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

SCRUTINY REPORT 33

6 AUGUST 2019
THE COMMITTEE

COMMITTEE MEMBERSHIP

Mrs Giulia Jones MLA (Chair)
Ms Bec Cody MLA (Deputy Chair)
Mr Michael Pettersson MLA

SECRETARIAT

Ms Nicola Kosseck (Secretary)
Ms Anne Shannon (Assistant Secretary)
Mr Stephen Argument (Legal Adviser—Subordinate Legislation)
Mr Daniel Stewart (Legal Adviser—Bills)

CONTACT INFORMATION

Telephone 02 6205 0173
Facsimile 02 6205 3109
Post GPO Box 1020, CANBERRA ACT 2601
Email scrutiny@parliament.act.gov.au
Website www.parliament.act.gov.au

ROLE OF COMMITTEE

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

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

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

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

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

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

(5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.
# Table of Contents

**Subordinate Legislation** ................................................................. 1

- Disallowable Instruments—No comment .............................................. 1
- Disallowable Instruments—Comment .................................................. 10
- Subordinate Laws—No Comment ....................................................... 20
- Subordinate Laws—Comment ............................................................ 21
- Regulatory impact statements—No comment ....................................... 26
- Regulatory impact statements—Comment ........................................... 26

**Responses** ...................................................................................... 28

- Government responses ................................................................. 28
- Government response—Comment ..................................................... 28

**Outstanding Responses** ................................................................. 30
SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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

- Disallowable Instrument DI2019-58 being the Road Transport (General) (Parking Permit Fees) Determination 2019 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-120 and determines fees payable for the purposes of the Act.


- Disallowable Instrument DI2019-68 being the Public Place Names (Lawson) Determination 2019 made under section 3 of the Public Place Names Act 1989 determines the names of seven new roads in the Division of Lawson.

- Disallowable Instrument DI2019-70 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2019 (No 1) made under section 139 of the Taxation Administration Act 1999 determines, for the purposes of the Scheme, the eligibility criteria of the eligible property, determination of amounts, method of calculation of duty payable and eligibility requirements.


- Disallowable Instrument DI2019-72 being the Independent Competition and Regulatory Commission (Price Direction for the Supply of Electricity to Certain Small Customers on Standard Retail Contracts) Terms of Reference Determination 2019 made under sections 15 and 16 of the Independent Competition and Regulatory Commission Act 1997 refers to the Independent Competition and Regulatory Commission the process to determine a new price direction for the supply of electricity to certain small customers on standard retail contracts.

• Disallowable Instrument DI2019-74 being the Integrity Commission (Commissioner) Appointment 2019 made under section 25 of the Integrity Commission Act 2018 appoints a specified person as the ACT Integrity Commissioner.

• Disallowable Instrument DI2019-75 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2019, 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 DI2019-76 being the Taxation Administration (Special arrangements—Energy Industry Levy returns and payments) Approval 2019 made under section 42 of the Taxation Administration Act 1999 approves a special arrangement that varies the requirement to lodge returns under the Act.

• Disallowable Instrument DI2019-79 being the Legislative Assembly (Members' Staff) Members' Salary Cap Determination 2019 (No 2) made under subsections 10(3) and 20(4) of the Legislative Assembly (Members' Staff) Act 1989 revokes DI2019-29 and determines the conditions under which Members may employ staff and engage consultants or contractors, including revised salary allocations for the 2018-19 financial year.

• Disallowable Instrument DI2019-80 being the Legislative Assembly (Members' Staff) Speaker's Salary Cap Determination 2019 (No 2) made under subsections 5(3) and 17(4) of the Legislative Assembly (Members' Staff) Act 1989 revokes DI2019-30 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors, including a revised salary allocation for the 2018-19 financial year.


• Disallowable Instrument DI2019-82 being the Waste Management and Resource Recovery (Exemption) Declaration 2019 (No 1) made under section 67 of the Waste Management and Resource Recovery Act 2016 exempts waste management businesses that transport waste through the ACT, but do not have any interaction with an ACT waste facility, from holding a waste transporter registration.


• Disallowable Instrument DI2019-84 being the Machinery (Fees) Determination 2019 (No 2) made under section 5 of the Machinery Act 1949 revokes DI2019-52 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-86 being the Official Visitor (Children and Young People) Appointment 2019 (No 1) made under paragraph 10(1)(a) of the Official Visitor Act 2012 appoints a specified person as an official visitor for the purposes of the Children and Young People Act 2008.

• Disallowable Instrument DI2019-88 being the Workers Compensation (Fees) Determination 2019 (No 2) made under section 221 of the Workers Compensation Act 1951 revokes DI2019-51 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-96 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Deputy Chair) Appointment 2019 made under section 15 of the City Renewal Authority and Suburban Land Agency Act 2017 and sections 78 and 79 of the Financial Management Act 1996 appoints a specified person as deputy chair of the City Renewal Authority Board.

• Disallowable Instrument DI2019-97 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2019 (No 1) made under section 15 of the City Renewal Authority and Suburban Land Agency Act 2017 and section 78 of the Financial Management Act 1996 appoints a specified person as a member of the City Renewal Authority Board, with knowledge or experience in urban renewal; social inclusion and community building; and law, public administration and governance.

• Disallowable Instrument DI2019-98 being the City Renewal Authority and Suburban Land Agency (City Renewal Authority Member) Appointment 2019 (No 2) made under section 15 of the City Renewal Authority and Suburban Land Agency Act 2017 and section 78 of the Financial Management Act 1996 appoints a specified person as a member of the City Renewal Authority Board, with knowledge or experience in urban renewal; and law, public administration and governance.

• Disallowable Instrument DI2019-99 being the Canberra Institute of Technology (CIT Board Member) Appointment 2019 (No 2) made under section 9 of the Canberra Institute of Technology Act 1987 and section 78 of the Financial Management Act 1996 appoints a specified person as a non-elected member of the CIT Board, with expertise and knowledge in industry and business; or vocational education and training and digital learning; or social policy issues, including access, equity and diversity issues; or finance; or governance, human resources, risk management, or the law.


• Disallowable Instrument DI2019-101 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2019 (No 1) made under section 139 of the Taxation Administration Act 1999 determines, for the purposes of the Scheme, the types of eligible property, determination of amounts, method of calculation of duty payable and eligibility requirements.

• Disallowable Instrument DI2019-104 being the City Renewal Authority and Suburban Land Agency (Suburban Land Agency Member) Appointment 2019 (No 1) made under section 45 of the and section 78 of the City Renewal Authority and Suburban Land Agency Act 2017 and Financial Management Act 1996 appoints a specified person as a member of the Suburban Land Agency, with knowledge or experience in civil engineering; environmentally sustainable development; and law, public administration and governance.


• Disallowable Instrument DI2019-107 being the Tree Protection (Fees) Determination 2019 (No 1) made under section 109 of the Tree Protection Act 2005 revokes DI2018-177 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-117 being the Traders (Licensing) (Fees) Determination 2019 made under section 52 of the Traders (Licensing) Act 2016 revokes DI2018-147 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-131 being the Stock (Levy) Determination 2019 made under section 6 of the Stock Act 2005 revokes DI2018-158 and determines the levy amount per stock unit and the number of animals making up a stock unit.

• Disallowable Instrument DI2019-132 being the Community Title (Fees) Determination 2019 made under section 96 of the Community Title Act 2001 revokes DI2018-159 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2019-133 being the Planning and Development (Fees) Determination 2019 made under section 424 of the Planning and Development Act 2007 revokes DI2018-167 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-135 being the Unit Titles (Fees) Determination 2019 made under section 179 of the Unit Titles Act 2001 revokes DI2018-169 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2019-136 being the Financial Management (Statement of Performance Scrutiny) Guidelines 2019 made under section 133 of the Financial Management Act 1996 revokes DI2017-66 and prescribes the information to be included in statements of performance of directorates and Territory authorities and their annual scrutiny by the Auditor-General.

• Disallowable Instrument DI2019-137 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2019 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2019-70 and determines, for the purposes of the Scheme, the eligibility criteria of the eligible property, determination of amounts, method of calculation of duty payable and eligibility requirements.

• Disallowable Instrument DI2019-138 being the First Home Owner Grant (Amount) Determination 2019 (No 1) made under paragraph 18(1)(b) of the First Home Owner Grant Act 2000 revokes DI2016-306 and determines that the amount of the First Home Owner Grant is a nil amount.

• Disallowable Instrument DI2019-139 being the Taxation Administration (Special Arrangements—Pensioner Duty Concession Scheme Deferrals) Approval 2019 (No 1) made under section 42 of the Taxation Administration Act 1999 provides for a special arrangement for the deferred payment of any duty payable by eligible transferees of the Pension Duty Concession Scheme.

• Disallowable Instrument DI2019-140 being the Planning and Development (Lease Variation Charge Deferred Payment Scheme) Determination 2019 made under paragraphs 279AA(1)(b) and (c) and subsection 279AC(2) of the Planning and Development Act 2007 determines the amount of the lease variation charge to be deferred for the purposes of the Act.


• Disallowable Instrument DI2019-149 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Chair) Appointment 2019 (No 1) made under section 21 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as chair of the ACT Climate Change Council.

• Disallowable Instrument DI2019-150 being the Adoption (Fees) Determination 2019 (No 1) made under section 118 of the Adoption Act 1993 repeals DI2018-267 and determines fees payable for services provided by Child and Youth Protection Services.

• Disallowable Instrument DI2019-151 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2019 (No 1) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the ACT Climate Change Council, representing climate change science.

• Disallowable Instrument DI2019-152 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2019 (No 2) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the ACT Climate Change Council, representing energy efficiency and the built environment.
• Disallowable Instrument DI2019-153 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2019 (No 3) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the ACT Climate Change Council, representing the interests of business.

• Disallowable Instrument DI2019-154 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2019 (No 4) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the ACT Climate Change Council, representing environmental management.

• Disallowable Instrument DI2019-155 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2019 (No 5) made under section 20 of the Climate Change and Greenhouse Gas Reduction Act 2010 appoints a specified person as a member of the ACT Climate Change Council, representing the community's interest in climate change.

• Disallowable Instrument DI2019-156 being the Land Titles (Fees) Determination 2019 (No 2) made under section 139 of the Land Titles Act 1925 revokes DI2019-67 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2019-161 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2019 made under section 48 of the Unlawful Gambling Act 2009 revokes DI2018-195 and determines the fee to accompany an application by a charitable organisation to conduct charitable gaming for the purposes of the Act.


• Disallowable Instrument DI2019-167 being the Partnership (Fees) Determination 2019 made under section 99 of the Partnership Act 1963 revokes DI2018-191 and determines the fee payable for an application for registration as an incorporated limited partnership.

• Disallowable Instrument DI2019-168 being the Unit Titles (Management) (Fees) Determination 2019 made under section 119 of the Unit Titles (Management) Act 2011 revokes DI2018-200 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2019-169 being the Public Place Names (Wright) Determination 2019 made under section 3 of the Public Place Names Act 1989 determines the name of a public place in the Division of Wright.


• Disallowable Instrument DI2019-171 being the Civil Law (Wrongs) The Law Society of Western Australia Professional Standards Scheme 2019 made under Schedule 4, section 4.10 of the Civil Law (Wrongs) Act 2002 gives notice of the Professional Standards Council of Western Australia's approval of The Law Society of Western Australia Scheme.


• Disallowable Instrument DI2019-177 being the Water and Sewerage (ACT Appendix to the Plumbing Code) Determination 2019 (No 3) made under subsection 44C(3) of the Water and Sewerage Act 2000 revokes DI2019-56 and makes the ACT Appendix to the Plumbing Code of Australia.

• Disallowable Instrument DI2019-179 being the Official Visitor (Mental Health) Appointment 2019 (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 Mental Health Act 2015.


DISALLOWABLE INSTRUMENTS—COMMENT

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

MINOR DRAFTING ISSUE—USE OF DOCUMENTS AS “PRECEDENTS” OR “TEMPLATES”


The first four instruments mentioned above appoint specified persons as acting members of the Domestic Violence Prevention Council. The persons are appointed under section 6 of the Domestic Violence Agencies Act 1986 and section 209 of the Legislation Act 2001. The latter provision relates to acting appointments. The fifth instrument appoints a person to act as chairperson of the Council and, as a result, also relies on section 6A of the Domestic Violence Agencies Act, which deals specifically with the appointment of an appointed member as chairperson of the Council. The explanatory statement for the first instrument mentioned above contains the following statement:
Section 227 of the Legislation Act provides that division 19.3.3 does not apply to appointees who are public servants. The person appointed by this instrument is not public servants [sic] ...

This (minor) error is replicated in the other four explanatory statements. This may indicate that the explanatory statement for an earlier instrument (appointing a number of persons) has been used as a “template” or “precedent” for the drafting of the explanatory statements for these instruments, without all the necessary modifications being made. In the Committee’s publication, Subordinate legislation—Technical and stylistic standards—Tips/Traps¹, the Committee cautions against this approach, stating:

**ISSUES ARISING FROM THE USE OF TEMPLATES AND PRECEDENTS**

The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only 1 person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the Explanatory Statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or Explanatory Statement is adapted to fit the new situation. The Committee accepts that instruments and Explanatory Statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.

The Committee reminds Ministers and agencies of the need to be careful in the use of existing documents as “templates” or “precedents”.

This comment does not require a response from the Minister.

Re-making of instrument, soon after the original instrument was made

- **Disallowable Instrument DI2019-69** being the Taxation Administration (Amounts Payable—Duty) Determination 2019 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2018-116 and determines differential rates of duty, or the method by which an amount of duty is payable under the Duties Act 1999.

- **Disallowable Instrument DI2019-141** being the Taxation Administration (Amounts Payable—Duty) Determination 2019 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2018-116 and DI2019-69 and determines differential rates of duty, or the method by which an amount of duty is payable under the Duties Act 1999.

The two instruments mentioned above determine various amounts of duty, for the Duties Act 1999. The first instrument was made, by the Treasurer, on 23 May 2019, and notified on the ACT Legislation Register on 28 May 2019. Section 2 of the instrument provides that it commences on 1 July 2019. The second instrument was made, by the Treasurer, on 25 June 2019, and notified on the ACT Legislation Register on 27 June 2019. Section 2 of the instrument provides that it commences on 1 July 2019. Section 10 of the second instrument provides that it revokes the first instrument (and also an instrument that the first instrument revoked).

The Committee notes that the explanatory statement for the second instrument states:

This instrument corrects errors in the stated duty amounts in Table 1 Part 2 of Taxation Administration (Amounts Payable – Duty) Determination 2019 (No 1), DI2019-69.

The Committee notes that the corrections are to the table in section 5 of both instruments. In the extract, below, the struck-out amounts are those that were set out in the first instrument:

5 Amounts payable (Transfer rate)

For the purposes of section 31 of the Duties Act, the duty payable on a dutiable transaction to which this part applies is the rate of duty listed in column 2 of table 1 opposite the dutiable amount listed in column 1.

Table 1 Amounts payable (Transfer rate)—Duties Act, s 31

<table>
<thead>
<tr>
<th>column 1</th>
<th>column 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>dutiable amount</td>
<td>rate of duty</td>
</tr>
<tr>
<td>less than or equal to $200,000</td>
<td>$1.20 for every $100, or part of $100, of the dutiable amount</td>
</tr>
<tr>
<td>more than $200,000 but not more than $300,000</td>
<td>$2,400 plus $2.20 for every $100, or part of $100, of the dutiable amount that is more than $200,000</td>
</tr>
<tr>
<td>more than $300,000 but not more than $500,000</td>
<td>$4,600 plus $3.40 for every $100, or part of $100, of the dutiable amount that is more than $300,000</td>
</tr>
<tr>
<td>more than $500,000 but not more than $750,000</td>
<td>$8,000 plus $4.32 for every $100, or part of $100, of the dutiable amount that is more than $500,000</td>
</tr>
<tr>
<td>more than $750,000 but not more than $1,000,000</td>
<td>$14,200 plus $5.90 for every $100, or part of $100, of the dutiable amount that is more than $750,000</td>
</tr>
<tr>
<td>more than $1,000,000 but not more than $1,455,000</td>
<td>$36,950 plus $6.40 for every $100, or part of $100, of the dutiable amount that is more than $1,000,000</td>
</tr>
<tr>
<td>more than $1,455,000</td>
<td>a flat rate of $4.54 per $100 applied to the total dutiable amount</td>
</tr>
</tbody>
</table>

As the two instruments have the same commencement date, the Committee assumes that there can be no possibility of individuals relying on the erroneous amounts in the first instrument, to their detriment.

This comment does not require a response from the Minister.

MINOR DRAFTING ISSUES

- Disallowable Instrument DI2019-77 being the Legal Aid (Commissioner—Specialist Assistance) Appointment 2019 made under paragraph 16(1)(d) of the Legal Aid Act 1977 appoints a specified person, with qualifications, training or experience that will enable him to give other specialist assistance to the Legal Aid Commission, as a part-time member and commissioner of the Board of the Legal Aid Commission.
• Disallowable Instrument DI2019-78 being the Legal Aid (Commissioner—Financial Management) Appointment 2019 made under paragraph 16(1)(c)(v) of the Legal Aid Act 1977 appoints a specified person, with expertise in financial management, as a part-time member and commissioner of the Board of the Legal Aid Commission.


Each of the first two instruments mentioned above appoints specified persons as “a part-time member and commissioner of the Board of the Legal Aid Commission”. As the Committee noted, as recently as Scrutiny Report 31 of the 9th Assembly (28 May 2019), also in relation to appointments to the Board of the Legal Aid Commission, the Legal Aid Act 1977 does not formally provide for the appointment of a “part-time member”, as such. The “part-time” element of the appointment arises from subsection 16(4) of the Legal Aid Act, which provides that “[a] person appointed as a member by the Minister is appointed on a part-time basis”.

A similar comment applies to the third instrument mentioned above, which deals with appointments to the Victims Advisory Board, under section 22D of the Victims of Crime Act 1994. Again, the explanatory statement indicates that the persons are appointed as “part-time” members, despite the fact that the Victims of Crime Act does not provide for the appointment of “part-time members”. In that case, the part-time status of members arises from subsection 22F(1) of the Victims of Crime Act.

This comment does not require a response from the Minister(s).

ISSUES WITH FEES INSTRUMENTS

As is to be expected at this time of the year, the Committee has considered, for this Scrutiny Report, over 60 instruments that determine fees, for the purposes of various Acts. 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/Traps. 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

In recent years, the Committee has been pleased to observe that the standard of fees
determinations (and their explanatory statements) is much-improved (in terms of them meeting the
Committee’s long-held views about fees determinations) from, say, 10 years ago. This improvement
is, again, evident, in this batch of instruments. However, there is still a level of inconsistency, in the
explanations provided, for the various fees increases. In addition, there are issues arising from a
relatively small number of instruments that require responses from relevant Ministers. These issues
are discussed below.

Consistency in explanations for fees increases

In the explanatory statements for this year’s batch of fees determinations, the Committee has
identified the following examples of what might be regarded as “standard” wording:

• **Electoral (Fees) Determination 2019—DI2019-71**
  
The fees for 2019/2020 financial year are determined by increasing the 2018-2019 fees,
determined by DI2018-106, by the Wage Price Index (WPI) of 2.5%, rounded down to the
nearest $0.05.

• **Dangerous Goods (Road Transport) Fees and Charges Determination 2019 (No 2)—DI2019-81**
  
  Fees in the 2019-20 financial year have been generally increased from fees in the previous
financial year by a wage price index (WPI) forecast of 2.5% and rounded down to the nearest
dollar. This increase gives effect to agreed Government policy under the *Fees and Charges:
Policy and Guidelines, November 2018*.

• **Domestic Animals (Fees) Determination 2019 (No 1)—DI2019-109**
  
  This determination increases fees contained in DI2018-285 by forecast Wage Price index (WPI)
2.5% as per Budget Memo 2019/09, rounded for cash handling and other purposes.

• **Architects (Fees) Determination 2019—DI2019-111**
  
  The regulatory fees in the determination have been increased by 2.5% for the 2019-20 financial
year, based on the wage price index as per government’s advice, Administration fees relating to
refunds are increased by 2.5% (the Wage Price Index), as per the government’s Fees and Charges
Policy and Guidelines. Appropriate rounding has been made in relation to increases.

• **Traders (Licensing) (Fees) Determination 2019—DI2019-117**
  
  Fees in the 2019-20 financial year have been increased from fees in the previous financial year
by a Wage Price Index (WPI) forecast of 2.5%. Calculations are rounded down to the nearest
dollar, with the exception of fees that have remained static for over three years, in which case
calculations are rounded up to the nearest dollar. This gives effect to the Government’s policy
decision to limit growth in government fees and charges for households to no more than the
Wage Price Index in 2019-20 as was announced in the 2019-20 ACT Budget. This approach also
aligns with the 2018 Treasury Fees and Charges Policy and Guidelines.
The Committee understands that “the Fees and Charges: Policy and Guidelines, November 2018”, “Budget Memo 2019/09”, “the Government’s Fees and Charges Policy and Guidelines” and “the 2018 Treasury Fees and Charges Policy and Guidelines” are all documents that are “internal” Government documents and are not publicly available. While a greater consistency in wording, ie in referring to these sources of authority, would be preferable, the gist of the explanations, above, is that the relevant fees have been increased (as in previous years) on the basis of a Budget decision, referencing changes to the Wage Price Index. The Committee considers these explanations to be acceptable.

Those “standard” explanations aside, what appear to be subject-matter-specific justifications for fees increases appear, for example, in the following fees determinations:

- **Cemeteries and Crematoria (Public Cemetery Fees) Determination 2019 (No 1)—DI2019-105**

  The determination increases fees by approximately 8.5% for the majority of services provided, this is to phase fee increases which were recommended in a report commissioned by the Regulator of the Act to ensure there is adequate funding in the Perpetual Care Trust Reserve to meet the requirements of the Act. Fees for ancillary services will increase by 2.5% reflecting the forecasted Wage Price Index for the 2019-20 budget. An exception to this is Christ the Redeemer Mausoleum fees and plaque fees which will not be increased this financial year as the fees are adequate to meet the perpetual care requirements under the Act and the costs are being recovered. All fees are rounded for cash handling purposes.

  An exception to part 6 of the Schedule to the instrument has been added where a person is surrendering an entitlement to an allotment which was reserved prior to 1 July 1996. The $500 flat fee is to encourage the surrendering of unused entitlements so that plots can be reallocated where they are no longer required by the entitlement holder or that person’s estate.

- **Waste Management and Resource Recovery (Fees) Determination 2019 (No 1)—DI2019-106**

  **Indexed Fees**

  This determination increases fees contained in DI2018-176 by forecast Wage Price index (WPI) 2.5% as per Budget Memo 2019/09, plus 7.5% interim increase prior to a Waste Levy introduction for commercial operators, rounded for cash handling and other purposes.

  This determination provides that registered charities and ACT Government agencies may apply to the Minister to waive a fee listed in schedule 1. The Minister may waive the fee (completely or partly).

  The WBRMC handling fee for Contaminated Remediation Material (CRM), Part 7, item 7.1, has been removed and per tonne cost amalgamated with the CRM acceptance fee, Part 7, item 7.2. This is due to the removal of the ability for customers to landfill their own CRM material using their own resources. This option was not used for many years due to the WHS requirements for handling asbestos and is no longer an option for the same reasons. The amalgamation of the two fees reflects the full cost of the service.

  **New Fees**

  New Fees have been established at part 8 of Schedule 2 for the acceptance of Beneficial Re-use, Asbestos Containing Material (non-friable) and Virgin Excavated Natural Materials at the former Mugga 2 Quarry (Mugga 2). These fees have been set due to the anticipated closure of the West Belconnen facility in the financial year and the opening of Mugga 2 due to the closure of West Belconnen.
New fees have been established at part 9 for the acceptance of Mr Fluffy Material at Mugga Landfill.

- **Water Resources (Fees) Determination 2019—DI2019-128**

  The regulatory fees (excluding water abstraction charge) in the determination have been increased by 2.5% for the 2019-20 financial year based on the wage price index as per government’s advice, appropriate rounding has been made in relation to increases. The government will index the Water Abstraction Charge (WAC) by 3% as per the government’s decision in the 2016-17 Budget.

- **Planning and Development (Fees) Determination 2019—DI2019-133**

  The regulatory fees in the determination have been increased by 2.5% for the 2019-20 financial year, based on the wage price index as per government’s advice. Administration fees relating to refunds are increased by 2.5% (the wage price index), as per the Government’s Fees and Charges Policy and Guidelines. Appropriate rounding has been made in relation to increases.

  Development Application fees for all developments that have a cost of works greater than $1 million have been increased by 20% and exemption declaration fees have been increased from $308 to $600. This increase in fees will allow for the expansion of the Merit Assessment Team and website management to better meet customer expectations.

- **Land Titles (Fees) Determination 2019 (No 2)—DI2019-156**

  Fees (apart from Items 130, 131, 132 and 132.1) in the 2019-20 financial year have been increased from fees in the previous financial year by 3.5 per cent on top of the Wage Price Index (WPI) forecast of 2.5 per cent. The additional 3.5 per cent increase is in order to support cost recovery for reforms under the Land Titles Modernisation Program, which will make buying a property simpler and more efficient. Calculations are rounded down to the nearest dollar, with the exception of fees that have remained static for over three years, in which case calculations are rounded up to the nearest dollar.

  Fees for Items 130, 131, 132 and 132.1 in the 2019-20 financial year have been increased by the WPI forecast of 2.5 per cent. Calculations are rounded down to the nearest dollar. This gives effect to the Government’s policy decision to limit growth in government fees and charges for households to no more than the Wage Price Index in 2019-20 as was announced in the 2019-20 ACT Budget. This approach also aligns with the 2018 Treasury Guidelines for Fees and Charges.

- **Guardianship and Management of Property (Fees) Determination 2019—DI2019-163**

  The new determination (the 2019 determination) sets the fee that will apply from 1 July 2019, and repeals the Guardianship and Management of Property (Fees) Determination 2018 (the 2018 determination), as well as it provides a fee increase in line with annual adjustments to the Wages Price Index (WPI) of 2.5%, rounded down to the nearest dollar. This gives effect to the Government’s policy decision to limit growth in government fees and charges for households to no more than the Wage Price Index in 2019-20 as was announced in the 2019-20 ACT Budget. This approach also aligns with the 2018 Treasury Guidelines for Fees and Charges.
The fee for the hourly rate for the examination of accounts maintained by an external financial manager is GST exempt and, when rounded, would have been $260. As this service is subsidised by Community Service Obligation funding, the Public Trustee and Guardian applies a 50% rebate to the fee. With the rebate applied, the fee would have been half of $260 which is $130.

The Committee considers those explanations to be both informative and acceptable.

ISSUES WITH PARTICULAR INSTRUMENTS

- Disallowable Instrument DI2019-89 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2019 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-125 and determines fees payable for the purposes of the Act.


- Disallowable Instrument DI2019-93 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2019 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-128 and determines fees payable for the purposes of the Act.

- Disallowable Instrument DI2019-94 being the Road Transport (General) Fees for Publications Determination 2019 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-129 and determines fees payable for various kinds of road transport publications.

- Disallowable Instrument DI2019-95 being the Road Transport (General) Driver Licence and Related Fees Determination 2019 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-126 and determines fees payable for the purposes of the Act.

- Disallowable Instrument DI2019-173 being the Victims of Crime (Fees) Determination 2019 (No 1) made under section 50(1) of the Victims of Crime Regulation 2000 revokes all previous Victims of Crime Regulation 2000 (Fees) determinations and determines the fees payable for the purposes of the Act.

- Disallowable Instrument DI2019-176 being the Working with Vulnerable People Background Checking (Fees) Determination 2019 (No 1) made under section 68 of the Working with Vulnerable People (Background Checking) Act 2011 repeals DI2018-137 and determines the fees for services provided by the Working With Vulnerable People Screening Unit.

The first instrument mentioned above determines fees under section 96 of the Road Transport (General) Act 1999. The explanatory statement for the instrument states:

Vehicle registration fees and other fees and charges have been increased by 2.5%, rounded down to the nearest ten cents. The short term registration surcharge (payable for registration periods of less than 12 months) has not been changed.

Heavy vehicle fees are set nationally and have not been amended by this determination.
The explanatory statement goes on to state:

The preference of the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) that Instruments or Explanatory Statements identify the amount of the old and new fee, any percentage increase and also the reason for any increase in the Instrument or the Explanatory Statement has been taken into account in the preparation of the Instrument and the Explanatory Statement.

However, the explanatory statement, in fact, does not provide the reason for the 2.5% fees increase. While (in the light of the discussion above, regarding the majority of the fees determinations that the Committee has considered, for this Scrutiny Report) the basis of the 2.5% increase may be surmised, it would be preferable if the reason for the increase was stated, in the explanatory statement for the instrument.

The same issue arises in relation to the second, third, fourth and fifth instruments mentioned above.

The Committee draws the attention of the Legislative Assembly to the explanatory statements for DI2019-89, DI2019-92, DI2019-93, DI2019-94 and DI2019-95, under principle (2) of the Committee’s terms of reference, on the basis that they do not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

The sixth instrument mentioned above (DI2019-173) determines fees for the Victims of Crime Regulation 2000. The explanatory statement for the instrument states:

The Minister delegated this function to the Director-General under his express delegation power in section 254A of the Legislation Act 2001, limited to the extent that the Director-General may determine fees only in relation to CPI increases (Instrument NI2018-337).

Schedule 1 of the instrument lists the amounts that service providers are to be paid, in accordance with their professional qualifications and the nature of the service provided.

The payments which applied previously are listed in italic in column 3. The 2019-20 ACT Budget has forecast a CPI of 2.25% for 2019-20. This index has been applied to calculate the payments for the 2019-20 period. The increased amount for 2019-20 is set out in column 4.

Fees have been generally increased based on aforementioned CPI rates and rounded up to the nearest dollar. [emphasis added]

The Committee notes that the reference to a 2.25% CPI increase is inconsistent with the reliance on a 2.5% WPI increase in the other fees determinations considered for this report.

The Committee seeks the Minister’s advice as to the reason for relying on the CPI, rather than the WPI, in relation to DI2019-173.

This comment requires a response from the Minister.

The seventh instrument mentioned above (DI2019-176) determines fees for the Working with Vulnerable People (Background Checking) Act 2011. The explanatory statement for the instrument states:
Fees for registration and renewal will increase in 2019-20. The Government is providing more resources for the Working with Vulnerable People Scheme to expedite application processing times thereby increasing the efficiency of delivering the Scheme.

Changes in the fee determination from the previous instrument is that the fee for paid employees has increased from $85 to $135 and the fee for paid employees renewing registrations has also increased from $85 to $135.

Fees charged for the issue of a duplicate card remains at $22.

On 1 July 2020, the Working with Vulnerable People registration period will be extended from three years to five years for all registrations.

To avoid any disadvantage for individuals who register or renew in the 2019-20 financial year, registrations received between 1 July 2019 and 30 June 2020 will be extended at the end of the three-year period by an additional two years at no further cost to the applicant. The extension will be added at the end of the three-year statutory registration period.

There will be a transition period for the introduction of worker screening of workers or volunteers engaged in NDIS regulated activities. This transition period will commence on 1 July 2020, with the commencement of the new requirements under the Working with Vulnerable People (Background Checking) Act 2011. Information will be made available to assist workers and volunteers during the transition period.

The Committee considers that the above explanation is less-than-ideal. While the “old” and “new” fees are identified, the percentage of the increase is not. In addition, the reason for the fees increases is not as explicit as it might be. It might be implied that the fees are being increased because “[t]he Government is providing more resources for the Working with Vulnerable People Scheme to expedite application processing times thereby increasing the efficiency of delivering the Scheme”. But (if this is the case) that explanation might have been made more clearly.

The Committee draws the attention of the Legislative Assembly to the explanatory statement for DI2019-176, under principle (2) of the Committee’s terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

IS THIS A DISALLOWABLE INSTRUMENT?


This instrument appoints a specified person as a member of the ACT Gene Technology Advisory Council. It is presented as a disallowable instrument.

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

(c) a person to a statutory position if the only function of the position is to advise the Minister.

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, 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 Committee notes that the explanatory statement for this instrument contains no such 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 person appointed by the instrument mentioned above is not a public servant.

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 SL2019-12 being the Victims of Crime (Financial Assistance) Amendment Regulation 2019 (No 1) made under the Victims of Crime (Financial Assistance) Act 2016 amends payment amounts provided to victims under specified sections to align the payments with the Consumer Price Index.

---

• Subordinate Law SL2019-13 being the Road Transport (Offences) Amendment Regulation 2019 (No 1) made under the Road Transport (General) Act 1999 amends the Road Transport (Offences) Regulation and determines infringement notice penalty amounts for offences under the Heavy Vehicle National Law and associated regulations.

• Subordinate Law SL2019-17 being the Building (General) Amendment Regulation 2019 (No 1) made under the Building Act 2004 provides for the Minister to determine a required document for a residential building work contract, and prohibits a condition in certain residential building contracts that allows a person, other than the owner of the land, to appoint or revoke the appointment of an eligible entity as a building certifier, or act as the agent of the owner in dealing with a building certifier.

SUBORDINATE LAWS—COMMENT

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

HUMAN RIGHTS ISSUES

• Subordinate Law SL2019-9 being the Electoral Amendment Regulation 2019 (No 1) made under the Electoral Act 1992 amends the Electoral Regulation to allow the Commissioner for Australian Capital Territory Revenue to access the ACT electoral roll for the purposes of the administration and enforcement of tax laws.

This subordinate law amends the Electoral Regulation 1993, to allow the Commissioner for Australian Capital Territory Revenue to access the ACT Electoral Roll for the purpose of the administration and enforcement of tax laws. The Committee notes that the explanatory statement for the subordinate law contains a comprehensive discussion of the human rights issues arising from the amendment.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendment made by this subordinate law, set out in the explanatory statement for the subordinate law.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

• Subordinate Law SL2019-10 being the Gambling and Racing Control (Code of Practice) Amendment Regulation 2019 (No 1), including a regulatory impact statement made under the Gambling and Racing Control Act 1999 amends the Gambling and Racing Control (Code of Practice) Regulation to implement measures from the National Consumer Protection Framework for Online Wagering in Australia.

This subordinate law amends the Gambling and Racing Control (Code of Practice) Regulation 2002, to implement measures from the National Consumer Protection Framework (NCPF) for Online Wagering in Australia. The Committee notes that the explanatory statement and the regulatory impact statement for the subordinate law contain a discussion of the human rights issues arising from the amendments.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendments made by this subordinate law, set out in the explanatory statement and the regulatory impact statement for the subordinate law.

This comment does not require a response from the Minister.
EXPLANATION OF REASONS FOR COSTS INCREASES

- Subordinate Law SL2019-11 being the Court Procedures Amendment Rules 2019 (No 1) made under the Court Procedures Act 2004 amends the Court Procedures Rules to provide for early commencement of practical legal training in certain circumstances, and introduces procedures, in exceptional circumstances, when an applicant for admission is unable to attend the ceremony and applying for absentee admission.

Among other things, this subordinate law amends costs provided for by Schedules 3 and 4 of the Court Procedure Rules 2006. The Committee notes that no information is provided in the (half-page) explanatory statement for the subordinate law. Consistent with the approach that the Committee has taken in relation to fees determinations, the Committee considers that it would be preferable if some explanation was provided, in relation to the magnitude of any increases in costs, provided for by the subordinate law, and the reasons for such increases.

The Committee draws the attention of the Legislative Assembly to the subordinate law mentioned above, 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.

HUMAN RIGHTS ISSUES / STRICT LIABILITY OFFENCES / DISAPPLICATION OF SUBSECTIONS 47(5) AND (6) OF THE LEGISLATION ACT 2001

- Subordinate Law SL2019-14 being the Road Transport (Road Rules) Amendment Regulation 2019 (No 1) made under the Road Transport (General) Act 1999 and Road Transport (Safety and Traffic Management) Act 1999 amends the Road Transport (Offences) Regulation, Road Transport (Road Rules) Regulation and the Road Transport (Safety and Traffic Management) Regulation to incorporate nationally agreed amendments to the Australian Road Rules, and to introduce a mobile device interaction ban for learner and provisional licence holders.

According to the explanatory statement for this subordinate law, the purpose of the subordinate law is “to incorporate nationally agreed amendments to the Australian Road Rules (ARRs) and introduce a mobile device interaction ban for learner and provisional licence holders.” The amendments made by the subordinate law include the insertion, into the various principal regulations amended, of new strict liability offences. The Committee notes that, in recognition of this fact, the explanatory statement for the subordinate law contains extensive discussion of human rights issues arising from the subordinate law, including specific discussion in relation to strict liability offences.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendments made by this subordinate law, set out in the explanatory statement for the subordinate law.

The comment immediately above does not require a response from the Minister.

The Committee notes that section 46 of the subordinate law inserts into the Road Transport (Road Rules) Regulation 2007 a new provision, that disapplies subsections 47(5) and (6) of the Legislation Act 2001, in relation to a “relevant standard”. That concept (which relates to standards for motorcycle helmets) is defined in a new definition, inserted into subsection 270(3) of the Road Transport (Road Rules) Regulation by section 45 of this subordinate law. The definition is as follows:
relevant standard, for a helmet, means—

(a) if the helmet is manufactured in Australia—either of the following, whether in force at the time the helmet is manufactured or at any later time:

(i) AS 1698-1988;
(ii) AS/NZS 1698; or

(b) if the helmet is imported into Australia—either of the following, whether in force at the time the helmet is imported or at any later time:

(i) AS 1698-1988;
(ii) AS/NZS 1698; or

(c) in any case—the United Nations Economic Commission for Europe standard 22.05, whether in force at the time the helmet is manufactured or at any later time;

but does not include a disapplied provision of a standard mentioned in paragraph (a), (b) or (c).

The Committee notes that the effect of subsection 47(5) of the Legislation Act 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 (ie rather than as it exists at the time that the subordinate law or disallowable instrument is made), a “notifiable instrument”. The effect of subsection 47(6) is to make any amendments or revisions of such (external) instruments, etc also notifiable instruments.

The effect of making an instrument a “notifiable instrument” is to require that it be published on the ACT Legislation Register. Publication of such material operates to enhance public access to the external material on which legislation sometimes relies. Disapplication of the publication requirement, obviously, limits public access to that material. While, in the past, the Committee has been prepared to accept that there are justifications for the disapplication of the publication requirement—the reference to copyright material and the need to respect the rights of copyright owners is the obvious example—the Committee has also required that a justification be provided. Further, the Committee has generally looked for a mechanism to be provided that allows public access to relevant documents, in a way that also protected the rights of copyright owners (eg making a copy available for public inspection, at a particular location, during office hours).

The explanatory statement for this subordinate law states (in relation to section 46 of the subordinate law):

This clause disapplies the provisions of section 47(5) and (6) of the Legislation Act 2001 which would otherwise require notification of instruments applied by reference (in this case the Australian, Australian/New Zealand and United Nations Economic Commission for Europe (UN ECE) Standards referred to in clause 45).

The standards referenced are technical in nature and describe performance standards with which motorbike helmets must comply. Due to this it is considered that the standards are technical in nature and are unlikely to be accessed by members of the public. Motorbike helmets sold in Australia must comply with one or more of these standards and are labelled with a sticker or stickers indicating which standard or standards it complies with.
The standards are regularly updated and the AS and AS/NZS standards are copyright. The ACT Government’s access to the standards is regulated by terms and conditions that govern how they can be used and disclosed. The AS and AS/NZS standards referenced in clause 45 can be purchased from the publisher SAI Global in either electronic or paper versions through the Standards Australia website (www.standards.org.au) or on 131 242. The UN ECE is available as a downloadable pdf by searching for the standard in an internet browser. Alternatively, a copy of the relevant Standards can be viewed by contacting roadtransportregulation@act.gov.au to organise a viewing time during business hours. 

The Committee notes, with approval, that public access is provided for, in relation to the AS and AS/NZS standards that are relied upon by this subordinate law.

The comment immediately above does not require a response from the Minister.

HUMAN RIGHTS ISSUES / STRICT LIABILITY OFFENCES

- **Subordinate Law SL2019-15 being the Road Transport (Public Passenger Services) Amendment Regulation 2019 (No 1) made under the Road Transport (Public Passenger Services) Act 2001 amends the Road Transport (Public Passenger Services) Regulation to remove a restriction on the types of vehicles that may be used to provide rideshare services.**

This subordinate law amends the **Road Transport (Public Passenger Services) Regulation 2002**. The amendments relate to “rideshare services”. The explanatory statement for the subordinate law states:

> Rideshare services in the ACT are recognised through accreditation and licensing requirements of rideshare vehicles and rideshare drivers. This regulation amends the types of vehicles that can be used for rideshare services and vehicle identification requirements for vehicles providing rideshare services.

> This Regulation removes an unnecessary restriction on the types of vehicles that may be used to provide rideshare services and as a result expands the types of vehicles that can be used for rideshare. There are no additional safety risks associated with this expansion.

> Rideshare vehicles may undertake both private and commercial activity and as such it is necessary to be able to identify when a vehicle is being used for rideshare purposes. The default position currently is that a rideshare vehicle licensee is issued with a label by the road transport authority for this purpose. The road transport authority may agree to other means of identification of a rideshare vehicle.

> This Regulation establishes the process by which the road transport authority may agree to other means and ensures that existing offences relating to identification of rideshare vehicles apply to both scenarios.

The amendments made by the subordinate law include the insertion, into the various principal regulations amended, of new strict liability offences. The Committee notes that, in recognition of this fact, the explanatory statement for the subordinate law contains extensive discussion of human rights issues arising from the subordinate law, including specific discussion in relation to strict liability offences.
The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendments made by this subordinate law, set out in the explanatory statement for the subordinate law.

This comment does not require a response from the Minister.

**HUMAN RIGHTS ISSUES**

- Subordinate Law SL2019-16 being the Gaming Machine Amendment Regulation 2019 (No 1) made under the *Gaming Machine Act 2004* provides detailed reforms to the community contributions scheme.

This subordinate law amends the *Gaming Machine Regulation 2004*. According to the explanatory statement, the amendments made by the subordinate law build on reforms made by the *Gaming Legislation Amendment Act 2018*, to “provide further detailed reforms to the community contributions scheme, including in relation to sport, in-kind contributions, facilities maintenance and specific exclusions from the scheme.”

The Committee notes that the explanatory statement for the subordinate law contains a discussion of human rights issues arising from the amendments made by the subordinate law.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendments made by this subordinate law, set out in the explanatory statement for the subordinate law.

This comment does not require a response from the Minister.

**STRICT LIABILITY OFFENCE / HUMAN RIGHTS ISSUES**

- Subordinate Law SL2019-18 being the Magistrates Court (Agents Infringement Notices) Amendment Regulation 2019 (No 1) made under the *Magistrates Court Act 1930* amends the Magistrates Court (Agents Infringement Notices) regulation to ensure that infringement notices may be issued to current licenced agents in respect of breaches of trust account auditing requirements.

The explanatory statement for this subordinate law states:

The Regulation amends the *Magistrates Court (Agents Infringement Notices) Regulation 2003* to make changes consequential to the *Red Tape Reduction Legislation Amendment Act 2017* (Red Tape Act).

In August 2017, section 115 of the *Agents Act 2003* (Agents Act) was amended by the Red Tape Act to make it an offence for current licenced agents to fail to comply with the trust account auditing requirement of the Agents Act. This brought offence provisions for current licensed agents in line with those for former licensed agents and personal representatives of a licensed agent. The amendment was intended to allow infringement notices to be issued to current licensed agents in respect of breaches of the trust account auditing requirements.

As part of this amendment, section 115 of the Agents Act was redrafted such that the offence provision, which was previously in subsection 115(2), was moved to subsection 115(1). Due to an oversight, the *Magistrates Court (Agents Infringement Notices) Regulation 2003* was not updated to reflect this change.
The Regulation ensures that infringement notices may be issued to current licenced agents in respect of breaches of the trust account auditing requirements.

The Committee notes that the explanatory statement goes on to note that, as it concerns a strict liability offence, the subordinate law might be seen to engage the presumption of innocence, a human right, under section 22 of the *Human Rights Act 2004*. The explanatory statement then states:

This Regulation does not create a new offence; it facilitates the administration of a strict liability offence already contained in the Agents Act. Without the ability to issue infringement notices, the only option available to the commissioner for fair trading is to apply to [the ACT Civil and Administrative Tribunal] for occupational discipline orders. This is a serious response, and this Regulation provides a method to achieve the policy purpose that is less restrictive on human rights.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues arising from the amendment made by this subordinate law, set out in the explanatory statement for the subordinate law.

This comment does not require a response from the Minister.

**REGULATORY IMPACT STATEMENTS—NO COMMENT**

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

- Subordinate Law SL2019-10 being the Gambling and Racing Control (Code of Practice) Amendment Regulation 2019 (No 1).

**REGULATORY IMPACT STATEMENTS—COMMENT**

The Committee has examined regulatory impact statement for the following disallowable instrument and offers these comments on it:


The instrument mentioned above is accompanied by a regulatory impact statement. Section 34 of the *Legislation Act 2001* sets out the fundamental requirements relating to the preparation of regulatory impact statements. Subsection 34(1) provides:

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

Section 35 of the Legislation Act then provides for the content of regulatory impact statements:
35  **Content of regulatory impact statements**

A regulatory impact statement for a proposed subordinate law or disallowable instrument (the *proposed law*) must include the following information about the proposed law in clear and precise language:

(a) the authorising law;

(b) a brief statement of the policy objectives of the proposed law and the reasons for them;

(c) a brief statement of the way the policy objectives will be achieved by the proposed law and why this way of achieving them is reasonable and appropriate;

(d) a brief explanation of how the proposed law is consistent with the policy objectives of the authorising law;

(e) if the proposed law is inconsistent with the policy objectives of another territory law—

   (i) a brief explanation of the relationship with the other law; and

   (ii) a brief explanation for the inconsistency;

(f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making a subordinate law or disallowable instrument) and why the alternative was rejected;

(g) a brief assessment of the benefits and costs of implementing the proposed law that—

   (i) if practicable and appropriate, quantifies the benefits and costs; and

   (ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f);

(h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency. [emphasis added]

The Committee’s role in relation to regulatory impact statements arises from paragraph 35(h) above, and from principle (2) of the Committee’s terms of reference, which requires the Committee to consider “whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee” [emphasis added].

The Committee notes that the regulatory impact statement for this instrument does not contain a discussion of “the scrutiny committee principles”, as required by paragraph 35(h) of the Legislation Act (though it does contain a brief reference to human rights issues).
The Committee draws the attention of the Legislative Assembly to the regulatory impact statement for this instrument, under principle (2) of the Committee’s terms of reference, on the basis that it does not meet the technical or stylistic standards expected by the Committee.

This comment requires a response from the Minister.

RESPONSES

GOVERNMENT RESPONSES

The Committee has received responses from:


  - DI2019-37—Water Resources Environmental Flow Guidelines 2019, and


These responses can be viewed online.

The Committee wishes to thank the Attorney-General, the Minister for the Environment and Heritage and the Minister for Transport and City Services for their responses.

GOVERNMENT RESPONSE—COMMENT

- Disallowable Instrument DI2019-33 being the Domestic Animals (Cat Containment) Declaration 2019 (No 1) made under section 81 of the Domestic Animals Act 2000 revokes DI2018-220 and declares specified areas of land as cat containment areas.

The Committee commented on the instrument mentioned above in Scrutiny Report 31 of the 9th Assembly (28 May 2019). The Committee queried whether the instrument had been validly made, noting that section 81 of the Domestic Animals Act 2000—which provides for the declaration of “cat containment areas”—requires that an “additional public notice” be given for the declaration of such areas. The Committee noted that the explanatory statement contained no indication that the Minister had given the relevant “additional public notice”, in this case. The Committee sought the Minister’s advice that such a notice had been given, for subsection 81(4) of the Domestic Animals Act 2000.

The Minister for Transport and City Services has responded to the Committee, in a letter dated 1 August 2019. The letter states (in part):

4 The responses can be viewed online.

Whilst a number of measures were taken to ensure that the public were made aware of the declaration, including a media release and providing information on the Transport Canberra and City Services Directorate website, due to an administrative oversight a dated public notice as required by section 81(4) of the Act was not given at the time. The oversight has now been addressed and a public notice has been posted on the ACT Government’s public notices website at .... www.act.gov.au/publicnotices

The Committee thanks the Minister for his response and for addressing the issue raised by the Committee.

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

Giulia Jones MLA
Chair

August 2019
OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

- **Report 27, dated 18 February 2019**
  - Electoral Amendment Bill 2018 (Government Response).

- **Report 28, dated 12 March 2019**
  - Electoral Amendment Bill 2018 (Private Member’s amendments).

- **Report 32, dated 23 July 2019**
  - Disallowable Instrument DI2019-48 Veterinary Practice (Fees) Determination 2019 (No 1)
  - Litter Legislation Amendment Bill 2019