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

SCRUTINY REPORT 11

30 OCTOBER 2017
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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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SUBORDINATE LEGISLATION

DISALLOWABLE INSTRUMENTS—NO COMMENT

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


Disallowable Instrument DI2017-226 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2017 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-81 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 DI2017-227 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2017 (No 2) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-82 and determines, for the purposes of the Scheme, the types of eligible property, determination of amounts, method of calculation of duty payable, and the eligibility requirements.

Disallowable Instrument DI2017-228 being the Taxation Administration (Amounts Payable—Disability Duty Concession Scheme) Determination 2017 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2016-142 and determines, for the purposes of the Disability Duty Concession Scheme, the types of eligible property, determination of amounts and the eligibility requirements.

Disallowable Instrument DI2017-231 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme) Determination 2017 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2015-93 and determines, for the purposes of the Scheme, the eligibility requirements, value of the concession, conditions and timing of applications.

Disallowable Instrument DI2017-232 being the Taxation Administration (Amounts Payable—Loose-fill Asbestos Insulation Eradication Buyback Concession Scheme—Eligible Impacted Properties) Determination 2017 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2016-4 and determines, for the purposes of the Scheme, the eligibility requirements, value of the concession, conditions and timing for applications.

Disallowable Instrument DI2017-233 being the Emergencies (Bushfire Council Members) Appointment 2017 (No 1) made under section 129 of the Emergencies Act 2004 appoints specified persons as members of the ACT Bushfire Council.

Disallowable Instrument DI2017-234 being the Road Transport (General) Application of Road Transport Legislation Declaration 2017 (No 7) made under section 12 of the Road Transport (General) Act 1999 declares that the road transport legislation does not apply to a road or road related area that is a section of parking on Barrine Drive to allow volunteers and traders to park free of charge while participating in the Floriade event.

Disallowable Instrument DI2017-236 being the Crimes (Sentence Administration) (Sentence Administration Board) Appointment 2017 (No 13) made under section 174 (1) (c) of the Crimes (Sentence Administration) Act 2005 appoints a specified person as a non-judicial member of the Sentence Administration Board.

Disallowable Instrument DI2017-244 being the Public Place Names (Taylor) Determination 2017 (No 3) made under section 3 of the Public Place Names Act 1989 determines the names of seven roads for the Division of Taylor.


Disallowable Instrument DI2017-246 being the Public Sector Management Amendment Standards 2017 (No 2) made under section 251 of the Public Sector Management Act 1994 amends the Standards.

Disallowable Instrument DI2017-247 being the Road Transport (Public Passenger Services) Maximum Fares for Taxi Services Determination 2017 (No 1) made under section 60 of the Road Transport (Public Passenger Services) Act 2001 revokes DI2015-187 and determines the maximum fares relating to the hiring or use of a taxi.


Disallowable Instrument DI2017-251 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2017, 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 compliance period 1 January to 31 December 2018.

**DISALLOWABLE INSTRUMENTS—COMMENT**

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

**MINOR DRAFTING ISSUE**


These instruments, made under sections 232A and 230 of the Duties Act 1999, respectively, revoke and re-make the Corporate Reconstruction Transaction Guidelines and the Intergenerational Rural Transfer Guidelines, respectively, in the light of amendments made to the Duties Act by the Revenue Legislation Amendment Act 2017. The Committee notes that the explanatory statement for the second instrument mentioned above correctly identifies that amendment Act, while the explanatory statement for the first instrument mentioned above merely refers to “the 2017 Act”.

This comment does not require a response from the Minister.
ARE THESE DISALLOWABLE INSTRUMENTS?

Disallowable Instrument DI2017-237 being the Territory Records (Advisory Council) Appointment 2017 (No 1) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing professional organisations interested in records management and archives.

Disallowable Instrument DI2017-238 being the Territory Records (Advisory Council) Appointment 2017 (No 2) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing organisations interested in public administration, governance or public accountability.

Disallowable Instrument DI2017-239 being the Territory Records (Advisory Council) Appointment 2017 (No 3) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing entities interested in Aboriginal and Torres Strait Islander heritage.

Disallowable Instrument DI2017-240 being the Territory Records (Advisory Council) Appointment 2017 (No 4) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing organisations interested in public administration, governance and public accountability.

Disallowable Instrument DI2017-241 being the Territory Records (Advisory Council) Appointment 2017 (No 5) made under section 44 of the Territory Records Act 2002 appoints a specified person as a member of the Territory Records Advisory Council, representing community associations interested in historical or heritage issues.


The first five instruments mentioned above appoint specified persons as members of the Territory Records Advisory Council. The appointments are made under section 44 of the Territory Records Act 2002. The sixth and seventh instruments mentioned above appoint two of those specified persons as chairperson and deputy chairperson of the Council, respectively. Those appointments are made under section 45 of the Territory Records Act. Each of the instruments in question is a disallowable instrument and it is on that basis that the instruments are considered by the Committee.

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 (available at http://www.parliament.act.gov.au/__data/assets/pdf_file/0007/434347/Subordinate-Legislation-Technical-and-Stylistic-Standards.pdf), the Committee stated:

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

None of the explanatory statements for the instruments mentioned above contains such a statement.

The Committee seeks the Minister’s confirmation that the persons appointed by the instruments mentioned above are not public servants.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2017-248 being the Smoke-Free Public Places (Public Transport Stops) Declaration 2017 (No 1) made under section 9O of the Smoke-Free Public Places Act 2003 declares public transport stops and waiting areas to be smoke-free public places.

Disallowable Instrument DI2017-249 being the Smoke-Free Public Places (Public Transport Stations) Declaration 2017 (No 1), including a regulatory impact statement made under section 9O of the Smoke-Free Public Places Act 2003 declares specified public transport stations to be smoke-free public places.

The instruments mentioned above declare certain places to be smoke-free public places, for section 9O of the Smoke-Free Public Places Act 2003. One of the effects of the declarations is that a strict liability offence is attached to smoking at one of the places declared to be smoke-free. The Committee notes that the explanatory statement for each instrument addresses the issue of the need for strict liability offences and also discussed the human rights issues involved in the relevant declarations.

The Committee draws the attention of the Legislative Assembly to the explanations.

This comment does not require a response from the Minister.
SUBORDINATE LAWS—NO COMMENT

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

**Subordinate Law SL2017-30 being the Road Transport (Offences) Amendment Regulation 2017 (No 1) made under the Road Transport (General) Act 1999 increases infringement notice penalties for offences under ACT road transport law and give effect to an increase in the Victims Services Levy.**

NATIONAL LAW—COMMENT

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

**Health Practitioner Regulation National Law and Other Legislation Amendment Act 2017**
(Queensland—Act No 32 of 2017).

This National Law was tabled in the Legislative Assembly on 24 October 2017. No explanatory statement was provided for the National Law, nor was there a tabling statement. The National Law itself provides no information as to how the National Law affects the ACT, nor how (if at all) it is relevant to the ACT.

The Committee assumes that the National Law involves an application of the **Health Practitioner Regulation National Law (ACT) Act 2010**. That (ACT) law applies the “Health Practitioner Regulation National Law”, as in force from time to time, and as set out in the Schedule to the **Health Practitioner National Law Act 2009** of Queensland as ACT law (subject to some ACT-specific modifications). The ACT Legislation Register contains the ACT version of the Health Practitioner Regulation National Law—titled the Health Practitioner Regulation National Law (ACT).

However, none of this information is provided in relation to this particular National Law. Nor is any information provided as to the capacity of the Legislative Assembly to scrutinise (or amend) this National Law. The Committee considers this to be highly unsatisfactory.

The Committee draws the Legislative Assembly’s attention to this National Law, under principle (2) of the Committee’s terms of reference, on the basis that (in this case) the absence of an explanatory statement does not meet the technical or stylistic standards expected by the Committee in relation to explanatory statements.

As it is important that the Legislative Assembly’s capacity to scrutinise and amend this National Law be clarified before any opportunity to amend (or disallow) this National Law has expired, this comment requires a response from the Minister as a matter of urgency.

REGULATORY IMPACT STATEMENT—NO COMMENT

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

**Disallowable Instrument DI2017-251 being the Energy Efficiency (Cost of Living) Improvement (Priority Household Target) Determination 2017.**
REGULATORY IMPACT STATEMENT—COMMENT

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

Disallowable Instrument DI2017-249 being the Smoke-Free Public Places (Public Transport Stations) Declaration 2017 (No 1).

The disallowable instrument mentioned above is accompanied by a regulatory impact statement (RIS). Chapter 5.2 of the Legislation Act 2001 provides for RISs for subordinate laws and disallowable instruments. The basic requirement is set out in section 34 of the Legislation Act, which provides (in part):

34 Preparation of regulatory impact statements

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

(2) However, this section does not apply to the proposed law if the administering Minister exempts the proposed law from subsection (1).

Note Section 32 and s 36 also state other circumstances when a regulatory impact statement is not required.

(3) An exemption under subsection (2) (the RIS exemption) is a disallowable instrument. Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under this Act.

(4) If the RIS exemption is disallowed under this Act after the proposed law has been made, the administering Minister must arrange for a regulatory impact statement to be prepared for the subordinate law or disallowable instrument.

(5) The regulatory impact statement prepared under subsection (4) must be presented to the Legislative Assembly not later than 5 sitting days after the day the RIS exemption is disallowed.

(6) This chapter (other than section 37 (When must regulatory impact statement be presented?)) applies to the law as if the law were a proposed subordinate law or disallowable instrument.

Section 35 of the Legislation Act then provides for the content of RISs:

35 Content of regulatory impact statements

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

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

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

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

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

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

   (ii) a brief explanation for the inconsistency;

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

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

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

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

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

Principle (2) of the Committee’s terms of reference dove-tails with paragraph 35(h) of the Legislation Act, in that it requires the Committee to consider (among other things) whether any RIS associated with an instrument meets the technical or stylistic standards expected by the Committee.

The RIS for this instrument contains no assessment of the consistency of the instrument with the Committee’s scrutiny principles.

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

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.
GOVERNMENT RESPONSES

The Committee has received responses from:


  An electronic copy of this response was not provided at the time of publication of this Report.

The Committee would like to thank the Minister for Health and Wellbeing, the Attorney-General and the Minister for Justice, Consumer Affairs and Road Safety for their helpful responses.

GOVERNMENT RESPONSE—COMMENT


The Committee commented on the instrument mentioned above in Scrutiny Report 9 of the 9th Assembly. The Committee’s comment focussed on the reliance of the instrument on Australian/New Zealand Standard (AS/NZS) Air-handling and water systems of buildings — Microbial control Design, installation and commissioning (AS/NZS 3666 1:2011) and the fact that the instrument disapplied subsection 47(6) of the Legislation Act 2001. The Committee noted that this meant that there was no requirement to publish that document on the ACT Legislation Register as a “notifiable instrument”, thereby denying persons affected by the instrument (or persons otherwise wanting to know the content of the obligations created by the instrument) free access to the document.
In Scrutiny Report 9, the Committee stated:

The Committee seeks the Minister’s advice as to whether AS/NZS 3666 1:2011 could be made available to the general public, on a restricted basis, and, if not, why not.

The Minister for Health and Wellbeing has responded to the Committee’s comment, in a letter dated 24 October 2017. In the response, the Minister states:

... the Committee sought my advice about issues of access to the Australian/New Zealand Standard (AS/NZS) Air-handling and water systems of buildings – Microbial control Design, installation and commissioning (AS/NZS 3666 1:2011) and whether it could be made available to the general public.

The Standard is available for viewing on the Standards Australia Website: https://infostore.saiglobal.com/en-au/Standards/preview-1497939/

The Committee notes that the link provided by the Minister provides access only to a preview of the document in question. Access to the complete document requires payment of a fee of $121.52.

The Committee seeks the Minister’s advice as to whether AS/NZS 3666 1:2011 could be made available to the general public for free, on a restricted basis, and, if not, why not.

The Committee draws this matter to the attention of the Assembly, and asks the Minister to respond.

Giulia Jones MLA
Chair

30 October 2017
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)
Disallowable Instrument DI2017-57 - Electoral Commission (Chairperson) Appointment 2017 (No 2)

Report 10, dated 17 October 2017
Heavy Vehicle National Amendment Regulation 2017
Firearms and Prohibited Weapons Legislation Amendment Bill 2017