



# Legislative Assembly for the Australian Capital Territory

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

## Scrutiny Report 40

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

---

Approved for publication

---

10th Assembly  
April 2024



# About the committee

## Establishing resolution

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

The Committee is responsible for the following areas:

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

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

## Committee members

Peter Cain MLA, Chair

Marisa Paterson MLA, Deputy Chair

Andrew Braddock MLA

## Secretariat

Hamish Finlay, Committee Secretary

Frieda Scott, Assistant Secretary

Daniel Stewart, Legal Adviser (Bills)

Stephen Argument, Legal Adviser (Subordinate Legislation)

## 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](mailto:scrutiny@parliament.act.gov.au)

**Website** [parliament.act.gov.au/parliamentary-business/in-committees](http://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.

# Contents

<b>About the committee</b>	<b>i</b>
Establishing resolution	i
Committee members	ii
Secretariat	ii
Contact us	ii
Role of Committee	ii
<b>1. Bills</b>	<b>1</b>
Bills—No comment	1
Cemeteries and Crematoria Amendment Bill 2024	1
Gaming Machine (Compulsory Surrender) Amendment Bill 2024	1
Liquor (Night-Time Economy) Amendment Bill 2024	1
Remuneration Tribunal Amendment Bill 2024	1
University of Canberra Amendment Bill 2024	1
Bills—Comment	2
Children and Young People Amendment Bill 2024 (No 2)	2
Crimes (Sentencing) Amendment Bill 2024	3
Human Rights Commission (Child Safe Standards) Amendment Bill 2024	4
Government response—No comment	5
<b>2. Subordinate Legislation</b>	<b>6</b>
Disallowable Instruments—No comment	6
Disallowable Instruments—Comment	7
Subordinate Laws—Comment	12
Government Response—Comment	13
<b>Outstanding responses</b>	<b>16</b>
Bills/Subordinate Legislation	16
Report 28, dated 3 May 2023	16
Report 38, dated 30 January 2024	16
Report 39, dated 12 March 2024	16



# 1. Bills

## Bills—No comment

### Cemeteries and Crematoria Amendment Bill 2024

- 1.1. This Bill will amend the *Cemeteries and Crematoria Act 2020* to clarify that the Territory and not the ACT Cemeteries and Crematoria Authority is ultimately responsible for the ongoing maintenance of cemeteries and crematoria facilities in perpetuity after they have stopped operating.

### Gaming Machine (Compulsory Surrender) Amendment Bill 2024

- 1.2. This Bill amends the *Gaming Machine Act 2004* to require licensees to compulsorily surrender authorisations to operate a gaming machine once the voluntary surrender scheme ends, in order for the ACT to reach the target of 3,500 authorisations by 1 July 2025. The legislation will only impose obligations on licensees under the Act, which relevantly only extends to incorporated bodies.

### Liquor (Night-Time Economy) Amendment Bill 2024

- 1.3. This Bill amends the *Liquor Act 2010* to:
- a) enable interim licences to be issued where there is a delay relating to the suitability of premises preventing a licence from being issued but the premises are otherwise suitable for the serving of alcohol;
  - b) allow extensions to trading hours and changes to floor plans for up to 10 licensee events or special events declared by the head of Access Canberra;
  - c) reduce annual licence fees for venues who regularly hold eligible events including live music, performance, visual or literary arts events or a cultural performance or arts event; and
  - d) allow the Minister to determine additional businesses as exempt from the licensing framework.

### Remuneration Tribunal Amendment Bill 2024

- 1.4. This Speaker's Bill will amend the *Remuneration Tribunal Act 1995* to provide for additional remuneration payable to a Member of the Assembly who acts in specified offices for a continuous period of 60 days or more.

### University of Canberra Amendment Bill 2024

- 1.5. This Bill amends the *University of Canberra Act 1989* to allow a delegate to subdelegate their functions to other members of staff of the university or other persons approved by the University of Canberra Council, and to allow appointments to the Council to be made by the responsible Minister instead of the Chief Minister.

## Bills—Comment

### Children and Young People Amendment Bill 2024 (No 2)

- 1.6. This Bill amends the *Children and Young People Act 2008* and Regulations to:
- a) extend the support for young people leaving out of home care from 18 to 21;
  - b) impose obligations on the director-general and staff to maintain and uphold charters relating to providing services for children and young people under the Act; and
  - c) establish an external merits review process in the ACT Civil and Administrative Tribunal.

### 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)

- 1.7. The Bill will amend the provisions of the Act providing for the transition of young adults between 18 and 25 from out-of-home care. The director-general will no longer have a discretion to provide non-financial assistance to young adults under 21 years of age. They will retain their discretion to provide financial assistance to young adults under 21 years of age, or non-financial assistance for young adults between 21 and 25 years of age. A young adult may ask the director-general to stop or restart providing services.
- 1.8. The Bill may therefore require continuing to collect and use personal information of the young adults being offered assistance, potentially limiting the protection of privacy provided by section 12 of the HRA.
- 1.9. The Bill will also provide for ACAT review of certain decisions made under the Act. Persons affected by those decisions must generally first seek internal review, although they can apply directly to ACAT where they consider there to be exceptional circumstances. The public advocate and, where relevant, the Aboriginal or Torres Strait Islander children and young people commissioner can also apply for internal or external review after having attempted to resolve the matter with the decision-maker. A decision on internal review must be made within 40 days or is considered to have confirmed the original decision.
- 1.10. By providing for external review of certain decisions made under the Act, the Bill may provide for personal information to be disclosed and become accessible, limiting the protection of privacy provided by section 12 of the HRA. For example, the Bill provides for internal review and reviewable decisions notices to be provided informing persons that they may make an application for review. Information can be withheld where disclosure in a notice would, among other things, unduly interfere with a person's privacy, although this may be subject to an ACAT application. ACAT must provide details of any applications made to the decision-maker, who in turn must advise other persons affected, the public advocate and the commissioner. ACAT must appoint a legal representative or a legal guardian in certain circumstances. Hearings, however, are to be held in private, and non-disclosure orders can be made where ACAT is satisfied a child or young person is likely to be harmed or endangered. ACAT must also suspend review applications where there are related court proceedings.



- 1.11. By imposing limits on the ability to seek ACAT review, including by not including all decisions which may affect individuals made under the Act and by requiring in non-exceptional circumstances use of internal review, the Bill may limit the right to a fair trial in section 21 of the HRA. The Bill may also limit this right by providing for private hearings and adding to the circumstances in which ACAT may make a non-disclosure order.
- 1.12. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.13. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Crimes (Sentencing) Amendment Bill 2024

- 1.14. This Private Member's Bill amends the *Crimes (Sentencing) Act 2005* to allow a court, in deciding how an offender should be sentenced for an offence, to consider a submission from any party on the sentence, or range of sentences, the party considers appropriate for the court to impose.

### 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)

Rights in criminal proceedings (section 22 HRA)

- 1.15. As described in the explanatory statement accompanying the Bill, the purpose of the Bill is to address concerns raised that the sentencing submission practises favour the defence in the ACT since the High Court decision of *Barbaro v The Queen*.<sup>1</sup> In that case, the plurality of the High Court held that the practice of criminal prosecutors nominating a quantified range of sentences considered available in the circumstances of the case was wrong in principle and should not be followed. As described in the subsequent High Court case of *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate*,<sup>2</sup> this conclusion followed from three considerations:
  - a) any attempt to predict the “available range” would be to attempt to predict the circumstances in which a judge may be held on appeal to have been in error by means of an impermissible numerical approach to sentencing;
  - b) a statement as to the available range of sentences can never be more than an expression of opinion, and in criminal proceeding the opinion of the prosecutor is irrelevant; and
  - c) allowing the Crown to nominate an available range could blur the sharp distinction, and perceived distinction, between the role of the judge and the role of the prosecutor.

<sup>1</sup> *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 ('*Barbaro*').

<sup>2</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 at [34] – [37].

- 1.16. Although there has been some comment in subsequent cases, including in the ACT Court of Appeal case of *R v Gordon*,<sup>3</sup> that *Barbaro* is limited to describing the limits of a prosecutor’s duty to the court to assist in avoiding appealable error, the decision of the court in *Barbaro* remains a reflection of what are considered important elements of the criminal justice process.
- 1.17. The Bill will allow the court to consider submissions from either party, including the prosecution, on what the party considers an appropriate sentence or range of sentences. Even in its application to the prosecution, the amendment is broader than the finding underpinning *Barbaro* in that it applies to submissions on an appropriate sentence or sentences. It is not limited to submissions on the range of sentences which the prosecution considers would be available, or not subject to be overturned on appeal, which was considered wrong in principle in *Barbaro*. The Committee is concerned that the amendment may therefore amplify some of the concerns raised in *Barbaro*.
- 1.18. The Bill does not alter the nature of the submission as one of opinion. By allowing such a submission to be taken into account the Bill will extend the range of considerations taken into account in sentencing beyond establishing the relevant facts, deciding applicable principles of law or applying those principles to the facts.
- 1.19. The Committee is therefore concerned that the Bill may limit the extent to which the Court, in sentencing, is at least perceived to be independent and impartial and hence may limit the right to a fair trial in section 21 of the HRA. To the extent the Bill may erode the distinction between the judge and the prosecutor, which may also extend to the role of the prosecutor prior to conviction, the Bill may limit the protection of innocence protected as a right in criminal proceedings in section 22 of the HRA.
- 1.20. The explanatory statement comments that the Bill “will engage positively with the right to a fair trial by allowing a mechanism for all parties to make a submission to the proceeding on what is an appropriate sentence (or not) if they choose”. The Bill will also support section 22 of the HRA. In the Committee’s view, those rights may also be limited requiring a justification for why any limits should be considered reasonable. **The Committee therefore requests information from the Member on why the Bill will not limit the rights in section 21 and 22 of the HRA, or why any potential limitation should be considered reasonable using the framework in section 28 of the HRA.**

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

## Human Rights Commission (Child Safe Standards) Amendment Bill 2024

- 1.21. This Bill amends the *Human Rights Commission Act 2005* to:
- Allow child safe standards to be prescribed which will be mandatory for all organisations providing a service for children and young people in the Territory; and
  - strengthen the Human Rights Commission’s role in providing capacity building support to organisations in implementing the standards.

<sup>3</sup> *R v Gordon* [2022] ACTCA 48 at [67].

## 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 work and other work-related rights (section 27B)

- 1.22. The *Human Rights Commission Act 2005* provides for persons to complain about a service for children and young people, including where the provider of such a service has acted inconsistently with generally expected standards of delivery for that kind of service or any other standard prescribed by regulation. The Bill will provide explicit authority to prescribe child safe standards which must be implemented by providers of services for children and young people and can form the subject of complaints to the Human Rights Commission. The standards must also be implemented by registered non-government schools as part of the standards for their registration. The standards will replace the National Principles for Child Safe Organisations which had previously been incorporated in the *Education Regulation 2005* for this purpose.
- 1.23. The standards prescribed by the Bill include:
- a) people working with children and young people are suitable and supported to reflect child safety and wellbeing values in practice; and
  - b) staff and volunteers are equipped with the knowledge, skills and awareness to keep children and young people safe through ongoing education and training.
- 1.24. The regulation of these standards may therefore limit the right to work under section 27B of the HRA. By providing a basis on which complaints can be made to the Human Rights Commission, which can then authorise the use of the Commission's investigation and information gathering powers, the Bill may limit the protection of privacy provided by section 12 of the HRA.
- 1.25. The explanatory statement accompanying the Bill recognises these potential limitations and sets out why they should be considered reasonable using the framework in section 28 of the HRA. The Committee refers that statement to the Assembly.
- 1.26. **The Committee draws this matter to the attention of the Assembly, but does not require a response from the Minister.**

## Government response—No comment

- 1.27. The Committee received a response to the Committee's comments on the following Bills and has no further comments:
- a) *Assisted Reproductive Technology 2023*
  - b) *Parentage (Surrogacy) Amendment Bill 2023*
- 1.28. These responses can be viewed [online](#).<sup>4</sup>
- 1.29. The Committee wishes to thank the Ministers for their helpful responses.

---

<sup>4</sup> Available at [https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS\\_Scrutiny/responses-to-comments-on-bills](https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/JCS_Scrutiny/responses-to-comments-on-bills).

## 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 DI2024-2 being the Major Events (Women’s International T20 Australia v South Africa) Notice 2024 made under section 9 of the *Major Events Act 2014* applies the provisions of the Act to the Women's International T20 Australia v South Africa cricket match being held at Manuka Oval on 27 and 28 January 2024.**
  - **Disallowable Instrument DI2024-5 being the Major Events (Men’s One Day International - Australia v West Indies) Notice 2024 made under section 9 of the *Major Events Act 2014* applies the provisions of the Act to the Men’s One Day International - Australia v West Indies cricket match being held at Manuka Oval on 6 February 2024.**
  - **Disallowable Instrument DI2024-6 being the Major Events (Freestyle Kings Live Show) Notice 2024 made under section 9 of the *Major Events Act 2014* applies the provisions of the Act to the Freestyle Kings Live Show motocross event being held at GIO Stadium on 16 February 2024.**
  - **Disallowable Instrument DI2024-11 being the Animal Welfare (Welfare of Horses in the ACT) Mandatory Code of Practice 2024 made under sections 22 and 23 of the *Animal Welfare Act 1992* revokes DI1993-162 and DI1996-9 and approves the Mandatory Code of Practice for the Welfare of Horses in the ACT 2024.**
  - **Disallowable Instrument DI2024-12 being the Long Service Leave (Portable Schemes) Building and Construction Industry Employer Levy Determination 2024 made under section 51 of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2023-151 and determines the levy payable by building and construction industry employer commencing on 1 October 2024.**
  - **Disallowable Instrument DI2024-13 being the Road Transport (General) Application of Road Transport Legislation (National Multicultural Festival) Declaration 2024 made under section 12 of the *Road Transport (General) Act 1999* disapply specific parking rules in specified areas to support the National Multicultural Festival event.**
  - **Disallowable Instrument DI2024-15 being the Long Service Leave (Portable Schemes) Security Industry Employer Levy Determination 2024 made under section 56A of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2018-43 and determines the levy payable by employers in the security industry for each quarter.**
  - **Disallowable Instrument DI2024-16 being the Long Service Leave (Portable Schemes) Community Sector Industry Employer Levy Determination 2024 made under section 56A of the *Long Service Leave (Portable Schemes) Act 2009* revokes DI2021-91 and determines the levy payable by employers in the community sector industry for each quarter.**

- **Disallowable Instrument DI2024-18 being the City Renewal Authority and Suburban Land Agency (Authority Board Member) Appointment 2024 (No 1) made under section 15 of the *City Renewal Authority and Suburban Land Agency Act 2017* appoints a specified person as an expert member of the City Renewal Authority Board.**

## Disallowable Instruments—Comment

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

### No Human Rights Issues

- **Disallowable Instrument DI2024-1 being the Nature Conservation (Canberra Spider Orchid) Action Plan Revocation 2024 made under section 105 of the *Nature Conservation Act 2014* revokes Action Plan No 31 in the 2013 action plan to clarify that the Action Plan for the Canberra Spider Orchid (*Arachnorchis actensis*), as detailed in the 2019 Action Plan, is in force.**
  - **Disallowable Instrument DI2024-8 being the Water Resources (Water Available from Areas) Determination 2024 made under section 17 of the *Water Resources Act 2007* revokes DI2019-191 and determines the total amounts of surface water and ground water that are available for taking in each water management areas.**
  - **Disallowable Instrument DI2024-9 being the Water Resources (Fees) Determination 2024 made under section 107 of the *Water Resources Act 2007* revokes DI2023-128 and clarifies a fee exemption to facilitate the Territory meeting its commitments under the Basin Plan 2012 (Cwlth).**
  - **Disallowable Instrument DI2024-20 being the Road Transport (General) Concession Determination 2024 (No 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2023-87 and updates vehicle registration and driver licence concessions to align arrangements with the previously announced arrangements for the introduction of emission-based registration charging.**
- 2.3. The first instrument mentioned above, made under section 105 of the *Nature Conservation Act 2014* revokes Action Plan No 31 (according to the explanatory statement for the instrument), in order to clarify the effect of the 2019 Action Plan.
- 2.4. The second instrument mentioned above, made under section 17 of the *Water Resources Act 2007*, determines the total amounts of surface water and ground water that are available for taking in each of the specified water management areas.
- 2.5. The third instrument mentioned above, made under section 107 of the *Water Resources Act 2007*, determines a fee exemption ‘to facilitate the Territory meeting its commitments under the Basin Plan 2012 (Cwlth)’.
- 2.6. The fourth instrument mentioned above, made under section 96 of the *Road Transport (General) Act 1999*, ‘updates’ vehicle registration and driver licence concessions, given under that Act, ‘to align arrangements with the previously announced arrangements for the introduction of emission-based registration charging’.

- 2.7. The Committee notes that the explanatory statement for each of the instruments mentioned above contains a statement to the effect that no human rights are engaged by the instrument.
- 2.8. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for each of the instruments mentioned above.**
- 2.9. **This comment does not require a response from the relevant Ministers.**

## Retrospectivity

- **Disallowable Instrument DI2024-3 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2024 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2023-173 and provides conditions under which Members may employ staff and engage consultants and contractors, including revised salary allocations, for the 2023-2024 financial year.**
  - **Disallowable Instrument DI2024-4 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2024 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2023-174 and determines the conditions under which the Speaker may, on behalf of the Territory, employ staff and engage consultants or contractors, including revised salary allocations, for the 2023-2024 financial year.**
- 2.10. The instruments mentioned above, made under subsections 10(3) and 20(4) and subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989*, respectively, determine conditions under which Members and the Speaker (respectively) may employ staff and engage consultants and contractors. Section 2 of each instrument provides that the instrument is taken to have commenced on 29 December 2023. Given that both instruments were notified on the ACT Legislation Register on 9 January 2024, this means that they are retrospective in effect.
- 2.11. Section 76 of the *Legislation Act 2001* provides that, for 'statutory instruments' (defined in section 13 of the *Legislation Act* to include a disallowable instrument, such as these instruments), only a 'non-prejudicial' provision can commence retrospectively. That concept is, in turn, defined in subsection 76(4) of the *Legislation Act*, which provides:
- (4) In this section:
- 'non-prejudicial provision'** means a provision that is not a prejudicial provision.
- 'prejudicial provision'** means a provision that operates to the disadvantage of a person (other than the Territory or a territory authority or instrumentality) by—
- (a) adversely affecting the person's rights; or
- (b) imposing liabilities on the person.

- 2.12. Given this statutory prohibition on ‘prejudicial retrospectivity’ in statutory instruments, the Committee has consistently required that, for subordinate legislation with a retrospective effect, there be an indication, usually in the explanatory statement, that the retrospectivity is ‘non-prejudicial’, for section 76 of the Legislation Act.
- 2.13. For these instruments, the Committee notes that the explanatory statements do not address the retrospectivity issue. However, the text of the explanatory statements, discussing the effect of the instruments, indicates that the effect is to increase relevant allowances, etc. As a result, the instruments may reasonably be assumed to be non-prejudicial. It would have assisted if section 76 of the Legislation Act was addressed explicitly, as suggested in the Committee’s document titled [Subordinate legislation—Technical and stylistic standards—Tips/Traps](#).<sup>5</sup>
- 2.14. **This comment does not require a response from the Chief Minister.**

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

- **Disallowable Instrument DI2024-7 being the Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2024 made under section 126A of the *Construction Occupations (Licensing) Act 2004* revokes DI2020-269 and approves the Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2024.**
- 2.15. This instrument approves a Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2024, for section 126A of the *Construction Occupations (Licensing) Act 2004*.
- 2.16. The Committee notes that section 4 of the instrument disapplies subsections 47(5) and (6) of the *Legislation Act 2001*. The Committee has consistently noted that the effect of subsections 47(5) and (6) of the Legislation Act is that any external document that is relied upon (ie, by being ‘applied, adopted or incorporated’) by this instrument would have to be published on the ACT Legislation Register, as a ‘notifiable’ instrument (for section 10 of the Legislation Act). This, in turn, ensures that users of legislation have free access to all the material that they need, in order to understand the full scope and effect of an instrument such as this. The Committee has always taken a strong view that such access is important. As a result, the Committee generally does not look favourably on the disapplication of subsections 47(5) and (6) of the Legislation Act and seeks an explanation as to why disapplication is necessary, in a particular case.
- 2.17. For this instrument, the Committee notes that the explanatory statement states:
- Clause 4 displaces the requirements in the Legislation Act, section 47 (5) and section 47 (6) consistent with section 126A (2) and (4) of [the *Construction Occupations (Licensing) Act 2004*] that establish the power to make the Code of Practice.

---

<sup>5</sup> Available at [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)



- 2.18. There is no other discussion of the disapplication of subsections 47(5) and (6).
- 2.19. The Committee notes that (as stated above) section 126A of the *Construction Occupations (Licensing) Act 2004* provides the power to make this instrument. Subsections 126A(2) and (4) provide:

(2) An approved code of practice may consist of a code, standard, rule, specification or provision relating to the construction occupation or occupation class, or a construction service, and may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

.....

(4) The Legislation Act, section 47 (5) or (6) does not apply in relation to a law or instrument mentioned in subsection (2).

*Note* Laws and instruments mentioned in s (2) do not need to be notified under the Legislation Act because s 47 (5) and (6) do not apply (see Legislation Act, s 47 (7)).

- 2.20. This means that section 4 of the instrument is merely declaratory (and arguably redundant).
- 2.21. The explanatory statement goes on to discuss human rights issues, by reference to the right to work, protected by section 27B of the *Human Rights Act 2004*:

Since the Code of Practice was first introduced, the ACT has included the right to work in its *Human Rights Act 2004*. Section 27B (1) of the HRA expressly provides that the practice of a trade, occupation or profession may be regulated by law. Codes of Practice are a common element of licensing schemes and set ongoing standards that licensed persons must meet to either maintain their licence or meet as part of their licensing obligations.

Building Assessors have been licensed for the purposes of providing [Energy Efficiency Rating] statements since 2010 and subject to a Code of Practice for EER statements since 2012.

The Code of Practice supports the reasonable expectation of the community that licensed building assessors preparing EER statements are subject to a level of accountability and regulatory oversight in providing those services.

The amendments contained in this edition of the Code of Practice do not introduce any additional obligations on licensed building assessors or impact their licence or right to undertake assessments required to produce an EER statement. Industry have been informed of the changes contained in this edition of the Code.

Any engagement with or limitation on the right to work in section 27B of the HRA is considered reasonable and justifiable.

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



## Human Rights Issues

- **Disallowable Instrument DI2024-10 being the Financial Management (Insourcing Framework) Determination 2024 (No 1) made under section 128 of the *Financial Management Act 1996* determines an Insourcing Framework, with features outlined in Schedule 1 of the instrument, to be used to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider.**
- 2.24. This instrument, made under section 128 of the *Financial Management Act 1996*, determines an ‘Insourcing Framework’, to be used to evaluate whether services or works required by a public sector entity should be provided by the public sector or an external provider. The explanatory statement for the instrument discusses human rights issues, by reference to the right to work, protected by section 27B of the *Human Rights Act 2004*:
- Human rights**
- The disallowable instrument may both promote and limit the right to work. The right to work is promoted by the Insourcing Framework’s aim of delivering secure work through formal employment in the ACT Public Service.
- The right to work may also be limited for some people outside of the ACT Public Service who would have previously engaged in contract or labour hire work through ACT Government procurement processes which outsource work. Any limitation of the right to work in this circumstance may be reasonably justified as promoting the legitimate aim of promoting secure and equal working conditions, and the measures are reasonable, necessary and proportionate to that aim as the legislation will allow for any workers previously benefiting from outsourcing to work within the ACT Public Service.
- 2.25. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statement for this instrument.**
- 2.26. **This comment does not require a response from the Minister.**

## Human Rights Issues

- **Disallowable Instrument DI2024-14 being the Public Place Names (Denman Prospect) Determination 2024 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the names of three roads for the public places in the Division of Denman Prospect.**
  - **Disallowable Instrument DI2024-17 being the Public Place Names (Whitlam) Determination 2024 (No 1) made under section 3 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Whitlam.**
- 2.27. The instruments mentioned above are made under section 3 of the *Place Names Act 1989*, naming public places in Denman Prospect and Whitlam, respectively. The Committee notes that, similar to explanatory statements for similar instruments, the explanatory statement for each instrument discusses potential human rights implications for the instrument. The particular human right identified is the right to privacy and reputation, set out in section 12 of the *Human Rights Act 2004*.

- 2.28. The Committee notes that the explanatory statement for the first instrument mentioned above 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.

- 2.29. The Committee notes that a similar statement appears in the explanatory statement for the second instrument mentioned above.
- 2.30. **The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues in the explanatory statements for the instruments mentioned above.**
- 2.31. **This comment does not require a response from the Minister.**

## Subordinate Laws—Comment

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

### No Human Rights Issues

- **Subordinate Law SL2024-1 being the Urban Forest (Transitional Provisions) Regulation 2024 made under the *Urban Forest Act 2023* provides details for assessment of protected trees and tree management plans applied for in a development application to the planning authority prior to the commencement of the Act.**

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

- 2.33. This subordinate law is made for section 316 of the *Urban Forest Act 2023*, which allows the Minister to prescribe transitional matters necessary or convenient to be prescribed (for the Act).
- 2.34. According to the explanatory statement, the subordinate law ‘provides details for the assessment of protected trees and tree management plans applied for in a development application to the planning authority prior to the commencement of the Act’.
- 2.35. The explanatory statement goes on to discuss human rights issues:
- Human rights**
- The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) terms of reference require consideration of human rights impacts, among other matters. In this case, no human rights are impacted.
- 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. **This comment does not require a response from the Minister.**

## Government Response—Comment

- **Disallowable Instrument DI2023-202 being the Children and Young People (Kinship and Foster Carers Risk Assessment) Guidelines 2023, made under section 514B of the Children and Young People Act 2008, determines risk assessment guidelines for that Act.**
- 2.38. The instrument mentioned above is made under section 514B of the *Children and Young People Act 2008*. It makes ‘risk assessment guidelines’ for that Act. It was commented on by the Committee in *Scrutiny Report 33* of the 10<sup>th</sup> Assembly (5 September 2023),<sup>6</sup> in which the Committee raised the issue of whether human rights analysis should have been provided with the instrument. In a response dated 18 September 2023, the Minister for Families and Community Services accepted the Committee’s comments, provided some human rights analysis and advised that she had ‘asked the Community Services Directorate to develop an updated Explanatory Statement to address this issue’.<sup>7</sup> The Committee was satisfied with this response and made no further comment.
- 2.39. The Committee then received a further response from the Minister (undated),<sup>8</sup> which was discussed in *Scrutiny Report 38* of the 10<sup>th</sup> Assembly (31 January 2024).<sup>9</sup> After noting her commitment in relation to updating the explanatory statement, the Minister states:
- ... the Guidelines’ Explanatory Statement was not able to be revised ahead of the 19 September 2023 deadline for the Legislative Assembly to move to disallow the Guidelines. Unfortunately, this meant it was not possible to substitute a revised Explanatory Statement on the ACT Legislation Register.
- 2.40. However, nevertheless, the Minister goes on to provide an update on ‘how the Committee’s comments have been considered and actioned and provide assurance that [the Community Services Directorate] will address the learnings from this process in developing future explanatory statements’.
- 2.41. In *Scrutiny Report 38*, the Committee thanked the Minister for this further information but indicated its disappointment that a revised explanatory statement (or other source of explanation) would not be available, on the ACT Legislation website, for the use of those who have to consider the instrument in question. The Committee also noted that the issue had arisen previously, referring to the experience with the Attorney-General, relating to the Court Procedures (Fees) Determination 2022.<sup>10</sup> identifying issues with the explanatory statement for that instrument.<sup>11</sup> In his initial response, dated 3 May 2022, the Attorney-General accepted the Committee’s comments, provided a proposed Amended Explanatory Statement and agreed ‘to table the attached Amended Explanatory Statement in the Assembly’.<sup>12</sup>

<sup>6</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/2279104/Scrutiny-Report-No-33.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/2279104/Scrutiny-Report-No-33.pdf).

<sup>7</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0004/2293924/08a99d3c97e0901b0740eae0256417d915ccce40.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2293924/08a99d3c97e0901b0740eae0256417d915ccce40.pdf).

<sup>8</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0006/2383170/DI2023-202Additional-response.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2383170/DI2023-202Additional-response.pdf).

<sup>9</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0006/2387085/Scrutiny-Report-38-Final.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0006/2387085/Scrutiny-Report-38-Final.pdf).

<sup>10</sup> See detail in *Scrutiny Report 38*.

<sup>11</sup> *Scrutiny Report 14* available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0008/1975904/Report-14-29Mar22.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0008/1975904/Report-14-29Mar22.pdf).

<sup>12</sup> Initial response available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0004/2004187/Response-DI2022-1-Court-Procedures-Fees-Determination-2022.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/2004187/Response-DI2022-1-Court-Procedures-Fees-Determination-2022.pdf).

- 2.42. In the light of the recurrence of the issue, the Committee sought to identify a solution, to prevent further recurrence. The Committee suggested that the most obvious solution was for Ministers to respond to such comments before the Legislative Assembly's capacity to disallow the instrument/subordinate law in question expires, as the Committee requests, in making the comment.<sup>13</sup>
- 2.43. The Committee went on to state that, if this was going to continue to be an issue, the Committee may have to consider adopting a practice similar to the Senate Standing Committee for the Scrutiny of Delegated Legislation, which issues a 'protective notice of motion to disallow',<sup>14</sup> to preserve the Senate's capacity to disallow a legislative instrument, pending the receipt of a satisfactory response. The Committee suggested that this would appear to avoid the issue that has recently arisen with the two instruments discussed above.
- 2.44. The Committee suggested that another option would appear to be to amend the *Legislation Act 2001*, to remove the limitation on registering amended explanatory statements, outside of the disallowance period.
- 2.45. Finally, the Committee suggested that another option, in the interim, might be to include information such as that generated in relation to the 2 instruments discussed above on the ACT Legislation Register, perhaps under the relevant 'Law History' tab.
- 2.46. **The Committee sought the views of the Minister for Families and Community Services and the Attorney-General on the above discussion.**
- 2.47. The Minister for Families and Community Services has provided a further response, dated 15 March 2024.<sup>15</sup>
- 2.48. The Minister states:
- To prevent recurrence and ensure revised explanatory statements are tabled in the Legislative Assembly within the disallowance period in the future, whole of ACT Government directorate guidance material has been reviewed and updated. The information now includes clearer guidance regarding the timeframe for tabling of a revised explanatory statement being the same as the requirement to provide a response to the Committee within the disallowance period.
- 2.49. The Committee welcomes this response to the Committee's concerns.
- 2.50. The Minister goes on:
- The Committee also suggested the *Legislation Act 2001* could be amended 'to remove the limitation on registering amended explanatory statements, outside of the disallowance period'. The main purposes of explanatory statements are to:
- a. provide the Legislative Assembly with information about the purpose and effect of proposed legislation that is before the Assembly, to assist it in its deliberations on the legislation; and

---

<sup>13</sup> See, eg, *Scrutiny Report 33*, at page 24.

<sup>14</sup> See

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Guidelines/Guide\\_to\\_working\\_with\\_the\\_committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines/Guide_to_working_with_the_committee).

<sup>15</sup> Available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0016/2421232/DI2023-202Further-response-to-Report-38.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0016/2421232/DI2023-202Further-response-to-Report-38.pdf).

b. aid in the interpretation of the legislation once it has taken effect.

The Parliamentary Counsel notes explanatory statements tabled after the disallowance period do not achieve either of these main purposes and publishing them is potentially misleading. This is because deliberation on the legislation associated with explanatory statements provided outside of the disallowance period has concluded. Further, a court interpreting a law would only consider explanatory statements tabled while a law is before parliament. This is recognised in the *Legislation Act 2001*, section 142. As such, the Government does not intend to amend the *Legislation Act 2001* in response to the Committee's suggestion.

- 2.51. The Committee notes the Minister's views relating to the limitations imposed by section 142 of the *Legislation Act 2001*. Those limitations could, of course, be removed.
- 2.52. Finally, on the Committee's suggestion that it might consider adopting a practice similar to the Senate Standing Committee for the Scrutiny of Delegated Legislation, which issues a 'protective notice of motion to disallow',<sup>16</sup> to preserve the Senate's capacity to disallow a legislative instrument, pending the receipt of a satisfactory response, the Minister states:

I note the Committee's comment regarding the possibility of the Committee adopting a practice similar to the Federal Government to move a 'protective notice of motion to disallow', which would grant an additional disallowance period to resolve any outstanding matters. It is at the discretion of the Committee as to whether or not to adopt this practice and to consider any legislative change which may be required to facilitate such a practice.

- 2.53. The Committee indicates that it is its understanding that the Senate Committee approach is merely a Committee practice and does not involve legislative or standing order authorisation. The Committee have decided, should there be a recurrence of this issue, it will move a protective notice of motion to disallow.
- 2.54. **This Committee thanks the Minister for this helpful response.**

Peter Cain MLA  
Chair

April 2024

---

<sup>16</sup> See

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Delegated\\_Legislation/Guidelines/Guide\\_to\\_working\\_with\\_the\\_committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines/Guide_to_working_with_the_committee).

# Outstanding responses

## Bills/Subordinate Legislation

### Report 28, dated 3 May 2023

#### Bill

- Modern Slavery Legislation Amendment Bill 2023

### Report 38, dated 30 January 2024

#### Bill

- Property Developers Bill 2023

### Report 39, dated 12 March 2024

#### Bill

- Biosecurity Legislation Amendment Bill 2024
- Civil Law (Wrongs) Amendment Bill 2024
- Environment Protection (Fossil Fuel Company Advertising) Amendment Bill 2024

#### Subordinate Legislation

- Disallowable Instrument DI2023-243 being the Motor Accident Injuries (Significant Occupational Impact Assessment) Guidelines 2023
- Disallowable Instrument DI2023-310 being the Motor Accident Injuries (Treatment and Care) Guidelines 2023
- Disallowable Instrument DI2023-311 being the Motor Accident Injuries (Quality of Life Benefit) Guidelines 2023
- Disallowable Instrument DI2023-313 being the Motor Accident Injuries (Significant Occupational Impact Assessment Referral) Guidelines 2023
- Subordinate Law SL2023-31 being the Magistrates Court (Public Unleased Land Infringement Notices) Amendment Regulation 2023 (No 1)
- Subordinate Law SL2023-36 being the Court Procedures Amendment Rules 2023 (No 2)