

2023

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

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2023

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

**Presented by
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Minister for Sustainable Building and Construction**

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2023

This explanatory statement relates to the Building and Construction Legislation Amendment Bill 2023 (the Bill) as presented to the ACT Legislative Assembly.

The statement is to be read in conjunction with the Bill. It is not a complete description but provides information about the intent of the provisions in the Bill.

It has been prepared to assist the reader. It does not form part of the Bill, has not been endorsed by the Assembly and is not to be taken as providing a definitive interpretation of the meaning of a provision.

The Bill has not been declared 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*.

OVERVIEW OF THE BILL

The Bill contains amendments that have been identified as required to ensure the ACT's building regulatory system can be effectively regulated and supports, drives, and delivers high quality design and building, compliance with building standards and integrity and accountability in the ACT building and construction industry.

The Bill includes amendments to address safety risks with the installation, testing and maintenance of medical gas systems and Distributed Energy Resources. It also contains minor and technical amendments to the ACT's building regulatory system.

The Bill amends the following legislation:

- *Architects Act 2004*
- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Building and Construction Industry (Security of Payment) Act 2009*
- *Construction Occupations (Licensing) Act 2004*
- *Construction Occupations (Licensing) Regulation 2004*
- *Electricity Safety Act 1971*
- *Electricity Safety Regulation 2004*
- *Gas Safety Act 2000*

- *Gas Safety Regulation 2001*
- *Liquor Act 2010*
- *Water and Sewerage Act 2000*

The Bill contains the following amendments that **support accountability and integrity in the building and construction industry**:

Medical gas systems – new licensing framework

The Bill introduces a licensing framework for people installing and working on medical gas systems. The Bill introduces new licence classes for people undertaking medical gas work, which will be supported by new qualifications requirements for those undertaking such work. The proposed qualifications are intended to align with those already required in other jurisdictions and currently available to the ACT industry.

Licensing requirements for distributed energy resources (DER) installations

The Bill introduces an endorsement for electricians working on DER, which will mean that all electricians installing such systems will have additional qualifications and experience. This is aimed at improving safety by reducing the risk of installation failures.

It is not currently a requirement for a licensed electrician to have additional qualifications to install DER, however, to be eligible for Australian or ACT Government solar rebates and support schemes, a DER must be installed by a licensed electrician who is also a Clean Energy Council (CEC) accredited installer.

With the gradual phase out of these rebate schemes, there is a concern that there will be an increase in the number of inexperienced workers undertaking DER installations.

These amendments engage with the right to work under the *Human Rights Act 2004* and are discussed in detail in the human rights analysis.

The Bill contains the following amendments that **support high quality design and building and compliance with building standards**:

Reconnecting electrical installations that have been disconnected from the electricity network

There is a safety risk with reconnecting an electrical installation that has been disconnected from the electricity network, or sat idle, for a period of time. This can be due to parts of the electrical installation being vandalised, damaged or stolen, or cables becoming damaged, for example by rodents. The Bill introduces an offence for reconnecting an electrical installation that has been disconnected for 6 months or more to an electricity network. This will treat installations that have sat idle for 6 months or more in the same manner as new electrical installations.

Disconnection of electrical installations that are becoming dangerous

In the course of their duties, electrical inspectors sometimes identify installations that they consider are becoming dangerous. They currently have limited ability to manage these installations until they are in fact dangerous and they can order their disconnection. The Bill introduces the ability for an electrical inspector to order the repair or replacement of electrical equipment that they determine is becoming dangerous.

CONSULTATION ON THE PROPOSED APPROACH

In developing the Bill, the Government consulted with key stakeholders on the main reforms relating to licensing those undertaking activities relating to medical gas systems and distributed energy resources installations.

Stakeholders consulted include the Justice and Community Safety Directorate, the Chief Minister, Treasury and Economic Development Directorate, ACT Health, Community Health Services, the Master Builders Association of the ACT (MBA), the Housing Institute Australia (HIA), the NSW Plumbers Union, the National electrical Communications Association (NECA) and the Electrical Trades Union (ETU).

CONSISTENCY WITH HUMAN RIGHTS

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

An assessment of the Bill against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Rights engaged

The Bill engages the following sections of the HRA:

- Section 9 – Right to life (promoted)
- Section 12 – Privacy and Reputation (limited)
- Section 17 – Right to take part in public life (engaged)
- Section 18 – Right to liberty and security of person (limited)
- Section 22 – Rights in criminal proceedings (limited)
- Section 27B – Right to work and other related work rights (engaged and limited)

Rights Promoted

Right to life

Medical gas licensing

The Bill promotes the right to life by introducing licensing requirements for people installing medical gas systems.

The need for introducing licensing requirements stemmed from two incidents in New South Wales (NSW) in 2015 and 2016, in which infants were administered nitrous oxide instead of oxygen in a hospital, resulting in one fatality and one serious injury. The NSW Chief Health Officer determined these incidents to be the result of incorrect installation of the medical gas pipes and subsequent flawed testing and commissioning processes.

There are significant risks to health, safety and the economic wellbeing of individuals resulting from the provision of medical gas services where an individual does not have adequate qualifications, experience or follow an established verification process for the installation.

By introducing licensing requirements, installers of medical gas systems will be incorporated into the construction occupations licensing framework. This means mandatory qualifications, experience and competencies will be required from all licensees and regulatory action can be taken for non-compliance.

The ACT's proposed approach is in line with other jurisdictions that have already introduced licensing requirements for installers of medical gas systems such as NSW, Victoria and Queensland.

Licensing requirements for distributed energy resource (DER) installations

The Bill promotes the right to life by establishing the requirement for the holder of an unrestricted electrician and electrical contractor licence to hold an endorsement in order to undertake electrical work on determined distributed energy resources (DER).

These requirements provide safety in the home for the community by ensuring that those undertaking installations of DER have the required skills and qualifications for the specific DER installations being undertaken. This reduces the risk of electrical incidents occurring from poor quality installations.

The licensing requirements will assist in ensuring electricians have the skills required to install specific DER. It also allows requirements to be tailored in a notifiable instrument so that the Government can be responsive to emerging technologies and the needs of industry, with an emphasis on ensuring safe installations for

consumers.

Rights Engaged

Right to take part in public affairs and elections

New section 127AA of the *Building Act 2004* introduces the option for a consumer representative to be appointed by the Minister. The ability for the Minister to appoint a consumer representative is currently contained in the *Building (Approval Criteria) Determination 2002 (DI2002-49)*.

The Bill moves this power to the Act to make it clear that this role applies to any approved scheme and provides consistency with other appointments within the ACT's building regulatory system.

This amendment may engage the right to take part in public affairs and elections, which includes the right to appointment to public service and public office. This provision provides the opportunity for people from an industry body or consumer organisation to be appointed to provide advice to the Minister on behalf of consumers in relation to approved schemes.

Right to work

The Bill provides a power for the Minister to approve a code of professional conduct for registered architects or an architectural service, which is a disallowable instrument.

The objects of the *Architects Act 2004* include ensuring architects provide services to the public both professionally and competently. This includes provisions to discipline architects who are found to have acted incompetently.

Currently the *Architects Act 2004* provides that a regulation may adopt, completely or partly, a code of professional conduct that sets out guidelines to be followed by architects in their professional practice.

Establishing a code of professional conduct as a disallowable instrument will align with current drafting practice and other similar legislative frameworks for construction professionals, such as the *Professional Engineers Act 2023*. A disallowable instrument provides oversight to the Legislative Assembly and contravention of the code links to grounds for occupational discipline.

Other jurisdictions including New South Wales, Victoria and Queensland have adopted codes of professional conduct for the provision of architectural services.

Through their professional training, architects already understand their obligations to provide professional architectural services and will not be disadvantaged should a code of conduct be introduced. Registered architects will be advised prior to any

code of conduct being introduced and consultation will be undertaken with key stakeholders on the content of the code.

Rights Limited

Right to liberty and security of person

Nature of the right and the limitation (s28(a) and (c))

The Bill amends an existing offence in the *Electricity Safety Act 1971* (section 4 (1)) in relation to connecting a new electrical installation to an electricity network without the installation being inspected, tested and passed by an inspector. This offence currently carries a potential penalty of imprisonment for 6 months.

The Bill expands this offence to apply to reconnections of electrical installations that have been disconnected for 6 months or more. This expansion is considered necessary to make clear that these installations are regulated and remove any ambiguity as to whether they do or do not fall within the definition of a new connection.

The Bill also amends an existing offence in relation to electrical equipment or electrical installations that an inspector believes on reasonable grounds is a source of danger (section 51, *Electricity Safety Act 1971*).

The Bill expands existing section 51 to provide inspectors with powers to take action in relation to not only electrical equipment or electrical installations that are source of danger but those that are becoming a source of danger. These amendments include a related hierarchy of offences with the offence of reconnecting an installation that has been disconnected by an inspector on the grounds that the installation is a source of danger before the installation is repaired or made safe for use retaining the original highest penalty. The maximum penalty for this offence is 50 penalty units, 6 months imprisonment or both.

Legitimate purpose (s28(b))

This expansion addresses risks to health, safety and the economic wellbeing of individuals resulting from electrical installations that have not been inspected or tested and dangerous electrical installations or electrical equipment.

Rational connection between the limitation and the purpose (s28(d))

Most jurisdictions have legislation that provides that an installation that has sat idle for a period of time must be inspected prior to being reconnected to an electricity network. Time periods before idle installations require a re-inspection vary but are generally between 6 and 12 months. In the ACT, it is practical to link requirements as much as reasonable and practical with NSW, which has a time period of 6 months for reinspection of these installations.

The changes to powers the electrical inspectorate has to address not only electrical installations or electrical equipment that is a source of danger but also those becoming a source of danger necessitates the creation of new offences. These new offences align with the new powers given to the electrical inspectorate and are designed to address specific acts or behaviours. These offences are designed to, prevent installations and articles of electrical equipment from becoming a source of danger through supporting action at the stage they are becoming dangerous rather than having to wait until they are a source of danger. The offence in section 51 (2) which carries a potential term of imprisonment is the most serious offence and thus carries the highest penalty.

These new powers and associated offences are an important safeguard to protect the public from electric shock and electrocution.

Proportionality (s28 (e))

While the offences under the *Electricity Safety Act 1971* apply to a person, any work undertaken on an electrical installation under the Act, including connection and reconnection, is licensable work and must be undertaken by a licensed electrician.

The offence at section 4 (1) (a) would in nearly all circumstances apply to a licensed electrician. This could be either the licensed electrician who has installed the wiring work in question and is connecting it to an existing installation (and thus to the network); or a licensed electrician who is an employee of the utility and is connecting a new installation to the electricity network for the first time or is reconnecting an installation by remote energisation.

A member of the public could conceivably commit an offence under section 4 (1) (a) which would also be the offence of pretending to be licensed under the *Construction Occupations (Licensing) Act 2004*, section 81 with a penalty of 50 penalty units.

Including installations that have been disconnected for 6 months or more in section 4 (1) (a) has the effect of treating these installations as an equivalent risk to new installations, by triggering an inspection prior to connection to the network.

A member of the public together with a licensed electrician or a person pretending to be licensed could commit an offence under section 51 (2). Existing safeguards apply to section 51, in that:

- The inspector, an officer within Access Canberra, must have the consent of the occupier to enter premises to inspect the installation.
- Installations that are becoming unsafe are identified during routine inspections where an inspector has already legitimately entered a premises for that purpose.

- The inspector must give the owner a written notice directing them to make an installation safe for use, which may include repair or replacement.
- The decision to give a written notice, and the subsequent disconnection if the owner fails to comply with the notice, are reviewable decisions by the owner of the installation.

Electricians will be made aware of the new requirements by direct correspondence, information in the construction newsletter, industry bodies and the Build, Buy Renovate website.

The general public will be made aware of the new requirements through information on the Access Canberra website and the Build, Buy Renovate website.

Right to work and other related work rights

Medical gas licensing

Nature of the right and the limitation (s28(a) and (c))

The Bill introduces licensing requirements for people installing medical gas systems. There is currently no requirement for people installing medical gas systems to be licensed in the ACT.

The introduction of a licensing framework engages the right to work (section 27B (1) of the HRA) and may limit this right by restricting access to what was a previously self-regulated profession.

The Bill creates within the Construction Occupations (Licensing) framework new occupation classes under the occupation of gasfitter which will require individuals, corporations and partnerships to be licensed to carry out work on medical gas systems, this includes medical gas fitting work and medical gas technician work.

By establishing medical gasfitters and medical gas technicians as occupation classes within the existing occupation of gasfitter, they are brought within the regulatory remit of the *Construction Occupations (Licensing) Act 2004* (COLA). COLA sets out licensing requirements for construction practitioners who provide, have provided, or propose to provide a construction service and includes assessment of eligibility criteria and disciplinary action.

Legitimate purpose (s28(b))

There are significant risks to health, safety and the economic wellbeing of individuals resulting from the provision of medical gas services where an individual does not have adequate qualifications, experience or follow an established verification process for the installation.

Unsafe medical gas systems can have a significant impact on vulnerable members of the community. The catalyst for introducing licensing requirements was two incidents in New South Wales (NSW) in 2015 and 2016, in which infants were administered nitrous oxide instead of oxygen in a hospital, resulting in one fatality and one serious injury. The NSW Chief Health Officer determined these incidents to be the result of incorrect installation of the medical gas pipes and subsequent flawed testing and commissioning processes.

Rational connection between the limitation and the purpose (s28(d))

The licensing requirements introduced by this Bill are rationally connected to the objective of ensuring the safety and correct installation of medical gas systems.

The requirements will assist in protecting the community from adverse outcomes associated with medical gas systems that are not installed or commissioned correctly, by requiring skills and experience to be verified for people applying for a medical gas licence.

Including medical gas installations in the existing licensing framework for gasfitters allows existing mechanisms to be used to ensure the safety of the systems. This includes access to reviewable decisions under the *Construction Occupations (Licensing) Act 2004* for refusing to issue a licence or the taking of disciplinary action. Additionally, those who install a medical gas piping system will not be able to commission their own work, meaning they will not be able to sign off that the system has been installed correctly and in accordance with relevant standards.

NSW, Victoria and Queensland have introduced licensing for medical gas work.

Proportionality (s28 (e))

The HRA permits reasonable and justifiable limits on human rights. Furthermore, section 27B (1) expressly provides that the practice of a trade, occupation or profession may be regulated by law.

The licensing provisions have been designed to be the least restrictive approach and with sufficient safeguards to ensure the limitation on the right to work can be considered reasonable and justifiable.

Commencement of the requirements will be designed to support those already working in the industry and the ongoing provision of services through ensuring that those currently working can continue to work while obtaining the new licences. Industry will be provided with 12 months to obtain the new licences. There are existing review mechanisms under the *Construction Occupations (Licensing) Act 2004* for refusal to issue a licence.

Mutual recognition of interstate licences will also be available to applicants, and it is expected that most medical gas workers applying for ACT licences will already be

licensed in NSW where the requirements have been in place since 2020. Specific skills and qualifications will be developed separately and will be modelled on interstate provisions.

Licensing requirements for distributed energy resource (DER) installations

Nature of the right and the limitation (s28(a) and (c))

The Bill establishes the requirement for the holder of an unrestricted electrician and electrical contractor licence to hold an endorsement in order to undertake electrical work on determined distributed energy resources (DER). The Minister will have the power to determine what is a DER that requires this endorsement.

To support this requirement, the Bill amends the *Construction Occupations (Licensing) Act 2004* to remove work on certain distributed energy resources (DER) from the scope of work of an unrestricted electrician and electrical contractor licence.

This engages the right to work (section 27B (1) of the HRA) as it restricts access to work that was previously able to be undertaken by licensed electricians.

This will have the effect of requiring an endorsement for electricians working on DER, which will mean that all electricians installing such systems will be required to apply for an endorsement and provide evidence of appropriate additional qualifications and experience.

For solar PV, these will be the same units of competency currently required for accreditation with the Clean Energy Council, or alternatively evidence of accreditation with the Clean Energy Council. This does not place an unreasonable expectation on electricians, as all electricians currently undertaking solar installations under a government rebate scheme are required to have this accreditation. This approach also creates another pathway to become licensed that does not rely on evidence of accreditation with the Clean Energy Council.

The criteria required for licensed electricians to work on certain DER will be determined by the Minister and will depend on evidence as to the specific skills and experience required to undertake certain DER work in addition to the existing requirements for obtaining an unrestricted electrician licence.

Legitimate purpose (s28(b))

It is not currently a requirement for a licensed electrician to have additional qualifications to install DER, however to be eligible for Australian or ACT Government solar rebates and support schemes, a DER must be installed by a licensed electrician who is also a Clean Energy Council (CEC) accredited installer. With the gradual phase out of these rebate schemes, there is a concern that there will be an increase in the number of inexperienced workers installing DER installations.

As electrical technologies emerge and new distributed energy resource installations become more prevalent, there is the need to ensure electricians have the specific skills to carry out this work.

Rational connection between the limitation and the purpose (s28(d))

The licensing requirements introduced by this Bill are rationally connected to the objective of ensuring the safety and correct installation of DER.

The requirements will assist in ensuring electricians have the skills required to install specific DER and allows for requirements to be tailored in a notifiable instrument that will be responsive to emerging technologies and the needs of industry, with an emphasis on ensuring safe installations for consumers.

Proportionality (s28 (e))

The HRA permits reasonable and justifiable limits on human rights. Furthermore, section 27B (1) expressly provides that the practice of a trade, occupation or profession may be regulated by law.

The Bill includes transitional arrangements that will allow an unrestricted electrician or electrical contractor to continue to install DER for 6 months under their existing licence without an endorsement.

These transitional arrangements will be supported by engagement and advice to industry on the new requirements.

DER is a term commonly understood by industry and is the term used in the National Construction Code (NCC), the National Electricity Rules, relevant Australian Standards and is the term used by the Australian Energy Market Operator (AEMO), Australian Energy Market Commission (AEMC), Australian Renewable Energy Agency (ARENA) and the Clean Energy Council (CEC).

It is expected that around one third of the approximately 3000 licensed electricians in the ACT currently install DER such as solar PV systems. Of these, most will already have CEC accreditation as they will be installing as part of a rebate scheme. As such, they will not need to undertake any additional training requirements in order to continue to provide those services and obtaining the endorsement will not be onerous for most electricians. Additionally, the cost of a licence endorsement is significantly less than the cost of CEC accreditation.

There is a limitation with the current CEC accreditation scheme in that people accredited through this pathway can have their accreditation revoked, or have demerit points issued, and it may not impact their electrician licence in the ACT. This could be because of poor workmanship including failure to comply with relevant standards. The CEC accreditation tells us that a licensed electrician has undertaken

relevant training to obtain the accreditation, but defects identified under this accreditation will not necessarily be made known to the ACT electrical inspectorate. This means a licensing requirement is necessary to complement the CEC accreditation process and provide appropriate consumer protections.

There are existing review mechanisms under the *Construction Occupations (Licensing) Act 2004* for refusal to endorse a licence.

Right to privacy

Nature of the right and the limitation (s28(a) and (c))

The Bill engages the right to privacy through expansion of an existing provision requiring the disconnection of dangerous electrical equipment and installations to also include those that are becoming dangerous.

Legitimate purpose (s28 (b))

The legitimate objective of this limitation is as an important safeguard to protect the public from electric shock and electrocution.

Rational connection between the limitation and the purpose (s28 (d))

The limitation on the right to privacy is safeguarded by the provisions in the *Electricity Safety Act 1971* that require consent of the occupier to enter premises to inspect the installation.

Installations that are becoming unsafe are also identified during routine inspections where an inspector has already legitimately entered a premises for that purpose.

Proportionality (s28 (e))

The expansion of this provision to include equipment or installations that are becoming dangerous provides an alternative option for inspectors to ensure safety. When such installations are identified early, it precludes the need to disconnect the installation in future which can in some cases result in loss of power for lengthy periods and affect multiple people.

Written directions to repair the installation will be worded clearly and have reasonable timeframes for people to comply or respond.

Rights in criminal proceedings – strict liability offences

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

Nature of the right and the limitation (s28 (a) and (c))

The Bill introduces new strict liability offences to support effective regulatory action in relation to electrical installations or articles of electrical equipment. Strict liability

offences engage and limit the right to be presumed innocent until proven guilty because they allow for the imposition of criminal liability without the need to prove fault.

This Bill introduces three new strict liability offences:

- Removing a label from an installation that has been labelled by an inspector as an article that is a source of danger before it is replaced, repaired or been made safe for use. This offence carries a maximum penalty of 40 penalty units.
- Removing a label from an installation that has been labelled by an inspector as an article that is becoming a source of danger before it is replaced, repaired or been made safe for use. This offence carries a maximum penalty of 30 penalty units.
- Failing to follow a written direction issued by an inspector in relation to an installation or article that will become a source of danger. This offence carries a maximum penalty of 30 penalty units.

Strict liability offences typically arise in a regulatory context where for reasons such as public safety and ensuring that regulatory schemes are complied with, criminal penalties are required. A defendant can reasonably be expected, because of their involvement with the regulated activity, to know what the requirements of the law are, and as such the mental, or fault, element can justifiably be excluded.

Legitimate purpose (s28 (b))

The legitimate objective of this limitation is to support the objective of the Bill, which is to promote the right to life by ensuring electrical installations or articles of electrical equipment are clearly identified as becoming dangerous and appropriate action is taken to prevent them becoming dangerous and needing to be disconnected which comes at significantly more cost and disruption for the owner and residents of the property.

Rational connection between the limitation and the purpose (s28 (d))

The intention of the strict liability offences introduced by this Bill is to support an effective regulatory scheme. The purpose of the specific penalties attributable to these offences is to provide an appropriate disincentive to individuals from undertaking the actions subject to the offence provisions.

As with many regulatory frameworks involving safety, the inclusion of a suite of strict liability offences is considered important in deterring non-compliance. A robust compliance framework is essential to supporting a regulatory framework that is intended to provide enhanced health and safety outcomes for individuals and the community.

The community will be made aware of these offences through an education and awareness campaign that will be undertaken as part of implementation and commencement of the framework.

Proportionality (s28 (e))

The offences and penalties are consistent with the ACT Government *Guide for Framing Offences* and are considered proportionate to their purpose. The maximum penalties attached to the offences reflect the seriousness of the offence relative to other offences in the ACT's Building Regulatory system and other offences of a similar nature in the ACT. They also reflect the level of responsibility the person committing the offence has for the conduct that will result in the offence being committed and the potential serious consequences that can arise for individuals and the community where there is non-compliance with the provisions.

Penalties created for the strict liability offences may include infringement notice penalties. Infringement notices are an important component of an effective regulatory framework by providing a deterrent to non-compliance and an alternative to prosecution. Effective infringement notice schemes minimise the cost of litigation for the Territory while offering people a choice concerning whether to accept a lesser penalty without admitting the offence or remaining liable to prosecution.

Any breaches of the offence framework will be managed through an 'engage, educate and enforce' compliance process. This provides a safeguard to ensure the limitation on rights is reasonable and proportionate. Should a breach occur, conduct that contravenes the legislative framework will be considered on a case-by-case basis and within its own context in the same way as existing offences under the *Electricity Safety Act 1971*. The regulator for the purposes of the *Electricity Safety Act 1971* is the Construction Occupations Registrar. The Registrar will determine what enforcement action it considers appropriate to take. The Registrar sits within Access Canberra and applies the Access Canberra Accountability Commitment Framework which establishes a risk-based approach to taking regulatory action. The Access Canberra Accountability Commitment Framework includes the [Building and construction services compliance framework](#) which is publicly available.

The strict liability offences introduced by this Bill are framed with clear criteria as to whether the offence has occurred.

Building and Construction Legislation Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Building and Construction Legislation Amendment Bill 2023**. 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

PART 1 Preliminary

Part 1 deals with formal matters including commencement.

Clause 1 Name of Act

This clause provides that the name of the Act is the *Building and Construction Legislation Amendment Act 2023*.

Clause 2 Commencement

This clause provides for the commencement of the Act.

Sections 9 to 15; 17 to 22; 38; 47; 51 and parts 4, 10 and 11 of the Act will commence on a day fixed by the Minister by written notice. These provisions will automatically commence within 12 months of the Act's notification date if not otherwise commenced. Commencing these provisions on written notice supports a phase in period for industry which will enable them to become familiar with the new requirements and ensures they can meet the new requirements before they commence. In addition, the changes to the residential building work insurance settings are interconnected with changes being made by the *Planning Act 2023* and *Planning (Consequential) Amendments Bill 2023*.

Sections 41; 44; 46; 48 to 50 and 53 to 56 of the Act relating to distributed energy resource work and dangerous electrical installations will commence 3 months after the Act's notification.

The remaining provisions commence on the day after this Act's notification day.

Section 81 of the *Legislation Act 2001* (the Legislation Act) allows for appointments and statutory instruments to be made in the period between notification and commencement.

Clause 3 Legislation amended

This clause provides that the Act amends the legislation in parts 2 to 13 of the Act which includes:

- *Architects Act 2004*
- *Building Act 2004*
- *Building (General) Regulation 2008*
- *Building and Construction Industry (Security of Payment) Act 2009*
- *Construction Occupations (Licensing) Act 2004*
- *Construction Occupations (Licensing) Regulation 2004*
- *Electricity Safety Act 1971*

- *Electricity Safety Regulation 2004*
- *Gas Safety Act 2000*
- *Gas Safety Regulation 2001*
- *Liquor Act 2010*
- *Water and Sewerage Act 2000*

PART 2 Architects Act 2004

This part makes amendments to the *Architects Act 2004* to align with best practice drafting and consistency with other frameworks regulating building and construction practitioners.

Clause 4 Grounds for occupational discipline Section 42 (1) (b)

This clause is a minor and technical amendment consequential on the changes at clause 6.

Clause 5 Ministerial directions to board Section 68 (1), example 3

This clause is a minor and technical amendment consequential on the changes at clause 6.

Clause 6 Section 88

This clause substitutes existing section 88 in relation to the process through which a code of professional conduct may be introduced for registered architects and aligns with current drafting practices.

New section 88 provides the Minister with the power to approve a code of professional conduct for registered architects or an architectural service. An approved code of practice is a disallowable instrument.

An approved code of professional conduct may incorporate, apply or adopt (with or without change or modification) a law or an Australian Standard as in force from time to time or another instrument as in force from time to time. This provision enables relevant instruments in other jurisdictions under similar laws or issued by industry bodies to be incorporated, applied or adopted in the ACT.

This clause disapplies section 47 (5) and (6) of the Legislation Act 2001. This disapplication will allow a consistent approach to the incorporation of instruments/documents whether copyrighted or not or otherwise publicly available. There may also be instances where it is not practical to publish information due to its volume and inefficient due to it being otherwise publicly available. The Bill supports transparency for processes and decision-making and provides for the use of the ACT

Government Build Buy Renovate website to provide easier access to information. This will allow for the community to have easy access to updated information.

This clause requires the Director-General, in circumstances where a code of professional conduct incorporates, applies or adopts (with or without change or modification) an instrument (excluding a law or an Australian Standard), to make the incorporated, applied or adopted instrument available:

- on the ACT legislation register; or
- available for inspection by anyone without charge during ordinary business hours at an ACT Government office; or
- (accessible) on an ACT Government website or by a link on an ACT Government website.

An instrument that is incorporated, applied or adopted is not enforceable unless it has been made accessible in accordance with the above.

As a code of professional conduct is in the form of a disallowable instrument it will be accompanied by an explanatory statement which will explain how any incorporated, applied or adopted documents in the code will be made available.

PART 3 Building Act 2004

This part contains amendments to the *Building Act 2004* following a review of the regulatory settings for fidelity fund schemes and other minor and technical amendments.

Clause 7 Building approval applications New section 26 (2) (aa)

This clause inserts a requirement for an owner of a parcel of land to nominate the kind of certificate of occupancy for which they propose to apply when applying for a building approval.

Clause 8 Notice to produce survey plan etc Section 60

This clause omits section 60 as it is obsolete.

Clause 9 Definitions—pt 6 Section 84, definition of *approved scheme*

This clause is a minor and technical amendment and is consequential on the changes at clause 12.

Clause 10 Section 84, new definition of *consumer representative*

This clause is a minor and technical amendment and is consequential on the changes at clause 17.

**Clause 11 Complying residential building work insurance
New section 90 (3A)**

This clause inserts new section 90 (3A) which clarifies the grounds for which a builder is taken to have disappeared for the purposes of sections 90 (1) (f) and (3).

Clause 12 Sections 96 to 98

This clause substitutes existing sections 96, 97 and 98.

Current section 96 provides for the approval of fidelity fund schemes by the planning and land authority and covers both the application and approval process.

New section 96 provides for the application for approval of a fidelity fund schemes. Applications must be made to the Minister. This reflects changes in Government responsibilities for these schemes since the provisions were first introduced. New section 96 is focused on the application process for approval.

Current section 97 provides for the requesting of additional information to support consideration of an application for approval of a fidelity fund scheme.

New section 97 retains the intent of current section 97 but is aligned with current drafting practices and future proofs should Government responsibilities for these schemes change in the future.

Current section 98 relates to the power to require changes to a fidelity fund scheme prior to it being approved.

New section 98 provides for the approval of fidelity fund schemes. Approval will now be granted by the Minister rather than the planning and land authority. Approval will continue to be issued in the form of a notifiable instrument. It includes the power in existing section 98 for the Minister to require changes a scheme prior to it being approved. Approvals will remain unlimited. Operational provisions utilising new section 97 will be in place to ensure ongoing regulatory oversight of approved schemes alongside reporting obligations contained in the approval criteria or prudential standards.

**Clause 13 Approval criteria for schemes
Section 99 (2)**

This clause substitutes existing section 99 (2) to align with current drafting practices and provide clarity around matters that are included in the approval criteria issued. Under new section 97, an application for approval must provide evidence to show that the scheme complies with the approval criteria. The approval criteria instrument is currently under review as part of the review of residential building work insurance settings in the ACT and this amendment supports the policy intent of the approval criteria and findings from the review.

Clause 14 Sections 100 to 102

This clause substitutes existing sections 100, 101 and 102 of the *Building Act 2004*.

Current section 100 provides for that approval of a fidelity fund scheme may be subject to conditions and that is an offence for each trustee of an approved scheme to fail to ensure that the scheme complies with any conditions of approval.

New section 100 retains the existing powers and offence in section 100 and introduces standing conditions on an approval. These standing conditions include:

- ongoing compliance with approval criteria following approval; and
- trustees of an approved scheme are required to tell the Minister, in writing, if there is a material change to the way in which the approved scheme complies with the approval criteria.

Conditions may also be prescribed by regulation and the Minister has discretion to apply any other condition the Minister considers appropriate. A decision under section 100 is not currently a reviewable decision. Prior to commencement of this provision, consideration will be given to whether the *Building (General) Regulation 2008* should be amended to include this and other decisions in relation to fidelity fund schemes to be reviewable decisions.

Current section 101 establishes the application process for an approved scheme seeking to make a change to the approved scheme.

New section 101 replicates the powers within existing section 101 but makes the Minister the person to who applications are submitted to align with current regulatory oversight responsibilities and future proofs should Government responsibilities for these schemes change in the future. It also establishes a clear application process for an approved scheme seeking to make a change to the approved scheme. It further provides a clear process for declaring what changes to an approved scheme do not require approval. This process is currently contained in the *Building (Prudential Standards) Determination 2005* (DI2005-250).

Current section 102 establishes the process for approving or refusing to approve changes to an approved scheme.

New section 102 replicates the powers within existing section 102 but makes the Minister the decision-maker to align with current regulatory oversight responsibilities and future proofs should Government responsibilities for these schemes change in the future.

Clause 15 Suspension or cancellation of approval of approved scheme New section 107 (1) (i)

This clause is a minor and technical amendment which introduces the ability to prescribe a ground for the suspension or cancellation of an approval scheme by regulation.

Clause 16 Section 127

This clause substitutes existing section 127 to align with current drafting practices and is consequential to repeal of the *Defamation (Criminal Proceedings) Act 2001*.

Clause 17 New division 6.6

This clause inserts a new division 6.6 establishing the role of consumer representative within the *Building Act 2004*. This power currently sits within the *Building (Approval Criteria) Determination 2002* (DI2002-49).

Consumer representative—appointment New section 127AA

New section 127AA provides that the Minister may appoint a consumer representative to advise the Minister about the interests of owners in relation to approved schemes. It establishes criteria for appointment of the consumer representative, including a requirement that they must not be a public servant and allows for additional criteria to be prescribed in regulation. It provides that the appointment is a notifiable instrument, and an appointment must be for no longer than 3 years. Conditions of the appointment are those agreed between the Minister and appointee.

Consumer representative—terms of reference New section 127AB

New section 127AB establishes that the Minister must determine terms of reference for the exercise of functions by the consumer representative. Terms of reference will take the form of a notifiable instrument and may include terms in relation to when the consumer representative may attend a meeting of the trustees of an approved scheme or request information from the trustees of an approved scheme.

Consumer representative—ending appointment New section 127AC

New section 127AC establishes grounds for when the Minister may end a person's appointment as the consumer representative, including if the Minister becomes aware that the person has been convicted of an offence punishable by imprisonment for 1 year or longer.

Clause 18 Energy efficiency certificates Section 139C (2) and (3)

This clause amends existing section 139C of the *Building Act 2004* to support increased energy efficiency provisions in the Building Code of Australia and provide flexibility in the operation of energy efficiency certificates and allow for all requirements relating to the preparation of energy efficiency certificates to be contained together in the regulation.

Clause 19 Dictionary, new definition of *consumer representative*

This clause inserts a new definition of consumer representative consequential to the changes at clause 16.

Clause 20 Further amendments, mentions of *territory planning authority*

This clause moves decision making powers in Part 6, Divisions 6.4 and 6.5 from the territory planning authority to the Minister. This reflects changes in Government responsibilities for these schemes since the provisions were first introduced and future proofs should Government responsibilities for these schemes change in the future.

Clause 21 Further amendments, mentions of the *authority*

This clause moves decision making powers in Part 6, Divisions 6.4 and 6.5 from the authority to the Minister. This reflects changes in Government responsibilities for these schemes since the provisions were first introduced and future proofs should Government responsibilities for these schemes change in the future.

Clause 22 Further amendment, mentions of the *authority's*

This clause replaces references to *the authority's* to *the Minister's*. This reflects changes in Government responsibilities for these schemes since the provisions were first introduced and future proofs should Government responsibilities for these schemes change in the future.

PART 4 Building and Construction Industry (Security of Payment) Act 2009

This part makes amendments to support national consistency in security of payment legislation.

**Clause 23 Meaning of construction work
Section 7 (1), definition of *construction work*,
paragraph (c)**

This clause is a minor and technical amendment to align with current drafting practices.

**Clause 24 Right to progress payments
Section 10 (1)**

This clause simplifies wording in section 10 (1) relating to entitlement to a progress payment and aligns with NSW legislation.

Clause 25 Section 10 (2) (c)

This clause amends section 10 (2) (c) by specifying that a progress payment may include a payment that is based on an event or date.

Clause 26 Section 10 (3)

This clause is a minor and technical amendment consequential on the changes at clauses 24 and 25.

**Clause 27 Due date for payment
Section 13 (1) (b)**

This clause amends section 13 (1) (b) to establish that a progress payment is made 15 business days after a payment claim is made rather than the current 10 business days and aligns with NSW.

**Clause 28 Payment claim
New section 15 (3A)**

This clause inserts new section 15 (3A) which establishes when a payment claim can be given and aligns with NSW.

Clause 29 Section 15 (4)

This clause is a minor and technical amendment to provide clarity and align with current drafting practices.

Clause 30 Section 15 (5)

This clause omits the term reference date and substitutes with the term calendar month to align with NSW and recommendations from the Murray review.

Clause 31 Section 15 (6)

This clause substitutes existing section 15 (6) to clarify the rights of the claimant in relation to including more than one progress payment, including an amount that has been the subject of a previous claim or giving the respondent a payment claim in a calendar month for work undertaken in a previous month. This aligns with NSW and the Murray review.

**Clause 32 Payment schedule
Section 16 (4) (b)**

This clause makes a minor and technical amendment consequential of changes in this part.

**Clause 33 Consequences of not paying claimant in accordance with
payment schedule
Section 18 (1) (b)**

This clause makes a minor and technical amendment consequential of changes in this part.

Clause 34 Dictionary, note 2

This clause inserts the definition of *calendar month* into the dictionary.

PART 5 Building (General) Regulation 2008

This part makes minor and technical amendments to the *Building (General) Regulation 2008*.

Clause 35 General requirements for plans—Act, s 27 (1) (a) Section 16 (3), definitions of *stormwater system, utility service and water main*

This clause omits definitions of *stormwater system, utility service and water main* and is consequential on the changes at clause 37.

Clause 36 General requirements for plans—Act, s 63A Section 36A (3), definition of *stormwater system, utility service and water main*

This clause omits definitions of *stormwater system, utility service and water main* and is consequential on the changes at clause 37.

Clause 37 Dictionary, new definitions

This clause inserts definitions of *stormwater system, utility service and water main* into the dictionary to align with current drafting practices of having terms contained in more than one provision included in the dictionary.

PART 6 Construction Occupations (Licensing) Act 2004

This part makes minor and technical amendments to the *Construction Occupations Licensing Act 2004*.

Clause 38 What is a gasfitter? Section 12 (3), definition of *gasfitting work*

This clause is a minor and technical amendment to update a cross-reference.

Clause 39 Licence conditions Section 21 (2) and (3)

This is a minor and technical amendment to align with current drafting practices.

Clause 40 Establishment of advisory boards Section 114 (1)

This clause is a minor and technical amendment to provide discretion to the registrar in relation to the establishment of advisory boards.

Clause 41 New part 23

This clause creates transitional provisions for distributed energy resource work. It will enable licensed electricians to continue to undertake or supervise this work if they were authorised under a licence to do or supervise this type of work immediately before the commencement of this section, for a period of 6 months after commencement. This will apply to all licensed electricians unless they have an existing condition preventing them from carrying out this work.

PART 7 Construction Occupations (Licensing) Regulation 2004

This part introduces new licensing requirements for those undertaking medical gas system work and installation of DER and contains minor and technical amendments to the *Construction Occupations (Licensing) Regulation 2004*.

Clause 42 Skill assessment of individuals Section 14 (1) and (2)

This clause is a minor and technical amendment to clarify that a skill assessment option is available for individuals applying for an endorsement.

Clause 43 Section 14 (5)

This clause is a minor and technical amendment consequential to the changes at clause 42.

Clause 44 New section 31D

This clause inserts new section 31D which provides that the registrar may endorse an electrician licence to work on distributed energy resources installations. It provides a power for the Minister to declare a distributed energy resource through a notifiable instrument and provides that an endorsement is subject to any condition the registrar is satisfied protects the public.

Clause 45 Requirement to consult under s 13 Section 49

This clause omits section 49 and is consequential to the changes at clause 40.

Clause 46 Classes of construction occupation licence and functions Schedule 1, part 1.6, items 1 and 2

This clause amends schedule 1, part 1.6 to exclude distributed energy resources work from the work that can be undertaken by an electrician in the electrical contractor or unrestricted classes of licence and is consequential on the changes at clause 44.

Clause 47 Schedule 1, part 1.7, new items 10 and 11

This clause is a minor and technical amendment consequential on the changes in Parts 10 and 11.

Clause 48 Reviewable decisions
Schedule 4, new item 32A

This clause provides that refusal to endorse an electrician licence is a reviewable decision and is consequential on the changes at clause 44.

Clause 49 Dictionary, new definition of *distributed energy resource work*

This clause inserts a definition of distributed energy resource work in the dictionary consequential on the changes at clause 44.

Clause 50 Dictionary, definition of *incidental electrical work*, paragraph (c)

This clause is a minor and technical amendment to the definition of *incidental electrical work* and is consequential on the changes at clause 46.

Clause 51 Dictionary, new definitions

This clause inserts dictionary definitions of *medical gasfitting work* and *medical gas technician work*.

PART 8 Electricity Safety Act 1971

This part amends the *Electricity Safety Act 1971* to include requirements for ensuring the safety of electrical installations.

Clause 52 Meaning of *electrical wiring rules*
New section 3B (3A)

This clause amends existing section 3B to clarify that an ACT Appendix to AS/NZS 3000 (Electrical Installations known as the Australian/New Zealand Wiring Rules) can include variations, additions, and exclusions from AS/NZS 3000. This approach aligns with the issuing of ACT Appendices under the *Building Act 2004* and *Water and Sewerage Act 2000* in relation to the National Construction Code (NCC).

**Clause 53 Connecting electrical installations to network—
inspections**
Section 4 (1) (a)

This clause substitutes existing section 4 (1) (a) and clarifies that reconnection of an electrical installation that has been disconnected for 6 months or more is an offence.

Clause 54 Testing and reporting of electrical work New section 6 (5)

This clause inserts new section 6 (5) to clarify that *electrical wiring work* includes the reconnection of an electrical installation that has been disconnected for 6 months or more to an electricity network.

Clause 55 Section 51

This clause substitutes existing section 51 to include powers for inspectors to take action in relation to electrical installations or equipment that are becoming dangerous. It also updates the existing offence and creates new offences in relation to electrical installations or electrical equipment that are a source of danger or becoming dangerous. Existing section 51 only applies to dangerous electrical equipment and installations.

New section 51 contains the following offences:

- Reconnection of an installation disconnected due to it being dangerous before it is repaired or made safe for use. This offence carries a maximum penalty of 50 penalty units, 6 months imprisonment or both. This offence replaces existing section 51 (2) which carries the same maximum penalty.
- Removing a label from an installation that has been labelled by an inspector as an article that is a source of danger and using that article. This offence carries a maximum penalty of 50 penalty units.
- Using an installation that has been labelled by an inspector as an article that is a source of danger. This offence carries a maximum penalty of 40 penalty units.
- Removing a label from an installation that has been labelled by an inspector as an article that is a source of danger before it is replaced, repaired or been made safe for use. This offence carries a maximum penalty of 40 penalty units and is a strict liability offence.
- Removing a label from an installation that has been labelled by an inspector as an article that is becoming a source of danger before it is replaced, repaired or been made safe for use. This offence carries a maximum penalty of 30 penalty units. This offence is a strict liability offence.
- Failing to follow a written direction issued by an inspector in relation to an installation or article that will become a source of danger. This offence carries a maximum penalty of 30 penalty. This offence is a strict liability offence.

These offences are drafted in accordance with the *ACT Guide for Framing Offences* and current drafting practice. The penalties are tiered to reflect the increasing level of risk associated with the behaviours the offences are seeking to deter.

Clause 56 Reviewable decisions
Schedule 1, new items 7 and 8

This clause provides that the decision to give a written notice directing an owner to replace or repair an installation or article, or decision to disconnect an installation are reviewable decisions.

PART 9 Electricity Safety Regulation 2004

Clause 57 New section 1A

This clause inserts new section 1A which prescribes the interval metering code of practice issued under the *Construction Occupations (Licensing) Act 2004* as electrical wiring rules under the *Electricity Safety Act 1971* to allow for appropriate enforcement.

PART 10 Gas Safety Act 2000

This part amends the *Gas Safety Act 2000* to include medical gas systems and medical gases within the remit of the *Gas Safety Act 2000*.

Clause 58 Objects of Act
New section 6 (b) (v)

This clause includes work in relation to medical gas systems in the objects of the Act.

Clause 59 Meaning of *gasfitting work*
Section 6F, definition of *gasfitting work*, paragraph (a) (ii)

This clause substitutes the existing definition of *gasfitting work* to include medical gasfitting work and medical gas technician work.

Clause 60 Dictionary, new definitions

This clause inserts definitions of *medical gas*, *medical gasfitting work*, *medical gas system* and *medical gas technician work*.

PART 11 Gas Safety Regulation 2001

Clause 61 New section 21

This clause inserts new section 21 which prescribes certain substances as medical gases for the purposes of definition of *medical gas* in the *Gas Safety Act 2000*.

PART 12 Liquor Act 2010

**Clause 62 Fire engineering study and inspection
Section 86 (4) (c)**

This clause is a minor and technical amendment to remove reference to a specific part of the Building Code which is now obsolete. It is replaced with a general reference to the building code.

PART 13 Water and Sewerage Act 2000

**Clause 63 Appointment of certifiers
New section 5 (2) (c) and (d)**

This clause inserts new exclusions to the need to appoint a certifier for an owner of premises where sanitary plumbing work, water supply plumbing work or sanitary drainage work is proposed where the work consists of basic maintenance; or the cost is less than \$1000 or a higher amount prescribed by regulation. This amendment removes a disparity in the requirements between residents of single dwellings and residents of units/townhouses.

Clause 64 Section 16 heading

This clause is a minor and technical amendment to align with current drafting practice.