



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

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

# **Scrutiny Report 37**

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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.

# Contents

<b>About the committee</b>	<b>i</b>
Establishing resolution	i
Committee members	ii
Secretariat	ii
Contact us	ii
Role of Committee	ii
<b>1. Bills</b>	<b>1</b>
Bills—No Comment	1
Human Rights (Healthy Environment) Amendment Bill 2023	1
Urban Forest (Consequential Amendments) Bill 2023	1
Bills—Comment	1
Crimes Legislation Amendment Bill 2023	1
Education (Early Childhood) Legislation Amendment Bill 2023	2
Government Procurement Amendment Bill 2023	4
Parentage (Surrogacy) Amendment Bill 2023	4
Sexual, Family and Personal Violence Legislation Amendment Bill 2023	6
Voluntary Assisted Dying Bill 2023	8
Responses—Comment	13
Electoral and Road Safety Legislation Amendment Bill 2023	13
Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023	14
Responses—No Comment	15
<b>2. Subordinate Legislation</b>	<b>16</b>
Disallowable Instruments—Comment	16
No Human Rights Issues	16
Human Rights Issues	16
Response—No Comment	17
<b>Outstanding responses</b>	<b>18</b>
Bills/Subordinate Legislation	18
Report 28, dated 3 May 2023	18
Report 35, dated 17 October 2023	18
Report 36, dated 30 October 2023	18



# 1. Bills

## Bills—No Comment

### Human Rights (Healthy Environment) Amendment Bill 2023

- 1.1. This Bill will amend the *Human Rights Act 2004* to introduce a new right to a clean, healthy, and sustainable environment to be enjoyed without discrimination. Unlike other rights, acting incompatibly with this new right or failing to take it into account cannot be the basis of legal proceedings. The Minister must report on a review of the operation of the new right and exclusion from legal proceedings as soon as practicable after 5 years.

### Urban Forest (Consequential Amendments) Bill 2023

- 1.2. This Bill will support the implementation of the *Urban Forest Act 2023* by making minor and technical updates to 14 pieces of legislation that relate to the management and protection of the Territory urban forest. There are also amendments to the Urban Forest Act to reflect enactment of the *Planning Act 2023*.

## Bills—Comment

### Crimes Legislation Amendment Bill 2023

- 1.3. This Bill will amend various legislation relating to the criminal justice system, including:
  - a) the *Bail Act 1992* to limit the period for which a bail decision is stayed when an application is made for a review of bail;
  - b) the *Confiscation of Criminal Assets Act 2003* to require a statutory review of the unexplained wealth scheme three years after the 2022 Review;
  - c) the *Crimes (Sentencing) Act 2005* to allow a non-parole period to be set for offences committed while in custody;
  - d) the *Crimes (Sentencing) Act 2005* to clarify that the court may impose a fine in addition to, or instead of, any other sentence;
  - e) the *Crimes Act 1900* to remove the element requiring the prosecution to prove that damage to property does not exceed \$5000 in the minor property damage offence;
  - f) the *Juries Act 1967* to introduce an offence for juror misconduct and to introduce a model for majority verdicts by juries; and
  - g) the *Magistrates Court Act 1930* to improve enforceability of infringement notice offences;

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

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.4. The Bill will amend the Juries Act to create an offence of improper inquiry by a juror. The offence will apply to a juror who makes an inquiry prior to their discharge for the purpose of obtaining information about any matter relating to the trial, including in contravention of a direction or permission given by the judge. The offence will not apply to a person who makes an inquiry authorised by the court. The offence will have a maximum penalty of imprisonment for 2 years.
- 1.5. By providing for a period of imprisonment the Bill may limit the right to liberty in section 18 of the HRA. By placing the evidential burden on the defendant to establish the exception of whether the inquiry was authorised by the court the Bill may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA.
- 1.6. The Bill will also amend the Juries Act to provide for a majority verdict of 11 out of 12 jurors where the judge is satisfied that a reasonable period of deliberation has passed (of at least 6 hours) and the jury is not likely to reach a unanimous verdict.
- 1.7. By amending the requirement for a unanimous verdict, the Bill may limit the requirement for criminal charges to be decided by a competent, independent, and impartial court or tribunal protected as a right to fair trial in section 21 of the HRA.
- 1.8. 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.
- 1.9. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Education (Early Childhood) Legislation Amendment Bill 2023

- 1.10. This Bill will amend legislation relating to childhood education, including:
  - a) the *Education Act 2004* to recognise that children start learning at birth and the importance of quality education in the two years prior to compulsory education, to make provision for the Directorate to support attendance in government preschool programs, and include principles for collaboration, cooperation and information sharing. The Bill will also clarify provisions in relation to the delegation and review of suspension powers; and



- b) the *ACT Teacher Quality Institute Act 2010* and the *ACT Teacher Quality Institute Regulation 2010* to provide for voluntary registration of early childhood teachers, authorise the sharing of a teacher’s personal information with corresponding regulatory bodies, authorise immediate suspension of a teacher’s registration or permit to teach where there is an unacceptable risk of harm to children, and enable the Teacher Quality Institute to issue electronic notices of registration or approval to teach.

## **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)

Right to a fair trial (section 21 HRA)

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

- 1.11. The Bill will introduce various amendments which may limit the protection of privacy provided by section 12 of the HRA. The Bill will authorise the director-general to establish procedures to encourage attendance by students enrolled at a preschool program delivered by a government school. Those procedures may include steps that may be taken to support attendance, such as referring the child’s parents to a support service. This may involve the collection and sharing of personal information with other services, with the consent of the parent.
- 1.12. By broadening professional registration to include early childhood teachers the Bill will require the collection, storage and possible sharing with other registering authorities of various forms of personal and professional information. The Bill will expand the range of information that can be shared with corresponding regulatory authorities including whether the teacher is the subject of disciplinary proceedings or investigations, subject to special conditions or has conditions placed on their registration, or if a person has been refused registration. The Bill will also enable the sharing of information with regulatory authorities and corresponding registering authorities where the Teacher Quality Institute reasonably believes that there is unacceptable risk of harm to a child, and giving the information could prevent the person from harming a child.
- 1.13. The Bill may also limit the right to a fair hearing in section 21 of the HRA by providing for immediate suspension of a teacher’s registration or permit to teach where the Teacher Quality Institute is reasonably satisfied there is an unacceptable risk to a child. Although registration is voluntary, suspension of registration may also impact on an individual’s ability to gain employment as a teacher and hence the Bill may limit the right to work and other work-related rights in section 27B of the HRA.
- 1.14. 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.

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

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

#### Incorporation of instruments as in force from time to time

- 1.16. The Bill will allow the Teacher Quality Institute to determine a standard for the ACT Teacher Quality Institute Act by incorporating a law of another jurisdiction or instrument, as in force from time to time (clause 55). The explanatory statement accompanying the Bill outlines the reason for this provision, including that it will enable the incorporation of the Australian Professional Standards for Teachers which is periodically revised. The Committee notes that any revisions to incorporated instruments must be registered as a notifiable instrument under the *Legislation Act 2001*.

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

### Government Procurement Amendment Bill 2023

- 1.18. This Bill will amend the *Government Procurement Act 2001* and Government Procurement Regulation 2007 to address issues relating to clarity, inconsistency and drafting style and to clarify the roles, obligations and composition of the Government Procurement Board and the matters that need to be referred to the Board for consideration.

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

#### Creation of offences by regulation

- 1.19. Clause 48 of the Bill will provide for regulations to create offences and fix maximum penalties of not more than 10 penalty units. The explanatory statement accompanying the Bill does not provide any justification for why this clause is included. **The Committee requests information from the Minister as to why it was considered necessary to include provision in the Bill for regulations to create offences.**

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

### Parentage (Surrogacy) Amendment Bill 2023

- 1.20. This Bill will amend the *Parentage Act 2004* and create a new regulation to remove unnecessary barriers to altruistic surrogacy in the ACT while strengthening the regulatory framework for surrogacy arrangements and making of parentage orders. It will also modernise the language in the Parentage Act to better align with other Australian jurisdictions.

- 1.21. The Committee notes that the Bill will have a beneficial retrospective effect by applying provisions relating to parentage orders to surrogacy arrangements made prior to the commencement of the Bill.

## **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)

- 1.22. The Bill will require a person to be over 18 years of age before they can agree to be a surrogate under a surrogacy arrangement. Persons under 25 years of age will be required to satisfy a counsellor that they are sufficiently mature and understand the implications of the decision to agree to be a surrogate. These age-based requirements will have to be complied with in making a parentage order. By making a distinction based on the age of a person the Bill may limit the right to equality before the law under section 8 of the HRA.
- 1.23. The Bill will place additional limits on the making of parentage orders where a child is born via a commercial surrogacy. In making a parenting order, the court needs to be satisfied that an order will be in the best interests of the child, each presumed parent freely consents, and various requirements applied by the Bill to a surrogacy agreement are met. When a commercial surrogacy is involved, the court will also have to be satisfied that there is a pressing disadvantage facing the child and that it is reasonable to make the order. By further limiting the circumstances where a parentage order can be made that would otherwise be in the best interests of the child the Bill may limit the right of children to protection under section 11 of the HRA.
- 1.24. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. Subject to the following comments the Committee refers that statement to the Assembly.
- 1.25. Proposed section 28G will generally require the court in making a parentage order to be satisfied that the requirements of proposed Division 2.5.2 are met. That division includes requirements relating to surrogacy agreements being in writing, and the requirements for all parties to a surrogacy agreement to receive prior legal advice and counselling. The court may, however, dispense with these requirements if satisfied that doing so is in the best interests of the child.
- 1.26. Proposed Division 2.5.2 also includes the requirement that, prior to entering into a surrogacy agreement, a surrogate (the birth parent) must be over 18, and where under 25 has received counselling about the surrogacy arrangement and its social and psychological implications. The counsellor must be satisfied that the birth parent was of sufficient maturity to understand the arrangement and its implications (proposed section 28B). Evidence of compliance with the requirements relating to counselling may be taken into account by the Supreme Court in making a parentage order. However, the Supreme Court can't dispense with the requirement.

- 1.27. This is contrasted with the positions in proposed sections 31B and 55 where the Supreme Court may dispense with any or all of the requirements of Division 2.5.2 in relation to surrogacy arrangements entered into prior to the commencement of the Bill.
- 1.28. The Committee is concerned that there may be circumstances where a surrogacy arrangement was entered into by a surrogate under 25 years of age without counselling prior to the arrangement, and where it is in the best interests of the child for a parentage order to be made.
- 1.29. **The Committee therefore requests further information from the Minister on why it was considered necessary for there to be no discretion for the Supreme Court to make a parentage order in those circumstances.**

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

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

- 1.30. The Bill will apply various provisions of the *Adoption Act 1993* to parentage orders made under the Bill as if they were an order for the adoption of the child (see proposed section 31C and 58). Those provisions include provisions for access to information relating to the adoption, including an integrated birth certificate, and information identifying the birth parent or relatives or adopted child.
- 1.31. By providing for access to personal information the Bill may limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill does not recognise this potential limitation.
- 1.32. **The Committee therefore requests further information from the Minister on why any limitation on the protection of privacy by the Bill should be considered reasonable using the framework set out in section 28 of the HRA, and recommends consideration be given to including this information in an amended explanatory statement.**

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

## Sexual, Family and Personal Violence Legislation Amendment Bill 2023

- 1.33. This Bill amends various legislation relating to family and personal violence to: allow more flexibility in family and personal violence proceedings; promote the safety of victim-survivors of family and sexual violence; and improve access to justice for victim-survivors during family, personal and sexual violence proceedings.

## 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 freedom of movement (section 13 HRA)

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

Right to a fair trial (section 21 HRA)

Rights in criminal proceedings (section 22 HRA)

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

- 1.34. The Bill will amend the *Bail Act 1992* to remove the presumption in favour of bail for the offences of sexual assault in the third degree, incest and similar offences, using a child for production of child exploitation material and grooming and depraving young children. By allowing for bail to be denied where that was preferable in the circumstances rather than when it is considered necessary the Bill may limit the right to liberty protected under section 18 of the HRA. By increasing the circumstances in which bail is refused, the Bill may also limit the right to freedom of movement in section 13 of the HRA. The Committee notes that requiring the court to consider the nature and seriousness of the offence and strength of the evidence; without any burden on the prosecution, may also limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.
- 1.35. The Bill will amend the *Family Violence Act 2016* to allow the Magistrates Court, prior to hearing an application for an amendment to an interim or final family violence order, to make a provisional amendment without the knowledge or attendance of the respondent. The Court must be satisfied that there are special or exceptional circumstances that justify making the amendment, a copy of the provisional amendment must be served on the respondent as soon as practicable and is not enforceable until served, and any provisional amendment ends as soon as the application for an amendment can be heard or after 12 months.
- 1.36. By providing for the orders to be made without the respondent being present, the Bill may limit the right to a fair trial in section 21 of the HRA. By allowing orders and conditions to be imposed without notice to the respondent that may lead to criminal charges being available, the Bill may also limit various rights in criminal proceedings in section 22 of the HRA.
- 1.37. The Bill will amend the *Family Violence Act* and the *Personal Violence Act 2016* to remove the requirement that applications for protection orders, or applications for amendment or review, must be listed for a preliminary conference before the application is heard. Under the Bill, a preliminary conference must be held unless the Court is satisfied, on application or its own initiative, that holding a preliminary conference would create an unacceptable risk to a person's safety, or would be unlikely to achieve its objectives. By removing the opportunity to respond to the application and engage in a process to reach a settlement at an early stage, without the costs and formalities of a hearing, the Bill may limit the right to a fair trial in section 21 of the HRA.

- 1.38. The Family Violence Act and the Personal Violence Act currently include a range of related charges that can extend the period of an interim protection order while they are being investigated. The Bill will add to these related charges the charge of contravention of the interim protection order itself. By extending the period of the interim protection order, which may include conditions on where a person is allowed to go, the Bill may limit the right to freedom of movement in section 13 of the HRA. Where conditions in the interim protection order limit the ability to attend a person's workplace, the Bill may limit the right to work in section 27B of the HRA. As a court cannot decide the application for a final protection order while related charges are still being investigated, the Bill may also limit the right to be tried without unreasonable delay, protected as a right in criminal proceedings in section 22 of the HRA.
- 1.39. The Family Violence Act currently allows the Magistrates Court to make an interim order only on application for a final order. The Bill will allow an application to amend an interim family violence order to be made after an application for a final order has been made but is yet to be finally determined. By extending the circumstances in which an interim order may be made and conditions imposed on movement within the Territory, the Bill may limit the right to freedom of movement in section 13 of the HRA. As an interim order can be made without the respondent being present, this proposed amendment may also limit the right to a fair trial in section 21 of the HRA.
- 1.40. 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.
- 1.41. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Voluntary Assisted Dying Bill 2023

- 1.42. This Bill will establish the conditions on which the provision and administration of an approved substance which causes death is taken not to be death by suicide, and on which protection against civil and criminal liability is afforded to persons who participate in providing access to, or administering such approved substances.

### 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 life (section 9 HRA)

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

Right to privacy and reputation (section 12 HRA)

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

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

Right to a fair trial (section 21 HRA)

- 1.43. The Bill will potentially limit a wide range of rights protected by the HRA. The following aspects of the Bill are identified in the explanatory statement as potentially limiting various rights and include why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

*Access to voluntary assisted dying*

- 1.44. The Bill will provide protections against criminal and civil liability for certain individuals to access a substance intended to cause death and to assist another individual to die. By supporting the taking of a person's life, the Bill may limit the right to life in section 9 of the HRA. The various requirements set out in the Bill before those protections are provided are intended to establish the reasonableness, necessity and proportionality of any limit to the right to life, particularly through the Bill's promotion of the relieving of suffering and the right to enjoy a life of dignity as an aspect of the right to life in section 9 of the HRA, as well as to have personal autonomy and self-determination as part of the protection of privacy provided by section 12 of the HRA.

*Preventing persons under 18 years of age from accessing voluntary assisted dying*

- 1.45. The Bill will not extend protection where the individual seeking access to voluntary assisted dying is under 18 years. By preventing a young person with decision-making capacity who would otherwise meet the requirements to access voluntary assisted dying, the Bill may limit the right to recognition and equality before the law in section 8 of the HRA. By not taking the views of a young person into account in determining their best interests, the Bill may also limit the right to the protection needed because of being a child in section 11 of the HRA.

*Restricting access to voluntary assisted dying to persons with advanced, progressive, and terminal conditions*

- 1.46. To be eligible to access the protections available under the Bill, an individual must have been diagnosed with a condition that, either on its own or in combination with other diagnosed conditions, is advanced, progressive and expected to cause death. By restricting access to persons who may otherwise meet the requirements, including where an individual may be suffering intolerably due to conditions which might not be beneficially treatable but not sufficient to cause death, the Bill may limit the right to equality in section 8, the right to life in section 9 and the right to privacy in section 12 of the HRA.

*Restricting access to voluntary assisted dying to persons with decision-making capacity*

- 1.47. Individuals accessing voluntary assisted dying under the Bill must be able to demonstrate their decision-making capacity at various stages including: when they are first assessed for eligibility by the medical practitioner, who will coordinate the future steps in the process; by the consulting practitioner who will make the second assessment of eligibility; at the final assessment of eligibility before any approved substance can be provided; and before any administration of the approved substance by the administering practitioner.

- 1.48. By restricting access on the basis of decision-making capacity, including in circumstances where the individual has earlier elected to end their life through voluntary assisted dying but lost their decision-making capacity due to the conditions contributing to their eligibility or their treatment, the Bill may limit the rights to recognition and equal treatment in section 8, the right to life in section 9 and the right to privacy in section 12 of the HRA.

*Restricting access to voluntary assisted dying to persons who have lived in the ACT for at least the previous 12 months*

- 1.49. To be eligible for the protections under the Bill, the individual seeking access to voluntary assisted dying must have lived in the Territory for at least 12 months before the assessment of their eligibility or are exempted from this requirement having satisfied the director-general that they have a substantial connection to the ACT.

- 1.50. By restricting access on the basis of residency, the Bill may limit the right to equal protection in section 8 of the HRA.

*Placing obligations on conscientious objectors*

- 1.51. The Bill provides for health practitioners and health service providers to conscientiously object to assisting with voluntary assisted dying. They will still be subject to various protections under the Bill if they elect not to participate. However, the Bill will require health practitioners and health service providers to provide individuals seeking voluntary assisted dying with information on other health practitioners or service providers that may be able to assist. This may include information about the care navigator service to be approved under the Bill to provide support, assistance and information relating to voluntary assisted dying.

- 1.52. By requiring a health practitioner and health provider to take action, the Bill may limit the right to freedom of thought, conscience, religion and belief in section 14 of the HRA.

*Powers of inspectors*

- 1.53. The Bill will apply the enforcement functions in Chapter 7 of the *Medicines, Poisons and Therapeutic Goods Act 2008* for the purpose of investigating, monitoring and enforcing compliance with a relevant provision. The relevant provisions relate to dealing with approved substances, the offence of administering an approved substance without approval, and eligibility requirements for health practitioners to carry out various roles. The powers of inspectors include entry to premises, including in limited circumstances residential premises, seizure of goods, issue of warrants, and taking and analysis of samples. The Bill may therefore limit the protection of privacy provided in section 12 of the HRA.

*Requirements to disclose or collect personal information*

- 1.54. The Bill will place various requirements on individuals to provide or obtain personal information, including sensitive and health information. Health assessments and transfer of functions and decisions relating to the administration of approved substances must be recorded on a person's health record. There are various requirements to inform the Board of health assessments and identifying information. The Bill will also authorise the Board to refer issues related to voluntary assisted dying to other entities which may involve the transfer of an individual's personal information. The Bill may therefore limit the protection of privacy provided by section 12 of the HRA.



### *Imprisonment offences*

- 1.55. The Bill will create offences which provide for maximum penalties including imprisonment. These include unauthorised administration of approved substances and inducing self-administration of an approved substance, which have a maximum penalty of imprisonment for 7 years. The Bill may therefore limit the right to liberty and security of a person in section 18 of the HRA.

### *ACAT hearings in private*

- 1.56. The Bill provides for various decisions to be reviewable in private in the ACT Civil and Administrative Tribunal. These include decisions at various stages relating to whether an individual meets eligibility requirements for access to voluntary assisted dying, has made decisions voluntarily and without coercion, and has decision-making capacity. By providing for hearings to be in private the Bill may limit the right to a public hearing included as part of a fair hearing in section 21 of the HRA.
- 1.57. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Rights in criminal proceedings (section 22 HRA)

### *Strict liability offences*

- 1.58. The Bill will introduce a large number of strict liability offences. Most involve requirements to provide information to the Board. However, they also include a requirement for the practitioner who administers an approved substance which causes death to inform the coordinating practitioner about the death, and requirements to provide contact details for the approved care navigator.
- 1.59. By providing for strict liability the Bill may limit the presumption of innocence protected as a right in criminal proceedings under s 22 of the HRA. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. Subject to the following comment, the Committee refers that statement to the Assembly.
- 1.60. Clause 64 of the Bill creates two offences: subclause 64(3) requires an original contact person to comply within 2 days with a request from an individual to provide the approved substance to another contact person to be used in self-administration by the individual, subject to a maximum penalty of 100 penalty units; and subclause 64(5) requires the original contact person to tell the board within two days of providing the substance to the new contact person, subject to a maximum penalty of 20 penalty units. Subclause 64(6) provides that an offence against this section is a strict liability offence.
- 1.61. The Committee is concerned that subclause 64(6) will have the effect that the offence in subclause 64(3) will also be a strict liability offence, with a maximum penalty in excess of the 30 penalty units provided for in the Guide to Framing Offences. This is contrasted with the approach taken in other provisions of the Bill, such as clause 101, where only one of two offences created by the clause is identified as a strict liability offence.

- 1.62. The Committee notes that a breach of subclause 64(3) may not have been intended to be a strict liability offence. That subclause is not described as a strict liability offence in the outline of the clause in the explanatory statement, and is not listed in the list of strict liability offences in Appendix 1 of the explanatory statement. The explanatory statement also refers to all strict liability offences having a maximum penalty of 20 or 30 penalty units.
- 1.63. The Committee therefore requests further information from the Minister whether it is intended that a breach of subclause 64(3) be a strict liability offence, and if so, why any limitation on the presumption of innocence by that subclause is considered necessary.**

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

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

#### *Placing obligations on facility operators*

- 1.64. Part 7 of the Bill will place obligations on facility operators to provide information, access and transfers relating to voluntary assisted dying. It will be an offence for a facility operator to withdraw or refuse a care service because an individual has asked for information about or made a request to access voluntary assisted dying. A facility operator includes a hospital, hospice, nursing home, hostel, respite facility or other facility where personal care is required, or residential aged care facilities. These facilities may not involve the provision of a health service.
- 1.65. The Committee is concerned that the obligations placed on facility operators may limit the right to freedom of thought, conscience, religion and belief in section 14 of the HRA of those associated with the operation of the facilities subject to the Bill. The explanatory statement accompanying the Bill does not refer to Part 7 of the Bill when discussing possible limitations of section 14 of the HRA.
- 1.66. The Committee therefore requests further information from the Minister on why Part 7 of the Bill should be considered a reasonable limit on the right to freedom of thought, conscience, religion and belief in section 14 of the HRA, and recommends consideration be given to amending the explanatory statement to include this information.**

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

### Right to life (section 9 HRA)

#### *Referral for advice about eligibility requirements*

- 1.67. The Bill will require two medical practitioners to make, respectively, the first and second assessments of whether an individual who has requested voluntary assisted dying meets

the eligibility requirements. Each of those medical practitioners must be authorised by the director-general based on requirements for eligibility prescribed by regulation (see Part 5). Each medical practitioner must also not have a personal interest in the individual seeking assistance, including not being a family member, or knowing or believing they are a beneficiary or otherwise stand to benefit financially from the death of the individual.

- 1.68. Clauses 17 and 24 of the Bill provide for the approved medical practitioners, in making the respective assessments, to refer the individual seeking assistance to another person who has the appropriate skills and training to advise about whether the individual meets the eligibility requirement. The Bill provides that the person referred to must also not have a personal interest in the individual seeking access. However, there is no explicit requirement that the person referred to for advice be authorised, not closely associated with the other medical practitioners involved, and not be referred to in both assessments.
- 1.69. The Committee is concerned that the ability to refer elements of the two eligibility assessments may compromise their independence. **The Committee therefore requests more information from the Minister on what safeguards are in place to ensure the first and second eligibility assessments are suitably independent.**

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

## Responses—Comment

### Electoral and Road Safety Legislation Amendment Bill 2023

- 1.70. In its *Scrutiny Report 36*, the Committee raised various concerns about proposed amendments to the Electoral and Road Safety Legislation Amendment Bill 2023 provided by Mr Braddock MLA. These included concerns over the purposes of expanding the range of foreign entities and including fossil fuel, defence and nicotine entities in restrictions, in terms of making donations to Territory political actors, and distinguishing between the use of electronic voting by the use of overseas and in-territory voters. Mr Braddock provided a response to the Committee on 30 October 2023. The Committee thanks the Member for his response.
- 1.71. Mr Braddock's response points to the same justification for restrictions on foreign entities as that utilised by the government in the explanatory statement accompanying the Bill. The proposed amendments would provide for fewer exceptions to prevent circumvention of the provisions. The Committee remains concerned that the expansion will prevent entities from making political donations who have significant links to Australia and the Territory. In the absence of evidence indicating the nature of the corruption risk posed by such entities, the restrictions on political donations from such entities may not be a proportionate response to the potential corruption risks identified in the explanatory statement.

- 1.72. Mr Braddock’s response in relation to expanding restrictions to further entity types refers to the possibility of corruption risks relevant to other states and the federal government also being relevant to the Territory. He does not, however, sufficiently identify the mechanism or evidence that donations to Territory political actors would potentially corrupt other governments with more substantial decision-making roles relevant to the entity types proposed. Mr Braddock also points to the potential for preferential access, achieved through political donations, to itself be a legitimate legislative objective. The Committee notes that this view has not received majority High Court support, and does not justify limiting political donations from some, but not all, entities.
- 1.73. Finally, Mr Braddock refers to the distinction between electronic and online voting systems and the different risks and consequences if access to each is withdrawn. The Committee recognises these potential differences, but remains concerned that the amendments proposed by Mr Braddock are not closely tailored to this distinction.
- 1.74. The Committee therefore remains concerned about the proposed amendments and their compatibility with the right to freedom of expression in section 16 of the HRA, and the constitutional protection of political communication.**
- 1.75. The Committee draws these matters to the attention of the Assembly, noting that the Bill has passed in the Assembly.**

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

- 1.76. In its *Scrutiny Report 36*, the Committee raised various concerns about proposed amendments to the Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023 provided by Mr Braddock MLA. These related to the use of a Henry VIII clause allowing regulations to amend primary legislation. The Committee’s comments included:
- 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.
- 1.77. Mr Braddock provided a response to the Committee on 30 October 2023. The Committee thanks the Member for his response. However, Mr Braddock’s response defers to the Government’s justification for the use of the Henry VIII clause provided in the government’s response to Committee comments on the Bill. The response does not address the Committee’s comment set out above.
- 1.78. The Committee draws these matters to the attention of the Assembly, noting that the Bill has passed in the Assembly.**

## Responses—No Comment

- 1.79. The Committee received a response to the Committee’s comments on the following Bills and has no further comments:
- a) *Births, Deaths and Marriages Registration Amendment Bill 2023*
  - b) *Building (Swimming Pool Safety) Legislation Amendment Bill 2023*
  - c) *Children and Young People Amendment Bill 2023*
  - d) *Gaming Machine Amendment Bill 2023*
- 1.80. These responses can be viewed [online](#).
- 1.81. The Committee wishes to thank the Ministers and Member for their helpful responses.

## 2. Subordinate Legislation

### Disallowable Instruments—Comment

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

#### No Human Rights Issues

- **Disallowable Instrument DI2023-238** being the Utilities (Grant of Licence Application Fee) Determination 2023 made under section 254 of the *Utilities Act 2000* revokes DI2009-93 and determines the fee payable for an application for grant of licence under subsection 34(a) of the Act.
- 2.2. This instrument, made under section 254 of the *Utilities Act 2000*, determines fees for the application for the grant of certain licences, under that Act.
- 2.3. The Committee notes that the explanatory statement for the instrument states that there are no human rights implications arising from the instrument.
- 2.4. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.5. **This comment does not require a response from the Minister.**

#### Human Rights Issues

- **Disallowable Instrument DI2023-239** being the Animal Diseases (Varroa Mite Import Restriction) Declaration 2023 (No 1) made under section 15 of the *Animal Diseases Act 2005* declares a specified area to be an import restriction area in response to the detection of varroosis in that area on 22 June 2022.
- 2.6. This instrument, made under section 15 of the *Animal Diseases Act 2005*, determines the State of New South Wales to be subject to an import restriction. The Minister can do so if the Minister has reasonable grounds for believing that an animal in the relevant area is infected with an exotic disease and the declaration is necessary to prevent the spread of the disease. According to the explanatory statement for the instrument, this determination relates to Varroosis (*Varroa destructor*), which is a declared exotic disease in the ACT under the Animal Diseases (Exotic Diseases) Declaration 2018 (DI2018-33). Varroosis is a parasitic disease of European honeybees (*Apis mellifera L.*), caused by the exotic mite *Varroa destructor*. The explanatory statement states:
- Varroa mite was first detected in the state of New South Wales by the NSW Department of Primary Industries on 22 June 2022. A National Response Plan was initiated on 8 July 2022 to eradicate Varroa mite.
- 2.7. The instrument prohibits importation into the ACT of European honeybees (*Apis mellifera*)—excluding queen bees, escort bees and queen cells—if those bees or beehives have been in NSW at any time since 22 December 2021 due to the biosecurity risk exceeding acceptable levels.

2.8. The explanatory statement goes on to discuss human rights issues, focussing on the right to privacy and reputation, protected by section 12 of the *Human Rights Act 2004*, on the basis that it involves the use of movement records:

Section 7(4)(j) of the instrument may engage the right to privacy in section 12 (a) of the HRA by providing that, if requested by an authorised person under the Act, a person importing queen bees, escort bees, queen cells, beehives and apiary equipment into the ACT produce a copy of the movement record to that authorised person.

2.9. A detailed discussion of the human rights issues follows, with this justification:

The provisions in the instrument which may impact the right to privacy of a person are directly linked to biosecurity risk management activities related to the function of the Act and are reasonable and justifiable to achieve the legitimate purpose of the Act.

Provision of movement records to an authorised person is only required for the importation of queen bees, escort bees, queen cells, honey supers, beehives and apiary equipment into the ACT.

2.10. The explanatory statement notes the existence of safeguards to minimise the impact on the right to privacy, including:

- (a) limitations on when a premises can be entered (section 66)
- (b) the requirement to produce an identity card (section 67).

2.11. It concludes:

The use of movement records to track is a commonly used and well-understood method to manage animal disease risk.

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

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

## Response—No Comment

2.14. The Committee received a response to the Committee’s comments on the following subordinate law and has no further comments: **Subordinate Law SL2023-20** being the Planning (General) Regulation 2023 made under the *Planning Act 2023*.

2.15. The response can be viewed [online](#).

2.16. The Committee wishes to thank the Minister for Planning and Land Management for his helpful response.

Peter Cain MLA  
Chair

November 2023

# Outstanding responses

## Bills/Subordinate Legislation

### Report 28, dated 3 May 2023

#### Bill

- Modern Slavery Legislation Amendment Bill 2023

### Report 35, dated 17 October 2023

#### Bills

- Building and Construction Legislation Amendment Bill 2023
- Justice and Community Safety Legislation Amendment Bill 2023 (No 2)

### Report 36, dated 30 October 2023

#### Bills

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

#### Subordinate Legislation

- Disallowable Instrument DI2023-236 being the Building (ACT Appendix to the Building Code) Determination 2023 (No 2)
- Disallowable Instrument DI2023-237 being the Building (General) (Alternative requirements for unaltered parts) Determination 2023 (No 2)