



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

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

# **Scrutiny Report 39**

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

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Approved for publication

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10th Assembly  
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# About the committee

## Establishing resolution

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

The Committee is responsible for the following areas:

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

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

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Hamish Finlay, Committee Secretary

Frieda Scott, Assistant Secretary

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

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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

### Appropriation Bill 2023-2024 (No 2)

- 1.1. This Bill provides for appropriations for:
- a) net controlled recurrent payments;
  - b) capital injections; and
  - c) payments to be made on behalf of the Territory.

### Appropriation (Office of the Legislative Assembly) Bill 2023-2024 (No 2)

- 1.2. This Bill provides for appropriations for the Office of the Legislative Assembly in relation to payments to be made on behalf of the Territory.

### Children and Young People Amendment Bill 2024

- 1.3. This Bill will amend the *Children and Young People Amendment Act 2023* to delay the commencement of that Act from 31 March 2024 until 1 July 2024.

### Climate Change and Greenhouse Gas Reduction (Membership) Amendment Bill 2024

- 1.4. This Bill will amend the *Climate Change and Greenhouse Gas Reduction Act 2010* to enable the Minister to appoint an additional member to the ACT Climate Change Council and for the Council, as far as practicable, to include two Aboriginal or Torres Strait Islander members.

## Bills—Comment

### Biosecurity Legislation Amendment Bill 2024

- 1.5. This Bill amends a variety of legislation to make minor, consequential or technical changes related to the commencement of the *Biosecurity Act 2023*.

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

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

Right to privacy and reputation (section 12 HRA)

Right to a fair trial (section 21 HRA)

- 1.6. The Bill will allow the sharing of information obtained in the exercise of functions under specified biosecurity-related Acts. The information can be given to the director-general or an authorised person when the provider of the information is satisfied, on reasonable grounds, that the information is necessary for the exercise of the director-general's or authorised person's functions under the Biosecurity Act. However, the authority to share information doesn't include sensitive or personal health information. By allowing for the sharing of personal or other private information the Bill may limit the protection of privacy provided by section 12 of the HRA.

- 1.7. The Bill will limit the right to seek review under the *Administrative Decisions (Judicial Review) Act 1989* for Biosecurity emergency declarations and Biosecurity control declarations under the Biosecurity Act. An application for review has to be made to the Supreme Court within 10 business days. By limiting access to one form of judicial review (other remedies for judicial review would still be available in the Supreme Court) the Bill may limit the right to a fair trial under section 21 of the HRA.
- 1.8. The Bill will also extend the current default period of 12 months in which prosecutions can be brought to 24 months for various offences, including strict liability offences, under the Biosecurity Act. Extending the prosecution period may also limit the right to a fair trial under section 21 of the HRA.
- 1.9. 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.
- 1.10. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

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

#### Henry VIII clause

- 1.11. The Bill will introduce transition provisions into the Biosecurity Act which authorise transition regulations which modify the Act to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately, or appropriately, dealt with by other transition provisions in that Act. Such a regulation will have effect despite anything elsewhere in the Act or in another territory law. The Bill will therefore introduce a Henry VIII clause.
- 1.12. The explanatory statement accompanying the Bill includes the following outline of the Henry VIII clause:

Section 234D (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify part 16A of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.
- 1.13. The Committee is concerned that this explanation is not sufficient to justify the introduction of a broad regulation making power of this form in the context of this particular Bill. The Committee notes that the Henry VIII clause is being introduced into an Act which has already been passed by the Assembly but has yet to commence. **The Committee therefore requests further information from the Minister on why the Henry VIII clause is considered necessary in the context of this Bill, including:**



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

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

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

## Civil Law (Wrongs) Amendment Bill 2024

1.14. This Bill will amend the *Civil Law (Wrongs) Act 2002* to introduce exemptions and defences relating to the publication of material on on-line services. The Bill gives effect to Stage 2 Part A and Part B amendments to Australia’s model defamation laws agreed to by the attorneys-general of all Australian jurisdictions (other than South Australia) on 22 September 2023. The Bill will:

- a) exempt digital intermediaries from liability in defamation law where they play a passive role as a conduit, caching or storage service;
- b) exempt search engines for automated results not promoted or sponsored for commercial benefit;
- c) provide a form of innocent dissemination defence specifically for digital intermediaries who provide an accessible complaints mechanism and remove or block access to content on their service or platform within 7 days of receiving a complaint;
- d) empower courts to make orders requiring digital intermediaries to remove or block access even if not a party to the proceedings;
- e) require courts to consider privacy, safety and public interest considerations when assisting plaintiffs to identify potential defendants;
- f) amending what constitutes an offer to make amends to include offers to remove or block access to content as an alternative to publishing a correction; and
- g) extending the defence of absolute privilege to include disclosures to police and specified statutory bodies.

### 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)

Freedom of expression (section 16 HRA)

1.15. The explanatory statement accompanying the Bill recognises the Bill’s potential limitation of the following rights protected under the HRA and sets out why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. Subject to the following comments, the Committee refers that statement to the Assembly.

- 1.16. The Bill will introduce a defence against liability for defamation for digital intermediaries who, within seven days of receiving a complaint from the plaintiff alleging that defamatory material is published on their platform or service, take action to remove or block ongoing access to content. This may also have the effect of encouraging digital intermediaries to remove non-defamatory content on the basis of untested allegations, potentially limiting the right to freedom of expression in section 16 of the HRA.
- 1.17. The Committee notes that the defence is available to digital intermediaries who provide a complaints mechanism accessible to the plaintiff. If a complaint is made, the digital intermediary then has 7 days to take reasonable access prevention steps to remove or block access to the matter identified in the complaint. However, the defence is expressed as only requiring access prevention steps where they are reasonably available. The Committee is concerned that the defence will be available for digital intermediaries who publish material in a way that does not permit them to block or remove access to the material, and then establishes a complaints mechanism that can provide little effective recourse. **The Committee therefore requests further information on when reasonable access prevention steps may not be available for the purposes of proposed paragraph 139BA(1)(c).**
- 1.18. By introducing exceptions and defences for defamation proceedings the Bill may limit the protection of reputation provided by section 12 of the HRA. However, the human rights discussion in the explanatory statement includes reference to only two aspects of the Bill as potentially limiting the right to reputation:
- a) the Bill will require courts to consider various matters before making an order to provide information to assist in identifying and locating posters of material to a person seeking to bring defamation proceedings. This includes considering the privacy, safety or other public interest considerations that may arise if the order is made. The Bill may therefore make it harder to obtain information enabling defamation actions to be brought against the individuals who were responsible for making the material available on-line; and
  - b) the Bill will extend the defence of absolute privilege, preventing a defamation action being brought against a publication to a police officer or the police service. The defence will also extend to publications to any of the specified bodies set out in Schedule 1A, including: the bar association and law society to make a complaint, the human rights commission, integrity commission, inspector of correctional services, office of the work health and safety commissioner, the official visitor, public trustee and guardian, and sentence administration board.
- 1.19. The explanatory statement does not, however, set out a full description of why the other exceptions and defences introduced by the Bill which may prevent or limit defamation proceedings otherwise available should not be considered unreasonable limitations on the right to reputation. The Committee recognises that the Bill represents the outcome of significant consultation engaged in by the Model Defamation Law Working Party in reporting to the Standing Council of Attorneys-General. However, the Committee considers that all potential limitations of the protection of reputation provided by section 12 of the HRA require explicit recognition and justification in the explanatory statement.

- 1.20. **The Committee therefore requests that consideration be given to amending the explanatory statement to include a discussion of the features of the Bill which may limit the protection of reputation provided by section 12 of the HRA and why any limit should be considered reasonable using the framework in section 28 of the HRA.**

#### Right to a fair trial (section 21 HRA)

- 1.21. The Bill will enable orders to be made against digital intermediaries who are not a party to defamation proceedings to have orders made requiring them to take steps to remove, prevent access or otherwise limit continued publication or give effect to a court order (proposed section 139JA). This includes orders relating to publications which occurred prior to the commencement of the Bill (proposed section 259). Generally, an order cannot be made against a non-party intermediary without giving them an opportunity to be heard. However, a temporary order can be made without an opportunity to be heard if the court considers it necessary in the circumstances for the order to be made expeditiously pending a subsequent hearing.
- 1.22. By providing for orders to be made against an intermediary without an opportunity to be heard, the Bill may limit the right to a fair trial in section 21 of the HRA. By providing for orders to be made against an intermediary in relation to publication which occurred prior to the commencement of the Bill, the Bill may also provide for a retrospective penalty or detriment. **The Committee therefore requests further information on why it was considered necessary to allow orders to be made against non-party intermediaries in circumstances where they have not been given the opportunity to be heard or where the cause of action for the publication of defamatory matter accrued before the commencement day.**

The Committee draws these matters 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.

## Crimes Legislation Amendment Bill 2024

- 1.23. This Bill will amend the:
- a) *Bail Act 1992* to allow the court to impose bail conditions when a person is before a court in response to a summons or court attendance notice, or to extend the time limits for a charged person to be brought to court when unfit to attend;
  - b) *Crimes (Child Sex Offenders) Act 2005* to update the list of offences that can require registration as a child sex offender;
  - c) *Crimes (Sentence Administration) Act 2005* to increase the number of Sentence Administration Board appointees;
  - d) *Crimes Act 1900* to clarify the definition of serious offence for provisions relating to unfitness to plead and mental impairment; and
  - e) various other acts to make technical amendments to substitute references to the National Anti-Corruption Commission.

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

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

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

Right to privacy and reputation (section 12 HRA)

Right to freedom of movement (section 13 HRA)

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

- 1.24. The explanatory statement accompanying the Bill recognises the following potential limitations of the HRA 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.
- 1.25. The Bill will amend the Bail Act to provide that a person who has answered a summons but is not already in custody, and either they were served while serving a sentence of imprisonment or there is fresh evidence that a relevant risk applies, is taken to be in the custody of the court upon adjournment or postponement of the hearing. The Court can then make an order granting bail, including imposing conditions relating to bail. By providing for conditions associated with bail to be imposed the Bill may limit the rights to freedom of movement in section 13 of the HRA and the right to liberty in section 18 of the HRA.
- 1.26. The Bill will also amend the Bail Act to provide for an additional 48 hours for a person who has been charged and taken into custody to be brought before the court where a hospital doctor states the accused is an inpatient and unfit to be brought before the court within the first 48 hours. By extending the period in which a person may be in custody without being brought before a court the Bill may limit the right to liberty in section 18 of the HRA.
- 1.27. The Bill will amend the Crimes (Child Sex Offenders) Act to update the registrable offences included in the Schedules. By extending the range of offences which require registration as a child sex offender with consequent restrictions and reporting requirements, the Bill may limit the protection of privacy and reputation provided by section 12 of the HRA, and the right to freedom of movement in section 13 of the HRA.
- 1.28. The Bill will amend the Crimes Act to change the definition of when a person has been charged with a serious crime so that, where they are considered unfit to plead but are likely to become fit within 12 months, the Court must remand the person in custody or release them on bail. The definition of a serious offence will include reference to where the factual circumstances of the offending involve actual or threatened violence and substantial risk of harm to another person. By amending the definition of serious offence, and exposure to restrictive consequences, to reflect the circumstances involved in the offence the Bill may limit the right to equality before the law in section 8 of the HRA.
- 1.29. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Disability Inclusion Bill 2024

- 1.30. This Private Member's Bill will require the responsible Minister to develop disability inclusion strategies and public sector entities to develop disability inclusion plans. The Bill will also establish the disability advisory council. The Bill is not intended to create any legal right or give rise to any civil right of action.

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

Right to privacy and reputation (section 12 HRA)

Right to take part in public life (section 17 HRA)

- 1.31. The Bill will require consultation to inform the strategies and plans provided for in the Bill, including consultation with people with disability. This may limit the right to privacy protected by section 12 of the HRA. The disability advisory council established by the Bill will have to be comprised of people with disability and others from diverse backgrounds and identities. This may require the collection of sensitive personal information as part of the application process to be appointed to the council which may also limit the protection of privacy. By limiting membership of the council the Bill may also limit the right to take part in public life in section 17 of the HRA.
- 1.32. 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.
- 1.33. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

## Environment Protection (Fossil Fuel Company Advertising) Amendment Bill 2024

- 1.34. This Private Member's Bill will amend the amend the *Environment Protection Act 1997* to prohibit displays or broadcasts which promote the trademark, trading name or brand of a fossil fuel company by the owners or persons in charge of specified sports venues.

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

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

Freedom of expression (section 16 HRA)

Rights in criminal proceedings (section 22 HRA)

- 1.35. The Bill will make it an offence for the owner, occupier or person in charge of a sports venue to place, display or broadcast an advertisement of a fossil fuel company at specified sports venues with a maximum penalty of 50 penalty units. An advertisement is any form of visual display which publicises, or otherwise promotes, all or part of a trademark, trading name or brand name of a fossil fuel company. The offence will not apply if the advertisement is incidentally displayed or broadcast and is being used personally by the person without direct or indirect financial benefit.

- 1.36. It is not clear to the Committee whether the definition of fossil fuel advertisement is intended to only apply to uses of a fossil fuel company's trademark, trading name or brand name in a way which is with the explicit or implicit permission of the company. It is not limited to forms of expression by the companies themselves. In any event, by preventing individuals from displaying or broadcasting advertisements the Bill may limit the freedom of expression in section 16 of the HRA. The scope of the prohibition may also infringe the protection of political communication implied in the Australian Constitution.
- 1.37. The offence created by the Bill includes a defence if the defendant proves that they took all reasonable precautions and exercised all appropriate diligence to prevent the commission of the offence. By placing the onus on establishing the defence on the defendant in any prosecution the Bill may also limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA.
- 1.38. The explanatory statement accompanying the Bill states that the Bill "does not limit any human rights. The bill supports the right to freedom of expression (s16 of the HRA) by exempting personal use advertisements." In the committee's view the exemption of personal use advertisements does not prevent the Bill from restricting what would otherwise be lawful forms of expression and hence may limit the right to freedom of expression.
- 1.39. **The Committee therefore requests further information from the member why the Bill does not engage with the rights identified, and, to the extent the Bill may limit those rights, 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 accompanying the Bill to include this statement.**

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

## Residential Tenancies Amendment Bill 2024

- 1.40. This Private Member's Bill will amend the *Residential Tenancies Act 1997* and the *Residential Tenancies Regulation 1998* to:
- prevent rents increasing for two years and then restricting future rent increases to 2 percent each year or as permitted by the ACT Civil and Administrative Tribunal;
  - prevent higher rent increases being specified in the terms of the residential tenancy agreement; and
  - make it an offence to agree to rent higher than the advertised rental rate.

**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)**

Rights in criminal proceedings (section 22 HRA)

- 1.41. The Bill will amend section 11AD of the Residential Tenancies Act to make it an offence for a lessor or agent of a lessor to accept a rental rate above the advertised rate. This offence will continue to be a strict liability offence. The Bill may therefore limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA. This potential limitation is recognised in the explanatory statement accompanying the Bill. The Committee notes that the explanatory statement does not address why strict liability should be accepted as reasonable in the circumstances of this offence, but recognises the justification given at the introduction of the current offence continues to apply.
- 1.42. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Workplace Legislation Amendment Bill 2024

- 1.43. This Bill will make various amendments to workplace health and safety related laws to implement the recommendations agreed to by Workplace Health and Safety Ministers in May 2021, including amending:
- a) the *Long Service Leave (Portable Schemes) Amendment Act 2023* to make minor and technical adjustments to commencement provisions;
  - b) The *Public Sector Management Act 1994* to expressly provide for the independence of the public service standards commissioner and staff carrying out work of the commissioner;
  - c) The *Work Health and Safety Act 2011* and *Work Health and Safety Regulation 2011* to allow for aggregation of conduct of persons within a corporation in establishing the physical and fault elements of offences, add a mechanism by which a body corporate can rely on mistake of fact, increase the maximum penalty for bodies corporate for the offence of industrial manslaughter, clarify that an officer may commit a Category 1 offence, and amend how penalty provisions are expressed, increasing penalty amounts and providing for indexation.

### 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)

Rights in criminal proceedings (section 22 HRA)

- 1.44. The Bill will amend the Work Health and Safety Act to make it clear that the offence of engaging in the category 1 offence of negligent or reckless conduct includes where an officer of a corporation that is conducting a business or undertaking exposes an individual to a risk of death or serious injury or illness. Strict liability will continue to apply to the physical elements of this offence, including whether the person conducting the business or undertaking owed a health and safety duty. The Bill will also increase penalties associated with offences that involve a strict liability element. The Bill may therefore limit the presumption of innocence protected as a right in criminal proceedings in section 22 of the HRA.

- 1.45. The Bill will also increase from 5 to 10 years the maximum penalty of imprisonment for the offence of engaging in negligent or reckless conduct under the Work Health and Safety Act. The Bill may therefore limit the right to liberty and security of person in section 18 of the HRA.
- 1.46. 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.
- 1.47. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Proposed Amendments—No comment

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

- 1.48. On 4 March 2024 the Committee received proposed amendments to the Births, Deaths and Marriages Registration Amendment Bill 2023 from Ms Nuttall MLA. The proposed amendments will:
- a) prevent a birth certificate from showing a person's former name to protect a person's privacy where requested by the person, their parent (and if over 14 the child consents or cannot understand the meaning or implications of the request) or a person prescribed by regulation;
  - b) remove the need, where a person applies for alteration of the record of their sex in a birth registration or for a recognised details certificate, for the person to show they have received appropriate clinical treatment for alteration or is an intersex person;
  - c) prevent a birth certificate from showing a person's former sex where requested by the person, their parent (and if over 14 the child consents or cannot understand the meaning or implications of the request); and
  - d) allow a person's sex to be nominated by using any term other than a prohibited sex descriptor.
- 1.49. The Committee has no comments on these proposed amendments.

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

- 1.50. On 19 February 2024 the Committee received proposed amendments to the Human Rights (Healthy Environment) Amendment Bill 2023 from Mr Cain MLA. The proposed amendments will remove the provision in the Bill which limits access to legal proceedings in the Supreme Court for acting incompatibly with or failing to take into account the new right to a healthy environment introduced by the Bill. The proposed amendments will also require a review of the operation of the new right after 3, rather than 5, years.
- 1.51. The Committee has no comments on these proposed amendments.



- 1.52. On 4 March 2024, the Committee received proposed amendments to the Human Rights (Healthy Environment) Amendment Bill 2023 from Mr Braddock MLA. Under the Bill, the proposed right to a healthy environment will not be able to be relied upon in legal proceedings claiming that a public authority has acted in a way which is incompatible with a human right or failed to give proper consideration to a relevant human right. The proposed amendments will limit that exclusion from legal proceedings for 3 years after commencement. The proposed amendments will also reduce the time for a review of the operation of the Bill to be presented to the Assembly from as soon as practicable 5 years after commencement provided for in the Bill, to the end of 3 years after commencement.
- 1.53. The Committee has no comments on these proposed amendments.

## **Government response—No comment**

- 1.54. On 16 February 2024, the Committee received a response to the Committee’s comments on the government response to the Committee’s comments on the Circular Economy Bill 2023 and has no further comments.
- 1.55. These responses can be viewed [online](#).<sup>1</sup>
- 1.56. The Committee wishes to thank the Minister for her helpful response.

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<sup>1</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/2397859/Circular-Economy-Bill-2023Further-response.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2397859/Circular-Economy-Bill-2023Further-response.pdf).

## 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 DI2023-245** being the **Taxation Administration (Special Arrangements—Lodging of Returns) Approval 2023** made under section 42 of the *Taxation Administration Act 1999* revokes 2014-245 and enables the approval of special arrangements for registered employers whose annual payroll tax liability is \$80,000 or less to lodge annual payroll tax return (as opposed to monthly returns) to the ACT Revenue Office.
  - **Disallowable Instrument DI2023-252** being the **Waste Management and Resource Recovery (Waste-to-Energy) Code of Practice 2023 (No 1)** made under section 60 of the *Waste Management and Resource Recovery Act 2016* approves the Waste to Energy Code of Practice as set out in Schedule 1 of the instrument.
  - **Disallowable Instrument DI2023-253** being the **Building and Construction Industry Training Levy (Governing Board) Appointment 2023 (No 1)** made under section 6 of the and section 78 of the *Building and Construction Industry Training Levy Act 1999* and *Financial Management Act 1996* revokes DI2021-119 and appoints a specified person as a member of the Building and Construction Industry Training Fund Governing Board for a period of three years.
  - **Disallowable Instrument DI2023-255** being the **Animal Welfare (Management of Animals in Pounds, Shelters and Rescue Establishments) Mandatory Code of Practice 2023** made under sections 22 and 23 of the *Animal Welfare Act 1992* revokes DI2023-255 and approves the Code of Practice for the Management of Animals in Pounds, Shelters and Rescue Establishments as a mandatory code of practice under the Act.
  - **Disallowable Instrument DI2023-256** being the **Government Procurement (Non-Public Employee Member) Appointment 2023 (No 2)** made under section 12 of the *Government Procurement Act 2001* to appoint a specified person to the Government Procurement Board.
  - **Disallowable Instrument DI2023-257** being the **Government Procurement (Non-Public Employee Member) Appointment 2023 (No 3)** made under section 12 of the *Government Procurement Act 2001* to appoint a specified person to the Government Procurement Board.
  - **Disallowable Instrument DI2023-259** being the **Health Records (Privacy and Access) (Fees) Determination 2023 (No 2)** made under section 34 of the *Health Records (Privacy and Access) Act 1997* revokes DI2023-31 and determines fees payable for the purposes of the Act.
  - **Disallowable Instrument DI2023-261** being the **Tobacco and Other Smoking Products (Fees) Determination 2023 (No 1)** made under section 70 of the *Tobacco and Other Smoking Products Act 1927* revokes DI2020-250 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2023-262 being the Radiation Protection (Fees) Determination 2023 (No 1) made under section 120 of the *Radiation Protection Act 2006* revokes DI2022-249 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-263 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2023 (No 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* revokes DI2022-247 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-264 being the Food (Fees) Determination 2023 (No 1) made under section 150 of the *Food Act 2001* revokes DI2022-246 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-265 being the Public Health (Fees) Determination 2023 (No 1) made under section 137 of the *Public Health Act 1997* revokes DI2022-248 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-266 being the Planning (Land Rent Payout) Policy Direction 2023 (No 1) made under section 322(1) of the *Planning Act 2023* repeals DI2015-308 and sets out a policy direction for determining the amount that a lessee must pay before being granted a variation of a lease from a land rent lease to a standard lease.**
- **Disallowable Instrument DI2023-267 being the Planning (Amount payable for, and term of, further rural lease) Determination 2023 made under section 347 of the *Planning Act 2023* determines the amount payable for a further rural lease and the term of a further rural lease if greater than 20 years.**
- **Disallowable Instrument DI2023-268 being the Planning (Protected Matters) Declaration 2023 made under section 221 of the *Planning Act 2023* declares certain matters to be “protected matters” for the purposes of offsets and offsets policy in Chapter 9 of the Act.**
- **Disallowable Instrument DI2023-276 being the Planning (Reduction of Lease Variation Charges) Determination 2023 made under section 338 of the *Planning Act 2023* determines the circumstances in which an amount of a lease variation charge must be reduced.**
- **Disallowable Instrument DI2023-277 being the Planning (Reduction of Lease Variation Charges for the Housing Commissioner) Determination 2023 made under section 338 of the *Planning Act 2023* determines circumstances in which an amount of the lease variation charge must be reduced for certain lease variations granted to the housing commissioner.**
- **Disallowable Instrument DI2023-278 being the Planning (Lease Variation Charges) Determination 2023 made under subsection 331(2) of the *Planning Act 2023* determines lease variation charges for the purposes of the Act.**
- **Disallowable Instrument DI2023-280 being the Planning (Reduction of Lease Variation Charges for Environmental Remediation) Determination 2023 made under section 338 of the *Planning Act 2023* determines reductions of lease variation charge applying to environmental remediation of the land, specifically disused service station sites.**

- **Disallowable Instrument DI2023-281 being the Duties (Pensioner Duty Deferral Scheme) Determination 2023 (No 2) made under section 75AG of the *Duties Act 1999* revokes DI2021-167 and determines a scheme for the deferred payment of duty by a pensioner and their domestic partner (if any) on an eligible transaction.**
- **Disallowable Instrument DI2023-282 being the Planning (Lease Variation Charge Deferred Payment Scheme) Determination 2023 made under sections 343 and 344 of the *Planning Act 2023* determines the amount of the lease variation charge to be deferred for the purposes of the Act.**
- **Disallowable Instrument DI2023-283 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2023 made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-289 and determines, for the purposes of the Scheme, how the amount of the concession is to be identified for properties identified as affected with loose-fill asbestos.**
- **Disallowable Instrument DI2023-284 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme—Eligible Impacted Properties) Determination 2023 made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-305 and determines, for the purposes of the Scheme, the eligibility requirements, value of the concession, conditions and timing for applications.**
- **Disallowable Instrument DI2023-285 being the Taxation Administration (Amounts Payable—Disability Duty Concession Scheme) Determination 2023 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2023-166 and determines, for the purposes of the Disability Duty Concession Scheme, the types of eligible property, determination of amounts and the eligibility requirements.**
- **Disallowable Instrument DI2023-286 being the Taxation Administration (Amounts Payable—Duty) Determination 2023 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2023-162 and determines differential rates of duty, or the method by which an amount of duty is payable under the *Duties Act 1999*.**
- **Disallowable Instrument DI2023-287 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2023 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2023-165 and determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable under the *Duties Act 1999*.**
- **Disallowable Instrument DI2023-288 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2023 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2023-163 and determines, for the purposes of the Scheme, the eligibility requirements and the method of calculation of duty payable.**

- **Disallowable Instrument DI2023-290** being the **ACT Teacher Quality Institute Board Appointment 2023 (No 4)** made under sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and sections 78 and 79 of the *Financial Management Act 1996* appoints a specified person as a member of the Board of the ACT Teacher Quality Institute for a period of three years.
- **Disallowable Instrument DI2023-291** being the **Board of Senior Secondary Studies Appointment 2023 (No 4)** made under section 8(1)(a) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as chair of the Board of Senior Secondary Studies for a period of three years.
- **Disallowable Instrument DI2023-293** being the **Road Transport (General) Application of Road Transport Legislation (Manuka Oval) Declaration 2023 (No 2)** made under section 12 of the *Road Transport (General) Act 1999* disapplies section 205 of the Road Transport (Road Rules) Regulation to support parking arrangements for major sporting events at Manuka Oval in 2023 and 2024.
- **Disallowable Instrument DI2023-296** being the **Gambling and Racing Control (Governing Board) Appointment 2023 (No 2)** made under section 11 of the and section 78 of the *Gambling and Racing Control Act 1999* and *Financial Management Act 1996* appoints a specified person as chair of the ACT Gambling and Racing Commission Governing Board.
- **Disallowable Instrument DI2023-298** being the **Land Titles (Fees) Determination 2023 (No 2)** made under section 139 of the *Land Titles Act 1925* revokes DI2023-185 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2023-300** being the **Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2023 (No 3)** made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.
- **Disallowable Instrument DI2023-301** being the **Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2023 (No 2)** made under section 62 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* appoints a specified person as a member of the Public Interest Monitor Panel.
- **Disallowable Instrument DI2023-303** being the **Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2023 (No 1)** made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2022-252 and determines the maximum fares relating to the hiring or use of a taxi.
- **Disallowable Instrument DI2023-305** being the **Liquor (Fees) Determination 2023 (No 2)** made under section 227 of the *Liquor Act 2010* revokes DI2023-186 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2023-307** being the **Road Transport (General) Application of Road Transport Legislation (Traffic Offence Detection Device) Declaration Revocation 2023** made under section 13 of the *Road Transport (General) Act 1999* revokes DI2023-4 because provisions are introduced into section 307A of the *Road Transport (Road Rules) Regulation 2017*.

- **Disallowable Instrument DI2023-308 being the Waste Management and Resource Recovery (Fees) Determination 2023 (No 2) made under section 126 of the *Waste Management and Resource Recovery Act 2016* revokes DI2023-106 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-309 being the Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2023 made under section 139 of the *Taxation Administration Act 1999* revokes DI2022-263 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2024.**
- **Disallowable Instrument DI2023-312 being the Motor Accident Injuries (Reportable Conduct) Guidelines 2023 made under section 487 of the *Motor Accident Injuries Act 2019* makes the MAI Reportable Conduct Guidelines.**
- **Disallowable Instrument DI2023-318 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 1) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the medicine category.**
- **Disallowable Instrument DI2023-319 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 2) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the human rights category.**
- **Disallowable Instrument DI2023-320 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 3) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the human rights category.**
- **Disallowable Instrument DI2023-321 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 4) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the provision of psychosocial support category.**
- **Disallowable Instrument DI2023-322 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 5) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the ethics and human rights categories.**
- **Disallowable Instrument DI2023-323 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 6) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the provision of psychological support, variation in sex characteristics, ethics and human rights categories.**

- **Disallowable Instrument DI2023-324 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 7) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the medicine category.**
- **Disallowable Instrument DI2023-325 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 8) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the variation in sex characteristics categories.**
- **Disallowable Instrument DI2023-326 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 9) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the provision of psychosocial support category.**
- **Disallowable Instrument DI2023-327 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 10) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the ethics and human rights category.**
- **Disallowable Instrument DI2023-328 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 11) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the ethics and human rights category.**
- **Disallowable Instrument DI2023-329 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 12) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the provision of psychological support, ethics and human rights categories.**
- **Disallowable Instrument DI2023-330 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Board Appointment 2023 (No 13) made under section 31 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* appoints a specified person as a member of the Restricted Medical Treatment Assessment Board in the ethics and human rights category.**
- **Disallowable Instrument DI2024-19 being the Public Sector Management Amendment Standards 2024 (No 1) made under section 251 of the *Public Sector Management Act 1994* amends the Public Sector Management Standard 2016.**

## Disallowable Instruments—Comment

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

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- **Disallowable Instrument DI2023-242 being the Public Place Names (Watson) Determination 2023 made under section 3 of the *Public Place Names Act 1989* determines the name of a specified park in the Division of Watson.**
- **Disallowable Instrument DI2023-246 being the Public Place Names (Macnamara) Determination 2023 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the names of specified public places in the Division of Macnamara.**
- **Disallowable Instrument DI2023-260 being the Public Place Names (Acton) Determination 2023 made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Acton.**
- **Disallowable Instrument DI2023-272 being the Public Place Names (Jacka) Determination 2023 made under section 3 of the *Public Place Names Act 1989* determines the names of roads in the Division of Jacka.**
- **Disallowable Instrument DI2023-289 being the Public Place Names (Dickson) Determination 2023 made under section 3 of the *Public Place Names Act 1989* determines the names of specified public places in the Division of Dickson.**
- **Disallowable Instrument DI2023-314 being the Public Place Names (Macnamara) Determination 2023 (No 3) made under section 3 of the *Public Place Names Act 1989* determines the names of specified public places in the Division of Macnamara.**

2.3. The instruments mentioned above are made under section 3 of the *Place Names Act 1989*, naming public places in Watson, Macnamara, Jacka, Dickson and Macnamara (again), respectively. The Committee notes that, similar to explanatory statements for similar instruments, the explanatory statement for each instrument discusses potential human rights implications for the instrument. The particular human right identified is the right to privacy and reputation, set out in section 12 of the *Human Rights Act 2004*.

2.4. The Committee notes that the explanatory statement for the first and third instruments mentioned above indicates that the right is *not* engaged, as the relevant public place is not named after a person. The explanatory statement for the second instrument mentioned above states:

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Section 12 of the *Human Rights Act 2004* creates a right to privacy and reputation.

Conceivably, the naming of a place has the potential to infringe the right to privacy and reputation of a person after whom a place is named. In this case the process through which places are named ensures that this right is not infringed and that only appropriate information is included in a determination. This process includes the consultation described above. Additionally, in relation to places named after people, only the names of deceased persons are determined.



- 2.5. The Committee notes that similar statements appear in the explanatory statement for the fourth and fifth instruments mentioned above.
- 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.**

## No discussion of potential human rights issues

- **Disallowable Instrument DI2023-243 being the Motor Accident Injuries (Significant Occupational Impact Assessment) Guidelines 2023 made under section 487 of the *Motor Accident Injuries Act 2019* sets out the legal framework and principles that underpin the Significant Occupational Impact assessment, including requirements for the assessor and assessment procedures.**
  - **Disallowable Instrument DI2023-310 being the Motor Accident Injuries (Treatment and Care) Guidelines 2023 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2021-281 and makes the Treatment and Care Guidelines.**
  - **Disallowable Instrument DI2023-311 being the Motor Accident Injuries (Quality of Life Benefit) Guidelines 2023 made under section 487 of the *Motor Accident Injuries Act 2019* revokes DI2022-22 and makes the Quality of Life Benefit Guidelines.**
  - **Disallowable Instrument DI2023-313 being the Motor Accident Injuries (Significant Occupational Impact Assessment Referral) Guidelines 2023 made under section 487 of the *Motor Accident Injuries Act 2019* makes the MAI Significant Occupational Impact Assessment Referral Guidelines**
- 2.8. Each of the instruments mentioned above are made under section 487 of the *Motor Accident Injuries Act 2019*, and determine guidelines for that Act. The first instrument mentioned above determines guidelines for an assessor to evaluate whether a person's injuries arising from a motor accident have had a Significant Occupational Impact (SOI) on their ability to work. The explanatory statement for the instrument states:

The guidelines are to be used by a suitably qualified and experienced assessor to evaluate whether a person's injuries arising from a motor accident have had a Significant Occupational Impact (SOI) on their ability to work. A report confirming a SOI can provide a pathway for an injured person to access damages in common law if they were not at-fault in a motor accident.

Specifically, the guidelines set out the legal framework and principles which underpin the SOI assessment, requirements for a SOI assessor, as well as detailing procedures to be followed by a SOI assessor in carrying out an assessment. The SOI assessment can only be carried out if the injured person meets the requirements of section 209 of the [*Motor Accident Injuries Act 2019*] and provides their consent to the insurer. Only an insurer can make a referral to the IME provider to arrange for a SOI assessment.

- 2.9. The Committee notes that the (1-page) explanatory statement for the (13-page) instrument does not discuss potential human rights issues (including the absence of human rights issues, if applicable). Given the application of the guidelines to assessment of an injured person's ability to work (with a possible flow-on effect on the person's access to damages), the Committee would have expected to see, in the explanatory statement, at least a mention of human rights issues, possibly by reference to the right to work and work-related rights, protected by section 27B of the *Human Rights Act 2004*.
- 2.10. The second instrument mentioned above determines guidelines in relation to treatment and care. The explanatory statement states:
- The guidelines provide guidance to insurers about their obligations to pay treatment and care benefits including making decisions about whether the treatment and care is reasonable and necessary, in relation to a recovery plan, and verifying treatment and care expenses.
- 2.11. The Committee notes that the (1-page) explanatory statement for the (11-page) instrument does not discuss potential human rights issues (including the absence of human rights issues, if applicable). Given the application of the guidelines to the treatment and care for an injured person that an insurer will pay for, the Committee would have expected to see, in the explanatory statement, at least a mention of human rights issues, possibly by reference to the right to life, protected by section 9 of the Human Rights Act.
- 2.12. The third instrument mentioned above makes guidelines (according to the explanatory statement) 'to provide guidance to insurers about their obligations to provide information and support to potential applicants for quality of life benefits and persons eligible to make a motor accident claim, and to arrange whole person impairment (WPI) assessments.'
- 2.13. The Committee notes that the (1-page) explanatory statement for the (10-page) instrument does not discuss potential human rights issues (including the absence of human rights issues, if applicable). Given the application of the guidelines to the provision of 'information and support to potential applicants for quality of life benefits and persons eligible to make a motor accident claim', the Committee would have expected to see, in the explanatory statement, at least a mention of human rights issues, possibly by reference to the right to life, protected by section 9 of the Human Rights Act.
- 2.14. Finally, the fourth instrument mentioned above, according to the explanatory statement, make guidelines that ...
- ... set out an insurer's obligations in obtaining consent and providing information and support to an injured person when preparing a referral for a Significant Occupational Impact (SOI) assessment. This includes the procedures to be followed when arranging a referral for a SOI assessment, and the information that should accompany a SOI assessment referral.
- 2.15. Again, the Committee notes that the (1-page) explanatory statement for the (6-page) instrument does not discuss potential human rights issues (including the absence of human rights issues, if applicable). Given the application of the guidelines to the provision of 'information and support' to an injured person, the Committee would have expected to see, in the explanatory statement, at least a mention of human rights issues, possibly by reference to the right to life, protected by section 9 of the Human Rights Act.

2.16. **The Committee seeks the Minister’s views on the above comments.**

The Committee draws this matter to the attention of the Legislative Assembly, under paragraph 10(d) of the Committee’s Resolution of Appointment, on the basis that the explanatory statements for the instruments mentioned above may 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 instruments expires.

## Human rights issues—Strict liability offences

- **Disallowable Instrument DI2023-244 being the Public Unleased Land (Movable Signs) Code of Practice 2023 (No 1) made under section 27 of the *Public Unleased Land Act 2013* revokes DI2019-41 and approves the amended Code of Practice for the Placement of Movable Signs in Public Places.**
- 2.17. This instrument revokes and re-makes the existing Code of Practice for the Placement of Movable Signs in Public Places (DI2019-41). The explanatory statement for the instrument indicates that it ‘introduces a strict liability penalty of 20 penalty units for breaching the maximum number of electoral advertising signs and for placing electoral advertising signs on Designated Public Roads, which are detailed at clauses 6(4)(a), 7(1)(a)(ii) and 9 of the Code’, noting that, at the time of the making of the instrument, this incurs an infringement penalty amount of \$440.
- 2.18. The Committee notes that the explanatory statement for the instrument contains a detailed and helpful human rights analysis of the use of strict liability offences and concludes by stating:
- The responsible area for administering the Code is Transport Canberra and City Services (TCCS). TCCS will work with the ACT Electoral Commission at implementation and future elections and referendums to ensure the new restrictions are understood by prospective candidates, parties, and other entities, including that a higher penalty applies to the new restrictions. Candidate briefings and information packs (e.g. the ACT Candidate Handbook) will also make this clear. TCCS also promotes the Code and provides a copy to relevant prospective candidates and parties at the commencement of an election period.
- 2.19. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.20. **This comment does not require a response from the Minister.**

## Human Rights Issues

- **Disallowable Instrument DI2023-247 being the Circular Economy (Prohibited Products—Special Circumstances) Exemption Declaration 2023 (No 1) made under section 23 of the *Circular Economy Act 2023* provides exemptions to allow prohibited products be supplied in certain circumstances where they are required.**
- **Disallowable Instrument DI2023-248 being the Circular Economy (Prohibited Products) Exemption Declaration 2023 (No 1) made under section 23 of the *Circular Economy Act 2023* provides an exemption to allow specified prohibited products be supplied.**

- **Disallowable Instrument DI2023-249 being the Circular Economy (Prohibited Products—Special Circumstances) Exemption Declaration 2023 (No 2) made under section 23 of the *Circular Economy Act 2023* provides exemptions to allow a specified prohibited product be supplied in certain circumstances where the use of alternatives may present a risk to safety.**
- **Disallowable Instrument DI2023-250 being the Circular Economy (Prohibited Products—Special Circumstances) Exemption Declaration 2023 (No 3) made under section 23 of the *Circular Economy Act 2023* provides an exemption to allow specified prohibited products to be supplied in certain circumstances where they are required.**
- **Disallowable Instrument DI2023-251 being the Circular Economy (Public Event) Declaration 2023 (No 1) made under section 21 of the *Circular Economy Act 2023* provides an exemption to allow specified prohibited products be supplied at specified events.**

2.21. The first 4 instruments mentioned above are made under section 23 of the *Circular Economy Act 2023*, which allows the Minister (subject to certain conditions) to disapply the Act in relation to a person or a product that is otherwise prohibited by the Act. The Committee notes that the various instruments (and the explanations provided in relation to them) is similar to instruments under section 17 of the *Plastic Reduction Act 2021* that the Committee has considered.<sup>2</sup>

2.22. The explanatory statement for the first instrument mentioned above states:

This instrument provides exemptions to allow prohibited products to be supplied in certain circumstances where they are required. Specifically, it provides exemptions to allow the supply of single-use plastic drinking straws and cotton buds with single-use plastic sticks in situations where they are required because alternative products are not suitable. This instrument recreates the exemption (DI2022-68)<sup>3</sup> that was originally made under *the Plastic Reduction Act 2021*, which has been repealed and replaced by the *Circular Economy Act 2023* (the Act).

The purpose of these exemptions is to ensure that the ban on additional plastic items does not prevent people who need single-use plastic drinking straws because of disability or a medical need from accessing them and does not prevent cotton buds with plastic sticks being used in forensic, scientific, or medical situations where alternative materials would compromise the results of analytical procedures.

This instrument has been made in conjunction with the *Circular Economy Regulation 2023* (the Regulation), which prohibits the products that are being exempted.

<sup>2</sup> See, eg, discussion of DI2023-98 and DI2023-99, in *Scrutiny Report 32* of the 10<sup>th</sup> Assembly (22 August 2023), available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0018/2271312/Scrutiny-Report-no.-32.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0018/2271312/Scrutiny-Report-no.-32.pdf).

<sup>3</sup> Discussed in *Scrutiny Report 20* of the 10<sup>th</sup> Assembly (13 September 2022), available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0010/2073178/Scrutiny-Report-No-20.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/2073178/Scrutiny-Report-No-20.pdf).

2.23. The explanatory statement goes on:

The instrument provides two exemptions to allow single-use plastic straws to be supplied in certain circumstances. The exemptions are designed so there are places where packets of straws can be supplied but also so that a straw can be supplied anywhere (e.g., a hospitality venue) if it is requested. This is so that, for example, a café could choose to stock and provide a single-use plastic straw to a customer, upon request, to enable them to consume a beverage. The exemption provides a general exemption for the supply of single-use plastic straws by a healthcare entity. It also provides that an individual straw can be supplied by anyone to anyone if requested. Neither of these exemptions creates a mandatory requirement for the exempted products to be stocked by any business.

2.24. The explanatory statement goes on to discuss (in detail) human rights issues, by reference to the right to recognition and equality before the law, the right to be presumed innocent until proved guilty and the right to privacy and reputation, protected by section 8, subsection 22(1) and section 12 of the *Human Rights Act 2004*, respectively.

2.25. According to the explanatory statement, the right to recognition and equality is supported, by ensuring that people who require straws can access them. The right to be presumed innocent until proven guilty is engaged because the instrument has the effect of reversing the onus of proof, by requiring a person to prove that conduct falls within an exemption. The right to privacy and reputation is engaged by virtue of the requirement that persons who *need* plastic straws have to ask for them, therefore potentially identifying themselves as a person with a disability.

2.26. On the privacy point, the explanatory statement states:

The exemption to allow straws was designed so that potential limitations on the right to privacy are minimised. No evidence or proof of disability or a medical need is required to access a single-use plastic straw. Further, it is not required that someone say that they need a straw because of disability or medical need. Though this is the reason that the exemption exists, it has been designed to allow a straw to be supplied on request, without any requirement relating to the need the person requesting the straw has for it. This will protect the right to privacy because people will be able to be supplied single-use plastic straws without having to disclose information about the reason that they need a single-use plastic straw. This has and will continue to be emphasised through engagement and education so that relevant businesses and organisations understand this. This design of the exemption will also protect those supplying straws, including businesses and staff, by providing certainty that they will not be committing an offence by supplying a straw to someone who requests it.

2.27. On the reversal of the onus of proof, the explanatory statement states:

[The relevant] conduct is not prohibited, but the onus of proving the exemption is on the defendant; the prosecution is not required to prove that the exemptions do not apply. However, this is justified and proportionate because the approach of making exemptions enables single-use plastic straws and cotton buds to continue to be supplied where needed, while otherwise prohibiting them. The exemptions are broadly worded and would therefore not be difficult to establish.

The exemptions enable the purpose of the regulation to be achieved while also allowing access to prohibited products where required.

2.28. The explanatory statement for the second instrument mentioned above states that it ‘recreates the exemption (DI2023-99)<sup>4</sup> that was originally made under the *Plastic Reduction Act 2021*, which has been repealed and replaced by the [Circular Economy] Act.’

2.29. The explanatory statement states:

This instrument provides an exemption to allow single-use paper or cardboard plates lined with plastic and single-use paper or cardboard bowls lined with plastic to be supplied and has been made on the Minister’s own initiative.

There is currently no practicable alternative to these products, as paper and cardboard plates and bowls have a thin lining, usually made from polyethylene. This applies to all printed items, coloured items, and white or natural-coloured items. This lining is required as a barrier to prevent inks transferring or contaminating the foodstuff, to be deemed food safe. Additionally, the plastic helps to maintain the structural integrity of the item when exposed to hot, wet foods.

2.30. The explanatory statement goes on to discuss human rights issues, focussing on the right to be presumed innocent and the reversal of the onus of proof. The discussion is similar to the explanation provided in relation to the first instrument mentioned above:

#### Human Rights

The creation of exemptions engages the right to be presumed innocent until proven guilty because it has the effect of reversing the onus of proof in the situation that conduct falls within an exemption. This conduct is not prohibited, but the onus of proving the exemption is on the defendant; the prosecution is not required to prove that the exemptions do not apply. However, this is justified and proportionate because the approach of making exemptions enables single-use paper or cardboard plates or bowls lined with any plastic to continue to be supplied. The exemptions are broadly worded and would therefore not be difficult to establish. The exemptions enable the purpose of the regulation to be achieved while also allowing access to prohibited products where no practicable alternative currently exists.

2.31. The explanatory statement for the third instrument mentioned above states:

This instrument recreates the exemption (DI2022-183) that was originally made under the *Plastic Reduction Act 2021* which has been repealed and replaced by the [Circular Economy] Act.<sup>5</sup>

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<sup>4</sup> Discussed in *Scrutiny Report 32*.

<sup>5</sup> Discussed in *Scrutiny Report 21* of the 10<sup>th</sup> Assembly (4 October 2022), available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0006/2083434/Scrutiny-Report-21-4-October-2022.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2083434/Scrutiny-Report-21-4-October-2022.pdf).

- 2.32. The instrument provides an exemption in relation to the use of single-use plastic cutlery in certain settings, where the use of alternatives may present a risk to safety. ‘Specifically, it exempts persons employed or otherwise engaged at detainee facing settings and mental health service settings from the prohibition on supplying single-use plastic cutlery.’
- 2.33. Reflecting discussion on the earlier, repealed, instrument the explanatory statement goes on to state:
- This instrument acknowledges that alternatives to single-use plastic cutlery such as wood or bamboo can be more readily weaponised. In certain settings, this may impact on the right to life under the *Human Rights Act 2004*.
- 2.34. It is significant to note that the explanatory statement indicates that the coverage of the new instrument is less than the coverage of the earlier, repealed, instrument ‘to reflect the fact that single-use plastic cutlery is no longer routinely used in these settings’.
- 2.35. The explanatory statement for the fourth instrument mentioned above states:
- This instrument recreates the exemption (DI2023-98) that was originally made under the *Plastic Reduction Act 2021*, which has been repealed and replaced by the *Circular Economy Act 2023* (the Act).<sup>6</sup>
- 2.36. The explanatory statement goes on to state:
- The purpose of this exemption is to ensure that the ban on additional plastic items does not prevent single-use plastic bowls being used in medical, scientific, or forensic situations where alternative materials would compromise the results of procedures. Alternatives to single-use plastic bowls can compromise health and safety in health scenarios, including surgical and clinical settings.
- 2.37. Reflecting discussion on the earlier, repealed, instrument (and on the first instrument mentioned above), the explanatory statement goes on to discuss human rights issues, by reference to the right to be presumed innocent until proven guilty and the effect of reversing the onus of proof:
- Human Rights*
- The creation of exemptions engages the right to be presumed innocent until proven guilty because it has the effect of reversing the onus of proof in the situation that conduct falls within an exemption. This conduct is not prohibited, but the onus of proving the exemption is on the defendant; the prosecution is not required to prove that the exemptions do not apply.
- However, this is justified and proportionate because the approach of making exemptions enables single-use plastic bowls to continue to be supplied where needed, while otherwise prohibiting them. The exemptions are broadly worded and would therefore not be difficult to establish. The exemptions enable the purpose of the regulation to be achieved while also allowing access to prohibited plastic products where required.

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<sup>6</sup> DI2023-98 is discussed in *Scrutiny Report 32*.

2.38. Finally, the fifth instrument mentioned above is made under section 21 of the Circular Economy Act, which allows the Minister to declare that a ‘prohibitible product’ must not be supplied at a ‘declared public event’. Under section 22 of that Act, it is an offence to supply a declared product to a person at a declared event. The explanatory statement states:

This instrument provides that certain prohibited single-use plastic items cannot be supplied at certain events. This instrument recreates the declaration (DI2022-3) made under the *Plastic Reduction Act 2021*, which has been repealed and replaced by the [Circular Economy] Act.<sup>7</sup>

2.39. The prohibitible products and the relevant public events are set out in the Schedule to the instrument. The prohibitible products are:

- single-use plastic takeaway containers;
- single-use plastic sandwich containers;
- single-use plastic soup bowls; and
- single-use plastic salad bowls.

2.40. The explanatory statement states:

Vendors will be required to supply non-plastic alternatives to these plastic items at the listed events.

2.41. The public events are:

- Super Rugby matches at GIO Stadium Canberra;
- National Rugby League matches at GIO Stadium Canberra;
- Australian Football League matches at Manuka Oval; and
- Cricket matches at Manuka Oval.

2.42. The explanatory statement goes on to discuss human rights issues, by reference to the presumption of innocence (arising from the reliance on strict liability offences):

#### Human rights

As a result of this instrument, certain conduct is made an offence under s 17 of the [Circular Economy] Act. This is a strict liability offence, which may be seen to engage the presumption of innocence. The Explanatory Statement for the Circular Economy Bill 2023 addressed the human rights considerations related to the creation of the offence.

The prohibition of single-use plastic sandwich containers, soup bowls and salad bowls at declared public events is intended to reduce plastic waste and provide an opportunity for the demonstration of alternative available products. The listed products are commonly used items for which alternative products that are not single-use plastics are currently available. As such, there is a rational connection between this ban and the intended purpose.

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<sup>7</sup> DI2023-3 was considered in *Scrutiny Report 14* of the 10<sup>th</sup> Assembly (29 March 2022), available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0008/1975904/Report-14-29Mar22.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1975904/Report-14-29Mar22.pdf).



This prohibition is reasonable as it is limited to declared events at which vendors will be required to supply alternative products. This declaration provides reasonable notice of which items are not permitted at the recurring events that are listed. This information is equally available to all vendors at the listed events due to its public nature. This instrument continues the existing prohibition of the listed items at the listed events by recreating the declaration (DI2022-3) made under the Plastic Reduction Act. That declaration has been in force since 24 April 2022. This instrument does not add any new declared public events or any new declared single-use plastic products.

2.43. **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.**

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

## Human Rights Issues

- **Disallowable Instrument DI2023-254 being the Road Transport (General) Application of Road Transport Legislation Declaration 2023 (No 7) made under section 13 of the *Road Transport (General) Act 1999* provides that certain parts of the road transport legislation do not apply to a designated vehicle or the driver of a designated vehicle, while participating in an active special stage of the Rally of Canberra 2023.**
- **Disallowable Instrument DI2023-317 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2023 (No 1) made under section 13 of the *Road Transport (General) Act 1999* removes application of the Road Transport (General) Act to ACT registered entrant, promotional and uninsured vehicles participating in the Summernats 36 Car Festival, and exempts vehicles from the provisions of the Road Transport (Safety and Traffic Management) Act 1999, the Motor Accident Injuries Act 2019, the Road Transport (Vehicle Registration) Regulation 2000 and the Road Transport (Driver Licensing) Regulation 2000.**

2.45. Each of the instruments 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. For the first instrument, the declaration provides that the *Motor Accident Injuries Act 2019*, and various other specified provisions of the motor traffic legislation, does not apply in relation to which applies to the Rally of Canberra 2023, scheduled to start on 16 November 2023. For the second instrument, similarly, the declaration provides that the *Motor Accident Injuries Act*, and various other (different) specified provisions of the motor traffic legislation, does not apply in relation to which applies to the Summernats 36<sup>th</sup> Car Festival, to be held from 4 to 7 January 2024.

2.46. The Committee notes that the explanatory statement for the first instrument discusses 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.

- 2.47. A similar statement appears in the explanatory statement for the second instrument mentioned above.
- 2.48. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for these instruments.**
- 2.49. **This comment does not require a response from the Minister.**

## No Human Rights Issues

- **Disallowable Instrument DI2023-258 being the Planning (Fees) Determination 2023 made under section 522 of the *Planning Act 2023* determines fees payable for the purposes of the Act, for the remainder of the 2023-24 financial year.**
- **Disallowable Instrument DI2023-269 being the Road Transport (General) Application of Road Transport Legislation (Use of Specialised Child Restraint) Declaration 2023 (No 1) made under section 13 of the *Road Transport (General) Act 1999* declares that a driver of a particular vehicle, who has a disability, is allowed to use the Romer-Britax "Hero-NXT" child restraint.**
- **Disallowable Instrument DI2023-273 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2023 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2022-258 and prescribes the method for measuring the amount of greenhouse gas emissions.**

- **Disallowable Instrument DI2023-274 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2023 (No 1) made under section 33 of the Road Transport (Safety and Traffic Management) Regulation 2017 declares the Canberra Trademen's Union Club Ltd to be a parking authority for the area of Block 30 of Section 34 in the division of Dickson.**
- **Disallowable Instrument DI2023-295 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2023 (No 2) made under section 33 of the Road Transport (Safety and Traffic Management) Regulation 2017 declares the person from time to time occupying the position of Executive Branch Manager of the National Arboretum Canberra and Stromlo Forest Park to be a parking authority for the area of Block 511 in the division of Stromlo.**
- **Disallowable Instrument DI2023-297 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2023 (No 3) made under section 33 of the Road Transport (Safety and Traffic Management) Regulation 2017 declares Capital Property Corporation Pty Ltd to be a parking authority for the area of Block 40 of Section 100 in the division of Dickson.**
- **Disallowable Instrument DI2023-299 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2023 made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* revokes DI2022-244 and determines eligible activities for the purposes of the Act.**
- **Disallowable Instrument DI2023-302 being the Road Transport (General) Application of Road Transport Legislation Declaration 2023 (No 8) made under section 13 of the *Road Transport (General) Act 1999* provides that certain parts of the road transport legislation do not apply to specified drivers or vehicles to support the USA Special Visitors Program.**
- **Disallowable Instrument DI2023-306 being the Urban Forest (Fees) Determination 2023 (No 1) made under section 143 of the *Urban Forest Act 2023* revokes DI2023-105 and determines the fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2023-333 being the Urban Forest (Prohibited Activities) Authorisation 2023 (No 1) made under section 19 of the *Urban Forest Act 2023* authorises specified activities for the purposes of urban forest management, fire management and Light Rail management.**

2.50. The first instrument mentioned above, made under section 522 of the *Planning Act 2023*, determines fees for that Act.

2.51. The second instrument mentioned above, made under section 13 of the *Road Transport (General) Act 1999*, declares that a driver of a particular vehicle, who has a disability, is allowed to use the Romer-Britax 'Hero-NXT' child restraint.

2.52. The third instrument mentioned above prescribes a method for measuring the amount of greenhouse gas emissions, for section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010*.

- 2.53. The fourth instrument mentioned above determines the Canberra Tradesmen’s Union Club, Dickson, to be a ‘parking authority’, for section 33 of the *Road Transport (Safety and Traffic Management) Regulation 2017*, in relation to a specified location in Dickson.
- 2.54. The fifth instrument mentioned above, also made under section 33 of the *Road Transport (Safety and Traffic Management) Regulation 2017*, declares the person from time to time occupying the position of Executive Branch Manager of the National Arboretum Canberra and Stromlo Forest Park to be a ‘parking authority’ for the area of Block 511 in the division of Stromlo.
- 2.55. The sixth instrument mentioned above, also made under section 33 of the *Road Transport (Safety and Traffic Management) Regulation 2017*, declares Capital Property Corporation Pty Ltd to be a ‘parking authority’ for a specified area in Dickson.
- 2.56. The seventh instrument mentioned above determines ‘eligible activities’, for section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*.
- 2.57. The eighth instrument mentioned above, made under section 13 of the *Road Transport (General) Act 1999*, provides that certain provisions of the road transport legislation do not apply to specified drivers or vehicles, used to support the USA Special Visitors Program, scheduled for 13 to 17 December 2023.
- 2.58. The ninth instrument mentioned above, made under section 143 of the *Urban Forest Act 2023*, determines fees payable for the purposes of the Act.
- 2.59. The tenth instrument mentioned above, made under section 19 of the *Urban Forest Act 2023*, authorises 3 specified authorities, within the ACT Government, to carry out specified activities, for the purposes of urban forest management, fire management and Light Rail management, that would otherwise be prohibited by the Act.
- 2.60. The Committee notes that the explanatory statement for each of the instruments mentioned above contains a statement to the effect that no human rights are engaged by the instrument.
- 2.61. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for each of the instruments mentioned above.**
- 2.62. **This comment does not require a response from the relevant Ministers.**

## Human Rights Issues

- **Disallowable Instrument DI2023-270 being the Urban Forest (Approval Criteria) Determination 2023 (No 1) made under section 20 of the *Urban Forest Act 2023* determines the criteria for approving an activity that would, or may, damage a protected tree or be prohibited groundwork in a protected zone, for a protected tree or a declared site.**
- **Disallowable Instrument DI2023-271 being the Urban Forest (Registration and Cancellation Criteria) Determination 2023 made under section 52 of the *Urban Forest Act 2023* determines the criteria for the registration of a tree and the cancellation of a tree's registration, on the ACT Tree Register.**

- **Disallowable Instrument DI2023-315 being the Urban Forest (Canopy Contribution Agreements–Financial Settlement) Determination 2023 (No 1) made under section 7 of the *Urban Forest Act 2023* determines the components of canopy contribution financial settlement calculations for the purposes of the Act.**
  - **Disallowable Instrument DI2023-316 being the Urban Forest (Canopy Contribution Agreements–On-Site Canopy Contribution) Determination 2023 (No 1) made under section 7 of the *Urban Forest Act 2023* determines the components of on-site canopy contribution calculations for the purposes of the Act.**
- 2.63. The instruments mentioned above are made under the *Urban Forest Act 2023*. The first instrument mentioned above determines criteria for approving an activity that would, or may, damage a protected tree or be prohibited groundwork in a protected zone, for a protected tree or a declared site, for section 20 of the Act. The second instrument mentioned above determines the criteria for the registration of a tree and for the cancellation of a tree's registration, on the ACT Tree Register, for section 52 of the Act.
- 2.64. The third instrument mentioned above is made under section 7 of the *Urban Forest Regulation 2023*, which allows the Minister to determine the following:
- the amount lost from a tree being removed;
  - the amount gained from planting a replacement tree;
  - the canopy cover restoration period;
  - the cost of planting a replacement tree; and
  - the zone modifier for a zone.
- 2.65. The explanatory statement for the instrument states:
- These components are used to calculate the financial settlement amount that a person who is the lessee of land must pay as part of a canopy contribution agreement under the *Urban Forest Act 2023*, section 36.
- 2.66. The fourth instrument mentioned above is made for section 6 of the *Urban Forest Regulation 2023*, which prescribes the number of trees that a person must plant on their land as part of a canopy contribution agreement and allows the Minister to determine the following:
- the canopy cover restoration period;
  - the minimum size of a replacement tree; and
  - the projected canopy area of a replacement tree at the end of the canopy cover restoration period.
- 2.67. The explanatory statement for the instrument states:
- Through the Urban Forest (Canopy Contribution Agreements – On-site Canopy Contribution) Determination 2023 (No 1), these components are used to calculate the on-site canopy contribution that a person who is the lessee of the land must make as part of a canopy contribution agreement under the *Urban Forest Act*, section 36.
- 2.68. The explanatory statements for each of the instruments discuss human rights issues. The explanatory statement for the first instrument states:

### Human rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. In this case, the right to life is promoted and the right to privacy and reputation is limited.

The *Urban Forest Act 2023* promotes the right to life. It seeks to address the ACT Government's obligation to protect the health and wellbeing of its citizens through maintaining and enhancing the environmental conditions of Canberra society. The approval criteria support the Government to be able to assess proposed activities which may significantly affect the urban forest in order to permit those which are justified and limit those which are not.

The right to privacy and reputation provides for a person's ability to enjoy their home. The *Urban Forest Act 2023* limits this right by requiring occupiers of the land on which regulated and registered trees are located to apply to the ACT Government to conduct activities which may impact these trees. The approval criteria limit the ability of persons to undertake such activities where the proposed activities do not meet the approval criteria. The limitations on the right to privacy are considered proportionate to the legitimate purpose of tree protection and securing a resilient and sustainable ACT urban forest.

2.69. The explanatory statement for the second instrument states:

### Human rights

The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters.

In this case, Cultural and Other Rights of Aboriginal and Torres Strait Islander Peoples are promoted. This right seeks to strengthen Aboriginal peoples' enjoyment of their culture and ability to engage in their distinct cultural practices relating to their use and enjoyment of land, natural resources and place. The inclusion of cultural significance as a Criteria for Registration of trees recognises the value of local Aboriginal cultural heritage and ongoing cultural practices relating to trees in the ACT.

2.70. The explanatory statement for the third and fourth instruments mentioned above almost identical (in terms of addressing human rights issues) to the explanatory statement for the first instrument mentioned above.

2.71. **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.**

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

## Human Rights Issues

- **Disallowable Instrument DI2023-275 being the Taxation Administration (Off the Plan Unit Duty Exemption Scheme) Determination 2023 (No 2) made under section 137E of the Taxation Administration Act 1999 revokes DI2023-164 and provides, for the purposes of the scheme, the operation of a duty concession for certain off the plan units.**

- **Disallowable Instrument DI2023-279 being the Taxation Administration (RZ1 Unit Duty Exemption Scheme) Determination 2023 made under section 137E of the *Taxation Administration Act 1999* exempts a transferee in relation to a specified eligible transaction from duty payable under the *Duties Act 1999*.**
- 2.73. The first instrument mentioned above, made under section 137E of the *Taxation Administration Act 1999*, revokes and re-makes a scheme for the operation of a duty concession, for certain (off-the-plan) units.
- 2.74. The explanatory statement for the instrument discusses human rights issues:
- Human Rights Act 2004**
- This instrument provides an exemption to duty and does not limit, and is consistent with, human rights. The exemption promotes affordable housing and in doing so the freedom to choose a residence (section 13 of the *Human Rights Act 2004*).
- In accordance with the legislation, the Determination includes a statement about whether the scheme is consistent with human rights.
- 2.75. Section 9 of the actual instrument states:
- 9 Human Rights Act 2004**
- In my opinion, as the Minister, this instrument is consistent with human rights. This instrument is non-prejudicial because it does not limit existing rights.
- 2.76. The second instrument mentioned above, also made under section 137E of the *Taxation Administration Act 1999*, exempts a transferee in relation to a specified eligible transaction from duty payable under the *Duties Act 1999*. The explanatory statement (and the actual instrument) contains similar statements, in relation to human rights, to those in the first instrument, but with the following addition:
- The ACT Human Rights Commission has been consulted.
- 2.77. **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.**
- 2.78. **This comment does not require a response from the Minister.**

## Fees instrument

- **Disallowable Instrument DI2023-292 being the Planning (Fees) Determination 2023 (No 2) made under section 522 of the *Planning Act 2023* revokes DI2023-258 and determines fees payable for the purposes of the Act.**
- 2.79. This instrument, made under section 522 of the *Planning Act 2023*, determines fees for that Act. It revokes and re-makes DI2023-258, which was notified on the ACT Legislation Register on 20 November 2023 and which is mentioned earlier in this *Scrutiny Report* (without comment). The Committee notes that the explanatory statement for this (later) instrument states:

This instrument revokes the Planning (Fees) Determination 2023 (DI2023-258).

The Planning (Fees) Determination 2023 (No 2) reproduces DI2023-258 except to amend an error in the wording of items 22.1 and 23.1 of the schedule. The revoked determination incorrectly applied fees based on the type of development classified under the Planning Act 2023.

The schedule of Planning (Fees) Determination 2023 (No 2) now correctly sets the public notification fees based on the activities that are undertaken. Specifically, the same public notification fee will apply to all development applications, except where some notification activities, such as placing signage on the development site, are exempted. Where these exemptions apply, a smaller fee will apply.

While this determination largely replicates the fees set for the 2022-23 financial year under the now repealed Planning and Development Act 2007, as reflected in column 4 of the schedule, not all fees are directly comparable to those determined under the Act. As such, column 4 of the schedule is included for information only. Column 5 of the schedule to the instrument determines the fees under the Act for the 2023-24 financial year, as nil fees in 2022-23 are applicable to the Act.

The instrument commences on the day after its notification day.

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

## Human Rights Issues

- **Disallowable Instrument DI2023-294 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2023 (No 2) made under section 352 of the Medicines, Poisons and Therapeutic Goods Regulation 2008 revokes DI2023-20 and provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.**

2.81. This instrument, made under made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008*, revokes and re-makes an earlier instrument (DI2023-20). It provides that a pharmacist or intern pharmacist may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards imposed by the Chief Health Officer.

2.82. The Committee notes that the explanatory statement for the instrument discusses the changes made to the earlier instrument (essentially to reflect changed circumstances).

2.83. The explanatory statement goes on to discuss human rights issues, focussing on the right to life and the right to privacy, protected by sections 9 and 12 of the *Human Rights Act 2004*, respectively. The explanatory statement indicates that the right to life is promoted. In relation to the right to privacy (which arises because personal information is collected, for reporting purposes), after referring to the various privacy protections that apply, the explanatory statement states:

The instrument commences on the day after its notification day.



Health consumers are also reasonably made aware of their human rights with regard to pharmacy services. In accordance with section 95 of the *Human Rights Commission Act 2005*, all health service providers are required to prominently display information about how complaints may be made to the ACT Human Rights Commission or appropriate regulatory agency.

The Vaccination Standards are therefore considered to engage with the right to privacy under the [*Human Rights Act 2004*], but do not operate as to arbitrarily or unlawfully interfere or otherwise limit an individual's right to privacy or reputation as described by the HR Act.

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

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

## **Disapplication of subsections 47(5) and (6) of the *Legislation Act 2001***

- **Disallowable Instrument DI2023-299 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Determination 2023 made under section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012* revokes DI2022-244 and determines eligible activities for the purposes of the Act.**

2.86. This instrument determines 'eligible activities', for section 10 of the *Energy Efficiency (Cost of Living) Improvement Act 2012*. Under section 10, an 'eligible activity' is an activity 'that is intended to reduce the consumption of energy'.

2.87. The Committee notes that, as with previous instruments made under this section, section 4 of the instrument disapplies subsections 47(5) and (6) of the *Legislation Act 2001*. As the Committee has consistently noted, the effect of subsections 47(5) and (6) of the *Legislation Act* is that any external document (such as, for example, the various Australian Standards relied on by this instrument) that is relied upon (ie, by being 'applied, adopted or incorporated') by this instrument would have to be published on the ACT Legislation Register, as a 'notifiable' instrument (for section 10 of the *Legislation Act*). This, in turn, ensures that users of legislation have free access to all the material that they need, in order to understand the full scope and effect of an instrument such as this. The Committee has always taken a strong view that such access is important. As a result, the Committee generally does not look favourably on the disapplication of subsections 47(5) and (6) of the *Legislation Act* and seeks an explanation as to why disapplication is necessary, in a particular case.

2.88. For this instrument, the Committee notes that section 4 of the instrument provides:

### **4 Disapplication of Legislation Act, s 47 (5) and (6)**

The *Legislation Act 2001*, section 47 (5) or (6) does not apply in relation to an instrument applied, adopted or incorporated under this instrument.

*Note 1* Australian Standards are available for purchase, and in some circumstances are available for free with an account, at [www.standards.org.au](http://www.standards.org.au).

*Note 2* A copy of the National Construction Code, which incorporates the Building Code of Australia and the Plumbing Code of Australia, is freely available for inspection at [www.abcb.gov.au](http://www.abcb.gov.au)

2.89. The Committee notes the changed wording of Note 1, above, which reflects information provided by the Minister for Sustainable Building and Construction, in a response discussed in *Scrutiny Report 38* of the 10<sup>th</sup> Assembly (31 January 2024),<sup>8</sup> concerning DI2023-236 and DI2023-237. The response stated (in part):

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

2.90. The explanatory statement for the instrument also states:

**Clause 4** disapplies the *Legislation Act 2001*, section 47 (5) and (6). This section is disapplied because it stipulates that any external text which is to be applied as law in the ACT needs to be republished as a notifiable instrument. It is not possible to republish text contained in Australian Standards documents as they are protected by copyright. It is not practical to republish information in the National Construction Code as it contains over 400 pages of information across 4 volumes.

2.91. The Committee notes that it last engaged with the Minister responsible for this instrument in *Scrutiny Report 25* of the 10<sup>th</sup> Assembly (31 January 2023) in relation to DI2022-244.<sup>9</sup> The Committee discussed various Ministerial responses in relation to the issue but concluded the discussion without requiring a further response.

2.92. The later response from the Minister for Sustainable Building and Construction demonstrates further progress, on the issue of accessibility, but the Committee considers that this is still a developing issue, which it will continue to monitor. The Committee's fundamental concern is to ensure that any material relied on by legislation is easily accessible by users, at no cost.

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

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

- **Disallowable Instrument DI2023-304 being the Building (ACT Appendix to the Building Code) Determination 2023 (No 3) made under subsection 136(3) of the *Building Act 2004* revokes DI2023-236 and makes ACT Appendices to the Building Code of Australia.**

2.94. This instrument, made under subsection 136(3) of the *Building Act 2004*, makes ACT Appendices to the Building Code of Australia. The effect of the appendices is to amend the Building Code, in its application to the ACT. The instrument revokes and re-makes an earlier instrument (DI2023-236).

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<sup>8</sup> Available at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0006/2387085/Scrutiny-Report-38-Final.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0006/2387085/Scrutiny-Report-38-Final.pdf).

<sup>9</sup> Available at [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0004/2171056/Final-Scrutiny-Report-No-25.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0004/2171056/Final-Scrutiny-Report-No-25.pdf).

2.95. Section 6 of the instrument provides:

#### **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](http://www.standards.org.au).

*Note 2* Free copies of the National Construction Code are available at [www.abcb.gov.au](http://www.abcb.gov.au).

2.96. This means that the Australian Standards and the National Construction Code, relied upon by the instrument, do not have to be published on the ACT Legislation Register, as ‘notifiable’ instruments. As discussed immediately above, the Committee’s fundamental concern is to ensure that any material relied on by legislation is easily accessible by users, at no cost.

2.97. The explanatory statement for the instrument states:

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

The BCA incorporates [a] number of Australian Standards, Australian/New Zealand Standards and International Standards. The standards are technical standards used by the building and construction sector to meet regulatory requirements across jurisdictions. The sector is generally expected to have knowledge of the standards relevant to undertaking their professional services. It is noted that there are often two or more versions of the Building Code applicable to building work at any one time and as such there are a significant number of Australian Standards and versions of Australian Standards that industry and regulators require access to.

The standards referenced in the BCA are available for purchase from [www.standards.org.au](http://www.standards.org.au). There are challenges relating to the ability to provide public access to Australian Standards due to copyright issues.

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

2.98. The Committee notes that progress is being made on the issue of accessibility, but the Committee considers that this is still a developing issue, which it will continue to monitor. The Committee’s fundamental concern is to ensure that any material relied on by legislation is easily accessible by users, at no cost.

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

## Human Rights Issues

- **Disallowable Instrument DI2023-331 being the Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1) made under section 17 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* makes Variation in Sex Characteristics (Restricted Medical Treatment) Assessment Criteria Guidelines 2023 (No 1).**
- **Disallowable Instrument DI2023-332 being the Variation in Sex Characteristics (Restricted Medical Treatment) Declared Person Declaration 2023 (No 1) made under paragraph 11(2)(a) of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* lists the types of persons who may make an application for a general treatment plan for the purposes of the Act.**

2.100. The first instrument mentioned above is made under section 17 of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* which provides that the Minister may, by disallowable instrument, make guidelines in relation to:

- (a) the matters that an assessment committee must or may consider under sections 13 to 16 of the Act; and
- (b) other guidance to assist an assessment committee or internal review committee to exercise their functions under the Act.

2.101. The explanatory statement for the instrument states:

The instrument provides for these guidelines. It stipulates the matters that an assessment committee must consider under sections 13 to 16 as well as matters an assessment committee may consider under these sections. It also provides for additional guidance which may assist assessment committees and internal review committees in exercising their functions under the Act.

2.102. The explanatory statement goes on to discuss human rights issues in detail, by reference to the right to recognition and equality before the law, the right to protection from torture and cruel, inhuman or degrading treatment and the right to protection of family and children, protected by sections 8, 10 and 11 of the *Human Rights Act 2004*, respectively. The text indicates that all three rights are promoted.

2.103. The explanatory statement concludes by stating:

The guidelines provide a degree of legislative protection against ..... arbitrary decision making by providing for the factors that assessment committees must consider and the relevant factors an assessment committee may consider when applying the assessment criteria under the Act. These factors are consistent with the other provisions and objectives of the [International Covenant on Civil and Political Rights] as they further promote the rights of the child and right to protection from torture and cruel, inhuman and degrading treatment as mentioned above. Accordingly, the guidelines help to prevent and mitigate any potential limitation to this right which might arise from the Act.

2.104. The second instrument mentioned above is made under paragraph 11(2)(a) of the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023*, which allows the Minister to declare the types of persons who may make an application for a general treatment plan, for the purposes of the Act. Section 3 of the instrument provides:

### **3 Who may apply for a general treatment plan**

In accordance with section 11(2)(a) of the Act, I declare that the following people may apply for a general treatment plan:

1. A person representing a specialist medical college, including a person representing a committee or subcommittee of a specialist medical college;
2. A health practitioner with qualifications in one or more of the following fields:
  - a. adolescent and young adult medicine;
  - b. clinical genetics;
  - c. general paediatrics;
  - d. neonatology;
  - e. paediatric endocrinology;
  - f. paediatric or adolescent gynaecology; or
  - g. paediatric urology.
3. A person representing an entity comprising scientists or health practitioners that includes members with qualifications in one or more of the following fields:
  - a. adolescent and young adult medicine;
  - b. clinical genetics;
  - c. general paediatrics;
  - d. neonatology;
  - e. paediatric endocrinology;
  - f. paediatric or adolescent gynaecology; or
  - g. paediatric urology.
4. A person who provides:
  - a. psychological support;
  - b. social work services;
  - c. counselling, including genetic counselling, services; or
  - d. support or care for psychosocial needsto people with a variation in sex characteristics;
5. A person representing an entity that undertakes advocacy for people with a variation in sex characteristics;
6. A statutory office holder with responsibilities related to children's rights or children's healthcare.

2.105. The explanatory statement for the second instrument also discusses human rights issues:

#### CONSISTENCY WITH HUMAN RIGHTS

The Variation in Sex Characteristics Act engages the right to equality and non-discrimination, right to life, protection from torture and cruel, inhuman or degrading treatment, right to protection of the family and child, right to privacy, rights to fair trial and fair hearing, and rights in criminal proceedings. A detailed human rights assessment is included in the Explanatory Statement for the Variation in Sex Characteristics Bill.

This instrument prescribes the people who may apply for a general treatment plan. It does not affect the rights of people involved in the public consultation process for general treatment plans in division 3.3 of the Act.

2.106. **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.**

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

## Subordinate Laws—Comment

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

### Human Rights Issues

- **Subordinate Law SL2023-27 being the Circular Economy Regulation 2023 made under section 13 of the *Circular Economy Act 2023* provides that certain prohibited plastic products are prohibited products.**

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

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

2.109. Part 3.8 of the *Magistrates Court Act 1930* creates a system of infringement notices for certain offences, as an alternative to prosecution. Under section 119 of that Act, regulations may be made prescribing offences as infringement notice offences. This subordinate law is made for section 119 and will allow infringement notices to be issued in relation to certain offences under the *Circular Economy Act 2023*.

2.110. The explanatory statement for the subordinate law goes on to discuss, in detail, human rights issues, by reference to the presumption of innocence, protected by subsection 22(1) of the *Human Rights Act 2004*, arising from the reliance on strict liability offences. The explanatory statement states:

#### HUMAN RIGHTS IMPLICATIONS

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

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

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

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

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

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

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

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

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

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

## Human Rights Issues

- **Subordinate Law SL2023-28 being the Magistrates Court (Urban Forest Infringement Notices) Regulation 2023 made under Part 3.8 of the *Magistrates Court Act 1930*, enables authorised persons under section 111 of the *Urban Forest Act 2023* to issue infringement notices and reminder notices.**

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

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

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

The use of strict liability offences is an established and common approach to enforcing offences in regulatory contexts. While this does limit rights in criminal proceedings, strict liability offences and corresponding infringement notices exist within the constraints of the education-focused compliance framework in the Act and the general protections of criminal law.

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

.....

The means proposed to achieve this objective is to introduce offences to discourage prohibited behaviours that cause damage to trees and reduce the canopy coverage. These include strict liability offences to facilitate enforcement of that prohibition, for which the infringement notices penalties are set out in the Regulation.

In particular, the strict liability offences listed in this Regulation are appropriate for infringement notices as they relate to damage to trees (either directly or via prohibited groundworks in their protection zone), contravening approval conditions, tree management plans or tree reparation directions, and non-compliance with enforcement (either via interfering with a seized thing or failing to provide personal details when directed). These offences relate directly to tree harm, commitments to avoid, minimise or, where possible, repair tree harm, and efforts to enforce breaches of the legislation. As infringement notices may be issued in a timely manner, they are an important tool in deterring and stopping such harms from continuing once they are identified. This is particularly valuable for tree protection as actions that breach these offences may cause long-term irreparable adverse impacts to trees which contribute to an overall decline of the urban forest.



.....

An inherent safeguard against the limitation on the right to the presumption of innocence is the availability of the defence of mistake of fact. This would allow anyone charged with an offence under ss 16(5) and 17(4) to challenge the assertion that tree damage or prohibited groundwork had occurred. This defence would be a safeguard for third parties like tradespeople or visitors who may be lawfully on the property and inadvertently breach offence provisions because they are not aware, for example, that the tree is protected by virtue of it being planted under a Canopy Contribution Agreement.

.....

The Urban Forest Act was notified on 11 April 2023 and is scheduled to commence on 1 January 2024, along with the commencement of this Regulation. Prior to the commencement date a public education program will be undertaken to alert the community and businesses, such as arborists, about the new laws to ensure they are aware of their obligations. Appropriate safeguards, such as mail-outs to third parties e.g. new property owners, will be implemented to ensure people likely to have the most regular dealings with protected trees are aware of their status so they do not inadvertently breach provisions of the Bill.

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

## Human Rights Issues

- **Subordinate Law SL2023-29 being the Planning (Transitional Provisions) Regulation 2023 made under section 601 of the *Planning Act 2023* amends chapter 20 of the *Planning Act 2023* to clarify certain transitional arrangements.**

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

Right to privacy (section 12 HRA)

Right to take part in public life (section 17 HRA)

- 2.117. This subordinate law is made under section 601 of the *Planning Act 2023*, which allows for regulations to be made to amend the Act (ie it is a 'Henry VIII' clause). According to its explanatory statement, this subordinate law ...

.... contains administrative and process provisions to support the operation of the *Planning Act 2023* (the Act) in the reformed planning system. This regulation amends chapter 20 of the Act to clarify transitional arrangements for:

- Minor plan amendments during the period of the interim Territory Plan
- Major plan amendments during the period of the interim Territory Plan
- lease processes commenced but not completed prior to the commencement of the Act.

- Applications for further leases made prior to commencement of the Act, or where a lease expired no more than 6 months prior to the commencement of the Act.
- 2.118. The explanatory statement for the subordinate law discusses ‘Scrutiny of Bills Committee principles and human rights’, identifying the right to privacy and the right to take part in public life, protected by sections 12 and 17 of the *Human Rights Act 2004*, respectively. It indicates that both rights are promoted. In relation to the right to take part in public life, the explanatory statement indicates that the relevant amendments enhance public consultation.
- 2.119. In relation to the right to privacy, the explanatory statement states:
- 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.
- 2.120. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.121. **This comment does not require a response from the Minister.**

## No Human Rights Issues

- **Subordinate Law SL2023-30 being the Work Health and Safety Amendment Regulation 2023 (No 2) made under section 276 of the *Work Health and Safety Act 2011* makes a minor and technical amendment to an Australian Standard reference in the Work Health and Safety Regulation 2011 in relation to boilers.**
- **Subordinate Law SL2023-32 being the ACT Teacher Quality Institute Amendment Regulation 2023 (No 1) made under the *ACT Teacher Quality Institute Act 2010* amends the ACT Teacher Quality Institute Regulation 2010 by including a definition of “teaching in Australia and New Zealand”, prescribing the qualifications required for eligibility for provisional registration, removing the requirement for Permit to Teach holders to have qualifications in the subject area the person is to teach, and removing certain provisions in relation to English Language Proficiency.**
- **Subordinate Law SL2023-37 being the Motor Accident Injuries (Premiums and Administration) Amendment Regulation 2023 (No 1) made under section 492 of the *Motor Accident Injuries Act 2019* prescribes matters which the Motor Accident Injuries Commission must consider before deciding to impose a financial penalty on an insurer.**

- **Subordinate Law SL2023-38 being the Liquor Amendment Regulation 2023 (No 1) made under the *Liquor Act 2010* removes the requirement for general licensed premises to have a separate on area and off area for the sale of liquor in open and sealed containers for consumption at and off the premises, and introduces new standard licensed times for liquor on licences where occupancy loading is 80 persons or less.**
- **Subordinate Law SL2023-42 being the Building (General) Amendment Regulation 2023 (No 1) made under the *Building Act 2004* amends the Building (General) Regulation 2008 to amend references to a new version of the National Construction Code that comes into effect in the ACT and Jervis Bay Territory on 15 January 2024, clarifies which energy efficiency provisions must be completed by a building assessor, and prescribes the forms of documentary evidence required for demonstrating compliance with the provisions.**

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

- 2.122. The first subordinate law mentioned above ‘makes a minor and technical amendment to an Australian Standard reference in the *Work Health and Safety Regulation 2011* in relation to boilers’.
- 2.123. The second subordinate law mentioned above amends the *ACT Teacher Quality Institute Regulation 2010*, by including a definition of ‘teaching in Australia and New Zealand’, prescribing the qualifications required for eligibility for provisional registration, removing the requirement for Permit to Teach holders to have qualifications in the subject area the person is to teach and removing certain provisions in relation to English Language Proficiency.
- 2.124. The third subordinate law mentioned above amends the *Motor Accident Injuries (Premiums and Administration) Regulation 2019*, in relation to the imposition of financial penalties on a licensed insurer, under section 394D of the *Motor Accident Injuries Act 2019* (**the Act**). The explanatory statement for the subordinate law states.

Under section 394D of the Act, the MAI Commission may impose a financial penalty on a licensed MAI insurer. Before deciding to impose a financial penalty, the MAI Commission must give a show cause notice to the insurer and provide the insurer with an opportunity to make a written submission about the proposed financial penalty. In addition, the MAI Commission must consider any written submissions from the insurer and the matters prescribed by regulation. A financial penalty can then only be imposed if the MAI Commission is satisfied that a ground for a financial penalty exists, the imposition of the penalty is in the public interest and is appropriate taking into account the nature of the contravention.

The regulation prescribes matters for the purposes of section 394D(1)(c) of the Act which the MAI Commission must consider before deciding to impose a financial penalty on an insurer. The prescribed matters include matters that relate to the nature and impact of the conduct in relation to the licensed insurer, the operation of the Act and persons affected by the conduct. Provision is also made for the Commission to consider the same or similar conduct, to the given conduct. The Commission may also consider any other matter which it considers relevant to the given conduct.

- 2.125. The fourth subordinate law mentioned above amends the *Liquor Regulation 2010*, to remove the requirement for general licensed premises to have a separate ‘on’ area and ‘off’ area for the sale of liquor in open and sealed containers for consumption at and off the premises and introduces new standard licensed times for liquor on licences where occupancy loading is 80 persons or less.
- 2.126. The fifth subordinate law mentioned above amends the *Building (General) Regulation 2008*. According to the explanatory statement:
- Its primary purpose is to amend references to a new version of the National Construction Code (**the NCC**) that comes into effect in the ACT and Jervis Bay Territory on 15 January 2024. It also clarifies which energy efficiency provisions must be completed by a building assessor, as defined under the *Construction Occupations (Licensing) Act 2004*, and prescribes the forms of documentary evidence required for demonstrating compliance with the provisions. This includes, for the first time, the new Building Code of Australia (**the BCA**) requirements around net equivalent energy usage, often referred to as a “whole of home” rating (or score).
- 2.127. The Committee notes that the explanatory statements for each of the subordinate laws mentioned above state that there are no human rights impacts related to the relevant subordinate law. The Committee notes that, in relation to the third subordinate law mentioned above, the explanatory statement states:
- There are no human rights implications identified in relation to the regulation. The financial penalty provisions apply to an insurer (a corporation) and not individuals.
- 2.128. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the subordinate laws mentioned above.**
- 2.129. **This comment does not require a response from the relevant Ministers.**

## Human Rights Issues

- **Subordinate Law SL2023-31 being the Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1) made under section 321 of the *Magistrates Court Act 1930* amends the Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013 to introduce a new public unleased land offence in relation to restrictions on electoral signs, particularly political corflutes.**

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

Right to freedom of expression (section 16 HRA)

Right to be presumed innocent until proved guilty (section 22 HRA)

- 2.130. This subordinate law amends the *Magistrates Court (Public Unleased Land Infringement Notices) Regulation 2013*, to introduce a new public unleased land offence in relation to restrictions on electoral signs, particularly political corflutes. The explanatory statement for the subordinate law states that the restrictions are based on Agreed Legislative Reform item no. 18 of the Parliamentary and Governing Agreement of the 10<sup>th</sup> Legislative Assembly (**PAGA**), to ‘further restrict roadside electoral advertising including further regulation of roadside corflutes’.

- 2.131. The new restrictions introduce a maximum number of signs per prospective candidate and entity on public unleased land during elections (currently set at 250) and bans the placement of electoral signs on or alongside designated public roads (currently defined as public roads with a speed limit of 90km/h or more, regardless of whether a temporary speed limit is applied to the road such as for road works) at elections and referendums.
- 2.132. The explanatory statement for the subordinate law discusses, in detail, human rights issues, focussing on the right to freedom of expression and the right to the presumption of innocence, protected by sections 16 and 22 of the *Human Rights Act 2004*, respectively. The latter right is engaged by the use of new strict liability offences, with a fairly standard justification provided.
- 2.133. In relation to the right to freedom of expression, the explanatory statement states:
- [The subordinate law] limits the right to freedom of expression under section 16 of the Human Rights Act and also engages the implied Australian Constitutional right to freedom of political communication.
- 2.134. The Committee notes that the explanatory statement does not directly justify the limitations on the right to freedom of expression, other than (indirectly) in justification of the use of strict liability offences.
- 2.135. **The Committee draws this matter to the attention of the Legislative Assembly.**
- 2.136. **The Committee requests that the Minister provide further information in relation to the justification for the limitation on the right to freedom of expression.**

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

## Human Rights Issues

- **Subordinate Law SL2023-33 being the Climate Change and Greenhouse Gas Reduction Amendment Regulation 2023 (No 1) made under the Climate Change and Greenhouse Gas Reduction Act 2010 modifies the application of the national energy laws in relation to new natural (fossil fuel) gas network connections.**

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

Right to life (section 9 HRA)

Right not to have one's home interfered with unlawfully or arbitrarily (paragraph 12(a) HRA)

Right to a fair trial (section 21 HRA)

- 2.137. This subordinate law amends the *Climate Change and Greenhouse Gas Reduction Regulation 2011*, by inserting new Parts 2, 3 and 4. According to the explanatory statement for the subordinate law:

This [subordinate law] modifies the application of the national energy laws to restrict new natural (fossil fuel) gas network connections to all residential, commercial and community facility zones and to residential type buildings in the ACT unless a transitional arrangement applies or an exemption application is approved by the Minister.

This will give effect to the ACT Government's intention to phase out new natural gas connections and meet the ACT Government's greenhouse gas emissions reduction targets.

In effect the regulation restricts new natural gas connections.

The regulation does this by prescribing areas, using the zone categories in the Territory Plan, to identify land areas, and identifies stated premises according to building class, as identified in the Building Code.

- 2.138. The explanatory statement goes on to discuss human rights issues, focussing on the right to life, the right not to have one's home interfered with unlawfully or arbitrarily and the right to a fair trial, protected by section 9, paragraph 12(a) and section 21 of the *Human Rights Act* 2004, respectively. The right to life is promoted. The explanatory statement states:

The regulation promotes the right to life as it restricts new gas connections for the legitimate aim of reducing greenhouse gas emissions caused by the use of natural gas. Reducing emissions contributes positively to addressing and adapting to climate change, which helps to preserve the environment. These measures protect the right to a life with dignity by addressing the threat of environmental degradation to present and future generations in the Territory.

- 2.139. In relation to the right not to have one's home interfered with unlawfully or arbitrarily, the explanatory statement states:

New section 6 of the regulation restricts the areas and premises in the ACT where the gas distributor can provide a new connection for natural gas. New section 6 may engage the right to privacy to the extent that the restriction could be considered an interference to a person's home by limiting their choice to connect their homes to the natural gas network in prescribed areas or premises.

- 2.140. The explanatory statement goes on:

The restriction is a necessary and proportionate measure to achieve the purpose of the limitation and less restrictive measures have proven to be ineffective at achieving this aim.

The restriction does not apply to the entire Territory and will have no impact on existing connections. Premises with an existing gas connection can relocate their gas connection (provided that relocation does not fall within the definition of 'new gas connection': section 13A(4) of the [*Climate Change and Greenhouse Gas Reduction Regulation Act 2010*]). Individuals will have ongoing access to other energy sources, including access to gas by other means not restricted under the regulation.

The exemption application process is an important safeguard and will allow for warranted exemptions to be made in areas that would otherwise be restricted from receiving a new natural gas connection.

2.141. In relation to the right to a fair trial, the explanatory statement states:

While not apparent on the face of the legislation, the right to a fair trial has been interpreted by the Courts to include a right to merits review for civil matters. New section 11 of the regulation provides a process by which an application can be made to the Minister to seek an exemption to the restriction and the Minister's decision of an application is subject to judicial review by a competent, independent and impartial court. However, the regulation does not provide a right of review by a tribunal. To this extent, the right to a fair trial may be limited by an absence of a right to tribunal review of the Minister's decision under the regulation.

It is anticipated that few individuals will utilise the exemption application process with most applications being received from commercial entities (to which the Human Rights Act 2004 does not apply: section 6). Consequently, the anticipated practical impact of the limitation is minimal.

2.142. In further justifying this limitation of the right to a fair trial, the explanatory statement points to the access to judicial review:

The regulation will preserve access to justice by ensuring that decisions made by the Minister are subject to judicial review. The purpose of the Minister retaining a discretion to consider exemption applications on a case-by-case basis is directly related to this potential limitation.

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

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

## Human Rights Issues

- **Subordinate Law SL2023-34 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2023 (No 3) made under section 184 of the *Medicines, Poisons and Therapeutic Goods Act 2008* amends the Medicines, Poisons and Therapeutic Goods Regulation 2008 in relation to the storage of controlled medicines by research and education program licence holders, refrigerated storage of controlled medicines and storage of daily use opioid maintenance treatment medication in community pharmacies.**

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

#### Right to life (section 16 HRA)

2.145. This subordinate law amends *the Medicines, Poisons and Therapeutic Goods Regulation 2008* to impose additional restrictions in relation to the storage of controlled medicines by research and education program licence holders, the refrigerated storage of controlled medicines and the storage of daily use opioid maintenance treatment medication in community pharmacies.

2.146. The explanatory statement for the subordinate law discusses human rights issues, identifying the right to life, protected by section 9 of the *Human Rights Act 2004*, as being promoted:

Ensuring the effective regulation of medicines in the ACT, including appropriate and flexible storage options for controlled medicines through the Amendment Regulation 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 supply of medicines.

The [subordinate law] expands on existing controlled medicine storage requirements, affording greater flexibility in storage options for controlled medicines proportionate to risk. Enabling refrigerated storage for controlled medicines allows for better options for controlled medicines requiring refrigeration to be prescribed and supplied in the ACT and by extension, improving patient access to medicinal treatment options.

As such, the [subordinate law] is considered to indirectly engage and promote the right to life.

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

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

## Human Rights Issues

- **Subordinate Law SL2023-35 being the Variation in Sex Characteristics (Restricted Medical Treatment) Regulation 2023 made under the *Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023* provides additional details on aspects of the operation of the Variation in Sex Characteristics (Restricted Medical Treatment) Act 2023 in relation to approval, assessment and eligibility requirements under the Act.**

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

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

2.149. This subordinate law provides ‘additional detail’ in relation to the following 5 issues identified by the explanatory statement for the subordinate law:

- What variations in sex characteristics do not require prior approval for what would be restricted medical treatments;
- What treatment, while not permanent in its effect, nevertheless requires prior approval under the Act before proceeding;
- How assessment committees work;
- Additional eligibility requirements that apply in some of the categories of membership of the [Restricted Medical Treatment Assessment Board]; and
- What information about reportable treatments must be provided to the Board.

2.150. The explanatory statement for the subordinate law discusses human rights issues, identifying the right to privacy, protected by section 12 of the *Human Rights Act 2004*, as being engaged:

The right to privacy of prescribed persons who have a variation in sex characteristics will be limited by this [subordinate law] in two ways additional to how that right is limited by the Act, and which is explained in detail in the Explanatory Statement to the Act (pages 30-36).<sup>10</sup>

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<sup>10</sup> Available at <https://www.legislation.act.gov.au/DownloadFile/a/2023-23/20231223-81245/PDF/2023-23.PDF>.



First, clause 4 of this [subordinate law] prescribes vaginal dilation under section 8(1)(b) of the Act as a treatment that is required to be managed as a restricted medical treatment. This extends the range of medical treatment of a person with a variation in sex characteristics for which treatment decisions will no longer be a private matter between their decision-makers and their treating medical practitioner.

Second, clause 9 of this [subordinate law] requires additional information about certain medical treatments to be reported to the Board. These are the details of each reportable treatment undertaken, and the date the reportable treatment started.

**2.151. The explanatory statement goes on:**

As set out in the Explanatory Statement to the Act, both health professionals and community advocates have sought better information about what treatments are being undertaken on people with variations in sex characteristics. Reporting requirements are also necessary so that the Board can understand how the Act is operating and what treatments are occurring without approval, under the Act's various exemptions (including through some variations in sex characteristics being exempted from approval requirements by this regulation).

However, without clause 9 of the regulation, for some prescribed persons who have a variation in sex characteristics, the Board would not be made aware of what treatment they were receiving or when it occurred. Without this information, the Board would lack an understanding of what medical interventions are occurring among people with variations in sex characteristics. This would in turn limit the ability of the Board to offer effective advice when meeting its responsibilities under section 30(b) of the Act.

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

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

## **No Human Rights discussion**

- **Subordinate Law SL2023-36 being the Court Procedures Amendment Rules 2023 (No 2) made under section 7 of the *Court Procedures Act 2004* makes amendments to the Court Procedures Rules 2006 with respect to documents filed and issued electronically.**

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

2.154. The amendments made by this subordinate law (according to the explanatory statement) 'clarify the operation of the *Court Procedures Rules 2006* with respect to documents filed and issued electronically.' The explanatory statement then details the particular amendments.

2.155. However, there is no discussion of possible human rights issues raised by the subordinate law, to assist the Committee in its (expanded) role under section 38 of the *Human Rights Act 2004*.

- 2.156. **The Committee draws the attention of the Legislative Assembly to this subordinate law, under principle (10)(d) of the Committee’s resolution of appointment, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.**

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

## Human Rights Issues

- **Subordinate Law SL2023-39 being the Urban Forest Regulation 2023 made under the Urban Forest Act 2023 provides details of the canopy contribution framework agreements and tree bond agreements, including contribution and bond amounts and bond periods.**

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

Right to life (section 9 HRA)

Right to privacy and reputation (section 12 HRA)

- 2.158. This subordinate law prescribes matters for the *Urban Forest Act 2023*. The explanatory statement for the subordinate law states:

The [subordinate law] provides the details of the canopy contribution framework agreements and tree bond agreements, including contribution and bond amounts, and bond periods. This supports the Act in enhancing Canberra’s tree canopy to reach a target of 30 per cent canopy coverage by 2045.

- 2.159. The explanatory statement goes on to discuss human rights issues, focussing on the right to life and the right to privacy and reputation, protected by sections 9 and 12 of the *Human Rights Act 2004*, respectively. The explanatory statement indicates that the right to life is promoted, in that the subordinate law ‘supports the [Urban Forest Act] in addressing the ACT Government’s obligation to protect its citizens through maintaining and enhancing environmental conditions of Canberra that impact on the right to life.’ In relation to the right to privacy and reputation, the explanatory statement indicates that this right is engaged because it involves the regulation of trees on private land, ‘in such a way as to impact on a person’s ability to enjoy their home’.

- 2.160. On the latter issue, the explanatory statement concludes:

The limitations on the right to privacy are considered proportionate to the legitimate purpose of tree protection and increasing canopy coverage. The limitation on privacy is achieved using the least restrictive means possible, because the canopy contribution amounts and bond agreement amounts and periods only apply where applicants have chosen to conduct works. No cost and low-cost canopy contribution pathways are available, as are discounts for concession holders as outlined in section 7(3) of the Regulation. Applicants who are making an on-site canopy contribution may choose the size and location of the replacement trees they are planting, so long as there is adequate planting space, and the combined trees will achieve the required canopy cover within twenty years. Where a tree bond is applied the bond will be fully refunded after a defined period where the tree has not been damaged, or partially refunded or not refunded where damage has occurred.

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

## Human Rights Issues / Strict liability offences

- **Subordinate Law SL2023-40 being the Road Transport (Road Rules) Amendment Regulation 2023 (No 1) made under the *Road Transport (General) Act 1999* and *Road Transport (Safety and Traffic Management) Act 1999* amends the Road Transport (Road Rules) Regulation and the Road Transport (Offences) Regulation to improve road safety and provide for traffic management in relation to the use of a mobile device while driving and the operation of a mobile device detection system.**

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

Right to the presumption of innocence until proved guilty (subsection 21(1) HRA)

- 2.163. This subordinate law amends the *Road Transport (Road Rules) Regulation 2017*, in relation to the use of a mobile device while driving and the operation of a mobile device detection system. According to the explanatory statement for the subordinate law, the amendments:
- introduce a permanent exemption under Part 19 [of the *Road Transport (Road Rules) Regulation 2017*] to allow vehicles being used as part of a mobile device detection system to contravene certain road rules relating to parking and manoeuvring when it is reasonable to do so;
  - clarify that holding a mobile phone while driving a vehicle includes resting the device, or keeping it in place by, the driver's body, an item on the driver's lap, or the driver's clothing (other than in a pocket or pouch). This change will also apply to a person travelling in or on a personal mobility device;
  - provide a singular offence for all drivers that illegally use a mobile device while the vehicle is moving, or is stationary but not parked; and
  - administrative amendments, including supporting the definition of mobile device to be relocated into the dictionary.
- 2.164. The explanatory statement for the subordinate law indicates that the amendments made include amendments to 3 existing strict liability offences. The Committee is pleased to note that, as a result, the explanatory statement goes on to provide a (fairly typical) justification for the use of strict liability offences, by reference to the right to the presumption of innocence until proved guilty, protected by subsection 22(1) of the *Human Rights Act 2004*.
- 2.165. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.166. **This comment does not require a response from the Minister.**

## Human Rights Issues

- **Subordinate Law SL2023-41 being the Senior Practitioner Regulation 2023 made under the *Senior Practitioner Act 2018* defines a prohibited restrictive practice and provides a list of physical restraints and punitive practices which are prohibited.**

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

No-one may be treated or punished in a cruel, inhuman or degrading way (paragraph 10(1)(b) HRA)

Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind (subsection 11(2) HRA)

No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law (subsection 18(2) HRA)

- 2.167. This subordinate law defines a ‘prohibited restrictive practice’ and provides a list of physical restraints and punitive practices which are prohibited. According to the explanatory statement for the subordinate law, ‘[this] ... will bring the ACT in line with other jurisdictions as well as the NDIS Quality and Safeguards Commission.’ The explanatory statement indicates that the amendments made by the subordinate law are consequential on an amendment to the *Senior Practitioner Act 2018*, passed by the Legislative Assembly on 22 November 2022, removing subparagraph 7(1)(b)(vi) of the Act.
- 2.168. The explanatory statement discusses human rights issues. The totality of the discussion is as follows:

#### Human rights implications

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

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

- Section 10 (1)(b): No-one may be treated or punished in a cruel, inhuman or degrading way.
- Section 11 (2): Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.
- Section 18 (2): No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.
- The *Senior Practitioner Act 2018* Section 6(e)(i) establishes that the objects of the Act are to regulate the use of restrictive practices by a provider in relation to a person in a way that is consistent with a person’s human rights.

Through the establishment of this regulation human rights are upheld as it ensures that those practices that are not consistent with a person’s human rights are established and are punishable through the *Senior Practitioner Act 2018*.

- 2.169. Though it is not made as clear as it might have been, the Committee assumes that the rights in question are, in fact, promoted. On that basis, the Committee makes no further comment.
- 2.170. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.171. **This comment does not require a response from the Minister.**

Peter Cain MLA  
Chair

March 2024

# Outstanding responses

## Bills/Subordinate Legislation

### Report 28, dated 3 May 2023

#### Bill

- Modern Slavery Legislation Amendment Bill 2023

### Report 37, dated 21 November 2023

#### Bill

- Parentage (Surrogacy) Amendment Bill 2023

### Report 38, dated 30 January 2024

#### Bills

- Assisted Reproductive Technology Bill 2023
- Property Developers Bill 2023

#### Subordinate Legislation

- Disallowable Instrument DI2023-202 being the Children and Young People (Kinship and Foster Carers Risk Assessment) Guidelines 2023