

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
(LEGISLATIVE SCRUTINY ROLE)

SCRUTINY REPORT 2

7 February 2017



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## ROLE OF COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

## RESOLUTION OF APPOINTMENT

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

- (1) consider 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):
  - (a) is in accord with the general objects of the Act under which it is made;
  - (b) unduly trespasses on rights previously established by law;
  - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) 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 Committee;
- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
  - (a) unduly trespass on personal rights and liberties;
  - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (d) inappropriately delegate legislative powers; or
  - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report 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*; and
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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## BILLS

### BILLS—NO COMMENT

The Committee has examined the following bills and offers no comment on them:

CRIMES LEGISLATION AMENDMENT BILL 2016
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This is a Bill to make minor amendments to a number of Territory laws relating to criminal justice.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2016 (NO 3)
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This is a Bill to make minor and technical amendments to a number of Territory laws within the Justice and Community Safety portfolio.

STATUTE LAW AMENDMENT BILL 2016
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This is a Bill to make minor and technical amendments to a number of Territory laws.

TRANSPORT CANBERRA AND CITY SERVICES LEGISLATION AMENDMENT BILL 2016
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This is a Bill to make minor and technical amendments to a number of laws administered by the Transport Canberra and City Services Directorate.

### BILLS—COMMENT

The Committee has examined the following bills and offers these comments on them:

COMMERCIAL ARBITRATION BILL 2016
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This is a Bill for an Act to facilitate the fair and final resolution of commercial disputes by impartial tribunals without unnecessary delay or expense.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?— paragraph (3)(a) of the terms of reference***

**Report under section 38 of the *Human Rights Act 2004***

*LIMITATION OF THE RIGHT OF A PARTY TO AN ARBITRATION AGREEMENT TO RESORT TO COURTS AND THE RIGHT TO FAIR TRIAL (HRA SUBSECTION 21(1))*

The Explanatory Statement notes that “[t]he Bill places certain limits on the right of parties who have freely entered into a commercial arbitration agreement to take their civil disputes with a party to the agreement to court. To this extent the Bill engages and limits the right to fair trial in s 21”.

By reference to HRA section 28, the Explanatory Statement offers a justification for limitations to HRA subsection 21(1).

There are however a number of particular matters to be considered.

*Exclusion of the Supreme Court and subsection 48A(1) of the Australian Capital Territory (Self-Government) Act 1988*

There appears to be a problem arising from attempts to limit power of the Supreme Court. This arises from subsection 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*, which provides that “[t]he Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory”.

The Committee has taken the view that subsection 48A(1) precludes a Territory law from excluding the Supreme Court’s jurisdiction to review administrative decisions, and it appears that the Government has accepted this position in that context. It might similarly be argued that the Supreme Court’s jurisdiction to decide contract disputes cannot be taken away.

*The right to a fair trial and the opportunity of a party to present their case*

Clause 18 states that “[t]he parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party’s case”. The Note to this clause states that it “differs from the Model Law to the extent that it requires a party to be given a ‘reasonable’, instead of ‘full’, opportunity of presenting the party’s case”.

On the face of it, clause 18 states a less fulsome right to present a case than that stated in the Model Law. The Explanatory Statement offers no reason for the departure from the Model Law, and the Committee considers that an explanation is required.

*The right to a fair trial and the opportunity of a party to obtain information concerning the material to be relied upon in the matter*

The Committee notes that there is no statement in subclauses 24(4) and 24(5) of the time within which these obligations must be met. This being the case, subsection 151B(2) of the *Legislation Act 2001* would apply, so that “[t]he thing must or may be done as soon as possible and as often as needed”.

The Committee recommends that consideration be given to inserting a Note in clause 24 to point to subsection 151B(2) of the *Legislation Act*.

*The privileges of persons required by subpoena to answer questions and/or to produce documents*

Clauses 27A and 27B govern situations where a person is required by subpoena to answer questions and/or to produce documents. Subclauses 27A(3) and 27B(5) provide that such a person must not be compelled to “to answer any question or produce any document that the person could not be compelled to answer or produce in a proceeding before the court”.

These provisions add to the Model Law and commendably enhance rights that are partially reflected in the Human Rights Act and more fully in the common law traditional rights. They would offer better protection would there to be a Note to these provisions drawing attention in non-exhaustive language to at least the major privileges, such as legal professional privilege and the privilege against self-incrimination.

**The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.**

***Does a clause of the Bill inappropriately delegate legislative powers?—Committee term of reference (3)(d)***

Clause 202 of the Bill makes provision for transitional regulations in a form commonly found in Territory statutes. It provides:

**202 Transitional regulations**

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

Subclause 202(1) is unexceptional and no comment is warranted.

Subclause 202(2) is a “Henry VIII” clause, inasmuch as it empowers the Executive, by a subordinate law (in this case, a regulation), to alter a statute passed by the Legislative Assembly. The power is limited in scope, for it relates to part 20 of the Bill that deals only with transitional matters. However, the principle that a regulation should not modify a statute is strong,<sup>1</sup> and the Committee expects an explanation in every case the principle is breached.

Where the breach relates only to transitional provisions, the explanation might be in terms such as that “the power is appropriate to enable the Executive to deal quickly with any unanticipated transitional issues that might arise as a consequence of this legislation”.

The Committee has consistently raised concerns about a provision such as subclause 202(3). Among other effects, this clause purports to preclude the Assembly—at a time later than the date on which this Bill becomes law as an Act—from passing into law a provision that would qualify the regulation-making power of the Executive under subclause 202(2) of this Bill. Subclause 202(3) thus attempts to “entrench” a regulation made under subclause 202(2).

The Committee’s concern is that (subject to an exception noted below) an Act passed by the Assembly cannot have the effect of limiting the legislative power of the Assembly in this way. The legislative power of the Assembly flows from and is limited by the *Australian Capital Territory (Self-Government) Act 1988* (Cwth). Subsection 22(1) of this Act provides that (subject to other provisions in the Act), “the Assembly has power to make laws for the peace, order and good government of the Territory”. It follows that the Assembly cannot make a law that would in any respect limit its power to make a law within the scope of the concept of “peace, order and good government”, for to do so would contradict the full scope of this power. As a matter of law, there is probably no practical limit to the range of subjects encompassed by this concept, and it would certainly extend to the subject of transitional matters as employed in subclause 202(1).

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<sup>1</sup> The Committee commented extensively on such clauses in *Scrutiny Report No. 4* of the 7th Assembly, in relation to a clause in the First Home Owner Grant Amendment Bill 2009, and see too *Scrutiny Report No. 1* of the 7th Assembly, in relation to the Development Application (Block 20 Section 23 Hume) Assessment Facilitation Bill 2008.

This conclusion is reinforced by section 26 of the ACT Self-Government Act, which provides that a Territory law may be entrenched if it has been passed into law in accordance with the procedure stated in section 26. In brief, any such law (such as subclause 202(3)) has effect only if approved by means of a referendum by a majority of the electors of the Territory.

The Committee view has been that a provision such as subclause 202(3) is objectionable because it appears to be ineffective.

The problem is more acute where such an ineffective attempt to entrench a provision is expressed so that it purports to operate against any other Territory law and is not confined to making some transitional provision.<sup>2</sup>

After many exchanges over the course of the 8<sup>th</sup> Assembly, the Attorney-General agreed with the Committee that entrenching was unconstitutional, and that an Explanatory Statement should contain a statement such as:

The proposed section does not express or intend to limit future enactments of the Legislative Assembly; nor, does it restrain the power of the Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.<sup>3</sup>

The Committee expects that such a statement will be inserted in every Explanatory Statement in relation to a Bill that contains a clause such as 202(3), whether that clause be confined to transitional provisions of an Act or more broadly.

It would be preferable if a Note to this effect was inserted at the foot of every such provision.

**The Committee draws this matter to the attention of the Assembly and recommends that the Minister respond.**

PLANNING, BUILDING AND ENVIRONMENT LEGISLATION AMENDMENT BILL 2016 (No 2)
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This is a Bill to make minor and technical amendments to a number of Territory laws administered by the Environment, Planning and Sustainable Development Directorate.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?—  
paragraph (3)(a) of the terms of reference***

**Report under section 38 of the *Human Rights Act 2004***

*Public consultation and the right to take part in public life (HRA section 17)*

By clause 17 of the Bill it is proposed to amend paragraph 20A(1)(ba) of the *Planning and Development Regulation 2008* to the effect that “public consultation is required for development proposals for more than one building, where the buildings have a combined gross floor area of more than 7000 square metres. The provision does not currently make specific provision for a development with multiple buildings” (Explanatory Statement at 3).

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<sup>2</sup> See the examples in clauses 8, 13 and 16 of the Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013, and *Scrutiny Report No 5 of the 8<sup>th</sup> Assembly*.

<sup>3</sup> See the Revised Explanatory Statement in relation to clause 29 of the Heavy Vehicle National Law (ACT) Bill 2013.

The Committee notes that this change to the law would enhance the right to take part in public life (HRA section 17).

**The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

REVENUE LEGISLATION AMENDMENT BILL 2016 (NO 2)
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This is a Bill to amend taxation legislation of the Territory to adopt a “Barrier Free” model for the collection of conveyance duty.

***Do any provisions of the Bill amount to an undue trespass on personal rights and liberties?— paragraph (3)(a) of the terms of reference***

**Report under section 38 of the *Human Rights Act 2004***

*The collection of personal information by a government authority and the right to privacy (HRA subsection 12(a))*

By clause 1.106, a new section 178B would be inserted into the *Land Titles Act 1925* by which the registrar-general would be authorised to collect various kinds of information in relation to certain transaction and instruments relating to land. Such information includes various kinds of personal information. The registrar-general must then give any information collected to the commissioner for revenue.

The Explanatory Statement acknowledges that proposed section 178B engages the right to privacy stated in HRA paragraph 12(a), and that the right may be limited by a law that satisfies the standards stated in HRA section 28.

Explanatory Statement pages 8 to 10 are a thoughtful and comprehensive analysis of how the standards in section 28 apply, and the Committee commends this exercise.

Provisions such as proposed section 178B are not uncommon, and the Explanatory Statement analysis is a model to follow.

**The Committee draws this matter to the attention of the Assembly but does not require a response from the Minister.**

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

The Committee has examined the following disallowable instruments and offers no comment on them:

**Disallowable Instrument DI2016-184 being the *Domestic Violence Agencies (Council) Appointment 2016 (No 2)* made under section 6 of the *Domestic Violence Agencies Act 1986* appoints a specified person as a community member of the Domestic Violence Prevention Council.**

**Disallowable Instrument DI2016-197 being the Road Transport (Public Passenger Services) Methods of Payment and Maximum Payment Surcharges Declaration and Determination 2016 (No 1) made under section 221K of the *Road Transport (Public Passenger Services) Regulation 2002* provides for the circumstances where payment for the hire of a taxi is made by electronic funds transfer.**

**Disallowable Instrument DI2016-209 being the Veterinary Surgeons (Board Member) Appointment 2016 (No 1) made under section 110 of the *Veterinary Surgeons Act 2015* appoints a specified person as a member of the ACT Veterinary Surgeons Board.**

**Disallowable Instrument DI2016-210 being the Nature Conservation (Scarlet Robin) Action Plan 2016 made under section 105 of the *Nature Conservation Act 2014* makes the Scarlet Robin Action Plan.**

**Disallowable Instrument DI2016-211 being the Public Place Names (Throsby) Determination 2016 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the names of seven roads in the Division of Throsby.**

**Disallowable Instrument DI2016-212 being the Public Trustee and Guardian (Investment Board) Appointment 2016 (No 1) made under section 48 of the *Public Trustee and Guardian Act 1985* appoints a specified person as a member of the Public Trustee Guardian Investment Board.**

**Disallowable Instrument DI2016-213 being the Official Visitor (Disability Services) Appointment 2016 (No 1) made under paragraph 10(1)(c) of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the *Disability Services Act 1991*.**

**Disallowable Instrument DI2016-214 being the Emergencies (Bushfire Council Members) Appointment 2016 (No 1) made under section 129 of the *Emergencies Act 2004* appoints a specified person as chairperson of the Bushfire Council.**

**Disallowable Instrument DI2016-215 being the Emergencies (Bushfire Council Members) Appointment 2016 (No 2) made under section 129 of the *Emergencies Act 2004* appoints a specified person as deputy chairperson of the Bushfire Council.**

**Disallowable Instrument DI2016-216 being the Emergencies (Bushfire Council Members) Appointment 2016 (No 3) made under section 129 of the *Emergencies Act 2004* appoints specified persons as members of the Bushfire Council.**

**Disallowable Instrument DI2016-218 being the Taxation Administration (Rates—Fire and Emergency Services Rebate) Determination 2016 (No 1) made under section 139 of the *Taxation Administration Act 1999* determines the fire and emergency services rebate for the purposes of the *Rates Act 2004*.**

**Disallowable Instrument DI2016-219 being the Taxation Administration (Safer Families Levy) Determination 2016 (No 1) made under section 139 of the *Taxation Administration Act 1999* determines the safer families levy for the purposes of the *Rates Act 2004*.**

**Disallowable Instrument DI2016-220 being the ACT Teacher Quality Institute Board Appointment 2016 (No 1) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* re-appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing the Archdiocese of Canberra and Goulburn Catholic Education Office.**

**Disallowable Instrument DI2016-221 being the ACT Teacher Quality Institute Board Appointment 2016 (No 2) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* re-appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing the Australian Education Union.**

**Disallowable Instrument DI2016-222 being the ACT Teacher Quality Institute Board Appointment 2016 (No 3) made under Division 3.2, sections 14 and 15 of the *ACT Teacher Quality Institute Act 2010* and section 78 of the *Financial Management Act 1996* re-appoints a specified person as a member of the ACT Teacher Quality Institute Board, representing teachers and principals from the non-government sector.**

**Disallowable Instrument DI2016-223 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 7) made under section 13 of the *Road Transport (General) Act 1999* disapplies Australian Road Rule 300 to the driver of a specified vehicle operated by Seeing Machine Ltd, while the vehicle is being driven on the Majura Parkway between 9 am and 3 pm on Thursday, 11 August 2016, and the driver is participating in a demonstration of a driver monitoring system used to detect mobile phone use whilst driving.**

**Disallowable Instrument DI2016-224 being the Work Health and Safety (Work Safety Council Member and Chair) Appointment 2016 (No 1) made under Schedule 2, sections 2.3 and 2.5 of the *Work Health and Safety Act 2011* appoints a specified person as a member and chair of the Work Safety Council.**

**Disallowable Instrument DI2016-225 being the Work Health and Safety (Work Safety Council Deputy Chair) Appointment 2016 (No 1) made under Schedule 2, section 2.5 of the *Work Health and Safety Act 2011* appoints the Work Safety Commissioner as deputy chair of the Work Safety Council.**

**Disallowable Instrument DI2016-226 being the Work Health and Safety (Work Safety Council Acting Member) Appointment 2016 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as an acting member of the Work Safety Council.**

**Disallowable Instrument DI2016-227 being the Work Health and Safety (Work Safety Council Employer Representative) Appointment 2016 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council, representing the interests of employers.**

**Disallowable Instrument DI2016-228 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2016 (No 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* revokes DI2014-35 and appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

**Disallowable Instrument DI2016-229 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2016 (No 3) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

**Disallowable Instrument DI2016-230 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2016 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* and section 209 of the *Legislation Act 2001* appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.**

**Disallowable Instrument DI2016-231 being the Work Health and Safety (Work Safety Council Acting Employee Representative) Appointment 2016 (No 2) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* and section 209 of the *Legislation Act 2001* appoints a specified person as an acting member of the Work Safety Council, representing the interests of employees.**

**Disallowable Instrument DI2016-232 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2016 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council, representing the interests of employees.**

**Disallowable Instrument DI2016-233 being the Work Health and Safety (Work Safety Council Member) Appointment 2016 (No 1) made under Schedule 2, section 2.3 of the *Work Health and Safety Act 2011* appoints a specified person as a member of the Work Safety Council.**

**Disallowable Instrument DI2016-234 being the Children and Young People (Death Review Committee) Appointment 2016 (No 1) made under section 727E of the Children and Young People Act 2008 appoints a specified person as chair of the Children and Young People Death Review Committee.**

**Disallowable Instrument DI2016-235 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 8) made under section 13 of the *Road Transport (General) Act 1999* determines that Australian Road Rule 300 does not apply to the driver of a specified vehicle operated by Seeing Machines Ltd, while the vehicle is being driven on the Majura Parkway between 10 am and 3 pm on Monday, 15 August 2016, and the driver is participating in a demonstration of a driver monitoring system used to detect mobile phone use whilst driving.**

**Disallowable Instrument DI2016-236 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 9) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to an official vehicle or the driver or passenger of an official vehicle, while participating in the Big Boys Toys 2016 "Race your Mate" driving experience.**

**Disallowable Instrument DI2016-237 being the Road Transport (Driver Licensing) Driving Instruction and Assessment Code of Practice 2016 (No 1) made under section 118 of the *Road Transport (Driver Licensing) Regulation 2000* revokes DI2000-40 and approves the Code of Practice for Accredited Driving Instructors.**

**Disallowable Instrument DI2016-238 being the Radiation Protection (Council Member) Appointment 2016 (No 1) made under section 68 of the *Radiation Protection Act 2006* appoints a specified person, a member of the public, as a member of the Radiation Council.**

**Disallowable Instrument DI2016-239 being the Radiation Protection (Council Member) Appointment 2016 (No 2) made under section 68 of the *Radiation Protection Act 2006* appoints a specified person, with expert knowledge in the physical properties of radiation, as a member of the Radiation Council.**

**Disallowable Instrument DI2016-240 being the Radiation Protection (Council Member) Appointment 2016 (No 3) made under section 68 of the *Radiation Protection Act 2006* appoints a specified person as a member of the Radiation Council, with qualifications and experience relevant to assisting the Council to carry out its functions.**

**Disallowable Instrument DI2016-241 being the Radiation Protection (Chair of Council) Appointment 2016 (No 2) made under section 70 of the *Radiation Protection Act 2006* appoints a specified person as chair of the Radiation Council.**

**Disallowable Instrument DI2016-246 being the Liquor (Fees) Amendment Determination 2016 (No 1) made under section 227 of the *Liquor Act 2010* amends DI2016-97 to replace the reference to "age" with "identity" in item 515.**

**Disallowable Instrument DI2016-247 being the Births, Deaths and Marriages Registration (Fees) Determination 2016 (No 2) made under section 67 of the *Births, Deaths and Marriages Registration Act 1997* revokes DI2016-82 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2016-248 being the Medicines, Poisons and Therapeutic Goods (Vaccinations by Pharmacists) Direction 2016 (No 3) made under section 352 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* revokes DI2016-21 and provides that pharmacists and intern pharmacists may administer vaccines without prescription if they comply with the Pharmacist Vaccination Standards at Schedule 1 of the instrument.**

**Disallowable Instrument DI2016-249 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2016 (No 4) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes DI2016-69 and amends the schedule of determined venues to include the Harmonie German Club, Raiders Weston and Italo Australian Club as approved sports bookmaking venues.**

**Disallowable Instrument DI2016-250 being the Smoke-Free Public Places (Play Spaces) Declaration 2016 (No 1) made under section 90 of the *Smoke-Free Public Places Act 2003* declares that play equipment in play spaces managed by the ACT Government, and the area within 10 metres of such play equipment, to be a smoke-free public place.**

**Disallowable Instrument DI2016-251 being the Public Sector Management Standards 2016 made under section 251 of the *Public Sector Management Act 1994* repeals DI2006-187 and approves the Public Sector Management Standards 2016.**

**Disallowable Instrument DI2016-252 being the Public Trustee and Guardian (Fees) Determination 2016 (No 2) made under section 75 of the *Public Trustee and Guardian Act 1985* revokes DI2016-106 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2016-253 being the Guardianship and Management of Property (Fees) Determination 2016 (No 2) made under section 75 of the *Guardianship and Management of Property Act 1991* revokes DI2016-105 and determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2016-254 being the Nature Conservation (Threatened Native Species Eligibility) Criteria 2016 made under section 65 of the *Nature Conservation Act 2014* determines the threatened native species list eligibility criteria.**

**Disallowable Instrument DI2016-255 being the Nature Conservation (Threatened Ecological Communities Eligibility) Criteria 2016 made under section 71 of the *Nature Conservation Act 2014* determines the threatened ecological communities list eligibility criteria.**

**Disallowable Instrument DI2016-256 being the Nature Conservation (Key Threatening Processes Eligibility) Criteria 2016 made under section 78 of the *Nature Conservation Act 2014* determines the criteria for listing of key threatening processes.**

**Disallowable Instrument DI2016-257 being the Climate Change and Greenhouse Gas Reduction (Greenhouse Gas Emissions Measurement Method) Determination 2016 made under section 11 of the *Climate Change and Greenhouse Gas Reduction Act 2010* revokes DI2015-264 and determines the method for measuring greenhouse gas emissions.**

**Disallowable Instrument DI2016-259 being the Cultural Facilities Corporation (Governing Board) Appointment 2016 (No 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2015-277 and appoints a specified person as a member of the Cultural Facilities Corporation governing board.**

**Disallowable Instrument DI2016-260 being the Planning and Development (Remission of Lease Variation Charge for Environmental Remediation) Determination 2016 (No 1) made under section 278D of the *Planning and Development Act 2007* requires a remission of the Lease Variation Charge for lease variations associated with disused service station sites.**

**Disallowable Instrument DI2016-261 being the University of Canberra Council Appointment 2016 (No 1) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**

**Disallowable Instrument DI2016-262 being the University of Canberra Council Appointment 2016 (No 2) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.**

**Disallowable Instrument DI2016-263 being the Utilities (Technical Regulation) Operating Certificate Fees Determination 2016 made under section 110 of the *Utilities (Technical Regulation) Act 2014* determines fees payable for the purposes of the Act.**

**Disallowable Instrument DI2016-264 being the Public Place Names (Holt) Determination 2016 made under section 3 of the *Public Place Names Act 1989* determines place names in the Division of Holt.**

**Disallowable Instrument DI2016-265 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2016 (No 5) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* determines two Tabcorp ACT Pty Ltd temporary locations as sports bookmaking venues for services on Melbourne Cup day.**

**Disallowable Instrument DI2016-266 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2016 (No 3) made under section 4L of the *Prohibited Weapons Act 1996* revokes DI2016-174 and determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.**

**Disallowable Instrument DI2016-267 being the Firearms (Use of Noise Suppression Devices) Declaration 2016 (No 3) made under section 31 of the *Firearms Act 1996* revokes DI2016-175 and declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.**

**Disallowable Instrument DI2016-268 being the Road Transport (Public Passenger Services) Bus Services—Service Standards 2016 (No 2) made under section 20B of the *Road Transport (Public Passenger Services) Regulation 2002* revokes DI2016-206 and sets out the Service Standards for Bus Services.**

**Disallowable Instrument DI2016-269 being the Public Place Names (Gungahlin District) Amendment Determination 2016 made under section 3 of the *Public Place Names Act 1989* amends DI1991-96 to revoke the division name of "Kinlyside".**

**Disallowable Instrument DI2016-270 being the Road Transport (Third-Party Insurance) UVP Liability Contribution Guideline 2016 (No 1) made under section 163D of the *Road Transport (Third-Party Insurance) Act 2008* determines the guidelines for the Unregistered Vehicle Permit (UVP) liability contributions and the amount to be paid by the UVP holder when obtaining their UVP.**

**Disallowable Instrument DI2016-271 being the Road Transport (Third-Party Insurance) (Industry Deed) Approval 2016 (No 1) made under section 6 of the *Road Transport (Third-Party Insurance) Regulation 2008* revokes DI2013-51 and approves the Insurance Industry Deed.**

**Disallowable Instrument DI2016-272 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 10) made under section 13 of the *Road Transport (General) Act 1999* determines that the Road Transport (Third-Party Insurance) Act does not apply to an entrant vehicle, or the driver of an entrant vehicle, participating in a special stage of the Innate Test Day.**

**Disallowable Instrument DI2016-273 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 11) made under section 13 of the *Road Transport (General) Act 1999* determines that the Road Transport (Third-Party Insurance) Act does not apply to an entrant vehicle, or the driver of an entrant vehicle, participating in a special stage of the Southern Cross Golden Anniversary Rally.**

**Disallowable Instrument DI2016-274 being the Legislative Assembly (Members' Staff) Office-holders' Hiring Arrangements Approval 2016 (No 1) made under subsections 5(3) and 17(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2015-75 and determines the arrangements under which office-holders may agree to employ staff and engage consultants or contractors.**

**Disallowable Instrument DI2016-275 being the Legislative Assembly (Members' Staff) Members' Hiring Arrangements Approval 2016 (No 1) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2015-73 and determines the arrangements under which Members may agree to employ staff and engage consultants or contractors.**

**Disallowable Instrument DI2016-276 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Ministerial Staff Determination 2016 (No 1) made under subsection 6(3) of the *Legislative Assembly (Members' Staff) Act 1989* provides for the portability of accrued leave entitlements for public services who take leave without pay from the ACT Public Service to work for a Minister.**

**Disallowable Instrument DI2016-277 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 12) made under section 12 of the *Road Transport (General) Act 1999* allows motorists attending cricket fixtures at Manuka Oval during the 2016-17 Cricket Australia One Day International Season to park in non-pay time limited parking spaces near Manuka Oval for a longer period of time than specified.**

**Disallowable Instrument DI2016-278 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2016 (No 1) made under section 75A of the *Road Transport (Safety and Traffic Management) Regulation 2000* declares NG Landholdings Nominee Pty Ltd to be a Parking Authority for the area block 2 section 200 in the division of Belconnen.**

**Disallowable Instrument DI2016-279 being the Road Transport (Third-Party Insurance) Early Payment Guidelines 2016 (No 1) made under section 75A of the *Road Transport (Third-Party Insurance) Act 2008* revokes DI2013-88 and provides guidance regarding the application of the early payment for medical expenses entitlement under the Act.**

**Disallowable Instrument DI2016-280 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2016 (No 2) made under subsections 10(3) and 20(4) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2016-111 and determines the conditions under which Members may employ staff and engage consultants or contractors, including salary allocations for the 2016-2017 financial year. The instrument also allows a Member to reimburse another member or office-holder, from the Member's salary allocation, the cost of salary or payments paid to staff, consultants or contracts for services provided to the member under a secondment arrangement between the member and another member or office-holder.**

**Disallowable Instrument DI2016-281 being the Legislative Assembly (Members' Staff) Variable Terms of Employment of Office-holders' Staff Determination 2016 (No 1) made under subsection 6(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes DI2015-78 and determines the remuneration, duties, and terms and conditions of employment of the Executive Chief of Staff.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

### *DRAFTING ISSUE*

**Disallowable Instrument DI2016-217 being the Tree Protection (Advisory Panel) Appointment 2016 (No 1) made under section 69 of the *Tree Protection Act 2005* appoints specified persons as members of the Tree Advisory Panel, with qualifications in forestry and landscape architecture.**

This instrument appoints two specified persons as the chair and as a member of the Tree Protection (Advisory Panel). The appointments are made under section 69 of the *Tree Protection Act 2005*, which provides:

#### **69 Members of advisory panel**

- (1) The advisory panel consists of 3 or more members appointed by the Minister.

*Note 1* For the making of appointments (including acting appointments), see the [Legislation Act](#), pt 19.3.

*Note 2* In particular, a person may be appointed for a particular provision of a law (see [Legislation Act](#), s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

*Note 3* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see [Legislation Act](#), div 19.3.3).

- (2) A member must be appointed to the advisory panel for a term of at least 1 year and not longer than 2 years.
- (3) The Minister must not appoint a person to the advisory panel unless the person has extensive experience in 1 or more of the following fields:
- (a) arboriculture;
  - (b) forestry;
  - (c) horticulture;
  - (d) landscape architecture;
  - (e) natural and cultural heritage.
- (4) The panel must include—
- (a) 1 or more members with extensive experience in arboriculture or forestry; and
  - (b) members who between them include people with extensive experience in 2 or more of the fields mentioned in subsection (3).

The Committee notes that there is no provision for the appointment of a chair of the advisory panel. This means that the appointment of the chair relies on section 79 of the *Financial Management Act 1996*, which provides:

**79 Appointment of chair and deputy chair**

- (1) The responsible Minister for a territory authority with a governing board may appoint a chair for the board and, unless the establishing Act otherwise provides, a deputy chair for the board.

*Note 1* For the making of appointments (including acting appointments), see the [Legislation Act](#), pt 19.3.

*Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

*Note 3* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see [Legislation Act](#), div 19.3.3).

- (2) However, the responsible Minister must not appoint the CEO of the territory authority as chair or deputy chair.
- (3) Also, the responsible Minister must not appoint a public servant as chair or deputy chair unless—
- (a) there is no member of the board who—
- (i) is not a public servant; and
- (ii) is available to be appointed; and
- (b) the Legislative Assembly approves, by resolution, the appointment.
- (4) The responsible Minister must try to ensure that the governing board of a territory authority always has a chair and, unless the establishing Act otherwise provides, deputy chair.

This being so, it would have been preferable if the instrument and/or the Explanatory Statement for the instrument mentioned section 79 of the *Financial Management Act*.

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

*DISAPPLICATION OF SUBSECTIONS 47(5) AND (6) OF THE LEGISLATION ACT 2001*

**Disallowable Instrument DI2016-242 being the Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2016 made under section 126A of the *Construction Occupations (Licensing) Act 2004* approves the Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice.**

**Disallowable Instrument DI2016-243 being the Construction Occupations (Licensing) Unit Title Site Assessment Code of Practice 2016 made under section 126A of the *Construction Occupations (Licensing) Act 2004* approves the Unit Title Site Assessment Code of Practice.**

**Disallowable Instrument DI2016-244 being the Construction Occupations (Licensing) Unit Title Landscaping Works Assessment Code of Practice 2016 made under section 126A of the Construction Occupations (Licensing) Act 2004 approves the Unit Title Landscaping Works Assessment Code of Practice.**

**Disallowable Instrument DI2016-245 being the Construction Occupations (Licensing) Unit Title Unit Fitness Assessment Code of Practice 2016 made under section 126A of the Construction Occupations (Licensing) Act 2004 approves the Unit Title Unit Fitness Assessment Code of Practice.**

The instruments mentioned above are all made under section 126A of the *Construction Occupations (Licensing) Act 2004*. The first instrument approves the Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2016. The Explanatory Statement for the instrument states that the new code replaces the Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2012 (No 1) and that there are no changes to the content of the code. The Explanatory Statement goes on to explain that the previous code was only made by way of a “notifiable” instrument (see section 10 of the *Legislation Act 2001*), while the new code is made by way of a disallowable instrument (bringing it within the Committee’s scrutiny remit). The Explanatory Statement further explains that this change in approach occurred as a result of amendments made by the *Building and Construction Legislation Amendment Act 2016*.

Section 4 of the instrument disapplies subsections 47(5) and (6) of the Legislation Act in relation to any instrument that is applied, adopted or incorporated by the code. Subsection 47(5) of the Legislation Act provides:

- (5) If a law of another jurisdiction or an instrument is applied as in force at a particular time, the text of the law or instrument (as in force at that time) is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument.

This means that any instrument that is relied upon by the code must be published on the ACT Legislation Register, as a “notifiable” instrument. This ensures public access to all the material that is relevant to working out what compliance with a piece of legislation requires.

Subsection 47(6) of the Legislation Act provides:

- (6) If subsection (3) is displaced [ie the prohibition on incorporating certain documents as they exist from-time-to-time] and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:
  - (a) the law or instrument as in force at the time the relevant instrument is made;
  - (b) each subsequent amendment of the law or instrument;
  - (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;

- (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

This means that any amendment, etc to an instrument that is relied upon by the code is also a notifiable instrument. Again, this ensures public access to all the material that is relevant to working out what compliance with a piece of legislation requires.

The disapplication of subsections 47(5) and (6) for this instrument therefore limits public access to external material relied upon by the code. While, in the past, the Committee has been prepared to accept that there are justifications for the disapplication of the publication requirement—the reference to copyright material and the need to respect the rights of copyright owners is the obvious example—the Committee has also required that a justification be provided. Further, the Committee has generally looked for a mechanism to be provided that allows public access to relevant documents, in a way that also protected the rights of copyright owners (eg making a copy available for public inspection, at a particular location, during office hours).

Subsections 47(5) and (6) are also disapplied by section 4 of the second, third and fourth instruments mentioned above, which also approve codes.

The Committee notes that, for each of the instruments mentioned above, no justification is provided for the disapplication of subsections 47(5) and (6) of the Legislation Act. Nor is any advice provided as to whether there is any alternative mechanism for public access to relevant documents.

**The Committee seeks the Minister’s advice as to the justification for the disapplication of subsections 47(5) and (6) of the *Legislation Act 2001* to these instruments. The Committee also seeks the Minister’s advice as to whether (free) public access to the various standards relied on by the instruments could, nevertheless, be provided.**

**These comments requires a response from the Minister.**

*IS THIS INSTRUMENT VALIDLY MADE?*

**Disallowable Instrument DI2016-258 being the Board of Senior Secondary Studies Appointment 2016 (No 7) made under section 8 of the *Board of Senior Secondary Studies Act 1997* appoints a nominee of vocational education and training organisations as a member of the ACT Board of Senior Secondary Studies.**

The instrument mentioned above appoints a specified person as a member of the ACT Board of Secondary Studies. The appointment is made under section 8 of the *Board of Senior Secondary Studies Act 1997*, which provides:

**8 Membership of board**

- (1) The board must consist of the following members:
- (a) a chair;
  - (b) 1 person appointed after consultation with the Canberra Institute of Technology;
  - (c) 1 person appointed after consultation with vocational education and training organisations;

- (d) 1 person appointed after consultation with the Australian National University;
  - (e) 1 person appointed after consultation with the University of Canberra;
  - (f) 1 person appointed after consultation with the Australian Catholic University;
  - (g) 1 person appointed after consultation with the body known as the Association of Independent Schools;
  - (h) 1 person appointed after consultation with the ACT branch of the Australian Education Union;
  - (i) 1 person appointed after consultation with the body known as the Catholic Education Commission;
  - (j) 1 person appointed after consultation with the body known as the ACT Principals' Association Inc.;
  - (k) 1 person appointed after consultation with the body known as the ACT Council of Parents and Citizens Associations;
  - (l) 1 person appointed after consultation with the Association of Parents and Friends of the ACT Schools Inc.;
  - (m) 1 person appointed after consultation with business and industry representative organisations in the ACT;
  - (n) 1 person appointed after consultation with the ACT Trades and Labour Council;
  - (o) the director-general.
- (2) The Minister must appoint the board members (other than the director-general).

*Note 1* For the making of appointments (including acting appointments), see the [Legislation Act](#), pt 19.3.

*Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

*Note 3* Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see [Legislation Act](#), div 19.3.3).

- (3) The Minister may appoint a person to be a board member only if satisfied that the person has qualifications and expertise relevant to the functions of the board.

The appointment made by the first instrument is evidently made under paragraph 8(1)(c), as the Explanatory Statement for the instrument states:

This instrument appoints [the specified person] a nominee of vocational education and training organisations, as a member of the Board from 1 January 2017 to 31 December 2019.

The Committee notes, however, that the power is not a power to appoint a “nominee” of one of the organisations mentioned in subsection 8(1). It is a power to appoint a person *after consultation with* the various organisations. While the fact that a person is a nominee of an organisation might be taken to imply that the Minister has consulted with the organisation, it would be preferable if the information provided in the Explanatory Statement more accurately reflected the power given by section 8 of the Board of Senior Secondary Studies Act.

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

## SUBORDINATE LAWS—NO COMMENT

The Committee has examined the following subordinate laws and offers no comment on them:

**Subordinate Law SL2016-21 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2016 (No 2) made under the *Road Transport (General) Act 1999* and *Road Transport (Safety and Traffic Management) Act 1999* makes amendments to the Road Transport (Safety and Traffic Management) Regulation and the Road Transport (Offences) Regulation relating to the use of a mobile phone or other wireless hand-held device, such as an iPad or other tablet computer, by the driver of a motor vehicle.**

**Subordinate Law SL2016-22 being the Road Transport (Alcohol and Drugs) Amendment Regulation 2016 (No 1) made under the *Road Transport (Alcohol and Drugs) Act 1977* prescribes the Alcolizer LE 5 Series as an alcohol screening device for the purposes of the Act.**

**Subordinate Law SL2016-24 being the Planning and Development (Solar Access) Amendment Regulation 2016 (No 1), including a regulatory impact statement made under the *Planning and Development Act 2007* amends the Planning and Development Regulation to reduce construction tolerances and some structures so that they are no longer exempt if they encroach on the solar building envelope.**

**Subordinate Law SL2016-25 being the Victims of Crime (Financial Assistance) Amendment Regulation 2016 (No 1) made under the *Victims of Crime (Financial Assistance) Act 2016* amends the maximum amount payable for personal security of a victim and loss of, or damage to, personal items.**

**Subordinate Law SL2016-26 being the Road Transport (Public Passenger Services) Amendment Regulation 2016 (No 1) made under the *Road Transport (Public Passenger Services) Act 2001* amends the Road Transport (Public Passenger Services) Regulation to remove the obligation for a driver to display their driver authority card where the driver is an affiliated driver for a transport booking service, and the service gives the hirer sufficient information, including photo ID, for the hirer to be able to identify the driver.**

**Subordinate Law SL2016-27 being the Retirement Villages Amendment Regulation 2016 (No 1) made under the *Retirement Villages Act 2012* makes consequential amendments to the Retirement Villages Regulation to make it consistent with the Act.**

**Subordinate Law SL2016-28 being the Firearms Amendment Regulation 2016 (No 1) made under the *Firearms Act 1996* amends the Firearm Regulation to ensure that firearms are stored safely when being transported.**

**Subordinate Law SL2016-29 being the Work Health and Safety Amendment Regulation 2016 (No 1) made under the *Work Health and Safety Act 2011* makes technical amendments the Work Health and Safety Regulation to address inadvertent errors and clarify policy intent.**

**Subordinate Law SL2016-30 being the Road Transport (Driver Licensing) Amendment Regulation 2016 (No 1) made under the *Road Transport (Driver Licensing) Act 1999* allows a police trainee, who holds an automatic car licence and who is undertaking recruit training or assessment while driving a police vehicle, to drive a manual transmission car without the need to display L plates. It also allows a police trainee who holds a provisional car licence and is undertaking recruit training or assessment while driving a police vehicle to drive without the need to display P plates.**

**Subordinate Law SL2016-31 being the Court Procedures Amendment Rules 2016 (No 2) made under section 7 of the *Court Procedures Act 2004* amends the Court Procedures Rules to allow the registrars of the Supreme Court and the Magistrates Court to make an order under rule 4050(1)(a) or (2) requiring the production of a person in custody, either in person or via audiovisual or audio link.**

**Subordinate Law SL2016-32 being the Freedom of Information Amendment Regulation 2016 (No 2) made under the *Freedom of Information Act 1989* exempts the Justice and Community Safety Directorate in relation to documents given or produced in relation to the independent inquiry into the management of the custody and care of a specified detainee at the Alexander Maconochie Centre.**

## SUBORDINATE LAW—COMMENT

The Committee has examined the following subordinate law and offers these comments on it:

### *UNUSUAL PROCEDURE FOR MAKING A SUBORDINATE LAW*

**Subordinate Law SL2016-23 being the Discrimination Regulation 2016 made under the *Discrimination Amendment Act 2016* determines the definition of *assistance animal* for the purposes of the Act.**

This subordinate law was made as a schedule to the *Discrimination Amendment Act 2016*, which amended the *Discrimination Act 1991*. Section 13 of the Discrimination Amendment Act inserts a new subsection 124 into the Discrimination Act, that provides:

#### **124 Discrimination Regulation 2016—sch 1**

- (1) The provisions set out in schedule 1 are taken, on the commencement of this section, to be a regulation made under section 123.
- (2) To remove any doubt and without limiting subsection (1), the regulation may be amended or repealed as if it had been made by the Executive under section 123.
- (3) Also to remove any doubt, the regulation is taken—
  - (a) to have been notified under the Legislation Act on the day the *Discrimination Amendment Act 2016* is notified; and
  - (b) to have commenced on the commencement of the Discrimination Amendment Act 2016; and
  - (c) not to be required to be presented to the Legislative Assembly under the Legislation Act, section 64(1).
- (4) Subsections (1) to (3) are laws to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

- (5) This section and schedule 1 expire on the day they commence.

This is an unusual situation, in that the subordinate law is “made” by the passage (and commencement) of the Discrimination Amendment Act and by the fact that new paragraph 124(3)(c) has the effect of removing the subordinate law from the (subordinate law) scrutiny remit of the Committee. This is because the Committee’s subordinate law remit is in relation to “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)” [*emphasis added*].

**The situation is complicated by the fact that the Legislative Assembly’s power to disallow a subordinate law or a disallowable instrument, set out in section 65 of the *Legislation Act 2001*, is premised on an instrument having been presented to the Legislative Assembly. If there is no requirement to present this subordinate law to the Legislative Assembly, there can be no power to disallow. This is most unusual.** <sup>4</sup>

No justification is provided, in the Explanatory Statement for the Discrimination Amendment Act, for this unusual approach.

While the exercising of “making” a regulation by principal legislation, of course, arguably enhances legislative scrutiny (ie in the sense that it effectively receives the same level of scrutiny as a piece of primary legislation), the Committee is interested to know the reason why that approach was taken in this instance.

**The Committee draws this issue to the attention of the Legislative Assembly.**

**The Committee seeks the Minister’s advice as to why the unusual “making” procedure was adopted for this instrument.**

**This comment requires a response from the Minister.**

## REGULATORY IMPACT STATEMENTS—NO COMMENT

The Committee has examined regulatory impact statements for the following instruments and offers no comment on them:

- Disallowable Instrument DI2016-263 being the Utilities (Technical Regulation) Operating Certificate Fees Determination 2016.
- Subordinate Law SL2016-24 being the Planning and Development (Solar Access) Amendment Regulation 2016 (No 1).

## GOVERNMENT RESPONSE

The Committee has received a response from Minister Rattenbury in relation to comments made in Scrutiny Report 1 concerning Disallowable Instrument DI2016-198—Road Transport (Public Passenger Services) Maximum Taxi Fares for NSW Taxis in ACT Region Determination 2016, dated 31 January 2017.

<sup>4</sup> See also the Committee’s comments in *Scrutiny Report 46* of the 8<sup>th</sup> Assembly (19 July 2016), at page 36, re the Electricity Feed-in (Large-scale Renewable Energy Generation) FIT Capacity Release Determination 2016 (No. 2) (DI2016-48), which was also made by way of primary legislation. In that *Scrutiny Report*, the Committee commented on the absence of an Explanatory Statement for the instrument. The Committee did not receive a response from the Minister on those comments.

A copy of this response can be viewed online at <http://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role>.

Giulia Jones MLA  
Chair

7 February 2016

## OUTSTANDING RESPONSES

### *BILLS/SUBORDINATE LEGISLATION*

**Report 1, dated 14 December 2016**

Disallowable Instrument DI2016-195—Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2016, including a regulatory impact statement.

Disallowable Instrument DI2016-196—Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2016, including a regulatory impact statement.