



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 35

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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

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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

ACT Teacher Quality Institute Amendment Bill 2023

- 1.1. This Bill amends the *ACT Teacher Quality Institute Act 2010* and the *ACT Teacher Quality Institute Regulation 2010* to validate the registration of teachers whose registration may not have been validly issued. The Bill removes the requirement for full registration that a person with provisional registration must not have taught for more than the prescribed period, namely 180 days, in the previous 5 years.
- 1.2. The Committee notes that this Bill was presented to the Assembly on 19 September 2023. It was passed by the Assembly on 21 September 2023 without prior consideration by this Committee.

Revenue Legislation Amendment Bill 2023

- 1.3. This Bill amends the:
 - a) *Duties Act 1999* to update various exemptions to landholder duty under Chapter 3 including where property passes to beneficiaries, securing financing and transactions made by apparent purchasers. Changes are also made to the definition of ‘land’ for Part 3.2 and when agreements to purchase, allot or issue shares or units are entered or completed. Amendments will also eliminate the double duty on alternate finance transactions of the kind where interest is prohibited.
 - b) *Rates Act 2004* to clarify the determination of average unimproved value where a Crown lease is subject to renewal, and update the name of the fire and emergency services levy to the police, fire and emergency services levy; and
 - c) *Taxation Administration Act 1999* to clarify when tax debt payable by a mortgagee is payable.

Bills—Comment

Births, Deaths and Marriages Registration Amendment Bill 2023

- 1.4. This Bill will amend the *Births, Deaths and Marriages Registration Act 1987* and *Births, Deaths and Marriages Registration Regulation 1998* to:
 - a) Reduce the age from 16 to 14 years at which a young person can apply directly to the director-general to change their registered sex or given name without having to apply to the ACT Civil and Administrative Tribunal to establish whether they understand the decision;
 - b) Allow a parent to reflect changes to their registered name or sex on the birth certificate of their child with the consent of the other parent and child (if aged 14 years or older). The parent will alternatively be able to change their child’s birth certificate to refer to the gender-neutral term ‘parent’ without anyone else’s consent;

- c) Allow a person to elect to include details of their prior and current registered sex to be reflected on their birth certificate; and
- d) Allow for a parent who has been granted sole parental responsibility for a child to apply to change their child's name and sex without the consent of the other parent. The parent applying to change their child's name or sex must be the only parent with parental responsibility for these decisions until the child is 18.

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

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

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

- 1.5. Currently, where a parent with sole parenting responsibilities wishes to change the name or sex of their child but does not have the consent of the other parent, they have to apply to the ACT Supreme Court and demonstrate that the change is in the child's best interests. The Bill will remove this requirement where the parent has sole parenting responsibilities until the child is 18.
- 1.6. By further removing the role of the other parent in consenting to major changes in their child's life, the Bill may limit the protection of family and children provided by section 11 of the HRA. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why it should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.7. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

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

- 1.8. Clauses 4 to 7 and 20 of the Bill, relating to changes on a child's birth certificate to a parent's name or relationship with their child, will commence up to 12 months after notification of the Bill unless the Minister, by written notice, fixes their commencement earlier. Section 79 of the *Legislation Act 2001*, which provides for commencement to occur at most 6 months after notification, is displaced. There is no explanation in the explanatory statement for why it is considered necessary to extend the possible commencement of these selected provisions.
- 1.9. **The Committee therefore requests information from the Minister as to why it was considered necessary to extend the possible commencement of these provisions. Consideration should be given to amending the explanatory statement to include such a justification.**

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

Building and Construction Legislation Amendment Bill 2023

- 1.10. This Bill will amend various Acts and Regulations relating to regulation of the Building and Construction sector. The amendments will include:
- a) Introducing licencing requirements for work on medical gas systems and distributed energy resources such as solar panel installations;
 - b) Requiring approval before reconnecting electrical installations that have been disconnected for more than 6 months;
 - c) Authorise inspectors to order repair or replacement of electrical equipment that is becoming dangerous; and
 - d) Other technical or minor amendments.

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

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

Right to privacy and reputation (section 12 HRA)

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

Rights in criminal proceedings (section 22 HRA)

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

- 1.11. The Bill will extend the existing provisions allowing an inspector who enters premises under the *Electrical Safety Act 1971* to require disconnection or repair of electrical equipment and installations that the inspector believes on reasonable grounds are becoming dangerous. By extending the powers upon entry into premises and preventing use of electrical equipment or installations the Bill may limit the protection of privacy provided by section 12 of the HRA.
- 1.12. The Bill will amend existing offences which include a possible penalty of imprisonment. These will include reconnecting an electrical installation that has been disconnected for six months or longer, and offences connected with removal of labels or use of electrical equipment that an inspector believes on reasonable grounds is becoming a source of danger. By extending the circumstances in which a person may be imprisoned, the Bill may limit the right to liberty and security of a person in section 18 of the HRA.
- 1.13. The Bill will require a licence to install and work on medical gas systems and distributed energy resource installations. By requiring an additional accreditation before being able to carry out certain types of work the Bill may limit the right to work and other work-related rights in section 27B of the HRA.

- 1.14. The Bill will introduce or amend several strict liability offences which may limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA.
- 1.15. Each of these possible limitations of rights under the HRA is recognised in the explanatory statement accompanying the Bill which sets out why any limitation should be considered reasonable using the framework in section 28 of the HRA. Subject to the following comment the Committee refers that statement to the Assembly.
- 1.16. The Bill will amend the current strict liability offence in section 100 of the *Building Act 2004* for an approved fidelity fund scheme not complying with the conditions imposed on the scheme. The Bill will retain the current penalty of 60 penalty units. The Committee notes that this penalty is higher than the maximum 50 penalty units for strict liability offences provided for under the Guide for Framing Offences.¹ **The Committee therefore requests further information from the Minister on why a maximum penalty of 60 penalty units is considered necessary for this strict liability offence.**

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

Do any provisions of the Bill inappropriately make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions?—Committee Resolution of Appointment paragraph (10)(a)(iii)

- 1.17. The Bill will amend the Building Act to make the approval and additional conditions imposed on fidelity fund schemes a decision for the Minister rather than the Planning and Land Authority. There is currently no provision for these decisions to be subject to review in the ACT Civil and Administrative Tribunal.² The Committee notes that the explanatory statement states:

Prior to commencement of this provision, consideration will be given to whether the Building (General) Regulation 2008 should be amended to include this and other decisions in relation to fidelity fund schemes to be reviewable decisions.

- 1.18. **The Committee considers that these decisions may appropriately be subject to review and requests further information from the Minister on why these decisions are not included in the reviewable decisions provided for in regulations.**

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

¹ Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010 p 29.

² See the reviewable decisions as set out in schedule 4 of the Building (General) Regulation 2008.

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

Use of Notifiable Instrument

- 1.19. The Bill will amend the *Construction Occupations (Licensing) Regulation 2004* to require a licenced electrician to have an endorsement before they can do or supervise electrical wiring work on a distributed energy resource (DER). What constitutes a DER will be declared by the Minister in a notifiable instrument.
- 1.20. There are a number of offences under the *Construction Occupations (Licensing) Act 2004* related to carrying out electrical work without a licence or an appropriate endorsement. The Bill will therefore provide for the work for which an electrician must have an endorsement to avoid the commission of an offence to be defined by the Minister in a notifiable instrument. In the Committee's view, such a definition should be provided in primary legislation or, perhaps due to its technical or evolving nature, a disallowable instrument.
- 1.21. There is no justification provided in the explanatory statement accompanying the Bill for why the determination of what constitutes a DER will be determined in a notifiable instrument. The explanatory statement describes the role of the Minister in the following way:

The criteria required for licensed electricians to work on certain DER will be determined by the Minister and will depend on evidence as to the specific skills and experience required to undertake certain DER work in addition to the existing requirements for obtaining an unrestricted electrician licence.

The Committee notes that the criteria to be applied in deciding whether to endorse an individual's licence as set out in section 32 of the Regulations and applied by the registrar is unchanged by this Bill.

- 1.22. The explanatory statement also states:

DER is a term commonly understood by industry and is the term used in the National Construction Code (NCC), the National Electricity Rules, relevant Australian Standards and is the term used by the Australian Energy Market Operator (AEMO), Australian Energy Market Commission (AEMC), Australian Renewable Energy Agency (ARENA) and the Clean Energy Council (CEC).

- 1.23. The explanatory statement also suggests that a substantial number of electricians will currently have accreditation issued by the CEC which may be sufficient to gain an endorsement. The Bill will also provide for a six-month transition period before electricians must be endorsed to work on DER. However, these do not prevent changes to what work needs to be endorsed to be determined by notifiable instrument without the opportunity for scrutiny by this Committee or the Assembly.

1.24. The Committee therefore requests further information from the Minister as to why it is necessary for declarations of distributed energy resources to be by notifiable instrument.

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

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

1.25. The Bill will provide for the Minister to approve a code of professional conduct for registered architects or architectural services. An approved code may incorporate laws, Australian Standards or instruments as in force from time to time. Subsections 47(5) and 47(6) are displaced, with the effect that any law, standard or instrument so incorporated does not have to be notified on the Legislation Register. However, to be enforceable by or against the Territory, any incorporated instrument must either be registered, available for inspection at an ACT government office, or accessible on an ACT government website.

1.26. The explanatory statement accompanying the Bill in outlining the relevant provision describes why this approach to incorporation of instruments has been taken. It states that the displacement of notification requirements:

will allow a consistent approach to the incorporation of instruments/documents whether copyrighted or not or otherwise publicly available. There may also be instances where it is not practical to publish information due to its volume and inefficient due to it being otherwise publicly available.

1.27. However, the Committee notes that there is no provision in the Bill which will facilitate access to any Australian Standard which may be incorporated in any code of professional conduct. There is no explanation for the distinction drawn between laws and Australian Standards on the one hand and other incorporated instruments on the other. While laws of other jurisdictions would invariably be publicly available, Australian Standards may only be accessible at significant cost.

1.28. The explanatory statement does state:

As a code of professional conduct is in the form of a disallowable instrument it will be accompanied by an explanatory statement which will explain how any incorporated, applied or adopted documents in the code will be made available.

The Committee would therefore expect that any Australian Standard incorporated into a code would be accompanied by a statement as to how it may be accessed. However, the Committee remains concerned that Australian Standards may be incorporated without provision for public access. **The Committee therefore requests further information on why the Bill treats Australian Standards differently to other incorporated instruments.**

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

Human Rights (Complaints) Legislation Amendment Bill 2023

- 1.29. This Bill will amend the *Human Rights Act 2004* and the *Human Rights Commission Act 2005* to enable community members to make complaints about alleged breaches of human rights obligations of public authorities under the Human Rights Act to the ACT Human Rights Commission for confidential conciliation. The Bill will also require the relevant Assembly committee to report on human rights issues raised in subordinate legislation.

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

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

Right to privacy and reputation (section 12 HRA)

- 1.30. The Bill will amend the Human Rights Commission Act to add human rights complaints to the complaints that can be made to and dealt with by the Human Rights Commission. In dealing with a complaint, the Commission has the power to request information, documents and other things and to require attendance to answer questions. The Bill may therefore extend the circumstances in which the Commission may act to limit the protection of privacy and reputation provided by section 12 of the HRA.
- 1.31. The explanatory statement accompanying the Bill recognises this potential limitation and sets out why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Committee.
- 1.32. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

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

- 1.33. This Bill is an omnibus Bill which amends a number of Acts and Regulations in the Attorney-General's portfolio.

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

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

Right to privacy and reputation (section 12 HRA)

- 1.34. The Bill includes various provisions which may limit the protection of privacy and reputation provided by section 12 of the HRA. These include:
- a) The Bill will amend the *Human Rights Commission Act 2005* to expand the circumstances in which the ACT Human Rights Commission is able to investigate a complaint that a vulnerable person is at risk of abuse, neglect or exploitation without first obtaining the consent of the vulnerable person. Currently the Commission can investigate without consent where the vulnerable person is not capable of giving consent or it is not appropriate to obtain consent because of the seriousness of the complaint or the risk to the personal safety of the vulnerable person. The Bill will expand these circumstances to include where obtaining consent is not possible or seeking consent may result in a risk of harm to the vulnerable person.

- b) The Bill will amend the *Residential Tenancies Act 1997* to provide for termination of temporary housing assistance provided where a tenant entitled to housing assistance has left the premises and the remaining tenant remains in the property. Where the remaining tenant does not apply for ongoing housing assistance within six weeks, they can be given 26 weeks' notice to vacate the premises. If the remaining tenant then applies for housing assistance but the housing commissioner decides they are not eligible, then they can be given at least 12 weeks, or up to the end of the initial period of 26 weeks, notice to vacate.
- c) The Bill will amend the *Wills Act 1968* to allow wills and identifying information about the will to be given by the registrar of the Supreme Court to the public trustee and guardian to allow the development of a centralised wills register.

1.35. Each of these potential limitations of the protection of privacy and reputation is recognised in the explanatory statement accompanying the Bill along with why any limitation should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.

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

Notification requirements

1.36. The Bill will amend the *Legal Profession Act 2006* and the *ACT Civil and Administrative Tribunal Act 2008* to remove the requirement that forms approved under those Acts be notifiable instruments. In outlining the effect of this amendment to the Legal Profession Act, for example, the explanatory statement states:

This requirement is administratively burdensome and reduces flexibility for the councils of the ACT Law Society and ACT Bar Association to amend and create new approved forms. Removing this requirement will streamline processes for the councils and support any future changes to utilising 'smart forms' which are unable to be notified on the Legislation Register.

The amendment to the ACT Civil and Administrative Tribunal Act is outlined to similar effect.

1.37. The Committee is concerned that these provisions may create uncertainty over which form has been approved and must be used. Both the Legal Profession Act and the ACT Civil and Administrative Tribunal Act provide for approval of forms. If a form is approved for a particular purpose, then the approved form must be used for that purpose. The consequences of failing to use the approved form are not made clear. Forms approved by the Tribunal must be in writing. However, there is no requirement for how approved forms are to be identified and made accessible to those who may have need of them, nor scope for transparency on the appropriateness or otherwise of the form.

- 1.38. **The Committee therefore requests information from the Minister as to what assurance can be provided that identification and accessibility of the approved form will not be reduced by removing the requirement that the form be notified on the Legislation Register.**

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

Mental Health Amendment Bill 2023

- 1.39. This Bill will amend the *Mental Health Act 2015* to:
- a) extend the ways in which a person who contravenes a mental health order or forensic mental health order can be given notice that a repeated failure to comply with the order can result in them being apprehended;
 - b) allow a person apprehended under emergency detention to be taken to an approved mental health facility by a police officer, authorised ambulance paramedic or doctor who was not involved in the initial apprehension of the person;
 - c) require the ACT Civil and Administrative Tribunal (ACAT), when reviewing the ongoing detention of a person detained under part 13 of the *Crimes Act 1900* (which relates to unfitness to plead and mental impairment), to also have regard to information provided by the chief psychiatrist or director-general in relation to the treatment, care or support a person requires;
 - d) amend the definition of restraint to not include use of a spit hood; and
 - e) make other consequential, minor or technical amendments.

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

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

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

- 1.40. The Bill will amend various provisions of the *Mental Health Act* which relate to the apprehension of a person and transport to a mental health facility. The amendments to sections 77 and 124 of the Act will extend the ways in which a person can be given notice that they have contravened a mental health order or forensic mental health order, with the consequence that further breaches may authorise their apprehension and confinement. The amendments to section 80 of the Act will extend the number of persons who are authorised to transport a person to a mental health facility beyond the officer, paramedic or doctor who made the initial assessment that immediate examination or treatment, care or support was required. These provisions may limit the right to liberty and security of a person under section 18 of the HRA.
- 1.41. These possible limitations are recognised by the explanatory statement accompanying the Bill along with a statement of 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.

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

Nature Conservation Amendment Bill 2023

- 1.43. This Bill will amend the *Nature Conservation Act 2014* to prohibit the use of fruit netting with a hole size greater than 5mm x 5mm in residential homes.

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

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

Right to privacy and reputation (section 12 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.44. The Bill will introduce two strict liability offences: putting mesh netting with a hole size greater than 5mm x 5mm on a plant on residential premises or be the occupier of premises in which such netting is used; and to display prohibited mesh netting for sale by retail without displaying a sign with the required statement. By restricting the use of netting in a person's home, and extending the circumstances in which enforcement action might be taken including entry onto residential premises, including without consent in limited circumstances, the Bill may limit the protection of privacy provided by section 12 of the HRA. By introducing strict liability offences, the Bill may limit the presumption of innocence protected as a right in criminal proceedings by section 22 of the HRA.
- 1.45. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.46. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Responses—Comment

Bail Amendment Bill 2023

- 1.47. On 25 September 2023, the Committee received a response from Dr Paterson MLA to its comments regarding the Bail Amendment Bill 2023. The Committee had raised the concern that, by removing the presumption of bail in relation to three specified offences, the Bill may limit the right to liberty and security of a person in section 18 of the HRA. In particular, the Committee considered that a decision to refuse bail on the basis that it was the preferable decision in the circumstances, as would be permitted under the Bill, was contrary to the position taken in commentary on the right to liberty that detention pending trial must be 'reasonable and necessary' in the circumstances. Recognition that removal of bail for the specific offences provided for in the Bill may limit the right to liberty should, in the Committee's view, have been provided in the explanatory statement along with a justification for why any limitation should be considered reasonable using the framework in section 28 of the HRA.

1.48. The Committee also raised concerns that removing the presumption of bail may require the court to consider the nature and seriousness of the offence and strength of the evidence and hence may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA. The presumption of bail requires that the prosecution establish these matters before any burden is placed on the accused. Removing the presumption of bail means that the court does not necessarily start from the position that the accused is innocent of the offences alleged against them.

1.49. Dr Paterson, in her response to the Committee, states that:

Given the evidence of the serious nature of these crimes, the high risk to the community and the high level of repeat offending for these offences, it is appropriate that these three offences sit as no presumption for Bail.

...

The Bill's amendments are targeted at specific offenses where there is substantial data suggesting offenders charged with these crimes have a very high rate of recidivism. There are many circumstances in the ACT where (particularly repeat offenders) have very seriously put innocent lives at risk, or worse, have injured or killed innocent people while out on bail.

1.50. In the Committee's views, these and other reasons for why the presumption of bail should not apply to the offences in question are appropriately included in setting out why any limitation of human rights should be considered reasonable using the framework in section 28 of the HRA. **The Committee again asks that consideration be given to amending the explanatory statement to include such a statement.**

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

Government Responses—No Comment

1.52. The Committee received a response to the Committee's comments on the following Bill and has no further comments:

a) *Biosecurity Bill 2023*

b) *Human Rights Commission Amendment Bill 2023*

1.53. This response can be viewed online.

1.54. The Committee wishes to thank the Minister for the Environment for her helpful response.

2. Subordinate Legislation

Subordinate Laws—Comment

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

Human Rights Issues / Strict Liability offence

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

- 2.2. The Committee notes that, according to the explanatory statement, this subordinate law replaces the *Planning and Development Regulation 2008*, following a review of the ACT planning system. The explanatory statement states that it ‘contains administrative and process provisions to support the operation of the *Planning Act 2023* in the reformed planning system.’ The Committee notes that, under section 2 of the Planning Act, the power to make this subordinate law (section 523 of the Planning Act) has not yet commenced and that (as recognised in section 2 of the subordinate law) the commencement of the subordinate law is dependent on that commencement.³

- 2.3. The explanatory statement goes on:

The regulation provides the requirements of development proposals for significant development, including:

- development proposals that require consultation with the design review panel;
- development proposals that require an assessment of environmental impact and the requirements needed to be undertaken to prepare the assessment;
- environmental impact assessment panel formation and operation;
- referral entities for significant development and the timeframes they must comply with;
- public notification periods and exemptions; and
- prohibited development.

The regulation provides for the direct sale of leases, including:

- direct sales requiring approval by Executive;
- direct sale criteria for territory and Commonwealth entities;
- direct sale criteria for non-government educational establishments;
- direct sale criterion for unallocated land for housing commissioner;
- direct sale criteria for leases of contiguous unleased land that is public land;
- direct sale criteria for UNSW campus land for University of NSW;
- direct sale criteria for community organisations;
- direct sale criteria for supportive accommodation;
- direct sale criteria for rural leases

³ The Committee notes that this is permitted by section 81 of the *Legislation Act 2001*.

- direct sales requiring approval by Minister
- direct sale criteria for territory;
- direct sale criteria for leases of contiguous unleased land other than public land;
and
- direct sales not requiring approval.

The regulation provides for the grant of leases, subletting of leases and grants of further leases, as well as community leases granted by tender.

The regulation provides for lease variations, discharge amounts for rural leases, surrendering and terminating leases and leases with building and development provisions.

2.4. The explanatory statement discusses human rights issues:

SCRUTINY OF BILLS COMMITTEE PRINCIPLES AND HUMAN RIGHTS

During the development of the regulation due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act).

The regulation promotes section 12 (right to privacy and reputation) of the HR Act.

The right to privacy protects individuals from unlawful or arbitrary interference with privacy and home and encompasses the idea that individuals should have a separate area of autonomous space free from excessive government intervention and unsolicited intrusion by other individuals.

The *Planning Act 2023* promotes an outcomes-focused approach to planning. It provides that development applications will be considered against the planning outcomes set out in the ACT's various plans and strategies. It seeks to reduce government intervention in prescribing how development should be undertaken on their properties. Instead, it provides space for developers, and therefore home-owners, to meet planning outcomes in ways that they believe best meet the particular conditions and circumstances in which development is to take place. The outcomes-focused approach does not mean that no restrictions exist in seeking to meet planning outcomes.

2.5. While this discussion is helpful, the Committee notes that the subordinate law contains a strict liability provision, section 25. This is acknowledged in the 'clause notes' section of the explanatory statement:

Clause 25 Inquiry to be public—Act, s 523 (2) (d)

This clause establishes the general principle that an inquiry conducted by an inquiry panel to be conducted in public and the exceptions to this principle. It also creates a strict liability offence for contravention of inquiry panel directions.

- 2.6. The Committee has a long-held expectation that strict liability offences are addressed – and justified – in explanatory statements for subordinate legislation. In its document titled [*Subordinate legislation—Technical and stylistic standards—Tips/Traps*](#),⁴ the Committee stated:

11 Strict and absolute liability offences

11.1 As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the explanatory statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

- 2.7. In addition, the Committee notes that strict liability offences engage the presumption of innocence, protected by subsection 22(1) of the *Human Rights Act 2004*. As a result, the Committee would have expected the human rights discussion, in the explanatory statement for the subordinate law, to have addressed the right to the presumption of innocence.

The Committee draws this subordinate law to the attention of the Legislative Assembly, under principle (10)(d) of the Committee’s Resolution of Appointment, on the basis that the explanatory statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee and asks the Minister to respond before the Legislative Assembly’s capacity to move to disallow the subordinate law expires.

- 2.8. **The Committee also draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law, but does not require a response from the Minister.**

Human Rights Issues

Subordinate Law SL2023-21 being the Planning (Exempt Development) Regulation 2023 made under the *Planning Act 2023*

- 2.9. This subordinate law is evidently part of the reform of the ACT planning system that is discussed above, in relation to SL2023-20. It appears that the subordinate law replaces elements of the *Planning and Development Regulation 2008* dealing with exempt development, with variations that are detailed in the explanatory statement. As with SL2023-20, the commencement of this subordinate law is dependent on the commencement of section 523 of the *Planning Act 2023*.

⁴ https://www.parliament.act.gov.au/data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf.

2.10. The explanatory statement for this subordinate law states:

Exempt development is an important concept for the effective operation of the planning system; it allows low-risk development to occur without development approval.

Given the regular use of exemptions by the development and building industries, the approach through the reform process was to prioritise certainty over change, so that changes only occur where necessary. There have been minor changes to drafting of some provisions to improve clarity.

A small number of new exemptions have been included that were not permitted under the previous *Planning and Development Regulation 2008*.

2.11. The explanatory statement goes on to discuss the new exemptions:

A new exemption has been added to allow some murals (street art) to be painted on to buildings without the need for development approval. This reflects a desire to support street art, which adds to the vibrancy and attractiveness of the city.

The new exemption contains important limitations to protect against offensive or unsightly murals, and potential driver distraction. These include that the mural:

- is not within a residential zone
- is undertaken with the consent of the lessee or land custodian
- does not contain material that discriminates against or vilifies any person or group, is offensive or sexually explicit
- does not contain advertising material
- is not illuminated or animated
- does not use reflective paint; and
- is not more than two storeys in height.

A new exemption has also been added for minor utility works. This allows minor works necessary for utilities to provide essential services to the community, such as fences around their facilities, lighting, modifications to existing infrastructure and excavation for exempt work. The new exemption contains important limitations to protect against impacts to nearby residents and the public, including, where relevant, height and plan area limits, a limit on distance to residential blocks, and compliance with other regulatory schemes.

2.12. As with SL2023-20, the explanatory statement discusses human rights issues, with reference to the right to privacy:

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During the development of the regulation due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act).

The regulation promotes section 12 (right to privacy and reputation) of the HR Act.

The right to privacy protects individuals from unlawful or arbitrary interference with privacy and home and encompasses the idea that individuals should have a separate area of autonomous space free from excessive government intervention and unsolicited intrusion by other individuals.

The *Planning Act 2023* promotes an outcomes-focused approach to planning. It provides that development applications will be considered against the planning outcomes set out in the ACT's various plans and strategies. It seeks to reduce government intervention in prescribing how development should be undertaken on their properties. Instead, it provides space for developers, and therefore homeowners, to meet planning outcomes in ways that they believe best meet the particular conditions and circumstances in which development is to take place. The outcomes-focused approach does not mean that no restrictions exist in seeking to meet planning outcomes.

- 2.13. Unlike SL2023-20, this subordinate law does not include any strict liability offences.
- 2.14. **The Committee also draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law, but does not require a response from the Minister.**

Government Response—Comment

Subordinate Law SL2023-11 being the Health Infrastructure Enabling Regulation 2023 made under the *Health Infrastructure Enabling Act 2023*

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

- 2.15. The Committee first commented on the first subordinate law mentioned above in *Scrutiny Report 32* of the 10th Assembly (22 August 2023).⁵ In that Scrutiny Report, the Committee noted that, according to the explanatory statement for the subordinate law, its purpose was 'to support the introduction of the *Health Infrastructure Enabling Act 2023* ... as a Territory law'. The Committee noted that that Act relates to the acquisition of Calvary Hospital.
- 2.16. After discussing the content of the subordinate law (including noting that it had earlier commented on the Bill for the enabling Act, on the basis that it might involve an inappropriate delegation of legislative power⁶), the Committee drew the attention of the Legislative Assembly to the subordinate law, under subparagraph 10(c)(iv) of the Committee's Resolution of Appointment, on the basis that it may contain matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly.

⁵ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0018/2271312/Scrutiny-Report-no.-32.pdf.

⁶ See *Scrutiny Report 29* of the 10th Assembly (23 May 2023) (available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/2227295/Scrutiny-Report-No-29.pdf).

- 2.17. In making this comment, the Committee noted that, given its earlier comments on the breadth of the regulation-making powers in the enabling legislation, it would have expected at least some attempt being made, in the explanatory statement for the subordinate law, to justify the inclusion of matters identified by the Committee (in *Scrutiny Report 32*) in subordinate, rather than primary, legislation. The Committee noted that it could not identify any such justification in the explanatory statement for the subordinate law.
- 2.18. The Committee sought a response from the Minister on these comments.
- 2.19. The Minister for Health responded to the Committee's comments on the first subordinate law (i.e., SL2023-11), in a letter dated 11 September 2023.⁷ The Committee considered that response in *Scrutiny Report 34* of the 10th Assembly (18 September 2023). The essence of the Minister's (first) response is reflected in the following paragraph:
- The Act and Regulation are a bespoke scheme and were deliberately structured in that way to allow appropriate levels of flexibility. Having the Regulation contain mechanical and process provisions allows for the fine tuning of those provisions, as required, given that the acquisition and transition is a complex exercise. As an example, the *Health Infrastructure Enabling Amendment Regulation 2023 (No 1)* amended the Regulation to provide greater clarity, progress Government obligations on providing just terms under the Act, and to respond to tentative concerns expressed by the ACT Supreme Court during the hearing of Calvary's challenge to the validity of the Act and Regulation.
- 2.20. In *Scrutiny Report 34*, the Committee recorded its disappointment that the Minister's response did not directly address the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation, as the Committee considered that there is a lack of guidance, on this issue, in the ACT.
- 2.21. The Committee also referred to judicial and academic commentary on the scope of the 'necessary or convenient' power, set out in subsection 44(1) of the *Legislation Act 2001*, referred to in the Minister's response but not substantially discussed in the Minister's response. In making this comment, the Committee noted that the scope of the 'necessary or convenient' power was a complicated legal issue, in terms of what it allowed to be done through regulations.
- 2.22. The Committee concluded its discussion (in *Scrutiny Report 34*) by noting that it had hoped that the Minister's response might have provided guidance, for the ACT jurisdiction, on the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation, referring to the guidance provided (for example) by paragraph 1.10 of the Commonwealth's *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet,⁸ of which the Committee had not been able to identify an ACT equivalent.

⁷ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/2281940/Letter-Minister-Stephen-Smith-to-P-Cain.pdf.

⁸ Available at <https://www.pmc.gov.au/resources/legislation-handbook>.

- 2.23. The Committee sought the Minister’s further advice as to whether, in fact, such guidance material exists, within the ACT Government, on the issue of the appropriate delineation between material that is appropriate for subordinate legislation and material that should only be set out in primary legislation, similar to what is set out in the Commonwealth’s *Legislation Handbook*.
- 2.24. The Minister responded to these further comments, in a letter dated 27 September 2023.⁹ Significantly, the Minister drew the Committee’s attention to the document titled *ACT Legislation—Developing Legislation and Working with PCO*, available on the ACT Parliamentary Counsel’s website.¹⁰ As the Minister noted, the document in question contains guidance similar to that provided in the Commonwealth’s *Legislation Handbook* and also referred to some of the academic commentary referenced by the Committee, in *Scrutiny Report 34*.
- 2.25. The Committee thanks the Minister for drawing its attention to the document.
- 2.26. Against this background material, the Minister’s response then offers the following justification for the inclusion of relevant material in the regulations:

The ACT Legislation Guidelines provide guidance on when legislation and regulations may be required. The guideline (citing Pearce and Argument, *Delegated Legislation in Australia*, 5th ed, LexisNexis Butterworths, Australia 2017, p 6) outlines some of the main reasons that regulations or other statutory instruments may be used, including:

- to reduce pressure on parliamentary time;
- legislation is too technical or detailed for parliamentary consideration; and
- legislation needs to deal with rapidly changing or uncertain situations, or should be flexible and responsive to changing needs.

In alignment with the above, and in response to the Committee’s request for comment on this matter in *Scrutiny Report 34*, the Act contains the key enabling provisions about acquisition, the process leading up to transition and the transition. The Regulation provides for “mechanical” and process provisions to support the Act. I consider that the Regulation was and remains appropriate to deal with rapidly changing or uncertain situations and the need to be flexible and responsive to changing needs within a public health environment.

The Regulation appropriately deals with matters ancillary to the acquisition which are of importance to the continued operation of the Calvary Public Hospital Bruce as the North Canberra Hospital, such as offers of employment, novation or assignment of contracts, amendment to the Crown lease and compensation. However, the Regulation does not operate to extend the scope or general operation of the Act and was validly made under s 28 of the Act.

⁹ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2293954/SL2023-14-Health-Infrastructure-Enabling-Amendment-Regulation-2023-No-1.pdf.

¹⁰ Available at https://www.pco.act.gov.au/_data/assets/pdf_file/0003/2216037/Developing-Legislation-and-Working-with-PCO.pdf.

2.27. The response goes on:

The ACT Legislative Assembly has determined to give the Executive clear scope to make the Regulation under s 28, by enacting ss 10(3) and 14(2) of the Act, and given the operation of s 44(1)(a) of the *Legislation Act 2001* (the Legislation Act). While it remains available, given the operation of s 44(1)(b) of the Legislation Act, the necessary or convenient power included in s 28 of the Act is subsidiary or incidental to the clear scope of the power in s 28 to make the Regulations given by ss 10(3) and 14(2) of the Act and s 44(1)(a) of the Legislation Act.

2.28. Turning to the Committee's comments by reference to the Commonwealth's *Legislation Handbook*, the response states:

I note that the Committee refers to criteria in the PM&C Handbook (1.10 (b), (c), (d), (j) and (l)) as examples that "might (possibly) be relevant to determining the appropriate 'mix' between primary and subordinate legislation for the Calvary acquisition". The criteria identified are all matters for which the Act provides and where the Regulation operates simply to support the key provisions in the Act. Specifically, the Act provides for:

- the acquisition of that part of the land on which Calvary Public Hospital Bruce was situated (Block 1 Section 1 Division of Bruce) to construct a new northside public hospital;
- the transition of the operation of the public hospital to the Territory, including by terminating the Calvary Network Agreement;
- the safe and orderly transition of Calvary Public Hospital Bruce employees, assets and services to the Territory;
- the continuity of, and standards of provision for, public hospital services at the hospital both during and immediately following the transition;
- the Territory to manage its obligations and liabilities in relation to the public hospital effectively, including those liabilities arising in relation to the operation of the public hospital before the transition; and
- any interest acquired by the Territory under the Act to be acquired on just terms.

2.29. The Committee thanks the Minister for this detailed and helpful response.

2.30. The Committee notes that the Minister's response also deals with the Committee's comments on the second subordinate law mentioned above (i.e. SL2023-14), made in *Scrutiny Report 33* of the 10th Assembly (5 September 2023).¹¹ In that Scrutiny Report, the Committee noted that the explanatory statement for the subordinate law (which amended the earlier subordinate law – SL2023-11) indicated that it had been made 'in response to tentative concerns expressed in' *Calvary Health Care ACT Limited v Australian Capital Territory* (SC 225 of 2023), a Supreme Court challenge to the legislation relating to the acquisition of Calvary Hospital.

¹¹ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2279104/Scrutiny-Report-No-33.pdf.

- 2.31. In *Scrutiny Report 33*, the Committee referred to its comments on the earlier subordinate law (noting, also, that it had not received a response to those comments) and went on to state that, while it acknowledged that there was not necessarily a direct correlation between the issue that had apparently been identified in the Supreme Court proceedings and the concerns that the Committee had expressed in relation to the earlier subordinate law, the Committee suggested that it might be argued that the content of the earlier subordinate law might have benefited from the closer scrutiny that would have been brought to bear, by the legislature, if it had been included in the primary legislation. On that basis, the Committee also re-iterated the concerns expressed about the earlier subordinate law.
- 2.32. In *Scrutiny Report 33*, the Committee drew the (second) subordinate law to the attention of the Legislative Assembly, under subparagraph 10(c)(iv) of the Committee's Resolution of Appointment, on the basis that it may contain matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly.
- 2.33. As indicated above, the Minister's 27 September 2023 response also addresses the Committee's comments on the second subordinate law mentioned above:

Having the Regulation contain mechanical and process provisions allows for the fine tuning of those provisions, as required, given that the acquisition and transition is a complex exercise. Section 28 of the Act is a discretionary regulation-making power, and the Act contemplates the making of regulations about several matters.

Paragraph [1.64] of the Scrutiny Report refers to section 13 of the Amendment Regulation, which inserted a new section 33A into the Regulation. The new section 33A of the Regulation makes it clear that nothing in the Regulation excludes the supervisory jurisdiction of a court of competent jurisdiction to determine a question of law (s 33A(a)) or the just terms for any acquisition of property under the Act (s 33A(b)), in circumstances where it is alleged the application of the Regulation does not adequately provide just terms for an acquisition of property under the Act.

Section 33A was inserted into the Regulation by section 13 of the Amendment Regulation for the avoidance of doubt. That is, to make certain and clarify that s 10(1) of the Act retains the Court's jurisdiction to determine just terms for any acquisition of property that is not sufficiently provided for by the Act read with the Regulation. Section 33A makes it clear that nothing in the Regulation impacts on the supervisory jurisdiction of the Court, and if there is an alleged gap in the Regulation, the Court can determine that allegation.

Accordingly, s 33A of the Regulation simply operates to avoid any doubt about the supervisory jurisdiction of the Court to determine, in relation to an acquisition of property by the Act, a legal dispute that might arise in the course of the claims process under the Regulation.

- 2.34. The Minister is correct in noting that the regulations contain mechanical and process provisions and also '[allow] for the fine tuning of those provisions, as required, given that the acquisition and transition is a complex exercise'. The Minister is also correct that the capacity to make adjustments by regulations, rather than by amendment of the primary legislation, enables the Executive to 'deal with rapidly changing or uncertain situations' and to be 'flexible and responsive to changing needs', as foreshadowed by Pearce and Argument. However, the Committee also notes that the response does not address the Committee's principal point, on this issue – might it be argued that the content of the earlier subordinate law might have benefited from the closer scrutiny that would have been brought to bear, by the legislature, if it had been included in the primary legislation?
- 2.35. Again, the Committee thanks the Minister for this helpful response.
- 2.36. **These comments do not require a further response from the Minister.**

3. Outstanding responses

Bills

Report 28, dated 3 May 2023

Bill

- Modern Slavery Legislation Amendment Bill 2023

Report 29, dated 23 May 2023

Bill

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

Report 34, dated 18 September 2023

Bill

- Building (Swimming Pool Safety) Legislation Amendment Bill 2023
- Children and Young People Amendment Bill 2023
- Circular Economy Bill 2023
- Gaming Machine Amendment Bill 2023

Marisa Paterson MLA
Acting Chair

October 2023