



## **Legislative Assembly for the Australian Capital Territory**

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

# **Scrutiny Report 36**

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

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Approved for publication

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10th Assembly  
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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

Erin Liet, Papers Officer

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Daniel Stewart, Legal Adviser (Bills)

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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

## Proposed Amendments—Comment

### Electoral and Road Safety Legislation Amendment Bill 2023

- 1.1. On 15 October 2023 the Committee received proposed amendments to the Electoral and Road Safety Legislation Amendment Bill 2023 from Mr Braddock MLA. These proposed amendments include:
- a) Redefining who is a foreign entity for the purpose of banning political donations from those entities;
  - b) Expanding the range of entities who are banned from making political donations above the threshold levels to include entities involved with defence, fossil fuel and nicotine;
  - c) Removing the exceptions in the Bill for donations from property developers that are paid into an account to be used for purposes relating to a federal election;
  - d) To replace additional infringement notice penalty amounts associated with traffic offences where the vehicle displays advertising or electoral matter with 1 demerit point; and
  - e) Omitting provisions in the Bill which relate to use of electronic voting systems by overseas electors.

### 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)

Freedom of expression (section 16 HRA)

- 1.2. The proposed amendments will each limit to varying extent the right to freedom of expression in section 16 of the HRA. They may also raise concerns over their compatibility with the Australian Constitution's implied freedom of political communication. The explanatory statement accompanying the proposed amendments recognises these potential limitations and sets out generally why they should be considered reasonable together with why they should be considered compatible with the implied freedom.
- 1.3. By drawing a distinction based on whether an individual is an Australian citizen or permanent resident and expanding the range of entities who may be prohibited from making donations to political entities in the Territory the proposed amendments may also limit the right to equality before the law in section 8 of the HRA. This possible limitation is not recognised in the explanatory statement.

- 1.4. The Bill places restrictions on foreign entities making donations to political entities in the Territory. The proposed amendments will extend the definition of a foreign entity to mean an individual who is not an Australian citizen or permanent resident or an entity that is beneficially owned by an individual or individuals who are not Australian citizens or permanent residents. When compared to the definition of foreign entity in the Bill, this proposed amendment will limit donations from individuals whose reside in Australia but are not citizens or permanent residents, and some entities' incorporated, based or whose principal place of activity is in Australia.
- 1.5. The High Court has accepted that restricting donations to political parties and candidates constitutes a burden on the freedom of political communication protected by the Australian Constitution. Restricting the funds available to political actors limits the use of those funds to engage in political communication.<sup>1</sup> The freedom protected by the Constitution does not protect donations as an act of communication in itself, nor any right of individuals to make political donations in order to gain access and make representations to politicians and political parties.
- 1.6. The question presented by any burden on political communication is whether the purpose for the burden, and the means adopted to achieve it, is compatible with Australia's system of representative democracy and can be considered suitable, necessary and proportionate. Restrictions on political donations has been accepted as a means of preventing corruption and undue influence, both actual or perceived, in government. It may also be a means to ensure equality of opportunity to participate in the exercise of political sovereignty. Foreign influence may amount to interference with our political system where it is covert, coercive or corrupt, and "can impede the ability of the Australian public and decision-makers to make informed decisions because it can deny those persons proper visibility over what interests are being advanced and by whom".<sup>2</sup>
- 1.7. The explanatory statement accompanying the proposed amendments describes the amendments to the definition of foreign entity as a means 'to recognise and protect the rights of individuals and organisations that have a legitimate purpose for engaging in Australia's system of representative democracy'. Foreign entities as defined in the proposed amendments do not have that 'legitimate presence' but are intending to 'extract value from Australia rather than contribute to Australia'.
- 1.8. The explanatory statement suggests that the need to ban foreign donations to political parties is broadly accepted as a legitimate objective. However, the Committee is concerned that this does not necessarily extend to the particular definition of foreign entities put forward by the proposed amendments. The proposed amendments seem concerned with establishing the limits of what are described as legitimate interests of individuals or entities in participating in political debate. Given the potentially broad range of entities covered by the proposed new definition, it is not clear how the proposed amendments will contribute to purposes accepted as legitimate such as preventing corruption, equality of access or undisclosed influence on our political process. In other words, it is not clear what harm or mischief restricting a broader range of foreign entities will address. It is only once that purpose is identified that the suitability, necessity and proportionality of the measure can be addressed.

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<sup>1</sup> Eg. *McCloy v NSW* [2015] HCA 34 at [24]

<sup>2</sup> *LibertyWorks Inc v Commonwealth* [2021] HCA 18 at [184].

- 1.9. Similarly, whether the proposed amendments can be considered a reasonable limitation of the right to freedom of expression provided by section 16 of the HRA requires identifying the importance of the purpose of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the limitations purpose. This requires a clear statement of the purpose to be achieved by expanding the definition of foreign entity as set out in the proposed amendments.
- 1.10. The Committee therefore requests further information on what purposes will be achieved by the proposed amendment to the definition of foreign entity and why, in light of that purpose, the proposed amendment should be considered, in the context of the Bill as amended, a reasonable limit on the right to freedom of expression using the framework set out in section 28 of the HRA.**
- 1.11. The Bill will also extend the list of entities which are prohibited from making political donations to include defence, fossil fuel and nicotine entities:
- a) A defence entity will be defined as an entity that holds or has held a contract with the Commonwealth for the provision of equipment or advice relating to the defence force.
  - b) A fossil fuel entity will mean an entity that extracts, mines, processes or refines fossil fuels for energy purposes.
  - c) A nicotine entity will mean an entity that manufactures or advertises products containing nicotine.
- 1.12. Decisions upholding bans on political donations from particular entities or groups have emphasised the nature of their business activities and “the nature of the public powers which they might seek to influence in their self-interest”.<sup>3</sup> The degree of dependence of the property developers on government decisions, for example, was accepted as carrying with it the risk of corruption and the loss of public confidence in the absence of restrictions on political donations. While there was no need for each jurisdiction to rely on its own experiences before taking legislative action,<sup>4</sup> there is a requirement to demonstrate the link between the legislative measures taken and the risks to the representative system.<sup>5</sup>
- 1.13. The Committee is concerned that it is not clear how placing restrictions on the ability of the selected entities to make political donations to Territory political actors is related to the stated purposes for doing so.
- 1.14. For example, the explanatory statement includes the following justification for restricting donations from defence entities:

There are very significant commercial benefits that can be derived from securing defence contracts and the perpetuation of military activities. Seeking favourable contractor selection via the principle of reciprocal favours is a source of corruption around which defence entities pose a distinct vulnerability. As Canberra has a major defence industry presence, that risk is more elevated here than in other parts of Australia.

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<sup>3</sup> *McCloy v NSW* [2015] HCA 34 at [49].

<sup>4</sup> *Spence v Queensland* [2019] HCA 15 at [96].

<sup>5</sup> *McCloy v NSW* [2015] HCA 34 at [53].



- 1.15. To the extent that the purpose of prohibiting donations from defence entities is to prevent the risk or perceptions of corruption in decisions relating to defence contracts, it is not clear there is a sufficient link between the making of political donations to Territory political actors and the making of those decisions.
- 1.16. Similarly, the justification for restricting donations from fossil fuel entities and nicotine entities refers to their reliance on government regulation and potential interference with political processes without sufficient evidence of the potential corrupting influence of political donations to Territory political actors in particular.
- 1.17. The Committee therefore requests further information on the basis on which limiting the making of political donations to Territory political entities by the prohibited entities will reduce the potential risks of corruption or undue influence or otherwise achieve a legitimate purpose.**
- 1.18. The proposed amendments will omit proposed new section 136H. This proposed new section will provide for the use of electronic voting for voters who will be in Antarctica or outside Australia when they vote. It will allow an eligible voter to apply to vote electronically up to three weeks prior to the election, a week longer than the two-week period provided for early voting within the Territory.
- 1.19. The explanatory statement accompanying the proposed amendments states that no jurisdiction “has been capable of developing an online voting system as would provide the standard of security and auditability required for public confidence in government elections”. The statement notes the hazards of ensuring integrity of the electronic voting system while preserving anonymity of voters, and the vulnerability of such systems to remote hacking. The withdrawal of an online voting system late in the election period may prevent overseas voters from making use of other methods including postal votes. Contemplating the use of an electronic voting system is described as a waste of government resources.
- 1.20. The Committee notes that the proposed amendment only affects the use of electronic voting systems by eligible voters who will generally not be present in Australia when they vote. The provisions of the Act and Bill relating to the approval of electronic voting systems and making arrangements for electronic voting will largely be unaffected by the proposed amendments. It is not clear to the Committee why the possibility of late withdrawal of the availability of electronic voting is sufficient justification for preventing the use of electronic voting systems for overseas voters when they might otherwise be available for use in the Territory. **The Committee therefore requests further information on the justification for distinguishing between use of electronic voting by overseas voters and voters within the Territory.**

The Committee draws these matters 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.

## Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

- 1.21. On 16 October 2023 the Committee received proposed amendments to the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 from Mr Braddock MLA. These amendments introduce two clauses to the Bill which will commence on 1 July 2030. The first increases the age under which an offence is considered a youth offence and is not to be disclosed in court proceedings from under 12 to under 14. The second introduces a new transitional Part 35 into the *Crimes Act 1900*.
- 1.22. The new transitional Part 35 largely replicates the Part 34 to be introduced by clause 58 of the Bill. Part 34 will bring to an end any enforcement action or criminal proceeding relating to offences committed by persons between 12 and 14 years of age when that Part commences on 1 July 2025. However, Part 34 does not apply to what are termed scheduled offences, which are defined in the Bill to involve murder, intentional infliction of grievous bodily harm, sexual assault in the first degree and act of indecency in the first degree. The new transitional Part 35 to be introduced by the proposed amendments will apply to these scheduled offences, bringing to an end any enforcement action or criminal proceeding relating to the scheduled offences committed by persons between 12 and 14 years of age after 1 July 2030.
- 1.23. The explanatory statement accompanying the Bill suggests that these proposed amendments will create the default position that criminal responsibility for the scheduled offences will be raised to 14 from 1 July 2030. This is expected to be after a review of the effect of the Bill is completed as provided in clause 93 of the Bill. Under the proposed amendments, further amending legislation will be required to change that default position.
- 1.24. The Committee, in its *Scrutiny Report 29*, raised concerns relating to the exceptions to raising the age of criminal responsibility for the scheduled offences and their potential limitation of the right to protection of family and children in section 11 of the HRA. The Committee notes that the proposed amendments will provide for these exceptions to be removed by 1 July 2030.
- 1.25. The Committee also raised concerns over providing for transitional regulations which may modify primary legislation, or the inclusion of so-called Henry VIII clauses. The Committee commented (at [1.96] – [1.98] of its report):

The proposed transitional parts include a Henry VIII clause in the following terms:

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the Justice (Age of Criminal Responsibility) Legislation Amendment Act 2023.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act.

The proposed transitional parts will expire 5 years after their commencement.

1.26. The proposed amendment includes a Henry VIII clause in the same terms. There is no discussion in the explanatory statement accompanying the proposed amendments of why the inclusion of such a clause was considered necessary and why provision for regulations to prescribe transitional matters necessary or convenient to be prescribed is not sufficient. The Committee notes that the proposed amendments will commence five years after the commencement of similar transition provisions in the Bill and will only apply to a small number of offences. Any unexpected consequences that might arise from the Bill will likely have been encountered prior to the commencement of these proposed amendments.

1.27. **The Committee therefore requests further information on why the Henry VIII clauses are 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 Member to respond prior to the proposed amendments being debated.

1.28. On 18 October 2023 the Committee received proposed government amendments to the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 from the Attorney-General. These proposed amendments include:

- a) allowing a referral to the therapeutic support panel where a child or young person is at risk of engaging in serious damage to property or the environment or cruelty to an animal;
- b) adding a range of health professionals to accredited persons who can visit a child or young person who is in intensive therapy at an intensive therapy place;
- c) clarifying that a person may be found guilty of incitement or recruitment if the child was under the age of criminal responsibility;
- d) amending the *Personal Violence Act 2016* to prevent corresponding protection orders made under another State, Territory, or New Zealand against a child under 12 or 14 years old from being registered and enforceable in the ACT, and revoking existing protection orders already registered;
- e) ensuring that victims of harmful behaviour of a child under the age of criminal responsibility has the same rights as other victims;
- f) expanding the range of individuals characterised as a secondary victim in the *Victims of Crime Act 1994* in circumstances where a primary victim dies because of the harmful behaviour of a child under the minimum age of criminal responsibility; and

- g) confirming that the ACT Civil and Administrative Appeals Tribunal can make a mental health assessment after referral by the Children’s Court both during proceedings for an interim or final intensive therapy order and in making those orders.

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

### Right to life (section 9 HRA)

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

- 1.29. The proposed government amendments will result in a child or young person under the minimum age of criminal responsibility no longer being the subject of a personal protection order in the ACT. Furthermore, interstate personal protection orders will no longer be registered and recognised in the ACT. By removing a form of protection for victims of harmful behaviour the proposed amendments may limit the victim’s right to life under section 9 of the HRA and their right to security of a person under section 18 of the HRA.
- 1.30. The supplementary explanatory statement provided along with the proposed amendments 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.
- 1.31. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Attorney-General.**

## Proposed Amendments—No Comment

### Biosecurity Bill 2023

- 1.32. On 10 October 2023, the Committee received a proposed government amendment to the Biosecurity Bill 2023. This amendment will remove the *Fertilisers (Labelling and Sale) Act 1904* from the list of Acts to be repealed by the Bill. The supplementary explanatory statement accompanying the amendment states the amendment is due to the delayed introduction of the national fertiliser code of practice, which was intended to be incorporated through amendments to regulations.
- 1.33. The Committee has no comment on this proposed amendment.

### Building (Swimming Pool Safety) Legislation Amendment Bill 2023

- 1.34. On 23 October 2023, the Committee received proposed amendments to the building (Swimming Pool Safety) Legislation Amendment Bill 2023 from the Minister. The proposed amendments will:
  - a) amend the definition of regulated swimming pool to provide clarity around those swimming pools and spas being regulated;
  - b) amend the definition of the demountable swimming pool to address a perverse outcome where a demountable swimming pool without a filtration system could not access the standing exemption for demountable swimming pools;

- c) clarify that a compliance certificate associated with a ministerial exemption that has been revoked is not in force from the day the revocation takes effect; and
- d) clarify that a revoked exemption certificate cannot be used to satisfy disclosure requirements on sale of a property.

1.35. The Committee has no comment on these proposed amendments.

## Electoral and Road Safety Legislation Amendment Bill 2023

1.36. On 20 October 2023 the Committee received proposed amendments to the Electoral and Road Safety Legislation Amendment Bill 2023 from the Minister. These proposed amendments will:

- a) omit references in the Bill to lowering the gift disclosure threshold, and other associated financial and disclosure thresholds, to \$100, leaving the thresholds at their current limit of \$1000;
- b) narrow the definition of what is considered translated electoral matter so that it only relates to the translation of materials, rather than their production;
- c) corrects an error in section 222K of the Act to replace ‘Commission’ with ‘Commissioner’, whilst also making minor technical amendments to the definition of ‘political entity’ in the Electoral Act and the Bill to ensure all definitions are consistent in their wording; and
- d) remove the proposed \$50 increase to the infringement notice penalty amounts for existing offences against part 12 of the road rules, if the vehicle displays advertising or electoral matters in or on the vehicle and increase the infringement notice penalty amount for an offence against new section 213SA in the Road Transport (Road Rules) Regulation 2017 from \$640 to \$700.

1.37. The Committee has no comment on this proposed amendment.

## Government Responses—Comment

### Building (Swimming Pool Safety) Legislation Amendment Bill 2023

1.38. On 16 October 2023, the Committee received a response to its comments in *Scrutiny Report 34* on the Building (Swimming Pool Safety) Legislation Amendment Bill 2023. The Committee thanks the Minister for her response.

1.39. The Committee raised concerns about the Bill’s application of Australian Standards in amendments to the Building (General) Regulation 2008 given that the requirement under s 47(6) to notify any Standard so applied was displaced. The explanatory statement accompanying the Bill states the Australian Standards are available for viewing at the National Library of Australia. The Committee requested confirmation from the Minister that the Australian Standards included in the Bill were in fact available from the National Library of Australia. In response, the Minister advised that, contrary to what was at least implied in the explanatory statement, that the Australian Standards in question were not available from the National Library. The Committee is concerned that this information was included in the explanatory statement without confirmation, and was not checked as a matter of course prior to incorporation into the drafting of the Bill and explanatory statement.

- 1.40. The Committee also requested information on why it is not possible to make the standards more readily available in some form. The Minister's response refers to the standards as technical documents already incorporated in the Building Code of Australia and familiar to building inspectors. They will be used by authorised persons to determine whether a pool is compliant. The government is also developing education and awareness materials to support the Bill which will include information on the prescribed standards.
- 1.41. The Committee commends the provision of education material that will include information on the requirements of the standards. However, the Committee notes that the Bill will create a strict liability offence of failing to maintain an effective and safe-resistant barrier, which may require compliance with the safety standards including the incorporated Australian Standards. In those circumstances, the Committee considers that the incorporated standards should be publicly accessible without charge.
- 1.42. **The Committee therefore recommends amendment of the explanatory statement to remove any reference to the Australian Standards being accessible at the National Library of Australia, and consideration be given to amending the Bill or otherwise providing for incorporated standards to be made publicly accessible without charge.**

**The Committee draws this matter to the attention of the Assembly and requires a response from the Minister.**

## Circular Economy Bill 2023

- 1.43. In its *Scrutiny Report 34*, this Committee raised concerns over provision in the Circular Economy Bill 2023 for Regulations to create offences with a maximum penalty of up to 50 penalty units. These penalties would exceed the 30 penalty units provided for in the ACT Guide for Framing Offences to be used in exceptional circumstances. The Committee requested further information on why any offences in regulations should not be limited to 30 penalty units.
- 1.44. The Committee received a response from the Minister on 16 October 2023. The Committee thanks the Minister for her response.
- 1.45. The Minister states the approach taken in the Bill to penalties for offences created by regulations is:
- designed to meet the dual needs of providing flexibility to adapt to innovation and changing industry practice and providing penalties that are commensurate with the seriousness of the offences to support behavioural change.
- 1.46. The Minister points to the need for adequate deterrence to promote industry behavioural change, consistency with existing offences to be carried over in the Bill, the potential for future offences provided for in regulations to have a broader scope that will be refined over time, and the requirement for extended consultation before making a regulation prescribing a requirement. The Minister concludes that "there are no sufficient alternative approaches that accommodate the unique circumstances in the waste reduction space."

- 1.47. The Committee does not consider the waste reduction space to be sufficiently unique to provide for penalties to be introduced in regulations with a penalty of over 30 penalty units. The provision for offences to be introduced through regulations is intended to accommodate the need to be responsive to changing industry practice. Any new offences can be introduced subject to a maximum penalty of 30 penalty units and then included in amendments to primary legislation if greater penalties are required. Any new offences introduced through regulations should always be the product of consultation and the subject of extensive industry education.
- 1.48. As the Minister's comments suggest, the offences to be introduced through regulations are likely to be different in kind to those provided for in the Bill, they are intended to be responsive to rapidly changing industry practice, and potentially broad in their scope. It is in those circumstances that the concerns with introducing very serious offences through regulation are at their highest.
- 1.49. The Committee considers that the circumstances presented by the Bill are not sufficient to warrant penalties up to 50 penalty units. **The Committee therefore recommends that consideration be given to amending the Bill to limit the penalties of any offences created by regulations to be limited to 30 penalty units.**

**The Committee draws this matter to the attention of the Assembly and requires a response from the Minister.**

## Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

- 1.50. On 18 October 2023 the Committee received a response to its comments in *Scrutiny Report 29* on the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 from the Attorney-General along with proposed amendments and a supplementary explanatory statement. In his response, the Attorney-General has also indicated that the explanatory statement for the Bill will be amended to reflect his response. The Committee thanks the Attorney-General for his response.
- 1.51. In its comments, the Committee raised concerns relating to the inclusion of exceptions to raising the age of criminal responsibility for particular scheduled offences and the potential for these exceptions to limit the right to protection of family and children in section 11 of the HRA. The Committee asked for further information on why these exceptions for the ages and offences in question were considered necessary and why they should be considered proportionate given the consequences of the criminal culpability they represent.
- 1.52. In his response the Attorney-General stated that the options provided by the criminal justice system may be necessary to ensure community safety in situations where the young person has intentionally committed extremely violent and harmful acts. The Bill takes a more cautious approach to those scenarios where longer periods of secure care may be needed to ensure the safety of the community. There are practical issues with providing alternative therapeutic treatment involving long periods of secure care without impacting on the rights of other young people in the therapeutic system. The Attorney-General also repeated the analysis presented in the explanatory statement accompanying the Bill for why the exceptions should be considered proportionate.

- 1.53. The Committee acknowledges the nature of the reforms presented by the Bill and the cautious approach taken in respect of the exceptions presented. The Committee also acknowledges that the Bill will require the prosecution to establish as a question of fact that a child between 12 and 14 knows that their conduct is wrong before the child can be found criminally responsible. However, the Committee repeats its concerns that there is no evidence presented that a child between the age of 12 and 14 who commits the offences included in the schedule necessarily present a greater risk to community safety, including so as to require substantially longer-term therapeutic care. The Committee also repeats its concerns that the practical difficulties of providing that care are not sufficient for the exposure to criminal responsibility presented by the exceptions to be considered proportionate.
- 1.54. The Committee therefore considers that the inclusion of exceptions to raising the age of criminal responsibility for particular scheduled offences may unreasonably limit the right to protection of family and children in section 11 of the HRA. **The Committee recommends that consideration be given to amending the Bill to remove or further limit the exceptions provided for in the Bill for children under 14 years of age to be held criminally responsible for scheduled offences.**

**The Committee draws this matter to the attention of the Assembly and requires a further response from the Minister.**

## Government Responses—No Comment

- 1.55. The Committee received a response to the Committee’s comments on the following Bill and has no further comments:
- a) *Electoral and Road Safety Legislation Amendment Bill 2023*
- 1.56. This response can be viewed [online](#).
- 1.57. The Committee wishes to thank the Acting Special Minister of State 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 DI2023-224** being the Official Visitor (Chair) Appointment 2023 made under paragraph 23B(2)(a) of the *Official Visitor Act 2012*
  - **Disallowable Instrument DI2023-225** being the Territory Records (Advisory Council) Appointment 2023 (No 1) made under sections 44 and 45 of the *Territory Records Act 2002*
  - **Disallowable Instrument DI2023-226** being the Territory Records (Advisory Council) Appointment 2023 (No 2) made under section 44 of the *Territory Records Act 2002*



- **Disallowable Instrument DI2023-227** being the Territory Records (Advisory Council) Appointment 2023 (No 3) made under section 44 of the *Territory Records Act 2002*
- **Disallowable Instrument DI2023-228** being the Territory Records (Advisory Council) Appointment 2023 (No 4) made under section 44 of the *Territory Records Act 2002*
- **Disallowable Instrument DI2023-229** being the Territory Records (Advisory Council) Appointment 2023 (No 5) made under section 44 of the *Territory Records Act 2002*
- **Disallowable Instrument DI2023-231** being the Health (Interest Charge) Determination 2023 (No 1) made under section 193 of the *Health Act 1993*
- **Disallowable Instrument DI2023-232** being the Motor Accident Injuries (Premiums) Guidelines 2023 (No 1) made under section 487 of the *Motor Accident Injuries Act 2019*
- **Disallowable Instrument DI2023-233** being the Tree Protection (Advisory Panel) Appointment 2023 (No 1) made under section 69 of the *Tree Protection Act 2005*
- **Disallowable Instrument DI2023-234** being the Tree Protection (Advisory Panel) Appointment 2023 (No 2) made under section 69 of the *Tree Protection Act 2005*
- **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*

## Disallowable Instruments—Comment

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

### No Human Rights Issues

- **Disallowable Instrument DI2023-230** being the Nature Conservation (Loss of mature native trees key threatening process) Action Plan 2023 made under sections 104 and 105 of the *Nature Conservation Act 2014*
- **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*

- 2.3. The first instrument mentioned above, made under sections 104 and 105 of the *Nature Conservation Act 2014*, determines a ‘final version’ of the draft Action Plan for the Loss of mature native trees, which had been listed by the Minister for environment and Heritage in September 2018 as a ‘key threatening process’, under section 76 of that Act.

- 2.4. The second instrument mentioned above makes a new ACT Appendix to the Building Code, under section 138 of the *Building Act 2004*.
- 2.5. The third instrument mentioned above, made under section 24 of the *Building (General) Regulation 2008*, determines 'alternative requirements for unaltered parts', for paragraph 29(2)(b) of the Building Act.
- 2.6. The Committee notes that the explanatory statements for each of the instruments mentioned above state that there are no human rights impacts related to the relevant instrument.
- 2.7. **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.**
- 2.8. **This comment does not require a response from the relevant Ministers.**

## Minor drafting issue

- **Disallowable Instrument DI2023-235** being the Tree Protection (Advisory Panel) Appointment 2023 (No 3) made under section 69 of the *Tree Protection Act 2005*
- 2.9. This instrument appoints a specified person as the chair of the Tree Advisory Panel. The formal parts of the instrument and the explanatory statement for the instrument state that the appointment is made under section 69 of the *Tree Protection Act 2005*. Section 68 of the Tree Protection Act establishes the Tree Advisory Panel. Section 69 then provides for the appointment of 3 or more members, who must have expertise in one or more of the following fields:
    - (a) arboriculture;
    - (b) forestry;
    - (c) horticulture;
    - (d) landscape architecture;
    - (e) natural and cultural heritage.
  - 2.10. The Committee notes that there is nothing in the Tree Protection Act relating to the appointment of a Chair of the Tree Advisory Panel. This means that this instrument also relies on section 79 of the *Financial Management Act 1996*, which provides:

### 79 Appointment of Chair and Deputy Chair

(1) The responsible Minister for a territory authority with a governing board may appoint a chair for the board and, unless the establishing Act otherwise provides, a deputy chair for the board.

Note For laws about appointments, see the Legislation Act, pt 19.3.

(2) However, the responsible Minister must not appoint the CEO of the territory authority as chair or deputy chair.

(3) Also, the responsible Minister must not appoint a public servant as chair or deputy chair unless—

(a) there is no member of the board who—

(i) is not a public servant; and

(ii) is available to be appointed; and

(b) the Legislative Assembly approves, by resolution, the appointment.

(4) The responsible Minister must try to ensure that the governing board of a territory authority always has a chair and, unless the establishing Act otherwise provides, deputy chair.

2.11. In this circumstance, the Committee would expect the formal part of the instrument and/or the explanatory statement for the instrument to refer to section 79 of the Financial Management Act.

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

## Disapplication of subsection 47(5) of the Legislation Act 2001 / Retrospectivity

- **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*

2.13. The first instrument mentioned above makes a new ACT Appendix to the Building Code, under section 138 of the *Building Act 2004*.

2.14. The second instrument mentioned above, made under section 24 of the *Building (General) Regulation 2008*, determines 'alternative requirements for unaltered parts', for paragraph 29(2)(b) of the Building Act.

2.15. The Committee notes that section 5 of each instrument disapplies subsection 47(5) of the *Legislation Act 2001*. The Committee also notes that, in each case, notes under the provision state:

*Note 1* Australian Standards are available for purchase at [www.standards.org.au](http://www.standards.org.au) and are available for inspection by members of the public at the National Library of Australia.

*Note 2* A copy of the National Construction Code is available for inspection for free at [www.abcb.gov.au](http://www.abcb.gov.au).

- 2.16. Finally, the Committee notes that the explanatory statement for both instruments contain the following statement:

Clause 5 displaces the requirement in the *Legislation Act 2001*, section 47(5). Section 47(5) provides that the text of an instrument applied as in force at a particular time is taken to be a notifiable instrument made under the relevant instrument, and therefore must be published on the Legislation Register. Copyright to the BCA is collectively owned by the Australian Government and the states and territories.

The arrangement between jurisdictions is that the BCA will be published on behalf of the jurisdictions in a single place by the ABCB. It would not be appropriate to publicly notify the code on an ACT Government website. The notes to section 5 of the instrument describe alternative access to the BCA, as it is not being notified on the Legislation Register.

- 2.17. As the Committee stated in *Scrutiny Report 34* of the 10th Assembly (18 September 2023), in the context of amendments to be made by the Building (Swimming Pool Safety) Legislation Amendment Bill 2023, the Committee has received correspondence from the National Library advising that not all Australian Standards are available at the National Library<sup>6</sup>. The Committee has also pointed out that, especially in circumstances where compliance with Australian Standards form an integral element of strict liability offences, access to the standards may be otherwise provided for, including by making them available in a publicly accessible place.
- 2.18. **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.**

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

- 2.19. The Committee notes that section 4 of the first instrument mentioned above provides that Schedule 1 to the instrument applies to:
- a) all building approvals determined on or after 1 May 2023 and on or before 14 January 2024
  - b) all building work that does not require a building approval started on or 1 May 2023 and on or before 14 January 2024.
- 2.20. The Committee notes, with approval, that this retrospective application is addressed in the explanatory statement for the instrument:

#### **Retrospectivity**

Schedule 1 of this instrument could be considered to be being applied retrospectively. This schedule replicates the requirements in the existing ACT Appendix to the Building Code in *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)*.

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<sup>6</sup> See also Paragraph 1.39 of this report.

As a result, any retrospective application of this schedule is non-prejudicial and maintains the status quo for industry but provides for it all to be located in one location.

Minor amendments made in schedule 1 of this instrument to the Schedule in the *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)* are to reflect the change in adoption date for the ACT from 1 October 2023 to 15 January 2024.

2.21. The Committee notes that the *Building (ACT Appendix to the Building Code) Determination 2023 (No 1)* was effective from 1 May 2023.

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

## Subordinate Laws—Comment

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

### Human Rights Issues

- **Subordinate Law SL2023-22** being the Magistrates Court (Planning Infringement Notices) Regulation 2023, made under the *Magistrates Court Act 1930*, enables infringement notices to be issued for a number of offences under the *Planning and Development Act 2007*
- 2.24. 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 *Planning Act 2023*.
- 2.25. The explanatory statement for the subordinate law states that infringement notices will be able to be issued if:
- a person undertakes development without development approval under the *Planning Act 2023* and under that Act the development requires development approval;
  - a person undertakes development, and the development is prohibited by the *Planning Act 2023*;
  - a person undertakes development, for which the person has a conditional development approval under the *Planning Act 2023*, and the person does not comply with a condition of the development approval when undertaking the development;
  - the territory planning authority gives a controlled activity order to a person, requiring the person to do, or not do, something stated in the order, and the person contravenes the order;
  - under the *Planning Act 2023* the territory planning authority directs a person to carry out rectification work in relation to a controlled activity, and the person contravenes the direction;

- under the *Planning Act 2023* the territory planning authority directs a prohibition notice to the person, and the notice states that an activity must not be carried on by the person in relation to a place, and the person carries on the activity, or carries on the activity otherwise than in accordance with the notice, in relation to the place;
  - under the *Planning Act 2023* an inspector lawfully requires a person to state the person's name and home address and the person fails to comply with the requirement.
- 2.26. The explanatory statement also contains a detailed discussion on the human rights implications of the subordinate law, prefaced by a discussion as to why the relevant offences are appropriately dealt with by an infringement notice. It also indicates that, as part of implementing the changes made by the *Planning Act 2023*, 'extensive education will be provided during the implementation of the Act and information will be available on the Territory Planning Authority's website.'
- 2.27. The Committee notes that the discussion does not actually reference the *Human Rights Act 2004*, or any of the particular rights protected by that Act.
- 2.28. The discussion concludes by stating:
- Issuing of infringement notices by authorised persons under the *Planning Act 2023* will be subject to the oversight of the Access Canberra Regulatory Complaint Assessment Committee (RCAC). The RCAC can advise on the issuing of notices including whether the issue of an infringement notice is appropriate and a proportionate response in the circumstances, having regard to a number of factors including (but not limited to) the nature of the offence, human rights impact, quality and weight of collected evidence, previous evidence of offending behaviour, and actions taken by an authorised officer.
- The framing of these offences under the *Planning Act 2023* seeks to ensure that the use of infringement notices does not have a discriminatory impact on vulnerable and disadvantaged people in the community. It is not considered that any of these provisions unreasonably limit an individual's human rights. If an individual's human rights are limited, any limitation is reasonable and justified.
- 2.29. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this Subordinate Law.**
- 2.30. **The comment immediately above does not require a response from the Minister.**

## No Human Rights Issues

- **Subordinate Law SL2023-23** being the Building and Construction Legislation Amendment Regulation 2023 (No 2) made under the *Building Act 2004*
  - **Subordinate Law SL2023-24** being the Associations Incorporation Amendment Regulation 2023 (No 1) made under the *Associations Incorporation Act 1991* raises the audit thresholds for incorporated associations
- 2.31. The first subordinate law mentioned above amends the *Building and Construction Legislation Amendment Regulation 2023 (No 1)* which was notified on 28 April 2023 (and considered by the Committee in *Scrutiny Report 29* of the 10<sup>th</sup> Assembly (23 May 2023)).

The explanatory statement for the first subordinate law mentioned above indicates that the amendments made (ie by the first subordinate law mentioned above) relate to the adoption, by the ACT, of energy efficiency, condensation mitigation and livable (accessible) housing) provisions in the 2022 edition of the National Construction Code (the NCC) from 15 January 2024. The explanatory statement goes on:

The ACT had originally planned to adopt these provisions on 1 October 2023.

This regulation amends the *Building and Construction Legislation Amendment Regulation 2023 (No 1)* which contained amendments due to commence on 1 October 2023 to support the planned adoption of NCC 2022 in the ACT.

This regulation removes those amendments due to the delay in the adoption of NCC 2022 and amendments proposed to the related Act provision in the Building and Construction Legislation Amendment Bill 2023.

- 2.32. The second subordinate law mentioned above amends the *Associations Incorporation Regulation 1991*. The amendments relate to the 'model rules' for associations. The explanatory statement for the second subordinate law mentioned above states:

The proposed model rules included provisions to permit virtual meeting attendance for committee meetings and general meetings. The inclusion of these provisions was generally welcomed by Associations. Accordingly, the new model rules in the Associations Incorporation Amendment Regulation permit virtual attendance at committee meetings and general meetings. The new model rules commence on 1 February 2024.

The Associations Incorporation Amendment Regulation is a transitional measure for the period before the new model rules commence. It amends the existing model rules to permit virtual meeting attendance for committee meetings and general meetings.

- 2.33. The Committee notes that the explanatory statements for each of the subordinate laws mentioned above state that there are no human rights impacts related to the relevant subordinate law.
- 2.34. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the subordinate laws mentioned above.**
- 2.35. **This comment does not require a response from the relevant Ministers.**

## Human Rights Issues

- **Subordinate Law SL2023-25** being the Associations Incorporation Regulation 2023 made under the *Associations Incorporation Act 1991* repeals and re-makes the *Associations Incorporation Regulation 1991*
- 2.36. This subordinate law repeals and re-makes the *Associations Incorporation Regulation 1991*, with effect from 1 February 2024. The explanatory statement for the subordinate law states:

This Regulation includes new model rules (schedule 1) that provide a clearer structure and improved readability to better support Associations to achieve their objects.

The model rules now include:

- new provisions for dispute resolution between members or members and the committee (div 1.3.1);
- clearer provisions for disciplinary proceedings (div 1.3.2);
- the requirement for an independent decision-maker to be appointed where a dispute resolution procedure has started (clause 15) or where the committee has decided to propose disciplinary action (clause 24);
- virtual attendance at committee meetings, where an association's committee so decides (clause 49);
- virtual attendance at general meetings, where an association's committee or a requesting member so decides (clause 58);
- clearer descriptions of roles of committee members (clauses 38 to 41);
- new provisions for the president, vice president, secretary, or treasurer to delegate their functions to any other relevant committee member (clause 42); and
- revisions to proxy voting in general meetings (clause 61).

2.37. The explanatory statement for the subordinate law includes a detailed discussion of human rights issues, referencing the right to privacy and reputation and the right to a fair trial, protected by sections 12 and 21 of the *Human Rights Act 2004*, respectively.

2.38. In relation to the right to privacy, the explanatory statement identifies the following provisions of the new 'model rules' as including:

- requiring membership applicants to provide their name and contact details;
- requiring the Association to keep a register of members;
- requiring parties to a dispute to disclose their name and contact details (as well as details of the dispute) when submitting a notice of the dispute;
- requiring the disclosure of the name and contact details of a person subject to disciplinary proceedings to an independent decision-maker; and
- providing for the disclosure of the names of parties to a dispute, or parties to a disciplinary hearing, to be disclosed to the general membership in the event of an appeal of a dispute resolution decision or disciplinary action decision (as the general meeting will decide the outcome of the appeal).

2.39. The explanatory statement goes on:

These provisions have minor impacts on the right to privacy by requiring the disclosure of personal information, including a person's name and contact details. The purpose of requiring this information is so that the Association can keep an accurate record of their members and so that the Association can contact members to inform them about meetings of the Association and other matters related to the running of the Association. The purpose of requiring disclosure of a name and contact details for dispute resolution and disciplinary proceedings is so that the parties to the proceedings can be identified and contacted in relation to the proceedings.



There are several safeguards to ensure the limitation to the right to privacy is proportionate. First, the information an individual is required to disclose is limited to their name and contact details. These details are not considered to be sensitive personal information. Further, the Associations Incorporation Act at s67B permits members of the Association to apply to the committee to restrict access to their personal information contained in the register of members. If such a request is agreed, access to the individual's information will only be available to the public officer and members of the committee other than stated member(s) of the committee. The limitation on the amount of information required, the non-sensitive nature of the information, as well as the ability to apply to have access to this information restricted, ensure that any limitation on the right to privacy is proportionate in the circumstances.

2.40. The explanatory statement indicates that the subordinate law actually supports the right to a fair hearing, pointing to the following provisions of the model rules as examples:

2.41. Provisions which support the right to a fair hearing include:

- limiting the grounds on which proceedings can be brought to:
  - disputes arising in relation to the Act or Association's rules; and
  - disciplinary proceedings in relation to a failure to comply with the Act or Association's rules or conduct that may be harmful to the Association;
- requiring parties to be notified of the proceedings;
- providing the opportunity for members involved in dispute or disciplinary proceedings to be heard by affording them an opportunity to put forward their position;
- providing for the appointment of an unbiased decision-maker who is required to make a decision in a timely manner;
- providing opportunities for disputes to be ended by agreement or for disciplinary procedures to be stopped by resolution of the committee; and
- allowing for reconsideration of the initial decision by providing for an appeals process.

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

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

# Outstanding responses

## Bills

### Report 28, dated 3 May 2023

#### Bill

- Modern Slavery Legislation Amendment Bill 2023

### Report 34, dated 18 September 2023

#### Bill

- Children and Young People Amendment Bill 2023
- Gaming Machine Amendment Bill 2023

### Report 35, dated 17 October 2023

#### Bill

- Births, Deaths, and Marriages Registration Amendment Bill 2023
- Building and Construction Legislation Amendment Bill 2023
- Justice and Community Safety Legislation Amendment Bill 2023 (No 2)

## Subordinate Laws

- Subordinate Law SL2023-20 being the Planning (General) Regulation 2023 made under the Planning Act 2023

Peter Cain MLA  
Chair  
October 2023