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

SCRUTINY REPORT 30

23 MARCH 2015

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ROLE OF COMMITTEE

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

RESOLUTION OF APPOINTMENT

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

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

  (a) is in accord with the general objects of the Act under which it is made;

  (b) unduly trespasses on rights previously established by law;

  (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

  (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

(2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

  (a) unduly trespass on personal rights and liberties;

  (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

  (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

  (d) inappropriately delegate legislative powers; or

  (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;

(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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SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-16 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 1) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is controlled by non-pay time limited permissive parking signs around Manuka Oval for the Australian Football League (AFL) NAB Challenge match and AFL matches.**

Disallowable Instrument DI2015-18 being the Official Visitor (Disability Services) Appointment 2015 made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the** *Disability Services Act 1991***.**

Disallowable Instrument DI2015-19 being the Official Visitor (Disability Services) Appointment 2015 (No. 2) made under section 10 of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the** *Disability Services Act 1991***.**

Disallowable Instrument DI2015-20 being the Medicines, Poisons and Therapeutic Goods (Medicines Advisory Committee) Appointment 2015 (No. 1) made under section 635 of the *Medicines, Poisons and Therapeutic Goods Regulation 2008* **and section 194 of the** *Medicines, Poisons and Therapeutic Goods Act 2008* **appoints specified persons as chair and members of the Medicines Advisory Committee.**

Disallowable Instrument DI2015-21 being the Long Service Leave (Portable Schemes) Contract Cleaning Industry Levy Determination 2015 made under subsection 51(2) of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by employers for each quarter in the contract cleaning industry.**

Disallowable Instrument DI2015-22 being the Long Service Leave (Portable Schemes) Community Sector Employers' Levy Determination 2015 made under subsection 51(2) of the *Long Service Leave (Portable Schemes) Act 2009* **determines the levy payable by employers for each quarter for the community sector industry.**

Disallowable Instrument DI2015-23 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 2) made under section 12 of the *Road Transport (General) Act 1999* **declares that the road transport legislation does not apply to a road or road related area that is a special stage of the Innate Motorsport Test Day to be held on 24 February 2015.**

Disallowable Instrument DI2015-24 being the Public Place Names (Moncrieff) Determination 2015 (No. 1) made under section 3 of the *Public Place Names Act 1989* **determines the names of four roads in the Division of Moncrieff.**

Disallowable Instrument DI2015-26 being the Road Transport (General) Independent Taxi Operator Exemption Determination 2015 (No. 1) made under section 13 of the *Road Transport (General) Act 1999* **exempts approved participants in the Independent Taxi Operator Pilot (ITOP) from certain provisions of the legislative requirements for taxi service operators to allow them to continue operating under current arrangements.**

Disallowable Instrument DI2015-27 being the Heritage (Council Member) Appointment 2015 (No. 1) made under section 17 of the *Heritage Act 2004* **appoints a specified person as a member of the ACT Heritage Council, with expertise in the discipline of architecture.**

Disallowable Instrument DI2015-28 being the Heritage (Council Member) Appointment 2015 (No. 2) made under section 17 of the *Heritage Act 2004* **appoints a specified person as a member of the ACT Heritage Council, with expertise in the discipline of landscape architecture.**

Disallowable Instrument DI2015-29 being the Heritage (Council Member) Appointment 2015 (No. 3) made under section 17 of the *Heritage Act 2004* **appoints a specified person as a member of the ACT Heritage Council, representing the Aboriginal community.**

Disallowable Instrument DI2015-30 being the Heritage (Council Member) Appointment 2015 (No. 4) made under section 17 of the *Heritage Act 2004* **appoints a specified person as a member of the ACT Heritage Council, representing the community.**

Disallowable Instrument DI2015-31 being the Heritage (Council Chairperson) Appointment 2015 (No. 1) made under section 17 of the *Heritage Act 2004* **appoints a specified person as chairperson of the ACT Heritage Council.**

Disallowable Instrument DI2015-32 being the Heritage (Council Deputy Chairperson) Appointment 2015 (No. 1) made under section 17 of the *Heritage Act 2004* **appoints a specified person as deputy chairperson of the ACT Heritage Council.**

Disallowable Instrument DI2015-33 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2015 (No. 1) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2014-260 and approves specific areas as identified in the Schedule as approved sports bookmaking venues.**

Disallowable Instrument DI2015-34 being the Cultural Facilities Corporation (Governing Board) Appointment 2015 (No. 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **revokes DI2012-17 and appoints a specified person as a member of the Cultural Facilities Corporation governing board.**

Disallowable Instrument DI2015-35 being the Official Visitor (Children and Young People) Aboriginal and Torres Strait Islander Appointment 2015 (No. 1) made under subsection 10(1) of the *Official Visitor Act 2012* **appoints a specified person as an official visitor for the** *Children and Young People Act 2008***.**

Disallowable Instrument DI2015-37 being the Race and Sports Bookmaking (Sports Bookmaking Events) Determination 2015 (No. 1) made under subsection 20(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2009-266 and determines specified events to be sports bookmaking events for the purposes of the Act.**

Disallowable Instrument DI2015-38 being the Race and Sports Bookmaking (Rules for Sports Bookmaking) Determination 2012 (No. 1) made under subsection 23(1) of the *Race and Sports Bookmaking Act 2001* **revokes DI2009-267 and extends approval in respect of international racing events.**

DISALLOWABLE INSTRUMENTS—COMMENT

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

Disapplication of subsection 47(6) of the Legislation Act

Disallowable Instrument DI2015-17 being the Public Sector Management Amendment Standards 2015 (No. 1) made under section 251 of the *Public Sector Management Act 1994* **amends the Standards.**

This instrument inserts new provisions into the *Public Sector Management Standards 2006*. The amendments relate to new forms of leave and changed leave arrangements and payments for

non-executive public sector employees. New section 660 references the *ACT Public Service Administrative and Related Classifications Enterprise Agreement 2013-2017* (**Enterprise Agreement**), as in force from time to time. By providing that the Enterprise Agreement applies "as in force from time to time", the provision displaces subsection 47(3) of the *Legislation Act 2001*, which provides that instruments (and the laws of other jurisdictions) can only be applied as they exist at a particular time. This displacement brings into effect subsection 47(6) of the Legislation Act, which requires that an instrument in relation to which subsection 47(3) is displaced (and any amendments to the instrument) is a "notifiable instrument". This means that the instrument (and any amendments to it) must be published on the ACT Legislation Register.

The point of subsection 47(6) is to ensure that users of ACT legislation have easy access, not only to legislation but also to instruments etc on which the operation of legislation relies.

However, new section 661 of the Public Sector Management Standards (also inserted by this instrument) disapplies subsection 47(6) of the Legislation Act. The Explanatory Statement for the instrument provides the following explanation for this disapplication:

> Section 661 disapplies the requirement that the Enterprise Agreement is notified. The rationale for lifting the requirement is that the document is widely known and can be readily accessed by public servants, therefore it does not require placement on the Legislation Register.

In addition, the Committee notes that new sections 659, 660 and 661 all have notes that provide the website address at which the Enterprise Agreement can be found.

This comment does not require a response from the Minister.

Retrospective effect

Disallowable Instrument DI2015-39 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2015 (No. 2) made under section 139 of the *Taxation Administration Act 1999* **revokes DI2015-7 and determines, for the purposes of the Scheme, the eligibility criteria, value of the concession, conditions and time limit for applications.**

This instrument (in effect) revokes and re-makes DI2015-7 (notified on 12 January 2015 and taken to have commenced on 1 January 2015), which determined the eligibility criteria, value of the concession, conditions and time limit for applications under the Asbestos Insulation Eradication Buyback Concession Scheme. The Explanatory Statement for the instrument states (in part):

> 5. This instrument revokes DI2015-7, in order to:
>
> (i) expand the operation of the concession so that the concession is now available on dutiable transactions that occurred on or after 18 February 2014 where previously the concession was only available on dutiable transactions that occurred on or after 28 October 2014; and
>
> (ii) clarify that the concession is only available on dutiable transactions in relation to residential premises.
>
> 6. This instrument commences on the day after its notification.

The instrument was notified on the ACT Legislation Register on 5 March 2015.

Given the application to "dutiable transactions that occurred on or after 18 February 2014", the instrument has a retrospective effect.

Section 76 of the *Legislation Act 2001* provides that only "non-prejudicial" provisions of a statutory instrument (which includes a disallowable instrument such as this) can commence retrospectively.

That concept is defined in subsection 76(4) of the Legislation Act, which provides (in part):

> ***non-prejudicial provision*** means a provision that is not a prejudicial provision.
>
> ***prejudicial provision*** means a provision that operates 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.

As a result of the requirements of section 76, for legislation with a retrospective effect, the Committee generally prefers that the Explanatory Statement for the instrument expressly addresses the section 76 issue and provide an assurance to the Committee (and to the Legislative Assembly) that there is no prejudicial retrospectivity (see the Committee's document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps*, available at http://www.parliament.act.gov.au/in-committees/standing_committees/justice_and_community_safety_legislative_scrutiny_role). The Committee notes that the Explanatory Statements for this instrument does not address this requirement.

In making this comment, the Committee notes that, in *Scrutiny Report No. 28* of the Eighth Assembly, it referred to DI2015-7 (ie the instrument revoked by this instrument), noting its retrospective effect but also noting that the Explanatory Statement for the earlier instrument indicated that it was "of benefit to taxpayers". The same is apparent here. The new instrument would appear to extend the benefit available to taxpayers. However (as the Committee stated in relation to the earlier instrument), it would be preferable if the section 76 requirements were addressed expressly, in each case of retrospective effect.

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 SL2015-5 being the Planning and Development (City West Precinct) Amendment Regulation 2015 (No. 1) made under the *Planning and Development Act 2007* **extends the date that the Australian National University (ANU) has to complete development on land under the ACT City West Integration Precinct Deed.**

Subordinate Law SL2015-7 being the Magistrates Court (Work Health and Safety Infringement Notices) Amendment Regulation 2015 (No. 1) made under the *Magistrates Court Act 1930* **amends the Magistrates Court (Work Health and Safety Infringement Notices) Regulation by inserting additional offences for which infringement notices can be issued.**

SUBORDINATE LAW—COMMENT

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

Human rights issues

Subordinate Law SL2015-3 being the Crimes (Sentencing) Amendment Regulation 2015 (No. 1) made under the *Crimes (Sentencing) Act 2005* **removes the Aboriginal Justice Centre as a criminal**

justice entity and prescribes the Aboriginal Legal Service (NSW/ACT) as a criminal justice entity pursuant to the Act.

This subordinate law is made under paragraph 136(4)(i) of the *Crimes (Sentencing) Act 2005*. It prescribes the Aboriginal Legal Service ACT/NSW Limited, the Canberra Mens Centre Incorporated and the Domestic Violence Project Coordinator (appointed under the *Domestic Violence Agencies Act 1986*) as "criminal justice entities". The effect of being prescribed as such is that the relevant entities can exchange information about alleged offences with other criminal justice entities.

The Explanatory Statement for the subordinate law contains the following explanation in relation to human rights issues that arise in relation to the subordinate law:

> *Impact on Human Rights*
>
> The disclosure of personal information engages and limits the right to privacy contained in section 12 of the *Human Rights Act 2004*, which states that "everyone has the right not to have his or her privacy… interfered with unlawfully or arbitrarily".
>
> However, the right to privacy is a qualified right and section 28 of the Human Rights Act provides legislative recognition that human rights may be limited in certain circumstances. Limitations on the right to privacy can be applied where it can be shown that it is necessary in a free and democratic society to do so and if there is a legal basis for such interference.
>
> On balance and considering the factors outlined in section 28, the limitation on the right to privacy is justified in this instance. Allowing the Aboriginal Legal Service (NSW/ACT), the Domestic Violence Project Coordinator and Canberra Men's Centre to share information with other criminal justice entities in certain circumstances is appropriate and will support the purposes of the Act.
>
> The purpose is to provide authority for criminal justice entities to exchange information to the extent of their responsibilities and allow for improved information sharing with other agencies in the criminal justice system, which is important and necessary. The limitation on the right to privacy related to the disclosure of personal information between criminal justice entities is justified and reasonable for this purpose.
>
> Additionally, the engagement of the right is limited as the information sharing provisions are restricted and controlled by the Act. Prescribing the entities that can receive information ensures that the disclosure does not happen unlawfully or arbitrarily. This is the least restrictive means of supporting the purposes of the Act and the efficient and effective operation of information sharing between criminal justice entities. For these reasons, the amendment is a proportionate limitation on the right to privacy.

The Committee draws the attention of the Legislative Assembly to this explanation.

This comment does not require a response from the Minister.

Human rights issues

Subordinate Law SL2015-4 being the Planning and Development (University of Canberra) Amendment Regulation 2015 (No. 1) made under the *Planning and Development Act 2007* **proposes removal of third-party appeal rights for a merit track DA on the site of the University of Canberra.**

This subordinate law amends Schedule 3 of the *Planning and Development Regulation 2008* to add developments on the "University of Canberra site" (as defined in a new definition that is inserted by this subordinate law) to the list of development applications that, under section 350 of the Planning and Development Regulation, are exempt from third-party review in the ACT Civil and Administrative Tribunal (**ACAT**). The effect of the amendment is to deny third parties who might otherwise have a right to challenge, in ACAT, a development application relating to the University of Canberra site, the right to seek such a review.

The Explanatory Statement for the subordinate law contains the following explanation of the human

rights issues arising from the relevant amendments:

> The *Human Rights Act 2004*, in section 21 (right to a fair trial [including a hearing]), recognises certain rights that arguably may be affected by the proposed law. However, in relation to section 21, it would appear that case law indicates that human rights legislation does not guarantee a right of appeal for civil matters. Opportunities for input into planning and development applications and the existence of a right to judicial review have been held in many cases to satisfy the requirement of the right to a fair trial.
>
> In two ACAT cases (*Thomson v ACT Planning and Land Authority* [2009] ACAT p38 and *Tran v ACT Planning and Land Authority & Ors* [2009] ACAT p46) ACAT agreed that some limitation on third-party appeal rights is warranted when it delivers certainty and predictability for proponents. Specifically the Commissioner (in Thomson) commented that "...providing certainty and predictability for applicants for development approval, and the need to ensure a timely approval process are sufficiently important objectives to justify some constraints on third-party review rights."
>
> In a further ACAT case (Tran) the Tribunal agreed with the approach in *Thomson*. Further in (Tran) the Tribunal noted: "Certainly it is not unusual in Australian planning law for the rights of third-party objectors to be limited or removed by legislation or other instruments.[53] See generally G McLeod (ed) *Planning Law in Australia* and for examples, note the restrictions in New South Wales at [1.180], Queensland at [1.2059] and Victoria at [2.740]".
>
> To the extent that the proposed law limits any rights afforded by the *Human Rights Act 2004*, these limitations must meet the proportionality test of section 28 of that legislation.
>
> Persons that may be affected by the development envisaged in this amending regulation continue to have the ability to make submissions on the DA, which the planning and land authority must consider in reaching any decision. The proposed law does not affect rights persons may have under the Administrative Decisions (Judicial Review) Act *or* at common law.
>
> There remains the question of whether the amending regulation contains matters that should properly be dealt with in an Act of the Legislative Assembly as (opposed to a regulation).
>
> As indicated above, schedule 1 of the Planning and Development Act, item 4, column 2, par (b) and item 6 expressly allows the Executive to make regulations to exempt specified matters in the merit and impact assessment tracks from being subject to third-party review. This means the amending regulation is within an express power granted by the Legislative Assembly and clearly in line with its intended purpose of focussing merit review on matters of greater impact (both onsite and offsite). The Legislative Assembly has also considered favourably several similar regulations made under this provision on previous occasions.
> In summary the regulation does not unduly trespass on existing rights, or, make rights unduly dependent upon non reviewable decisions and is an appropriate matter for regulation.
> [footnotes omitted]

The Committee draws the attention of the Legislative Assembly to this explanation.

This comment does not require a response from the Minister.

Human rights issues

Subordinate Law SL2015-6 being the Information Privacy Amendment Regulation 2015 (No. 1) made under the *Information Privacy Act 2014* **prescribes the administrative unit responsible for the administration of ACT Courts and Tribunals that are exempted from the application of the Act in**

relation to the disclosure or use of personal information for the purposes of implementing the new case management system project known as the Integrated Case Management System (ICMS).

This subordinate law amends the *Information Privacy Regulation 2014*. It is made under paragraph 25(1)(h) of the *Information Privacy Act 2014*, which allows the regulations to prescribe agencies, and acts and practices done or engaged in by prescribed agencies, that are exempt from the operation of (and the restrictions on the use of information imposed by) the Information Privacy Act.

The particular effect of the amendments made by this subordinate law is to prescribe the administrative unit responsible for the administration of ACT Courts and Tribunals, exempting it from the operation of the Information Privacy Act when that unit discloses or uses personal information for the purposes of implementing the new case management system project known as the Integrated Case Management System (ICMS). Further, disclosure and use under the exemption that is given by this subordinate law can only be made to the West Australian Department of the Attorney-General (WADAG), as the provider of the infrastructure supporting the new ICMS.

The Explanatory Statement for the subordinate law contains the following explanation of the human rights implications of the amendments:

> *Human rights implications*
>
> This regulation provides a limited exemption for specific acts of use and disclosure of personal information by the ACT Courts and Tribunal. This exemption engages the right to privacy (s 12, *Human Rights Act 2004*) and may limit that right.
>
> The limitation on the right is justifiable given consideration of the following factors:
>
> (a) *the nature of the right affected:* the right to privacy is a fundamental right, but is not absolute and can be limited by clear legislative provision. In this case the legislative provision is in the Information Privacy Regulation, rather than listed as a specific exemption under section 25 of the Act. The highly specific nature of the exemption, which is constrained to a particular named project, for which an exemption may not always be required, or which may change according to revisions to the procurement agreement is properly suited to inclusion in a regulation.
>
> (b) the purpose of the limitation: the purpose of providing an exemption is to provide clear and explicit authority for the use and disclosure of personal information collected and held by the ACT Courts and Tribunal, for the purposes of testing, developing and maintaining the ICMS system. Arguably, even without the exemption in this regulation, the ACT Courts and Tribunal would be able to use and disclose this information to allow for the upgrade of the existing case management system within the terms of the Territory Privacy Principles as part of normal business practice.
>
> However, given the risks to the successful implementation of the ICMS if data migration is unsuccessful or delayed and the sensitive nature of the data, a specific exemption for use of the personal information or disclosure to the WADAG will allow the ACT Courts and Tribunal to confidently share live data with WADAG for ICMS testing as well as for ongoing support and maintenance for the ICMS system.
>
> Further, there is a public interest in ensuring that the data migrated from MAX to ICMS is accurately and securely migrated in order to avoid inaccuracies or errors in the data as a result of having to scramble data to avoid disclosing or using personal information for migration and testing of the new ICMS software.
>
> (c) the nature and extent of the limitation: The risk of any privacy breach as a result of the disclosure to WADAG, or use as part of the case management system project is low. There is a standard privacy protection clause in the procurement contract with WADAG. WADAG has confirmed that access to all data will be restricted to those who have gone through a proper vetting process and that the data hosted in WA will be protected and

secured in a Tier 4 Data Centre (highest security). This provides a similar level of protection to that which currently exists in the ACT Government computer network.

The Act will continue to apply to storage, access to and correction of the migrated personal information in the ICMS system that will ultimately be hosted within the ACT. This means that protections and the ability to make a privacy complaint about alleged breaches of those protections to the independent Privacy Commissioner remain in place.

(d) the relationship between the limitation and its purpose: the disclosure and use of personal information for the development, testing and installation of an information management system for cases heard, or to be heard by ACT Courts and Tribunal, and the ongoing maintenance and upgrading of the system has been drafted to be as targeted in application as is possible, while still allowing flexibility in the delivery of a stable, secure and functional case management system.

The enhanced case management system will improve the experience of those dealing with the ACT Courts and Tribunal system by improving allocation and follow through on matters and reducing hearing wait times. It is anticipated that the new case management system will ultimately support the rights to trial without delay (Human Rights Act – s 18(6) and s 22(2)(c)).

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve: the use of scrambled or fictitious data instead of personal information held by the ACT Courts and Tribunal was considered as an option for the migration and testing of the new ICMS system. This option would be possible but would add substantially to the cost, time and complexity of the system upgrade and would increase the likelihood of 'go-live errors' and 'system failures' on its rollout … The importance of the implementation of the new case management system, and the substantial risks to the development and rollout of the system arising from the use of scrambled data has been assessed as warranting a limited exemption to clearly provide for the use and disclosure of unscrambled personal information for the upgrade project.

The Committee draws the attention of the Legislative Assembly to this explanation.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENTS

The Committee has examined the Regulatory Impact Statement for the following subordinate law and offers these comments on it:

Subordinate Law SL2015-4 being the Planning and Development (University of Canberra) Amendment Regulation 2015 (No. 1) made under the *Planning and Development Act 2007* **proposes removal of third-party appeal rights for a merit track DA on the site of the University of Canberra.**

Chapter 5 of the *Legislation Act 2001* provides for regulatory impact statements (RISs) for subordinate laws and disallowable instruments. The basic requirement is set out in section 34 of the Legislation Act, which provides (in part):

34 Preparation of regulatory impact statements

(1) If a proposed subordinate law or disallowable instrument (the ***proposed law***) is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law (the ***administering Minister***) must arrange for a regulatory impact statement to be prepared for the proposed law.

Section 34 goes on to provide for exemptions to the RIS requirements.

Section 35 provides for the content of RISs:

> **35 Content of regulatory impact statements**
>
> A regulatory impact statement for a proposed subordinate law or disallowable instrument (the proposed law) must include the following information about the proposed law in clear and precise language:
>
> (a) the authorising law;
>
> (b) a brief statement of the policy objectives of the proposed law and the reasons for them;
>
> (c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;
>
> (d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;
>
> (e) if the proposed law is inconsistent with the policy objectives of another territory law—
>
> (i) a brief explanation of the relationship with the other law; and
>
> (ii) a brief explanation for the inconsistency;
>
> (f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;
>
> (g) a brief assessment of the benefits and costs of implementing the proposed law that—
>
> (i) if practicable and appropriate, quantifies the benefits and costs; and
>
> (ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);
>
> **(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.** [emphasis added]

Principle (2) of the Committee's terms of reference dove-tails with paragraph 35(h) of the Legislation Act, in that it requires the Committee to consider whether any RIS associated with a subordinate law meets the technical or stylistic standards expected by the Committee.

The Committee notes that the RIS for this subordinate law states:

> The matters that need to be addressed by this Regulatory Impact Statement in terms of consistency with the Committee's principles are that as the proposed law takes away an existing right of review, does it unduly trespass on rights previously established by law (terms of reference (a) ii) and make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions (terms of reference (a) iii). There is also the issue of whether the

proposed law contains matter which should properly be dealt with in an Act of the Legislative Assembly (terms of reference (a) (iv).

The proposed law can be considered to trespass on rights previously established by law as it removes an existing right to review. The issue is whether it does so unduly. In addition, by removing existing review rights, the proposed law makes certain rights, etc dependent on decisions that are non-reviewable. Again, the issue is whether it does so unduly.

The Planning and Development Act modified third-party appeal rights, so that in general terms, only DAs having significant off site impacts, particularly in residential areas, would be open to third-party appeals. Third-party appeal rights have been significantly modified during the first 6 years of the Acts operation to align the Act with its core policy objectives of increasing certainty and clarity around development processes and making the planning system "faster, simpler and more effective" (see Attachment A – Background to the policy object of the ACT Planning and Development Act 2007).

The proposed law is specific, not general in its application, and only applies to the identified site. Significant community input and consultation occurred during the creation of the new planning system including its zoning and development provisions and the proposed development is consistent with the provisions and requirements of the Territory Plan.

The Regulatory Impact Statement then goes on to (in essence) re-state the human rights considerations that are set out in the earlier discussion of this subordinate law in this Scrutiny Report, before concluding:

> In summary the proposed law does not unduly trespass on existing rights, or, make rights unduly dependent upon non reviewable decisions and is an appropriate matter for regulation.

The Committee notes that the RIS for this subordinate law meets the technical and stylistic standards expected by the Committee.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSE

The Committee has received a response from:

- The Minister for Racing and Gaming, dated 10 March 2015, in relation to comments made in Scrutiny Report 28 concerning Subordinate Law SL2014-37—Gaming Machine Amendment Regulation 2014 (No. 2) and Subordinate Law SL2015-1—Gaming Machine Amendment Regulation 2015 (No. 1) (attached).

The Committee wishes to thank the Minister for Racing and Gaming for her helpful response.

Steve Doszpot MLA
Chair

23 March 2015

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 3, dated 25 February 2013

Disallowable Instrument DI2013-5—Road Transport (Third-Party Insurance) Early Payment Guidelines 2013 (No. 1)

Report 20, dated 31 July 2014

Red Tape Reduction Legislation Amendment Bill 2014

Report 27, dated 3 February 2015

Disallowable Instrument DI2014-284 - Gene Technology (GM Crop Moratorium) Advisory Council Member Appointment 2014 (No. 1)

Public Sector Bill 2014

Report 28, dated 3 February 2015

Subordinate Law SL2014-32—Work Health and Safety (Asbestos) Amendment Regulation 2014 (No. 1)

Report 29, dated 10 March 2015

Courts Legislation Amendment Bill 2015

Joy Burch MLA

MINISTER FOR EDUCATION AND TRAINING
MINISTER FOR POLICE AND EMERGENCY SERVICES
MINISTER FOR DISABILITY
MINISTER FOR RACING AND GAMING
MINISTER FOR THE ARTS

MEMBER FOR BRINDABELLA

Mr Steve Doszpot MLA
Chair
Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Doszpot

I write in response to the Standing Committee on Justice and Community Safety's Scrutiny Report No 28 of 16 February 2015 which contained comments on Subordinate Law SL2014-37, *Gaming Machine Amendment Regulation 2014 (No 2)*, and Subordinate Law SL2015-1, *Gaming Machine Amendment Regulation 2015 (No 1)*, made under the *Gaming Machine Act 2004* (the Act).

I thank the Committee for their comments on both Amendment Regulations. The response below addresses the Committee's comments in relation to the reasons why a strict liability provision is required and the available defences.

A key objective of the regulation of the gaming industry is to minimise harm from problem gambling. The strict liability offence provision addresses a gaming machine licensee's (licensee) operation of a gaming machine that accepts bank notes that are not authorised. The provision is consistent with the offence provisions contained in the ACT's suite of racing and gaming legislation.

The incorporation of strict liability elements has been carefully considered during the Bill's development. Strict liability offences arise in a regulatory context where for reasons such as consumer protection and public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded.

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Those who provide gambling services and are licensed to conduct such functions can be expected to be aware of their duties and obligations to the wider public. This is especially relevant to the protection of problem gamblers and the overall requirement for harm minimisation strategies.

Under the Act a licensee is an entity and not an individual, and human rights considerations need to be viewed in that light. Further, the offence provision is restricted to the highest level of the organisation, namely the licensee.

In developing the Amendment Regulations, an assessment was made as to whether any less restrictive means were available when a licensee permitted a gaming machine to accept unauthorised bank notes. Consideration was also given as to whether a statutory reasonable excuse for not ensuring a gaming machine operated in accordance with the Act should be inserted. Neither of these options was viable in the context of the ACT Gambling and Racing Commission's obligations under section 7 of the *Gambling and Racing Control Act 1999* and it was considered that the exercise of this power was appropriate and proportionate.

The maximum penalty units applied for the strict liability offence also conforms to the *Guide for Framing Offences*.[1] Furthermore, the Criminal Code defences are still available to a person charged under these offence provisions, particularly the mistake of fact defence (Code section 36) and, where appropriate, the defence of intervening act (Code section 39).

I trust that this response addresses the Committee's comments. I thank the Committee for its consideration of the Amendment Regulations.

Yours sincerely

Joy Burch MLA
Minister for Racing and Gaming
March 2015

[1] Australian Capital Territory Government, Department of Justice and Community Safety, *Guide for Framing Offences*, April 2010, p29.