



Legislative Assembly for the Australian Capital Territory

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

Scrutiny Report 32

Legislative Assembly for the Australian Capital Territory
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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

Kathleen de Kleuver, Committee Secretary

Kate Mickelson, Assistant Secretary

Anna Hough, Assistant Secretary

Satyen Sharma, Administration Officer

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

Contact us

Mail Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
Legislative Assembly for the Australian Capital Territory
GPO Box 1020
CANBERRA ACT 2601

Phone (02) 6205 0171

Email scrutiny@parliament.act.gov.au

Website parliament.act.gov.au/parliamentary-business/in-committees

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 (Office of the Legislative Assembly) Bill 2023-2024

- 1.1. This Bill provides for appropriations for the ACT Integrity Commissioner, the Auditor General, the Electoral Commissioner and the Office of the Legislative Assembly.

Appropriation Bill 2023-2024

- 1.2. This Bill provides for appropriations for net controlled recurrent payments, capital injections, and payments to be made on behalf of the Territory to directorates established by the Administrative Arrangements and guidelines issued under Section 133 of the *Financial Management Act 1996* (FMA), Territory authorities and Territory-owned corporations.

Bills—Comment

Bail Amendment Bill 2023

- 1.3. This Private Member's Bill amends Schedule 1 of the *Bail Act 1992* to remove the presumption of bail in relation to three offences: culpable driving of motor vehicle and driving motor vehicle at police (offences against the *Crimes Act 1900*), and furious, reckless or dangerous driving (an offence against the *Road Transport (Safety and Traffic Management) Act 1999*).

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

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

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

Rights in criminal proceedings (section 22 HRA)

- 1.4. A person charged with the offences listed in the Bill is currently entitled to be granted bail unless the court or authorised officer is satisfied that refusal of bail is justified after considering the relevant criteria. By removing this presumption in favour of bail, whether any defendant accused of committing any of the three offences listed in the Bill would be granted bail would depend on whether, in the circumstances of the case, the granting of bail was the preferable decision. In those circumstances neither the applicant nor the Crown has an onus to persuade the decision-maker whether any particular test has been met.¹

¹ See, for example: *R v Day* [2022] ACTSC 60.

- 1.5. In the Committee’s view, by providing for bail to be refused on the basis of refusal being the preferable decision, the Bill may limit the right to liberty and security of person in section 18 of the HRA. The grant of bail is generally provided for under subsection 18(5) of the HRA which provides: ‘[a]nyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear ...’. In its commentary on the equivalent provision in the *International Covenant on Civil and Political Rights*, the United Nations Human Rights Committee states:

Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.²

- 1.6. By requiring only that detention is considered preferable rather than starting from the presumption that continuing detention will only be authorised where it can be justified, the Bill may limit this right.
- 1.7. Removal of the presumption for bail may also give rise to the need, in determining whether to grant bail, for the prosecution and courts to consider factors including the nature and seriousness of the offence and strength of the evidence against the person (see sections 22 and 23 of the Bail Act). This may limit the presumption of innocence protected as a right in criminal proceedings under section 22 of the HRA.³
- 1.8. The explanatory statement accompanying the Bill states that the amendments ‘uphold and protect Human Rights’ and ‘do not limit any rights’. In the Committee’s view, given the Bill may limit the right to liberty and rights in criminal proceedings, these potential limitations should be recognised, and a statement provided setting out why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. **The Committee asks that consideration be given to amending the explanatory statement to include such a statement.**

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

Courts Legislation Amendment Bill 2023

- 1.9. This Bill amends a range of legislation relating to courts in the Territory, including:
- a) The *Supreme Court Act 1933* to remove the position of Associate Judge and extend the maximum term of appointment of an acting judge from 12 months to 2 years;

² UN Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35.

³ See also *Woods v DPP* [2014] VSC 1 at [34].

- b) the *Magistrates Court Act 1930* to clarify the application of immunity for magistrates, registrars and deputy registrars in the exercise of judicial or administrative functions; and
- c) the *Court Procedures Act 2004* to enable the *Court Procedure Rules 2006* to provide courts with the power to order costs against non-parties to proceedings.

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

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

Right to privacy and reputation (section 12 HRA)

Right to a Fair Trial (section 21 HRA)

- 1.10. Under the Court Procedures Act, the rule-making committee (comprising judges and magistrates) has the power to establish rules relating to, among other things, costs. The Bill will amend that Act to enable rules relating to costs to include costs against non-parties to proceedings. By allowing for orders to be made for non-parties to the proceeding the Bill may limit the protection of privacy and reputation provided in section 12 of the HRA, and the right to a fair trial in section 21 of the HRA.
- 1.11. 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 explanatory statement includes a description of the criteria to be applied in any order of costs against non-parties as set out by the High Court in the case of *Knight v FP Special Assets Limited* (1992) 174 CLR 178. The Committee refers that statement to the Assembly.
- 1.12. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Electoral and Road Safety Legislation Amendment Bill 2023

- 1.13. This Bill amends:
 - a) the *Electoral Act 1992* to ban donations from foreign donors and introduce real time donation reporting, allow any voter to access early voting for two weeks prior to the election and provide for overseas electronic voting, support administrative efficiencies for Elections ACT, and strengthen rules around authorisation statements; and
 - b) the *Public Unleased Land Act 2013* and Road Transport regulations to further restrict roadside electoral advertising including corflutes, and introduce offences or increase penalties associated with vehicles advertising commercial or political messages.

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)

Rights in criminal proceedings (section 22 HRA)

- 1.14. The Explanatory statement for the Bill recognises that each of these rights may be limited by the following aspects of the Bill and provides for why any limitation should be considered reasonable using the framework set out in section 28 of the HRA. The Committee refers that statement to the Assembly.

Enhancing party membership checks and requiring names and address of party secretaries to be provided to the Electoral Commission

- 1.15. Registration for a political party currently involves providing details of the registered officer for the party. The Bill will also require details of the secretary of the political party to be provided. Parties must also currently provide the name and address of at least 100 members of the party who are electors. The Bill will amend this to require details of the member's date of birth and email address to also be provided. The application for registration is available for public inspection at the Commissioner's office.

- 1.16. By requiring the provision of further personal details of secretaries and members of registered political parties the Bill may limit the protection of privacy provided by section 12 of the HRA.

Special Interest Profiles

- 1.17. Generally posting electoral matter on social media requires the person authorising the material to be identified in the post. However, s 293A of the Electoral Act provides an exemption from this need to authorise electoral matter where the social media posts are not paid for and form part of the individual's personal political views. The Bill will also require that, to be exempted, the post be made in an individual's personal capacity and the social media account is either in their name or not created for the dominant purpose of disseminating electoral matter.

- 1.18. By adding further requirements to the use of social media for disseminating unauthorised electoral matter the Bill may limit the right to freedom of expression in section 16 of the HRA.

Electoral sign offences under the Public Unleased Land Act 2013

- 1.19. The Public Unleased Land Act currently includes the strict liability offence for placing a movable sign on public unleased land and failing to comply with the movable signs code of practice. The offence has a penalty of 10 penalty units, or 50 penalty units if the failure relates to insurance. The Bill will insert a new strict liability offence for placing a moveable sign which contains electoral matter on public unleased land which either exceeds the

number of signs permitted by the code of practice (currently 250) or is placed adjacent to a designated public road. The new offence will have a penalty of 20 penalty units.

- 1.20. By limiting the number and placement of electoral material the Bill may limit the protection of freedom of expression under section 16 of the HRA. By providing for strict liability the proposed offence may limit the presumption of innocence protected as a right in criminal proceeding under s 22 of the HRA.
- 1.21. **The Committee draws these matters to the attention of the Assembly, but does not require a response from the Minister.**

[Freedom of expression \(section 16 HRA\)](#)

[Rights in criminal proceedings \(section 22 HRA\)](#)

Road safety offence under the road transport legislation

- 1.22. The Bill will amend the *Road Transport (Road Rules) Regulation 2017* to insert an offence where a vehicle with an attached sign displaying advertising or electoral matter is parked in a designated place. The offence will be a strict liability offence with a maximum penalty of 20 penalty units. A road, road related area or public unleased land can be designated by the Minister in a notifiable instrument in the interests of public safety. The Minister may also declare matter that is or is not advertising in a disallowable instrument.
- 1.23. By limiting the ability to display signs on parked cars the Bill may limit the protection of freedom of expression under section 16 of the HRA. By providing for strict liability the proposed offence may limit the presumption of innocence protected as a right in criminal proceeding under s 22 of the HRA.
- 1.24. The Committee is concerned that the elements of the strict liability offence are defined through further delegated instruments, insufficiently subjecting the exercise of legislative power to parliamentary scrutiny in line with the Committee Resolution of Appointment paragraph (10)(a)(v). While the explanatory statement suggests that there will be a public community education campaign prior to the commencement of the amendments, this will not necessarily apply to subsequent declarations or adequately inform drivers of where the designated areas are or the details of what does or does not constitute an advertisement.
- 1.25. The Committee notes that there is no necessary link in the Bill between the nature of an advertisement or electoral matter and the impact their display is likely to have on public safety. The definition of sign refers to a board, device, plate or screen, ruling out banners and flags which may be just, if not more, distracting for drivers. There is no reference to the size or obtrusiveness any sign would have to have before its display could lead to the offence. It is therefore not clear to the Committee whether these details would necessarily be included in any disallowable instrument defining what is and what is not an advertisement.
- 1.26. The Committee also notes that the Bill will amend the *Road Transport (Offences) Regulation 2005* to provide the Minister with the power to declare matter that is or is not advertising for the purposes of various infringement notice offences which relate to stopping and parking set out in Part 12 of the *Road Transport (Road Rules) Regulation*

2017. Any declaration will be a disallowable instrument. The Bill will also insert a new definition of electoral matter in the regulation. Where a relevant offence is committed, and such advertising or electoral matter is displayed, the applicable infringement notice penalty will be increased by \$50.

- 1.27. As the Bill will introduce higher penalties associated with the display of advertising or electoral material the Bill may limit the freedom of expression protected by section 16 of the HRA. The explanatory statement accompanying the Bill does not recognise any such limit associated with the amendment to the Road Transport (Offences) Regulation nor provide an explanation for why it should be considered reasonable using the framework in section 28 of the HRA. The Committee notes that what constitutes display for the purposes of higher infringement notice penalties is not defined, and there is no necessary connection between the advertisement or electoral material and concerns with public safety. There is also no requirement for the declaration of what constitutes an advertisement under the Road Transport (Offences) Regulation to be the same as under the new offence to be introduced into the Road Transport (Road Rules) Regulation.
- 1.28. **The Committee therefore requests further information on the operation of the new offences and penalties associated with signs or displays of advertising and electoral material, including:**
- a) **why it is considered necessary to define elements of the offences through delegated instruments; and**
 - b) **why any limitations of rights protected under the HRA associated with higher infringement notice penalties should be considered reasonable using the framework under s 28 of that Act.**

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

[Right to recognition and equality before the law \(section 8 HRA\)](#)

[Freedom of association \(section 15 HRA\)](#)

Introduction of real-time political donation reporting

- 1.29. The Bill will generally require political entities to disclose any gift they receive valued at over \$100 within seven days. An accumulated total of 13 or more gifts each under \$100 in a relevant period, generally a financial year, also has to be reported within seven days of receiving the 13th and each subsequent gift. The details of the donation, including the donor's name and address, have to be disclosed, although only the person's post code, suburb or post box must be made public by the Commissioner. A political entity will be defined to mean registered political parties and members who are members of the legislative assembly (MLAs), candidates and prospective candidates, and non-party MLAs, candidates and prospective candidates and persons making financial expenditure on their behalf.

- 1.30. By lowering the current threshold of \$1,000 to \$100 and hence requiring the names and addresses of many more donors to be reported the Commissioner, the Bill may limit the protection of privacy provided by section 12 of the HRA. The explanatory statement accompanying the Bill recognises this potential limit. Subject to the following comments, the Committee refers that statement to the Assembly.
- 1.31. The Committee is concerned that increased transparency of public donations may require political parties to disclose the payment of membership fees which may entitle the person to participate in party activities such as being put forward or voting for a party candidate. The Committee notes that the definition of a gift does not include the first \$250 of any annual subscription for membership of a party (section 198AA). To the extent that the Bill allows for inferences to be drawn that certain payments may constitute membership fees and hence allow identification of members of the political parties, the Bill will go beyond the current membership reporting requirements. The Bill will require all party members to agree to having their identity and, and least indirectly, their membership of the party, disclosed. This may limit the right to freedom of association under section 15 of the HRA and potentially limit the right to take part in public life protected under section 17 of the HRA.
- 1.32. The Bill will provide that 13 or more gifts of under \$100 in a relevant period will have to be reported. The relevant period is defined for a registered political parties, MLAs or associated entities to be a financial year. However, for non-party candidates and prospective candidates and those who incur electoral expenditure on their behalf, the period depends on whether they were a candidate in a previous Territory election. The relevant period for previous candidates will start on the 31st day after the polling day for that previous election. For other non-party candidates and potential candidates the relevant period doesn't begin until the person announces or is nominated as a candidate in the coming election. For all non-party candidates and prospective candidates, the relevant period ends 30 days after polling day.
- 1.33. The Committee acknowledges that the Bill will adopt the current definition of the relevant period in section 216A. However, The Committee is concerned that its continued use in these amendments may impose an additional burden on non-party candidates who have been a candidate in previous elections. Non-party candidates will have to disclose donations above the threshold quantity for a longer period of time than political parties. This may require the disclosure of donations that, if they had been donated to a political party, would not have to be disclosed. This may limit the right to equal protection under section 8 of the HRA.
- 1.34. **The Committee therefore asks for further information on the potential impact of the reporting requirements on disclosure of party membership, and on candidates in previous elections.**

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

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

Freedom of expression (section 16 HRA)

Rights in criminal proceedings (section 22 HRA)

Ban on donations from foreign entities

- 1.35. The Bill will make it an offence for a foreign entity to donate over \$250 to a political entity in the Territory. Donations under \$250 will incur a debt to the Territory of an equal amount. A foreign entity will be defined as not including Australian citizens or residents, persons enrolled to vote in the Territory or the Commonwealth, companies incorporated, who have their head office, or principal place of activity in Australia, or Australian body politics such as State governments.
- 1.36. There are various exemptions to these restrictions including non-monetary gifts provided by foreign governments under \$250, gifts that are returned within 30 days, gifts paid into federal accounts for the purposes of the *Commonwealth Electoral Act 1918* (Cth) and prospective candidates who do not declare as a candidate for the election.
- 1.37. By imposing limits on donations from foreign entities, to the extent those entities are individuals the Bill will limit the right to equality before the law under section 8 of the HRA. By creating offences with a possible penalty of imprisonment, the Bill may also limit the right to liberty in section 18 of the HRA. The explanatory statement accompanying the Bill recognises these potential limitations 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.
- 1.38. A ban on donations from foreign entities may reduce the funding available for political entities for purposes associated with an election or their role as a political representative. Political entities will also be prevented from accepting gifts given by or on behalf of foreign entities, including through the introduction of an offence for a political entity to accept a gift over \$250 from or on behalf of a foreign entity unless the political entity takes reasonable steps to ensure against such a donation occurring. This may, at least indirectly, limit the ability of political entities from engaging in political communication and hence may limit the freedom of expression protected by section 16 of the HRA. The Bill may also limit the presumption of innocence protected as a right in criminal proceeding in section 22 of the HRA by placing an evidential burden on the defendant to establish they took reasonable steps to ensure a gift was not by or on behalf of a foreign entity.
- 1.39. The explanatory statement accompanying the Bill does not recognise these potential limits of rights protected under the HRA relating to the Bill's limitations on donations from foreign entities. The Committee recognises that the justification given in the explanatory statement for why any limitation of the right to equality should be considered reasonable may also be applicable to these further limitations. However, consideration should be given to amending the explanatory statement to recognise and make clear the justification

for the limitation of freedom of expression or rights in criminal proceedings in these amendments.

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

Planning (Consequential Amendments) Bill 2023

- 1.40. This Bill makes consequential amendments to over 70 pieces of ACT legislation as a result of the *Planning Act 2023* and associated regulations.

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 a fair trial (section 21 HRA)

- 1.41. The Bill will amend the *Administrative Decisions (Judicial Review) Act 1989* ('ADJR Act') to exclude from review under that Act the following decisions made under the Planning Act:

a decision under chapter 6 (Significant development), chapter 7 (Development assessment and approvals) or chapter 10 (Leases and licences) in relation to a development proposal that is related to light rail, other than a development proposal involving a protected matter.

This amendment will substantially replicate the current exclusions for review under the ADJR Act for decisions relating to the light rail project.

- 1.42. By removing the possibility of judicial review under the ADJR Act the Bill will therefore potentially limit the right to a fair trial under s 21 of the HRA Act. The explanatory statement recognises this potential limit and sets out why any limitation should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.43. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

Government Responses - Comment

Human Rights Commission Amendment Bill 2023

- 1.44. In its *Report 28* of 3 May 2023, the Committee raised a concern with the *Human Rights Commission Amendment Bill 2023*. The Bill provides for the Human Rights Commission to impose a final prohibition or control order with the effect of conditioning or prohibiting the provision of a health service. One of the conditions which, if satisfied, could lead to the imposition of such an order was the conviction of the health care worker of offences under

various specified Commonwealth and Territory legislation where the offence was in relation to a health service provided by the health care worker. The Committee raised the concern that some of these offences might be unrelated to the concerns with public health and safety with which the provision is concerned, and that any final order in those circumstances may constitute an additional source of penalty, potentially limiting the right not to be tried or punished more than once protected by section 24 of the HRA.

- 1.45. In their response to the Committee's concern on 16 June 2023, the Minister emphasised the purpose of a final order under the Bill is to protect the public from a serious risk to health and safety. A final order is therefore intended to be protective rather than punitive in character and hence not a limitation of section 24 of the HRA. The Minister indicated that to make an order the Commission must be satisfied on reasonable grounds that there would be a serious risk to the health and safety of the public separately and in addition to the offence.
- 1.46. The Committee remains concerned with the role the conviction of the offences listed in the provision may play in enabling the Commission to make a final order. The offences listed in the Bill include offences under the *Competition and Consumer Act 2020* (Cth) and the *Fair Trading (Australian Consumer Law) Act 1992*. The Committee is concerned that offences under these and the other legislation listed, even where the offences arise in relation to a health service provided by the health care worker, may not give rise to any risk to the health and safety of the public. A health care worker who engages in conduct that poses a serious risk to the health and safety of the public and who has, in unrelated circumstances, previously been convicted of an offence, can be subject to a final order prohibiting them from providing a health service. A health care worker who engages in the same conduct which presents the same risk but who has not previously been convicted would not be subject to a final order. It is not clear to the Committee why health care workers should be treated differently in those circumstances.
- 1.47. **The Committee therefore requests further information from the Minister on how the range of offences which enable the making of a final prohibition order was selected and why they are sufficiently connected with the health and safety of the public so as to justify their role in being able to make a final prohibition order.**

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

Proposed Amendment - Comment

Electoral Amendment Bill 2021

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

- 1.48. On 11 August 2023, the Committee received proposed amendments to the Electoral Amendment Bill 2021 to be tabled in future debate by Mr Braddock MLA. The proposed amendments:

- a) alter the commencement date of the Bill to prior to the Territory election in 2024 only if the Bill is passed at least 12 months prior to that election, or otherwise on 28 February 2025;
 - b) provide, for the purposes of the offence of failing to vote in a Territory election, that new electors are to be taken to have a valid and sufficient reason for failing to vote. A new elector will be defined as a person enrolled and entitled to vote but who has not been eligible to vote in a previous Territory or Commonwealth House of Representatives election; and
 - c) replaces the provision in the Bill for a reduction in the penalty applicable to an elector between 16 and 18 years old with the issue of a warning notice.
- 1.49. The proposed amendments were accompanied by a draft revised explanatory statement reflecting incorporation of the proposed amendments into the Bill and a revised statement of human rights considerations. That statement includes a justification for why eligibility to vote in a Territory election should be limited to persons over the age of 16, and eligibility to enrol to persons over 14. This justification refers to ‘contemporary understandings about the cognitive development and maturity of young people’ without further supporting evidence. The proposed amendments will put persons under the age of 18 in the same position as other new electors, including any person potentially up to 21 years of age as well as new citizens who have not previously been eligible to vote in a Territory or Commonwealth House of Representatives election.
- 1.50. The provision for a warning notice to be issued to new electors under the proposed amendments is premised on a new elector being required to vote at the election and who appears to have failed to vote. In that case the commissioner must give the new elector a warning notice including that they will not be a new elector in future elections and it is an offence to fail to vote without a valid and sufficient reason. However, a new elector, who is taken by that fact to have a valid and sufficient reason for failing to vote, is not required to vote under s 129 of the Electoral Act. It is therefore not clear to the Committee whether the proposed provision was intended to operate merely on the fact that a new elector failed to vote at a Territory election.
- 1.51. In his letter to the Committee enclosing the proposed amendments, Mr Braddock also referred to the possibility of seeking the Government Solicitor’s advice on the compatibility of the Bill’s and the proposed amendment’s compatibility with the principle of compulsory voting in paragraph 4(1)(a) of the *Proportional Representation (Hare-Clarke) Entrenchment Act 1994* (‘the Entrenchment Act’). As the Committee stated in its initial comments on the Bill in its *Report 12*, it may be possible to provide for the age of the elector in the issuing of default notices and discharge of any liability under the Electoral Act consistent with the Entrenchment Act. It is not clear to the Committee that the alternative approach taken in the proposed amendments of exempting new voters from the requirement to vote in section 129 of the Act will be compatible with the Entrenchment Act, but otherwise makes no further comment.

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

Proposed Amendment – No Comment

Appropriation Bill 2023-2024

- 1.53. On 15 August 2023 the Committee received proposed amendments to the Appropriation Bill 2023-2023 from Ms Clay MLA. The proposed amendments will reduce the amount appropriated for payments on behalf of the Territory allocated to the Justice and Community Safety Directorate by \$3.23M.

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 DI2023-96** being the Gambling and Racing Control (Governing Board) Appointment 2023 (No 1) made under section 11 of the *Gambling and Racing Control Act 1999* and section 78 of the *Financial Management Act 1996*
 - **Disallowable Instrument DI2023-97** being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Certain Small Customers on Standard Retail Contracts) Terms of Reference Determination 2023 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997*
 - **Disallowable Instrument DI2023-110** being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2023 (No 1) made under section 21(1) of the *Race and Sports Bookmaking Act 2001*

Disallowable Instruments—Comment

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

Human Rights Issues

- **Disallowable Instrument DI2023-98** being the Plastic Reduction (Single-use Plastic Products—Special Circumstances) Exemption 2023 made under section 17 of the *Plastic Reduction Act 2021*
- **Disallowable Instrument DI2023-99** being the Plastic Reduction (Single-use Plastic Products) Exemption 2023 made under section 17 of the *Plastic Reduction Act 2021*

2.3. Each of the instruments mentioned above is made under section 17 of the *Plastic Reduction Act 2021*, which allows the Minister, on his or her own initiative, to exempt a person or a single-use plastic product from the prohibitions that otherwise apply, under that Act. The first instrument mentioned above (according to its explanatory statement) allows ‘the supply of single-use plastic bowls and single-use plastic microbeads contained in a rinse-off product in situations where they are required because alternative products are not suitable.’ The explanatory statement goes on:

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 forensic, scientific, or medical 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.

2.4. The second instrument mentioned above (according to the explanatory statement) ‘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’. The explanatory statement goes on:

There is currently no practicable alternative to these products, as paper and cardboard plates and bowls have a thin lining, usually made from polyethylene (PE). 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.

2.5. The explanatory statements for both instruments contain a discussion of human rights issues. The explanatory statement for the first instrument states:

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.

2.6. The explanatory statement for the second instrument contains a similar statement.

- 2.7. Though not specified in relation to either instrument, the human right engaged is the right set out in subsection 22(1) of the *Human Rights Act 2004*.
- 2.8. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.9. **This comment does not require a response from the Minister.**

Human Rights Issues

- **Disallowable Instrument DI2023-100** being the Public Place Names (Macnamara) Determination 2023 (No 1) made under section 3 of the *Public Place Names Act 1989*
- 2.10. This instrument, made under section 3 of the *Place Names Act 1989*, names public places in Macnamara. The Committee notes that, similar to explanatory statements for similar instruments, the explanatory statement for the 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*. The explanatory statement states:

Human Rights

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.

- 2.11. In addition, the Committee notes that one of the streets in question is named after an inanimate object – the Oppenheimer iron telegraph pole.
- 2.12. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.13. **This comment does not require a response from the Minister.**

Fees determinations / Human Rights Issues

- **Disallowable Instrument DI2023-101** being the Animal Welfare (Fees) Determination 2023 (No 1) made under section 110 of the *Animal Welfare Act 1992*
- **Disallowable Instrument DI2023-102** being the Clinical Waste (Fees) Determination 2023 (No 1) made under section 40 of the *Clinical Waste Act 1990*
- **Disallowable Instrument DI2023-103** being the Domestic Animals (Fees) Determination 2023 (No 1) made under section 144 of the *Domestic Animals Act 2000*

- **Disallowable Instrument DI2023-104** being the Public Unleased Land (Fees) Determination 2023 (No 1) made under section 130 of the *Public Unleased Land Act 2013*
- **Disallowable Instrument DI2023-105** being the Tree Protection (Fees) Determination 2023 (No 1) made under section 109 of the *Tree Protection Act 2005*
- **Disallowable Instrument DI2023-106** being the Waste Management and Resource Recovery (Fees) Determination 2023 (No 1) made under section 126 of the *Waste Management and Resource Recovery Act 2016*
- **Disallowable Instrument DI2023-108** being the Working with Vulnerable People Background Checking (Fees) Determination 2023 made under section 68 of the *Working with Vulnerable People (Background Checking) Act 2011*
- **Disallowable Instrument DI2023-109** being the Electoral (Fees) Determination 2023 made under section 340B of the *Electoral Act 1992*
- **Disallowable Instrument DI2023-111** being the Utilities (Technical Regulation) (Operating Certificate Fees) Determination 2023 made under section 110 of the *Utilities (Technical Regulation) Act 2014*
- **Disallowable Instrument DI2023-113** being the Dangerous Goods (Road Transport) Fees and Charges Determination 2023 made under section 194 of the *Dangerous Goods (Road Transport) Act 2009*
- **Disallowable Instrument DI2023-114** being the Dangerous Substances (Fees) Determination 2023 made under section 221 of the *Dangerous Substances Act 2004*
- **Disallowable Instrument DI2023-115** being the Labour Hire Licensing (Fee) Determination 2023 made under section 75 of the *Labour Hire Licensing Act 2020*
- **Disallowable Instrument DI2023-116** being the Machinery (Fees) Determination 2023 made under section 5 of the *Machinery Act 1949*
- **Disallowable Instrument DI2023-117** being the Scaffolding and Lifts (Fees) Determination 2023 made under section 21 of the *Scaffolding and Lifts Act 1912*
- **Disallowable Instrument DI2023-118** being the Work Health and Safety (Fees) Determination 2023 made under section 278 of the *Work Health and Safety Act 2011*

- 2.14. Each of the instruments mentioned above determines fees, for various Acts. As the Committee noted in *Scrutiny Report 6* of the 10th Assembly (15 June 2021), the Committee expects to be required to consider in excess of 100 such instruments at this time of the year, as new fees, etc are determined for the new financial year.
- 2.15. As the Committee also stated in *Scrutiny Report 6*, in recent years, the Committee has been pleased to observe that the standard of fees determinations (and their explanatory statements) is much improved (in terms of them meeting the Committee’s long-held views

about fees determinations⁴) from, say, ten years ago. This improvement is again evident in this batch of instruments. The Committee notes that the requirement in relation to setting out the 'old' and 'new, fees has been consistently met. The Committee also notes that, in the batch of instruments mentioned above, there is a high degree of consistency in the explanations provided for the various fees increases. In addition, there are some instruments that provide for different increases/explanations, in the circumstances of particular Acts. These issues are discussed below.

Consistency in explanations for fees increases

- 2.16. The Committee notes that the explanatory statement for the first instrument mentioned above (DI2023-101), which determines fees for the *Animal Welfare Act 1992*, states:

This determination increases fees contained in DI2022-58 by a Wage Price index (WPI) of 3.75% as per advice from ACT Treasury, rounded for cash handling and other purposes.

- 2.17. A slight variation on this explanation is set out in the explanatory statement for the ninth instrument mentioned above (DI2023-113), which determines fees for the *Dangerous Goods (Road Transport) Act 2009*:

Fees in the 2023-2024 financial year have been generally increased from fees in the previous financial year by a wage price index (WPI) forecast of 3.75% and rounded down to the nearest dollar. This increase also aligns with the 2022 *Treasury Guidelines for Fees and Charges*.

- 2.18. The Committee notes that the explanatory statements for the majority of the instruments mentioned above use one of the two examples identified above. Some variations on that explanation, for particular Acts, are discussed below.

- 2.19. In relation to the methodology behind fees increases, the Committee notes the following explanation, provided by the Minister for Transport and City Services, in response to comments made by the Committee in *Scrutiny Report 26* of the 10th Assembly (14 March 2023):

Changes to fees and charges, levies and taxes by annual decisions or different indexation arrangements are driven by a range of policy considerations. Indexation is largely linked to growth in wages to cover the cost of Government employees providing services to the community, while ensuring the indexation does not create undue cost of living pressures. Where a different indexation is used, it usually reflects the changes in prices of goods and services acquired by

⁴ Set out in the Committee's document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf), available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf

households (i.e. the Consumer Price Index), or seeks to align with the intended policy objectives of the fees and charges.⁵

Act-specific explanations for fees increases

2.20. The explanatory statements for following determinations indicate that the relevant fees are determined in relation to the particular to the circumstances of the relevant Act:

Public Unleased Land (Fees) Determination 2023 (No 1) (DI2023-104)

Indexed Fees

The fee for a public unleased land permit, where the activity for the permit is any other commercial purpose within a Tertiary area, has been increased from 4 cents per metre² to 7 cents per metre² or 75%. This increase seeks an equitable return from proponents who would look to utilise public land in the Tertiary Zone.

Fees related to business as a Hawker have been maintained at \$0 to reflect decisions from the 2019-20 Budget Review.

Fees related to outdoor dining have been maintained at 50% of the total fee per annum to reflect decisions from the 2019-20 Budget Review. Outdoor dining fees for 2023-24 have been indexed at the recommended WPI of 3.75%.

Electoral (Fees) Determination 2023 (DI2023-109)

Electoral Officer Services – salary component

Paragraph 7(1)(g) of the Electoral Act empowers the Electoral Commission to provide services to persons or organisations for a determined fee. The provision of services includes assisting bodies such as universities and government agencies to conduct elections. The Commission is empowered to determine fees for these services under section 340B of the Electoral Act.

This instrument determines hourly fees for services provided by 4 categories of electoral officers:

- Electoral Officer (equivalent to Administrative Service Officer Class 5 employed under the *Public Sector Management Act 1994*)
- Senior Electoral Officer (equivalent to Senior Officer Grade C employed under the *Public Sector Management Act*)
- Electoral Casual Officer (equivalent to a casual officer employed under the Electoral Act)
- Senior Electoral Casual Officer (equivalent to a casual officer in charge employed under the Electoral Act)

⁵ Available at https://www.parliament.act.gov.au/data/assets/pdf_file/0009/2199015/Road-TransportPublic-Passenger-Services-Maximum-Fares-for-taxi_Redacted.pdf.

The fees include different hourly rates for the above 4 categories of officers depending on the time of the provision of services and reflect the various applicable standard and overtime rates applying to officers employed to assist the Electoral Commissioner under the Public Sector Management Act and the Electoral Act. The hourly fees incorporate overhead costs and salary costs.

Electoral goods and services

The instrument also determines a fee for goods purchased by the Electoral Commission for the purposes of providing goods to persons or organisations under paragraph 7(1)(g) of the Electoral Act. This fee simply allows the Commission to be reimbursed for any costs incurred by the Commission in providing goods such as printing ballot papers for an election. These costs could also include postage and mailing house costs, for example.

In addition, this instrument determines a fee for the provision of electronic voting services to organisations under paragraph 7(1)(g) of the Electoral Act. This fee allows for the development and maintenance cost of electronic voting services software incurred by the Electoral Commission to be passed on to purchasers of services.

Provision of copies of documents

This instrument sets fees for obtaining copies of the specified categories of documents.

Subsection 243(4) of the Electoral Act provides that a person is entitled, on payment of a determined fee, to obtain a copy of a return referred to in subsection 243(1). These returns include returns showing disclosure of donations, returns showing disclosure of electoral expenditure and annual returns submitted by registered political parties, MLAs, associated entities and donors.

Sections 88 and 91 of the Electoral Act provide that various documents related to registration of political parties are required to be made available for public inspection. From time to time members of the public have asked for copies of these documents. To cover the costs of providing such copies, this instrument provides that the Electoral Commission may provide persons with copies of these documents for the determined fee.

Section 333 of the Electoral Act states that voting statistics shall be published and that a person may obtain copies of the statistics in electronic form for a fee.

Utilities (Technical Regulation) (Operating Certificate Fees) Determination 2023 (DI2023-111)

Overview

The purpose of this instrument is to determine the fees payable for applying for the grant of an operating certificate to an unlicensed regulated utility and ongoing

audit and compliance fees. The fees will assist in recovering the costs incurred by the technical regulator in meeting the regulator's obligations under the Act.

This disallowable instrument determines fees payable by an unlicensed regulated utility when applying for the grant of an operating certificate and for regulatory activities related to audit and compliance of an operating certificate and the development or amendment of relevant technical codes.

Outline of the fees

Schedule 1 of the instrument applies to an unlicensed regulated utility requiring an operating certificate other than solar installations that are 200 kilowatts (**kW**) to 1 megawatt (**MW**). The fees in items 1 and 3 are based on the hourly cost for granting a certificate and for administration and regulation of the operating certificate. Item 2 is an annual fee for the review of annual reports submitted in compliance with conditions of operating certificates. This fee structure is intended to represent full cost recovery for the ACT Government for each unlicensed regulated utility that provides a regulated utility service and that is assessed and regulated. The annual increase of 3.75% is imposed to fee for 2023-24 year which is the standard increase of Wage Price Index (**WPI**) for this year. For 2024-25 and 2025-26, the rate of increase is based on WPI of 3.5%.

Schedule 2 applies to all solar installations 200kW-1MW (200kW and above but less than 1MW) to reflect costs for granting a certificate, cost for inspections by licensed electrical inspectors, and cost for administration and regulation of the operating certificate. To issue operating certificates, all solar installations below 1MW require inspections by licensed electrical inspectors. Solar installations of 1MW and above require engagement with independent certifiers for the inspections and payment of the fees shown in schedule 1. The annual increase of 3.75% is imposed to fee for 2023-24 year which is the standard increase of Wage Price Index (**WPI**) for this year. For 2024-25 and 2025-26, the rate of increase is based on WPI of 3.50%.

The type of operating certificate that may be required depends on the kind and size of the regulated utility service being provided. These could include a Design and Construct Operating Certificate for larger installations issued prior to the construction of infrastructure or a Provision of Service Operating Certificate issued when the unlicensed regulated utility is ready to commence providing the service. A Compliance Operating Certificate may be issued to smaller installations designed, built and inspected in compliance with the *Electrical Safety Act 1971*, the *Water and Sewerage Act 2000* or the *Gas Safety Act 2000*.

Human rights issues

- 2.21. The Committee notes that the explanatory statement for the Utilities (Technical Regulation) (Operating Certificate Fees) Determination 2023 (DI2023-111) states:

Human rights

No human rights are impacted by this instrument.

- 2.22. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for the instrument mentioned immediately above.**
- 2.23. **This comment, and the comments above, do not require a response from the relevant Ministers.**

Minor drafting issue

- **Disallowable Instrument DI2023-107** being the Government Procurement (Non-Public Employee Member) Appointment 2023 (No 1) made under section 12 of the *Government Procurement Act 2001*
- 2.24. Section 3 of this instrument appoints a specified person as a ‘part-time Non-Public Employee member’ of the Government Procurement Board. The appointment is made under section 12 of the *Government Procurement Act 2001*. The Committee notes that section 12 provides only for the appointment of ‘members’, not ‘*part-time* members’. As the Committee noted in *Scrutiny Report 10* of the 10th Assembly (2 November 2021), in relation to [DI2021-215] and, previously, in *Scrutiny Report 1* of the 10th Assembly (2 February 2020), in relation to [DI2020-270] and [DI2020-271], the concept of members being ‘part-time’ comes from section 11 of the Act.
- 2.25. **This comment does not require a response from the Minister.**

Subordinate Laws – Comment

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

Human Rights Issues

- **Subordinate Law SL2023-10** being the Plastic Reduction Amendment Regulation 2023 (No 1), including a regulatory impact statement made under the *Plastic Reduction Act 2021*
- 2.27. This subordinate law repeals and replaces section 4 of the *Plastic Reduction Regulation 2022*. The effect of the new provision is to add new single-use plastic products that are ‘prohibited plastic products’, for subsection 7(1) of the *Plastic Reduction Act 2021*. According to the explanatory statement for the subordinate law:

The additional prescribed products include single-use plastic microbeads contained in a rinse-off product, a single-use tray that is made of expanded polystyrene; and used for packaging perishable food for retail sale, single-use expanded polystyrene loose-fill packaging, a single-use plastic plate, a single-use plastic bowl, other than a bowl designed or intended to have a spill-proof lid as prescribed products. The effect of this is that these products are

prohibited and cannot be supplied in the ACT, except in accordance with any exemptions that apply.

- 2.28. The subordinate law also inserts a new section 6 into the Plastic Reduction Regulation, dealing with plastic retail carry bags. The explanatory statement for the subordinate law states:

The Amendment Regulation also prescribes plastic retail carry bags under the definition of a prohibited single-use plastic shopping bag. This means that a bag with handles made wholly or in part from plastic and used for conveying goods purchased from a retailer is prohibited and cannot be supplied in the ACT.

The Amendment Regulation also prescribes certain plastic retail carry bags to be excluded from the definition of a single-use plastic shopping bag, with the effect that they can continue to be supplied in the ACT. This includes an unsealed bag that is the packaging in which perishable food is offered for sale, as well as a carry bag made from nylon, polyester, woven polypropylene, or non-woven polypropylene that has sewn, rather than heat welded seams, and the fabric has a minimum weight of 90 g/m² measured as a single layer of fabric.

- 2.29. The explanatory statement notes that, in conjunction with these measures, exemptions are provided by [DI2023-98] and [DI2023-99], discussed earlier in this Scrutiny Report. It states:

The [subordinate law] has been made in conjunction with Plastic Reduction (Single-use Plastic Products – Special Circumstances) Exemption 2023, which is a disallowable instrument that provides an exemption to allow the supply of a certain product in certain circumstances. It provides an exemption to allow the supply of single-use plastic bowls and microbeads to be supplied where scientific, forensic, or medical integrity would be compromised.

The [subordinate law] has also been made in conjunction with Plastic Reduction (Single-use Plastic Products) Exemption 2023, which is a disallowable instrument that provides an exemption to allow the supply of certain products in certain circumstances, until 1 November 2024. It provides an exemption to allow the supply of single-use paper or cardboard plates lined with any plastic, and single-use paper or cardboard bowls lined with any plastic, to 1 November 2024, as there are currently no viable non-plastic single-use alternatives on the market.

- 2.30. The explanatory statement goes on to discuss, in detail, human rights issues arising from the subordinate law, principally by reference to the relevance of strict liability provisions in the legislative scheme, which engages the rights protected by section 22 of the *Human Rights Act 2004* (though the provision is not identified). The explanatory statement states:

Human Rights

Offence Provisions

The [subordinate law] does not create any new offences, but it does bring additional conduct within existing offences. Supplying the products prescribed by the [subordinate law] will now fall within the existing offence of supply of prohibited plastic products in s 10 of the Act, which is a strict liability offence.

These offences engage human rights, as explained in the explanatory statement to the Plastic Reduction Bill 2020 (the Bill). Namely, rights in criminal proceedings and the right to be presumed innocent until proven guilty. The offences also engage the right to privacy because of the enforcement provisions in the Act such as directions to give name and address. As with the provisions in the primary legislation, the rights limited by the [subordinate law] are for the legitimate purpose of reducing the impact of plastic on the environment and the waste management system. The items listed in the [subordinate law] are single-use items that are used frequently but have a very short lifespan. After use, they cannot be easily recycled and will either end up in landfill or as harmful litter, polluting the natural environment and waterways.

There is a rational connection between the limitation on rights and the purpose of the law because strict liability offences support enforcement of offences for this additional class of plastics in a regulatory context, and compelling people to give their name and address and answer questions would enable a full and proper investigation. The limitations are reasonable and proportionate as rights are limited to circumstances where offences apply to a specified class of additional plastic products, which are being implemented in a staged manner to enable individuals and businesses to find alternatives or eliminate prohibited products in their activities. The enforcement mechanisms are considered to be the most effective and least intrusive way of making sure the statutory requirements are complied with.

The regulatory ban will be supported by public education and engagement, to ensure that stakeholders and the community are aware of their legal obligations surrounding the products. This will include the development of communications materials about the ban, and store visits to directly engage with relevant businesses.

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 will enable plastic bowls and plastic microbeads to continue to be supplied where needed for medical, scientific or forensic purposes, 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.

- 2.31. The Committee also notes that a (50-page) regulatory impact statement (**RIS**) is provided with this subordinate law and that it also contains a detailed human rights analysis. Oddly, the RIS analysis, identifies several additional human rights that are engaged, namely:
- a) recognition and equality before the law (section 8, Human Rights Act);
 - b) right to life (section 9, Human Rights Act);
 - c) right to privacy (section 12, Human Rights Act);
 - d) right to not have reputation unlawfully attacked (section 12, Human Rights Act); and
 - e) rights in criminal proceedings (section 22, Human Rights Act).
- 2.32. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement and in the regulatory impact statement for this subordinate law.**
- 2.33. **This comment does not require a response from the Minister.**

Human Rights Issues / Matters more appropriate for parliamentary enactment

- **Subordinate Law SL2023-11** being the Health Infrastructure Enabling Regulation 2023 made under the *Health Infrastructure Enabling Act 2023*
- 2.34. According to the explanatory statement for this subordinate law, its purpose is ‘to support the introduction of the *Health Infrastructure Enabling Act 2023* ... as a Territory law’. The Committee notes that that Act relates to the acquisition of Calvary Hospital. The explanatory statement states:
- Matters relating to compensation and other terms arising from the termination of the [Calvary Network Agreement – CNA] will be subject to ongoing discussions between the ACT Government and Calvary. If the Bill is enacted, the Regulation will be made under the Act to provide a framework for determining just terms for the acquisition of the land and termination of the CNA. They will also provide a mechanism to transition Calvary Public Hospital Bruce employees, assets, and services to the Territory.
- 2.35. The Committee notes that the explanatory statement for the subordinate law contains the following discussion of human rights issues:

Human Rights Implications

It is not considered that any provision of the [subordinate law] unreasonably limits an individual’s human rights. If an individual’s human rights are limited, any limitation is reasonable and justified.

The preamble to the *Human Rights Act 2004* (HR Act) states that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. This is further reflected in section 28 of the Human Rights Act with subsection (2) stating that in

deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purposes; and
- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Right to work and other work-related rights

Section 27B provides that everyone has the right to work, including the right to choose their occupation or profession freely and to enjoy the rights in section 27B without discrimination.

Section 27B may be read as an obligation on Government to enforce laws banning forced labour and to ensure non-discrimination practises are enforced by employers within the scope of the Human Rights Act.

This right is potentially engaged and limited by the Bill to the extent that it will affect the employment of employees and individual contractors of Calvary Public Hospital Bruce. Any limitations of this right are considered reasonable and necessary to achieve the legitimate objective of ensuring the safe and orderly transition of the operation of the public hospital to the Territory and continuity of the operation and service delivery standards at the hospital.

The Bill and the details of the [subordinate law] provide safeguards for the transfer and/or novation of employment under the *Public Sector Management Act 1994* (PSM Act). The Territory values the work of all employees at Calvary Public Hospital Bruce. These employees will be offered employment with the Territory in accordance with the PSM Act and will continue to have contractual rights as their employment is transferred to the Territory.

There may be a small number of individuals who may not be eligible for employment under the PSM Act. Where required, the Territory will work with Calvary to ensure appropriate notice and support is given to employees not eligible for employment with the Territory during the transition period. These employees will retain all existing employment rights in relation to their employment by Calvary.

The Bill and the [subordinate law] provides for the Territory to novate any existing services and supply contracts from Calvary to the Territory. This, by extension, gives support to the Territory's intent to minimise any disruption to the operations of Calvary Public Hospital Bruce, including the operations of third-party suppliers.

- 2.36. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this subordinate law.**
- 2.37. **The comment immediately above does not require a response from the Minister.**
- 2.38. However, the Committee notes that no justification is provided, in the explanatory statement, for the inclusion of various (seemingly) significant matters in subordinate, rather than primary, legislation. In making this observation, the Committee notes that the subordinate law deals with matters including (in no particular order):
- a) issues relating to the acquisition of the public hospital land, and the termination of the CNA ‘on just terms’;
 - b) issues relating to compensation in relation to the above (including payment of interest);
 - c) issues in relation to the Crown lease;
 - d) issues relating to the rights of affected employees; and
 - e) issues in relation to dispute resolution.
- 2.39. In all the circumstances – including in the context of the Committee’s comments in *Scrutiny Report 29* of the 10th Assembly (23 May 2023)⁶ on the breadth of the regulation-making powers in the enabling legislation – the Committee would have expected at least some attempt being made to justify the inclusion of these matters in subordinate, rather than primary, legislation. The Committee cannot identify any such justification.
- 2.40. **The Committee draws the attention of the Legislative Assembly to this subordinate law under subparagraph 10(c)(iv) of the Committee’s Resolution of Appointment, on the basis that it may contain matter that, in the opinion of the Committee, should properly be dealt with in an Act of the Legislative Assembly.**
- 2.41. **This comment requires a response from the Minister.**

The Committee draws this matter to the attention of the Assembly and asks the Minister to respond before the Legislative Assembly’s capacity to move to disallow the subordinate law expires.

Regulatory impact statement – No comment

- 2.42. The Committee has examined a regulatory impact statement for the following subordinate law and has no comments on it:
- **Subordinate Law SL2023-10** being the Plastic Reduction Amendment Regulation 2023 (No 1), made under the *Plastic Reduction Act 2021*.

⁶ Available at https://www.parliament.act.gov.au/_data/assets/pdf_file/0011/2227295/Scrutiny-Report-No-29.pdf, see paras 1.51 – 1.61.

3. Outstanding responses

Bills

Report 12, dated 1 February 2022

Bills

- Electoral Amendment Bill 2021

Report 28, dated 3 May 2023

Bills

- Modern Slavery Legislation Amendment Bill 2023

Report 29, dated 23 May 2023

Bills

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

Peter Cain MLA
Chair
August 2023