 penalty units. There are also extensive enforcement and regulatory provisions enabling the detection and forced removal and destruction of prohibited products. There are also broad powers to condition Ministerial exemptions.

- 1.43. Enabling regulations to prescribe which products are prohibited already provides considerable flexibility to adapt to innovation and changed industry practice. The penalties associated with offences already present in the Plastic Reduction Act and set out in the Bill are already in excess of those recommended in the Guide to Framing Offences. The fast evolving and technical nature of the waste-management space may be a justification for enabling offences to be created by regulation, but it does not justify the possible imposition of serious penalties.
- 1.44. The Committee also does not consider the need for deterrence and consistency with existing and other offences contained in the Bill to justify the imposition of penalties of up to 50 penalty units in regulations. Existing offences may not be comparable to regulations applying to largely undefined circumstances and practices. The explanatory statement suggests that education and awareness will be at the forefront of the waste reduction process, and that behavioural change and changes in the industry will take time. There should therefore be no need to introduce serious offences through subordinate legislation.
- 1.45. The Committee therefore requests further information from the Minister on why any offences in regulations should not be limited to 30 penalty units.**

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

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

Displacement of section 47(6) of the Legislation Act 2001

- 1.46. The Bill will enable a regulation or instrument to incorporate a law, an Australian Standard, or other instrument, as in force from time to time. Sections 47(5) and (6) of the *Legislation Act 2001* are disapplied to such an incorporated instrument, meaning that the instrument and any changes does not have to be notified on the ACT Legislation Register. The explanatory statement does not provide any explanation for why incorporation of instruments and displacement of notification requirements is necessary for this Bill.
- 1.47. The Committee notes that similar comments were made in relation to the Plastic Reduction Bill 2021,³ and the Minister provided a helpful response outlining some of the reasons for those provisions.⁴ The Committee would have considered it appropriate to have included those and any other applicable reasons in the explanatory statement for this Bill.

³ See *Scrutiny Report 1*, 2 February 2020, at pp 7-9.

⁴ Available on the Committee website, or at https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/1730642/Plastic-Reduction-Bill-2020.pdf.

- 1.48. However, the Committee notes that the Bill requires any incorporated instrument to be either registered, available for inspection at an ACT government office, or accessible on or by link from an ACT government website. The Committee commends the Minister for taking this approach to providing for public access to incorporated instruments.
- 1.49. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Gaming Machine Amendment Bill 2023

- 1.50. This Private Member's Bill will amend the *Gaming Machine Act 2004* to prevent the Gambling and Racing Commission from issuing authorisation certificates for Class C gaming machines (which includes poker machines) in premises in the Molonglo Valley and other undeveloped areas of the Territory.

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

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

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

- 1.51. The Bill will prevent authorisation certificates for class C gaming machines being issued for premises located in the Molonglo Valley or an undeveloped area. The opportunities, or harms, associated with authorising the use of poker machines in other areas of the ACT will be unaffected.
- 1.52. The explanatory statement accompanying the Bill states that the Bill was introduced on the basis of feedback received from residents of the Molonglo Valley. It will 'address the fact that the closer in proximity that you live to venues with poker machines, the more likely you are to experience gambling harm'. There is no further explanation for why the reforms should extend only to the Molonglo Valley area or undeveloped land.
- 1.53. The Committee is concerned that an unexplained differentiation, even one based on location within the ACT, may limit the right to equality before the law under section 8 of the HRA. **The Committee therefore requests further information from the Member as to the purpose of differentiating the operation of the Act on the basis of locality and why that should be considered a reasonable limitation using the framework in section 28 of the HRA.**

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

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

- 1.54. The explanatory statement accompanying the Bill includes a brief summary of the amendments which repeats in large part the outline of each clause. Both the summary and outline of clauses include information which in the Committee's view can be confusing or unhelpful in identifying the effect of the clause on the operation of the Act being amended.
- 1.55. For example, one of the effects of removing the ability to issue or amend authorisation certificates for class C gaming machines for premises on what is currently undeveloped land is that there will no longer be any role for in-principle authorisation certificates as provided for in Part 2C of the Act. The Bill will therefore remove the various current references to in-principle certificates in other provisions of the Act. Section 10G(2)(c), for example, provides that a licensee is not entitled to apply for an in-principle authorisation certificate after voluntarily surrendering an authorisation certificate. Clause 5 omits this reference as a consequence of the omission of Part 2C. The explanatory statement however, outlines clause 5 in this way:

The Act amends the *Gaming Machine Act 2004* to omit part 2 (c) [sic] to ensure that the venues cannot apply for an authorisation certificate for Class C gaming machines, if the premises is located in Molonglo Valley and an undeveloped area in the ACT.

- 1.56. Note that the reference to 'part 2 (c)' in this outline should be a reference to paragraph 10G(2)(c), and not Part 2C of the Act.
- 1.57. **The Committee therefore requests that the explanatory statement be revised to include an outline of the provisions which correctly refers to the provision in the Act being amended, and provides the reader with an accurate indication of the effect and reason for the clause and its relationship with other amendments and the overall objectives of the Bill.**

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

Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023

- 1.58. This Bill will amend the *Crimes (Sentencing) Act 2005* (Sentencing Act) and make consequential amendments to the *Crimes (Sentence Administration) Act 2005* to improve the legislative framework for the administration of Drug and Alcohol Treatment orders (treatment orders) and the operation of the Drug and Alcohol Sentencing List.

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

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

Right to protection from torture and cruel, inhuman or degrading treatment (section 10 HRA)

Right to privacy and reputation (section 12 HRA)

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

- 1.59. The Bill will amend the orders the court can make when satisfied that the offender has breached a condition of a treatment order (other than by committing an offence) to include ordering the person to undergo an assessment for, and participate in, a residential rehabilitation program. If the person refuses to undergo the assessment or participate in the program their treatment order may be cancelled. The person may therefore have to return to full-time imprisonment. The Bill may therefore limit the right not to be subject to medical treatment without free consent protected by section 10 of the HRA.
- 1.60. The Bill will also extend the range of core conditions which must be part of a treatment order to require the person to submit to alcohol and drug testing under the *Corrections Management Act 2007* when directed by a member of their treatment and supervision team. This doesn't require that the person pass each test, but merely submit to be tested, with the information used in their ongoing rehabilitation. However, allowing information from the test to be provided to others may still limit the protection of privacy provided by section 12 of the HRA.
- 1.61. The Bill allows for the term of a provisional cancellation of a suspended sentence (i.e. a temporary return to full-time imprisonment) to be extended beyond the current limit of 14 days to such longer period so as to allow the treatment and supervision team to secure a placement in a residential rehabilitation facility or other further treatment. This may limit the right to liberty in section 18 of the HRA.
- 1.62. Each of these potential limits is recognised in the explanatory statement accompanying the Bill which sets out why any limitation should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.63. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Victims of Crime Amendment Bill 2023

- 1.64. This Bill will amend the *Victims of Crime Act 1994* to make it clearer that the police are to inform a complainant once a decision to charge has been reached unless it would prejudice an investigation or a matter more generally. The Bill implements recommendation 2 of the Final Report of the Board of Inquiry into the Criminal Justice provided to the Chief Minister on 31 July 2023.

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

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

Right to privacy and reputation (section 12 HRA)

- 1.65. The Act currently provides that police are to update victims when there has been a change in the status of an investigation unless doing so would prejudice the investigation. A change in the status of an investigation includes when a person is charged with the offence or a warrant is issued. The Bill will amend these provisions to provide for the update to also not be provided where it might prejudice the matter generally, such as when the investigation is complete. The Bill will also modify when a change in status occurs to include when the police have decided to charge a person or issue a warrant for their arrest.
- 1.66. By providing information about an impending charge or warrant for the arrest of a person earlier than is currently provided for in the Act, the Bill may limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.67. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Responses—No Comment

- 1.68. The Committee received a response to the Committee's comments on the following Bill and has no further comments:
- a) Electoral Amendment Bill 2021
- 1.69. This response can be viewed [online](#).
- 1.70. The Committee wishes to thank the Member for his helpful response.

2. Subordinate Legislation

Disallowable Instruments—No comment

- 2.1. The Committee has examined the following disallowable instruments and has no comments on them:
- **Disallowable Instrument DI2023-215 being the Cemeteries and Crematoria (Immersion of Cremated Remains in Flowing Water) Code of Practice 2023, made under section 123 of the *Cemeteries and Crematoria Act 2020*, provides direction to members of the public who wish to memorialise a deceased person by immersing their cremated remains in flowing water**
 - **Disallowable Instrument DI2023-217 being the ACT Teacher Quality Institute Board Appointment 2023 (No 3) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996***
 - **Disallowable Instrument DI2023-218 being the ACT Teacher Quality Institute Board Appointment 2023 (No 2) made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996***
 - **Disallowable Instrument DI2023-219 being the Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2023 (No 1) made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006***
 - **Disallowable Instrument DI2023-220 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment Revocation 2023 (No 1) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a member of the ACT Gene Technology Advisory Council until 2 May 2025**
 - **Disallowable Instrument DI2023-221 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment Revocation 2023 (No 2) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a member of the ACT Gene Technology Advisory Council until 2 May 2025**
 - **Disallowable Instrument DI2023-222 being the Official Visitor (Corrections Management) Appointment 2023 (No 1), made under paragraph 10(1)(b) of the *Official Visitor Act 2012*, appoints 2 specified persons as official visitors for the *Corrections Management Act 2007*.**

Disallowable Instruments—Comment

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

Minor Drafting Issue

- **Disallowable Instrument DI2023-212 being the Architects Board (Registered Architect Member) Appointment 2023, made under section 70 of the *Architects Act 2004*, appoints a specified person as a registered architect member of the Architects Board**
- 2.3. This instrument is made under section 70 of the *Architects Act 2004*, which provides for the appointment of members of the Architects Board. The formal part of the instrument itself simply indicates that the instrument is made under section 70. However (as with the explanatory statements for DI2023-213 and DI2023-214) the explanatory statement identifies the particular provision under which the specified person is appointed (noting that section 70 provides that particular members be appointed to represent particular interests).
- 2.4. The explanatory statement for this instrument states:
- The Act provides the Minister with the authority to appoint members to the architects board. In accordance with section 70(1)(e) one board member is [to] be a registered architect.
- 2.5. The Committee notes that, in fact, paragraph 70(1)(c) of the Architects Act provides for the appointment of a registered architect. However, the Committee also notes that, in simple terms, the reference to an incorrect empowering provision will not automatically invalidate the exercise of a statutory power, *as long as the relevant power actually exists* (as it does here).⁵
- 2.6. **This comment does not require a response from the Minister.**

No Human Rights Issues

- **Disallowable Instrument DI2023-212 being the Architects Board (Registered Architect Member) Appointment 2023, made under section 70 of the *Architects Act 2004*, appoints a specified person as a registered architect member of the Architects Board**
- **Disallowable Instrument DI2023-213 being the Architects Board (Commercial Lawyer Member) Appointment 2023, made under section 70 of the *Architects Act 2004*, appoints a specified person as a commercial lawyer member of the Architects Board**
- **Disallowable Instrument DI2023-214 being the Architects Board (Community Interests Member) Appointment 2023, made under section 70 of the *Architects Act 2004*, appoints a specified person as a member of the Architects Board to represent community interests**

⁵ See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (6th Edition, LexisNexis, 2023), paras 13.18-24.

- **Disallowable Instrument DI2023-216 being the Nature Conservation (Fees) Determination 2023 (No. 2) made under section 368 of the *Nature Conservation Act 2014* revokes DI2021-254 and determines fees payable for the purposes of the Act**
- 2.7. The first three instruments mentioned above appoint specified persons to the Architects Board, to represent various specified interests, as provided for by the *Architects Act 2004*.
 - 2.8. The fourth instrument mentioned above determines fees for the *Nature Conservation Act 2014*.
 - 2.9. The Committee notes that the explanatory statements for each of the instruments mentioned above indicates that ‘no human rights are impacted’ by the instrument.
 - 2.10. **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.**
 - 2.11. **This comment does not require a response from the relevant Ministers.**

Human Rights Issues

- 2.12. **Disallowable Instrument DI2023-223 being the Public Place Names (Denman Prospect) Determination 2023 (No 1), made under section 3 of the *Public Place Names Act 1989*, names public places in Denman Prospect**
- 2.13. This instrument, made under section 3 of the *Place Names Act 1989*, names public places in Denman Prospect. The Committee notes that, similar to explanatory statements for similar instruments, the explanatory statement for the instrument discusses potential human rights implications for the instrument. The particular human right identified is the right to privacy and reputation, set out in section 12 of the *Human Rights Act 2004*. The explanatory statement states:

Human Rights

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

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

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

Subordinate Laws—Comment

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

Human Rights Issues

- **Subordinate Law SL2023-19 being the Work Health and Safety Amendment Regulation 2023 (No 1) made under the *Work Health and Safety Act 2011***
- 2.17. This subordinate law amends the Work Health and Safety Regulation 2011 (**WHS Regulation**) in relation to the management of psychosocial hazards in the workplace and also (according to the explanatory statement) makes ‘minor technical amendments to update references to superseded Australian Standards and correct typographic errors as provided by Safe Work Australia’s model Work Health and Safety Amendment Regulation 2023’. The explanatory statement states that the subordinate law also ‘reinserts the definition of engineered stone for the purposes of an administrative correction following republication of the WHS Regulation in July 2023.’
- 2.18. In relation to psychosocial hazards, the explanatory statement states:
- One key action taken by Safe Work Australia (SWA) was to amend the model Work Health and Safety (WHS) Regulations in relation to psychosocial hazards under recommendation two of the Boland Review. Recommendation two sought the amendment of the model WHS Regulations to deal with how to identify psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks. As the ACT is harmonised with the model WHS laws, this amendment regulation progresses adoption of the model WHS Regulation changes dealing with psychosocial hazards.
- The ACT Government recognises the fundamental role that persons who conduct a business or undertaking (PCBUs) have in ensuring workplaces are safe for all workers, particularly in terms of workplace culture. This includes the elimination or minimisation of hazards that might contribute to sexual assault. In recognition of the important role that PCBUs have in creating a workplace culture that is healthy and safe, the ACT Government has passed the *Workplace Legislation Amendment Act 2022* which expands the incident notification provisions to cover workplace sexual assault incidents.
- To assist duty-holders in meeting the obligations of the amendment regulation an *ACT Code of Practice on Managing Psychosocial Hazards at Work* has also been developed.
- 2.19. The explanatory statement goes on to discuss the human rights implications of the subordinate law, identifying the right to life and the right to work and other work-related rights, protected under sections 9 and 27B of the Human Rights Act, respectively, as being both engaged and promoted:

CONSISTENCY WITH HUMAN RIGHTS

All amendment regulations must be compatible with the *Human Rights Act 2004* (HRA). The compatibility of this Amendment Regulation with the HRA was considered during its development.

An assessment of the Amendment Regulation against the rights protected by the HRA is provided below.

Rights Engaged

The Amendment Regulation engages and promotes the right to work and other work-related rights under section 27B of the HRA.

The Amendment Regulation also engages and promotes the right to life under section 9 of the HRA.

Rights Promoted

The Regulation engages and promotes the right to work and other work-related rights (section 27B), in particular the right to the enjoyment of just and favourable conditions of work.

The amendment regulation promotes section 27B by ensuring clarity around the obligations of duty-holders to manage psychosocial hazards in the workplace and implement control measures according to the hierarchy of controls. This promotes the safety of working conditions as it ensures the elimination or minimisation of psychosocial hazards in the workplace, therefore reducing the risk of injury to workers.

This amendment requires PCBUs [Persons conducting a business or undertaking] to have regard to the design of work including job demands and tasks, when determining control measures to implement in their workplace. When changing the design of work, PCBUs can consider the psychosocial hazards identified and look for opportunities to turn these into controls to mitigate risk. For example, where there is role overload such as excessive time pressure, role conflict, and poor practical support, PCBUs could improve scheduling to minimise overload, clarify roles and responsibilities and provide additional practical support. The elements of good work design promote the human rights of workers by enabling work that protects both physical and psychological wellbeing.

Effectively managing and controlling psychosocial hazards at work according to the hierarchy of controls will ensure they are treated with the same seriousness as physical hazards.

The right to life under section 9 of the HRA includes a duty on government to protect life, including through measures that address the general conditions of society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. This Amendment Regulation upholds

safe conditions of work, reducing workplace risks that may jeopardise workers' right to life and dignity of life.

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

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

Government Response—Comment

- **Subordinate Law SL2023-11** being the Health Infrastructure Enabling Regulation 2023 made under the *Health Infrastructure Enabling Act 2023*
- **Subordinate Law SL2023-14** being the Health Infrastructure Enabling Amendment Regulation 2023 (No 1) made under the *Health Infrastructure Enabling Act 2023*

2.22. The Committee commented on the first subordinate law mentioned above in *Scrutiny Report 32* of the 10th Assembly (22 August 2023).⁶ In that Scrutiny Report, the Committee noted that, according to the explanatory statement for the subordinate law, its purpose was 'to support the introduction of the *Health Infrastructure Enabling Act 2023* ... as a Territory law'. The Committee noted that this Act relates to the acquisition of Calvary Hospital.

2.23. After discussing the content of the subordinate law (including noting that it had earlier commented on the Bill for the enabling Act, on the basis that it might involve an inappropriate delegation of legislative power⁷), the Committee drew the attention of the Legislative Assembly to the subordinate law, under subparagraph 10(c)(iv) of the Committee's Resolution of Appointment, on the basis that it may contain matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly.

2.24. In making this comment, the Committee noted that, given its earlier comments on the breadth of the regulation-making powers in the enabling legislation, it would have expected at least some attempt being made, in the explanatory statement for the subordinate law, to justify the inclusion of matters identified by the Committee (in *Scrutiny Report 32*) in subordinate, rather than primary, legislation. The Committee noted that it could not identify any such justification in the explanatory statement for the subordinate law.

2.25. The Committee sought a response from the Minister on these comments.

2.26. The Committee commented on the second subordinate law mentioned above in *Scrutiny Report 33* of the 10th Assembly (5 September 2023).⁸ In that Scrutiny Report, the Committee noted that the explanatory statement for the subordinate law (which amended the earlier subordinate law – SL2023-11) indicated that it had been made 'in response to tentative concerns expressed in' *Calvary Health Care ACT Limited v Australian Capital*

⁶ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0018/2271312/Scrutiny-Report-no.-32.pdf.

⁷ See *Scrutiny Report 29* of the 10th Assembly (23 May 2023) (available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/2227295/Scrutiny-Report-No-29.pdf).

⁸ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2279104/Scrutiny-Report-No-33.pdf.

Territory (SC 225 of 2023), a Supreme Court challenge to the legislation relating to the acquisition of Calvary Hospital.

- 2.27. In *Scrutiny Report 33*, the Committee referred to its comments on the earlier subordinate law (noting, also, that it had not received a response to those comments) and went on to state that, while it acknowledged that there was not necessarily a direct correlation between the issue that had apparently been identified in the Supreme Court proceedings and the concerns that the Committee had expressed in relation to the earlier subordinate law, the Committee suggested that it might be argued that the content of the earlier subordinate law might have benefited from the closer scrutiny that would have been brought to bear, by the legislature, if it had been included in the primary legislation. On that basis, the Committee re-iterated the concerns expressed about the earlier subordinate law.
- 2.28. The Committee drew the subordinate law to the attention of the Legislative Assembly, under subparagraph 10(c)(iv) of the Committee's Resolution of Appointment, on the basis that it may contain matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly.
- 2.29. The Committee sought the Minister's views on these comments.**
- 2.30. The Minister for Health has responded to the Committee's comments on the first subordinate law mentioned above, in a letter dated 11 September 2023.
- 2.31. In relation to the comments on the first subordinate law (i.e. SL2023-11), the Minister's response states:

I thank the Committee for its consideration of the Regulation and offer the following comments in relation to the Committee's concerns that there may be significant matters addressed in the Regulation rather than in the *Health Infrastructure Enabling Act 2023* (the Act).

The Act contains key enabling provisions about the acquisition, the process leading up to the acquisition and the transition. The Regulation serves to facilitate the acquisition and transition by providing a mechanism to determine compensation payable to Calvary Health Care ACT Limited (Calvary) on just terms to acquire the land and terminate the Calvary Network Agreement. It also provides a mechanism to transition Calvary Public Hospital Bruce employees, assets, and services to the Territory.

The Act and Regulation are a bespoke scheme and were deliberately structured in that way to allow appropriate levels of flexibility. Having the Regulation contain mechanical and process provisions allows for the fine tuning of those provisions, as required, given that the acquisition and transition is a complex exercise. As an example, the *Health Infrastructure Enabling Amendment Regulation 2023 (No 1)* amended the Regulation to provide greater clarity, progress Government obligations on providing just terms under the Act, and to respond to tentative concerns expressed by the ACT Supreme Court during the hearing of Calvary's challenge to the validity of the Act and Regulation.

2.32. The Minister’s response goes on:

The validity of the Act was upheld by the Full Court of the Supreme Court,⁹ and Calvary has since sought the Court’s leave to discontinue the remaining part of the proceeding relating to its challenge to the Regulation.

The Act provides that regulations may be made to address how claims for compensation are made and dealt with, or how any dispute about compensation is resolved. The Act further permits regulations relating to the arrangements for the transition of employees and other contractual matters necessary for the operation of the public hospital.

Specifically, s 28 of the Act is a regulation-making power. It gives the Executive a discretion to make regulations “for [the] Act” but does not require any regulations to be made. The scope of that power is set out in s 44(1) of the *Legislation Act 2001* and has two limbs:

- to make regulations in relation to any matter “required or permitted to be prescribed by the” Act (relevantly here, the matters set out in ss 10(3) and 14(2) of the Act); and
- to make regulations that are “necessary or convenient ... for carrying out or giving effect to the” Act.

Even though the regulation-making power is a discretionary power, as observed by the Full Court of the Supreme Court, the Act contemplates the making of regulations about several matters.

2.33. The Committee is disappointed that the Minister’s response does not directly address the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation, as the Committee considers that there is a lack of guidance, on this issue, in the ACT.

2.34. In making this comment, the Committee notes that the Minister refers to the power to make regulations that are ‘necessary or convenient ... for carrying out or giving effect to the [Act]’, referring to subsection 44(1) of the *Legislation Act 2001*, which provides:

44 Power to make statutory instruments for Act etc.

(1) If an Act or statutory instrument (the **authorising law**) authorises or requires the making of a statutory instrument for the authorising law or another Act or statutory instrument (the **other law**), the power authorises a statutory instrument to be made in relation to any matter that—

- (a) is required or permitted to be prescribed by the authorising law or other law; or
- (b) is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law or other law.

⁹ Decision available at <http://classic.austlii.edu.au/au/cases/act/ACTSCFC/2023/1.html>.

2.35. The Committee notes that ‘statutory instrument’ is defined in subsection 13(2) of the Legislation Act to include a subordinate law (which is, itself, defined in subsection 8(1) of the Legislation Act to include a regulation).

2.36. The Committee also notes that, while the Supreme Court decision upheld the validity of the legislative package, it did not directly address the scope of the ‘necessary and convenient’ power, which has been the subject of considerable discussion, by courts (including the High Court) and academics.

2.37. In *Delegated Legislation in Australia*, Pearce and Argument state:

The use of the words ‘necessary or convenient’ imports an element of vagueness into the regulation-making power, and there are many cases which have considered whether or not particular regulations can properly be said to fall within the scope of the expression. These cases must, of necessity, depend very much upon their facts, as the court will have to consider whether the regulation is necessary or convenient for giving effect to the particular Act. However, some broad principles have been enunciated and there are cases which indicate that certain regulations cannot be made under a necessary or convenient power.¹⁰

2.38. The authors go on to refer to the High Court’s decision in *Carbines v Powell*, where the Court stated:

... such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.¹¹

2.39. Pearce and Argument go on:

Detail in Act Determines Scope of Power

14.7 The scope of a necessary or convenient empowering clause will vary according to the content of the Act in which it is included. The more detailed the Act, the more limited the power to make regulations; the more general the Act, the more it is apparent that the legislature has deliberately left it to the Executive to spell out the details in regulations. This distinction is made in *Morton v Union Steamship Company of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402. In that case, regulations purported to impose a liability for excise duty on certain persons where the Act had already made specific provision for other persons to be liable in like circumstances. The regulations were held to be invalid. The main interest of the case in the present context is the following passage from the judgment of Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ (at 410):

¹⁰ Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (6th Edition, LexisNexis, 2023), para 14.2.

¹¹ [1925] HCA 16; (1925) 36 CLR 88.

The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned. In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed.

- 2.40. The Committee notes that Pearce and Argument discuss the scope of the necessary or convenient power over several pages, discussing numerous judicial authorities, indicating that the scope of the power is a complicated issue. That being the case, given that the Minister's response invoked the 'necessary or convenient' power, the Committee would have preferred that the Minister's response addressed (or acknowledged) the complexities involved in arguments based on the power.
- 2.41. Legal issues aside, as the Committee has already mentioned, the Committee had hoped that the Minister's response might have provided guidance, for the ACT jurisdiction, on the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation.
- 2.42. In making this comment, the Committee notes that, in the Commonwealth jurisdiction, the *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, provides the following guidance on the appropriate delineation between primary and delegated (or 'subordinate') legislation:

PRIMARY OR SUBORDINATE LEGISLATION?

1.10 While it is not possible or desirable to provide a prescriptive list of matters suitable for inclusion in primary legislation and matters suitable for inclusion in subordinate legislation, the following are examples of matters generally implemented only through Acts of Parliament:

- (a) appropriations of money;
- (b) significant questions of policy including significant new policy or fundamental changes to existing policy;
- (c) rules which have a significant impact on human rights and personal liberties;
- (d) provisions imposing obligations on individuals or organisations to undertake certain activities (e.g. to provide information or submit documentation, noting that the detail of the information or documentation required may be included in subordinate legislation) or desist from activities (e.g. to prohibit an activity and impose penalties or sanctions for engaging in an activity);

- (e) provisions creating offences or civil penalties which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
- (f) provisions imposing administrative penalties for regulatory offences (administrative penalties are imposed automatically by force of law instead of being imposed by a court);
- (g) provisions imposing taxes or levies;
- (h) provisions imposing high or substantial fees and charges;
- (i) provisions authorising the borrowing of funds;
- (j) procedural matters that go to the essence of the legislative scheme;
- (k) provisions creating statutory entities (noting that some details of the operations of a statutory entity would be appropriately dealt with in subordinate legislation); and
- (l) amendments to Acts of Parliament (noting that the continued inclusion of a measure in an Act needs to be examined against these criteria when an amendment is required).

However, the decision as to whether a particular matter could be included in primary or subordinate legislation may well be influenced by the nature of the subject matter and a variety of other factors. Departments are required to consult OPC about the appropriateness of including particular matters in primary or subordinate legislation. (See also paragraphs 5.65 to 5.67.)¹²

- 2.43. If the above criteria were applicable in the ACT then paragraphs (b), (c), (d), (j) and (l) might (possibly) be relevant to determining the appropriate 'mix' between the primary and subordinate legislation for the Calvary acquisition. However, obviously, these criteria do not apply beyond the Commonwealth jurisdiction.
- 2.44. The Committee can identify no equivalent guidance, for the ACT, on (say) the Parliamentary Counsel's Office website.
- 2.45. The Committee would appreciate the Minister's response to the above comments. In particular, the Committee would appreciate the Minister's advice, in consultation with the Auditor-General as to whether guidance material exists, within the ACT Government, on the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation, similar to what is set out in the Commonwealth's *Legislation Handbook*.**
- 2.46. **This comment requires a response from the Minister.**

¹² Available at <https://www.pmc.gov.au/sites/default/files/resource/download/legislation-handbook-2017.pdf>.

The Committee draws this matter to the attention of the Assembly and asks the Member to respond before the Legislative Assembly's capacity to move to disallow the subordinate law expires.

3. Outstanding responses

Bills

Report 28, dated 3 May 2023

Bills

- Modern Slavery Legislation Amendment Bill 2023

Report 29, dated 23 May 2023

Bills

- Biosecurity Bill 2023
- Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

Report 33, dated 4 September 2023

Disallowable Instruments

- DI2023-202 Children and Young People (Kinship and Foster Carers Risk Assessment) Guidelines 2023
- DI2023-205 Legal Aid (Commissioner—ACTCOSS Nominee) Appointment 2023
- DI2023-206 Remuneration Tribunal (Fees and Allowances of Members) Determination 2023

Peter Cain MLA
Chair

September 2023