

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

SCRUTINY REPORT 41

15 February 2016

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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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BILLS

BILL—NO COMMENT

The Committee has examined the following bill and offers no comment on it:

DOMESTIC VIOLENCE AND PROTECTION ORDERS AMENDMENT BILL 2016

This is a Bill to amend the *Domestic Violence and Protection Orders Act 2008* to address operational issues that have arisen from the introduction of a new special interim domestic violence order scheme.

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

Disallowable Instrument DI2015-299 being the Cemeteries and Crematoria (Public Cemetery Fees) Determination 2015 (No. 2) made under section 49 of the *Cemeteries and Crematoria Act 2003* revokes DI2015-87 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2015-300 being the Lotteries (Fees) Determination 2015 (No. 2) made under section 18A of the *Lotteries Act 1964* revokes DI2015-155 and determines fees payable for the purposes of the Act.

Disallowable Instrument DI2015-301 being the Lotteries (Exempt Lotteries) Determination 2015 (No. 1) made under paragraph 6(1)(a)(ii) of the *Lotteries Act 1964* revokes DI2011-146 and determines the maximum total value of prizes for specified minor lotteries.

Disallowable Instrument DI2015-302 being the Veterinary Surgeons (Fees) Determination 2015 (No. 1) made under section 136 of the *Veterinary Surgeons Act 2015* determines fees payable for the purposes of the Act.

Disallowable Instrument DI2015-303 being the Remuneration Tribunal (Fees and Allowances of Members) Determination 2015 made under section 20 of the *Remuneration Tribunal Act 1995* determines fees and allowances for members of the Remuneration Tribunal.

Disallowable Instrument DI2015-304 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2015 (No. 7) made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* determines a Tabcorp ACT Pty Ltd temporary location as a sports bookmaking venue.

Disallowable Instrument DI2015-305 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 10) made under section 12 of the *Road Transport (General) Act 1999* disapplies specified road transport legislation to a road or road related area that is a special stage of the Rallye des Femmes.

Disallowable Instrument DI2015-306 being the Public Place Names (Moncrieff) Determination 2015 (No. 8) made under section 3 of the *Public Place Names Act 1989* determines the names of two roads in the Division of Moncrieff.

Disallowable Instrument DI2015-309 being the Public Place Names (Throsby) Determination 2015 (No. 1) made under section 3 of the *Public Place Names Act 1989* determines the names of 18 roads in the Division of Throsby.

Disallowable Instrument DI2015-310 being the Tree Protection (Advisory Panel) Appointment 2015 (No. 2) made under section 69 of the *Tree Protection Act 2005* appoints a specified person as a member of the Tree Advisory Panel, with experience as a landscape architect working in urban design and vegetation assessment.

Disallowable Instrument DI2015-312 being the University of Canberra Council Appointment 2015 (No. 4) made under section 11 of the *University of Canberra Act 1989* appoints a specified person as a member of the University of Canberra Council.

Disallowable Instrument DI2015-313 being the Electricity Feed-in (Renewable Energy Premium) Registered Rural Block 1470 Tuggeranong Total Capacity Determination 2015 (No. 1) made under section 5E of the *Electricity Feed-in (Renewable Energy Premium) Act 2008* determines the total renewable energy generators capacity that can be installed at Registered Rural Block 1470 District of Tuggeranong.

Disallowable Instrument DI2015-315 being the Road Transport (General) Application of Road Transport Legislation Declaration 2015 (No. 11) 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 Rallye des Femmes.

Disallowable Instrument DI2015-316 being the Duties (Corporate Reconstruction Guidelines) Determination 2015 (No. 1) made under section 232A of the *Duties Act 1999* revokes DI2014-288 and determines the guidelines for the approval, by the Commissioner for ACT Revenue, of duty concessions for certain eligible transactions.

Disallowable Instrument DI2015-317 being the Civil Law (Wrongs) Professional Standards Council Appointment 2015 (No. 5) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person to be a member of the Professional Standards Council, representing Western Australia

Disallowable Instrument DI2015-318 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2015 (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 29 Car Festival 2016, and exempts vehicles from specified provisions of the Road Transport (Vehicle Registration) Act and the Road Transport (Vehicle Registration) Regulation.

Disallowable Instrument DI2015-319 being the Legislative Assembly (Members' Staff) Code of Conduct for Ministerial Staff and Staff of Other Office-holders Determination 2015 made under subsection 5(3) of the *Legislative Assembly (Members' Staff) Act 1989* formalises a code of conduct for staff of ministers and other office-holders.

Disallowable Instrument DI2015-320 being the Legislative Assembly (Members' Staff) Code Of Conduct For Staff Of Non-Executive Members Determination 2015 made under subsection 10(3) of the *Legislative Assembly (Members' Staff) Act 1989* formalises a code of conduct for staff of non-executive members.

Disallowable Instrument DI2015-321 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2015 (No. 3) made under paragraph 174(1)(a) of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as chair of the Sentence Administration Board.

Disallowable Instrument DI2015-323 being the Cultural Facilities Corporation (Governing Board) Appointment 2015 (No. 5) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2015-276 and appoints a specified person as deputy chair of the Cultural Facilities Corporation governing board.

Disallowable Instrument DI2015-324 being the Cultural Facilities Corporation (Governing Board) Appointment 2015 (No. 4) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* appoints a specified person as a member of the Cultural Facilities Corporation governing board.

Disallowable Instrument DI2015-325 being the Road Transport (General) CTP Regulator Levy Determination 2015 (No. 1) made under section 96 of the *Road Transport (General) Act 1999* revokes DI2013-17 and determines the CTP Regulator Levy.

Disallowable Instrument DI2015-326 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2015 made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2014-295 and determines maximum fares payable on regular route services provided by ACTION.

Disallowable Instrument DI2015-327 being the Commissioner for Sustainability and the Environment (Reporting Period and Reporting Day) Determination 2015 made under section 19 of the *Commissioner for Sustainability and the Environment Act 1993* specifies the reporting period for the next ACT State of the Environment Report and the reporting day for the Commissioner for Sustainability and the Environment to submit his report to the Minister for the Environment.

Disallowable Instrument DI2015-329 being the Civil Law (Wrongs) RICS Valuers Ltd Scheme 2015 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the approval of the RICS Valuers Ltd Scheme by the Professional Standards Council of New South Wales.

Disallowable Instrument DI2015-330 being the Civil Law (Wrongs) Australian Computer Society Professional Standards Scheme 2015 (No. 1) made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the approval of The Australian Computer Society Professional Standards Scheme by the Professional Standards Council of New South Wales.

Disallowable Instrument DI2015-332 being the Taxation Administration (Ambulance Levy) Determination 2015 (No. 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2014-313 and determines the monthly ambulance levy to be paid by health benefits organisations for the reference months January to December 2016.

Disallowable Instrument DI2015-333 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2015 (No. 3) made under section 139 of the *Taxation Administration Act 1999* revokes DI2015-108 and determines, for the purposes of the Scheme, the income test and thresholds, eligibility criteria, determination of amounts, conditions, method of calculation of duty payable and time limit for applications.

Disallowable Instrument DI2015-334 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2015 (No. 3) made under section 139 of the *Taxation Administration Act 1999* revokes DI2015-230 and determines, for the purposes of the Scheme, the eligibility criteria, amounts, conditions, method of calculation of duty payable and the time limit for applications.

Disallowable Instrument DI2015-335 being the Taxation Administration (Amounts Payable—Over 60s Home Bonus Scheme) Determination 2015 (No. 4) made under section 139 of the *Taxation Administration Act 1999* revokes DI2015-226 and determines, for the purposes of the Scheme, the eligibility criteria, amounts, conditions, method of calculation of duty payable and the time limit for applications.

Disallowable Instrument DI2015-338 being the Official Visitor (Mental Health) Appointment Revocation 2015 (No. 1) made under section 10 of the *Official Visitor Act 2012* revokes DI2000-291 and DI2000-293.

DISALLOWABLE INSTRUMENTS—COMMENT

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

MINOR DRAFTING ISSUE

Disallowable Instrument DI2015-311 being the Gambling and Racing Control (Governing Board) Appointment 2015 (No. 3) made under sections 11 and 12 of the *Gambling and Racing Control Act 1999* and sections 78 and 79 of the *Financial Management Act 1996* revokes DI2012-230 and appoints a specified person as a member and chair of the ACT Gambling and Racing Commission Governing Board.

This instrument appoints a specified person as member and chair of the ACT Gambling and Racing Commission Governing Board. The instrument states that it is made under section 11 of the *Gambling and Racing Control Act 1999*, which establishes the Board, section 12 of that Act, which provides for the membership of the Board, and also sections 78 and 79 of the *Financial Management Act 1996*. Section 78 of the *Financial Management Act* sets out general provisions relating to the appointment of the members of the governing board of a territory authority. Section 79 provides for the appointment of chairs and deputy chairs of the governing board of a territory authority, in circumstances where the relevant Act does not provide for such appointments.

The Committee notes that section 3 of the instrument appoints the specified person as “a member and chair” of the Board. However, the explanatory statement for the instrument states that the person is appointed as “a member and deputy chair” of the Board. This is clearly an error.

This comment does not require a response from the Minister.

IS THIS A DISALLOWABLE INSTRUMENT?

Disallowable Instrument DI2015-314 being the ACT Civil and Administrative Tribunal (Non-Presidential Members) Appointment 2015 (No. 6) made under section 96 of the ACT Civil and Administrative Tribunal Act 2008 appoints a specified person as a non-presidential, full-time senior member of the ACT Civil and Administrative Tribunal.

This instrument appoints a specified person as a non-presidential member of the ACT Civil and Administrative Tribunal. The formal part of the instrument states that it is made under section 96 of the *ACT Civil and Administrative Tribunal Act 2008*, which provides:

96 Appointment of non-presidential members

- (1) The Attorney-General may appoint a person to the tribunal as a senior member or ordinary member.
- (2) Also, the Attorney-General may appoint a person to the tribunal as a temporary senior member or temporary ordinary member.
- (3) The Attorney-General must not appoint a person under subsection (1) or (2) unless satisfied that the person has the experience or expertise to qualify the person to exercise the functions of a senior or ordinary member.
- (4) A regulation may make provision in relation to the appointment of non-presidential members of the tribunal, including when the Attorney-General may or must be satisfied that a person has the experience or expertise to exercise the functions of a senior member or ordinary member.
- (5) The appointment of a non-presidential member is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

The explanatory statement for the instrument also refers to section 6 of the *ACT Civil and Administrative Tribunal Regulation 2009*, which (relying on the power in subsection 96(4) above) provides (in part):

6 Appointment of senior and ordinary members of the tribunal—Act, s 96

- (1) When considering whether to appoint a person to the tribunal as a senior member or ordinary member, the Attorney-General must take reasonable steps to ensure that the tribunal has sufficient members with relevant interests, qualifications or experience to allow the tribunal to exercise its functions.

Under subsection 96(5) of the Act, an instrument appointing a non-presidential member is expressly a **notifiable** instrument, rather than a disallowable instrument. The Committee can identify nothing in the Act or in the Regulations that changes this requirement. Yet this instrument is presented to the Legislative Assembly as a disallowable instrument.

In addition, the Committee notes that it is only the appointment of non-public servants that must be effected by disallowable instrument. The Committee has consistently noted that section 227 of the *Legislation Act 2001* provides that section 229 (which requires the making of statutory appointments by disallowable instrument) only applies to appointments of persons *other than* public servants. It is for this reason that the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

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

There is no such statement in the explanatory statement for the instrument. As the Committee has consistently pointed out, this is not an onerous requirement.

The Committee seeks the Minister’s advice as to why this appointment is made by way of a disallowable instrument.

APPLICATION OF SECTION 47 OF THE LEGISLATION ACT 2001

Disallowable Instrument DI2015-322 being the Road Transport (Safety and Traffic Management) Approval of Protective Helmets for Motorbike Riders Determination 2015 (No. 1) made under paragraph 66(1)(3) of the Road Transport (Safety and Traffic Management) Regulation 2000 revokes DI2009-2 and specifies protective helmets considered acceptable by the Road Transport Authority as suitable protective helmets for use by motorbike riders.

This instrument sets standards with which helmets worn by motorbike riders must comply. Section 4 of the instrument sets those standards by reference to various Australian/New Zealand Standards and a United Nations Economic Commission for Europe Regulation. The Committee notes that this application of requirements contained in external documents appears to be provided for in section 34 of the *Road Transport (Safety and Management) Act 1999*, which provides:

34 Regulations may apply certain documents etc

- (1) A regulation may apply a publication of the National Transport Commission approved, or of matters approved, by the Australian Transport Council or any other instrument as in force from time to time.

Note 1 The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disappplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

- (2) For a regulation, a regulation may define a term defined by this Act (or apply the definition of a term in an instrument mentioned in subsection (1))—
- (a) in the same (or in substantially the same) way as it is defined by this Act; or
 - (b) by reference to a matter included in the term as defined by this Act; or
 - (c) by reference to a combination of matters included in the term as defined by this Act and in any other term defined by this Act; or
 - (d) for applying a publication of the National Transport Commission approved, or of matters approved, by the Australian Transport Council—in the same way as it is defined in the publication despite anything in this Act or other road transport legislation.

- (3) In this section:

publication of the National Transport Commission includes—

- (a) a document published by or for the National Road Transport Commission under the *National Road Transport Commission Act 1991* (Cwlth); and
- (b) a document published for the National Transport Commission.

Note The Commonwealth Act mentioned in par (a) has been repealed and replaced by the *National Transport Commission Act 2003* (Cwlth).

The Committee assumes that the documents relied upon in section 4 of the instrument are covered by the reference to “any other instrument” in subsection 34(1) above. This means that they can be applied “as in force from time to time”, contrary to the general rule set out in subsection 47(3) of the *Legislation Act 2001*, which provides that such instrument can only be applied as in force at a particular time.

The Committee notes that (as reflected in Note 1 to subsection 34(1) of the Act) the text of a document applied in the way that the various documents referred to in section 4 of this instrument, whether applied as in force from time to time or as at a particular time, are taken to be **notifiable instruments**. The proviso to this requirement (as reflected in the Note) is that subsections 47(5) and (6) of the Legislation Act are not disapplied, exercising the power contained in subsection 47(7) of the Legislation Act.

The Committee can find no evidence of the various documents referred to in section 4 of the instrument as having been notified on the ACT Legislation Register.

The Committee seeks the Minister’s advice as to whether the various external documents referred to in section 4 of this instrument are notifiable instruments and, if not, why not.

*NO EXPLANATORY STATEMENT***Disallowable Instrument DI2015-328 being the Pool Betting (Prescribed Percentage) Determination 2015 (No. 1) made under paragraph 13A(2)(a) of the *Pool Betting Act 1964* revokes all previous determinations made under section 13A of the Act.**

This instrument prescribes a percentage (of 100%) as the amount payable under the law of a State, “for the purposes of [paragraph] 13A(2)(a) of the *Pool Betting Act 1964*”. The effect of the instrument appears to be that the promoter of a pool betting competition that is lawfully conducted under a law of a State who receives money that was paid in the ACT by or on behalf of a person in connection with the submission in the ACT by the person of an entry in the competition must pay to the Territory the same duty that they would be required to pay to the relevant State.

The Committee notes that there is no explanatory statement for this instrument. 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.

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

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.

The Committee draws the Legislative Assembly’s attention to this instrument, 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.

DISAPPLICATION OF SUBSECTION 47(6) OF THE LEGISLATION ACT

Disallowable Instrument DI2015-331 being the Training and Tertiary Education (National Code of Good Practice for Australian Apprenticeships) Approval 2015 made under section 13 of the *Training and Tertiary Education Act 2003* approves the National Code of Good Practice for Australian Apprenticeships.

This instrument approves a code of practice under section 13 of the *Training and Tertiary Education Act 2003*, which provides:

13 Code of practice

- (1) In providing work-related training under an approved training contract, all parties must comply with any code of practice approved by the Minister for this section.
- (2) An approved code of practice may apply, adopt or incorporate an instrument, as in force from time to time.

Note 1 The text of an applied, adopted or incorporated instrument, whether applied as in force from time to time or at a particular time, is taken to be a notifiable instrument if the operation of the Legislation Act, s 47 (5) or (6) is not disapplied (see s 47 (7)).

Note 2 A notifiable instrument must be notified under the Legislation Act.

- (3) An approval is a disallowable instrument.

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

Section 3 of the instrument provides:

3 Code of practice

- (1) I approve the *National Code of Good Practice for Australian Apprenticeships* as in force from time to time (the **Code of Practice**) as the approved code of practice relating to a training contract under section 13.
- (2) The Legislation Act, section 47(6) does not apply to the Code of Practice.

Note The Code of Practice does not need to be notified under the Legislation Act because s 47(6) does not apply (see Legislation Act, s 47 (7)). The Code of Practice may be found at Australian Apprenticeships.

It should be noted at this point that, in the electronic version of the instrument, “Australian Apprenticeships”, in the Note, includes the following hyperlink that is not reflected in the hard copy document or in the hard copy of the explanatory statement for the instrument:

http://skills.act.gov.au/documents/NationalCodeofGoodPracticeForAustralianApprenticeships_July2015.pdf

The Committee notes that the disapplication of subsection 47(6) of the *Legislation Act 2001* is both permitted by subsection 47(7) of the *Legislation Act* and also foreshadowed by Note 1 to subsection 13(2) of the *Training and Tertiary Education Act*. By way of explanation for the disapplication of subsection 47(6), the explanatory statement for the instrument states:

This instrument approves the *National Code of Good Practice for Australian Apprenticeships* (Code of Practice) as an approved Code of Practice under the *Training and Tertiary Education Act 2003*, and revokes the *Training and Tertiary Education (National Code of Practice for Australian Apprenticeships) approval 2013 DI2013-167*.

The *Training and Tertiary Education (National Code of Good Practice for Australian Apprenticeships)*, DI2013-167 was adopted at a point in time, with the document notified and attached to the Disallowable Instrument.

By adopting this Code of Practice from time to time, the *Legislation Act*, section 47(6) will disapply and alleviate the on-going notification requirements of a new Disallowable Instrument each time the Code of Practice text is amended.

The Committee has several observations on these statements. First, the Committee queries why, unlike the situation with the revoked instrument, a copy of the *National Code of Good Practice for Australian Apprenticeships* was not attached to this instrument. Second, the Committee notes that it is not the case that “the *Legislation Act*, section 47(6) will disapply and alleviate the on-going notification requirements of a new Disallowable Instrument each time the Code of Practice text is amended”. Rather, it is the case that *the disapplication of subsection 47(6)* that will alleviate “the on-going notification requirements” that would otherwise apply.

Third, the Committee notes that no justification is provided for the disapplication of subsection 47(6), beyond that the disapplication will “alleviate” those requirements. Given that provisions such as subsection 47(6) of the *Legislation Act* are designed to ensure that readers and users of ACT legislation have access, through the ACT Legislation Register, to all the material that is relevant to ascertaining what the requirements of ACT legislation involves, the Committee generally expects that, where subsection 47(6) is disappplied, a justification is provided for the resulting denial of access. The Committee does not consider that “alleviating” the resulting requirements is (of itself) a sufficient justification.

The Committee seeks the Minister’s advice as to why it is necessary to disapply subsection 47(6) of the *Legislation Act 2001* in relation to this instrument.

REFERENCE TO EXTRINSIC MATERIAL

Disallowable Instrument DI2015-336 being the Domestic Animals (Exercise Areas) Declaration 2015 (No. 1) made under section 40 of the *Domestic Animals Act 2000* declares locations marked in green on the "dog exercise areas" map overlay on the ACTMAPi website as dog exercise areas.

Disallowable Instrument DI2015-337 being the Domestic Animals (Prohibited Areas) Declaration 2015 (No. 1) made under section 41 of the *Domestic Animals Act 2000* declares locations marked in pink on the "dog exercise areas" map overlay on the ACTMAPi website as areas where dogs are prohibited.

Section 3 of the first instrument mentioned above declares locations of “Dog exercise areas” as exercise areas for dogs, for section 40 of the *Domestic Animals Act 2000*. Section 3 provides:

3 Declaration

I declare the locations marked in green on the ‘Dog exercise areas’ map overlay on the ACTMAPi website as exercise areas for dogs.

Note The ACTMAPi website is located at www.actmap.i.act.gov.au.

Section 3 of the second instrument mentioned above declares locations of “Dog exercise areas” as areas where dogs are prohibited. It provides:

3 Declaration

I declare the locations marked in pink on the ‘Dog exercise areas’ map overlay on the ACTMAPi website as areas where dogs are prohibited.

Note The ACTMAPi website is located at www.actmap.i.act.gov.au.

While the Committee notes that the explanatory statements for the instruments do not in any way address the issue, this reliance on material that is extrinsic to the instrument (ie a map on the ACTMAPi website) presumably relies on section 47 of the *Legislation Act 2001*, which provides (in part):

47 Statutory instrument may make provision by applying law or instrument

- (1) This section applies if an Act, subordinate law or disallowable instrument (the **authorising law**) authorises or requires the making of a statutory instrument (the **relevant instrument**) about a matter.
- (2) The relevant instrument may make provision about the matter by applying an ACT law—
 - (a) as in force at a particular time; or
 - (b) as in force from time to time.
- (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.

Note For information on the operation of s (3), see the examples to s (9).

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The map on the ACTMAPi website is, clearly, not “an ACT law”. It is, presumably, “an instrument”, for subsection 47(3). This means that (in the absence of any statements to the contrary) it can only be applied as it exists *at a particular time*. However, the Committee notes that would not appear to be the effect of section 3 of each of the instruments mentioned above. On any ordinary reading of those provisions, the relevant map is to apply as it exists *at any time that it is accessed by a reader or user of the legislation*. This would appear to be in breach of subsection 47(3) of the Legislation Act.

The Committee seeks the Minister’s advice as to the intended effect of section 3 of the instruments mentioned above, by reference to the requirements of section 47 of the *Legislation Act 2001*.

There may, in addition, be a more fundamental problem with the instruments mentioned above. There is a fundamental legal principle that a person to whom the power to do a legislative act cannot (without express authority) then subdelegate the performance of the act. This is referred to as the rule against subdelegation – *delegatus non potest delegare* (see, generally, Pearce, DC and Argument, S, *Delegated Legislation in Australia* [4th edition], chapter 23).

In the present case, in section 40 of the Domestic Animals Act, the Legislative Assembly has delegated, to the Minister, the power to declare an area of land or water to be an “exercise area” under that Act. In section 41, the Legislative Assembly has delegated, to the Minister, the power to declare an area of land or water to be an area where dogs are prohibited. In the two instruments mentioned above, the Minister has purported to exercise the powers in question by reference to areas shaded in different colours on a map that is to be found on the ACTMAPi website. There is nothing to indicate that the map in question was prepared or approved by or on behalf of the Minister. That being the case (and given that the content of the map goes directly to the substance of the power that is being exercised—it is the marking of the areas on the map that gives effect to the declaration, not what the Minister has done in the instrument), there would appear to be an argument that what the Minister has done, in the two instruments mentioned above, is subdelegate the power given by sections 40 and 41 of the Domestic Animals Act.

The Committee seeks the Minister’s advice in relation to whether he is satisfied that the instruments mentioned above do not involve a breach of the rule against subdelegation.

SUBORDINATE LAWS—NO COMMENT

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

Subordinate Law SL2015-35 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2015 (No. 2) made under the *Road Transport (Safety and Traffic Management) Act 1999* amends the Road Transport (Safety and Traffic Management) Regulation to modify the operation of the incorporated Australian Road Rules to enable ACT drivers to use mobile phones for GPS purposes, provided the phone is securely mounted to the vehicle.

Subordinate Law SL2015-36 being the Medicines, Poisons and Therapeutic Goods Amendment Regulation 2015 (No. 2) made under the *Medicines, Poisons and Therapeutic Goods Act 2008* recognises oral health therapy as a registered dental health profession for the purposes of dealing with scheduled medicines.

Subordinate Law SL2015-37 being the Legal Profession (Solicitors) Conduct Rules 2015 made under section 580 of the *Legal Profession Act 2006* revokes SL2007-31 and determines the Legal Profession (Solicitors) Conduct Rules 2015.

Subordinate Law SL2015-39 being the Veterinary Surgeons Regulation 2015 made under the *Veterinary Surgeons Act 2015* provides the operating provisions that give effect to the Act.

Subordinate Law SL2015-40 being the Gaming Machine Amendment Regulation 2015 (No. 2) made under the *Gaming Machine Act 2004* determines the prescribed number of days for a notifiable action under the Act.

Subordinate Law SL2015-42 being the Court Procedures Amendment Rules 2015 (No. 3) made under section 7 of the *Court Procedures Act 2004* amends the Court Procedures Rules.

Subordinate Law SL2015-43 being the Magistrates Court (Environment Protection Infringement Notices) Amendment Regulation 2005 (No. 1) made under the *Magistrates Court Act 1930* provides for the issuing of infringement notices for offences against sections 66B and 66C of the Environment Protection Regulation.

Subordinate Law SL2015-44 being the Road Transport (Offences) Amendment Regulation 2015 (No. 2) made under the *Road Transport (General) Act 1999* introduces double demerit points during holiday periods for specified offences under the Australian Road Rules.

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

Subordinate Law SL2015-38 being the Planning and Development (Bushfire Preparedness) Amendment Regulation 2015 (No. 1), including a regulatory impact statement, made under the *Planning and Development Act 2007* enables certain developments, including bushfire preparedness development works, to qualify for exemption from the requirement to prepare a development application if any required environmental authorisation or protection agreement is held.

This subordinate law amends the *Planning and Development Regulation 2008*, to add certain further developments, including bushfire preparedness development works, to the exemption from having to prepare a development application (DA). The exemption is conditional on either an environmental authorisation or environmental protection agreement not being required, under the *Environment Protection Act 1997* or such an authorisation being granted or such an agreement being entered into.

The Committee notes that the explanatory statement for the subordinate law contains the following analysis of the human rights issues involved in the amendments:

Human rights analysis

The amendment regulation has been reviewed in relation to the Human Rights Act 2004.

The benefits of the amendment regulation as noted above include:

- a reduction in unnecessary regulatory burden on the Territory for select public works;
- making the development assessment process for development by the Territory more efficient; and
- maintaining an appropriate level of protection for the environment.

The amendment regulation is consistent with the ACT Government's commitment to reduce red tape and regulatory burden and consistent with the objects of the [*Planning and Development Act 2007*].

Generally under the PD Act, development proposals that require a DA are publically notified and the general public has a right to make representations on the DA. There is also a right to seek ACAT merit review of a decision on a DA in some circumstances. These features do not apply to development proposals that are DA exempt as there is no application to notify and no DA decision that can be subject to merit review.

The proposed amendment regulation will broaden the scope of DA exemptions with a consequent reduction in mechanisms for the community to comment on the development and seek ACAT merit review.

Third party appeal rights have been significantly modified during the first six years of the PD Act's operation to align it with the core policy objectives of increasing certainty and clarity around development processes and making the planning system faster, simpler and more effective.

The proposed law is specific, not general in its application, and only applies to defined development that satisfies the general exemption criteria, holds an environmental authorisation or environmental protection agreement (if required) and is being undertaken by the Territory. Development that triggers Schedule 4 of the PD Act, for example, would not be eligible for the proposed exemption.

It should also be noted that environmental authorisations and environmental protection agreements may include conditions, can be suspended or cancelled and involve public consultation or public notice. It is an offence to undertake an activity that would otherwise require an environmental authorisation. It is also an offence to contravene a condition of an environmental authorisation.

In all the circumstances, it is contended that the proposed law does not trespass unduly on previous rights established by the law nor does it make certain rights unduly dependent on non reviewable decisions.

It is important to note that while the change nominally extends the scope of existing exemptions, the extension will only apply to developments that would already be exempt but for the fact they require an environmental authorisation or environmental protection agreement.

The objective of the amendment regulation is an important one for the reasons noted above, that is, for removing unnecessary regulatory burden and ensuring the Territory can undertake select public works in a timely and efficient way. The objects of the amendment regulation are consistent with the objects of the PD Act and the *Environment Protection Act 1997*. The amendment is necessary and effective in meeting the stated objectives and there are no other reasonable means available for doing this.

The types of changes proposed by the amendment regulation are not considered to unduly impact on the abovementioned human rights. This is because the types of development that may be DA exempt as a result of the amendment regulation are relatively minor and works that:

- are defined and must be undertaken by the Territory
- would otherwise be DA exempt under the Regulation but for the fact that the works require an environmental authorisation; and
- must meet the general exemption criteria and any environmental authorisation and environmental protection agreement requirements.

A decision of the Environment Protection Authority to issue an environmental authorisation can include conditions, can be suspended or cancelled, is subject to public consultation and is enforceable.

In relation to section 21 human rights, it would appear that case law from related jurisdictions indicates that human rights legislation containing the equivalent of section 21 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. Case law in relation to human rights legislation containing the equivalent of section 12 suggests that any adverse impacts of a development authorised through a planning decision must be severe to constitute unlawful and arbitrary interference with a person's right to privacy.

Consistent with the above it is concluded that to the extent that the amendment regulation does impact on rights afforded by the *Human Rights Act 2004*, it is considered that these amendments meet the proportionality test of section 28 of the *Human Rights Act 2004* and are reasonable in the circumstances.

The Committee draws the Legislative Assembly's attention to the above explanation.

REMOVAL OF VARIOUS INSTRUMENTS FROM SCRUTINY BY THE LEGISLATIVE ASSEMBLY AND REQUIREMENTS FOR PUBLICATION ON THE ACT LEGISLATION REGISTER

Subordinate Law SL2015-41 being the Health Amendment Regulation 2015 made under the *Health Act 1993* implements a more streamlined legislative process for nurse practitioners.

This subordinate law makes three amendments to the Health Regulation 2004. The first, set out in section 5 of the subordinate law, amends subsection 5(2) of the Health Regulation by replacing the previous requirement that the Minister determine criteria applicable to a decision (by the relevant director-general) to approve a position as a nurse practitioner position (under section 8 of the Health Regulation) by disallowable instrument with a requirement that the Minister do so by notifiable instrument. This means that the relevant criteria go from being disallowable by the Legislative Assembly (and subject to scrutiny by the Committee) to merely having to be notified on the ACT Legislation Register.

By way of explanation of the amendment, the explanatory statement for the subordinate law states:

Clause 4 – Section 5 (2) and note – substitutes a new subsection providing that a determination of the criteria for the approval of nurse practitioner positions is a notifiable instrument.

Given the importance of the Legislative Assembly's (and the Committee's) supervisory role in relation to instruments such as the criteria in question, and given that the criteria evidently were previously thought to warrant the application of that supervisory role, the Committee considers that an explanation ought to be provided for the diminution of the Legislative Assembly's (and the Committee's) role in this instance.

Given that a member of the Committee may have to give serious consideration as to whether it is appropriate to move a motion to disallow this provision, the Committee seeks the Minister's urgent advice as to why it is necessary to remove the disallowance mechanism that currently applies in relation to subsection 5(2) of the Health Regulation 2004.

Prior to the amendment made by section 5 of this subordinate law, subsection 8(2) of the Health Regulation made the approval of a nurse practitioner position (by the director-general) something that was required to be done in writing, with the resulting instrument being a notifiable instrument. This meant that the instrument had to be notified on the ACT Legislation Register.

Similarly, prior to the amendment made by section 6 of this subordinate law, subsection 11(2) of the Health Regulation made the approval of the "scope of practice" for a nurse practitioner position (by the director-general) something that was required to be done in writing, with the resulting instrument being a notifiable instrument.

Sections 5 and 6 of this subordinate law remove those requirements. By way of explanation, the explanatory statement for the subordinate law states:

Clause 5 – Section 8 (2) and note – omits subsection (2) and note which removes the requirement for the approval of nurse practitioner positions to be a notifiable instrument. The removal of the need to notify these positions will help to streamline the approval process and will allow these positions to be established in a more timely manner. Any need to notify the general public regarding these positions can effectively be done by notification on the [Australian Health Practitioner Regulation Agency] website rather than by way of a notifiable instrument.

Clause 6 – Section 11 (2) and note – omits subsection (2) and note which removes the requirement for the approval of their scope of practice of nurse practitioner to be a notifiable instrument. The removal of the need to notify the scope of their practice will help to streamline the approval process and will allow the scope of their practice to be established in a more timely manner. Any need to notify the general public regarding the scope of their practice can effectively be done by notification on the AHPRA website rather than by way of a notifiable instrument.

While this is, clearly, a more detailed explanation of the considered need for the section 5 and section 6 amendments, nevertheless, it is not immediately evident why it would be "more timely" if the relevant instruments are notified on the AHPRA website, rather than the ACT Legislation Register.

Given that a member of the Committee may have to give serious consideration as to whether it is appropriate to move a motion to disallow these provisions, the Committee seeks the Minister's urgent advice as to why it would be "more timely" if the relevant instruments are notified on the Australian Health Practitioner Regulation Agency website, rather than the ACT Legislation Register.

REGULATORY IMPACT STATEMENT

The Committee has examined the regulatory impact statement for the following subordinate law and offers no comment on it.

Subordinate Law SL2015-38 being the Planning and Development (Bushfire Preparedness) Amendment Regulation 2015 (No. 1), including a regulatory impact statement, made under the Planning and Development Act 2007 enables certain developments, including bushfire preparedness development works, to qualify for exemption from the requirement to prepare a development application if any required environmental authorisation or protection agreement is held.

GOVERNMENT RESPONSE

The Committee has received a response from:

- The Attorney-General, dated 10 February 2016, in relation to comments made in Scrutiny Report 40 concerning the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 (attached).

The Committee wishes to thank the Attorney-General for his response.

Steve Doszpot MLA
Chair

15 February 2016

OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

Report 27, dated 3 February 2015

Public Sector Bill 2014

Report 39, dated 10 November 2015

Disallowable Instrument DI2015-268 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Target) Determination 2015 (No. 1), including a regulatory impact statement

Disallowable Instrument DI2015-269 - Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2015 (No. 1)

Disallowable Instrument DI2015-270 - Energy Efficiency (Cost of Living) Improvement (Emissions Multiplier) Determination 2015 (No. 1)

Disallowable Instrument DI2015-271 - Energy Efficiency (Cost of Living) Improvement (Energy Savings Contribution) Determination 2015 (No. 1)

Disallowable Instrument DI2015-272 - Energy Efficiency (Cost of Living) Improvement (Penalties for Noncompliance) Determination 2015 (No. 1)

Subordinate Law SL2015-30 - Planning and Development Amendment Regulation 2015 (No. 1), including a regulatory impact statement

Report 40, dated 2 February 2016

Health Legislation Amendment Bill 2015

Justice Legislation Amendment Bill 2015

Powers of Attorney Amendment Bill 2015

Workers Compensation Amendment Bill 2015



SIMON CORBELL MLA
DEPUTY CHIEF MINISTER

Attorney-General
Minister for Health
Minister for the Environment and Climate Change
Minister for Capital Metro
Minister for Police and Emergency Services

Member for Molonglo

Mr Steve Doszpot
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 40 of 2 February 2016 which contains comments on the *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015* (the Bill).

The Committee's report under section 38 of the *Human Rights Act 2004* (HRA) draws one matter to the attention of the Legislative Assembly. The Committee also draws the attention of the Legislative Assembly to three issues arising out of the intensive correction order scheme. I am grateful for the Committee's comments and note the recommendation that I respond.

The Committee expresses the view that the interpretation of the right to liberty and security of person has been too narrowly construed and cites *Department of Health and Community Services v JWB & SWB (Marion's Case)* [1992] HCA 15 in support of this view. While I agree that human rights should not be restrictively construed, I am unclear whether the Committee is suggesting that security of person is engaged beyond the context of physical liberty by the intensive correction order scheme. I am of the view that it is not as no aspect of the scheme interferes with a person's physical security. In addition, I have not been able to identify any authority that would justify a broader interpretation of liberty than that contained in the explanatory statement, although I would welcome further feedback from the Committee. In the absence of any such authority I do not think addressing a broader interpretation would be appropriate.

ACT LEGISLATIVE ASSEMBLY

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Turning to the three comments in relation to the intensive correction order scheme in order:

1. I note the Committee's recommendation for a cross-reference. Section 11(7) as amended of the *Crimes (Sentencing) Act 2005* (clause 7 of the Bill) provides a direction to chapter 5, which includes new section 77 and so I do not consider it necessary to amend the Bill at this stage for this purpose. However, should any issue arise in the future which would indicate a specific cross-reference is desirable, this may be addressed in an omnibus bill dealing with minor amendments.
2. The Committee recommends an absolute bar to an intensive correction order being imposed in the absence of consent of persons in the same household. I thank the Committee for its consideration of this issue and its acknowledgement of the challenges involved in the issue of consent. This issue was given much thought during the development of the Bill and the Committee will note that consent is a requirement before a curfew may be imposed (new section 11(6) at clause 7). This is particularly important where an offender is being ordered to remain at a specified address. However, I am of the view that generally this should be a matter in the discretion of the court, which is best placed to consider the particular circumstances of each individual case.
3. The Committee comments on new section 78(7) (at clause 26) and the requirement for the court to give reasons when making or declining to make an intensive correction order which is contrary to the recommendation in the intensive correction assessment. As the Committee notes, the duty to give reasons is a hallmark of judicial power but I do not accept that this section could be interpreted as undermining this duty. The section merely requires the court to turn its mind to the recommendation of the intensive correction assessment and to justify a departure from that recommendation. As such, it supports the giving of reasons by a court.

I thank the Committee for its report and careful consideration of the Bill.

Yours sincerely

Simon Corbell MLA
Attorney-General