

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

NATURE CONSERVATION AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
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Minister for the Environment**

NATURE CONSERVATION AMENDMENT BILL 2023

INTRODUCTION

This explanatory statement relates to the Nature Conservation Amendment Bill 2023 (the **bill**) as presented to the Legislative Assembly. It has been prepared to assist the reader of the bill and to help inform debate. It does not form part of the bill and has not been endorsed by the Legislative Assembly.

The statement must be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

The bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (the HRA).

OVERVIEW OF THE BILL

The purpose of the bill is to restrict the use of inappropriate fruit netting in ACT residential premises to prevent the risk of injury or death to native wildlife. The bill will contribute to the protection of native wildlife, particularly the threatened Grey-headed Flying-fox, from net entanglement.

The bill also makes a consequential amendment to the *Magistrates Court (Nature Conservation Infringement Notices) Regulation 2015*.

CONSULTATION ON THE PROPOSED APPROACH

ACT Wildlife

Consultation with ACT Wildlife has occurred since the Legislative Assembly passed the motion in 2021 for the ACT Government, in consultation with local businesses and other stakeholders, to develop legislation that allows only the use of animal-friendly netting in the ACT.

ACT Wildlife provided context and data which demonstrated the scope of the issue in the ACT. Their input was integral in the development of the wellbeing impact assessment as it provided a good understanding of the impacts and costs of wildlife entanglement rescues to the community. ACT Wildlife endorsed the approach taken by the Victorian Government to ban netting over the 5 mm x 5 mm threshold and to focus only on prohibiting inappropriate netting on residential premises as this is where most Grey-headed Flying-fox rescues occur. The ACT Government continues to consult and partner with ACT Wildlife to progress the unsafe netting swap and disposal program.

Victorian Government

Household fruit netting regulations to protect wildlife commenced in Victoria in September 2021. Consultations with the Victorian Department of Energy, Environment and Climate Action (DEECA) were conducted to gain insights related to enforcement, penalties, and other issues. Representatives from DEECA affirmed the advice given by ACT Wildlife to focus banning the use of inappropriate netting on residential premises as usage in residential settings posed a more significant problem than in commercial settings. Whilst ACT Wildlife felt that only white netting should be made compliant, DEECA representatives explained that the Victorian legislation does not mandate the colour of netting due to lack of evidence.

Community Stakeholders

Consultation with various community stakeholders, including retailers and community gardening groups, occurred via email. Respondents reported that the stocking/use of inappropriate fruit netting has ceased and/or groups were in the process of transitioning away from inappropriate netting. Consultation with a representative from Friends of Bats and Bushcare Inc. has provided insight into the success of the Victorian legislation when it came to wildlife rescues.

CONSISTENCY WITH HUMAN RIGHTS

Due regard was given to the compatibility of the bill with the *Human Rights Act 2004* (HRA). The amendments introduced in the bill may be seen as engaging the following human rights in the HRA.

Rights engaged

- Section 9 (promoted)– Right to life;
- Section 12 (limited) – Right to privacy and reputation;
- Section 22 (limited) – Rights in criminal proceedings (right to be presumed innocent until proven guilty).

Section 28 (1) of the HRA provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28 (2) provides that in deciding whether a limit on a human right is reasonable, the following factors must be considered:

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

To the extent that any provision of this Bill limits an individual's human rights, any limitation is reasonable and justified as outlined below.

Rights Promoted

Right to Life

The bill promotes the right to life by supporting the ACT's biodiversity, thus ensuring a healthy environment for residents and future generations to live in. The provision to prohibit inappropriate netting on plants prevents injury or death to wildlife, thus promoting biodiversity and enabling susceptible wildlife to live and perform their ecological functions from which nature and people benefit from.

Rights Limited

Right to privacy and reputation

Entanglement in fruit netting is a major cause of hospital admissions for flying foxes in urban environments.¹ Injury due to entanglement from netting with a large mesh size often leads to death, not only in flying foxes but in other wild animals such as possums, birds and reptiles. The bill aims to decrease the risk of injury or death in wildlife from fruit net entanglement by restricting the use of large mesh size fruit netting in residential premises.

Under section 12 of the HRA, everyone has the right not to have his or her home interfered with unlawfully or arbitrarily. The bill engages the right to privacy as it limits what ACT residents can do in their homes and on their private property through the creation of offences in the Act that regulate the use of certain netting at a residential property. The bill limits the right of ACT residents to utilise netting that is prohibited under the bill.

This limitation is justified with respect to the intent and purpose of the bill, which is to protect wildlife. Protection of wildlife from inappropriate netting has wider ecological benefits by supporting the continuation of ecological services that benefit nature and communities. For example, bats provide vital ecological services through seed dispersal, insect control, pollination and nutrient cycling.²

Section 28 of the HRA provides that rights can be limited, provided it can be demonstrated that the limitation is necessary, reasonable and proportionate. The proposed amendments are considered reasonable and proportionate as it will only restrict the use of non wildlife-friendly netting, which are nets with mesh hole size

¹ Aziz SA, Olival KJ, Bumrungsri S, Richards GC, Racey PA. The conflict between pteropodid bats and fruit growers: species, legislation and mitigation. *Bats in the Anthropocene: Conservation of bats in a changing world*. 2016:377-426.

² Ranirez-Francel LA, Garcia-Herrera LV, Losada-Prado S, Reinoso-Florez G, Sanchez-Hernandez A, Estrada Villegas S, Lim BK, Guevara G. Bats and their vital ecosystem services: a global review. *Integrative Zoology*. 2022 Jan;17(1):2-3.

greater than 5mm x 5 mm, and will not prohibit the community from using wildlife safe netting to protect their fruiting plants. These amendments are necessary as net entanglement has been identified as a major threat to Grey-headed flying foxes in the ACT, a threatened species under the *National Environment Protection and Biodiversity Conservation Act 1999* and the *ACT's Nature Conservation Act 2014*.

The right to privacy may also be limited in relation to the enforcement of the new provisions by Conservation Officers. An officer may enter a private residential premise under certain circumstances for the purpose of carrying out enforcement activities. However, the requirement for Conservation Officers under the *Nature Conservation Act 2014* to obtain consent or a warrant to enter a place in all but serious and urgent circumstances provide safeguards to ensure the exercise of these powers does not unreasonably limit or restrict the right to privacy. The right to privacy is also protected by the fact that an authorised officer can only enter a place to protect life or property if the officer believes on reasonable grounds the circumstances are so serious and urgent that immediate entry to the premises without authority of a warrant is necessary.

Right to be presumed innocent until proven guilty

The bill limits the right to be presumed innocent until proven guilty according to law by reversing the onus of proof with the introduction of two strict liability offences: use of prohibited fruit netting (s 138A) and prohibited fruit netting retail display (s 138B).

Public education and information campaigns will play a large part in helping ensure the public is aware of the amendments and that their behaviour complies with it. The Environment Protection and Sustainable Development Directorate (EPSDD) has allocated \$25,000 for a net swap program which will be run by ACT Wildlife during September and October 2023. The net swap program replaces old netting with compliant netting free of charge for the ACT community. The net swap program will include a public awareness component on the dangers and risks of inappropriate netting through distribution of brochures, face-to-face education carried out by ACT Wildlife and EPSDD staff and posting of information and alerts on social media and the ACT Wildlife and EPSDD websites. Once the Bill is enacted, the requirement for businesses to display signage about the restrictions on use of nets will serve to further inform the public.

The section 138B offence regarding prohibited fruit netting retail display will apply to retail businesses. Businesses are aware that they need to comply with regulations which change from time-to-time and have processes in place to stay up to date with their requirements. Letters will be sent to businesses selling fruit netting to inform them of the law and the signage requirements.

Section 138A and 138B establish strict liability offences. A strict liability offence may be justifiable in this situation as it is directly relevant to environmental objectives and the person knows, or ought to know, their legal obligations. The suggested penalty

of 5 penalty units (and no imprisonment) for the use offence and 10 penalty units (and no imprisonment) for failure to display signage in retail stores is comparable with other offences in the NC Act.

The use of an infringement notice scheme will allow for a timely and effective response to non-compliance. The use of infringement notices is designed to promote a change in community-wide behaviour. The infringement notice fines are lower compared to other offences in the Act relating to the harming of or interference with native wildlife, as the indirect and prospective impact on wildlife resulting from the use of inappropriate netting was also considered. The infringement notice amount of \$150 and \$250 respectively is less than the maximum fine as set out in the ACT Government's Guide to Framing Offences.

As stated above, there will be a significant public communications and education program surrounding the new offence. These measures in addition to the signage requirement for vendors selling netting which is not wildlife-safe will assist in putting a person, who is looking to buy new netting, on notice. Furthermore, none of the amendments in the Bill limit the right of a person to dispute an infringement notice in court, which is a safeguard.

Human rights have been considered in the development of the Bill and rights were limited in the least restrictive way possible, whilst achieving the purpose of the bill. The impacts to Grey-headed Flying-Fox and other native wildlife from entanglement in non wildlife-friendly netting have been recognised for several years. Following the ban of both the use and sale of inappropriate netting in Victoria, monitoring showed a marked decline in the number of Grey-headed Flying-Fox becoming entangled in fruit netting. Thus, a decision was made to introduce similar restrictions in the ACT. The provisions introduced are the least restrictive means as they still allow the use and sale of wildlife friendly nets and a thorough education campaign will go hand in hand with the amendments.

The basis for inclusion of a strict liability offence is to ensure that a sufficiently robust and consistent monitoring and enforcement system can operate without requiring prosecution in all cases. The purpose of the offences is to protect the environment and promote a change in community behaviour, while establishing appropriate enforcement mechanisms. The issuing of infringement notices is guided by internal policy, where education and awareness is the primary mechanism used for compliance with the law. The NC Act Compliance and Enforcement Policy puts emphasis on education as the foundation of voluntary compliance to the law and that education may sometimes be the most appropriate response to non-compliance.

Infringement Notices will be used as a means to promote and achieve timely compliance and will only be issued when there is sufficient evidence of the breach to successfully pursue the matter in court. The impacts on a person's rights are considered reasonable and proportionate to the objectives of the legislation and the risks and outcomes for community and environmental protection.

Nature Conservation Amendment Bill 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the ***Nature Conservation Amendment Bill 2021***. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Nature Conservation Amendment Act 2023*.

Clause 2 Commencement

This clause provides that the Act commences on the day fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause provides that the legislation amended by the Act is the *Nature Conservation Act 2014*, and the *Magistrates Court (Nature Conservation Infringement Notices) Regulation 2015*.

Clause 4 Definitions – div 6.1.2

Section 127, new definitions

This clause inserts a new definition of ***prohibited fruit netting***, which provides for the particulars of the fruit netting to be prohibited under the Act.

Clause 5 New sections 138A and 138B

This clause inserts new provisions that determine what constitutes an offence when using or selling prohibited fruit netting.

New section 138A provides that it is an offence when a person place prohibited fruit netting on a plant on residential premises. Additionally, a person commits an offence if prohibited fruit netting is on a plant on residential premises and that person occupies the premises. The offence against this section is a strict liability offence.

New section 138B (1) and (2) provides that a person commits a strict liability offence if prohibited fruit netting is displayed for retail sale without a prominent signage (and in appropriate format) accompanying the product display.

New section 138B (3) sets out the display requirements for the sign that must accompany the prohibited fruit netting for sale. The sign must be prominently displayed at or near the prohibited fruit netting for sale and contain the statement, “*Use of this netting is restricted in the ACT as it can lead to wildlife injury or death. Penalties may apply (Nature Conservation Act 2014, section 138A).*” Additionally, the font used must be in Arial bold typeface 50 point or bigger and the colour must contrast with the background colour of the signage for ease of reading.

**Schedule 1 Magistrates Court (Nature Conservation Infringement Notices)
Regulation 2015 – consequential amendment**

This clause inserts new items 2A, 2B and 2C into the infringement notice regulation to provide an infringement notice amount of \$150 for offences under section 138A (1) and 138A (2), and \$250 for offences under 138B (1).