

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

SCRUTINY REPORT 9

5 SEPTEMBER 2017

COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)

Ms Bec Cody MLA (Deputy Chair)

Ms Elizabeth Lee MLA

Mr Chris Steel MLA

SECRETARIAT

Mr Max Kiermaier (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

Mr Daniel Stewart (Legal Adviser—Bills)

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) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

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BILLS

BILLS—NO COMMENT

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

CRIMES (FOOD OR DRINK SPIKING) AMENDMENT BILL 2017

This Bill amends the *Crimes Act 1900* to create offences relating to providing intoxicating substances. It will be an offence punishable by up to 500 penalty units or five years imprisonment to give a person food or drink containing an intoxicating substance, or more of an intoxicating substance, where the person was not aware of the substance and there is an intention to cause harm by giving the person the food or drink. Harm includes an impairment of the senses or understanding that the person might reasonably be expected to object to in the circumstances. It is a defence to provide the intoxicating substance in the course of practicing a health profession.

HOLIDAYS (RECONCILIATION DAY) AMENDMENT BILL 2017

This Bill amends the *Holidays Act 1958* to remove the Family and Community Day as a public holiday in the ACT and provide that 27 May (or, if the 27 May is not a Monday, the following Monday) is a Reconciliation Day public holiday in the ACT.

TREE PROTECTION AMENDMENT BILL 2017

This Bill amends the *Tree Protection Act 2005* to provide for cancellation of registration of a tree where the conservator is satisfied, on reasonable grounds, that a registered tree has died of natural causes. It also will enable merits review to be sought in the ACT Civil and Administrative Tribunal for decisions relating to approval or cancellation of registration of a tree.

BILLS—COMMENT

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

CASINO (ELECTRONIC GAMING) BILL 2017

This Bill will regulate how the casino operator will acquire authorisations to operate gaming machines (including fully automated table games (FATG)) and the conditions of their operation, including various measures intended to reduce the harms associated with gambling. The Bill will also amend the *Gambling and Control Act 1999* to limit the number of gaming machine authorisations the casino can hold to a maximum of 200, and FATG authorisations to 60.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (S 12 HRA)

Part 7 of the Bill will institute a pre-commitment system, requiring the casino operator to require a person playing casino gaming machines to set a limit on their net loss and, if the player wants to, how long they can play for. Those limits will then apply for 24 hours, or for a period prescribed by the regulations or a longer period nominated by the player. The player can make changes only to lower the

limits during that period. As this pre-commitment system requires the collection of information about the player to be collected it engages the right to privacy protected by s 12 of the HRA.

The explanatory statement accompanying the Bill sets out an analysis of whether Part 7 of the Bill acts as a reasonable limit on the right to privacy using the framework set out in s 28 of the HRA, and the Committee refers the Assembly to that analysis. In particular, the Committee notes that use or disclosure of pre-commitment information is expressly limited under proposed s 34, breach of which is a strict liability offence. Regulations will also provide for the approval and operation of any pre-commitment system by the gambling and racing commission, as well as the collection and secure storage of any pre-commitment information. The gambling and racing commission is able to investigate complaints relating to use or collection of personal information, subject to secrecy provisions set out in Division 4.4 of the *Gambling and Racing Control Act 1999*.

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (S 22 HRA)

The Bill provides for the introduction of a number of strict liability offences. Strict liability offences engage the right to the presumption of innocence provided for in s 22 of the HRA. The explanatory statement accompanying the Bill sets out a justification for the adoption of a strict liability offence using the framework set out in s 28 of the HRA and the Committee draws this analysis to the attention of the Assembly.

In particular, the Committee notes that all but one of the strict liability offences are imposed on the casino licensee which is a corporate entity. The licensee operates in a highly regulated industry and can reasonably be expected to understand their legal requirements. The Bill and explanatory statement make it clear that various defences set out in the Criminal Code are available, including mistake of fact and an intervening conduct or event. Several of the offences also include an express defence relating to the taking of reasonable steps.¹

Section 34 of the proposed Act provides for strict liability for offences relating to the collection and use of information provided by a player as part of the pre-commitment system. The explanatory statement justifies the use of strict liability “given the privacy implications of an improper use or disclosure of information held within the [pre-commitment system]”. The Committee acknowledges the importance of protecting the privacy of persons using the pre-commitment system, particularly where that system is compulsory. However, it may not be clear in all cases that the information in question will have been obtained through use of the pre-commitment system. A person may therefore be strictly liable in circumstances where they may not know or should have known that there may be restrictions on its further disclosure. Further justification for the imposition of strict liability, and the operation of the various defences available, should therefore have been provided.

The Committee also notes that several offences have a maximum penalty of 100 penalty units.² As set out in the *Guide to Framing Offences*,³ strict liability offences are generally limited to a maximum penalty of 50 penalty units. The explanatory statement states that it “was considered necessary and

¹ See ss 26(7) (Acquiring casino gaming machine under authorisation); and 33(2) and (4) (offences in relation to the pre-commitment system).

² See ss 18 (acquiring authorisations), 26 (Acquiring casino gaming machine under authorisation); 27 (operating etc casino gaming machines without casino gaming machine authorisation); 29 (operating etc casino FATG terminals without casino FATG terminal authorisation); and 33 (offences in relation to the pre-commitment system).

³ Justice and Community Safety Directorate, *Guide to Framing Offences* (available at http://www.justice.act.gov.au/resources/attachments/report_GuideforFramingOffences_LPB_2010.pdf).

appropriate to provide a higher penalty for some offences and this aligns with the strong compliance regime provided by the existing gaming legislation.” The Committee considers that further explanation should be provided in relation to the particular offences in question, such that the Assembly is able to understand the need both for the application of strict liability in relation to what is considered a serious offence and the extent of the penalty imposed.

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

Do any provisions of the Bill inappropriately delegate legislative powers?—Committee terms of reference paragraph 3(d)

CREATION OF OFFENCES BY REGULATION

Section 54 of the Bill will authorise regulations which create offences for contraventions of the regulations with maximum penalties of not more than 30 penalty units. The Justice and Community Safety Directorate’s *Guide to Framing Offences* suggests that a penalty of 30 penalty units be available in subordinate instruments in only exceptional cases.⁴ The Committee is concerned that no explanation has been provided for why offences can be created in any context in which regulations might be made under the proposed Act, and why it is appropriate for penalties of up to 30 penalty units to be applied.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

MONITORING OF PLACES OF DETENTION (OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE) BILL 2017

This Bill will create arrangements for the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the subcommittee) to conduct periodic visits to places of detention.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO PRIVACY AND REPUTATION (S 12 HRA)

Various clauses of the Bill will provide for access being provided to information. Clauses 11 and 12 require the Minister and detaining authority ensure that the subcommittee and accompanying experts and assistants are given unrestricted access to places of detention for the purpose of exercising their functions, subject only to limited grounds of objection. Clause 13 provides for the subcommittee to access “all relevant information that is requested by the subcommittee”, including any record under the control of, or reasonably required by, the responsible Minister or detaining authority. Clause 14 provides for reasonable assistance to be given to the subcommittee to interview persons. These clauses therefore engage the right to privacy protected under s 12 of the HRA.

⁴ Justice and Community Safety Directorate, *Guide to Framing Offences* (available at http://www.justice.act.gov.au/resources/attachments/report_GuideforFramingOffences_LPB_2010.pdf), at p 29.

As the explanatory statement recognises, “the right to privacy is relative and may be limited to the extent necessary, reasonable and proportionate to achieve a demonstrated and justifiable purpose.”⁵ The explanatory statement provides an analysis of why the clauses in the Bill, if enacted, would satisfy these requirements in limiting the right to privacy. While the explanatory statement does not expressly adopt the framework in s 28 of the HRA, the explanatory statement includes provision for each of the elements of that framework, and the Committee refers the Assembly to that analysis.

In particular, the Committee notes that provision in clause 13 for the subcommittee to access information “does not include the right to inspect any record that is personal information of a detainee, under an ACT privacy law, unless the detainee consents to the inspection.” Similarly, the ability to interview persons does not require “a person who objects or does not consent to being interviewed by the subcommittee to participate in an interview.” An ACT privacy law is defined as the *Health Records (Privacy and Access) Act 1997* or the *Information Privacy Act 2014*.

The Committee also notes that the protection against civil or criminal liability for providing information to the subcommittee in clause 15 does not extend to information protected by an ACT privacy law. However, clause 16, which prevents reprisals being taken against a person because that person provided, or is believed to have provided, information to the subcommittee, is not so limited. There may be a range of legitimate reprisals that may arise from breach of ACT privacy laws, including prejudice in employment and disciplinary proceedings. While it is possible that clause 16 will be interpreted, if enacted, as not protecting what were intended to be unlawful disclosures to the subcommittee, this should be made clear in the drafting of the provision or noted in the explanatory statement. If it is intended that clause 16 act to deny any detriment flowing from breaches of ACT privacy laws, then this should be justified in the explanatory statement as a limit on the right to privacy.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

PURPORTED RESTRICTION ON LEGISLATIVE POWER OF THE LEGISLATIVE ASSEMBLY

A previous version of this Bill was presented to the 8th Assembly.⁶ In commenting on that Bill, this Committee as then composed commented on provisions which would have to be read down to avoid invalidly restricting the legislative power of the Assembly.⁷ Those provisions are replicated in this Bill (Clauses 8, 13(5) and 15(2)).

The Committee recommended that the explanatory statement include a statement to the following effect:

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

⁵ See explanatory statement at p.3

⁶ *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013*

⁷ See *Scrutiny Report 5* of the 8th Assembly, 2013 at 4-5. See also the comment on government response, *Scrutiny Report 8* of the 8th Assembly, 2013 at 17-18.

While it can be difficult to avoid questions of inconsistency arising between statutes, the Committee considers it useful for explanatory statements to make it clear that provisions such as those referred to above do not act to restrict future legislative amendment.

The Committee also notes that the explanatory statement refers to the purpose of clause 8 as to “ensure that the [role of the subcommittee] is not limited by Territory laws that are inconsistent with the Act, except those that protect an individual’s right to privacy”. The Committee notes that clause 8 refers to ACT privacy laws rather than protection of an individual’s right to privacy generally and that this should be accurately reflected in the explanatory statement.

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

PLANNING AND DEVELOPMENT AMENDMENT BILL 2017

This Bill will amend the *Planning and Development Act 2007* by requiring development approval for new and some ongoing storage of dangerous substances, provides for development approval on contaminated sites to proceed based on an environmental significance opinion provided by the planning and land authority rather than a more onerous environmental impact assessment, and requires draft Territory Plan variations to be referred to the planning committee of the Assembly.

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

Report under section 38 of the *Human Rights Act 2004* (HRA)

RIGHT TO LIFE (S 9 HRA)

The Bill proposes to make it easier to develop contaminated land and therefore potentially engages the right to life protected under s 9 of the HRA. The explanatory statement, while not expressly referring to the framework provided by s 28 of the HRA, engages with the substance of that framework in justifying any limitation on the right to life and the Committee refers the Assembly to that analysis.

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

RIGHT TO TAKE PART IN PUBLIC LIFE (S 17) AND RIGHT TO A FAIR TRIAL (S 21 HRA)

The amendments proposed in the Bill in relation to contaminated sites means that, where an environmental significance opinion is provided, the current opportunity for the public to comment on an environmental impact statement will no longer be available. This reduction in the opportunity for public comment engages the right to take part in public life protected by s 17 of the HRA and, to the extent the public notice and comment requirements relating to an environmental impact statement satisfy procedural fairness requirements, the right to a fair trial in s 21 of the HRA.

The explanatory statement, while not expressly referring to the framework provided by s 28 of the HRA, engages with the substance of that framework in justifying any limitation on the rights to take part in public life and to a fair trial and the Committee refers the Assembly to that analysis.

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

STATUTE LAW AMENDMENT BILL 2017

This Bill makes minor or technical and non-controversial amendments to various Acts and regulations.

Do any provisions of the Bill insufficiently subject the exercise of legislative power to parliamentary scrutiny – Committee terms of reference paragraph (3)(e)

DISPLACEMENT OF S 47(6) OF THE LEGISLATION ACT 2001

The Bill will amend the *Residential Tenancies Act 1997* in relation to the installation of smoke alarms. Currently, the Residential Tenancies Act provides that a residential tenancy agreement can't be entered into unless smoke alarms are installed in the premises and the installation complies with a particular part of the building code. The Bill will replace this provision with a requirement that smoke alarms and the installation of smoke alarms comply with the requirements prescribed by regulation (clause 1.4). Regulations made for this purpose are expressly authorised to apply, adopt or incorporate a law or instrument as in force from time to time.

The Bill also inserts regulation 1B into the *Residential Tenancies Regulation 1998* to require smoke alarms installed at premises subject to a residential tenancy agreement to, among other things, comply with AS 3786 (where AS 3786 is defined as "Australian Standard 3786 *Smoke alarms using scattered light, transmitted light or ionization* as in force from time to time"). Regulation 1C is also inserted in the following terms:

1C Disapplication of Legislation Act, s 47 (6)

- (1) The Legislation Act, section 47 (6) does not apply to AS 3786 under section 1B.
- (2) However, the director-general must make a copy of AS 3786 available for inspection by members of the public during ordinary business hours at a place decided by the director-general.

This displacement of s 47(6) is permitted under s 47(7) of the *Legislation Act 2001*. The effect of displacing s 47(6) in the new regulation 1C will be that AS 3786 and any amendments made from time to time do not have to be made available on the ACT legislation register as a notifiable instrument. The explanatory statement provides this justification for the displacement of s 47(6):

This is because the incorporated standards are subject to copyright and may be purchased over the Internet. In addition, the regulation provides that a copy of the standard must be made available for inspection by members of the public by the director-general.

An explanatory note to the clause in question (clause 1.8) is expressed in similar terms.

As discussed in more detail below in commenting on Disallowable Instrument DI2017-165,⁸ the issue of access to material incorporated into the law by reference to external documents, such as AS/NZS and international standards, is an issue of ongoing concern to this Committee. The Committee notes with approval that in this instance a justification has been provided for why s 47(6) is being displaced, and that provision has been made in the regulation for free access to the incorporated material. The Committee commends this approach to the other Ministers and agencies.

⁸ See comment below at pp [8-10]

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

SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2017-188 being the Animal Diseases (Import Restriction) Declaration 2017, 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 farmed prawns.

Disallowable Instrument DI2017-190 being the Land Titles (Fees) Determination 2017 (No 2) made under section 139 of the *Land Titles Act 1925* revokes DI2017-85 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2017-191 being the Traders (Licensing) (Fees) Determination 2017 made under section 52 of the *Traders (Licensing) Act 2016* determines fees for the purposes of the Act and replaces the fees determinations made under the *Fair Trading (Motor Vehicle Repair Industry) Act 2010*, *Pawnbrokers Act 1902*, *Sale of Motor Vehicles Act 1977* and *Second-hand Dealers Act 1906*, for the purpose of issuing and renewing licences.

Disallowable Instrument DI2017-192 being the Sale of Motor Vehicles (Fees) Revocation 2017 made under section 91 of the *Sale of Motor Vehicles Act 1977* revokes DI2017-77.

Disallowable Instrument DI2017-194 being the Electoral Commission (Acting Electoral Commissioner) Appointment 2017 (No 1) made under section 12 of the *Electoral Act 1992* appoints a specified person as Acting Electoral Commissioner of the ACT Electoral Commission.

Disallowable Instrument DI2017-195 being the Public Place Names (Taylor) Determination 2017 (No 2) made under section 3 of the *Public Place Names Act 1989* determines the names of five roads for the Division of Taylor.

Disallowable Instrument DI2017-196 being the Major Events (Rugby League World Cup) Declaration 2017 made under section 6 of the *Major Events Act 2014* applies the provision of the Act to three matches being held at GIO Stadium as part of the Rugby League World Cup 2017.

Disallowable Instrument DI2017-197 being the Victims of Crime (Victims Advisory Board) Appointment 2017 (No 2) made under section 22D of the *Victims of Crime Act 1994* revokes DI2014-77, DI2014-78, DI2014-79, DI2014-243, and appoints specified persons as members of the Victims Advisory Board.

Disallowable Instrument DI2017-198 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2017 (No 1) made under subsection 10(3) of the *Blood Donation (Transmittable Diseases) Act 1985* revokes DI2016-194 and AF2016-56 and approves the blood donation declaration form.

Disallowable Instrument DI2017-199 being the Domestic Animals (Cat Containment) Declaration 2017 (No 1) made under section 81 of the *Domestic Animals Act 2000* revokes DI2015-58 and declares specified areas of land as cat containment areas.

Disallowable Instrument DI2017-200 being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2017 (No 1) made under subsection 20(1) of the *Race and Sports Bookmaking Act 2001* determines a specified event to be an approved sports bookmaking event.

DISALLOWABLE INSTRUMENTS—COMMENT

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

DISAPPLICATION OF SUBSECTIONS 47(3) AND (6) OF THE LEGISLATION ACT 2001

Disallowable Instrument DI2017-165 being the Public Health (Cooling Towers) Risk Activity Declaration 2017 (No 1) made under section 18 of the *Public Health Act 1997* declares the operation of a cooling tower to be a location-specific public health risk activity for the purposes of the Act.

This instrument declares the operation of a “cooling tower” a “registrable public health risk activity”, for subsection 18(3) of the *Public Health Act 1997*.

Section 4 of the instrument defines “cooling tower” as follows:

cooling tower means a cooling tower as defined by *Air-handling and water systems of buildings – Microbial control Design, installation and commissioning* (AS/NZS 3666 1:2011) from time to time.

Section 5 of the instrument then provides:

5 Disapplication of Legislation Act, s 47 (3) and (6)

The Legislation Act, s 47(3) and (6) do not apply to AS/NZS 3666 1:2011.

Note AS/NZS 3666 1:2011 does not need to be notified under the Legislation Act because s 47(3) and (6) do not apply (see Legislation Act, s 47(7)). The standard may be purchased at www.saiglobal.com.

Subsection 47(3) of the *Legislation Act 2001* provides a power for a statutory instrument (ie such as this instrument) to make provision by applying another law or another instrument. It states:

- (3) The relevant instrument may make provision about the matter by applying a law of another jurisdiction, or an instrument, as in force only at a particular time.

This means that the standard proposition is that the law of another jurisdiction, or any other instrument, can only be applied as in force at a particular time. The disapplication of subsection 47(3) means that (as here) an instrument (ie, here, the Australian Standard/New Zealand Standard (AS/NZS) referred to) can be applied, as amended.

Subsection 47(6) of the Legislation Act provides:

- (6) If subsection (3) is displaced and a law of another jurisdiction or an instrument is applied as in force from time to time, the text of each of the following is taken to be a notifiable instrument made under the relevant instrument by the entity authorised or required to make the relevant instrument:

- (a) the law or instrument as in force at the time the relevant instrument is made;
- (b) each subsequent amendment of the law or instrument;
- (c) if the law or instrument is repealed and remade (with or without changes)—the law or instrument as remade and each subsequent amendment of the law or instrument;
- (d) if a provision of the law or instrument is omitted and remade (with or without changes) in another law or instrument—the provision as remade and each subsequent amendment of the provision.

This means that the standard proposition is that if subsection 47(3) is disapplied then any other law or any other instrument that is applied, as it exists from time to time, is a “notifiable instrument”, as is any later instrument that amends or re-makes that instrument. Under section 19 of the Legislation Act, a “notifiable instrument” must be published on the ACT Legislation Register. The disapplication of subsection 47(6) means that the requirement to publish on the ACT Legislation Register is removed.

By way of explanation, the explanatory statement for the instrument states:

AS/NZS 3666 1:2011 is incorporated into this instrument by the definition of cooling tower. The Legislation Act, s 47 (6) provides that an incorporated document, and any amendment or replacement of such a document, are taken to be notifiable instruments. A notifiable instrument must be notified on the legislation register under the Legislation Act. However, the Legislation Act, s 47 (6) may be displaced by the authorising law or the incorporating instrument (see s 47 (7)). The Legislation Act, s 47 (6) is displaced here because the incorporated standards are subject to copyright and may be purchased over the Internet.

This means that the justification is that the relevant AS/NZS is “subject to copyright”.

In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

ACCESSIBILITY OF LEGISLATION / INCORPORATION OF MATERIAL BY REFERENCE

The Committee considers that, as far as possible, legislation should be freely available to the general public. This goal can be undermined where legislation incorporates other legislation (including legislation of other jurisdictions) and, even, non-legislative material “by reference”. That is, legislation can provide that the legislation of another jurisdiction or the content of an Australian Standard applies to the regulation of a particular subject matter in the ACT. This can create an accessibility issue, in that the referenced material may not be available in the same way that other ACT legislation is available to the public - through the ACT Legislation Register.

One of the innovations of the *Legislation Act 2001* is that it deals with the accessibility of material that is incorporated by reference by making it “notifiable” (see section subsections 47(5) and (6) of the Legislation Act). This general rule is able to be displaced, however. The power to displace the general rule is often exercised, thereby limiting the access to legislation that making material “notifiable” would otherwise provide.

The Committee accepts that there may be plausible reasons why the general rule of section 47 can be displaced. An example is where legislation incorporates an Australian Standard and where there is only a certain class of people that can be expected to be concerned by the requirements of the Standard. Australian Standards are generally copyrighted documents and the publishers of such Standards recoup the costs of publishing them by charging (often sizeable) fees for persons wishing to have access to the Standards. While still not an ideal situation, this is one in which the Committee generally considers that it may be acceptable to disapply section 47 of the Legislation Act.

That said, the Committee considers that legislation that disapplies section 47 of the Legislation Act should be accompanied by an explanation as to why it is considered to be necessary to disapply section 47. The Committee also considers that, in some circumstances, it is appropriate that legislation nevertheless provide that the general public may inspect a copy of the material that is incorporated by reference at a particular place (eg an ACT Government office), within certain hours.

The Committee notes that the issue of whether the relevant AS/NZS could, nevertheless, be made available to the general public, for inspection at an ACT Government office, within certain hours, is not in any way addressed in the explanatory statement for the instrument.

In this context, the Committee notes that the issue of access to material incorporated into the law by reference to external documents, such as AS/NZS and international standards, has been an issue of ongoing concern to various Australian parliamentary scrutiny committees. Recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.⁹ This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The Committee is generally concerned about the lack of free access to material incorporated into legislation and will continue to monitor this issue.

The Committee seeks the Minister's advice as to whether AS/NZS 3666 1:2011 could be made available to the general public, on a restricted basis, and, if not, why not.

This comment requires a response from the Minister.

ISSUES WITH FEES INSTRUMENT

Disallowable Instrument DI2017-189 being the Dangerous Goods (Road Transport) Fees and Charges Determination 2017 made under section 194 of the *Dangerous Goods (Road Transport) Act 2009* revokes DI2015-100 and determines fees payable for the purposes of the Act.

This instrument determines fees for the *Dangerous Goods (Road Transport) Act 2009*.

As the Committee has consistently noted, it takes a particular interest in relation to fees determinations. In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

⁹ Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) <http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3> (accessed 6 June 2017).

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.

Noting the Committee’s oft-stated preferences, the Committee notes that neither the explanatory statement for this instrument nor the instrument itself states the amount of the “old” fees provided for by the instrument. The explanatory statement does, however, indicate that “[t]he fees in the determination have been increased by the Wages Price Index (WPI) of 2%, rounded down to the nearest dollar”.

The Committee reminds Ministers and agencies that the Committee would prefer that, in addition to the magnitude of any increase being identified (and the reasons for it), the “old” fees also be stated.

This comment does not require a response from the Minister.

ISSUES WITH FEES INSTRUMENT

Disallowable Instrument DI2017-193 being the Health (Fees) Determination 2017 (No 2) made under section 192 of the *Health Act 1993* revokes DI2017-1 and determines fees payable for the purposes of the Act.

This instrument determines fees for the *Health Act 1993*.

As the Committee has consistently noted, it takes a particular interest in relation to fees determinations. In the Committee’s document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

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.

Noting the Committee’s oft-stated preferences, the Committee notes that the explanatory statement for this instrument states:

This Determination of Fees revokes and replaces the Determination of Fees DI2017-1, dated 16 January 2017.

The Determination comes into effect on the day after notification and reproduces Determination DI2017-1 except for:

- items on Attachment A, which have increased by the Wage Price Index of 2.0% (subject to rounding);
- items on Attachment B, which have increased by the National Consumer Price Index of 2.1% (subject to rounding);

- items on Attachment C, which have increased by other factors;
- minor amendments to the definitions;
- minor wording, numbering and formatting changes; and
- the date of effect.

The Committee notes that, while the “old” and “new” fees are identified for the items in Attachment C to the explanatory statement, neither the instrument nor the explanatory statement identifies the “other factors” that are relevant to the fees increases in Attachment C.

The Committee seeks the Minister’s advice as to the “other factors” that are relevant to the fees increases mentioned in Attachment C to the explanatory statement for this instrument.

This comment requires 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 SL2017-19 being the Road Transport (Third-Party Insurance) Amendment Regulation 2017 (No 2) made under the *Road Transport (Third-Party Insurance) Act 2008* inserts a new compulsory third-party insurance premium class and includes amendments to revise and clarify certain provisions.

Subordinate Law SL2017-21 being the Traders (Licensing) Regulation 2017 made under the *Traders (Licensing) Act 2016* prescribes licence eligibility requirements, suitability of applicants and licence conditions.

Subordinate Law SL2017-22 being the Discrimination Amendment Regulation 2017 (No 1) made under the *Discrimination Act 1991* amends the *Discrimination Regulation 2016*, to provide the definition of assistance animal, for the purposes of a discrimination complaint.

Subordinate Law SL2017-23 being the Road Transport Legislation Amendment Regulation 2017 (No 2) made under the *Road Transport (General) Act 1999* and *Road Transport (Safety and Traffic Management) Act 1999* amends the Road Transport (Offences) Regulation and Road Transport (Safety and Traffic Management) Regulation by replacing references to the term "segway" with "personal mobility device".

SUBORDINATE LAW—COMMENT

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

STRICT LIABILITY OFFENCES

Subordinate Law SL2017-20 being the Waste Management and Resource Recovery Regulation 2017 made under the *Waste Management and Resource Recovery Act 2016* seeks to bring the ACT into line with other Australian jurisdictions in relation to waste management.

The Committee notes that the explanatory statement for this subordinate law states that it:

.... builds upon the *Waste Minimisation Regulation 2001* (Waste Minimisation Regulation). The only significant departures from the previous regulatory regime are the licensing, registration and reporting requirements for waste businesses, as well as additional offence provisions which strengthen the Government's ability to penalise inappropriate and potentially dangerous waste management practices where compliance is not achieved through public education or the issuing of a rectification notice under s17. These changes are explained in this document.

The explanatory statement goes on to note that the subordinate law creates 6 new offences that are strict liability offences. The new offences are:

- failing to segregate waste (section 18);
- failing to keep waste in a waste container (section 19);
- failing to maintain a waste container in a hygienic condition (section 20);
- keeping waste in an unsightly condition (section 21);
- failing to keep a waste container properly closed (section 22); and
- failing to place or keep a waste container within the property boundary or at an approved location (section 23).

In the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee set out its views and preferences in relation to legislation that creates offences of strict or absolute liability:

STRICT AND ABSOLUTE LIABILITY OFFENCES

As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the Explanatory Statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

The Committee notes with approval that pages 3 to 5 of the explanatory statement for this subordinate law provide a comprehensive explanation as to the reasons why the relevant offences should be offences of strict liability and also the defences that are nevertheless available. The Committee commends this approach to other Ministers and agencies.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined a regulatory impact statement for the following disallowable instrument and has no comments on it:

Disallowable Instrument DI2017-188 being the Animal Diseases (Import Restriction) Declaration 2017.

GOVERNMENT RESPONSES

The Committee has received responses from:

- The Minister for Planning and Land Management, dated 16 August 2017, in relation to comments made in Scrutiny Report 7 concerning the Lands Acquisition Amendment Bill 2017.
- The Attorney-General, dated 18 August 2017, in relation to comments made in Scrutiny Report 8 concerning the Gaming Machine (Cash Facilities) Amendment Bill 2017.
- The Minister for Transport and City Services, dated 31 August 2017, in relation to comments made in Scrutiny Report 8 concerning Disallowable Instruments:
 - DI2017-180—Public Unleased Land (Fees) Determination 2017 (No 1); and
 - DI2017-186—Public Unleased Land (Fees) Determination 2017 (No 2).

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

The Committee would like to thank the Minister for Planning and Land Management, the Attorney-General and the Minister for Transport and City Services for their responses.

Bec Cody MLA
Deputy Chair

5 September 2017

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 6, dated 30 May 2017

Education and Care Services National Law Amendment Act 2017 (Victoria)

Report 7, dated 18 July 2017

Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB)

Report 8, dated 8 August 2017

Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB)

Disallowable Instrument DI2017-57 - Electoral Commission (Chairperson) Appointment 2017 (No 2)