

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

SCRUTINY REPORT 4

27 March 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.

TABLE OF CONTENTS

SUBORDINATE LEGISLATION.....	1
DISALLOWABLE INSTRUMENTS—NO COMMENT	1
DISALLOWABLE INSTRUMENTS—COMMENT.....	1
SUBORDINATE LAWS—NO COMMENT.....	3
GOVERNMENT RESPONSES	3
OUTSTANDING RESPONSES	5

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2017-12 being the Civil Law (Wrongs) RICS Valuers Limited Scheme Amendment 2017 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the approval of the RICS Valuers Limited Scheme by the Professional Standards Council of New South Wales.

Disallowable Instrument DI2017-14 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 1) made under section 12 of the *Road Transport (General) Act 1999* disapplies specified road transport legislation to suspend pay parking in specified areas to support the 2017 National Multicultural Festival.

Disallowable Instrument DI2017-15 being the Housing Assistance Rental Bonds Housing Assistance Program 2017 (No 1) made under subsection 19(1) of the *Housing Assistance Act 2007* revokes DI2010-60 and provides rental bond assistance to eligible applicants.

Disallowable Instrument DI2017-16 being the Official Visitor (Disability Services) Appointment 2017 (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 INSTRUMENTS—COMMENT

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

IS THIS A DISALLOWABLE INSTRUMENT?

Disallowable Instrument DI2017-17 being the Architects Board Appointment 2017 (No 1) made under subsection 70(2) of the *Architects Act 2004* appoints a specified person to the Australian Capital Territory Architects Board as the community representative member.

This instrument appoints a specified person to the Australian Capital Territory Architects Board. The appointment is made under subsection 70(2) of the *Architects Act 2004*. Section 70 of that Act provides:

70 Board membership

- (1) The Board consists of the following members (the *board members*):
 - (a) 1 member nominated in writing by a representative body;
 - (b) 1 member who is, or has recently been, an academic architect;
 - (c) 1 member who is registered;
 - (d) 1 member who is a commercial lawyer;

- (e) 1 member to represent community interests who is not registered.
- (2) The Minister must appoint the board members.
 - Note 1* For the making of appointments (including acting appointments), see Legislation Act, pt 19.3.
 - Note 2* Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).
- (3) In this section:

academic architect means a person who teaches architecture at an educational institution.

commercial lawyer means a lawyer with experience in either or both of the following areas:

- (a) consumer protection law;
- (b) trade practices law.

representative body means an entity that has as a main purpose the promotion of the interests of architects.

Note The board can still function with a vacancy in membership (see Legislation Act, s 199 (5)).

The Committee notes that, though it is not mentioned in the Explanatory Statement for the instrument, section 3 of the instrument states that the specified person is appointed as a community member (ie under paragraph 70(1)(e)).

Section 227 of the *Legislation Act 2001* deals generally with the making of appointments to statutory positions, by Ministers. It provides:

227 Application—div 19.3.3

- (1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.
- (2) However, this division does not apply to an appointment of—
 - (a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or
 - (b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
 - (c) a person to a statutory position if the only function of the position is to advise the Minister.

Given paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the Explanatory Statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.

The Committee notes that the Explanatory Statement for this instrument states:

None of the appointments to the Board are ACT Public Servants.

This instrument makes only one appointment. As a result, it is not clear whether the above statement is merely an incorrect statement in relation to the current appointment (perhaps copied from a previous Explanatory Statement that related to multiple appointments) or intended to be a general statement that public servants are not appointed to this particular board. The former seems to be the most likely explanation. Assuming that this is the case, the Committee urges those who draft Explanatory Statements to be more careful in their use of previous material as “precedents”.

This comment does not require a response from the Minister.

Subordinate Law—Comment

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

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2017-1 being the Planning and Development Amendment Regulation 2017 (No 1) made under the *Planning and Development Act 2007* provides that a crown lease for a surrendered residential block may be granted by direct sale.

Subordinate Law SL2017-2 being the Rail Safety National Law (ACT) Amendment Regulation 2017 (No 1) made under the *Rail Safety National Law (ACT) Act 2014* prescribes the particulars to be provided, in writing, at the time of drug and alcohol testing of rail safety workers.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Climate Change and Sustainability, in relation to comments made in Scrutiny Report 1, concerning Disallowable Instruments—
 - DI2016-195—Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2016; and

- DI2016-196—Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2016.
- The Attorney-General, dated 14 March 2017, in relation to comments made in Scrutiny Report 2, concerning the Commercial Arbitration Bill 2016.
- The Minister for Justice, Consumer Affairs and Road Safety, dated 5 March 2017, in relation to comments made in Scrutiny Report 2 concerning SL2016-23—Discrimination Regulation 2016.
- The Minister for Justice, Consumer Affairs and Road Safety, dated 20 March 2017, in relation to comments made in Scrutiny Report 3 concerning the Co-operatives National Law (ACT) Bill 2017.
- The Minister for Transport and City Services, in relation to comments made in Scrutiny Report 3, concerning Disallowable Instrument DI2016-293—Road Transport (Public Passenger Services) Regular route Services Maximum Fares Determination 2016.
- The Attorney-General, dated 22 March 2017, in relation to comments made in Scrutiny Report 3, concerning the Family and Personal Violence Legislation Amendment Bill 2017.
- The Minister for Climate Change and Sustainability, in relation to comments made in Scrutiny Report 3, concerning Disallowable Instruments—
 - DI2016-302—Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2016 (No 2); and
 - DI2016-303—Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2016 (No 2).

A copy of these responses 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>.

- The Minister for Police and Emergency Services, in relation to comments made in Scrutiny Report 3, concerning Disallowable Instruments—
 - DI2016-295—Firearms (Use of Noise Suppression Devices) Declaration 2016 (No 4); and
 - DI2016-296—Prohibited Weapons (Noise Suppression Devices) Declaration 2016 (No 4).

An electronic copy of this response was not provided at the time of publication of this Report.

The Committee would like to thank the Minister for Climate Change and Sustainability, the Attorney-General, the Minister for Justice, Consumer Affairs and Road Safety, the Minister for Transport and City Services, and the Minister for Police and Emergency Services for their helpful responses.

Giulia Jones MLA
Chair

27 March 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 14 March 2017

Disallowable Instrument DI2016-285 - Public Health (Fees) Determination 2016 (No 1)

Disallowable Instrument DI2016-286 - Medicines, Poisons and Therapeutic Goods (Fees) Determination 2016 (No 1)

Disallowable Instrument DI2016-287 - Health Records (Privacy and Access) (Fees) Determination 2016 (No 1)

Disallowable Instrument DI2016-288 - Food (Fees) Determination 2016 (No 1)

Disallowable Instrument DI2016-289 - Radiation Protection (Fees) Determination 2016 (No 1)

Disallowable Instrument DI2016-294 - Court Procedures (Fees) Determination 2016 (No 3)

Health Practitioner Regulation National Law Amendment (Midwife Insurance Exemption) Regulation 2016 (No. 126/2016, dated 10 October 2016)