

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

SCRUTINY REPORT 14

19 FEBRUARY 2018

## COMMITTEE DETAILS

### COMMITTEE MEMBERSHIP

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Ms Bec Cody MLA (Deputy Chair)

Ms Elizabeth Lee MLA

Mr Chris Steel MLA

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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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## BILLS

### PROPOSED GOVERNMENT AMENDMENTS

The Government proposes to move amendments to the *Lakes Amendment Bill 2017* in relation to the requirements to wear life jackets.

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

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

RIGHT TO THE PRESUMPTION OF INNOCENCE (S 22 HRA)

The proposed amendments to the Bill include strict liability offences relating to failing to wear a life jacket in boats under 4.8m in length, or while water skiing or similar. These will replace the original offences in the Bill which only related to children under 12 or at night. The supplementary explanatory statement accompanying the proposed amendments justifies the strict liability nature of the offences as “appropriate in these circumstances as the offences do not contain a fault element and are regulatory in nature”.

The explanatory statement for the original Bill includes a general justification for the use of strict liability offences and justifies their impact on the right to the presumption of innocence protected by section 22 of the HRA. The background to the proposed amendments also includes a discussion of the reasons for the expansion of the offences, including the safety concerns that might arise on ACT lakes. Taken together, the explanatory statements for the Bill and proposed amendment set out why the use of strict liability offences is a reasonable limit on the right to the presumption of innocence for the purposes of section 28 of the HRA and the Committee refers the Assembly to that discussion.

The Committee notes that it would be preferable, where proposed amendments include provisions which will impact human rights protected under the HRA, for the supplementary explanatory statement accompanying those amendments to include a statement using the framework set out in section 28 of the HRA.

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

## SUBORDINATE LEGISLATION

### DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- **Disallowable Instrument DI2017-270 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 9) 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 specified road or road related areas to allow motorists attending major sporting events at Manuka Oval on specified dates to park in non-pay time limited parking spaces for a longer period of time than specified on relevant parking signs.**

- **Disallowable Instrument DI2017-271 being the Co-operatives National Law (ACT) (Fees) Determination 2017** made under schedule 1 the *Co-operatives National Law (ACT) Act 2017* replaces schedule 1 of the Regulation and excludes specified fees where there is no direct authority to charge them under the Co-operatives National Law.
- **Disallowable Instrument DI2017-276 being the Official Visitor (Corrections Management) Appointment 2017 (No 3)** made under section 10 of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the Corrections Management Act 2007.
- **Disallowable Instrument DI2017-277 being the Utilities (Electricity Network Boundary Code) Revocation 2017** made under sections 46 and 59 of the *Utilities Act 2000* revokes DI2013-71.
- **Disallowable Instrument DI2017-278 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 14)** made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.
- **Disallowable Instrument DI2017-279 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 15)** made under section 174 of the *Crimes (Sentence Administration) Act 2005* appoints a specified person as a non-judicial member of the Sentence Administration Board.
- **Disallowable Instrument DI2017-280 being the Board of Senior Secondary Studies Appointment 2017 (No 1)** made under section 8 of the *Board of Senior Secondary Studies Act 1997* revokes DI2016-186 and appoints a nominee of the ACT Council of Parents and Citizens Associations as a member of the ACT Board of Senior Secondary Studies.
- **Disallowable Instrument DI2017-281 being the Utilities (Technical Regulation) (Electricity Network Boundary Code) Approval 2017**, including a regulatory impact statement, made under section 14 of the *Utilities (Technical Regulation) Act 2014* approves the Electricity Network Boundary Code, November 2017.
- **Disallowable Instrument DI2017-282 being the Construction Occupations (Licensing) (Mandatory Qualifications) Declaration 2017 (No 1)** made under section 13 of the *Construction Occupations (Licensing) Regulation 2004* revokes NI2016-194 and declares the qualifications necessary for an individual to be eligible to be licensed in various construction occupations and occupation classes.
- **Disallowable Instrument DI2017-283 being the Construction Occupations (Licensing) (Fees) Determination 2017 (No 2)** made under section 127 of the *Construction Occupations (Licensing) Act 2004* revokes DI2017-150 and determines fees payable for the purposes of the Act.
- **Disallowable Instrument DI2017-284 being the Firearms (Use of Noise Suppression Devices) Declaration 2017 (No 4)** made under section 31 of the *Firearms Act 1996* declares that a firearm fitted with a noise suppression device is not a prohibited firearm when being used by an authorised person for a prescribed purpose.
- **Disallowable Instrument DI2017-285 being the Prohibited Weapons (Noise Suppression Devices) Declaration 2017 (No 4)** made under section 4L of the *Prohibited Weapons Act 1996* determines that a noise suppression device being used by an authorised person for a prescribed purpose is not a prohibited article.

- **Disallowable Instrument DI2017-288 being the Nature Conservation (Native Grassland) Action Plans 2017 made under sections 104 and 105 of the *Nature Conservation Act 2014* revokes DI2005-84 and DI2013-277 and sets out the final version of specified native grassland action plans.**
- **Disallowable Instrument DI2017-289 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2017 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-231 and determines, for the purposes of the Scheme, how the amount of the concession is to be identified for properties identified as affected with loose-fill asbestos.**
- **Disallowable Instrument DI2017-290 being the Civil Law (Wrongs) Law Society of South Australia Professional Standards Scheme Amendment 2017 made under Schedule 4, sections 4.10 and 4.11 of the *Civil Law (Wrongs) Act 2002* gives notice of the Professional Standards Council of South Australia's approval of the amended Law Society of South Australia Professional Standards Scheme.**
- **Disallowable Instrument DI2017-291 being the Utilities (Water and Sewerage Capital Contribution Code) Approval 2017 made under sections 58 and 63 of the *Utilities Act 2000* approves the Water and Sewerage Capital Contribution Code, January 2018.**
- **Disallowable Instrument DI2017-292 being the ACT Teacher Quality Institute (Fees) Determination 2017 (No 1) made under section 95 of the *ACT Teacher Quality Institute Act 2010* revokes DI2016-292 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2017-293 being the Official Visitor (Corrections Management) Appointment 2017 (No 4) made under section 10 of the *Official Visitor Act 2012* appoints a specified person as an official visitor for the purposes of the Corrections Management Act 2007.**
- **Disallowable Instrument DI2017-294 being the Nature Conservation (Protected Native Species) Criteria and Processes 2017 made under section 113 of the *Nature Conservation Act 2014* determines the criteria and processes to be used in deciding whether a species is eligible to be included in a category on the Protected Native Species List.**
- **Disallowable Instrument DI2017-295 being the Public Place Names (Acton) Determination 2017 made under section 3 of the *Public Place Names Act 1989* determines the name of a park in the Division of Acton.**
- **Disallowable Instrument DI2017-296 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 10) made under section 12 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to specified areas to support the New Year's Eve in the City 2017 event.**
- **Disallowable Instrument DI2017-297 being the Tree Protection (Advisory Panel) Appointment 2017 (No 1) made under section 69 of the *Tree Protection Act 2005* appoints specified persons as members of the Tree Advisory Panel, with qualifications in forestry and arboriculture.**
- **Disallowable Instrument DI2017-298 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 2) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**

- **Disallowable Instrument DI2017-299 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 3) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-300 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 4) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-301 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 5) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-302 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 6) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-303 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 7) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-304 being the Gene Technology (GM Crop Moratorium) Advisory Council Appointment 2017 (No 8) made under section 11 of the *Gene Technology (GM Crop Moratorium) Act 2004* appoints a specified person as a part-time member of the ACT Gene Technology Advisory Council.**
- **Disallowable Instrument DI2017-305 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme—Eligible Impacted Properties) Determination 2017 (No 2) made under section 139 of the *Taxation Administration Act 1999* revokes DI2017-232 and determines, for the purposes of the Scheme, how the amount of the concession is to be identified for properties that were determined to be eligible impacted properties more than six months after the release of the Eligible Impacted Property Buyback Program.**
- **Disallowable Instrument DI2017-306 being the University of Canberra (Academic Progress) Statute 2017 made under section 40 of the *University of Canberra Act 1989* revokes DI2015-261 and omits definitions and operative provisions that will instead be incorporated in Rules.**
- **Disallowable Instrument DI2017-310 being the Civil Law (Wrongs) Certified Public Accountants Australia Limited Professional Standards Scheme 2017 made under section 4.10, Schedule 4 of the *Civil Law (Wrongs) Act 2002* approves the Certified Public Accountants Australia Limited Professional Standards Scheme.**
- **Disallowable Instrument DI2017-312 being the Freedom of Information (Fees) Determination 2017 (No 2) made under section 104 of the *Freedom of Information Act 2016* determines fees payable for the purposes of the Act.**



- **Disallowable Instrument DI2017-314 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2017 (No 1) made under section 13 of the Road Transport (General) Act 1999 disapplies the Road Transport (Third-Party Insurance) Act in respect of ACT registered entrant and promotional, or uninsured, vehicles participating in the Summernats 31 Car Festival 2018. It also exempts participating vehicles from specified provisions of the Road Transport (Vehicle Registration) Act and the Road Transport Vehicle Registration) Regulation, and exempts drivers from section 60 of the Road Transport (Driver Licensing) Regulation.**
- **Disallowable Instrument DI2017-315 being the Taxation Administration (Amounts Payable— Ambulance Levy) Determination 2017 (No 1) made under section 139 of the *Taxation Administration Act 1999* revokes DI2016-307 and determines fees for the purposes of the ACT for the months January to December 2018.**
- **Disallowable Instrument DI2017-316 being the Cultural Facilities Corporation (Governing Board) Appointment 2017 (No 1) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2016-259 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.**
- **Disallowable Instrument DI2017-317 being the Cultural Facilities Corporation (Governing Board) Appointment 2017 (No 2) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2014-256 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.**
- **Disallowable Instrument DI2017-318 being the Cultural Facilities Corporation (Governing Board) Appointment 2017 (No 3) made under section 9 of the *Cultural Facilities Corporation Act 1997* and section 78 of the *Financial Management Act 1996* revokes DI2015-323 and appoints a specified person as a member of the Cultural Facilities Corporation Governing Board.**
- **Disallowable Instrument DI2017-319 being the Official Visitor (Mental Health) Appointment 2017 (No 1) made under paragraph 10(1)(e) of the *Official Visitor Act 2012* appoints specified persons as official visitors for the purposes of the Act.**
- **Disallowable Instrument DI2018-1 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 1) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* reappoints a specified person as a member of the ACT Professional Standards Council.**
- **Disallowable Instrument DI2018-3 being the University of Canberra Council Appointment 2018 (No 1) 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 DI2018-4 being the Road Transport (General) Exclusion of Road Transport Legislation (Queen's Baton Relay) Declaration 2018 (No 1) made under section 13 of the *Road Transport (General) Act 1999* disapplies Australian Road Rules 265 and 268 to a designated vehicle in the Queen's Baton Relay.**
- **Disallowable Instrument DI2018-5 being the Civil Law (Wrongs) New South Wales Bar Association Scheme Amendment 2018 made under Schedule 4, section 4.10 of the *Civil Law (Wrongs) Act 2002* gives notice of the New South Wales Professional Standards Council's approval of an amendment to the New South Wales Bar Association Scheme.**

- **Disallowable Instrument DI2018-6 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 2) made under Schedule 4, section 4.38 of the *Civil Law (Wrongs) Act 2002* appoints a specified person as a member of the ACT Professional Standards Council.**
- **Disallowable Instrument DI2018-7 being the Public Place Names (Denman Prospect) Determination 2018 made under section 3 of the *Public Place Names Act 1989* determines the names of nine roads in the Division of Denman Prospect.**

## DISALLOWABLE INSTRUMENTS—COMMENT

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

WHY ARE THE FEES PROVIDED FOR BY THESE INSTRUMENTS BEING INCREASED?

- **Disallowable Instrument DI2017-272 being the Food (Fees) Determination 2017 (No 1) made under section 150 of the *Food Act 2001* revokes DI2016-288 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2017-273 being the Medicines, Poisons and Therapeutic Goods (Fees) Determination 2017 (No 1) made under section 197 of the *Medicines, Poisons and Therapeutic Goods Act 2008* revokes DI2016-286 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2017-274 being the Public Health (Fees) Determination 2017 (No 1) made under section 137 of the *Public Health Act 1997* revokes DI2016-285 and determines fees payable for the purposes of the act.**
- **Disallowable Instrument DI2017-275 being the Radiation Protection (Fees) Determination 2017 (No 1) made under section 120 of the *Radiation Protection Act 2006* revokes DI2016-289 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2017-286 being the Health Records (Privacy and Access) (Fees) Determination 2017 (No 1) made under section 34 of the *Health Records (Privacy and Access) Act 1997* revokes DI2016-287 and determines fees payable for the purposes of the Act.**
- **Disallowable Instrument DI2017-311 being the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2017 made under section 23 of the *Road Transport (Public Passenger Services) Act 2001* revokes DI2016-293 and determines maximum fares payable on regular route services provided by ACTION.**

Each of the instruments mentioned above determines fees under a relevant Act. In relation to the first four instruments mentioned above, the explanatory statement for each of the instruments states:

This instrument comes into effect on 1 January 2018 and increases the fees by 4.0% (rounded to the nearest dollar), as set out below .....

In each case, the explanatory statement then lists the relevant fees, together with the “old” fee.

In the case of the fifth instrument mentioned above, the explanatory statement states:

This instrument comes into effect on 1 January 2018 and reproduces DI2016-287 except for:

- Fees have increased by 2% (rounded); and
- the date of effect.

In the case of the sixth instrument mentioned above, the explanatory statement states:

The instrument contains the maximum fares payable for travel on ACTION buses by holders of MyWay smart cards and those paying cash fares. MyWay fares have increased by up to 2.6 percent from those fares set in the Road Transport (Public Passenger Services) Regular Route Services Maximum Fares Determination 2016 (DI2016–293). Cash fares for adult passengers have increased by up to 2.2%. The MyWay monthly maximum cost has increased by 2.6 percent from those fares set in DI2016-293.

No explanation is provided, in any of the relevant explanatory statements, as to *why* the relevant fees have been increased.

The Committee has consistently required that explanatory statements for instruments that increase fees address certain issues. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf)), the Committee states:

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. [emphasis added]

**The Committee requests that the Ministers responsible for the instruments mentioned above provide the Committee with the reasons for the various fees increases.**

**This comment requires a response from the Minister(s).**

AVAILABILITY OF EXTRINSIC MATERIAL RELIED UPON BY THE INSTRUMENT

**Disallowable Instrument DI2017-287 being the Construction Occupations (Licensing) Interval Metering Transitional Code of Practice 2017 made under section 126A of the *Construction Occupations (Licensing) Act 2004* approves the Interval Metering Transitional Code of Practice.**

This instrument determines a code of practice, under section 126A of the *Construction Occupations (Licensing) Act 2004*, which allows the Minister to determine a code of practice for a construction occupation, a class of construction occupation or a construction service. Various provisions of the instrument refer to AS/NZS 3000, being “Wiring Rules” developed by Standards Australia. In particular, the definition of **metering enclosure**, in the Dictionary, states:

**metering enclosure**—see AS/NZS 3000

AS/NZS 3000 is available for purchase from SAI Global, at a cost. However, the SAI Global website indicates that AS/NZS 3000 is not currently available (see <https://www.saiglobal.com/en-au/standards-and-content/wiring-rules-as-nzs-3000/>).

On its face, the instrument appears to incorporate AS/NZS 3000 by reference, for section 47 of the *Legislation Act 2001*. However, the Committee notes that section 126A of the *Construction Occupations (Licensing) Act* provides (in part):

(2) An approved code of practice may consist of a code, standard, rule, specification or provision relating to the construction occupation or occupation class, or a construction service, and may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

(3) An approved code of practice is a disallowable instrument.

*Note 1* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

*Note 2* An amendment or repeal of an approved code of practice is also a disallowable instrument (see Legislation Act, s 46(2)).

(4) The Legislation Act, section 47(5) or (6) does not apply in relation to a law or instrument mentioned in subsection (2).

*Note* Laws and instruments mentioned in s (2) do not need to be notified under the Legislation Act because s 47(5) and (6) do not apply (see Legislation Act, s 47(7)).

The disapplication of subsections 47(5) and (6) of the Legislation Act to any external instruments relied on by a code of practice, including Australian Standards, is to prevent those instruments (and any amendments to them) being taken to be a “notifiable instrument”, which removes the obligation to register those instruments on the ACT Legislation Register, so as to make them publicly available.

As the Committee has previously observed, access to instruments incorporated into ACT legislation is an important element of subjecting the contents of those instruments to scrutiny and ensuring that people affected by the content of the instruments have access to them. The Committee has consistently stated that a justification for the displacement of the usual notification requirements should be provided, and notice of how the instrument may be accessed, preferably without cost, should be provided. No such justification is provided in relation to the Australian Standard relied upon by this instrument, though the Committee notes that the disapplication of subsections 47(5) and (6) comes from the Construction Occupations (Licensing) Act, not from the instrument itself.

Nevertheless, the Committee considers that the explanatory statement for the instrument might provide information as to whether (and, if so, where) AS/NZS 3000 can be accessed by the public, at no cost. If free public access cannot be provided, the Committee considers that the explanatory statement should provide as explanation as to why this is not practical or reasonable.

**The Committee requests the Minister’s advice as to whether free public access can be provided to AS/NZS 3000 and, if not, why not.**

**This comment requires a response from the Minister.**

HUMAN RIGHTS ISSUES

**Disallowable Instrument DI2017-307 being the University of Canberra (Medical Leave) Statute 2017 made under section 40 of the University of Canberra Act 1989 authorises the University Council to make rules that allow for a student to be placed on involuntary medical leave in prescribed circumstances.**

This instrument, made under section 40 of the *University of Canberra Act 1989*, provides that the Council of the University of Canberra may make rules, not inconsistent with the parent Act or the *Disability Discrimination Act 1992* (Cwlth), prescribing all matters that are necessary or convenient to be prescribed for the placing of a student on a period of involuntary medical leave. Subsection 4(2) of the instrument provides that the rules may prescribe the meaning of “serious health condition”.

Subsection 4(4) provides:

- (4) The University may only impose reasonable limits on a student’s human rights under these Rules in accordance with the *Human Rights Act 2004*.

*Note* ‘Reasonable’ limits are to be determined in the relevant circumstances with reference to section 28(2) of the *Human Rights Act 2004*.

The Committee notes that the explanatory statement for the instrument provides five pages of discussion of “human rights considerations”.

**The Committee draws to the attention of the Legislative Assembly the discussion in the explanatory statement for this instrument of the human rights issues relevant to the instrument.**

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

#### AVAILABILITY OF EXTRINSIC MATERIAL RELIED UPON BY THE INSTRUMENTS

**Disallowable Instrument DI2017-308 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2017, including a regulatory impact statement, made under section 25 of the Energy Efficiency (Cost of Living) Improvement Act 2012 revokes DI2016-302 and approves the Energy Efficiency Improvement Eligible Activities Code of Practice, December 2017.**

**Disallowable Instrument DI2017-309 being the Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2017, including a regulatory impact statement, made under section 25 of the Energy Efficiency (Cost of Living) Improvement Act 2012 revokes DI2016-303 and approves the Record Keeping and Reporting Code of Practice, December 2017.**

These instruments make codes of practice, under the *Energy Efficiency (Cost of Living) Improvement Act 2012*. Each of the codes of practice relies on external documents, including Australian Standards and the National Construction Code. Each instrument disapplies subsections 47(5) and (6) of the *Legislation Act 2001*, meaning that any external instruments relied on by a code of practice, including Australian Standards, is to prevent those instruments (and any amendments to them) being taken to be a “notifiable instrument”, which removes the obligation to register those instruments on the ACT Legislation Register, so as to make them publicly available.

For the first instrument mentioned above, the explanatory statement states:

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

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

The effect of subsection 47(5) is to make any law of another jurisdiction, or an instrument, that is applied by a subordinate law or by a disallowable instrument, as in force from time to time, a ‘notifiable instrument’. The effect of subsection 47(6) is to make any amendments or revisions of such (external) instruments also notifiable instruments.

The reason for disapplying the application of section 47(5) and (6) is to avoid breaching copyright. The code refers to Australian standards which would be required to be notified if s47 of the Legislation Act applied. Standards Australia is the nation's peak non-government, not-for-profit standards organization whose main responsibility is the development of standards. Australian Standards are protected by copyright and are sold and distributed worldwide by SAI Global Limited. To provide a Standard referred to in legislation as a notifiable instrument on the Act Legislation Register (that is make it available publically for free) would constitute a breach of Standards Australia's copyright in that particular standard. For this reason, the instrument disapplies s47(5) and (6) of the Legislation Act which requires the documents to be notified.

Disapplying s47(5) and (6) means interested persons will be required to purchase the relevant standard. In relation to the cost associated with having to purchase a standard, the only people likely to have sufficient interest or need to purchase a Standard are those considering delivering activities as part of the Energy Efficiency Improvement Scheme (EEIS). Those parties include service providers such as electricians and plumbers who should already have access to the relevant Standards as part of their professions. The cost therefore should be minimal.

Additionally, many Australian and International Standards are available for viewing at the National Library of Australia (NLA). An online search of the NLA's catalogue can be undertaken to identify which Standards it has available.

The explanatory statement goes on to state:

#### **Section 5 – Referenced documents**

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

Largely identical statements appear in the explanatory statement for the second instrument mentioned above.

Section 5 of the first instrument states:

#### **5 Referenced documents**

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

Section 5 of the second instrument is in similar terms, though it also notes that the National Construction Code incorporates the Building Code of Australia and the Plumbing Code of Australia.

While the explanatory statements for the instruments do much to address the concerns previously expressed by the Committee, in relation to free public access to documents referenced by legislation, the Committee considers that the explanatory statements for the instruments mentioned above might have provided information as to whether each of the standards relied on by the instrument are in fact available for viewing at the National Library of Australia, for free, rather than requiring users of the legislation to make their own inquiries. Further, the Committee seeks the Minister's advice as to whether the referenced standards might be made available for viewing through the Access Canberra shopfront, as is the National Construction Code.

**The Committee requests the Minister’s advice as to whether free public access can be provided to the various external standards referenced by the two instruments mentioned above and, if not, why not.**

**This comment requires a response from the Minister.**

IS THIS A DISALLOWABLE INSTRUMENT?

**Disallowable Instrument DI2017-313 being the Veterinary Surgeons (Acting Member) Appointment 2017 (No 1) made under section 110 of the *Veterinary Surgeons Act 2015* determines a specified person as an acting member of the ACT Veterinary Surgeons Board.**

This instrument appoints a specified person as an acting member of the ACT Veterinary Surgeons Board. The appointment is made under section 110 of the *Veterinary Surgeons Act 2015*. The explanatory statement for the instrument states:

Section 228 of the *Legislation Act 2001* provides that before making an appointment to a statutory position, a Minister must consult with the relevant standing committee of the Legislative Assembly. Section 227 of the Legislation Act provides that the consultation requirement in section 228 does not apply to the appointment of 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 second or subsequent consecutive period. As this is the second acting appointment of [the specified person] to act as a member of the Board, the Minister consulted with the relevant standing committee.

However, the explanatory statement does not address the issue as to whether or not the *Legislation Act 2001* does not apply to the appointment of the specified person, because of the operation of paragraph 227(2)(a) of the Legislation Act, which excludes the appointment of public servants to statutory positions from the requirements of Division 19.3.3 of the Legislation Act (including the requirement that appointments be made by disallowable instrument). It is for this reason that the Committee has consistently requested that explanatory statements relating to statutory appointments include a statement to the effect that “this is not a public servant appointment”.

**The Committee seeks the Minister’s confirmation that the specified person is not a public servant, for the purposes of paragraph 227(2)(a) of the *Legislation Act 2001*.**

**This comment requires a response from the Minister.**

IS THIS A DISALLOWABLE INSTRUMENT?

**Disallowable Instrument DI2018-2 being the Legal Aid (Review Committee Panels) Appointment 2018 made under section 37 of the *Legal Aid Act 1977* appoints specified persons as part-time members of the Legal Aid Commission review committee panel.**

This instrument appoints various specified persons to the Legal Aid Commission Review Committee Panel. The appointments are made under section 37 of the *Legal Aid Act 1977*.

The Committee notes that the explanatory statement for the instrument does not address the issue as to whether or not the *Legislation Act 2001* does not apply to the appointment of any of the specified persons, because of the operation of paragraph 227(2)(a) of the Legislation Act, which excludes the appointment of public servants to statutory positions from the requirements of Division 19.3.3 of the Legislation Act (including the requirement that appointments be made by

disallowable instrument). It is for this reason that the Committee has consistently requested that explanatory statements relating to statutory appointments include a statement to the effect that “this is not a public servant appointment”.

**The Committee seeks the Minister’s confirmation that the specified person is not a public servant, for the purposes of paragraph 227(2)(a) of the *Legislation Act 2001*.**

**This comment requires a response from the Minister.**

## SUBORDINATE LAWS—NO COMMENT

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

- **Subordinate Law SL2017-32 being the Family Violence Regulation 2017 made under the *Family Violence Act 2016* prescribes which orders are eligible to be recognised in the ACT under Part 9 of the ACT.**
- **Subordinate Law SL2017-33 being the Construction Occupations (Licensing) Amendment Regulation 2017 (No 1) made under the *Construction Occupations (Licensing) Act 2004* provides for a new licensing regime for various construction occupations.**
- **Subordinate Law SL2017-34 being the Aboriginal and Torres Strait Islander Elected Body Regulation 2017 made under the *Aboriginal and Torres Strait Islander Elected Body Act 2008* determines how Aboriginal and Torres Strait Islander Elected Body members should declare their pecuniary and personal interests, defines the role of the chair and deputy chair and institutes a prescribed code of conduct.**
- **Subordinate Law SL2017-36 being the Public Health Amendment Regulation 2017 (No 1) made under the *Public Health Act 1997* amends Part 3 of the *Public Health Regulation 2000* to facilitate a phased transition from the ACT Cervical Cytology Register to the National Cancer Screening Register.**
- **Subordinate Law SL2017-37 being the Magistrates Court (Waste Management and Resource Recovery Infringement Notices) Regulation 2017 made under the *Magistrates Court Act 1930* creates a system of infringement notices for certain offences against the *Waste Management and Resource Recovery Act 2016* and the *Waste Management and Resource Recovery Regulation 2017*.**
- **Subordinate Law SL2017-38 being the Mutual Recognition (Australian Capital Territory) Regulation 2017 made under the *Mutual Recognition (Australian Capital Territory) Act 1992* provides the Australian Capital Territory's container deposit scheme with a 12 month temporary exemption from the *Mutual Recognition Act 1992* and the *Trans-Tasman Mutual Recognition Act 1997*.**
- **Subordinate Law SL2017-39 being the Trans-Tasman Mutual Recognition Regulation 2017 made under the *Trans-Tasman Mutual Recognition Act 1997* provides the Australian Capital Territory's container deposit scheme with a 12 month temporary exemption from the *Mutual Recognition Act 1992* and the *Trans-Tasman Mutual Recognition Act 1997*.**
- **Subordinate Law SL2017-40 being the Court Procedures Amendment Rules 2017 (No 4) made under the *Court Procedures Act 2004* amends the *Court Procedures Rules 2006* and extends the application of the rules of proceedings under the *Family Violence Act 2016*.**



- **Subordinate Law SL2017-41 being the Energy Efficiency (Cost of Living) Improvement Regulation 2017, including a regulatory impact statement, made under the *Energy Efficiency (Cost of Living) Improvement Act 2012* determines four new classes of priority households to be targeted under the Energy Efficiency Improvement Scheme.**
- **Subordinate Law SL2017-42 being the Freedom of Information Regulation 2017 made under the *Freedom of Information Act 2016* determines that the principal officer for both territory authorities and instrumentalities is the person who has responsibility for managing the affairs of the entity for the purposes of the Act.**
- **Subordinate Law SL2017-44 being the Road Transport (Road Rules) (Consequential Amendments) Regulation 2017 (No 1) made under the *Dangerous Goods (Road Transport) Act 2009, Road Transport (Driver Licensing) Act 1999, Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2001, Road Transport (Vehicle Registration) Act 1999 and Victims of Crime Act 1994* repeals SL2000-10, NI2013-329, DI2007-207 and DI2015-2 and amends specified legislation consequential to the commencement of the *Road Transport (Road Rules) Regulation 2017* and the *Road Transport (Safety and Traffic Management) Regulation 2017*.**
- **Subordinate Law SL2017-45 being the Road Transport (Safety and Traffic Management Regulation) 2017 made under the *Road Transport (Safety and Traffic Management) Act 1999* determines provisions about impounding vehicles, unsafe loads, traffic offence detection devices (police speedometers, speed detection devices, camera, digital and laser speed measuring devices), parking schemes (meter and ticket parking schemes, heavy vehicle parking in residential areas, parking permits and mobility parking schemes).**

## SUBORDINATE LAW—COMMENT

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

### STRICT LIABILITY OFFENCES

**Subordinate Law SL2017-43 being the Road Transport (Road Rules) Regulation 2017 made under the *Road Transport (Safety and Traffic Management) Act 1999* provides for a single regulation of road rules applying to vehicles and road users in the ACT.**

This subordinate law consolidates the “road rules” applying to vehicles and road users on roads and road-related areas in the ACT. The explanatory statement for the subordinate law states that “[t]his is consistent with other Australian jurisdictions, who have consolidated the Australian Road Rules (ARRs) into a single regulation that is applicable to that State or Territory.”

Regulation 8 provides:

#### **8 Offences against regulation—strict liability**

An offence against this regulation is a strict liability offence.

The Committee notes that the Road Transport (Safety and Traffic Management) Regulation 2017 (Subordinate Law SL2017-45), also considered by the Committee for this Scrutiny Report, contains no equivalent of regulation 8.

The subordinate law contains over 400 strict liability offences. Each of the offences carries a maximum penalty of 20 penalty units. Under section 133 of the *Legislation Act 2001*, a penalty unit is \$150 for an individual and \$750 for a corporation.

The Committee has consistently taken the view that strict liability offences need to be justified. In its document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf)), the Committee states:

#### **STRICT AND ABSOLUTE LIABILITY OFFENCES**

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

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

The explanatory statement for this subordinate law contains no justification for the various offences created by the subordinate law needing to be offences of strict liability. However, in terms of the defences available, the Committee notes that regulation 7 provides:

#### **7 Offences against regulation—application of Criminal Code etc**

Other legislation applies in relation to offences against this regulation.

##### *Note 1 Criminal Code*

The Criminal Code, ch 2 applies to all offences against this regulation (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg "conduct", "intention", **recklessness** and **strict liability**).

##### *Note 2 Penalty units*

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Regulation 9 provides:

#### **9 Offences against regulation—defence**

It is a defence to an offence against this regulation if the defendant proves that the offence—

- (a) was the result of an accident; or
- (b) could not have been avoided by any reasonable efforts by the defendant.

This means that the defences issue has been addressed, but not the justification.

The Committee seeks the Minister’s advice as to the justification for offences in this subordinate law needing to be offences of strict liability.

The Committee draws the attention of the Legislative Assembly to this subordinate law, under principle (1)(b) of the Committee’s terms of reference, on the basis that it may unduly trespass on rights previously established by law, and also under principle (2) of the Committee’s terms of reference, on the basis that the explanatory statement for the subordinate law does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

## NATIONAL REGULATIONS—COMMENT

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

### *Retrospective operation*

#### **Education and Care Services National Further Amendment Regulations 2017 made under the Education and Care Services National Law as applied by the law of the States and Territories.**

These National Regulations were tabled in the Legislative Assembly on 13 February 2018. The Committee notes with approval that an explanatory statement was tabled with the National Regulations.

As the explanatory statement notes, the National Regulations are made under the *Education and Care Services National Law (ACT) Act 2011*, referred to in the explanatory statement as “the Adopting Law”. That Adopting Law adopts the Education and Care Services National Law for the ACT. Section 6 of the Adopting Law provides:

#### **6 Adoption of Education and Care Services National Law**

- (1) Subject to this section, the Education and Care Services National Law, as in force from time to time, set out in the schedule to the Victorian Act—
  - (a) applies as a territory law; and
  - (b) as so applying may be referred to as the *Education and Care Services National Law (ACT)*; and
  - (c) so applies as if it were part of this Act.
- (2) A law that amends the Education and Care Services National Law set out in the schedule to the Victorian Act and is passed by the Victorian Parliament after this Act’s notification day must be presented to the Legislative Assembly not later than 6 sitting days after the day it is passed.
- (3) The amending law may be disallowed by the Legislative Assembly in the same way, and within the same period, that a disallowable instrument may be disallowed.

*Note* See the Legislation Act, s 65 (Disallowance by resolution of Assembly).

- (4) If the amending law is not presented to the Legislative Assembly in accordance with subsection (2), or is disallowed under subsection (3), the Education and Care Services National Law applying under subsection (1) is taken—
  - (a) not to include the amendments made by the amending law; and
  - (b) to include any provision repealed or amended by the amending law as if the amending law had not been made.
- (5) Section 303 (4) (Parliamentary scrutiny of national regulations) of the Education and Care Services National Law set out in the schedule to the Victorian Act does not apply as a territory law.

The relevance of section 6 of the Adopting Law is reflected in the explanatory statement for these National Regulations, which states:

Under section 220(1)(g) of the [Education and Care Services] National Law the relevant Ministerial Council (currently the Education Council) has the power to recommend or approve amendments to the National Law.

The Ministerial Council also has the power to make regulations under section 221. The National Law provides for the tabling of regulations in each ‘House of Parliament’ of a participating jurisdiction under section 303. A committee of the House of Parliament of any participating jurisdiction may consider the regulation and the regulation may be disallowed. The National Law disallowance however, has no effect unless the regulation is disallowed by a majority of participating jurisdictions.

Under section 6 of the ACT’s Adopting Law, the Assembly is empowered to disallow an amending law presented to the Assembly. If the Assembly is not presented with an amending law the National Law is taken not to be amended by that law. If the amending law is disallowed, the National Law is taken not to be amended by that law. However, section 6 does not enable the Assembly to amend or propose a new Bill to amend the National Law. To do this the Assembly would need to modify the Adopting Law.

Section 6(2) requires any amendments to the Education and Care Services National Law passed by the Victorian Parliament, to be presented to the Legislative Assembly no later than 6 sitting days.

There are apparently words missing from the final sentence of the paragraph immediately above. To reflect subsection 6(2) of the Adopting Law, the words “after the day it is passed by the Victorian Parliament” should be added after “no later than 6 sitting days”.

The explanatory statement goes on to state:

The National Law amendments as outlined in this explanatory statement were given Royal Assent on 27 March 2017.

Section 6 of the ACT’s Adopting Law also modifies the effect of section 303 of the National Law by in effect enabling the Assembly to disallow a regulation unilaterally.

As indicated by subsections 6(1) and (2) of the Adopting Law, the Education and Care Services National Law is set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria. Sections 301 to 304 of that Victorian Act deal with National Regulations. They provide:

**301 National regulations**

- (1) The Ministerial Council may make regulations for the purposes of this Law.
- (2) The national regulations may provide for any matter that is required or permitted to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Law.
- (3) Without limiting subsection (1), the national regulations may provide for the following—
  - (a) fees (including application fees and annual fees) for approvals and other things done under this Law;
  - (b) the indexation of fees;
  - (c) standards for education and care services;
  - (d) requirements for educational programs, including the quality of those programs and their development, documentation and delivery;
  - (e) requirements and standards to be complied with for the safety, health and wellbeing of children being educated and cared for by an education and care service;
  - (f) requirements and standards to be complied with for safety, security, cleanliness, comfort, hygiene and repair of premises, outdoor spaces, fencing, gates, resources and equipment used for providing education and care services;
  - (g) requirements and standards about the premises to be used to provide an education and care service including siting, design, layout, space, security and entitlement to occupy;
  - (h) requirements and standards for the staffing of education and care services including the recruitment (and conduct of criminal history or other security checks) and the appointment of staff, performance improvement, professional standards, professional development, numbers and qualifications of educators (including minimum age and requirements concerning groups of children of different ages and composition) and staffing rosters and arrangements;
  - (i) requirements and standards about educators' relationships with children, interactions and behaviour guidance and inclusion policies and practice for education and care services;
  - (j) requirements and standards for partnerships between education and care services and the community in which they are located and the families of children being educated and cared for by education and care services, including requirements for services to link to other support services for children and families;

- (k) requirements and standards as to the leadership and management of education and care services including governance and fitness and propriety of all staff members and volunteers, management of grievances and complaints and the provision of information to families;
  - (l) the records, policies and procedures to be kept by approved providers and family day care educators including enrolment and attendance information;
  - (m) requirements and standards about first aid and management of children's medical conditions including—
    - (i) the training of educators and staff members; and
    - (ii) plans, policies and procedures used to manage medical conditions and first aid; and
    - (iii) the keeping and storage of first aid kits and medications;
  - (n) information required to be submitted for applications made under this Law;
  - (o) requirements and standards for the provision and display of information by approved providers;
  - (p) the publication of information about enforcement actions taken under this Law, including notice and review of proposals to publish information;
  - (q) matters relating to the application of this Law to partnerships, eligible associations or prescribed entities;
  - (r) requirements relating to the receipt and payment and distribution of fees and monetary penalties payable under this Law.
- (4) The national regulations—
- (a) may be of a general or limited application; and
  - (b) may differ according to differences in time, place(including jurisdiction) or circumstances; and
  - (c) may differ according to the type or class of education and care service and the ages of children being educated and cared for by a service; and
  - (d) may exempt any education and care service or any type or class of education and care service from complying with all or any of the regulations; and
  - (e) may leave any matter or thing to be from time to time determined, applied, dispensed with or regulated by a Regulatory Authority; and
  - (f) may apply, adopt or incorporate by reference any document either—
    - (i) as in force at the date the national regulations come into operation or at any date before then; or
    - (ii) wholly or in part or as amended by the national regulations; and

- (g) may impose penalties not exceeding \$2000 for offences against the national regulations.

**302 Publication of national regulations**

- (1) The national regulations are to be published on the NSW Legislation website in accordance with Part 6A of the Interpretation Act 1987 of New South Wales.
- (2) A regulation commences on the day or days specified in the regulation for its commencement (being not earlier than the date it is published).

**303 Parliamentary scrutiny of national regulations**

- (1) The member of the Ministerial Council representing a participating jurisdiction is to make arrangements for the tabling of a regulation made under this Law in each House of the Parliament of the participating jurisdiction.
- (2) A committee of the Parliament of a participating jurisdiction may consider, and report to the Parliament about, the regulation in the same way the committee may consider and report to the Parliament about regulations made under Acts of that jurisdiction.
- (3) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction in the same way, and within the same period, that a regulation made under an Act of that jurisdiction may be disallowed.
- (4) A regulation disallowed under subsection(3) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.
- (5) If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the day of its disallowance in the last of the jurisdictions forming the majority.

- (6) In this section—

**regulation** includes a provision of a regulation.

**304 Effect of disallowance of national regulation**

- (1) The disallowance of a regulation in a majority of jurisdictions has the same effect as a repeal of the regulation.
- (2) If a regulation ceases to have effect under section 303 any law or provision of a law repealed or amended by the regulation is revived as if the disallowed regulation had not been made.
- (3) The restoration or revival of a law under subsection(2) takes effect at the beginning of the day on which the disallowed regulation by which it was amended or repealed ceases to have effect.

- (4) In this section—

**regulation** includes a provision of a regulation.

The NSW Legislation website indicates that these National Regulations were published on that website on 22 December 2017. The Committee notes that this information is not provided in the explanatory statement for these National Regulations, which speaks prospectively about publication of the National Regulations.

As indicated at the outset, the National Regulations were tabled in the Legislative Assembly on 13 February 2018. This means that there is no issue of them not being tabled within 6 sitting days after its “notification day”, as required by subsection 64(1) of the *Legislation Act 2001*.

The next issue is the Legislative Assembly’s capacity to scrutinise and disallow these National Regulations. It is important to remember that subsection 6(5) of the Adopting Law provides that subsection 303(4) of the Education and Care Services National Law. This means that disallowance of a National Regulation in the ACT can apply unilaterally, rather than only applying if disallowance occurs in a majority of jurisdictions, as provided for by subsection 303(4). The Committee notes with approval that the explanatory statement for these National Regulations reflects this

These formal matters aside, the Committee notes that section 3 of these National Regulations provides:

### **3 Commencement**

- (1) These Regulations (except regulations 5, 6, 16, 17 and 18) commence on 31 December 2017.
- (2) Regulations 5, 6, 16, 17 and 18 commence on 1 February 2018.

In the Committee’s document titled *Subordinate legislation—Technical and stylistic standards—Tips/Traps* (available at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf)), the Committee states:

#### **RETROSPECTIVITY**

The Committee would generally prefer that subordinate legislation not have a retrospective operation. The Committee accepts, however, that retrospective application is occasionally required. Section 76 of the *Legislation Act 2001* provides (in simple terms) that only “non-prejudicial” retrospectivity is permissible. Subsection 76(4) provides that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Retrospectivity that is prejudicial to the Territory or to a territory authority, etc is permitted.

While the Committee may be entitled to assume that any provision that has a retrospective operation must not have a prejudicial operation (ie on the basis that the Committee is entitled to assume that legislation would not be drafted in breach of section 76), it assists the Committee (and the Legislative Assembly) if that issue is expressly dealt with in the Explanatory Statement. That is, it assists the Committee if there is a statement to the effect that “this legislation does not have a prejudicial operation”.

While the reliance, in that extract, on the operation of section 76 of the Legislation Act, in the circumstances of these National Regulations, may be questioned, the Committee considers that the retrospectivity issue should, nevertheless have been addressed in the explanatory statement.



The Committee seeks the Minister's advice as to whether the retrospectivity provided for by these National Regulations has a prejudicial effect on any person (other than the Territory or a territory authority or instrumentality).

The Committee draws the attention of the Legislative Assembly to these National Regulations, under principle (1)(b) of the Committee's terms of reference, on the basis that they may unduly trespass on rights previously established by law, and also under principle (2) of the Committee's terms of reference, on the basis that the explanatory statement for these National Regulations does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

## REGULATORY IMPACT STATEMENTS—NO COMMENT

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

- Disallowable Instrument DI2017-281 being the Utilities (Technical Regulation) (Electricity Network Boundary Code) Approval 2017.
- Disallowable Instrument DI2017-308 being the Energy Efficiency (Cost of Living) Improvement (Eligible Activities) Code of Practice 2017.
- Disallowable Instrument DI2017-309 being the Energy Efficiency (Cost of Living) Improvement (Record Keeping and Reporting) Code of Practice 2017.
- Subordinate Law SL2017-41 being the Energy Efficiency (Cost of Living) Improvement Regulation 2017.

## GOVERNMENT RESPONSE

The Committee has received a response from:

- The Attorney-General, dated 12 February 2018, in relation to comments made in Scrutiny Report 13 concerning the Crimes (Fortification Removal) Amendment Bill 2017.

***This response can be viewed online at <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills>***

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

Giulia Jones MLA  
Chair

19 February 2018

## 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 13, dated 6 February 2018**
  - Building and Construction Legislation Amendment Bill 2017
  - Disallowable Instrument DI2017-263 - Terrorism (Extraordinary Temporary Powers) Public Interest Monitor Panel Appointment 2017 (No 1)
  - Work Health and Safety Legislation Amendment Bill 2017