



# Legislative Assembly for the Australian Capital Territory

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

## Scrutiny Report 38

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

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# About the committee

## Establishing resolution

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

The Committee is responsible for the following areas:

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

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

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Hamish Finlay, Committee Secretary

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## Role of Committee

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

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# 1. Bills

## Bills—Comment

### Assisted Reproductive Technology Bill 2023

- 1.1. This Bill will introduce regulatory requirements for the clinical practice of assisted reproductive technology (ART) by ART providers, and provide for the establishment of a register of information in relation to donors, intended parents and donor-conceived persons.

### 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 protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

Freedom of expression (section 16 HRA)

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

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

Right to work and other work-related rights (section 27B)

- 1.2. The Bill may limit various human rights as described below. 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. The Committee commends the Minister for the detailed and useful human rights discussion in the explanatory statement and refers that statement to the Assembly.
- 1.3. The Bill will increase the requirements placed on ART providers, including the need for accreditation and registration. It will also place limitations on the number of families that may result from donations. This may limit accessibility to ART services, which may have a disproportionate affect on groups for whom access to ART services is necessary in conceiving children, including single women and members of the LGBTIQ+ community. The Bill may therefore limit the right to equality in section 8 of the HRA.
- 1.4. The Bill generally requires the consent of the donor for any use of their donated gamete in ART services. However, the donor will be prevented from withdrawing consent once the gamete or donated embryo is placed in a person's body or a donated gamete is used to create an embryo. This may interfere with the donor's ability to decide who can genetically consist of their family, limiting the protection of the family provided by section 11 of the HRA. Allowing a donated gamete to be used after the death of the donor may also interfere with this right by allowing a child to be born without the opportunity of being raised with or being able to contact their biological father.

- 1.5. There are a number of provisions in the Bill which provide for the collection, storage, use and disclosure of personal information and personal health information of donors, donor-conceived people, and their family and biological relations which may limit the protection of privacy provided by section 12 of the HRA. Disclosure under the Bill will not give rise to any breach of confidence, professional etiquette or ethics or professional conduct rules, or incur criminal or civil liability. The potential limitations on the protection of privacy include:
- a) the Bill will enable mature donor-conceived people (generally a person over 16 years of age or who is considered sufficiently mature) to obtain identifying information about their donor from the donor register without seeking the consent of the donor. After the commencement of the Bill, all donors will donate with the knowledge that their identifying information may be so used as part of the accreditation requirements for ART providers. This potential limitation of the protection of privacy may extend to the privacy of families of donors and donor-conceived persons where they were not aware of the donation and may be identified through the information disclosed under the Bill. Identifying information of a donor will also be available to parents of a donor-conceived child;
  - b) the Bill will require an ART provider to provide the director-general with information about a donor and the child within 2 months of the donation resulting in a child being born alive. That information will be kept on a donor register. The director-general may require the provision of donor information where it was not provided as required or shared under information sharing arrangements. The donor register will also be used to store information provided voluntarily relating to donations made before the commencement of the relevant provisions;
  - c) health information about a donor or donor-conceived child can also be provided by an ART provider or the director-general in circumstances where it is necessary to prevent or reduce a serious and imminent risk to anyone's life or physical, mental or emotional health or to warn of potentially harmful genetic or hereditary medical conditions. The director-general can also disclose information in limited ways where they believe on reasonable grounds that a donor or donor conceived person is involved in a consanguineous relationship; and
  - d) the Bill also contains provision for the registration of ART providers and enforcement of registration requirements. These include requirements to disclose and register details of some individuals, including doctors who are to perform or supervise ART services, as part of the registration and accreditation process. There are also powers of entry to premises, seizure, compelling of information and inspection which are detailed in the explanatory statement.
- 1.6. Information included on the donor register will be excluded from access under the *Freedom of Information Act 2016*. This may limit the right to freedom of expression under section 16 of the HRA Act.
- 1.7. The Bill will create offences with terms of imprisonment which may limit the right to liberty under section 18 of the HRA. The various offences are detailed in the explanatory statement.
- 1.8. Where an ART provider is a sole trader, the authority provided under the Bill for the director-general to make various decisions relating to a person's registration as an ART provider, and hence subject that person to the possibility of committing criminal offences, may limit the right to a fair trial in section 21 of the HRA. The Committee notes the provision for review of these decisions by the ACT Civil and Administrative Appeals Tribunal.



- 1.9. Several offences created by the Bill include exceptions or defences for which the defendant bears an evidential burden. The Bill will also create strict liability offences. The Bill may therefore limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA. The various offences in question, nature of the limitation and why they should be considered reasonable are detailed in the explanatory statement.
- 1.10. The Bill also limits a person's right against self-incrimination protected in section 22 of the HRA by requiring compliance with a direction to provide information about a donor conceived person or as part of an enforcement action under Part 8 of the Bill even if in doing so the person may tend to incriminate themselves or expose them to a penalty. However, evidence obtained cannot be used against the person in criminal or civil proceedings other than those arising out of the evidence's false or misleading nature.
- 1.11. Finally, the Bill may limit the right to work in section 27B of the HRA by placing restrictions for accreditation and registration on ART providers who are sole traders, and on executives, officers and associated entities. The Committee notes that the Bill may also place limitations on the right to work by prescribing qualifications a person must hold to provide counselling services to be provided by ART providers.
- 1.12. **The Committee draws these matters 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

- 1.13. The Bill provides for the executive to make regulations which create offences with maximum penalties of not more than 30 penalty units. There is no explanation given in the explanatory statement as to why a power to create offences by regulation is required. **The Committee requests this information from the Minister.**

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

- 1.14. Section 126 of the Bill will allow regulations to incorporate, apply or adopt laws or instruments as in force from time to time. Subsection 47(6) of the *Legislation Act 2001* will not apply to any such instrument, displacing the requirement for the instrument and any amendments to be notified on the legislation register. The explanatory statement does not provide any justification for why it is considered necessary for instruments as amended from time to time to be incorporated into regulations, and why the requirements for notification should be displaced. **The Committee requests this information from the Minister.**

- 1.15. The Committee notes that the Bill will require the director-general to ensure that any incorporated instrument is either on the legislation register, available for inspection without charge during ordinary business hours at an ACT government office, or accessible on an ACT government website. Any incorporated instrument will not be enforceable unless made accessible in accordance with those requirements. The Committee commends this approach to the use of incorporated instruments, but remains concerned about the general lack of notification requirements for all instruments incorporated through regulation. In circumstances where it is not certain if incorporated instruments may be able to be notified due to copyright or other concerns, then provision may be made for regulations to exclude the operation of section 47(6) of the Legislation Act. In those circumstances an explanation for why a particular incorporated instrument cannot be notified would be expected to be set out in the explanatory statement accompanying the regulation and subject to scrutiny by the Committee.

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

## Domestic Violence Agencies (Information Sharing) Amendment Bill 2023

- 1.16. This Bill will amend the *Domestic Violence Agencies Act 1986* to authorise information sharing between prescribed information sharing entities (ISEs) where necessary to establish, assess, manage, prevent, and reduce risks of domestic and family violence.

### 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 protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

Freedom of expression (section 16 HRA)

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

- 1.17. The Bill may limit various human rights as described below. 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. The Committee refers that statement to the Assembly.
- 1.18. The Bill will facilitate the sharing of information among specified and prescribed information sharing entities relating to the risks of domestic and family violence. Any information shared or otherwise dealt with must generally be for a protection purpose – to establish or assess whether domestic or family violence is taking place, or to enable action to be taken to prevent or manage that violence. The Bill does not, however, authorise the use of information for such protection purposes. Entities also have to comply with various obligations before they can deal with information under the Bill, including when seeking consent, or otherwise comply with risk assessment and management framework, Ministerial protocols and individual entity protocols. Any disclosure or use of information must also be:

- a) with the consent of the at-risk person or connected person;
  - b) to the extent required or allowed under territory law, either as prescribed or to lessen or prevent a serious and urgent threat to individual or public health or safety; or
  - c) to comply with various mandatory reporting requirements under specified legislation.
- 1.19. There are also various other grounds that prevent the sharing of information, including that it might endanger a person's life or physical safety, prejudice an investigation, coronial inquest or inquiry, or court or tribunal proceeding, disclose a confidential law enforcement source, or be contrary to the public interest.
- 1.20. The Bill will also require information sharing entities to inform persons at risk of domestic or family violence, or persons connected with such a person, where the entity is sharing their information with other information sharing entities, taking action for a protection purpose, or disclosing or using the information for specified other purposes. There are only limited circumstances in which a person need not be informed by the entity, including where they have already been told or indicated they do not wish to be informed, it is not practicable for them to be informed, or telling them may cause a risk to their life, health or safety. The person of concern must not be informed about information being dealt with under the Bill.
- 1.21. An information sharing entity may disclose information to another such entity if they reasonably believe the information is relevant to the other entity's functions and is necessary for a protection purpose. An information sharing entity may also be required in those circumstances to share information to another such entity upon request by that information sharing entity or the information sharing coordinator. An information sharing entity may also share information about a person of concern to a person who is at risk if the entity believes it is necessary for a protection purpose.
- 1.22. The Bill will allow the Minister to declare an entity to be the information sharing coordinator who will be authorised to:
- a) have information disclosed to it and take appropriate action, including seeking more information from information sharing entities;
  - b) provide advice to, and coordinate, information sharing entities in taking action; and
  - c) provide assistance to at-risk persons and family members such as providing or referring to support services.
- 1.23. Dealing honestly and without recklessness with information under the Bill will be protected from civil and criminal liability.
- 1.24. The Bill will also authorise the disclosure of information by police likely to aid an approved crisis support organisation in supporting a person at risk of domestic or family violence or their child.
- 1.25. To the extent the Bill will authorise the sharing and use of information about various individuals, including those of concern about, at risk of, or connected with family and domestic violence, including by allowing that information to be shared or otherwise dealt with without their consent, the Bill may limit the protection of privacy provided by section 12 of the HRA. By defining those persons at risk of domestic or family violence whose information may be subject to sharing without consent or otherwise differentially dealt with under the Bill, the Bill may limit the right to equal protection under section 8 of the HRA.

- 1.26. The provisions of the Bill will apply to children and young persons between 14 and 18 years of age. The Bill sets out requirement for seeking consent for dealing with sensitive information about young persons, including providing reasonable supports. Consent of children and young persons without sufficient decision-making ability to give consent must generally be sought by the person with parental responsibility. However, consent need not be sought where seeking consent, or not taking action in the absence of consent, may cause a serious risk to the life, health or safety of the child or young person or connected person. By providing for action to be taken without consent of a child or young person or person with parental responsibility the Bill may limit the protection of children provided by section 11 of the HRA.
- 1.27. The Bill will prevent the *Freedom of Information Act 2016* from applying to information held only because it was disclosed under the Bill. This may limit the right to expression in section 16 of the HRA Act.
- 1.28. The Bill will also provide for various offences with maximum penalties including imprisonment for disclosure of shared information about protected persons. This may limit the right to liberty in section 18 of the HRA.
- 1.29. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Liquor Amendment Bill 2023

- 1.30. This Bill will make amendments to the *Liquor Act 2010* and *Liquor Regulation 2010* to strengthen the existing framework relating to security measures for licensed venues.

### 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)

- 1.31. The Bill will amend the Liquor Regulation to amend prescribed conditions on bar or nightclub licences to require that security cameras be fitted on licenced premises and their vicinity. The amendments will set out the requirements for the type and quality of footage captured, that the cameras must be, as far as possible, clearly visible, and signs indicating the use of cameras displayed near entrances. The security camera footage must be stored by the licensee for at least 30 days but no more than 90 days.
- 1.32. By prescribing obligations on bar and nightclub licensees to install and use security cameras and make them available to police in specified circumstances 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.
- 1.33. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Property Developers Bill 2023

- 1.34. This Bill will establish licensing requirements for residential property developers and establishes a regulatory scheme to enhance accountability of developers for defects and other statutory warranties.

### 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)

Freedom of expression (section 16 HRA)

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

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

Right to work and other work-related rights (section 27B)

- 1.35. This Bill will engage with several rights under the HRA as set out below. 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. The Committee refers that statement to the Assembly.
- 1.36. The Bill will require property developers to establish their suitability for a property developers licence. This may include consideration of whether they, and in some cases their key personnel or directors, have been convicted of offences under specified or prescribed legislation. This includes the preparation of a report by a rating entity which includes a review of disciplinary or regulatory actions which will be considered in assessing the suitability of an applicant. By requiring consideration of a person's criminal record as a basis to potentially refuse a licence the Bill may limit the right to non-discrimination in section 8 of the HRA.
- 1.37. The Bill includes a wide range of provisions which may limit the protection of privacy under section 12 of the HRA. These include various provisions relating to the licensing requirements under the Bill:
- a) the requirement to provide personal information and sensitive information in applying for a property developers licence, including information relating to current and former key persons of a corporation, to assess a property developer's suitability for a licence;
  - b) requiring applicants for a licence to submit a ratings report from a ratings entity which includes consideration of an individual's criminal and regulatory history;
  - c) requiring establishment of a public register which will include names of individual licensees and directors, conditions on the licence and details of any regulatory action taken;

- d) providing authorised persons with the authority to enter premises, to inspect and copy documents, seize things, restrict access to things, to direct a person to give information including name and address, to take measurements, samples and inspect and copy documents;
  - e) authorising the Property Developers Registrar established under the Bill to access personal information to undertake assessment of complaints and regulatory action; and
  - f) allowing the sharing of personal information with specified and prescribed agencies relating to the prevention of death or injury, harm to the environment or damage to property.
- 1.38. The Bill will also permit authorised persons to access premises to undertake rectification work where a property developer has failed to comply with a rectification order. The Registrar may also issue an access order requiring the occupier of land to permit reasonable access within a selected period to allow rectification work to proceed. An individual's home may also be accessed by the Construction Occupations Registrar and building inspectors in monitoring and enforcement of the Bill. These various aspects of the Bill may also limit the right to privacy in section 12 of the HRA.
- 1.39. The Bill will create various offences relating to false or misleading representations about licensing status, including a strict liability offence. This may limit the right to free expression in section 16 of the HRA. These and other offences include offences with a maximum penalty including imprisonment which may limit the right to liberty in section 18 of the HRA.
- 1.40. The Registrar will be able to immediately suspend or cancel a property developer licence without providing advance notice or an opportunity to respond where a specified or prescribed ground for regulatory action exists and it is in the public interest. There is also automatic suspension while fees are unpaid, bankruptcy or insolvency, winding up or under administration. An emergency rectification order may also be issued without notice where a property developer is the subject of a winding up order, or placed into administration, receivership or liquidation, or deregistered. These provisions may limit the right to a fair trial in section 21 of the HRA.
- 1.41. The Bill will also place the onus on a builder or property developer to establish that any defect notified within 2 years of completion of a residential development does not need to be rectified. This creates the presumption that an alleged defect is the responsibility of the builder and property developer which may also limit the right to a fair trial in section 21 of the HRA.
- 1.42. The Bill also includes 14 strict liability offences as well as offences which include exceptions or defences for which the evidentiary basis rests with the defendant. These may limit the presumption of innocence protected as a right of criminal proceedings in section 22 of the HRA. This right may also be limited through dis-application of the privilege against self-incrimination in responding to an enforcement direction. However, it is noted that any information, document or thing obtained can only be used for an offence arising out of its false or misleading nature.<sup>1</sup>

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<sup>1</sup> The Committee notes that the explanatory statement accompanying the Bill mistakenly refers to the offence of a seller entering into an off-the-plan contract without a property developer licence or contrary to a condition on such a licence as being a strict liability offence with a maximum penalty of 100 penalty units.

- 1.43. Finally, by conditioning the ability to carry out residential property development without a licence, or by limiting the ability of key personnel to work for a licenced developer, the Bill may limit the right to work in section 27B of the HRA.
- 1.44. **The Committee draws these matters 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)

#### Henry VIII clause

- 1.45. Part 13 of the Bill authorises transitional regulations which modify that Part, including in relation to another Territory law, to make provision for anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with. Such a regulation would have effect despite anything elsewhere in the Act or another territory law.
- 1.46. The explanatory statement accompanying the Bill does not provide a justification for why a Henry VIII clause in this form was required. **The Committee therefore requests further information from the Minister on why the Henry VIII clause is considered necessary in the context of this Bill, including:**
- a) **what limits, if any, are placed on the scope, subject matter and duration of the Henry VIII clause so as to restrict the potential impact of any regulations; and**
  - b) **what alternatives to the Henry VIII clause, either to the clause itself or the use of a Henry VIII clause in general, were considered and why those alternatives were not accepted.**

**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 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

- 1.47. The Bill will allow for regulations or instruments made under the Bill to incorporate laws, Australian Standards or other instruments as in force from time to time. Subsection 47(6) of the *Legislation Act 2001* will not apply to such incorporated documents, meaning that there is no requirement to notify any incorporated law, standards or other instruments, or future amendments, on the notification register. However, an incorporated instrument is not enforceable unless made accessible through being on the legislation register, available for inspection without charge during business hours, or accessible on an ACT government website or link.

- 1.48. The explanatory statement accompanying the Bill states that the disapplication of subsection 47(6) ‘will allow a consistent approach to the incorporation of instruments/documents whether copyrighted or not or otherwise publicly available’. While the Committee recognises the efforts to ensure that instruments are accessible in some form, the Committee is concerned that accessibility is only provided for instruments and not Australian Standards. The Committee also notes that there is no requirement for all incorporated instruments to be made available in the same way, undermining any benefit of consistency.
- 1.49. **The Committee therefore requests further information from the Minister on why it was necessary to exempt notification requirements for all incorporated instruments, including Australian Standards.** As discussed above in relation to the Assisted Reproductive Technology Bill, it may be preferable for provision to be made for regulations to exempt subsection 47(6) notification requirements in relation to specific standards or instruments provided they were made accessible in some other form. This would allow scrutiny by this Committee of the reasons for both incorporating individual standards or instruments as well as the form of accessibility provided.

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

## Road Safety Legislation Amendment Bill 2023

- 1.50. This Bill amends various road safety legislation relating to offences for impaired driving, including:
- amending penalties for drink and drug driving offences;
  - creating a low-range drink driving traffic infringement notice for first time offenders;
  - creating a new offence for simultaneous drug and alcohol driving;
  - expanding roadside drug testing to include cocaine; and
  - other minor or technical amendments.

### 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 protection of the family and children (section 11 HRA)

Right to privacy and reputation (section 12 HRA)

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

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

Right to work and other work-related rights (section 27B)



- 1.51. This Bill may limit several rights under the HRA as described below. 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. The Committee refers that statement to the Assembly.
- 1.52. The Bill will amend the *Road Transport (Alcohol and Drugs) Act 1997* to make amendments to offences, including strict liability offences, relating to driving under the influence of various levels of alcohol or drugs. The Bill will also add a strict liability offence relating to driving with a prescribed concentration of both alcohol and drugs. The Bill will generally increase the maximum penalties associated with these offences, for both first and repeat offenders, and including terms of imprisonment.
- 1.53. For example, the new offence of driving with both alcohol and drugs will, depending on the level of alcohol, have a maximum penalty of 100 penalty units, imprisonment for 12 months, or both, for a first offender. Offences relating to avoiding testing will be subject to 100 penalty units, imprisonment for 12 months or both for first offenders.
- 1.54. The Bill will also amend or introduce defences or exceptions to offences, such as allowing for reasonable excuse as a defence to not undertaking various forms of screening or testing procedures. The evidential burden in raising these exceptions will be placed on the defendant.
- 1.55. The introduction or amendment of strict liability offences and use of exceptions or defences in offences may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. These rights are further limited by the imposition of significant penalties and, in some cases, limiting the mistake of fact defence otherwise available. The imposition of possible terms of imprisonment may also limit the right to liberty in section 18 of the HRA. Increased penalties may also disproportionately affect vulnerable members of the community who may be subject to the offences in question, including young persons and persons with drug or alcohol dependencies, or who are unable to pay associated fines. This may limit the right to equality in section 8 of the HRA.
- 1.56. The Committee notes that the explanatory statement accompanying the Bill justifies the increase to penalties associated with these and other offences amended in the Bill by reference to community expectations, the need for significant deterrence, and comparisons with offences with similarly harmful effects on those directly affected and the community generally. Penalties for offences relating to delaying or avoiding testing have also been increased to prevent individuals avoiding penalties for other offences.
- 1.57. The Committee notes that the increased penalties are applied to both strict liability and non-strict liability offences. For example, the offence in section 22 of the Road Transport (Alcohol and Drugs) Act relates to refusing to provide a breath sample. Section 23 relates to refusing to provide a blood sample or undergo a medical examination. These penalties for these offences have been raised in line with the increases to penalties in sections 22A, 22B and 22C which also relate to refusing to take a test or procedure of some form. However, the offences in sections 22 and 23 are not strict liability offences.<sup>2</sup>

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<sup>2</sup> The Committee notes that the explanatory statement mistakenly refers to section 22 and 23 of the Road Transport (Alcohol and Drugs) Act as strict liability offences (see eg. p.11).

- 1.58. By including a new offence which, where a police officer reasonably believes the offence has been committed, provides authority for police officers to enter residential premises in order to carry out testing, the Bill may also limit the right to privacy protected under section 12 of the HRA.
- 1.59. The Bill will amend the provisions of the Road Transport (Alcohol and Drugs) Act dealing with automatic driver licence disqualification, including in some cases increasing the periods of disqualification. This may limit the right to work under s 27B of the HRA where a person uses their car or licence for work, and right to family and children under section 11 of the HRA where a person relies on a car to care for family members. These rights may also be limited by the extended range of offences in the Bill which can lead to an interlock condition being placed on a person's licence which will require having to use a device to test the presence of alcohol on a person's breath before being able to drive a vehicle.
- 1.60. The Bill will also increase the range of offences which can lead to immediate suspension notices being issued. An immediate suspension notice can be issued where a police officer believes on reasonable grounds that a person's alcohol or drug test results meet the threshold of an offence, and the person accepts the penalty without a criminal charge being determined by a court. This may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.
- 1.61. The Bill will provide for first time offenders of an offence under section 19 of the Road Transport (Alcohol and Drugs) Act with a low-level blood alcohol reading to be issued with a traffic infringement notice as a way to avoid having to attend court and having a criminal conviction recorded. This may limit the right to a fair trial in section 21 of the HRA. As issue of an infringement notice may also give rise to automatic licence disqualification for 6 months, the Bill may limit the right to the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. Where a person uses their car for work the right to work in section 27B may be limited. Where a person uses their car for family or caring responsibilities the right to protection of family and children in section 11 may be limited.
- 1.62. The Bill will also expand the range of prescribed drugs which can be the subject of roadside testing to include cocaine. This may limit the protection of privacy provided by section 12 of the HRA.
- 1.63. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

**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)**

- 1.64. The Committee notes that the explanatory statement accompanying the Bill, while generally very useful in its description of human rights impacts and in outlining the effect or intent of the various provisions of the Bill, includes inaccurate cross-references to relevant clauses. For example, the outline for clause 35 includes reference to clause 28 for the remaking of sections 32 and 33 of the Road Transport (Alcohol and Drugs) Act. This should be a reference to clause 34. This may cause some confusion or otherwise reduce the utility of the explanatory statement.

- 1.65. The Committee recommends that consideration be given to amending the explanatory statement to correct cross-references to relevant clauses.

## Proposed amendments—No comment

### Births, Deaths and Marriages Registration Amendment Bill 2023

- 1.66. On 23 January 2024, the Committee received proposed amendments to the Births, Deaths and Marriages Registration Amendment Bill 2023 from Miss Nuttall MLA. These proposed amendments will amend the process of changing a sex marker on a birth certificate, including:
- a) removing the requirement for clinical verification of a change of sex and allowing a self-declaration process similar to the current change of name process;
  - b) allowing for an ‘open text’ sex marker description with only limited prohibited sex descriptors;
  - c) allowing applicants, upon application in writing, to have their sex removed from their birth certificate, meaning an individual can choose to have a birth certificate issued without a sex marker; and
  - d) requiring previous names not to be displayed after a change of name on newly issued birth certificates while allowing for people to display this information should they choose to do so.

## Government responses—No comment

- 1.67. The Committee received a response to the Committee’s comments on the following Bills and has no further comments:
- a) *Building and Construction Legislation Amendment Bill 2023*;
  - b) *Government Procurement Amendment Bill 2023*;
  - c) *Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023*;
  - d) *Justice and Community Safety Legislation Bill 2023 (No.2)*; and
  - e) *Voluntary Assisted Dying Bill 2023*.
- 1.68. These responses can be viewed [online](#).<sup>3</sup>
- 1.69. The Committee wishes to thank the Ministers for their helpful responses.

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<sup>3</sup> Available at [https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny/responses-to-comments-on-bills](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny/responses-to-comments-on-bills).

## 2. Subordinate Legislation

### Scrutiny of subordinate legislation under the *Human Rights Act 2004*

- 2.1. On 28 November 2023, the Legislative Assembly passed the *Human Rights (Complaints) Legislation Amendment Act 2023 (Amendment Act)*.<sup>4</sup> Sections 6 and 7 of the Amendment Act amend section 38 of the *Human Rights Act 2004*. As amended, section 38 provides:

**38 Consideration of **legislation bills** by relevant Assembly committee**

- (1) The relevant Assembly committee must report to the Legislative Assembly about human rights issues raised by bills **and subordinate laws** presented to the Assembly.
- (2) In this section:

*relevant Assembly committee* means a standing committee of the Legislative Assembly nominated, in writing, by the Speaker for subsection (1).<sup>5</sup>

- 2.2. The explanatory statement for the Bill that was enacted as the Amendment Act relevantly states:

The Bill also makes additional amendments to the Human Rights Act to:

- Require that the relevant Assembly committee must report to the Legislative Assembly about human rights issues raised by subordinate legislation. Currently this requirement only applies to bills presented to the Assembly. Broadening the Scrutiny Committee’s mandate to consider the human rights implications of subordinate legislation will improve transparency of human rights considerations in the Territory. Equivalent committees in other human rights jurisdictions (Victoria and Queensland) have a formal scrutiny mandate of this kind.

.....<sup>6</sup>

- 2.3. The Committee notes that, under subsection 2(1) of the Amendment Act, the amendments made by section 6 and 7 commenced on 12 December 2023.
- 2.4. The Committee welcomes these amendments, which reflect a substantive and positive response – by the Executive and the Legislative Assembly – to representations made by the Committee to the Minister for Human Rights, over recent years. As the Committee reported in *Scrutiny Report 20* of the 10<sup>th</sup> Assembly (13 September 2022),<sup>7</sup> on 12 July 2021, the Committee wrote to the Minister for Human Rights about human rights issues in subordinate legislation, seeking the Minister’s support in formalising its scrutiny of human rights issues in subordinate legislation.

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<sup>4</sup> See <https://www.legislation.act.gov.au/a/2023-53/>.

<sup>5</sup> The annotations in red indicate the amendments made by the Amendment Act.

<sup>6</sup> Available at [https://www.legislation.act.gov.au/DownloadFile/es/db\\_68453/20230920-81972/PDF/db\\_68453.PDF](https://www.legislation.act.gov.au/DownloadFile/es/db_68453/20230920-81972/PDF/db_68453.PDF).

<sup>7</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0010/2073178/Scrutiny-Report-No-20.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/2073178/Scrutiny-Report-No-20.pdf).

- 2.5. In doing so, the Committee noted that, under section 38 of the *Human Rights Act 2004*, the Committee had a formal statutory role only in relation to ‘human rights issues raised by bills presented to the Assembly’ but no formal, statutory role in relation to human rights issues raised by *subordinate* legislation presented to the Assembly. The Committee went on to note that, nevertheless, it had, in recent years, been pleased to note that explanatory statements for subordinate legislation considered by the Committee have increasingly included a discussion of human rights issues, despite the absence of any statutory requirement to address such issues for subordinate legislation, unlike the requirement imposed by section 37 of the *Human Rights Act 2004* to provide a ‘compatibility statement’ in relation to the consistency of bills with human rights. The Committee noted that, among other things, the provision of human rights analysis (in relation to subordinate legislation) assisted the Committee in its role under principle (10)(c)(ii) of the Committee’s Resolution of Appointment, which requires the Committee to consider whether subordinate legislation may unduly trespass on rights previously established by law.
- 2.6. Before moving on, the Committee notes that the Amendment Act does not amend the Human Rights Act, to provide an obligation to supply compatibility statements in relation to subordinate laws.
- 2.7. The Committee concluded its 12 July 2021 letter by seeking the Minister’s support in resolving the issue in relation to human rights scrutiny of subordinate legislation and suggesting the following possible options for achieving this:
- amend section 37 of the *Human Rights Act 2004*, to include a legal requirement to prepare a compatibility statement in relation to subordinate legislation, and amend section 38 of the *Human Rights Act 2004*, to give the Committee a formal, statutory jurisdiction in relation to human rights issues arising from subordinate legislation;
  - amend Standing Orders, to give the Committee a formal jurisdiction in relation to human rights issues arising from subordinate legislation;
  - amend the Committee’s resolution of establishment, to give the Committee a formal jurisdiction in relation to human rights issues arising from subordinate legislation.

- 2.8. The Minister responded to the Committee on 29 June 2022, stating:

I acknowledge the potential benefits of amending the *Human Rights Act 2004* (HRA) to formalise the Committee’s mandate to scrutinise and report on the human rights impact of subordinate legislation presented to the Assembly. While the Committee already provides valuable commentary on these issues in its reports, it would be beneficial for this role to be specifically recognised in the Human Rights Act.

While there are strong arguments for broadening the Committee’s remit, the potential benefits of requiring a compatibility statement in respect of all subordinate legislation are less clear. Such a requirement could have significant resourcing implications in requiring centralised internal scrutiny of all delegated legislation.

I note that the existing Human Rights Act framework already ensures that human rights are considered as part of the development of subordinate legislation, and that human rights analysis is generally included in explanatory statements for subordinate legislation.

I intend to progress consideration of amendments to enhance the Committee's mandate to consider human rights in subordinate legislation. While the Government does not intend to introduce a requirement for compatibility statements for subordinate legislation at this point, I have written to remind Ministers there is an expectation that explanatory statements include human rights analysis.

In the meantime, I thank the Committee for raising these issues and supporting enhanced human rights scrutiny in the Territory.<sup>8</sup>

- 2.9. The Committee thanked the Minister for this helpful response. Now, the Committee thanks the Minister for carrying through with the relevant amendments. The Committee considers this to be a significant step forward.
- 2.10. The Committee notes, however, that the additional (statutory) jurisdiction given to the Committee is limited to 'subordinate laws', defined in section 8 of the *Legislation Act 2001* as follows:

#### **8 Meaning of subordinate law**

- (1) A subordinate law is a regulation or rule (whether or not legislative in nature) made under—
- (a) an Act; or
  - (b) another subordinate law; or
  - (c) power given by an Act or subordinate law and also power given otherwise by law.
- (2) A reference to a **subordinate law** includes a reference to a provision of a subordinate law.

- 2.11. This should be contrasted with the Committee's jurisdiction in relation to subordinate legislation, which is significantly wider than 'subordinate laws', given that paragraph (10)(c) of the Committee's Resolution of Appointment requires the Committee to consider '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)' against the scrutiny principles set out in the Resolution of Appointment. In practice, this includes disallowable instruments (defined in section 9 of the Legislation Act), which – by far – make up the majority of the Committee's subordinate legislation jurisdiction.<sup>9</sup>

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<sup>8</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0005/2073704/Letter-Human-rights-scrutiny-in-subordinate-legislate.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/2073704/Letter-Human-rights-scrutiny-in-subordinate-legislate.pdf).

<sup>9</sup> For example, the ACT Legislation Register records 42 subordinate laws being promulgated in 2023, compared to 333 disallowable instruments.

- 2.12. The Committee has considered the limitations on its additional (formal, Human Rights Act) jurisdiction on its future work and decided that, despite the omission of ‘disallowable instruments’ from the amendments made by the Amendment Act, it will continue to consider human rights issues in disallowable instruments. The Committee considers that this is consistent with (in the context of ‘subordinate legislation’) the Minister’s having ‘written to remind Ministers there is an expectation that explanatory statements include human rights analysis’ (see letter dated 29 June 2022). The Committee considers that this is also consistent with what Executive agencies expect the Committee to consider, as reflected by this statement (from a relatively recent explanatory 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.<sup>10</sup>

- 2.13. In relation to reporting on subordinate laws under section 38 of the Human Rights Act, the Committee intends to adjust its reporting format, for consistency with the reporting in relation to bills.

## Disallowable Instruments—No comment

- 2.14. The Committee has examined the following disallowable instrument and has no comments on it:

- **Disallowable Instrument DI2023-240 being the Emergencies (Multi-Hazard Advisory Council Members) Appointment 2023 (No 2) made under section 127 of the *Emergencies Act 2004* appoints a specified person as a member of the ACT Multi-Hazard Advisory Council.**

## Disallowable Instruments—Comment

- 2.15. The Committee has examined the following disallowable instrument and offers these comments on it:

- **Disallowable Instrument DI2023-241 being the Road Transport (General) Fee Determination Revocation 2023 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2014-24, DI2014-29 and DI2015-325.**

## No human rights issues

- 2.16. The Committee notes that this instrument, made under section 96 of the *Road Transport (General) Act 1996*, revokes various transport-related fees determinations that are (according to the explanatory statement for the instrument) redundant.
- 2.17. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.18. **This comment does not require a response from the Minister.**

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<sup>10</sup> See explanatory statement for Water and Sewerage (Fees) Determination 2023 (DI2023-119) (available at [https://www.legislation.act.gov.au/DownloadFile/es/db\\_67843/current/PDF/db\\_67843.PDF](https://www.legislation.act.gov.au/DownloadFile/es/db_67843/current/PDF/db_67843.PDF)), discussed in *Scrutiny Report 33* of the 10<sup>th</sup> Assembly (5 September 2023) (available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/2279104/Scrutiny-Report-No-33.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2279104/Scrutiny-Report-No-33.pdf)).

## Subordinate Laws—Comment

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

- **Subordinate Law SL2023-26 being the Magistrates Court (Circular Economy Infringement Notices) Regulation 2023 made under part 3.8 of the *Magistrates Court Act 1930* enables infringement notices to be issued for certain offences against the *Circular Economy Act 2023*.**

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

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

- 2.20. Part 3.8 of the *Magistrates Court Act 1930* creates a system of infringement notices for certain offences, as an alternative to prosecution. Under section 119 of that Act, regulations may be made prescribing offences as infringement notice offences. This subordinate law is made for section 119 and will allow infringement notices to be issued in relation to certain offences under the *Circular Economy Act 2023*.
- 2.21. The explanatory statement for the subordinate law goes on to discuss, in detail, human rights issues, by reference to the presumption of innocence, protected by subsection 22(1) of the *Human Rights Act 2004*, arising from the reliance on strict liability offences. The explanatory statement states:

#### HUMAN RIGHTS IMPLICATIONS

This regulation contains strict liability offences, as such, it might be seen to engage the presumption of innocence. Section 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. In a strict liability offence, there is no requirement to establish a fault element, such as intention, recklessness, or negligence and the prosecution need only show that the defendant did the prohibited act.

Strict liability offences arise in a regulatory context where for reasons such as environmental protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. Where a defendant can reasonably be expected to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded.

This regulation does not create any new offences. This regulation introduces infringement notices for the following strict liability offences in the *Circular Economy Act 2023*, which have been carried over from the *Plastic Reduction Act 2021* with some expansion to allow them to apply to non-plastic products in future:

- supplying a prohibited product at section 17;
- not complying with a notice to dispose of prohibited products at section 19;
- supplying declared products at a declared public event at section 22;
- not complying with an exemption condition at section 23;
- not returning an identity card at section 26; and
- not complying with direction to give name and address at section 30.



Without the ability to issue infringement notices, the only option available to the regulating authority is to prosecute offences through the courts. This is a serious response, and this regulation provides a method to achieve the policy purpose that is less restrictive on human rights.

While an infringement notice scheme offers the opportunity for a person to pay the infringement notice rather than face prosecution, it does not prevent them from choosing to challenge the notice and instead face prosecution in court, so the minimum guarantees in criminal proceedings under section 22(2) and rights to a fair trial under section 21 of the Human Rights Act remain available and are not undermined by the possibility of an infringement notice scheme.

A less restrictive approach (namely, not creating infringement notices for these offences) would still enable enforcement but would not be as effective as a deterrent and would only be feasible to enforce for larger-scale breaches. Given the educative approach to circular economy changes, the effectiveness of deterrence is critical to generate wide-scale behavioural change. A less restrictive approach would not achieve this and would thus not induce the myriad of changes to practices that are needed to move towards a circular economy for the ACT.

The limitation on this right is for the legitimate purpose of moving toward a circular economy and reducing negative environmental and waste management impacts of the use of single-use plastics. The use of strict liability offences directly supports the effective enforcement of the *Circular Economy Act 2023* which will create a deterrent for businesses from breaching the law regarding prohibited plastic products. This infringement notice scheme is proportionate because it is a reasonable and qualified limitation of the right and is targeted to its legitimate purpose of supporting enforcement to achieve the circular economy objectives of the Bill.

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

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

## Government responses—Comment

- **Disallowable Instrument DI2023-202 being the Children and Young People (Kinship and Foster Carers Risk Assessment) Guidelines 2023, made under section 514B of the *Children and Young People Act 2008*, determines risk assessment guidelines for that Act.**

2.24. The instrument mentioned above is made under section 514B of the *Children and Young People Act 2008*. It makes ‘risk assessment guidelines’ for that Act. It was commented on by the Committee in *Scrutiny Report 33* of the 10<sup>th</sup> Assembly (5 September 2023),<sup>11</sup> in which the Committee raised the issue of whether human rights analysis should have been provided with the instrument. In a response dated 18 September 2023, the Minister for Families and Community Services accepted the Committee’s comments, provided some human rights analysis and advised that she had ‘asked the Community Services Directorate to develop an updated Explanatory Statement to address this issue’.<sup>12</sup> The Committee was satisfied with this response and made no further comment.

<sup>11</sup> Available at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0007/2279104/Scrutiny-Report-No-33.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0007/2279104/Scrutiny-Report-No-33.pdf).

<sup>12</sup> Available at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0004/2293924/08a99d3c97e0901b0740eae0256417d915ccce40.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0004/2293924/08a99d3c97e0901b0740eae0256417d915ccce40.pdf).

2.25. The Committee has now received a further response from the Minister (undated).<sup>13</sup> After noting her commitment in relation to updating the explanatory statement, the Minister states:

... the Guidelines' Explanatory Statement was not able to be revised ahead of the 19 September 2023 deadline for the Legislative Assembly to move to disallow the Guidelines. Unfortunately, this meant it was not possible to substitute a revised Explanatory Statement on the ACT Legislation Register.

2.26. However, nevertheless, the Minister goes on to provide an update on 'how the Committee's comments have been considered and actioned and provide assurance that [the Community Services Directorate] will address the learnings from this process in developing future explanatory statements'.

2.27. The Committee thanks the Minister for this further information. However, the Committee is disappointed that a revised explanatory statement (or other source of explanation) is not available, on the ACT Legislation website, for the use of those who have to consider the instrument in question.

2.28. The Committee notes that this issue has arisen previously. In *Scrutiny Report 14* of the 10th Assembly (29 March 2022),<sup>14</sup> the Committee commented on the Court Procedures (Fees) Determination 2022, identifying issues with the explanatory statement for that instrument.<sup>15</sup> In his initial response, dated 3 May 2022, the Attorney-General accepted the Committee's comments, provided a proposed Amended Explanatory Statement and agreed 'to table the attached Amended Explanatory Statement in the Assembly'.<sup>16</sup> However, in a further response, dated 24 May 2022, the Attorney-General advised:

Unfortunately, I have now been advised that the amended Explanatory Statement cannot be included on the Legislation Register as it was received just outside of the six sitting day disallowance period. I have been further advised that, although I could table the amended Explanatory Statement in the Legislative Assembly, the statement could not then be accessed on the Legislation Register – potentially creating confusion for users.<sup>17</sup>

2.29. The Committee is concerned that this has now occurred twice and seeks to identify a solution, to prevent further recurrence. The most obvious solution is for Ministers to respond to such comments before the Legislative Assembly's capacity to disallow the instrument/subordinate law in question expires, as the Committee requests, in making the comment.<sup>18</sup>

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<sup>13</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0006/2383170/DI2023-202Additional-response.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2383170/DI2023-202Additional-response.pdf).

<sup>14</sup> *Scrutiny Report 14* available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0008/1975904/Report-14-29Mar22.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1975904/Report-14-29Mar22.pdf). Further response available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0004/2008669/Response-DI2022-1-Court-Procedures-Fees-Determination-2022-additional.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2008669/Response-DI2022-1-Court-Procedures-Fees-Determination-2022-additional.pdf).

<sup>15</sup> *Scrutiny Report 14* available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0008/1975904/Report-14-29Mar22.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1975904/Report-14-29Mar22.pdf).

<sup>16</sup> Initial response available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0004/2004187/Response-DI2022-1-Court-Procedures-Fees-Determination-2022.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2004187/Response-DI2022-1-Court-Procedures-Fees-Determination-2022.pdf).

<sup>17</sup> Further response available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0004/2008669/Response-DI2022-1-Court-Procedures-Fees-Determination-2022-additional.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2008669/Response-DI2022-1-Court-Procedures-Fees-Determination-2022-additional.pdf).

<sup>18</sup> See, eg, *Scrutiny Report 33*, at page 24.

- 2.30. If this is going to continue to be an issue, the Committee may have to consider adopting a practice similar to the Senate Standing Committee for the Scrutiny of Delegated Legislation, which issues a ‘protective notice of motion to disallow’,<sup>19</sup> to preserve the Senate’s capacity to disallow a legislative instrument, pending the receipt of a satisfactory response. This would appear to avoid the issue that has arisen with the 2 instruments discussed above.
- 2.31. Another option would appear to be to amend the *Legislation Act 2001*, to remove the limitation on registering amended explanatory statements, outside of the disallowance period.
- 2.32. Another option, in the interim, might be to include information such as that generated in relation to the 2 instruments discussed above on the ACT Legislation Register, perhaps under the relevant ‘Law History’ tab.
- 2.33. The Committee seeks the views of the Minister for Families and Community Services and the Attorney-General on the above discussion.**
- 2.34. This comment requires a response from the Minister/Attorney-General.**

The Committee draws this matter to the attention of the Assembly and asks for a response from the Minister/Attorney General.

- **Disallowable Instrument DI2023-236 being the Building (ACT Appendix to the Building Code) Determination 2023 (No 2) made under subsection 136 of the *Building Act 2004* revokes DI2019-45 and makes the ACT appendix to the Building Code of Australia.**
  - **Disallowable Instrument DI2023-237 being the Building (General) (Alternative requirements for unaltered parts) Determination 2023 (No 2) made under section 24 of the *Building (General) Regulation 2008*.**
- 2.35. The Committee commented on the instruments mentioned above in *Scrutiny Report 36* of the 10<sup>th</sup> Assembly (30 October 2023).<sup>20</sup> The issues identified by the Committee for response were the disapplication of subsection 47(5) of the *Legislation Act 2001* and, in particular, the reliance by the instruments on Australian Standards. The Committee was concerned (and has been for some time) about (free) public access to these standards, noting that the instruments indicated that the relevant standards were publicly available in the National Library. Based on recent experience indicating that not all Australian Standards were available in the National Library, the Committee requested the Minister to confirm that the standards in question were available from the National Library, and also advise why it is not possible to make the standards in question more readily available, in some form.

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<sup>19</sup> See

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Guidelines/Guide\\_to\\_working\\_with\\_the\\_committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines/Guide_to_working_with_the_committee).

<sup>20</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0009/2311011/Scrutiny-Report-36-Final.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0009/2311011/Scrutiny-Report-36-Final.pdf).

2.36. The Minister for Sustainable Building and Construction responded to the Committee, in a letter dated 24 November 2023.<sup>21</sup> The Minister states:

As the Committee is aware, there are challenges relating to the ability to provide public access to Australian Standards due to copyright issues.

I am pleased to advise that Standards Australia has recently released an initiative (Reader Room) that provides limited, no-fee access to the entire catalogue of Australian Standards for non-commercial purposes, that is for personal, domestic or household use. This initiative provides access for free to a maximum of three standards every 12 months, with access for 24 hours at a time. The Reader Room is available at <https://readerroom.standards.org.au/>.

For more regular use, Australian Standards may be purchased at [www.standards.org.au](http://www.standards.org.au).

2.37. The response goes on:

There are often two or more versions of the Building Code applicable to building work at any one time and as such there are a significant number of Australian Standards and versions of Australian Standards that industry and regulators require access to. There are also challenges to providing public access due to entities, such as the National Library, no longer providing public access to current standards, although certain historical versions of Australian Standards are available.

2.38. On the wider issues, the response states:

The Australian Government continues to raise with Standards Australia the feedback from stakeholders on the cost and accessibility of Australian Standards. Standards Australia is aware of industry's concerns and has made five commitments to improve standards accessibility, as outlined in their Memorandum of Understanding with the Australian Government (section 8.32):

1. *Improve competition in the distribution of standards by supporting multiple channels for distribution;*
2. *Offer partnership options with Standards Australia to facilitate forms of public access;*
3. *Develop new innovative channels for accessing standards;*
4. *Provide greater flexibility in pricing structures; and*
5. *Provide public access to standards for non-commercial use.*

I also note that over the last couple of years, Standards Australia has improved distribution competition and they recently released Small Business Sets to combine commonly referenced documents across select industries into a single, more economical package.

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<sup>21</sup> Available at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0019/2333233/DI2023-236-and-DI2023-237Response.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0019/2333233/DI2023-236-and-DI2023-237Response.pdf).

I continue to work with National Building Ministers on improving the accessibility of standards to professions in the building and construction sector who require them to perform their regulated functions, in particular those standards that are incorporated into the National Construction Code (the Building Code of Australia and the Plumbing Code of Australia).

The Environment, Planning and Sustainable Development Directorate is also working with Standards Australia on options for improving access to Australian Standards including affordability for licensed occupations in the building and construction sector.

**2.39. The Committee thanks the Minister for this helpful and informative response. The Committee would be grateful if the Minister could keep the Committee informed of relevant developments.**

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

Peter Cain MLA  
Chair

January 2024

# Outstanding responses

## Bills/Subordinate Legislation

### Report 28, dated 3 May 2023

#### Bill

- Modern Slavery Legislation Amendment Bill 2023

### Report 36, dated 30 October 2023

#### Bill

- Circular Economy Bill 2023

### Report 37, dated 21 November 2023

#### Bill

- Parentage (Surrogacy) Amendment Bill 2023