



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

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

# **Scrutiny Report 24**

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  
November 2022

# 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

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

Kathleen de Kleuver, Committee Secretary

Emma-Kate Weaver, Acting Assistant Secretary

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## Contact us

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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

## Responses – No Comment

- Climate Change and Greenhouse Gas Reduction (Natural Gas Transition) Amendment Bill 2022.

The responses can be viewed [online](#).

The Committee wishes to thank the Minister for the helpful response.

## 2. Subordinate Legislation

### Disallowable Instruments – No Comment

- 2.1. The Committee has examined the following disallowable instruments and has no comments on them:
- **Disallowable Instrument DI2022-231** being the Motor Accident Injuries (Premiums) Guidelines 2022 (No 1) made under section 487 of the *Motor Accident Injuries Act 2019*.
  - **Disallowable Instrument DI2022-232** being the Electoral (Fees) Determination 2022 (No 2) made under section 340B of the *Electoral Act 1992*.
  - **Disallowable Instrument DI2022-233** being the Territory Records (Advisory Council) Appointment 2022 (No 1) made under section 44 of the *Territory Records Act 2002*.
  - **Disallowable Instrument DI2022-235** being the Cemeteries and Crematoria (Determination of Trustee) Determination 2022 (No 2) made under section 105 of the *Cemeteries and Crematoria Act 2020*.
  - **Disallowable Instrument DI2022-236** being the Electoral (Electoral Commissioner) Appointment 2022 (No 1) made under section 12 of the *Electoral Act 1992*.

### Disallowable Instruments – Comment

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

#### Minor Drafting Issue

- **Disallowable Instrument DI2022-234** being the Victims of Crime (Victims Advisory Board) Appointment 2022 (No 1) made under section 22D of the *Victims of Crime Act 1994*.
- 2.3. This instrument, made under section 22D of the *Victims of Crime Act 1994*, appoints a specified person to the Victims Advisory Board, to represent the interests of victim’s services groups, for paragraph 22D(2)(a) of that Act. The Committee notes that the explanatory statement refers, in places, to the person appointed in plural. The Committee suspects that an explanatory statement for multiple appointments has been used as a “template” for this explanatory statement, a practice that the Committee has previously suggested – in its 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)<sup>1</sup> – that caution should be used when using previous documents as templates or precedents.

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<sup>1</sup> [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards-Revised-March-2022.pdf).

## Issues arising from the use of templates and precedents

The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only one person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the explanatory statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or explanatory statement is adapted to fit the new situation. The Committee accepts that instruments and explanatory statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

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

## Privacy / Human Rights Issues / Minor Drafting Issue

- **Disallowable Instrument DI2022-237** being the Public Health (Notifiable Conditions) Determination 2022 (No 2) made under section 100 of the *Public Health Act 1997*.
- **Disallowable Instrument DI2022-238** being the Public Health (Reporting of Notifiable Conditions) Code of Practice 2022 (No 2) made under section 133 of the *Public Health Act 1997*.

### 2.5. The first instrument mentioned above determines “notifiable conditions”, for section 100 of the *Public Health Act 1997*. The explanatory statement for the instrument states:

This instrument adds Monkeypox to the list of notifiable diseases. The determination is a disallowable instrument for the purposes of the *Legislation Act 2001*.

Monkeypox has been a temporary notifiable condition following a declaration by the Chief Health Officer on 27 May 2022. Under section 101(3) of the Act, a declaration as a temporary notifiable condition can remain in force for not longer than 6 months, meaning the temporary declaration will conclude on 1 November 2022.

The Australian Chief Medical Officer declared Monkeypox to be a Communicable Disease of National Significance on 28 July 2022. This followed the World Health Organization declaring the global situation regarding Monkeypox to be a public health emergency of international concern. Accordingly, these declarations are indicative that Monkeypox continues to represent a public health threat such that its status as a notifiable condition must apply beyond 1 November 2022.

### 2.6. The explanatory statement also indicates that some further, minor amendments have been made to the previous instrument, to reflect changes in national guidance documents, on which the ACT requirements rely.



- 2.7. The effect of a condition being declared “notifiable” is that requirements set out in various provisions of the Public Health Act (e.g., those set out in Division 6.2) then apply to a person affected, doctors, nurses, etc. Some (e.g., section 102A) involve strict liability offences with penalties for failure to comply.
- 2.8. The second instrument mentioned above determines a Code of Practice for the reporting of notifiable conditions, under section 133 of the Public Health Act. The Code of Practice expands on the obligations set out in the Public Health Act. Section 5 of the Code states:

#### **Privacy**

The Act makes provision for the treatment and disclosure of information acquired by ACT Health in relation to a notification or investigation. Unless authorised, a person may not disclose personal information to any person not involved with the investigation or follow-up of a disease notification.

Notifiers are encouraged to inform their patients or clients that information relating to them, and their condition may be shared with ACT Health and may be used for public health purposes.

- 2.9. Given the reference to privacy, the Committee would have expected to see a discussion (in the explanatory statement for the second instrument) of human rights issues, by reference (at least) to section 12 of the *Human Rights Act 2004*. There is none. The only reference to privacy is in the final paragraph of the explanatory statement:

The first two sections of the code of practice address the obligation to report notifiable conditions and details who is obliged to report. Section 3 of the code of practice details notification requirements. Sections 4 and 5 describe the public health response to notifications and issues related to privacy and disclosure of information. Section 6 provides an explanation of the definitions used in the code of practice. These provisions have undergone minor editorial changes from the previously determined code of practice.

- 2.10. A similar statement appears in the explanatory statement for the first instrument mentioned above. It does not otherwise address potential human rights issues.
- 2.11. The Committee would be grateful for further information that addresses any human rights issues arising from both instruments mentioned above.

**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.**

- 2.12. The Committee notes that the final two paragraphs of the explanatory statement for the first instrument appear to replicate the final two paragraphs of the explanatory statement for the second instrument. While the information provided is not unhelpful, it does not appear to (strictly) relate to the first instrument. The Committee suggests that this is another example of the potential danger of using documents as “templates” (as discussed in the item immediately above).
- 2.13. **This comment does not require a response from the Minister.**

## Privacy / Human Rights Issues

- **Disallowable Instrument DI2022-239** being the Blood Donation (Transmittable Diseases) Blood Donor Form 2022 (No 1) made under subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985*.
- 2.14. This instrument determines a Blood Donor Form, for subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985*. The Committee notes that the form asks questions about personal medical history, including questions about sexually transmitted infections. Clearly, this is highly personal information. However, the only reference to privacy is in this section of the form:

**Your information will be:**

used to:

- assess your eligibility to donate blood,
- ensure the safety of both donors and recipients,
- contact you for future donations, and
- assist with research including improving the safety of transfusion and donation;
- treated as confidential and held in compliance with the *Privacy Act 1988* (Cth), State/Territory health records legislation and Lifeblood’s Privacy Policy. Our Privacy Policy explains how we collect, use, store and disclose your personal information; how you may access or seek correction of your personal information; how to make a complaint about a breach of your privacy, and how we will handle that complaint.

Our Privacy Policy is available at [donateblood.com.au](https://donateblood.com.au).

- 2.15. Given the obvious privacy implications, the Committee would have expected to see a discussion in the explanatory statement for the instrument of human rights issues, by reference to section 12 of the *Human Rights Act 2004*. There is none. There is, however, this statement, warning about the potential consequences for providing false, misleading, or incorrect information on the form:

It is an offence under Part 3.4 of the Criminal Code to make a false or misleading statement, or to give false or misleading information. Accordingly, a donor that

completes the Donor Declaration Form and in doing so knowingly provides false, misleading or incorrect information, or that omits information the absence of which makes the information false or misleading, is likely to have committed an offence.

**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.**

## Subordinate Laws – Comment

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

### Human Rights Issues / Strict Liability Offences

- **Subordinate Law SL2022-13** being the Work Health and Safety Amendment Regulations 2022 (No 2) made under section 276 of the *Work Health and Safety Act 2011*.
  - **Subordinate Law SL2022-15** being the Work Health and Safety Amendment Regulations 2022 (No 3) made under section 276 of the *Work Health and Safety Act 2011*.
- 2.17. The subordinate laws mentioned above make a number of amendments to the *Work Health and Safety Regulation 2011* in relation to Crystalline Silica.
- 2.18. The explanatory statement to the first subordinate law contains a detailed discussion of the human rights implications of the subordinate law, by reference to the right to life, the right to work and the rights in criminal proceedings, provided for by section 9, 27B and 22 of the *Human Rights Act 2004*, respectively. The explanatory statement states that the right to life and the right to work are promoted and the rights in criminal proceedings are limited.
- 2.19. The rights in criminal proceedings are limited because the amendments made by the subordinate law include strict liability provisions. The explanatory statement includes a detailed justification for this, including:

The legitimate purpose of the strict liability provision is to support enforcement of the measures in the regulation to restrict/prohibit dry cutting of silica containing materials, which aims to protect the health and safety of workers. The penalty that may be imposed on commission of the offence will act as a deterrent against providing unsafe workplaces and work cultures. The *Work Health and Safety Act 2011* (WHS Act) imposes health and safety duties on all PCBUs in the Territory, as well as duties to their officers and workers. All PCBUs are required to be aware of their health and safety duties under the WHS Act and it is reasonable for the law to assume this is the case in the context of a workplace exposure to silica containing materials.

The offence elements applying strict liability have been considered during the development of the Amendment Regulation. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. The rationale for its use in the Regulation is that people who owe work safety duties such as PCBUs (person conducting a business or undertaking), persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. In particular, where an accused can reasonably be expected, because of his or her professional involvement, to know the requirements of the law, the mental (or fault) element can justifiably be excluded. Accordingly, strict liability offences are applied so that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and others at the workplace.

Given the serious health implications exposure to silica containing materials may have on workers, the application of strict liability is necessary and proportionate to ensure a culture of safe work practices. It is not considered that there are any less restrictive means reasonably available to achieve the purpose of addressing the risks that arise from uncontrolled dry cutting of silica containing materials and encouraging proactive work health and safety compliance is far more difficult to achieve without the use of strict liability offences. Strict liability clearly identifies the essential elements that form part of the regulatory framework that encourage PCBUs to maintain a workplace that is free from harm or injury.

The application of strict liability is reasonable to protect the health and safety of workers. Strict liability is only applied to particular elements of the uncontrolled dry cutting of silica containing materials offence under Section 418B of the Regulation. This Amendment Regulation clarifies that a PCBU must not direct or allow a worker to cut material containing crystalline silica with a power tool or use another mechanical process to cut the material unless a combination of control measures are in place. It ensures those who hold responsibility for a health or safety duty uphold that responsibility and cannot escape liability by claiming ignorance of the duty or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* remains available to any accused for any strict liability provisions. The requirement to which the offence applies is not burdensome or out of alignment with the WHS framework and relates to ensuring the safety of workers as well as the broader ACT community.

The application of strict liability to uncontrolled dry cutting and to PCBUs who do not take all reasonably practicable measures to address exposure risks associated with silica containing materials, complements the existing scheme regulating WHS and is supported by increasing evidence of the substantial risk of inhalation of silica dust.

The application of strict liability and the penalties imposed are in line with those applied to asbestos duties under the WHS Regulation. The penalty amount applied is also consistent with penalties applied for breach of duty relating to asbestos under chapter 8 of the WHS regulation. The strict liability offence applied in the silica chapter of the regulation acts as an incentive for duty holders and officers to observe their duties under the regulation.

- 2.20. The Regulation places the least restrictive limitation on the right to presumption of innocence, as it does not apply strict liability to information that is known by an accused, and that may be revealed to prove or disprove the defence.
- 2.21. The explanatory statement to the second subordinate law mentioned above contains a similar, detailed discussion of human rights, by reference to the same rights (i.e., the right to life and the right to work are promoted and the rights in criminal proceedings are limited).
- 2.22. **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.**
- 2.23. **This comment does not require a response from the Minister.**

## Human Rights Issues / Privacy

- **Subordinate Law SL2022-14** being the Crimes (Sentencing) Amendment Regulation 2022 (No 1) made under the *Crimes (Sentencing) Act 2005*.
- 2.24. This subordinate law amends section 3 of the *Crimes (Sentencing) Regulation 2006*, to make the following entities “criminal justice entities”:
- ACAT (ACT Civil and Administrative Tribunal);
  - the Coordinator-General for Family Safety;
  - the Coordinator-General for the Prevention of Sexual Violence;
  - the body known as the Sexual Assault (Police) Review Oversight Committee.
- 2.25. The definition is relevant for section 136 of the *Crimes (Sentencing) Act 2005*, which allows for entities to be prescribed, for the definition. The explanatory statement for this subordinate law states:

Section 136 of the [*Crimes (Sentencing) Act 2005*] provides that criminal justice entities may exchange information contained in their records relating to an offence, including an alleged offence.

Section 136 of the Act was enacted to address concerns that some agencies had with sharing information with each other on the basis that they might be in breach of their obligations under the National Privacy Principles contained in the *Privacy Act 1988* (Cth) (now the Australian Privacy Principles), and that sharing information might otherwise prejudice the effective operation of their agency.

Section 136 of the Act puts beyond doubt the ability of criminal justice entities to share information that falls within the scope of the section. Further, it conveys to

agencies the strong intention of the ACT Legislative Assembly that they cooperate with each other in the exchange of information relating to the criminal justice system in pursuit of the best practice fulfilment of their respective functions.

- 2.26. The explanatory statement for the instrument explains why, in each case, it is thought necessary to extend the definition to the entities in question.
- 2.27. The explanatory statement goes on to discuss human rights implications, principally by reference to the right to privacy, protected by section 12 of the *Human Rights Act 2004*:

**Impact on Human Rights**

Section 12 of the *Human Rights Act 2004* provides that “everyone has a right not to have his or her privacy... interfered with unlawfully or arbitrarily”. The disclosure of personal information engages and limits the right to privacy contained in section 12 of the *Human Rights Act 2004*, which states that “everyone has the right not to have his or her privacy... interfered with unlawfully or arbitrarily”.

However, the right to privacy is a qualified right and section 28 of the *Human Rights Act 2004* provides legislative recognition that human rights may be limited in certain circumstances. Limitations on the right to privacy can be applied where it can be shown that it is necessary in a free and democratic society to do so and if there is a legal basis for such interference.

On balance and considering the factors outlined in section 28, the limitation on the right to privacy is justified in this instance. Allowing the Oversight Committee, the Coordinator-General for Family Safety, the Coordinator-General for the Prevention of Sexual Violence and ACAT to share information with other criminal justice entities in certain circumstances is appropriate and will support the purposes of the *Crimes (Sentencing) Act 2005*.

The purpose is to provide authority for criminal justice entities to exchange information to the extent of their responsibilities and allow for improved information sharing with other agencies in the criminal justice system, which is important and necessary. The limitation on the right to privacy related to the disclosure of personal information between criminal justice entities is justified and reasonable for this purpose.

Limitation on rights need to be lawful and not arbitrary. Arbitrary refers to a decision or action which is not based on reasonable and relevant identifiable criterion. A law that permits an interference with privacy must be sufficiently precise and confined so as not to give too much discretion to authorities. The regulation designates specific, identified organisations which have a role attached to the function of the criminal justice system as criminal justice entities under section 36 of the *Crimes (Sentencing) Act 2005*.

The engagement of the right is limited as the information sharing provisions are restricted and controlled. Prescribing the entities that can receive information ensures that the disclosure does not happen unlawfully or arbitrarily. This is the

least restrictive means of supporting the purposes of the Act and the efficient and effective operation of information sharing between criminal justice entities. The prescription of the Sexual Assault (Police) Review Oversight Committee is intended to conclude on 30 June 2024, reflecting the time limited nature of the Committee's role; while the prescription of the two Coordinators-General and ACAT are ongoing, reflecting the ongoing role of these entities in the criminal justice system. Further, the prescription by regulation is a safeguard as regulations are subject to examination by the Legislative Assembly.

For these reasons, the amendment is a proportionate limitation on the right to privacy.

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

Peter Cain MLA  
Chair  
November 2022

# Outstanding responses

## Bills

### Report 12, dated February 2022

#### Bills

- Electoral Amendment Bill 2021

### Report 20, dated 13 September 2022

#### Bills

- Period Products and Facilities (Access) Bill 2022 [response required prior to the Bill being debated]
- Urban Forrest Bill 2022 [response required prior to the Bill being debated]

### Report 21, dated 4 October 2022

#### Bills

- Planning Bill 2022 [response required prior to the Bill being debated]

### Report 23, dated 15 November 2022

#### Bills

- Integrity Commission Amendment Bill 2022 (No 2) [response required prior to the Bill being debated]
- Work Health and Safety Amendment Bill 2022 [response required prior to the Bill being debated]

### Subordinate Legislation

- Disallowable Instrument DI2022-228 being the Animal Welfare (Advisory Committee Member) Appointment 2022 (No 2) [response required before Legislative Assembly's capacity to move to disallow instrument expires]
- Disallowable Instrument DI2022-224 being the Public Health (COVID-19 Management) Declaration 2022 [response required before Legislative Assembly's capacity to move to disallow instrument expires]