COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)
Ms Bec Cody MLA (Deputy Chair)
Ms Elizabeth Lee MLA
Mr Chris Steel MLA

SECRETARIAT

Mr Andrew Snedden (Acting Secretary)
Ms Joanne Cullen (Acting Assistant Secretary)
Mr Daniel Stewart (Legal Adviser—Bills)
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

CONTACT INFORMATION

Telephone 02 6205 0173
Facsimile 02 6205 3109
Post GPO Box 1020, CANBERRA ACT 2601
Email scrutiny@parliament.act.gov.au
Website www.parliament.act.gov.au

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) inappropriate 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

## Bills

- Co-operatives National Law (ACT) Bill 2017 ................................................................. 1
- Crimes Legislation Amendment Bill 2017 ................................................................. 3
- Family and Personal Violence Legislation Amendment Bill 2017 ............................. 4

## Subordinate Legislation

- Disallowable Instruments—No Comment ................................................................. 7
- Disallowable Instruments—Comment ................................................................. 10
- Subordinate Laws—No Comment ................................................................. 20
- Subordinate Law—Comment ................................................................. 20
- National Laws—Comment ................................................................. 21
- Regulatory Impact Statements—No Comment ........................................................ 26

## Government Response

................................................................. 27

## Outstanding Responses

................................................................. 28
BILLS

BILLS—COMMENT

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

**CO-OPERATIVES NATIONAL LAW (ACT) BILL 2017**

The Co-operatives National Law (ACT) Bill 2017 implements the Australian Uniform Co-operative Laws Agreement (AUCLA) to enact model co-operative laws in all Australian states and territories. The Bill will repeal the Cooperatives Act 2002 and replace it with the Co-operatives National Law (CNL), which is contained in an appendix to the Co-operatives (Adoption of National Law) Act 2012 (NSW). The Explanatory Statement accompanying the Bill provides that the model law allows mutual recognition of co-operatives to operate throughout Australia, clarifies governance procedures, and reduces reporting requirements for smaller co-operatives.

**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 (HRA)**

The Committee notes that, by providing for the forming of co-operatives, the Bill engages with and supports various human rights recognised in the Human Rights Act, including the right to freedom of peaceful assembly and freedom of association, the right to equality before the law, and the right not to be tried or punished more than once (see the discussion in the Explanatory Statement at pp 7-10).

The Committee also notes that the CNL limits the following human rights:

- **Right to privacy and reputation (s 12 Human Rights Act)**
  
The CNL provides an inspector with various powers to enter property, conduct searches, take possession of property, and require persons to provide information. The Committee notes the limits placed on these powers. Entering property requires either consent, an authorised warrant issued by a magistrate, or the place entered is a ‘place at which the affairs or activities of a co-operative are managed or conducted’ (see s 498 CNL). Similarly, powers to seize a thing are limited to a reasonable belief that the thing seized is evidence of an offence against a co-operative law and consistent with the purpose of entry (s 508 CNL).

  The Committee notes that justification of the limits on the right to privacy and reputation provided in the Explanatory Statement at pages 9-10 does not follow the framework set out in s 28 of the Human Rights Act, but otherwise provides the basis for why the limitation on privacy is reasonable and necessary to facilitate investigation and enforcement of the CNL.

- **Rights to a fair trial (s 21 Human Rights Act) and rights in criminal proceedings (s 22 Human Rights Act)**
  
The CNL provides for several strict liability offences. The Explanatory Statement at p 10 briefly justifies the shift in onus of proof involved in strict liability offences as the relevant element of the offence being within the peculiar knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove the element than for the defendant to establish it.
The Committee notes that where terms of imprisonment are provided for under the CNL, the Bill modifies those penalties to impose only a pecuniary penalty, consistent with the Human Rights Act 2004 and the Justice and Community Safety Guide to Framing Offences. The Committee also notes that s 550 of the CNL provides for the defence of mistake of fact to apply to offences of strict liability.

The Committee also notes that the privilege against self-incrimination is limited, under s 503 of the CNL, when required to make statements to inspectors under Part 6.4. It is only where a ‘person claims before making a statement that the statement might tend to incriminate him or her’ that the ‘statement is not admissible in evidence against him or her in criminal proceedings, other than proceedings under this Part’. The Committee notes that no justification for this provision is provided for in the explanatory statement for the Bill. The Committee considers it appropriate to amend the Explanatory Statement to include reference to the modification of the right against self-incrimination provided for in the CNL.

The Committee draws these matters to the attention of the Assembly, and asks the Minster to respond.

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

Clause 7 of the Bill applies the CNL as if it were part of the Bill when enacted. It also provides that a law that amends the CNL, as passed by the NSW Parliament, must be presented to the ACT Legislative Assembly within 6 sitting days and subject to disallowance in the same way, and within the same period, as a disallowable instrument.

Subclause 7(5) allows the NSW Executive, namely the Governor of NSW acting with the advice of the Executive Council of that State and on the recommendations of the Ministerial Council of Consumer Affairs referred to in Part VIII of the AUCLA to make regulations. The power to make regulations in s 612 of the CNL includes the power to set fees and create offences penalised by not than $2000. Co-operative National Regulations (CNRs) made in this way will be applied as in force under the Co-operative National Law (ACT) Act when enacted.

CNRs are to be published on the NSW legislation website and commence as set out in the regulation on or after their date of publication unless retrospective effect is permitted under the CNL. Clause 8 of the Bill provides that chapter 7 of the Legislation Act which provides for presentation, amendment and disallowance of subordinate law and disallowable instruments) applies to CNRs as if they were notified under the Legislation Act on the day published on the NSW website.

The committee therefore notes that the Bill provides for delegation of legislative powers to the NSW parliament and executive but considers that this delegation is subject to appropriate scrutiny by the Assembly.

The Committee draws these matters to the attention of the Assembly.

Other Comments

The Committee notes that, other than in relation to disallowance discussed above, the Legislation Act does not apply to the CNL once enacted as a law of the ACT. The CNL, in Part 1.2 and Schedule 4, includes various provisions relating to interpretation of the CNL and CNR.
As discussed in the Committee’s *Guide to writing an explanatory statement*, an explanatory statement should (at [3.7]):

> identify all respects in which a provision of the bill and of the adopted model national law affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws.

Here, the Explanatory Statement refers to the exclusion of the Legislation Act at p.12 without elaboration of the differences in interpretation entailed. However, in the view of the Committee the differences in approach are unlikely to be significant or otherwise warrant further description in the Explanatory Statement.

**The Committee draws these matters to the attention of the Assembly.**

---

**CRIMES LEGISLATION AMENDMENT BILL 2017**

The *Crimes Legislation Amendment Bill 2017* (the Bill) amends both the *Crimes (Sentence Administration) Act 2005* (SA Act) and the *Crimes (Sentencing) Act 2005* (Sentencing Act). Those Acts provide for the director-general (which, given the operation of s 163 of the *Legislation Act 2001* refers to the Director-General of the Justice and Community Safety (JACS) Directorate) to exercise various functions in relation to intensive corrections orders (ICOs). There is no provision for delegation in either of the Acts. However, under s 20 of the *Public-Sector Management Act 1994*, the director-general can delegate to a public employee or another person a function given to the director-general under any law applying in the ACT. Under Part 19.4 of the Legislation Act, a delegation must be in writing signed by, in this context, the director-general. The Legislation Act effectively cures any defect or irregularity in relation to a delegation (see s 242) but would generally not displace the need, for example, of attempting a delegation in the first place. There is no provision in the SA Act or Sentencing Act for any delegation to have retrospective effect, which accords with general principles of statutory interpretation of provisions authorising delegation.

The Bill provides for the delegation of specified functions of the director-general under the two Acts to various ACT Corrective Services staff (by reference to their position numbers) for a period from 2 March 2016 to 9 November 2016 or 11 November 2016. It therefore provides retrospective authorisation of various functions carried out by persons other than the director-general during that period. The explanatory statement states that the functions of the director-general were not originally delegated due to ‘an administrative oversight’. The Bill therefore overcomes any lack of delegated authority to carry out the specified functions.

The functions delegated in the Bill range from procedural (eg a change in contact details (s 42(2) SA Act), provision of reports (ss 51(2) and 55(2)) or maintaining and authorising access to records (s 76)) to substantive (relating to imposition of a curfew (s 58), inquiring into breach of conditions (s 73)). They include requiring samples be provided for drug and alcohol screening (s 43, 50) and carrying out assessments to be used by the sentencing court in imposing any ICOs (ss 78, 80D and 80J Sentencing Act). The Bill therefore validates the imposition and implementation of conditions relating to ICOs, which affects the period of imprisonment met by offenders under the Acts.
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 (HRA)

As recognised in the Explanatory Statement, the Bill places limitations on the right to liberty and security of person at s 18 of the Human Rights Act 2004 (the HR Act). To the extent it requires samples to be taken for drug and alcohol testing it also engages the right to privacy under s 12 of the HR Act. The reasonableness of any limitations was discussed in the Scrutiny committee’s report on the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015. ¹ The Bill, by retrospectively authorising functions under the two Acts, would not generally be considered a distinct interference with the rights in question, and in any event any such interference would be considered a reasonable limit in accordance with s 28 of the Human Rights Act.

By retrospectively validating functions carried out by ACT Corrective Services staff the Bill also validates any period of imprisonment that followed from those functions. The Bill therefore could be argued to interfere with any entitlement of those affected by that imprisonment to seek remedies in an action for unlawful imprisonment, and to that extent trespasses on personal rights and liberties (see committee terms of reference 3(a)). However, as discussed in the explanatory statement, any trespass is limited. The period in question, decisions affected by the Bill and hence periods of imprisonment, circumstances under which the functions being validated were carried out (including that the functions carried out were within what staff at the time expected was a valid delegation), and the limited delay in seeking to validate the functions in question indicate that the Bill does not unduly interfere with the rights of those affected by the Bill.

The Committee draws these matters to the attention of the Assembly.

FAMILY AND PERSONAL VIOLENCE LEGISLATION AMENDMENT BILL 2017

This is a Bill to amend the Family Violence Act 2016 (FV Act) and the Personal Violence Act 2016 (PV Act) which, upon their general commencement on 1 May 2017, will introduce streamlined family violence and personal protection order schemes. The purpose of this Bill, as stated in the Explanatory Statement, is to ‘address procedural issues and reduce red tape’ to facilitate those schemes. The Bill also amends the Evidence (Miscellaneous Provisions) Act 1991 (E(MP) Act) to provide for recorded statements of police interviews to be used as evidence in applications for protection orders.

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 engagement of each of the Acts amended in this Bill with various Human Rights Act 2004 (HR Act) rights has been commented upon in previous reports of this Committee. ² To the extent this Bill makes administrative or procedural amendments without changing the substantive operation of

¹ see Scrutiny Report 40 of the 8th Assembly.
² For Division 4.3.3 of the E(MP) Act see the discussion of the Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015 in Scrutiny Report No. 38 of the 8th Assembly, pp 7-10; the Family Violence Bill 2016 and Personal Violence Bill 2016 was discussed in Scrutiny Report No 46 of the 8th Assembly, pp 7-12, 13.
those Acts the Committee generally makes no further comment. Further human rights issues engaged by the Bill are discussed below.

**Limitation of the right to fair trial (HRA subsection 21(1))**

**Leave to call child as a witness in protection order proceedings**

Under proposed s 60D of the FV Act and s 55D of the PV Act, the court must grant leave before a child, other than a child who is a party to a proceeding, can be called as a witness. At page 4, the Explanatory Statement identifies the need for a court to grant leave for a child to be called as a witness in protection order proceedings as engaging and limiting the right to a fair trial (section 21). The compatibility of the need to grant leave with this right is assessed using the framework stated in HRA section 28.

The Committee draws this matter to the attention of the Assembly.

**Use of recorded statements as evidence**

The Bill seeks to substitute s 81G(2) and inserts a new s 81H into the E(MP) Act. This will allow a recorded statement of a police interview of a person complaining that a domestic violence offence has been committed to also be used in an application for a protection order under the FV Act.

The current s 81G of the E(MP) Act was introduced by the *Crimes (Domestic and Family Violence) Legislation Amendment Act 2015*. In the Explanatory Statement to that Act, and as discussed in a previous report of this Committee,³ the use of recorded statements in relation to domestic violence offences can engage the right to a fair trial, even if it does not limit that right.

The Committee notes that in the context of domestic violence offences, the use of recorded statements is subject to the rules of evidence, with only the hearsay rule and opinion rule not preventing the admission of recorded evidence in that form.⁴ After the amendments proposed by this Bill, recorded statements will be available for use in an application for a protection order under the FV Act, where the rules of evidence will not apply (see further the discussion of application of the rules of evidence below). As there is no requirement that charges have been laid or an offence proved in relation to the family violence offence that was the subject of the recorded statement, the use of recorded statements in protection order proceedings could encourage questions and answers to be recorded that would not be admissible in hearings of domestic violence offences, further engaging the rights to a fair trial.

The Committee recommends that the explanatory statement be amended to include recognition that amendments to the use of recorded statements in an application for a protection order under the FV Act engages with the rights to a fair trial.

The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.

---

³ see the discussion of the *Crimes (Domestic and Family Violence) Legislation Amendment Bill 2015* in Scrutiny Report No. 38 of the 8th Assembly, pp 7-10

⁴ See also the notes to ss 79 and 81 of the E(MP) Act which make it clear that the rules of evidence will apply to recorded statements.
Application of the rules of evidence

Provision 9 of the Bill inserts s 13A into the FV Act which provides that the Magistrates Court need not comply with the rules of evidence applying in the ACT in a proceeding under this Act. Provision 71 has the same effect in inserting s 10A into the PV Act. Both are expressed as to ‘remove any doubt’ and contain notes to other provisions in those Acts (s 65 and s 59 respectively) that provide the Magistrates Court may inform itself in any way it considers appropriate in a proceeding for a protection order.

The Explanatory Statement, at p 4, states that the right to fair trial is not engaged by these amendments. However, the basis for that statement is not made clear. The Explanatory Statement refers to the ability of the court to inform itself in any way, as well as the limited affect of the Evidence Act 2011 on the operation of provisions of any other Act, to suggest that the amendments do not make any substantive difference to the rules of evidence applicable in protection order proceedings. The Explanatory Statement then goes on to state that removing the rules of evidence ensures consistency with other ACT legislation, without example, as well as family violence order proceedings in Victoria and Queensland. It is therefore unclear whether the Explanatory Statement is stating that these amendments do not engage with or limit the right to a fair trial further than the original Acts, or that the right to a fair trial doesn’t extend to the application of the rules of evidence to proceedings of this general type.

The committee notes that the explanatory statements accompanying enactment of the FV Act and PV Act did not include reference to whether the right to a fair trial was engaged by the ability of the court to inform itself in any way. The Committee also notes that the subsection of the Victorian Act referred to in the Explanatory Statement (s 65(1) of the Family Violence Protection Act 2008 (Vic)) is more limited than the proposed amendments, maintaining the application of various provisions of the Victorian Evidence Act equivalent and allowing use of evidence to be refused or limited only where it is just and equitable to do so or the probative value of the evidence is substantially outweighed by its prejudicial effect or is misleading or confusing. It is also noted that the Victorian provision was recognised as engaging the right to a fair hearing under s 24 of the Charter of Human Rights and Responsibilities Act 2006 (Vic), but the right was not limited due at least in part to the additional safeguards built in. The absence of human rights scrutiny in Queensland makes the example of the Queensland legislation less relevant to the ACT.

The Evidence Act also contains several protections of a fair hearing that are expressly maintained in the Victorian Family Violence Protection Act. These include the application of privileges such as the privilege against self-incrimination and client legal privilege (see Part 3.10). Under Part 15.4 of the Legislation Act, legislation must be interpreted to preserve the common law privileges against self-incrimination (s 170) and in relation to client legal privilege (s 171). It is likely that a court, when interpreting the statement in the Bill excluding the rules of evidence from protection order proceedings, would hold that these privileges have not been sufficiently clearly displaced. However, that intention should be more clearly set out, if not expressly in the Bill, then in the explanatory statement.

---

5 See Family Violence Protection Bill 2008 (Vic), Statement of Compatibility, as set out in Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Assembly, Thursday 26 June 2008 at p 2637.

The Committee recognises that compliance with all of what might be considered to be rules of evidence is not generally a necessary condition of the right to a fair hearing. The Committee did not raise any concerns in relation to the ability of the Magistrates Court to inform itself in any way when commenting on the FV Act or PV Act. However, in the Committee’s view, particularly given the amendments regarding recorded statements discussed above, it is at least arguable that removing compliance with the rules of evidence may engage the right to a fair trial in the context of protection order proceedings. The explanatory statement should provide a clearer statement of why the right to a fair trial is not engaged.

The Committee draws these matters to the attention of the Assembly, and asks the Minister to respond.

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2016-282 being the Fisheries Prohibition and Declaration 2016 (No 1) made under sections 13, 15, 16, and 17 of the Fisheries Act 2000 revokes DI2013-272 and determines the restrictions and requirements on fishing.


Disallowable Instrument DI2016-284 being the Health (Fees) Determination 2016 (No 3) made under section 192 of the Health Act 1993 revokes DI2016-73 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2016-289 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 13) made under section 13 of the Road Transport (General) Act 1999 determines that certain parts of the road transport legislation do not apply to an entrant vehicle or the driver of an entrant vehicle while participating in a special stage of the Rallye des Femmes.

Disallowable Instrument DI2016-291 being the Road Transport (General) Segway Exemption Determination 2016 (No 2) made under section 13 of the Road Transport (General) Act 1999 allows the existing commercial Segway tour operator to continue to operate under unchanged conditions while the review of Segway use is finalised.


Disallowable Instrument DI2016-299 being the Legislative Assembly (Members’ Staff) Officeholders’ Hiring Arrangements Approval 2016 (No 2) made under subsections 5(3) and 17(4) of the Legislative Assembly (Members’ Staff) Act 1989 revokes DI2016-274 and determines the arrangements under which office-holders may agree to employ staff and engage consultants or contractors.

Disallowable Instrument DI2016-300 being the Legislative Assembly (Members’ Staff) Members’ Hiring Arrangements Approval 2016 (No 2) made under subsections 10(3) and 20(4) of the Legislative Assembly (Members’ Staff) Act 1989 revokes DI2016-275 and determines the arrangements under which Members may agree to employ staff and engage consultants or contractors.

Disallowable Instrument DI2016-301 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2016 made under section 20 of the Remuneration Tribunal Act 1995 revokes DI2015-303 and determines fees and allowances for members of the Remuneration Tribunal.

Disallowable Instrument DI2016-304 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2016 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2016-74 and determines, for the purposes of the Scheme, the time limit for applications, determination of amounts, method of calculation of duty payable, and eligibility requirements.

Disallowable Instrument DI2016-305 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2016 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2016-77 and determines, for the purposes of the Scheme, the income test and thresholds, time limit for applications, eligibility criteria of the subject property, determination of amounts, method of calculation of duty payable, and eligibility requirements.

Disallowable Instrument DI2016-306 being the First Home Owner Grant (Amount) Determination 2016 (No 1) made under paragraph 18(1)(b) of the First Home Owner Grant Act 2000 revokes DI2015-247 and determines the amount of the First Home Owner Grant.

Disallowable Instrument DI2016-307 being the Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2016 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2015-332 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2017.

Disallowable Instrument DI2016-308 being the Public Place Names (Taylor) Determination 2016 made under section 3 of the Public Place Names Act 1989 determines the names of 21 roads in the Division of Taylor.

Disallowable Instrument DI2016-309 being the Road Transport (General) Application of Road Transport Legislation Declaration 2016 (No 14) made under section 13 of the Road Transport (General) Act 1999 suspends specific parking rules in specified areas to support the New Year’s Eve in the City event.

Disallowable Instrument DI2016-310 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2016 (No 1) made under section 13 of the Road Transport (General) Act 1999 removes application of the Road Transport (Third-Party Insurance) Act to ACT registered entrants, promotional and uninsured vehicles participating in the Summernats 30 Car Festival 2017, and exempts vehicles from specified provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.
Disallowable Instrument DI2016-311 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2016 (No 1) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the Climate Change Council, representing the interests of business.

Disallowable Instrument DI2016-312 being the Pest Plants and Animals (Pest Animals) Declaration 2016 (No 1) made under section 16 of the Pest Plants and Animals Act 2005 revokes DI2005-255 and determines specified animals to be pest animals.

Disallowable Instrument DI2016-313 being the Animal Diseases (Import Restriction) Declaration 2016, including a regulatory impact statement made under section 15 of the Animal Diseases Act 2005 declares a specified area to be an import restriction area in response to an outbreak of whitespot disease in four prawn farms.


Disallowable Instrument DI2016-315 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2016 (No 1) made under Schedule 3, section 3.4 of the Workers Compensation Act 1951 appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to employer interests.

Disallowable Instrument DI2016-316 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2016 (No 2) made under Schedule 3, section 3.4 of the Workers Compensation Act 1951 appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to worker interests.

Disallowable Instrument DI2016-317 being the Workers Compensation (Default Insurance Fund Advisory Committee) Appointment 2016 (No 3) made under Schedule 3, section 3.4 of the Workers Compensation Act 1951 appoints a specified person as a member of the Default Insurance Fund Advisory Committee, with experience, knowledge or expertise in regard to insurer interests.

Disallowable Instrument DI2017-1 being the Health (Fees) Determination 2017 (No 1) made under section 192 of the Health Act 1993 revokes DI2016-284 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-2 being the Official Visitor (Corrections Management) Appointment 2017 (No 1) made under paragraph 10(1)(b) of the Official Visitor Act 2012 appoints a specified person as an official visitor for the purposes of the Corrections Management Act 2007.

Disallowable Instrument DI2017-3 being the Public Place Names (Macquarie) Determination 2017 made under section 3 of the Public Place Names Act 1989 determines the name for a public place in the Division of Macquarie

Disallowable Instrument DI2017-4 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 1) made under paragraph 174(1)(c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2017-5 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 2) made under paragraph 174(1)(c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as non-judicial member of the Sentence Administration Board.
Disallowable Instrument DI2017-6 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 3) made under paragraph 174(1)(c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2017-7 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 4) made under paragraph 174(1)(c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2017-8 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 5) made under paragraph 174(1)(c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2017-9 being the Legal Aid (Commissioner—Bar Association Nominee) Appointment 2017 made under paragraph 16(1)(c)(ii) of the Legal Aid Act 1977 revokes DI2014-202 and appoints a specified person, a nominee of the Council of the ACT Bar Association, as a part-time member of the Board of the Legal Aid Commission.

Disallowable Instrument DI2017-11 being the Public Trustee and Guardian (Investment Board) Appointment 2017 (No 1) made under paragraph 48(1)(b) of the Public Trustee and Guardian Act 1985 appoints a specified person as a member of the Public Trustee and Guardian Investment Board.


DISALLOWABLE INSTRUMENTS—COMMENT

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

WHY ARE THE FEES DETERMINED BY THESE INSTRUMENTS BEING INCREASED?

Disallowable Instrument DI2016-285 being the Public Health (Fees) Determination 2016 (No 1) made under section 137 of the Public Health Act 1997 revokes DI2015-293 and determines fees payable for the purposes of the Act.


Each of the instruments mentioned above determines fees, for the various Acts under which they are made. The first instrument mentioned above increases fees under the Public Health Act 1997 for “the application, renewal and transfer of all licensable or registrable public health risk activities” by 4% (rounded to the nearest dollar). The second instrument increases fees payable under the Health Records (Privacy and Access) Act 1997 by 1.6% (“rounded”). The third instrument increases fees for applications for licences under the Medicines, Poisons and Therapeutic Goods Act 2008 by 4% (rounded to the nearest dollar). The fourth instrument increases fees payable under the Food Act 2001 for “the application, renewal and transfer of food business registrations, as well as for the reinspection of food businesses following service of a prohibition order” by 4% (rounded to the nearest dollar). The fifth instrument increases fees payable under the Radiation Protection Act 2006 by 4% (rounded to the nearest dollar). The sixth instrument provides for fees under the Court Procedures Act 2004, “to reflect the ACT Civil and Administrative Tribunal Act 2008”.

The Committee has traditionally taken a keen interest in fees instruments. In the Committee’s publication 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:

FEES DETERMINATIONS

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the Legislation Act 2001, which provides that a fees determination must provide:

- by whom the fee is payable; and
- to whom the fee is to be paid

The Committee notes that the Explanatory Statements for each of the first five instruments mentioned above identify the “old” fee, the new fee and the percentage of the increase. The Explanatory Statement for the sixth instrument provides no such information (though see further the discussion below).

The Explanatory Statements for the first, second and fifth instruments provide no information as to the reason for the increase.
The Explanatory Statement for the third instrument mentioned above states:

The fees schedule balances the importance of ensuring that fees are not a barrier to accessing health records with the need to ensure service providers receive reasonable reimbursement for the cost of providing access to the health records they hold.

No further information is provided as to the reason for the increases.

The Explanatory Statement for the fourth instrument mentioned above states that they have been increased “in line with ACT Government policy”. No further information is provided as to the reason for the increases (including which policy is relied upon).

The Explanatory Statement for the sixth instrument is a little different. It states:

The purpose of this determination is to reflect the *ACT Civil and Administrative Tribunal Act 2008* increased jurisdiction in civil disputes, which take effect on 15 December 2016. From 15 December 2016, the ACT Civil and Administrative Tribunal’s (ACAT’s) jurisdiction in civil disputes will increase from $10,000 to $25,000. This also means that the jurisdiction of the Magistrates Court in civil matters has changed to those above $25,000.

The ACAT fee structure for instituting proceedings and for filing counter-claims and cross-claims applies different fees for different levels of claim. Prior to the increase in jurisdiction, three different levels of fees applied, for claims where the amount is dispute is less than $2,000, claims where the amount in dispute is greater than $2,000 but less than $10,000, and claims where the amount in dispute is greater than $10,000. In this determination, these categories are amended to differentiate between claims where the amount in dispute is less than $2,000, claims where the amount in dispute is greater than $2,000 but no greater than $25,000, and claims where the amount in dispute is greater than $25,000.

Item 1107 (c) has also been amended to reflect the increase in the lower limit of claims that can be heard in the Magistrates Court. The fee amounts are unchanged.

It is possible that “the fee amounts are unchanged” is intended to refer to all the fees provided for by the instrument, with the further implication that, as a result, it is not necessary to identify or explain any fees increases. However, this is not clear.

The Committee draws these instruments to the attention of the Legislative Assembly, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements associated with the instruments do not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

**Why are the fares determined by these instruments being increased?**

Disallowable Instrument DI2016-293 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2016 made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2015-326 and determines maximum fares payable on regular route services provided by ACTION.
This instrument, made under the *Road Transport (Public Passenger Services) Act 2001*, determines maximum fares payable, by My Way Smart Card and by cash, for ACTION services. It also provides for persons who are exempt from paying fares.


**FEES DETERMINATIONS**

The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the Explanatory Statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (e.g., an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.

The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the Legislation Act 2001, which provides that a fees determination must provide:

- by whom the fee is payable; and
- to whom the fee is to be paid

This approach is equally applicable to instruments that determine fares.

The Explanatory Statement for this instrument states:

MyWay fares have increased by up to 2.7 percent from those fares set in the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2015 (DI2015–326), whilst cash fares have increased up to 4.3 percent. The MyWay off-peak single concession cash fare has increased to 50 percent of the standard fare over a three year period.

A table then sets out the old and new fares. However, no information is provided as to the reason for the fares increases.

The Committee draws this instrument to the attention of the Legislative Assembly, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statements associated with the instruments do not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

**DO THESE INSTRUMENTS DEAL WITH MATTERS MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT OR OTHER MORE SUBSTANTIVE ACTION?**

Disallowable Instrument DI2016-295 being the Firearms (Use of Noise Suppression Devices) Declaration 2016 (No 4) made under section 31 of the *Firearms Act 1996* revokes DI2016-267 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 DI2016-296 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2016 (No 4) made under section 4L of the Prohibited Weapons Act 1996 revokes DI2016-266 and determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.

These instruments revoke and re-make previous instruments that exempt the use of “noise suppression devices” (i.e. silencers) from prohibitions that would otherwise apply under the Firearms Act 1996 and the Prohibited Weapons Act 1996. The instruments are made under section 31 of the Firearms Act and section 4L of the Prohibited Weapons Act, respectively, which provide:

31 Firearms declarations by registrar

(1) The registrar may, in accordance with any guidelines under section 37 (Minister’s guidelines), do any of the following:

(a) declare something to be a firearm or imitation firearm;

(b) declare an unregulated firearm to be a prohibited firearm;

(c) declare that something is not a firearm, imitation firearm or prohibited firearm.

(2) A declaration remains in force for 3 months beginning on the day after the day the declaration is notified under the Legislation Act.

(3) A declaration is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(4) The registrar must give additional public notice of the declaration.

Note Public notice means notice on an ACT government website or in a daily newspaper circulating in the ACT (see Legislation Act, dict, pt 1). The requirement in s (4) is in addition to the requirement for notification on the legislation register as a notifiable instrument.

4L Prohibited articles and weapons declarations by registrar

(1) The registrar may, in accordance with any guidelines under section 4K (Minister’s guidelines), do any of the following:

(a) declare something to be a prohibited article;

(b) declare an unregulated weapon to be a prohibited weapon;

(c) declare that something is not a prohibited article or prohibited weapon.

(2) A declaration remains in force for 3 months beginning on the day after the day the declaration is notified under the Legislation Act.
(3) A declaration is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

(4) The registrar must give additional public notice of the declaration.

*Note* Public notice means notice on an ACT Government website or in a daily newspaper circulating in the ACT (see Legislation Act, dict, pt 1). The requirement in s (4) is in addition to the requirement for notification on the legislation register as a disallowable instrument.

An important thing to note about both provisions is that there is a time-limitation on a declaration made under the provisions. This means that they have to be revoked and re-made every 3 months, if they are to continue to have effect. As the numbering of the instruments suggests, these are the fourth emanation of the relevant exemptions, dating back to DI2016-174 and DI2016-175, both dated 27 June 2016 (and commented on by the Committee in *Scrutiny Report 47* of the Eighth Assembly (8 August 2016), page 19).

Principle (1)(d) of the Committee’s terms of reference requires it to consider whether any instrument of a legislative nature made under an Act that is subject to disallowance and/or disapproval by the Assembly “contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly”. That principle may apply to these instruments. It may be suggested that it is preferable that issues in relation to noise suppression devices be dealt with by an amendment of the relevant Acts (or even by amendment of relevant regulations), rather than by these rolling exemption declarations.

In this context, the Committee notes that both the empowering provisions were inserted into their respective Acts by the *Firearms Amendment Act 2008*. In relation to the provision that was later re-numbered as section 31 of the Firearms Act, the Explanatory Memorandum for the Firearms Amendment Act states that the new provision ...

... will enable the registrar to declare items to be firearms, prohibited firearms or neither. This part will enable the registrar to deal with types of firearms that do not currently fall within the descriptions contained in the Act. A declaration will classify a firearm as prohibited or not, and give the Executive an opportunity to give the declaration legislative effect. A declaration that the item is neither a firearm nor prohibited firearm would have the legal effect that the item would not be subject to the Act.

The registrar may make a prohibited firearms declaration pursuant to section 5(1)(b) [now section 31(1)(b)].

Section 5 [now section 31] deals with the types of declaration the registrar may make and the form of the declaration. According to subsection (1) the registrar may make 4 types of declaration [sic]:

- declare an item to be a firearm;
- declare an item to be a prohibited firearm;
- declare that an item is not a firearm or prohibited firearm.
A declaration made under this section, by disallowable instrument, will be valid for 3 months. The registrar will also be required to publish a declaration made under this section in the Canberra Times so that the community is made aware of the item and its classification under the Act.

The ability for the registrar to make declarations that an item is a firearm or prohibited firearm augments the existing powers of the Executive to permanently declare something to be a firearm to which a category of licence applies (section 17 [now section 52] of the Act) or to permanently prescribe a prohibited firearm by regulation (clause 8, new section 4AB [now section 7]).

In relation to the insertion of section 4L into the Prohibited Weapons Act, the Explanatory Memorandum for the Firearms Amendment Act states that the new provision ....

... will enable the registrar to declare items to be prohibited articles, prohibited weapons or neither. This part will enable the registrar to deal with types of weapons that do not currently fall within the descriptions contained in the Act. A declaration will classify a weapon as prohibited or not, and give the Executive an opportunity to give the declaration legislative effect. A declaration that the item is neither a firearm nor a prohibited firearm would have the legal effect that the item would not be subject to the Act.

The registrar may make a prohibited weapon declaration pursuant to section 4L(1)(b).

Section 4L deals with the types of declaration the registrar may make and the form of the declaration. According to subsection (1) the registrar may make 3 types of declaration:

- declare an item to be a prohibited article;
- declare an item to be a prohibited weapon; or
- declare that an item is not a prohibited article or prohibited weapon.

A declaration made under this section, by disallowable instrument, will be valid for 3 months. The registrar will also be required to publish a declaration made under this section in the Canberra Times so that the community is made aware of the item and its classification under the Act.

The discussion in relation to the insertion of what is now section 31 of the Firearms Act suggests that, certainly in relation to the prohibition of firearms, it is contemplated that exemption declarations are intended to be a temporary alternative, pending a more permanent solution being found. In any event, the Committee seeks the Minister’s views as to whether or not a more substantive solution is being considered to issues arising from the use of noise suppression devices, in the circumstances dealt with by these instruments.

The Committee draws these instruments to the attention of the Legislative Assembly, under principle (1)(d) of the Committee’s terms of reference, on the basis that they may contain that should properly be dealt with in an Act of the Legislative Assembly.

This comment requires a response from the Minister.
RETROSPECTIVE OPERATION OF INSTRUMENT

Disallowable Instrument DI2016-298 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2016 (No 2) made under subsections 5(3) and 17(4) of the Legislative Assembly (Members' Staff) Act 1989 revokes DI2016-112 and determines conditions under which the Speaker may employ staff and engage consultants or contractors, including the salary allocation for the 2016-2017 financial year.

The Committee notes that this instrument (which was made on 12 December 2016) is taken to have commenced on 1 July 2016 (see section 2). This means that the instrument has a retrospective operation. However, the Explanatory Statement for the instrument states:

The determination is dated to operate from 1 July 2016 and is non-prejudicial as the allocation represents an increase on the allocation provided under DI2016-112. The increase is the result of an error in the calculation advised to the Speaker for the employment of staff by the Office of the Legislative Assembly, and the subsequent engagement, in good faith, of staff from 14 November 2016 based on that advice.

The Committee notes that the above statement addresses the issue that would otherwise arise under subsection 76(2) of the Legislation Act 2001, which prohibits the retrospective operation of “prejudicial” provisions (defined in subsection 76(4) as provisions that operate to the disadvantage of a person - other than the Territory or a territory authority or instrumentality - by (a) adversely affecting the person’s rights or (b) imposing liabilities on the person).

This comment does not require a response from the Minister.

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


Each of the two instruments mentioned above (referred to below as “the first instrument” and “the second instrument” respectively) approve a code of practice, under section 25 of the Energy Efficiency (Cost of Living) Improvement Act 2012. Each of the instruments revokes and re-makes an existing instrument – DI2016-195 and DI2016-196, respectively. The earlier instruments are both dated 25 July 2016 and were commented on in the Committee’s Scrutiny Report 1 of the Ninth Assembly (14 December 2016), at page 4. The Committee has not received any response to its comments on the earlier instruments.

As the Committee observed in relation to the previous instruments, section 4 of each of the instruments disapplies subsections 47(5) and (6) of the Legislation Act 2001 in relation to any instrument that is applied, adopted or incorporated by the codes of practice. The effect of subsection 47(5) is to make any law of another jurisdiction, or an instrument, that is applied by a subordinate law or by a disallowable instrument, as in force from time to time (ie rather than as it
exists at the time that the subordinate law or disallowable instrument in instrument), is a “notifiable instrument”. The effect of subsection 47(6) is to make any amendments or revisions of such (external) instruments, etc also notifiable instruments.

The effect of making an instrument a “notifiable instrument” is to require that it be published on the ACT Legislation Register. Publication of such material operates to enhance public access to the external material on which legislation sometimes relies. Disapplication of the publication requirement, obviously, limits public access to that material. 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).

In the case of these instruments, the Committee notes that, in each case, the Explanatory Statement for the instrument simply states:

**Section 4 – Disapplication of Legislation Act, s47(5) and 47(6)**

This section allows the code of practice to apply, incorporate or adopt an instrument without the instrument having to be notified.

The Explanatory Statement for the first instrument then states:

**Section 5 – Referenced documents**

This section contains information about documents which the code of practice refers to. Links to the relevant references [sic] documents are also provided.

The Explanatory Statement for the second instrument has a slightly different statement:

**Section 5 – Referenced documents**

This section contains information about documents to which the code of practice refers and includes links to access those documents.

Section 5 of the first instrument states:

5 Referenced documents


(2) A copy of the National Construction Code, which incorporates the Building Code of Australia and the Plumbing Code of Australia, is available for inspection by members of the public between 9am and 4.30pm on business days at the Access Canberra shopfront, Dame Pattie Menzies House, 16 Challis Street, Dickson or for purchase at [www.abcb.gov.au](http://www.abcb.gov.au).
Section 5 of the second instrument states:

5 Referenced documents

(1) Australian Standards are available for purchase at www.standards.org.au.

(2) A copy of the Building Code of Australia is available for inspection by members of the public between 9am and 4.30pm on business days at the Access Canberra shopfront, Dame Pattie Menzies House, 16 Challis Street, Dickson, or for purchase at www.abcb.gov.au.

The Committee notes the difference in wording between the 2 provisions above and, in particular, the addition of “available for purchase” in subsection 5(1) of the second instrument. The Committee also noted this difference in the earlier instruments.

Section 25 of the first instrument refers to “Australian Standard ISO 10002-2006”. As the Committee observed in its Scrutiny Report 1 of the Ninth Assembly, a search of the Standards Australia website (which re-directs the search to the SAI Global website https://infostore.saiglobal.com/) reveals “no results” for such a standard.

Paragraph 54(2)(d) of the first instrument refers to “AS/NZS 5601”, an Australian Standard / New Zealand Standard. The Standards Australia website advises that Australian Standards are available for purchase from Australian Standards “are sold and distributed worldwide by SAI Global Limited”. AS/NZS 5601 is available for purchase from SAI Global for $1,252.01 (including GST) (see https://infostore.saiglobal.com/en-au/Standards/Plumbing-and-Gas-Set-2016-1845071/).


Paragraph 149(6)(d) of the first instrument refers to “AS 2293”, an Australian Standard. That standard is available from SAI Global at no cost.

As the Committee also observed in Scrutiny Report 1 of the Ninth Assembly, the Dictionary to the first instrument indicates that a total of 17 standards are relied upon by the instrument. Without researching the cost (if any) of each of the standards, it is relatively clear that some considerable expense would be involved in gaining access to all of the extrinsic material on which the instrument relies.

As the Committee also observed in Scrutiny Report 1 of the Ninth Assembly, the Dictionary to the second instrument refers to a total of 12 standards that are relied upon by that instrument. Again, without researching the cost (if any) of each of the standards, it is relatively clear that some considerable expense would be involved in gaining access to all of the extrinsic material on which the second instrument relies.

This being the case, the Committee considers that there should have been greater justification for the disapplication of subsections 47(5) and (6) of the Legislation Act to these instruments. In addition, the Committee queries why (free) public access to the various standards relied upon could not have been provided, in the way that subsection 5(2) of each of the instruments provides access to the National Construction Code, the Building Code of Australia and the Plumbing Code of Australia, at the Access Canberra shopfront.
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.

This comment requires a response from the Minister.

**POSITIVE COMMENT**

Disallowable Instrument DI2017-10 being the Road Transport (Public Passenger Services) Maximum Taxi Fares for NSW Taxis in ACT Region Determination 2017 made under section 60 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2016-198 and determines maximum fares for the hiring or use of a NSW-licensed taxi operating within the ACT region.

The Committee notes that this instrument revokes and re-makes DI2016-198, which the Committee commented on in Scrutiny Report 1 of the Ninth Assembly (14 December 2016), at page 6. The Committee notes with approval that the revoking and re-making is in accordance with the response from the Minister for Climate Change and Sustainability, Justice and Community Affairs, Corrections and Mental Health, dated 23 January 2017.

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 comments on them:

Subordinate Law SL2016-33 being the Court Procedures Amendment Rules 2016 (No 3) made under section 7 of the *Court Procedures Act 2004* amends the Court Procedures Rules.

Subordinate Law SL2016-35 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2016 (No 3) made under the *Road Transport (Safety and Traffic Management) Act 1999* amends the Road Transport (Safety and Traffic Management) Regulation to approve a new digital camera detection device (VITRONIC PoliScan FM1) for the purposes of the Act.

Subordinate Law SL2016-36 being the Construction Occupations (Licensing) Amendment Regulation 2016 (No 1) made under the *Construction Occupations (Licensing) Act 2004* amends the Construction Occupations (Licensing) Regulation to allow an applicant for an owner-builder licence, who has previously held a licence in relation to a premises that has been acquired under a buyback scheme for either an affected residential premises under the Dangerous Substances Act or a eligible residential premises under the Civil Law (Sale of Residential Property) Act, to be eligible for a licence for a different premises within a five year period.

**SUBORDINATE LAW—COMMENT**

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

Human Rights Issues

Subordinate Law SL2016-34 being the Boxing Control Regulation 2016 made under the *Boxing Control Act 1993* exempts persons associated with the World Fight Australia event from the application of the provisions of the Act.
This subordinate law was made on 14 December 2016, under the *Boxing Control Act 1993*, relying on the power in subsection 22(2) to make regulations exempting “people” from the effect of the Boxing Control Act. The effect of this subordinate law is to provide an exemption from the operation of the Boxing Control Act to a “World Fight Event”, involving the “combat sport” muay thai, that was held on 17 December 2016, at the Australian Institute of Sport arena, Bruce.

The Explanatory Statement for the instrument states:

> In order to provide procedural fairness, the Boxing Control Regulation 2016 (the Regulation) exempts persons associated with the World Fight Australia event on 17 December 2016 from the application of the Act, subject to conditions.

The conditions included in the Regulation provide for minimum safety standards. Prior to the event, the promoter must provide evidence demonstrating the experience and capacity of the promoter and other participants; insurance provisions; statements of fitness for contestants (including serological clearances); accreditation for timekeepers, judges and referees; the engagement of doctor/s; the rules of the contest; and the sanctioning body for the event.

The exemption provided under the Regulation will be limited to the single specified event, and will not have wider application.

It is not immediately clear how “procedural fairness” is relevant to the subordinate law.

The Explanatory Statement addresses human rights issues engaged by the subordinate law, noting that the right to privacy and reputation and the right to protection against discrimination are engaged. The Committee notes that, after discussing those issues, the Explanatory Statement states:

> On balance, the Regulation is considered reasonable and proportionate given that without the exemption made possible by the Act, the event could not proceed as scheduled without significant risk to the promoter and participants that they may be committing offences. The conditions strike a balance between meeting minimum safety standards while recognising the burden that full compliance would impose on the promoter at this late stage.

The Committee draws the attention of the Legislative Assembly to the above statement (and the discussion of human rights issues that precedes it).

This comment does not require a response from the Minister.

**National Laws—Comment**

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

**Positive Comment**

*Education and Care Services National Amendment Regulations 2017 (2016 No 810) made under sections 301 and 324 of the Education and Care Services National Law, as applied by the law of the States and Territories.*

The Committee notes with approval that this National Regulation is accompanied by a detailed and informative Explanatory Statement

This comment does not require a response from the Minister.

The Committee notes that this National Regulation is not accompanied by an Explanatory Statement. It was tabled in the Legislative Assembly on 14 February 2017. It is dated 10 October 2016. There is no commencement provision in the National Regulation. While there was no Explanatory Statement, the Committee notes that there was a tabling statement provided in relation to the National Regulation.

The Committee notes that the formal part of the National Regulation indicates that it is made under section 245 of the Health Practitioner National Law, “as applied by the States and Territories”. For the ACT, this application has occurred through the Health Practitioner Regulation National Law (ACT) Act 2010, section 6 of which provides:

6 Application of Health Practitioner Regulation National Law

The Health Practitioner Regulation National Law, as in force from time to time, set out in the schedule to the Qld Act—

(a) applies as a territory law, as modified by schedule 1; and

(b) as so applying may be referred to as the Health Practitioner Regulation National Law (ACT); and

(c) so applies as if it were a part of this Act.

“Qld Act” is defined in the Dictionary to the Health Practitioner Regulation National Law (ACT) Act as the Health Practitioner Regulation National Law Act 2009 (Qld).

The effect of this National Regulation is to amend section 29 of the Health Practitioner National Regulation which, prior to the amendment, provided:

29 Transition period in relation to professional indemnity insurance arrangement for midwives practising private midwifery

For the purposes of section 284(3)(b) of the Law, the transition period ends on 31 December 2016.

The amendment made by this National Regulation omits “2016” and inserts “2019”. The effect of the amendment is to extend the “transition period” provided for by section 284 of the Health Practitioner Regulation National Law Act 2009 (Qld), as applied to the ACT by the Health Practitioner Regulation National Law (ACT) Act. Section 284 provides:

284 Exemption from requirement for professional indemnity insurance arrangements for midwives practising private midwifery

(1) During the transition period, a midwife does not contravene section 129(1) merely because the midwife practises private midwifery if—
(a) the practise occurs in a participating jurisdiction in which, immediately before
the participation day for that jurisdiction, a person was not prohibited from
attending homebirths in the course of practising midwifery unless professional
indemnity insurance arrangements were in place; and

(b) informed consent has been given by the woman in relation to whom the
midwife is practising private midwifery; and

(c) the midwife complies with any requirements set out in a code or guideline
approved by the National Board under section 39 about the practise of private
midwifery, including—

(i) any requirement in a code or guideline about reports to be provided by
midwives practising private midwifery; and

(ii) any requirement in a code or guideline relating to the safety and quality
of the practise of private midwifery.

(2) A midwife who practises private midwifery under this section is not required to
include in an annual statement under section 109 a declaration required by
subsection (1)(a)(iv) and (v) of that section in relation to the midwife’s practise of
private midwifery during a period of registration that is within the transition period.

(3) For the purposes of this section, the transition period—

(a) starts on 1 July 2010; and

(b) ends on the prescribed day.

(4) If the National Board decides appropriate professional indemnity arrangements are
available in relation to the practice of private midwifery, the Board may recommend
to the Ministerial Council that the transition period, and the exemption provided by
this section during the transition period, should end.

(5) In this section—

homebirth means a birth in which the mother gives birth at her own home or
another person’s home.

informed consent means written consent given by a woman after she has been
given a written statement by a midwife that includes—

(a) a statement that appropriate professional indemnity insurance arrangements
will not be in force in relation to the midwife’s practise of private midwifery;
and

(b) any other information required by the National Board.

midwife means a person whose name is included in the Register of Midwives kept
by the National Board.

National Board means the Nursing and Midwifery Board of Australia.

private midwifery means practising the nursing and midwifery profession—

(a) in the course of attending a homebirth; and

(b) without appropriate professional indemnity insurance arrangements being in
force in relation to that practise; and

(c) other than as an employee of an entity.

transition period means the period referred to in subsection (3).
While (as the Committee has noted above) there is no Explanatory Statement for the National Regulation that is the subject of this comment, the Committee notes that the tabling statement made in connection with the tabling of this National Regulation states that the effect of the amendment made by this National Regulation is “to extend the current exemption for privately practising midwives providing homebirth services for a period of 3 years to 31 December 2019”. The tabling statement also advises that:

- the National Regulation was published in the Victorian Government Gazette, by the Victorian Government Printer, in accordance with subsection 245(3) of the *Health Practitioner Regulation National Law Act 2009* (Qld), on 11 October 2016; and

- the National Regulation was tabled in the Queensland Parliament on 4 November 2016.

This information is relevant because section 246 of the *Health Practitioner Regulation National Law Act 2009* (Qld) provides (in part):

246 Parliamentary scrutiny of national regulations

(1) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction—

(a) in the same way that a regulation made under an Act of that jurisdiction may be disallowed; and

(b) as if the regulation had been tabled in the House on the first sitting day after the regulation was published by the Victorian Government Printer.

This means that the tabling requirements and the disallowance mechanism provided for by sections 64 and 65 of the *Legislation Act 2001*, respectively, operate by reference to the date that this National Regulation was published in the Victorian Government Gazette. If this National Regulation was published on 11 October 2016, it was deemed to have been tabled in the Legislative Assembly on the first sitting day after that date – 31 October 2016. The 6 sitting days within which, under subsection 65(1) of the *Legislation Act 2001*, a disallowance motion could have been moved started running from that date. There were 3 sitting days in December 2016 and 3 sitting days in February 2017, including 14 February, when the National Regulation was tabled.

This means that the disallowance period has expired and the capacity of the Legislative Assembly to exercise its scrutiny jurisdiction (with the advice of the Committee) over the National Regulation is spent. This is a significant concern, for the Committee and for the Legislative Assembly. Neither the Committee nor the Legislative Assembly can be expected to monitor the publications of the Victorian Government Printer, to monitor when National Regulations such as this one have been published, in order to work out when disallowance periods start to run. The Committee and the Legislative Assembly rely on Ministers tabling National Regulations such as this, to bring them to their attention. No explanation has been provided as to why this National Regulation was not tabled in the Legislative Assembly as soon as possible after it was published by the Victorian Government Printer, to give the Committee (and the Legislative Assembly) as much time as possible to scrutinise the National Regulation.

Except as specifically identified above, none of the background information set out above has been provided to the Legislative Assembly.
As the Committee noted at the outset, there is no Explanatory Statement for this National Regulation. While the Committee has always accepted that there is no formal, legal requirement that an Explanatory Statement be provided in relation to subordinate legislation, the Committee has always maintained that it is important that an Explanatory statement nevertheless be provided.


Principle (b) of the Committee’s terms of reference [now principle (2)] requires it to “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”. Many of the issues identified below involve things that the Committee considers ought to be addressed in the Explanatory Statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.

A further point is that addressing potential issues expressly in Explanatory Statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee’s comments. Often, the explanation is something that could have been included in the Explanatory Statement for a piece of subordinate legislation. It may involve no more than a sentence (eg “this is not a public servant appointment”, this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee’s comments.

One of the issues with this National Regulation is its commencement. The Committee notes that subsection 245(4) of the *Health Practitioner Regulation National Law Act 2009* (Qld) provides:

(4) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

As the Committee has already noted above, no commencement date is specified in this National Regulation. That being so, it is not clear to the Committee whether or not this National Law is intended to have a commencement that would be retrospective.

In the absence of the sort of information that might be provided in, say, an Explanatory Statement, the Committee (and the Legislative Assembly) has no information on which to judge whether this National Law might raise issues under subsection 76(2) of the *Legislation Act* 2001, in relation to the prohibition on prejudicial retrospectivity. This, in turn, goes to principle (1)(b) of the Committee’s terms of reference, which requires the Committee to 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) “unduly trespasses on rights previously established by law”. Retrospective operation of laws, with prejudicial effect on persons other than the Territory, falls squarely within that term of reference.
The Committee also notes that, as it has previously observed (including as recently as Scrutiny Report 42 of the Eighth Assembly, at page 12), a necessary consequence of the failure to provide the sort of information set out above in an explanatory statement or in a tabling statement in relation to National Regulations denies the Legislative Assembly (and the Committee) important information. As the Committee has consistently observed, the operation of National Regulations are invariably complicated. In the particular (complicated) circumstances of these National Regulations, the Committee (and the Legislative Assembly) would have been greatly assisted by an explanation such as that set out above, rather than the Committee (and the Legislative Assembly) having to work out the mechanics of the operation (and the mechanisms for presentation and disallowance) of these National Regulations for itself.

The Committee draws the Legislative Assembly’s attention to this National Regulation, under principle (2) of the Committee’s terms of reference, on the basis that (in this case) the absence of an explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

The Committee requests that the Minister advise why this National Law was not tabled in the Legislative Assembly on the first sitting day of the Legislative Assembly following its publication by the Victorian Government Printer, to give the Legislative Assembly (and the Committee) as much time as possible to scrutinise the National Regulation, within the period during which it could have been disallowed by the Legislative Assembly.

The Committee requests that the Minister provide the Legislative Assembly with an Explanatory Statement for this National Regulation.

This comment requires a response from the Minister.

REGULATORY IMPACT STATEMENTS—NO COMMENT

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


Disallowable Instrument DI2016-312 being the Pest Plants and Animals (Pest Animals) Declaration 2016 (No 1) made under section 16 of the Pest Plants and Animals Act 2005 revokes DI2005-255 and determines specified animals to be pest animals.

Disallowable Instrument DI2016-313 being the Animal Diseases (Import Restriction) Declaration 2016, including a regulatory impact statement made under section 15 of the Animal Diseases Act 2005 declares a specified area to be an import restriction area in response to an outbreak of whitespot disease in four prawn farms.
GOVERNMENT RESPONSE


Giulia Jones MLA
Chair

14 March 2016
# OUTSTANDING RESPONSES

## Bills/Subordinate Legislation

### Report 1, dated 14 December 2016


### Report 2, dated 7 February 2017

Commercial Arbitration Bill 2016

Subordinate Law SL2016-23—Discrimination Regulation 2016