Standing Committee on Justice and Community Safety
(Legislative Scrutiny Role)

SCRUTINY REPORT 23

29 OCTOBER 2018
THE COMMITTEE

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ROLE OF COMMITTEE

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

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

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
   (a) is in accord with the general objects of the Act under which it is made;
   (b) unduly trespasses on rights previously established by law;
   (c) makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
   (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

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

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
   (a) unduly trespass on personal rights and liberties;
   (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   (d) inappropriately delegate legislative powers; or
   (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

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

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.
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The Committee has examined the following disallowable instruments and offers no comments on them:

- Disallowable Instrument DI2018-235 being the Cemeteries and Crematoria (ACT Public Cemeteries Authority Governing Board) Appointment 2018 (No 1) made under sections 29 and 29A of the Cemeteries and Crematoria Act 2003 and sections 78 and 79 of the Financial Management Act 1996 appoints specified persons as chair, deputy chair and a member of the ACT Public Cemeteries Authority Governing Board.

- Disallowable Instrument DI2018-236 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2018 (No 2) made under section 33 of the Road Transport (Safety and Traffic Management) Regulation 2017 declares Megaside Pty Ltd to be a parking authority for the area block 4 section 226 (Winyu House) in the division of Gungahlin.

- Disallowable Instrument DI2018-237 being the Racing Appeals Tribunal Appointment 2018 (No 5) made under section 40 and Schedule 1, section 1.1 of the Racing Act 1999 appoints a specified person as a member of the Racing Appeals Tribunal.

- Disallowable Instrument DI2018-238 being the Racing Appeals Tribunal Appointment 2018 (No 6) made under section 40 and Schedule 1, section 1.1 of the Racing Act 1999 appoints a specified person as a member of the Racing Appeals Tribunal.


- Disallowable Instrument DI2018-241 being the Public Place Names (Denman Prospect) Determination 2018 (No 2) made under section 3 of the Public Place Names Act 1989 determines the names of eight roads in the Division of Denman Prospect.


- Disallowable Instrument DI2018-243 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2018, including a regulatory impact statement made under section 8 of the Energy Efficiency (Cost of Living) Improvement Act 2012 determines the priority household target for the purposes of the Act.

- Disallowable Instrument DI2018-244 being the Road Transport (General) Application of Road Transport Legislation (Pedicab) Declaration 2018 made under section 13 of the Road Transport (General) Act 1999 declares that a pedicab service operator is exempt from complying with the specified Acts and Regulations.

- Disallowable Instrument DI2018-245 being the Road Transport (General) Concession Determination 2018 (No 2) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-131 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.
• Disallowable Instrument DI2018-248 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 7) made under section 12 of the Road Transport (General) Act 1999 declares that certain parts of the road transport legislation do not apply to a section of parking on Barrine Drive during the Floriade event.

• Disallowable Instrument DI2018-249 being the Financial Management (Credit Facility) Revocation 2018 (No 1) made under section 59 of the Financial Management Act 1999 revokes DI2008-236, DI2012-208 and DI2013-40 as they are no longer is use and are no longer required.

• Disallowable Instrument DI2018-251 being the Public Place Names (Taylor) Determination 2018 (No 5) made under section 3 of the Public Place Names Act 1989 determines the names of 13 roads in the Division of Taylor.

• Disallowable Instrument DI2018-252 being the Tree Protection (Advisory Panel) Appointment 2018 (No 1) made under section 69 of the Tree Protection Act 2005 appoints specified persons as members and appoints a specified person as chair of the Tree Advisory Panel.

• Disallowable Instrument DI2018-253 being the Health (National Health Funding Pool and Administration) Appointment 2018 (No 1) made under section 8 of the Health (National Health Funding Pool and Administration) Act 2013 appoints an individual agreed to by all members of the Standing Council on Health to the office of Administrator.

• Disallowable Instrument DI2018-254 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 8) made under section 12 of the Road Transport (General) Act 1999 declares that certain parts of the road transport legislation do not apply to a section of parking for the 2018/2019 cricket fixtures at Manuka Oval.

• Disallowable Instrument DI2018-255 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 9) made under section 13 of the Road Transport (General) Act 1999 declares that certain parts of the road transport legislation do not apply to a designated vehicle or the driver of a designated vehicle while participating in the Innate Test Day taking place on 6 October 2018.

• Disallowable Instrument DI2018-257 being the Public Trustee and Guardian (Investment Board) Appointment 2018 (No 2) made under paragraph 48(1)(b) of the Public Trustee and Guardian Act 1985 appoints a specified person as a member of the Public Trustee and Guardian Investment Board.


DISALLOWABLE INSTRUMENTS—COMMENT

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

WHY ARE THESE FEES BEING INCREASED?

Disallowable Instrument DI2018-239 being the Tobacco and Other Smoking Products (Fees) Determination 2018 (No 1) made under section 70 of the Tobacco and Other Smoking Products Act 1927 revokes DI2017-113 and determines fees payable for the purposes of the Act.

This instrument sets various licence application fees, under section 70 of the Tobacco and Other Smoking Products Act 1927. The explanatory statement for the instrument states:
This instrument comes into effect on 1 October 2018 and increases the annual fees payable by 4% (rounded to the nearest dollar), as set out below ....

The explanatory statement then lists 10 new fees, and also sets out (in each case) the “old” fee. This (and the identification of the percentage increase) is in accordance with the Committee’s expectations, in relation to fees determinations (and other matters) are set out in the Committee’s document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps¹ (available at https://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf). In that document, the Committee states:

FEES DETERMINATIONS

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

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

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

However, the explanatory statement does not indicate the reason for the 4% increase. In making this comment, the Committee notes that it identified a similar issue in relation to various explanatory statements for fees instruments considered by the Committee for Scrutiny Report 20 of the 9th Assembly (7 August 2018). In that Scrutiny Report, the Committee noted that other explanatory statements considered for that Scrutiny Report indicated that a 4% increase in fees was “in accordance with Government policy regarding regulatory fees increases for 2018-2019” [see, eg, the Lotteries (Fees) Determination 2018 (No 1) [DI2018-115]]. The Committee assumes that the same is the case for this instrument. However, the Committee would prefer that the reason for the fees increase is stated, either in the instrument itself or in the explanatory statement for the instrument.

The Committee draws the attention of the Legislative Assembly to the instrument mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

The Committee requests the Minister’s advice as to the reasons for the increase in the fees determined by this instrument and asks the Minister to respond.

DISALLOWABLE INSTRUMENT DI2018-246 being the Government Procurement (Non-Public Employee Member) Appointment 2018 (No 1) made under section 12 of the Government Procurement Act 2001 appoints a specified person as a part-time non-public employee member of the Government Procurement Board.

DISALLOWABLE INSTRUMENT DI2018-247 being the Government Procurement (Non-Public Employee Member) Appointment 2018 (No 2) made under section 12 of the Government Procurement Act 2001 appoints a specified person as a part-time non-public employee member of the Government Procurement Board.

The Committee notes that each of these instruments, made under section 12 of the Government Procurement Act 2001, appoints a specified person as a member of the Government Procurement Board. In each case, section 3 of the instrument appoints the specified person “as a part-time non-public employee member of the Government Procurement Board”. The Committee notes that section 12 of the Act does not expressly provide for the appointment of “part-time” members. The part-time status of members is mentioned only in section 11 of the Act, which makes it clear that all members of the relevant Board are part-time.

This comment does not require a response from the Minister.

IS THIS A DISALLOWABLE INSTRUMENT?

DISALLOWABLE INSTRUMENT DI2018-250 being the Radiation Protection (Council Member, Chair and Deputy Chair) Appointment 2018 (No 1) made under sections 68 and 70 of the Radiation Protection Act 2006 appoints specified persons as members and a specified person as a chair and deputy chair of the Radiation Council of the ACT.

This instrument, made under sections 68 and 70 of the Radiation Protection Act 2006, appoints six specified persons as members of the Radiation Council of the ACT. Relying on the power in section 70 of the Act, two of the persons are then appointed as chair and deputy chair of the Council. The instrument is a disallowable instrument.

Each of the instruments in question is a disallowable instrument and it is on that basis that the instruments are considered by the Committee.

The Committee notes that section 227 of the Legislation Act 2001 deals generally with the making of appointments to statutory positions, by Ministers. It provides:

227 Application—div 19.3.3

(1) This division applies if a Minister has the power under an Act to appoint a person to a statutory position.

(2) However, this division does not apply to an appointment of—

(a) a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant); or

(b) a person to, or to act in, a statutory position for not longer than 6 months, unless the appointment is of the person to, or to act in, the position for a 2nd or subsequent consecutive period; or
Given paragraph 227(2)(a) of the Legislation Act, the Committee has consistently maintained that instruments of appointment should clearly state that the appointee is not a public servant, in order to make clear that, in fact, the appointment should be made by way of disallowable instrument. In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps\(^2\), the Committee stated:

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

The explanatory statement for this instrument contains such a statement.

The Committee draws the attention of the Legislative Assembly to the instrument mentioned above, under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the instrument does not meet the technical or stylistic standards expected by the Committee.

The Committee seeks the Minister’s confirmation that the persons appointed by the instrument mentioned above are not public servants and asks the Minister to respond.

MINOR DRAFTING ISSUE


This instrument appoints three specified persons as official visitors, under section 10 of the Official Visitor Act 2012. Section 10 provides:

10 Appointment

(1) The Minister must appoint the following:

(a) for the Children and Young People Act 2008—at least 2 official visitors, including one official visitor who is an Aboriginal or Torres Strait Islander person;

(b) for the Corrections Management Act 2007—at least 2 official visitors, including one official visitor who is an Aboriginal or Torres Strait Islander person;

(c) for the Disability Services Act 1991—at least 1 official visitor;

(d) for the Housing Assistance Act 2007—at least 1 official visitor;
(e) for the Mental Health Act 2015—at least 1 official visitor.

(2) The Minister may appoint a person as an official visitor for an operational Act only if—
(a) the Minister has consulted the operational Minister; and
(b) satisfied on reasonable grounds that the person has suitable qualifications or experience to exercise the functions of an official visitor for the operational Act.

(3) However, the Minister must not appoint a person as an official visitor if the person—
(a) is a public employee; or
(b) has a relevant interest.

(4) An operational Act may prescribe additional requirements for deciding whether or not to appoint a person as an official visitor for the operational Act.

(5) In this section:

Aboriginal or Torres Strait Islander person means a person who—
(a) is a descendant of an Aboriginal person or Torres Strait Islander person; and
(b) identifies as an Aboriginal person or Torres Strait Islander person; and
(c) is accepted as an Aboriginal person or Torres Strait Islander person by an Aboriginal community or Torres Strait Islander community.

relevant interest means—
(a) a direct interest in a contract with a visitable place or an entity providing services to the visitable place; or
(b) a financial interest in a visitable place.

Section 3 of the instrument provides:

3 Appointment

I appoint Tracey Whetnall and Tracey Lea Harris as official visitors for the Children and Young People Act 2008 until 7 April 2019 and Narelle Hargreaves as an official visitor for the Children and Young People Act 2008 until 7 April 2019.

The drafting of section 3 seems curious. The three specified persons are appointed for the same Act and for the same period. As a result, it is difficult to see why the appointment section is structured in the way that it is (ie into two portions—one appointing two persons and the other one person).
A possible explanation for this approach comes from the explanatory statement for the instrument, which states:

This instrument appoints Narelle Hargreaves for the purposes of the *Children and Young People Act 2008* and Tracey Whetnall and Tracey Lea Harris, who are Aboriginal and Torres Strait Islander persons, for the purposes of the *Children and Young People Act 2008*. The Minister for Disability, Children and Youth has recommended the appointments of Narelle Hargreaves, Tracey Whetnall and Tracey Lea Harris as persons who are experienced and well-qualified.

It is possible that the drafting of section 3 is intended to separate the first two specified persons from the third specified person because they are “Aboriginal and Torres Strait Islander persons” and, therefore, meet the requirement in paragraph 10(1)(a) that the appointments include “one official visitor who is an Aboriginal or Torres Strait Islander person”. However, the fact that this requirement has been met might also have been achieved by dealing with the issue in the explanatory statement, rather than by the curious drafting of section 3.

The Committee notes with approval that the explanatory statement for the instrument deals appropriately with the other requirements and limitations of section 10.

**This comment does not require a response from the Minister.**

**SUBORDINATE LAW—NO COMMENT**

The Committee has examined the following subordinate law and offers no comments on it:

*Subordinate Law SL2018-17 being the Taxation Administration Amendment Regulation 2018 (No 1) made under the Taxation Administration Act 1999* prescribes the Commissioner for ACT Revenue to disclose taxpayer information to the chief planning executive for the purpose of working out the required fee under section 298D of the *Planning and Development Act 2007*.

**SUBORDINATE LAWS—COMMENT**

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

**HUMAN RIGHTS ISSUES / STRICT LIABILITY OFFENCES—POSITIVE COMMENT**

*Subordinate Law SL2018-16 being the Road Transport Legislation Amendment Regulation 2018 (No 2) made under the Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2001 and the Road Transport (Vehicle Registration) Act 1999* amends specified road transport legislation to align the regulatory settings across public passenger modes and makes a number of minor and technical amendments to accord with current drafting practices and reflect changes made to the *Sale of Motor Vehicles Act 1997*.

This regulation amends various road traffic-related regulations. According to the explanatory statement for the subordinate law, the amendments:

(a) Align the regulatory settings across public passenger modes, in particular across light rail and bus services. These amendments provide customers with as seamless an experience as possible across the Territory’s public transport network through consistency in the regulatory settings (for example, passenger conduct) and operational aspects (for example, ticketing system).
(b) Set infringement penalty amounts for light rail related offences.

(c) Implement a budget decision to increase penalty amounts across the public passenger legislation by six per cent.

The regulation also makes a number of minor and technical amendments to accord with current drafting practices and reflect changes made to the Sale of Motor Vehicles Act 1997.

As indicated by the explanatory statement, the subordinate law “remakes several existing offences and creates new offences to which strict liability will apply”. It appears that at least 37 strict liability offences are set out in the subordinate law.

The Committee notes with approval that the explanatory statement for this subordinate law addresses the strict liability issue (as previously identified by the Committee), adequately and in detail, by reference to the right to the presumption of innocence until proven guilty, under section 21 of the Human Rights Act 2004. The explanatory statement states:

...The reasons for applying strict liability are explained in the clause notes for each provision. In the case of remade offences, these offences have generally been interpreted as attracting strict liability and the intention is to maintain the current situation.

The strict liability offences created or remade by this regulation cover:

- obligations on accredited bus service providers
- conduct of passengers on bus services
- conduct of the public at light rail stops

These offences are consistent with existing offences for other public passenger services in the Territory and other jurisdictions.

This regulation may be seen as engaging the following rights under section 22 of the [Human Rights Act]:

- the presumption of innocence until proven guilty (section 22(1))
- right against self-incrimination (section 22 (2)(i))
- right of a child who is charged with a criminal offence to a procedure that takes into account the child’s age and the desirability of promoting the child’s rehabilitation (section 22(3)).

The Committee also notes with approval that the explanatory statement addresses, in some detail, the effect of the amendments made by the subordinate law by reference to the following rights under the Human Rights Act:

- section 8—recognition and equality before the law;
- section 11—protection of the family and children;
- section 12—privacy and reputation;
• section 13—freedom of movement;
• section 16—freedom of expression;
• section 18—right to liberty and security of person.

There is also a detailed discussion of the operation of section 28 of the Human Rights Act and the limitation that that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

The Committee draws the attention of the Legislative Assembly to the discussion in the explanatory statement for this subordinate law of the human rights issues arising from the subordinate law.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES / STRICT LIABILITY OFFENCES—POSITIVE COMMENT

Subordinate Law SL2018-19 being the Road Transport (Road Rules) Amendment Regulation 2018 (No 1) made under the Road Transport (General) Act 1999 and the Road Transport (Safety and Traffic Management) Act 1999 prohibits a pedestrian standing on or moving into a designated intersection to engage in on-road commercial activities in specified intersections.

This subordinate law makes various amendments to the Road Transport (Road Rules) Regulation 2017, including the insertion into that regulation of a new offence that prohibits pedestrians from washing windscreens, hitchhiking, displaying advertisements, selling articles or soliciting contributions, employment or business from an occupant of a vehicle. The new limitation applies only to certain intersections along the “light rail corridor”. As a result of section 8 of the Road Transport (Road Rules) Regulation—which makes all offences under those regulations offences of strict liability—this is a strict liability offence.

The Committee notes with approval that the explanatory statement for this subordinate law addresses the strict liability issue (as previously identified by the Committee), adequately and in detail, by reference to the right to the presumption of innocence until proven guilty, under section 21 of the Human Rights Act 2004. The Committee also notes with approval that the explanatory statement addresses, by reference to the right under section 8 of the Human Rights Act to recognition and equality before the law, the potential impact of the new provision on persons who are living in disadvantaged circumstances and persons raising money for charitable causes. Among other things, the discussion includes consideration of whether a less-restrictive approach to the issue that is being addressed was possible.

The Committee draws the attention of the Legislative Assembly to the discussion in the explanatory statement for this subordinate law of the human rights issues arising from the subordinate law.

This comment does not require a response from the Minister.
REGULATORY IMPACT STATEMENT—NO COMMENT

The Committee has examined the regulatory impact statement to the following instrument and offers no comments on it:


GOVERNMENT RESPONSE

The Committee has received a response from:


  This response can be viewed online.

Elizabeth Lee MLA
Chair

29 October 2018

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OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 7, dated 18 July 2017**
  - Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).

- **Report 8, dated 8 August 2017**
  - Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).

- **Report 12, dated 21 November 2017**
  - Crimes (Criminal Organisation Control) Bill 2017 (PMB).

- **Report 17, dated 4 May 2018**
  - Crimes (Consent) Amendment Bill 2018 (PMB).

- **Report 19, dated 24 July 2018**
  - Anti-corruption and Integrity Commission Bill 2018 (PMB)

- **Report 20, dated 7 August 2018**
  - Disallowable Instrument DI2018-138—Agents (Fees) Determination 2018
  - Disallowable Instrument DI2018-140—Births, Deaths and Marriages Registration (Fees) Determination 2018
  - Disallowable Instrument DI2018-142—Classification (Publications, Films and Computer Games) (Enforcement) (Fees) Determination 2018
  - Disallowable Instrument DI2018-143—Co-operatives National Law (ACT) (Fees) Determination 2018
  - Disallowable Instrument DI2018-144—Prostitution (Fees) Determination 2018
  - Disallowable Instrument DI2018-145—Registration of Deeds (Fees) Determination 2018
  - Disallowable Instrument DI2018-146—Retirement Villages (Fees) Determination 2018
  - Disallowable Instrument DI2018-147—Traders (Licensing) (Fees) Determination 2018