



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 29

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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

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Role of Committee

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

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1. Bills

Bills—No Comment

Justice and Community Safety Legislation Amendment Bill 2023

- 1.1. This omnibus Bill amends various legislation, primarily in the Attorney-General's portfolio, including:
- a) *Court Procedures Act 2004* to change the title of the Principal Registrar and Chief Executive Officer of ACT Courts to the Chief Executive Officer of ACT Courts;
 - b) *Crimes (Sentence Administration) Act 2005* and *Crimes (Sentencing) Act 2005* to allow detainees transferred from interstate who were sentenced to life imprisonment to have their non-parole period recognised and given effect to in the ACT. This will have a non-prejudicial retrospective effect to apply to current detainees;
 - c) *Gaming Machine Act 2004* to extend by two years the time for licensees to redeem land, lease and planning, and development charge offsets under Part 2A; and
 - d) *Land Titles (Unit Titles) Act 1970* to replace two references to the Magistrates Court with the correct references to the ACT Civil and Administrative Tribunal in relation to registering final building damage and administration orders.

Bills—Comment

Biosecurity Bill 2023

- 1.2. This Bill will repeal legislation and instruments relating to biosecurity, including the *Animal Diseases Act 2005*, the *Plant Diseases Act 2002* and the *Pest Plants and Animals Act 2005* and replace them with a single legislative framework to address inconsistencies and gaps, provide power to regulate biosecurity risks and respond to changing biosecurity risk-management needs.

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 1971 (HRA)

Right to privacy and reputation (section 12 HRA)

- 1.3. The Bill provides for powers of entry to premises, search, compelling the provision of information, inspection, and recording of oral responses. These include:
- a) An emergency declaration can be made by the Minister where they are satisfied that there is a likely biosecurity risk that may have a significant biosecurity impact. The

emergency declaration can authorise measures considered reasonably necessary to respond to the emergency, including restrictions on the use of premises, treatment measures, and installation of devices. This may include external treatment measures on individuals and visual inspections and movement of a person's hair. The declaration must not require any internal treatment measure or provision of samples or authorise surveillance within residential premises without consent of the occupier.

- b) Authorised persons will be able to issue biosecurity directions to a person regulating the person's conduct, to manage security risks or biosecurity impact, remedy a failure to comply or generally to enforce the Bill. As with emergency declarations, a biosecurity direction may provide for the use of premises, treatment measures on individuals, and installation of devices. This may include external treatment measures and visual inspections and movement of a person's hair, but must not require any internal treatment measure or provision of samples or authorise surveillance within residential premises without consent of the occupier.
 - c) An authorised person may enter premises for a variety of reasons, including if they suspect on reasonable grounds there is a biosecurity risk, or to investigate, monitor or enforce compliance with the Bill. Entry to part of the premises being used for residential purposes is only permitted with the occupier's consent, with a search warrant, or if the authorised person believes that the risk is so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary. An authorised person has various powers on entry, including inspection, taking or removing samples and taking images or recordings.
 - d) While exercising their powers of entry, or by written notice, an authorised person may require information be provided that is reasonably necessary to exercise a function under the Bill or to answer questions in relation to a matter under the Bill. Any information given orally may be recorded.
 - e) An authorised person, if they believe that a person may commit an offence against the Bill or can assist in the investigation of an offence against the Bill, can require the person to provide their name and home address and, within 24 hours, evidence supporting that identification information.
- 1.4. These various provisions may potentially limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises these potential limits and sets out why they should be considered reasonable. Subject to the following comments the Committee refers that statement to the Assembly.
- 1.5. As discussed above, the Bill will allow an authorised person to enter residential premises without consent 'if the authorised person believes on reasonable grounds that the risk is so serious and urgent that immediate entry to the premises without the authority of a search warrant is necessary' (proposed paragraph 173(1)(g)). The Committee is concerned that it is not sufficiently clear what risks this provision is referring to. Paragraph 173(1)(a) refers to a biosecurity risk, which in turn is defined in section 13 as the risk of a biosecurity impact

happening. However, other paragraphs in subsection 173(1) refer to entry to enforce compliance with the Bill or to facilitate a biosecurity audit which are not dependent on the existence of a biosecurity risk. **The Committee therefore requests the Minister confirm that risk in this context refers to a biosecurity risk that requires access to the premises or provide further information on the types of risk that might lead to entry onto residential premises.**

- 1.6. The Committee notes that there are various other provisions of the Bill which may potentially limit the protection of privacy and reputation provided by section 12 of the HRA. Proposed section 224 authorises a certifier authority or auditor authority to disclose to the director-general any information obtained in exercising a function under the Act. Proposed section 223 authorises the director-general to disclose information they obtained under the Act to another entity where it is necessary for that entity to exercise a function relating to managing a biosecurity risk and disclosure to that entity is appropriate. Giving information about a biosecurity matter honestly and without recklessness to the director-general is not a breach of confidence (proposed section 226). There is also explicit provision for the court to order a person to publicise an offence they have been convicted of, and for the director-general to carry out that order if the person fails to do so (proposed section 211).
- 1.7. **The Committee requests further information from the Minister on why these potential limitations should be considered reasonable using the framework set out in section 28 of the HRA, and consideration be given to amending the explanatory statement to include that information.**

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

Right to freedom of movement (section 13 HRA)

- 1.8. The Bill may also potentially limit the right to freedom of movement under section 13 of the HRA:
- a) Under proposed section 43, an emergency declaration can include measures which control entry or exit from stated premises or areas and use of roads, or require a person to be subject to a visual inspection or external treatment measure on entering or exiting stated premises.
 - b) A control declaration can include measures which regulate the use of premises or activities involving a biosecurity matter. Proposed section 56 prevents a control declaration from prohibiting, regulating, controlling or requiring the movement of a person, but might still impact on that movement.
 - c) A biosecurity direction issued by an authorised person may control entry to or exit from stated premises or areas or use of access roads, and by regulating activities or use of premises may also indirectly impact on the movement of persons.

- 1.9. Each of these potential limitations is recognised in the explanatory statement and a statement provided for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.10. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

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

- 1.11. The Bill includes offences relating to managing biosecurity risks, including failing to comply with the general biosecurity duty, notification duties or an emergency declaration and dealing with prohibited biosecurity matter. Each of these include maximum penalties with a term of imprisonment that may be higher than that set out in the *ACT Guide to Framing Offences*. The explanatory statement accompanying the Bill recognises the potential for these offences to limit the right to liberty protected by section 18 of the HRA, and provides why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.12. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Right to a fair trial (section 21 HRA)

- 1.13. The Committee is concerned that limitations on courts or tribunals issuing interim orders in relation to emergency declarations may limit the right to a fair trial under section 21 of the HRA. Under Part 3 of the Bill, where the Minister reasonably suspects a biosecurity risk is likely to happen that may have a significant biosecurity impact, the Minister may declare a biosecurity emergency. An emergency declaration can include a variety of emergency measures, including restricting movement of people, providing for external treatment and inspection of individuals, and providing for destruction of things. An authorised person can be authorised to enter premises and take action to rectify a failure to comply with an emergency declaration. It is also an offence to fail to comply with an emergency declaration.
- 1.14. Proposed section 50 provides:
- (1) A court or tribunal must not grant an interim injunction, make any other interim order or give any other interim relief having the effect of preventing, restricting, staying or deferring any emergency declaration or anything authorised or required to be done under an emergency declaration during the period the declaration has effect.
 - (2) However, subsection (1) does not prevent a court or tribunal from making a permanent injunction or other final order in any proceeding at any time.
- 1.15. The Committee recognises that proposed Part 14 of the Bill will make provision for the payment of compensation for the market value of animals, plants or property destroyed, or which would have been destroyed, in accordance with an emergency declaration. No compensation will be payable under that Part for any loss of profit, loss caused by breach

of contract, loss of production or any other consequential loss, though compensation may be payable under other causes of action. The Committee also recognises that there may be significant harm associated with delaying any response to biosecurity risks. However, it is not clear why this may not be appropriately reflected in the considerations taken into account by a court or tribunal before making any interim orders.

- 1.16. By removing the ability, particularly of a court, to issue an interim order protecting against the destruction of property or other action which may not be adequately compensated for or otherwise remedied through final orders, the Bill may limit the right to a fair trial in section 21 of the HRA. **The Committee requests information on why it was considered necessary to restrict the ability of courts and tribunal to make interim orders to protect emergency actions, and consideration be given to amending the explanatory statement to include this justification.**
- 1.17. The Bill provides for authorised persons to destroy something if they reasonably suspect it is, or carries, prohibited biosecurity matter, is a declared pest, infected or infested and cannot be treated, or authorised by emergency or control declarations. Proposed section 202 of the Bill provides that generally 24 hours written notice must be provided to the owner or person in charge of the thing before it is destroyed. There are a variety of circumstances in which 24 hours' notice is not required, including where the authorised person reasonably believes that the thing must be destroyed without delay to manage a biosecurity risk and it is not practicable to give notice, or delaying the destruction of an animal will cause the animal pain and suffering.
- 1.18. The provision will also excuse the lack of notice where 'the authorised person considers that, in the circumstances, the destruction must be carried out without delay or prior notice to the owner or person in charge'. It is not clear to the Committee why this exception is required, particularly to the extent it authorises destruction of property in circumstances unrelated to biosecurity risks that might arise if action is not taken immediately.
- 1.19. By providing for the destruction of property without prior notice and without adequate justification, the provision may limit procedural fairness rights, including those protected within the right to a fair trial under section 21 of the HRA. **The Committee therefore requests further information on why this exception to the provision of notice was considered necessary, and consideration be given to amending the explanatory statement accompanying the Bill to include this justification.**

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

Rights in criminal proceedings (section 22 HRA)

Strict liability offences

- 1.20. The Bill includes 22 strict liability offences which may limit the right to be presumed innocent protected as a right in criminal proceeding in section 22 of the HRA. Several of

these offences include various defences or exceptions for which the evidential burden is placed on the defendant. These strict liability offences are recognised in the explanatory statement along with a statement on why they should be considered reasonable using the framework set out in section 28 of the HRA. That statement notes that strict liability offences are subject to the defence of a mistake of fact, and are limited to monetary penalties of 50 penalty units. Subject to the following comments the Committee refers that statement to the Assembly.

- 1.21. Proposed section 27 of the Bill creates a strict liability offence for failing to comply with a duty to notify a biosecurity event. A biosecurity event includes the presence of prohibited biosecurity matter in any part of the ACT. Prohibited biosecurity matter is declared by the Minister if they are satisfied the matter poses a significant biosecurity risk to any part of the ACT. A person who becomes aware or reasonably suspects that a biosecurity event is likely to happen has a duty to immediately notify the event in the way prescribed in regulations. The duty applies to owners of the premises, a carrier (such as an animal) or other thing that relates to the event, anyone who becomes aware of or suspects the biosecurity event in their professional capacity, or is a person prescribed in regulations.
- 1.22. Similarly, proposed section 31 of the Bill creates a strict liability offence of failing to comply with a duty to notify the presence of notifiable biosecurity matter. A Minister can declare notifiable biosecurity matter if satisfied that the matter poses a biosecurity risk. Owners, occupiers or possessors of premises, carriers or things, or persons who become aware of or suspect notifiable biosecurity matter in their professional capacity, or are a person prescribed in regulations, have a duty to immediately notify in the way prescribed in regulations.
- 1.23. Each of these strict liability offences may arise immediately upon the Minister declaring prohibited or notifiable biosecurity matter, where the owner, occupier or possessor of premises, carriers or related objects may be aware of the matter but not be aware that the matter has been declared by the Minister. Unlike for offences relating to dealing with biosecurity matter, defences including taking all reasonable precautions or having a reasonable excuse are not available. Declarations of prohibited and notifiable biosecurity matter will be notifiable instruments. However, the Committee remains concerned that the owner of premises or things may be subject to an offence of failing to notify the presence of matter which the owner is not aware poses any biosecurity risk.
- 1.24. The Committee notes that the Bill imposes a general biosecurity duty on persons who deal with biosecurity matter and who know, or reasonably ought to know, that the matter poses a biosecurity risk. The explanatory statement accompanying the Bill sets out the limited class of persons who are likely to be affected by this duty, including persons who deal with biosecurity matter in their professional capacity. In rural and peri-urban areas, information relating to biosecurity risks is readily available through established community networks, and community and volunteer groups are also informed about biosecurity risks. However, it is not clear to the Committee that these sources of information are sufficient to ensure that persons who may become subject to duties to immediately notify the

presence of declared biosecurity matter will in all cases be sufficiently informed of that duty.

- 1.25. The Committee also notes that the Bill includes provision for public notice of emergency declarations and control declarations, and the defences available for failing to comply with these declarations where the person was not made aware of the declarations, including through public notice.
- 1.26. **The Committee therefore requests further information on how information relating to declarations of prohibited and notifiable biosecurity matter will be communicated throughout the community to ensure that persons possibly subject to notification duties will be reasonably aware of their obligations under the Bill.**

Privilege against self-incrimination or exposure to a civil penalty

- 1.27. Proposed section 182 of the Bill abrogates the privilege against self-incrimination or exposure to a civil penalty in relation to being compelled to produce information or otherwise respond to questions by authorised persons when enforcing obligations under the Bill. This abrogation is subject to a limited use immunity, with any information or thing obtained, directly or indirectly, not being admissible in evidence other than in a proceeding for an offence arising out of the false or misleading nature of the information provided. A warning must also be given, including the effect of the abrogation of privilege, before any offence for refusing to provide information that may incriminate arises.
- 1.28. The privilege against self-incrimination and exposure to a penalty is also abrogated in relation to the duty to notify a biosecurity event in proposed section 27, and in relation to the duty to notify the presence of notifiable biosecurity matter in proposed section 31. Both of these sections provide that any information, document or thing obtained, directly or indirectly, in complying with the respective duties to notify is not admissible in civil or criminal proceedings other than an offence against the duty to notify itself or offences arising out of the false or misleading nature of the information, document or thing.
- 1.29. By requiring the provision of information which may tend to incriminate the person or expose the person to a penalty, the Bill may limit the right against self-incrimination included as a right in criminal proceedings under section 22 of the HRA, as well as the common law protection against exposure to a civil penalty. The limited use immunity and, under proposed section 182, availability of a warning may ameliorate any limitation of these rights. However, any abrogation should be recognised in the explanatory statement accompanying the Bill. **The Committee therefore asks that consideration be given to amending the explanatory statement to include recognition of the abrogation of the privileges and why any limitation of section 22 of the HRA should be considered reasonable using the framework in section 28 of the HRA.**

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

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

- 1.30. As the explanatory statement accompanying the Bill recognises, the Bill includes provisions for ‘permit, authorisation, registration, identification and traceability schemes’. These provisions may impact people whose work and livelihoods require engaging in conduct that may be subject to these schemes, and hence limit the right to work set out in section 27B of the HRA.
- 1.31. The explanatory statement recognises these potential limitations of the right to work 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.
- 1.32. **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 insufficiently subject the exercise of legislative power to parliamentary scrutiny? – Committee Resolution of Appointment paragraph (10)(a)(v)

- 1.33. As set out above, the Bill will enable the Minister to make emergency declarations which authorise a variety of emergency measures. An emergency declaration is generally a notifiable instrument, but does not have to be notified to the extent it applies only to stated premises and the Minister considers notification would not be appropriate. Emergency declarations are limited to six months duration, but can be extended for further six month periods. An extension, like the original declaration, may not always be notified.
- 1.34. Proposed section 47 provides that an emergency declaration will prevail over a variety of other instruments made under the Bill, including regulations. The Committee is concerned with this ability of emergency declaration to override regulations without being subject to scrutiny by this Committee or the Assembly. The Committee recognises that emergency declarations may have to be made in circumstances requiring urgent action to be taken. It also recognises that public notification of biosecurity risks might impact an identified individual’s privacy and reputation and have other impacts that may not be adequately compensated. However, the use of the considerable authority conferred through the issue of emergency declarations should be subject to adequate scrutiny.
- 1.35. **The Committee therefore requests further information on why it is considered necessary to allow emergency declarations to override regulations. Consideration could also be given to providing for some form of reporting to the Assembly on the use of emergency declarations and other substantial powers under the Act not otherwise subject to direct scrutiny by the Assembly.**
- 1.36. The Bill will authorise the making of regulations which may ‘apply, adopt or incorporate an instrument as in force from time to time’. The Committee notes with approval that the notification requirements of section 47 of the *Legislation Act 2001* are not displaced and referenced in a note to the provision. However, no explanation is provided in the explanatory statement for why there might be a need to incorporate other instruments as

in force from time to time. **The Committee recommends that consideration be given to amending the explanatory statement to include such an explanation.**

- 1.37. The Bill will also authorise the creation of offences through regulations and fix maximum penalties of not more than 50 penalty units for the offences. The explanatory statement includes the following comment in the overview of the Bill:

In relation to the National Livestock Identification System (NLIS) it is proposed that provisions be included in a regulation under the Bill given the detailed nature of these provisions and the anticipated need for regular amendments as the national scheme evolves. The current NLIS provisions include offences with a maximum penalty of 50 penalty units and it is proposed to maintain the current penalties in the regulation.

- 1.38. **The Committee notes this explanation and refers it to the Assembly. The Committee recommends that consideration be given to including this in the clause note on the regulation-making power in proposed section 234.**

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

Health Infrastructure Enabling Bill 2023

- 1.39. This Bill will allow the Territory to compulsorily acquire land and assets currently occupied by the Calvary Public Hospital Bruce for the purposes of building a new public hospital. The Bill will also terminate the existing agreement between the Territory and the hospital, and provide for the Territory to take over operation of the hospital.

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 977 1 (HRA)

Right to privacy and reputation (section 12 HRA)

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

- 1.40. The Bill will enable the Territory to take over operating the current public hospital in Bruce operated by Calvary Health Care ACT Limited. This includes:
- a) allowing an authorised person to enter any operational or service delivery part of the hospital to do anything necessary for the purposes of the Act, while minimising any interference with Calvary's use of the land as much as reasonably practicable. Police may be authorised to enter under court order;
 - b) requiring Calvary to provide information including public patient health records, suppliers of goods and services, employment records and payroll information,

existing and pending investigations, proceedings or remedies arising under a law applying in the territory, and administrative records;

- c) any information, including public patient health records, provided by Calvary may be given to a Territory employee or contractor; and
- d) transfer or use of public patient health information and personal information of a public hospital employee or other person, including by the Territory when using the transferred information for a purpose of the Bill or keeping the information, does not constitute a breach of the *Health Records (Privacy and Access) Act 1997* or the *Information Privacy Act 2014*.

1.41. By authorising or requiring access to and transfer of personal information, including sensitive health information, employment information and potentially confidential information relating to investigations and complaints, the Bill may limit the protection of privacy and reputation provided by section 12 of the HRA.

1.42. The Bill may also affect the employment or contracts of workers currently engaged with the public hospital. Although it is intended that employees will be offered employment with the Territory in accordance with the *Public Sector Management Act 1994*, not all employees may be eligible under that Act or the operation of the Bill may otherwise have the consequence of ending the employment or contractual rights of existing workers. The Bill may therefore limit the right to work and other work-related rights under section 27B of the HRA.

1.43. The explanatory statement accompanying the Bill recognises these potential limitations and provides a brief statement for why they should be considered reasonable. Although not presented in the form set out in section 28 of the HRA, the statement provides the substance required of that section. The Committee refers that statement to the Assembly subject to the following comment.

1.44. Proposed section 22 of the Bill states that the required transfers of information under the Bill do not constitute a breach of territory privacy laws. Subsection 3 then states:

Nothing in the section limits any obligation Calvary, a related corporation or the Territory would otherwise have under a territory privacy law in relation to the use, disclosure and security of the transferred information.

1.45. It is not clear to the Committee what the scope of this subsection is intended to be. The explanatory statement, in discussing why any limitation by the Bill of the protection of privacy should be considered, states:

The Bill does not displace laws that regulate privacy of personal information and health records in the ACT. The Territory will take receipt of the information, store it securely and maintain the information in accordance with relevant Territory legislation, including the *Health Records (Privacy and Access) Act 1997*, *Territory Records Act 2002*, and *Information Privacy Act 2014*.

- 1.46. While the Bill would not seem to affect the operation of the Territory Records Act, it expressly provides that certain actions in relation to transferred information does not constitute a breach of the other privacy laws listed. The intention may be to retain privacy obligations over transferred information except to the extent necessary to give effect to the purposes of the Act, but it is not clear that this is what is achieved by section 22.
- 1.47. For example, as many of the obligations in the territory privacy laws are subject to authorisation in Territory legislation, the limitation of subsection 22(3) may be intended to limit what might otherwise be authorised under the Bill. However, it is unclear what subsection 22(2) adds in that case. Similarly, subsection 22(3) is expressed as limited to the use, disclosure and security of the transferred information. It is not clear whether the requirements in Principle 4.1, Schedule 1 of the Health Records (Privacy and Access) Act, which provide for records to be destroyed seven years after collection, are intended to apply given keeping the transferred information does not constitute a breach of territory privacy law under subsection 22(2).
- 1.48. The Committee therefore seeks further information from the Minister on the intended operation of territory privacy laws after passage of the Bill.**

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond prior to the Bill being debated. Due to the potential significance of these matters, the Committee would welcome the opportunity to consider the Minister's response prior to debate.

Do any provisions of the Bill make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers? – Committee Resolution of Appointment paragraph (10)(a)(iii)

- 1.49. Proposed section 21 provides that where Calvary has an obligation under the Bill and fails to comply, including because they do not have access to required resources, then a related corporation of Calvary nominated by the Territory must comply with the requirement or ensure another related corporation does so. A related corporation is defined in the dictionary as 'a related body corporate, associate or related entity under the *Corporations Act 2001* (Cwlth)'. These obligations may include obligations to allow entry onto land and to view services and operations, to provide information, to cooperate to ensure the safe and orderly transition, to do all things necessary to ensure that transition and continued operation of the public hospital services, and to provide historical information relating to existing or pending investigations and employee rights and entitlements. The Bill will also require nominated related corporations to comply with a Magistrates Court order under proposed section 25.
- 1.50.** Any nomination of a related corporation must be in writing, but there is no obligation that the nomination be notified on the legislation register or otherwise made public. There is also no requirement that a related body corporate be able to comply with the requirement

in question or is able to ensure that another related corporation does so. **The Committee therefore requests further information on the circumstances in which a related body corporate may be nominated as being subject to the requirements of the Act.**

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond prior to the Bill being debated. Due to the potential significance of these matters, the Committee would welcome the opportunity to consider the Minister's response prior to debate.

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

Breadth of Regulations

- 1.51. Paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('Self-Government Act') provides that the Assembly has no power to make laws with respect to the acquisition of property otherwise than on just terms. Any acquisition of property under the Bill must therefore provide for the payment of just terms in order for the Bill to be valid. This is provided for in the Bill through section 10, which states that the Territory must provide just terms to a person from whom an interest is acquired under this Act. Interest is defined in the Bill for this purpose in terms sufficiently broad to likely encompass forms of property requiring just terms. However, an interest does not include an interest excluded by regulation.
- 1.52. Subsection 10(2) provides various examples of acquisitions where reasonable compensation is payable, including the acquisition of Calvary's interest or other security rights in the land or assets, or arising due to the termination of the agreement between Calvary and the Territory for the provision of public hospital services or any other contract, or any redundancy payments.
- 1.53. Subsection 10(3) then provides for regulations to provide for various matters, including how compensation under subsection (2) is to be worked out, how claims for compensation are made and dealt with, time limits from bringing a claim, what information is needed in making a claim, resolving disputes, how compensation is paid and other relevant matters.
- 1.54. The validity of the Bill is therefore largely dependent on the provision, in regulations, for the payment of just terms for any property interest acquired under the Bill. However, the Committee is concerned that some acquisitions of property may be excluded by regulations or not clearly provided for under the Bill, including:
 - a) Paragraph 10(3)(a) provides for regulations to provide for how compensation under subsection 10(2) is worked out. However, subsection 10(2) is expressed as not limiting the range of acquisitions under the Bill for which just terms is required. Regulations may therefore not extend to compensation for acquisitions not listed in subsection 10(2).

- b) Sections 8 and 9 provide for the acquisition of public hospital land and public hospital assets respectively. Any interest in land or assets that is ‘divested, extinguished or diminished’ because of the acquisitions effected under those sections is taken to have been acquired by the Territory under the Bill. However, subsection 4 of those sections states that a ‘regulation may provide for an interest [which is taken to be acquired by the Territory under the Bill] ... to be dealt with in a different way’. This suggests that regulations may provide for interests to be dealt with other than by being taken to be an acquisition of property. Interests dealt with in this way may be excluded from the operation of section 10.

- 1.55. The Committee therefore requests further information from the Minister on how the Bill will apply to any acquisition which may require just terms under the Self-Government Act, even if that acquisition is not expressly included in the list in subsection 10(2) or not taken to be an acquisition of property under regulations. Consideration should be given to making it clear that any acquisition of property, as that term is used in the Self-Government Act, under the Bill requires the payment of just terms.**

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond prior to the Bill being debated. Due to the potential significance of these matters, the Committee would welcome the opportunity to consider the Minister’s response prior to debate.

Henry VIII clauses

- 1.56. Proposed section 6 of the Bill provides for the application of other territory laws. Subsection 6(1) sets out various Acts which do not apply in relation to anything done under this Act, including the *Government Procurement Act 2001*, *Lands Acquisition Act 1994*, and *Planning and Development Act 2007*.
- 1.57. However, the Bill also provides (in proposed section 18) for the preparation of an amendment to the Crown lease governing the land which will remain or become a private hospital. Under proposed subsection 6(1) the Planning and Development Act will continue to apply on and from the acquisition day to that amended Crown lease, although the Bill will prevail to the extent of any inconsistency (subsection 6(3)).
- 1.58. Subsection 6(4) provides that a regulation may modify the operation of subsections (2) and (3). This means that it is possible to amend the extent to which the Planning and Development Act will apply to an amended Crown lease, and which legislation will prevail to the extent of any inconsistency.
- 1.59. By allowing for regulations to modify the operation of particular subsections of the Bill which in turn provide for the application of other territory legislation, the Bill includes a form of Henry VIII clause.
- 1.60. Proposed section 14 of the Bill will provide for the operation of the public hospital. It states that a regulation may provide for matters including the offer of employment and

employment of employees of the public hospital and ‘the disapplication of provisions of the *Public Sector Management Act 1994*’. Again, this clause will enable regulations to modify the application of primary territory legislation.

- 1.61. There is no explanation in the explanatory statement for why clauses of this form are required to give effect to the purposes of the Bill. **The Committee therefore requests further information on why any modification of primary legislation enabled by these clauses can be considered necessary given the purposes of the Bill.**

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

Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

- 1.62. This Bill will raise the minimum age of criminal responsibility (MACR) in the ACT in stages from 10 to 12 seven days after notification, and from 1 July 2025, except for children aged 12 and 13 years who commit certain named offences, to 14. Children under the MACR cannot be held criminally responsible. The Bill will also introduce various forms of alternative therapeutic pathways for children and young people, including Intensive Therapy Orders and Therapeutic Correction Orders.

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 1971 (HRA)

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

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

Right to privacy and reputation (section 12 HRA)

Right to freedom of movement (section 13 HRA)

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

- 1.63. The following potential limits on rights protected by the HRA are identified in the explanatory statement accompanying the Bill, including why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

Therapeutic support panel

- 1.64. The Bill will amend the *Children and Young People Act 2008* (CYP Act) to establish a therapeutic support panel to assess the therapeutic needs and advise on appropriate treatment and support for children and young people who are referred to it. The panel will

also make recommendations for intensive therapy orders, assist with developing therapy plans and provide advice to the director-general.

- 1.65. The panel will have the power to request certain information sharing entities share safety and wellbeing information, produce a document or something else about a child or young person for the purposes of producing a therapy plan. The entity must comply with the request unless they do not have the requested information or have a reasonable excuse.
- 1.66. The panel may also receive referrals from a variety of entities – including police, education providers, health facilities and practitioners, court or tribunal officers – where the entity believes on reasonable grounds that the child or young person has a need for support services and is at risk of harming themselves or others.
- 1.67. The role of the panel will therefore involve the collection, use and sharing of personal information which may limit the protection of privacy provided by section 12 of the HRA.

Intensive Therapy Orders

- 1.68. The Bill will enable the Childrens Court to issue an intensive therapy order (ITO) for children over 10 years old. An ITO directs the child to undergo an assessment of their behaviour and needs and receive treatment according to a therapy plan to reduce the likelihood of the child engaging in harmful conduct in the future. An ITO may authorise the director-general to issue a direction that the child be confined under the care responsibility of the director-general as considered reasonably necessary as a last resort for the purpose of the assessment or treatment. The ITO may also include other conditions the court considers necessary to prevent the child from engaging in conduct which has a significant risk of significant harm to themselves or others or to ensure they undergo any necessary treatment.
- 1.69. Notice of an application by the director-general for an ITO must be provided to various people, including the child's parents or persons with care responsibilities, the chair of the therapeutic support panel, the public advocate, and, if the child or young person is an Aboriginal or Torres Strait Islander person—the Aboriginal and Torres Strait Islander children and young people commissioner. These persons must also be involved in other aspects of the ITO process, including in the making or extension of an ITO or in applying for amendment or revocation.
- 1.70. The Childrens Court can make an interim ITO of up to 2 weeks, with further orders totalling up to 12 weeks, where the court is satisfied that there is a significant risk of significant harm to the child or someone else arising from the child's conduct, and the interim order is necessary to prevent the harmful conduct. An interim ITO can also order a child be confined where that is necessary as a last resort to prevent the child engaging in harmful conduct and ensure the child undergoes any necessary treatment in accordance with a therapy plan.
- 1.71. The Childrens Court can also issue an ITO for up to 12 weeks (with further orders extending the period by 8 weeks up to a total of 6 months) where the Court is satisfied of each of the following:

- a) If the order is not made or extended there will be a significant risk of significant harm to the child or someone else arising from the child's conduct;
 - b) Less restrictive ways to prevent the child engaging in harmful conduct have not been successful or are not considered appropriate, and there are no other less restrictive ways available;
 - c) Any confinement may be necessary as a last resort to enable assessment of the child's behaviour and needs or treatment in accordance with a therapy plan;
 - d) The therapy plan is more likely than not to reduce the likelihood of the child engaging in harmful conduct in the future; and
 - e) Making the order or extension is in the best interest of the child or young person.
- 1.72. Any confinement direction issued by the director-general must be as a last resort and necessary and reasonable to ensure assessment or treatment of the child. Continuous confinement can only last for 14 days, although there can be more than one period of confinement while an ITO is in place.
- 1.73. While subject to an ITO or interim ITO, a child may be subject to a scanning, frisk or electronic search and anything dangerous found seized if there are reasonable grounds for believing they are carrying anything that would present a danger to another person or could be used to escape from the place where they are receiving therapy. The search must be as least intrusive as possible, but force can be used as is necessary and reasonable.
- 1.74. The entity which operates a place where a child may be confined while receiving intensive therapy must keep a register including personal details of each child confined and details of their therapy plan and any searches conducted and force used. The register can be accessed only by listed persons.
- 1.75. Police can be asked by the director-general to assist in carrying out an ITO. A warrant can be issued to authorise entry into stated premises to take a child into custody if the child is in danger due to a breach of the ITO or interim ITO, or the child is absent from the therapy place where they are to be confined.
- 1.76. Information relating to intensive therapy is protected information under the CYP Act and must be protected in the same way as other information collected under that Act. Information brought into existence for the purposes of a referral to the therapeutic support panel, preparation of a therapy plan, relating to a child in intensive therapy or implementation of an ITO or interim ITO is not admissible in any criminal proceeding. The Bill will also amend the *Victims of Crime Act 1994* to provide for information disclosure to the victim of a child's harmful behaviour, including information about the child's therapeutic treatment but only if considered appropriate by the Chair of the therapeutic support panel and the Commissioner and the information does not include personal information about the child.
- 1.77. By providing for therapeutic treatment to be provided to a child without their or their parent's consent, including confining a child for the purpose of administering treatment, the Bill may limit the right to protection from torture and cruel, inhuman or degrading

treatment in section 10 of the HRA. By authorising confinement of a child and restricting a child's movements while under an ITO or interim ITO the Bill may limit the right to freedom of movement in section 13 of the HRA, the right to liberty and security of person in section 18 of the HRA, and the right to protection of the family and children in section 11 of the HRA. By allowing personal searches, and providing for the sharing and keeping of records relating to highly sensitive information, the Bill may limit the protection of privacy provided by section 12 of the HRA.

- 1.78. The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

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

Right to privacy and reputation (section 12 HRA)

Right to freedom of movement (section 13 HRA)

Right to peaceful assembly and freedom of association (section 10 HRA)

Therapeutic Correction Orders

- 1.79. The Bill will also amend the *Crimes (Sentencing) Act 2005* to allow a Court to impose a therapeutic correction order (TCO) where a young offender has been found guilty of an offence committed when they were under 18. The explanatory statement suggests that the TCO is a community-based sentencing option intended to be a more intensive therapeutic order for those young offenders for whom a good behaviour order does not have a strong enough therapeutic benefit.
- 1.80. A TCO is based on an assessment of the offender's suitability for a TCO arranged by the director-general responsible for the CYP Act. The assessment must consider various factors relating to whether the offender is likely to comply with or benefit from the TCO. A TCO can last up to four years, and require an offender to not commit any further offences, to report to or receive visits from the therapeutic correction team, and prevents an offender from leaving the Territory without approval from the director-general. The offender must also complete a program of treatment, including medical, psychiatric or psychological treatment or detoxification, participate in counselling, attend meetings, participate in education or employment programs, and submit to alcohol and drug testing.
- 1.81. A court will also be able to make a non-association and place restriction order along with the TCO. A non-association order prohibits an offender from attempting to be with or communicate with a named person. A place restriction order prohibits an offender from attempting to be in or near a named place or area. The Court can make the order only for relevant offences and when the order is necessary and reasonable to prevent someone being harassed or their safety or welfare endangered, to prevent further offences or to assist the offender manage things that make them more likely to commit further offences. Non-association and place restriction orders can last up to 24 months. The director-general may also apply for a review of an offender's TCO if they believe that a change in the

offender's circumstances, including living arrangements, is likely to substantially affect the offender's ability to comply with the order.

- 1.82. By placing restrictions on where a person can live or go including preventing an offender leaving the Territory without approval, the Bill potentially limits the right to freedom of movement protected by section 13 of the HRA. By requiring supervision as a requirement of a TCO the Bill may also limit the protection of privacy provided by section 12 of the HRA. By restricting who an offender may associate or communicate with the Bill may limit the freedom of association provided by section 15 of the HRA. The explanatory statement accompanying the Bill recognises these potential limitations and provides for why they should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly subject to the following comments.
- 1.83. One of the purposes and conditions of a TCO is that an offender complete a program of treatment, including medical treatment. This may limit the right to protection from torture and cruel, inhuman or degrading treatment under section 10 of the HRA, which includes the right to not be subjected to medical treatment without free consent.
- 1.84. The Bill will also provide assessors carrying out an assessment of an offender's suitability for a TCO with authority to ask any entity to provide information, including documents, for the purpose of the assessment. The entity must comply as soon as practicable. Providing the information honestly and with reasonable care is not a breach of confidence or professional ethics or misconduct, or a ground for defamation. Information obtained as part of making a therapeutic correction assessment or TCO can be shared between the Court, the director-general and prescribed entities for the purpose of exercising functions under the Crimes (Sentencing) Act. By providing for the provision of information, including personal information, to be compelled or shared in these ways, the Bill may further limit the protection of privacy provided by section 12 of the HRA.
- 1.85. **The Committee therefore requests further information on why the provisions in the Bill relating to amendments to the Crimes (Sentencing) Act and the making of a TCO may not limit the rights in sections 10 and further limit the right in section 12 of the HRA, and why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. Consideration should be given to amending the explanatory statement to include this information.**

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

Right to life (section 9 HRA)

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

- 1.86. The Bill will amend the *Criminal Code 2002* to provide that, after seven days from notification, a child under 12 years old is not criminally responsible for an offence and a child between 12 and 14 can be criminally responsible only if the prosecution proves they

know their conduct is wrong. After 1 July 2025 a child under 14 years old will not be criminally responsible for an offence unless the child is at least 12 years old, engages in conduct that is an offence mentioned in the proposed schedule 1 to that Act, and the prosecution proves that the child knows that their conduct is wrong. Raising the MACR will also prevent children under 12 or 14 from being a respondent to an application for a family violence order under the *Family Violence Act 2016* or a protection order under the *Personal Violence Act 2016*.

- 1.87. These amendments may limit the right to life under section 9 of the HRA, which requires public authorities take reasonable steps to protect life, including protecting someone whose life is at risk from another person, where the authorities know or should know of this risk. The amendments may also limit the right to security of person under section 18 of the HRA, which may include providing victims and witnesses with information about the outcome of court proceedings as soon as possible, particularly where the accused is released from custody.
- 1.88. 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. In particular, the explanatory statement suggests that the alternative pathways set out in the Bill to respond to harmful behaviour will protect against potentially harmful behaviour of children. There will also be provision for victims of harmful behaviour to provide a harm statement to be considered by the therapeutic support panel, or to be informed of certain information about the child's therapy plan where appropriate. They will still be eligible for financial assistance through the Victim Support Scheme. The child may also participate in a restorative justice conference. Police will retain powers of arrest and detention. The Committee refers that statement to the Assembly.
- 1.89. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Protection of the Family and Children (section 11 HRA)

- 1.90. Subsection 11(2) of the HRA states that every child has the right to the protection needed because of being a child, without distinction or discrimination of any kind. This right is potentially limited by the exceptions provided in the Bill for children aged 12 or 13 who will remain criminally culpable after the MACR is raised to 14 where they commit one of the four offences listed in the proposed schedule 1 of the Criminal Code. Those offences will be murder; intentionally inflicting grievous bodily harm; sexual assault in the first degree; and act of indecency in the first degree.
- 1.91. The explanatory statement accompanying the Bill recognises that this exception is contrary to the statement of the United Nations Committee on the Rights of the Child, whose recommendation to raise the MACR to at least 14 is used in the explanatory statement as part of the basis for the Bill. That UN Committee, in its General comment No. 24 (2019) on children's rights in the child justice system, stated (at [25]):

The [UN] Committee is concerned about practices that permit the use of a lower minimum age of criminal responsibility in cases where, for example, the child is

accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.

- 1.92. The explanatory statement, however, states that the exception to raising the MACR to 14, and the consequent limitation of the rights of children, is warranted:

This legislation is intended to promote the rights of children and young people by adopting therapeutic approaches that focus on rehabilitation. However, it is vital that the community is also properly protected from harm, particularly where the new therapeutic system is being established, and the ability of that system to manage risks associated with extreme cases is not fully tested.

This limitation is considered reasonable and proportionate due to the nature of these very serious offences and the response that may be required to ensure public safety.

- 1.93. The Committee recognises that the offences listed in the proposed schedule 1 of the Criminal Code are exceptionally serious and violent offences. However, as the UN Committee report indicates, there is insufficient evidence to support the conclusion that children under 14 are sufficiently intentional to warrant criminal culpability. Similarly, there is no evidence presented in the explanatory statement that suggests that a child is more likely to cause harm to others after the commission of these particular offences than they would after commission of other violent offences, or that the therapeutic treatment otherwise provided under the Bill will be less affective in relation to these particular offences in providing for rehabilitation or otherwise protecting against further harm to the community.
- 1.94. The Committee notes that the explanatory statement suggests that there are practical issues in a small jurisdiction in providing alternative therapeutic approaches for the likely very small number of young people who may commit the offences listed, at least in comparison to the opportunities provided in a youth justice facility. There would also be concerns with subjecting young people for longer periods of secure care without conclusively establishing their involvement in such serious criminal activity. The Committee is concerned, however, that these statements are premised to some degree on the need to treat children who have committed the particular crimes in question differently from those that have committed other violent or serious offences.
- 1.95. **The Committee therefore requests further information on why it is considered necessary that an exception to the protection of children provided by the Bill should be made for the ages and offences in question, and why that exception should be considered proportionate given the consequences of criminal culpability 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.

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

Henry VIII clause

1.96. The Bill will insert new transitional parts in the *Crimes Act 1900* (proposed parts 33 and 34), the *Family Violence Act 2016* (proposed part 23 and 24), and the *Personal Violence Act 2016* (proposed parts 23 and 24) setting out transitional provisions to reflect the staged lifting of the MACR to 12 seven days after commencement of the Bill and then 14 after 1 July 2025. 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.

1.97. The proposed transitional parts will expire five years after their commencement.

1.98. The explanatory statement accompanying the Bill does not recognise the nature of these clauses as providing authority for regulations to modify the effect of primary legislation, nor set out a justification for why they have been included. **The Committee therefore requests further information on why the Henry VIII clauses are considered necessary in the context of this Bill and the Crimes Act, Family Violence Act and Personal Violence Act in particular, including:**

- a) what limits, if any, are placed on the scope, subject matter and duration of the Henry VIII clause so as to restrict the potential impact of any regulations; and
- b) what alternatives to the Henry VIII clause, either to the clause itself or the use of a Henry VIII clause in general, were considered and why those alternatives were not accepted.

Consideration should also be given to amending the explanatory statement to include this information.

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

Supreme Court Amendment Bill 2023

- 1.99. This Bill will amend the *Supreme Court Act 1933* to provide for the Court of Appeal to grant leave to appeal against a conviction on the ground that there is fresh and compelling evidence that should be considered and granting leave is in the interests of justice. Where, after taking into account that fresh and compelling evidence, the Court of Appeal considers that there has been a substantial miscarriage of justice, the court may set aside the conviction or finding of guilt, and either order a verdict of not guilty to be entered or order a new trial or hearing.

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 1998 1 (HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.100. The rights in criminal proceedings protected by section 22 of the HRA includes the right of anyone convicted of a criminal offence to have the conviction and sentence reviewed by a higher court in accordance with law. The Bill will extend this right by allowing the grant of leave to appeal on the basis of fresh and compelling evidence. However, by only allowing a successful appeal where there has been a substantial miscarriage of justice, the Bill may potentially limit the right to appeal in section 22.
- 1.101. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.102. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Proposed Amendments—No Comment

Period Products and Facilities (Access) Bill 2022

- 1.103. On 18 May 2023 the Committee received proposed government amendments to the Period Products and Facilities (Access) Bill 2022. The proposed amendments will omit Part 3 of the Bill, which provided for workplace access to toilets, handwashing and sanitary waste facilities, and make other consequential amendments. The Committee has no comments on these amendments.

Proposed Amendments—Comment

Planning Bill 2022

- 1.104. On 15 May 2023 the Committee received proposed government amendments to the Planning Bill 2022. These amendments are mainly of a technical nature, or to clarify or make minor amendments to provisions of the Bill. The Bill also amends the process for the issue of controlled activity orders to address privacy concerns raised by the Committee in its report on the Bill.
- 1.105. The proposed amendments will insert new provisions providing for design guides for development proposals to support the territory plan to be prepared by the Minister and technical specifications to support design guides and the territory plan to be developed by the chief planner. Both the design guides and technical specifications are notifiable instruments and must be published on the authority website (clause 31 of the proposed amendments).
- 1.106. An amendment to the territory plan to add or change a reference to a design guide will be a minor plan amendment for which no consultation is needed (clause 35). In deciding a development application under Part 7.6 of the Bill, the decision-maker will have to consider any applicable design guidance in a design guide. An application for a development proposal in relation to which a design guide applies has to include the proponent's response to the design guide (clause 92).
- 1.107. The Committee is concerned that design guides may substantially affect the requirements for development approvals and potentially act as a legislative requirement for which insufficient scrutiny is provided. **The Committee therefore requests further information on why design guides cannot be subject to disallowance by the Assembly.**

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

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

Right to privacy and reputation (section 12 HRA)

Right to a fair trial (section 21 HRA)

- 1.108. The proposed amendments were accompanied by a supplementary explanatory statement which responds to several comments made by this Committee in its report on the Bill by providing additional statements recognising and justifying potential limits on various rights protected under the HRA, including the right to equality in section 8 of the HRA, the protection of privacy and reputation in section 12 of the HRA, and the right to a fair trial in section 21 of the HRA. The Committee refers that statement to the Assembly.
- 1.109. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Government Response—No Comment

- 1.110. The Committee received a response to the Committee’s comments on the following Bill and has no further comments:
- a) *Motor Accident Injuries Amendment Bill 2023*
- 1.111. This response can be viewed [online](#).
- 1.112. The Committee wishes to thank the Minister for Transport and City Services 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 DI2023-30** being the City Renewal Authority and Suburban Land Agency (Agency Board Member) Appointment 2023 (No 1) made under section 45 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the Suburban Land Agency Board.
 - **Disallowable Instrument DI2023-31** being the Health Records (Privacy and Access) (Fees) Determination 2023 (No 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* revokes DI2020-300 and determines fees payable for the purposes of the Act.
 - **Disallowable Instrument DI2023-32** being the Taxation Administration (Amounts Payable—Utilities (Network Facilities Tax)) Determination 2023 made under section 139 of the *Taxation Administration Act 1999* revokes DI2021-46 and determines the rate for section 8 of the *Utilities (Network Facilities Tax) Act 2006* for the year ending 31 March 2022.
 - **Disallowable Instrument DI2023-34** being the Land Tax (Affordable Community Housing) Determination 2023 made under paragraph 13A(5)(a) of the *Land Tax Act 2004* revokes DI2020-277 and determines the eligibility criteria that an owner of a parcel of land must satisfy to be eligible for an exemption under section 13A of the Act.
 - **Disallowable Instrument DI2023-35** being the Cultural Facilities Corporation (Governing Board) Appointment 2023 (No 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2021-285, and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.
 - **Disallowable Instrument DI2023-36** being the Board of Senior Secondary Studies Appointment 2023 (No 1) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the ACT Board of Senior

Secondary Studies, after consultation with business and industry representative organisations.

- **Disallowable Instrument DI2023-37** being the Heritage (Council Chairperson) Appointment 2023 made under section 17 of the *Heritage Act 2004* appoints a specified person as chairperson of the ACT Heritage Council.
- **Disallowable Instrument DI2023-38** being the Heritage (Council Deputy Chairperson) Appointment 2023 made under section 17 of the *Heritage Act 2004* revokes DI2021-27, and appoints a specified person as deputy chairperson of the ACT Heritage Council.
- **Disallowable Instrument DI2023-39** being the Heritage (Council Member) Appointment 2023 (No 1) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-40** being the Heritage (Council Member) Appointment 2023 (No 2) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-41** being the Heritage (Council Member) Appointment 2023 (No 3) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-42** being the Heritage (Council Member) Appointment 2023 (No 4) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-43** being the Heritage (Council Member) Appointment 2023 (No 5) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-44** being the Heritage (Council Member) Appointment 2023 (No 6) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-45** being the Heritage (Council Member) Appointment 2023 (No 7) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-46** being the Heritage (Council Member) Appointment 2023 (No 8) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-47** being the Heritage (Council Member) Appointment 2023 (No 9) made under section 17 of the *Heritage Act 2004* appoints a specified person as a member of the ACT Heritage Council.
- **Disallowable Instrument DI2023-49** being the Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2023 (No 1) made under section 12 of the *Road Transport (General) Act 1999* provides that section 205 of the *Road*

Transport (Road Rules) Regulation 2017 does not apply to a specified area during the Dettol T20 International cricket series for the period 11 to 20 February 2022.

- **Disallowable Instrument DI2023-52** being the Veterinary Practice (Fees) Determination 2023 (No 1) made under section 144 of the *Veterinary Practice Act 2018* determines fees payable for the purposes of the Act and revokes DI2021-53.
- **Disallowable Instrument DI2023-59** being the Financial Management (Transfer of Funds from Capital Injection to Other Appropriations) Approval 2023 (No 1) made under paragraph 14A(2)(b) *Financial Management Act 1996* (Transfer of funds from capital injection appropriation to other appropriations).
- **Disallowable Instrument DI2023-65** being the Legal Profession (Bar Council Fees) Determination 2023 made under subsection 84(2) of the *Legal Profession Act 2006* revokes DI2015-180 and determines fees payable for applications for the grant or renewal of a barrister practising certificate.

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 DI2023-50** being the Utilities (Licensing) Exemption 2023 (No 1) made under section 22 of the *Utilities Act 2000* exempts the Suburban Land Agency & Riverview Developments (ACT) Pty Limited from the requirement to hold a utility licence for various water-related utility services provided in the ACT.
 - **Disallowable Instrument DI2023-51** being the Utilities (Licensing) Exemption 2023 (No 2) made under section 22 of the *Utilities Act 2000* exempts the Australian Capital Territory (as represented by the Directorate which has responsibility for a stormwater utility service licence for various water-related utility services provided in the ACT.
- 2.3. The first instrument mentioned above, made under section 22 of the *Utilities Act 2000*, exempts the Suburban Land Agency & Riverview Developments (ACT) Pty Limited ABN 72 619 778 053, which the explanatory statement for the instrument states is the ‘West Belconnen Joint Venture also commonly referred to as the Ginninderry Joint Venture’, from the requirement to hold a utility licence in relation to the building and commissioning of stormwater infrastructure in the Ginninderry Estate in West Belconnen.
- 2.4. The second instrument mentioned above exempts ‘the Australian Capital Territory, as represented by the Directorate which has responsibility for a stormwater utility service’ from the requirement to hold a utility licence in relation to the management and operation of the stormwater harvesting and distribution network in the Ginninderry Estate in West Belconnen.

- 2.5. The Committee notes that the explanatory statement for each of the instruments mentioned above states that there are no human rights implications arising from the instrument.
- 2.6. **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.**
- 2.7. **This comment does not require a response from the Minister.**

Displacement of subsection 47(6) of the *Legislation Act 2001*

- **Disallowable Instrument DI2023-33** being the Taxation Administration (Amounts Payable—Motor Vehicle Duty) Determination 2023 made under section 139 of the *Taxation Administration Act 1999*.
- 2.8. This instrument, made under section 139 of the *Taxation Administration Act 1999*, determines motor vehicle registration duties for Part 9.1 of the *Duties Act 1999*. The explanatory statement for the instrument notes that the instrument implements the Vehicle Emission Reduction Scheme (VERS), under which duty is charged on the basis of four rating categories (A, B, C and D), with the rating category of a motor vehicle depending on its environmental performance as measured by the grams of carbon dioxide emitted by the vehicle per kilometre. The classification of vehicles in the instrument relies on the Commonwealth *Green Vehicle Guide*, defined in section 3 of the instrument as:

Green Vehicle Guide means the Green Vehicle Guide published by the Commonwealth as in force from time to time.

Note The Green Vehicle Guide is available at www.greenvehicleguide.gov.au.

- 2.9. Section 4 of the instrument then provides:

4 Displacement of Legislation Act, s 47 (6)—Green Vehicle Guide

The *Legislation Act 2001*, section 47 (6) does not apply to the Green Vehicle Guide.

Note This section of the Legislation Act would require the Green Vehicle Guide to be remade as a notifiable instrument each time the Green Vehicle Guide is amended.

- 2.10. As the Note indicates, the effect of section 4 is to displace subsection 47(6) of the *Legislation Act 2001*, which would otherwise require that the Green Vehicle Guide (and any amendment to it) be published on the ACT Legislation Register as a notifiable instrument. This issue is addressed in the explanatory statement for the instrument:

Displacement of *Legislation Act 2001*, section 47 (6)

As the CO₂ emissions of motor vehicles under this instrument are ascertained by reference to the GVG [Green Vehicle Guide], this instrument incorporates those details as in force from time to time.

Section 47 (6) of the *Legislation Act 2001* (Legislation Act) provides that an incorporated instrument, and any amendment or replacement of such an

instrument, are taken to be notifiable instruments. A notifiable instrument must be notified on the legislation register under the Legislation Act.

However, for the purpose of determining a rate for motor vehicle duty, section 208 (3) permits a determination under section 139 of the [Taxation Administration Act] to apply, adopt or incorporate an instrument as in force from time to time.

As the GVG is amended frequently (whenever a new vehicle model becomes available for sale, which can be as frequent as two to three times per week), section 5 of this instrument displaces section 47 (6) of the Legislation Act.

If section 47 (6) of the Legislation Act were not displaced, the text of the GVG would have to be remade as a new notifiable instrument every time the GVG is amended.

The displacement ensures that the current version of the GVG always applies for the purposes of the instrument, removing the need to remake it as a notifiable instrument whenever it is amended by the Commonwealth.

- 2.11. While the Committee notes that it has ongoing concerns about the displacement of subsection 47(6) of the Legislation Act (particularly in relation to Australian Standards), the Committee considers that the above is a reasonable justification for the disapplication of subsection 47(6), in this instance, particularly the ready availability of the *Green Vehicle Guide*, free of charge.

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

Retrospectivity

- **Disallowable Instrument DI2023-48** being the Land Tax (Affordable Community Housing) Determination 2023 (No 2) made under paragraph 13A(5)(a) of the *Land Tax Act 2004* revokes DI2020-277 and determines the eligibility criteria that an owner of a parcel of land must satisfy to be eligible for an exemption under section 13A of the Act.
- 2.13. This instrument, made under paragraph 13A(5)(a) of the *Land Tax Act 2004*, determines the eligibility criteria that an owner of a parcel of land must satisfy to be eligible for an exemption under section 13A of the Act. Section 3 of the instrument provides that it is taken to have commenced on 1 April 2023. As the instrument was made on 15 April 2023, this means that it has a retrospective operation. The Committee notes (with approval) that the retrospectivity issue is addressed in the explanatory statement for the instrument:

Commencement and retrospectivity

The Determination is taken to have commenced on 1 April 2023 – that being the date of commencement of section 45 of the *Residential Tenancies Legislation Amendment Act 2023*.

Under section 76 of the *Legislation Act 2001*, a statutory instrument may provide that a non-prejudicial provision of the instrument commences retrospectively. The correction of the errors in Table 1 from the previous Determination is non-prejudicial, as the corrected values provide an additional allowance to the combined annual gross income threshold for households with children. Without the values for

each child the income thresholds would only be based on adult members of a household, potentially reducing eligibility for the land tax exemption.

- 2.14. In relation to the 'errors', the explanatory statement states:

Update

This instrument corrects errors in the stated amounts in Table 1 of the Land Tax (Affordable Community Housing) Determination 2023, DI2023-34 (the previous Determination). Specifically, the combined annual gross income thresholds for a tenant/s for 2022/23 and 2023/24 values now include values for children consistent with the National Rental Affordability Scheme (NRAS).

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

Human Rights Issues

- **Disallowable Instrument DI2023-53** being the Road Transport (General) Application of Road Transport Legislation Declaration 2023 (No 4) made under section 13 of the *Road Transport (General) Act 1999*.

- 2.16. The instrument mentioned above is made under section 13 of the *Road Transport (General) Act 1999*, which allows the Minister to declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration. Section 3 of the instrument declares that the *Motor Accident Injuries Act 2019* does not apply in relation to the LCCC Blue Range Rally Sprint 2023, scheduled to be held on 30 April 2023. Section 4 of the instrument provides that various specified provisions of other road transport legislation do not apply (in certain circumstances), in relation to the same rally.

- 2.17. The Committee notes that the explanatory statement for the instrument contains the following discussion of human rights issues:

Human rights implications

During the development of this instrument, due regard was given to its effect and the operation of the rally in relation to the compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

Section 28 of the HRA provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28 (2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected
- b) the importance of the limitation
- c) the nature and extent of the limitation
- d) the relationship between the limitation and its purpose

e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 13 of the HRA provides a right for people to move freely within the ACT.

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

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

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

Disapplication of subsections 47(5) and (6) of the *Legislation Act 2001* / Human Rights Issues

- **Disallowable Instrument DI2023-67** being the Building (ACT Appendix to the Building Code) Determination 2023 (No 1) made under subsection 136(3) of the *Building Act 2004* revokes DI2019-45 and makes the ACT appendix to the Building Code of Australia.
- **Disallowable Instrument DI2023-68** being the Water and Sewerage (ACT Appendix to the Plumbing Code) Determination 2023 made under subsection 44C(3) of the *Water and Sewerage Act 2000* revokes DI2019-46 and makes the ACT appendix to the Plumbing Code of Australia .
- **Disallowable Instrument DI2023-69** being the Building (General) (Alternative requirements for unaltered parts) Determination 2023 (No 1) made under the *Building Act 2004*.

2.20. The first instrument mentioned above makes an ACT Appendix to the Building Code of Australia, under section 136 of the *Building Act 2004*. Section 136 of the Building Act gives effect to the Building Code of Australia, for the ACT. However, subsection 136(2) allows for an ACT Appendix to the Building Code, with 'variations, additions and exclusions for the ACT'. Subsection 136(3) makes such an appendix a disallowable instrument.

2.21. The explanatory statement for the instrument states:

This instrument revokes the I (DI2019-175) and provides for revised adoption dates for certain provisions of the BCA, to allow earlier adoption of the provisions with transitional arrangements for building approvals considered before 1 May 2023, and identifying the 1 October 2023 adoption date for certain provisions.

2.22. Section 5 of the instrument states:

5 Disapplication of Legislation Act

The *Legislation Act 2001*, section 47 (5), does not apply to this instrument.

Note 1 Australian Standards are available for purchase at 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 freely available for inspection at www.abcb.gov.au.

2.23. The Committee notes that this provision is not actually necessary, given that subsection 136A(3) of the Building Act expressly disapplies subsections 47(5) and (6).

2.24. Nevertheless, the Committee notes that the disapplication issue is addressed in the explanatory statement for the instrument:

Section 5 of the instrument displaces the requirement in the *Legislation Act 2001* (the Legislation Act), 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 [Building Code of Australia] 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 [Australian Building Codes Board]. 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.

2.25. The Committee notes that the explanatory statement does not address the availability (at no cost) of Australian Standards relied upon by the instrument, which is an ongoing issue for the Committee.

2.26. The second instrument mentioned above makes an ACT Appendix to the Plumbing Code of Australia, under section 44C of the *Water and Sewerage Act 2000*. Section 44C of the Water and Sewerage Act gives effect to the Plumbing Code of Australia, for the ACT. However, subsections 44C(2) and (3) allow for an ACT Appendix to the Building Code, with 'variations, additions and exclusions for the ACT'. Subsection 44C(4) makes such an appendix a disallowable instrument.

2.27. The explanatory statement for the second instrument mentioned above states:

This instrument is made under section 44C of the *Water and Sewerage Act 2000* (the Act).

The Plumbing Code of Australia (PCA) is developed and published by the Australian Building Codes Board (ABCB). The ACT is represented on the ABCB along with

representatives from all States, the Northern Territory, the Commonwealth Government and the building industry.

Section 44C of the Act, adopts the PCA including any ACT-specific requirements as published in the appendices of the PCA as part of the plumbing code for the purposes of the Act.

Section 44C (3) of the Act entitles the Minister to make an ACT appendix to the PCA to provide a mechanism for the ACT to amend the PCA from time to time, including to amend the date and edition of the PCA, or a provision of the PCA, comes into effect in the ACT.

The PCA and its ACT appendix form part of ACT law. The published ACT appendices in the PCA (published on the ABCB website) do not include specific provisions but instead refer readers to the ACT Legislation Register, where all instruments made under the Act can be found, including the ACT appendix to the PCA. This is so that there is a single source for the ACT appendix to the PCA, and a single version published as current at any one time, which can be amended as required.

The ACT appendix only applies to the ACT and Jervis Bay Territory.

2.28. Section 5 of the second instrument disapplies subsection 47(5) of the Legislation Act:

5 Disapplication of notification requirement

The *Legislation Act 2001*, section 47 (5), does not apply to this instrument.

Note 1 Australian Standards are available for purchase at 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, which incorporates the Plumbing Code of Australia, is freely available for inspection at www.abcb.gov.au.

2.29. Again, this provision would appear to be unnecessary, as subsection 44D(3) of the Water and Sewerage Act expressly disapplies subsections 47(5) and (6) of the Legislation Act.

2.30. Nevertheless, the Committee notes that the explanatory statement for the second instrument states:

Section 5 of the instrument displaces the requirement in the *Legislation Act 2001* (the Legislation Act), 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 PCA [Plumbing Code of Australia] is collectively owned by the Commonwealth, States and Territories.

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

- 2.31. The Committee notes again that the explanatory statement does not address the availability (at no cost) of Australian Standards relied upon by the instrument, which is an ongoing issue for the Committee.
- 2.32. The third instrument mentioned above is made under section 24 of the *Building (General) Regulation 2008*, which allows the Minister to determine ‘alternative requirements’ for ‘[a]n unaltered part of a substantially altered class 1, class 10a or class 10b building’. The explanatory statement for the third instrument states:

This instrument contains provisions relating to alternative requirements to the Building Code of Australia (BCA) that apply to unaltered parts of substantially altered class 1, 10a or 10b buildings.

A substantial alteration is defined in the regulation.

These provisions were previously located in the regulation. In the latest republication of the regulation, dated 1 April 2021, they were included at sections 24 to 29 inclusive. These provisions addressed energy efficiency, fire safety, swimming pool safety, glazing, stairs and barriers and handrails.

- 2.33. Section 5 of the third instrument disapplies subsection 47(5) of the Legislation Act:

5 Disapplication of notification requirement

The *Legislation Act 2001*, section 47 (5) does not apply to this instrument.

Note 1 Australian Standards are available for purchase at 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 freely available for inspection at www.abcb.gov.au.

- 2.34. The Committee notes that, in relation to this disapplication of subsection 47(5) of the Legislation Act, the explanatory statement for the third instrument states:

Section 5 of the instrument displaces the requirement in the *Legislation Act 2001* (the Legislation Act), 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 Commonwealth 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 Australian Building Codes Board (ABCB). It would not be appropriate to publicly notify the code on an ACT Government website. Section 5 of the instrument provides for alternative access to the BCA as it is not being notified on the Legislation Register.

- 2.35. Again, the Committee notes that the explanatory statement does not address the availability (at no cost) of Australian Standards relied upon by the instrument, which is an ongoing issue for the Committee.

- 2.36. In relation to each of the instruments mentioned above, the Committee reiterates its ongoing concern about the reliance on Australian Standards and, in particular, about the availability of those Standards to users of legislation, free of charge. The Committee notes that it has recently raised this issue, in correspondence with the Chief Minister and the Attorney-General.
- 2.37. The Committee notes that the explanatory statements for each of the three instruments mentioned above state that there are ‘no human rights impacts related to this Instrument’.
- 2.38. 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.
- 2.39. This comment does not require a response from the Minister.

Subordinate Laws—Comment

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

Disapplication of subsections 47(5) and (6) of the *Legislation Act 2001* / Human Rights Issues

- **Subordinate Law SL2023-4** being the *Residential Tenancies Amendment Regulation 2023 (No 1)* made under the *Residential Tenancies Act 1997*.
- 2.41. This subordinate law amends the *Residential Tenancies Regulation 1998* (according to the explanatory statement for the subordinate law), ‘to establish a minimum energy efficiency standard for premises made available for occupation under a residential tenancy agreement in the ACT.’ The substantive provisions refer to and rely on two Australian Standards – AS 4859.1 (Materials for the thermal insulation of buildings) and AS 60598.2.2:2001 (Luminaries) – ‘as in force from time to time’.
- 2.42. Section 14 of the subordinate law provides:
- 14 Disapplication of Legislation Act, s 47 (5) and (6)**
- The Legislation Act, section 47 (5) and (6) do not apply to an Australian Standard applied, adopted or incorporated under this part.
- Note* An Australian Standard applied, adopted or incorporated under this part does not need to be notified under the Legislation Act because s 47 (5) and (6) do not apply (see Legislation Act s 47 (7)). Australian Standards may be purchased at www.standards.org.au. Australian Standards are also available for inspection by members of the public at the National Library of Australia.
- 2.43. This means that the relevant Standards (and any amendments to them) do not need to be published on the ACT Legislation Register as notifiable instruments. As the Committee has indicated elsewhere in this *Scrutiny Report*, the Committee has an ongoing concern about disapplication of subsections 47(5) and (6) of the *Legislation Act 2001*, in relation to the reliance on Australian Standards. The Committee has a particular concern about the

availability of those Standards to users of legislation, free of charge. The Committee notes that it has recently raised this issue, in correspondence with the Chief Minister and the Attorney-General.

- 2.44. The Committee notes that, for this subordinate law, the explanatory statement states:

Section 14 Disapplication of Legislation Act, s 47 (5) and (6)

Ceiling insulation comes in different materials and different thicknesses which have different thermal properties. To ensure consistency in measurement, insulation materials are rated using an R value. The 'R value' is a measure of the thermal performance of insulation and is determined in accordance with a particular Australian Standard (AS- 4859.1 - Materials for the thermal insulation of buildings). To ensure rental premises achieve a particular level of thermal insulation, it was considered necessary to set the minimum standard for ceiling insulation with reference to a particular 'R value'. As the R value for insulation is determined with reference to an Australian Standard, reliance on an Australian Standard is necessary.

Copyright in Australian Standards is owned by Standards Australia, a private organisation. These documents cannot be notified on the Legislation Register without breaching Standards Australia's copyright. As such, the disapplication of section 47 (5) and (6) is necessary in this instance.

This section therefore provides that section 47 (5) and (6) of the *Legislation Act 2001* does not apply to an Australian Standard applied, adopted or incorporated under new part 3.

This removes the requirement for the text of an Australian Standard applied under the part to be notified as an instrument on the Legislation Register.

However, in disapplying section 47 (5) and (6), it is noted that the organisations that will be engaged to undertake inspections and upgrades to ensure compliance with the minimum standards in the regulation are already required to comply with Australian Standards. As such, they already have a good working knowledge of these documents to provide a report or any document to the lessor (and subsequently, any prospective tenant).

Australian Standards may be purchased at www.standards.org.au and are available at the National Library of Australia. Their availability at the National Library of Australia ensures that community members who are interested in or affected by the application of the Australian Standard can access the standard free of charge.

- 2.45. **The Committee notes, with approval, that this is a detailed justification for the disapplication of subsections 47(5) and (6) of the Legislation Act. However, the Committee reiterates its concerns about the availability Australian Standards to users of legislation, free of charge. The Committee awaits a response on these issues from the Chief Minister and the Attorney-General.**

- 2.46. The Committee notes that the explanatory statement for this subordinate law discusses human right issues, by reference to:

Rights engaged

The regulation engages the following rights under the *Human Rights Act 2004*:

- Section 8 (2): Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- Section 8 (3): Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.
- Section 11 (1): Protection of the family and children. The family is the natural and basic group unit of society and is entitled to be protected by society.
- Section 12 (a): Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

- 2.47. A detailed discussion of these rights follows, with the explanatory statement explaining that the first three rights mentioned above being promoted and the fourth – the right to privacy – being only marginally limited and with justification.
- 2.48. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.49. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Subordinate Law SL2023-5** being the *Medicines, Poisons and Therapeutic Goods Amendment Regulation 2023 (No 1)* made under section 184 of the *Medicines, Poisons and Therapeutic Goods Act 2008* supports the expansion of the COVID-19 vaccinating workforce at ACT Government-operated vaccination clinics.
- 2.50. This subordinate law amends the *Medicines, Poisons and Therapeutic Goods Regulation 2008*. The amendments relate to the prescribing of medicines by intern doctors and dealings with regulated substances and regulated goods by public employees. The explanatory statement for the subordinate law states:
- Both these changes seek to create efficiencies in the public health system through enabling people employed in health professional roles to deal with medicines in accordance with their scope of professional practice and employment.
- 2.51. The explanatory statement goes on to discuss human rights issues, by reference to the right to life, protected by section 9 of the *Human Rights Act 2004* (which is promoted):
- Ensuring the effective regulation of medicines and poisons in the ACT and the authorities that deal with them through the [subordinate law] as described above engages and promotes the right to life under the HR Act. The right to life is concerned with preventing the arbitrary deprivation of life and is relevant to the delivery of medical treatment.
- The amendment enables the Director-General to authorise a class of public employees to deal with medicines within the scope of their employment to ensure timely and safe delivery of medicines, indirectly improving patient access to medical

treatment. This amendment also enables intern doctors to prescribe medicines for patients on discharge from an institution.

Through enabling greater flexibility in the health workforce and in the safe and quality use of medicines within the public health system, these changes are considered to indirectly engage and promote the right to life.

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

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

Human Rights Issues

- **Subordinate Law SL2023-6** being the *Electoral Amendment Regulation 2023 (No 1)* made under the *Electoral Act 1992* amends the *Electoral Regulation 1993* to allow the Commissioner for Australian Capital Territory Revenue to access the ACT electoral roll for the purposes of the administration and enforcement of tax laws.

2.54. This subordinate law amends the *Electoral Regulation 1993* to allow the Commissioner for the ACT Integrity Commissioner (integrity commissioner) to access a roll kept under the *Electoral Act 1992* for the purposes prescribed in new section 4AC. The explanatory statement for the subordinate law states:

The amendment provides that the integrity commissioner may give a copy of a roll or information contained on a roll to another person or entity if they are satisfied that the person or entity requires it for a prescribed purpose. The regulations may provide for how a prescribed authority may deal with material provided.

Giving the integrity commissioner access to electoral roll information allows the commissioner to rely on best available evidence when carrying specific functions under the *Integrity Commission Act 2018* and the *Public Interest Disclosure Act 2012*, which include investigating allegedly corrupt conduct, dealing with corruption reports and referring suspected instances of criminality to appropriate authorities. It improves the integrity commissioner's ability to fulfil its functions of combatting corruption and aids to foster public confidence in the integrity of the ACT Government.

The integrity commissioner's access to electoral rolls will be for the purposes prescribed in this amendment only. Criminal penalties apply to the misuse of this information (see section 65 (2) of the *Electoral Act 1992*).

This amendment will allow the integrity commissioner to improve its ability to investigate, expose and prevent corruption, and to oversee the management of public interest disclosures in the ACT Public Service.

2.55. The explanatory statement goes on to discuss human rights issues, stating:

This Regulation is compatible with the *Human Rights Act 2004*. While it limits the right to privacy, that limitation is reasonable, necessary and proportionate.

- 2.56. A detailed justification for this statement is then set out.
- 2.57. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.58. **This comment does not require a response from the Minister.**

No Human Rights Issues

- **Subordinate Law SL2023-7** being the *Building and Construction Legislation Amendment Regulation 2023 (No 1)* made under the *Building Act 2004*, *Construction Occupations (Licensing) Act 2004*, *Unit Titles Act 2001* and the *Water and Sewerage Act 2000*.
- 2.59. This subordinate law amends the *Building (General) Regulation 2008*, the *Construction Occupations (Licensing) Regulation 2004*, the *Unit Titles Regulation 2001* and the *Water and Sewerage Regulation 2001*. According to the explanatory statement for the subordinate law:

It seeks to clarify the desired policy intent and outcome of the provisions, remove inconsistencies and reduce duplication. This is in part achieved by updating references to specific sections or parts of the Building Code of Australia (the **BCA**). Most of these amendments are minor and technical amendments to update references to old provisions of the National Construction Code (the **NCC**).

The primary purpose of the regulation is to amend the amended regulations due to a new version of the NCC coming into effect. This amendment will also address several minor and technical amendments identified by the Building Reform team or sought by Access Canberra, as the building and construction industry regulator.

- 2.60. The explanatory statement goes on to discuss human rights issues:

Consistency with Human Rights

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

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

Regulatory impact statement—No Comment

- 2.63. The Committee has examined a regulatory impact statement for the following subordinate law and has no comments on it:
- **Subordinate Law SL2023-4** being the *Residential Tenancies Amendment Regulation 2023 (No 1)* made under the *Residential Tenancies Act 1997*.

Government Responses—No Comment

- 2.64. The Committee received a response to the Committee’s comments on the following instrument and has no further comments:
- **Disallowable Instrument DI2023-7** being the Lifetime Care and Support (Catastrophic Injuries) (Home Modifications) Guidelines 2023 made under section 93 of the Lifetime Care and Support (Catastrophic Injuries) Act 2014.
- 2.65. This response can be viewed [online](#).
- 2.66. The Committee wishes to thank the Minister for Transport and City Services for his helpful response.

3. Outstanding responses

Bills/Subordinate Legislation

Report 12, dated 1 February 2022

Bills

- Electoral Amendment Bill 2021

Report 28, dated 3 May 2023

Bills

- Human Rights Commission Amendment Bill 2023
- Modern Slavery Legislation Amendment Bill 2023

Subordinate Legislation

- **Disallowable Instrument DI2023-15** being the Domestic Animals (Temporary Variation of Prohibited Areas—Glebe Park) Declaration 2023 made under section 41 of the *Domestic Animals Act 2000*.

Peter Cain MLA
Chair
May 2023