THE COMMITTEE

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ROLE OF COMMITTEE

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

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

(1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):

(a) is in accord with the general objects of the Act under which it is made;

(b) unduly trespasses on rights previously established by law;

(c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;

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

(3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:

(a) unduly trespass on personal rights and liberties;

(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(d) inappropriately delegate legislative powers; or

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

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

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

DISALLOWABLE INSTRUMENTS—NO COMMENT

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


- Disallowable Instrument DI2018-100 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2018 (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.

- Disallowable Instrument DI2018-101 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2018 (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.

- Disallowable Instrument DI2018-102 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2018 (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.

- Disallowable Instrument DI2018-103 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2018 (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.

- Disallowable Instrument DI2018-104 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Member) Appointment 2018 (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.

- Disallowable Instrument DI2018-105 being the Climate Change and Greenhouse Gas Reduction (Climate Change Council Chair) Appointment 2018 (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 DI2018-107 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 6) made under section 13 of the *Road Transport (General) Act 1999* declares that certain parts of the road transport legislation do not apply to an entrant vehicle, or the driver of an entrant vehicle, participating in a special stage of the National Capital Rally.


• Disallowable Instrument DI2018-116 being the Taxation Administration (Amounts Payable—Duty) Determination 2018 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-79 and determines differential rates of duty, or the method by which an amount of duty is payable under the Duties Act 1999.

• Disallowable Instrument DI2018-117 being the Taxation Administration (Amounts Payable—Home Buyer Concession Scheme) Determination 2018 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-226 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 DI2018-118 being the Taxation Administration (Amounts Payable—Pensioner Duty Concession Scheme) Determination 2018 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-227 and 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 DI2018-119 being the Board of Senior Secondary Studies Appointment 2018 (No 3) made under section 8 of the Board of Senior Secondary Studies Act 1997 appoints a specified person as chair of the ACT Board of Senior Secondary Studies.

• Disallowable Instrument DI2018-120 being the Road Transport (General) (Parking Permit Fees) Determination 2018 (No 2) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-75 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-121 being the Emergencies (Security and Emergency Management Senior Officials Group) Appointment 2018 (No 1) made under section 142(2) of the Emergencies Act 2004 appoints the people occupying specified positions as members of the Security and Emergency Management Senior Officials Group (SEMSOG).

• Disallowable Instrument DI2018-122 being the Gambling and Racing Control (Governing Board) Appointment 2018 (No 2) made under sections 11 and 12 of the Gambling and Racing Control Act 1999 and sections 78 and 79 of the Financial Management Act appoints a specified person as a member and deputy chair of the ACT Gambling and Racing Commission.

• Disallowable Instrument DI2018-123 being the Civil Law (Wrongs) Professional Standards Council Appointment 2018 (No 5) made under Schedule 4, section 4.38 of the Civil Law (Wrongs) Act 2002 appoints a specified person as a member of the ACT Professional Standards Council.

• Disallowable Instrument DI2018-131 being the Road Transport (General) Concession Determination 2018 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2016-47 and determines the concessional fees payable by eligible persons for vehicle registration and driver licensing.


• Disallowable Instrument DI2018-137 being the Working with Vulnerable People Background Checking (Fees) Determination 2018 (No 1) made under section 68 of the Working with Vulnerable People (Background Checking) Act 2011 repeals DI2017-174 and determines the fees for services provided by the Working With Vulnerable People Screening Unit.

• Disallowable Instrument DI2018-139 being the Official Visitor (Mental Health) Appointment 2018 (No 1) made under paragraph 10(1)(e) of the Official Visitor Act 2012 appoints specified persons as official visitors for the purposes of the Act.


• Disallowable Instrument DI2018-153 being the Health (Fees) Determination 2018 (No 1) made under section 192 of the Health Act 1993 revokes DI2017-193 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-155 being the Architects (Fees) Determination 2018 made under section 91 of the Architects Act 2004 revokes DI2017-147 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-158 being the Stock (Levy) Determination 2018 made under section 6 of the Stock Act 2005 revokes DI2017-162 and determines the levy amount per stock unit and the number of animals making up a stock unit.

• Disallowable Instrument DI2018-159 being the Community Title (Fees) Determination 2018 made under section 96 of the Community Title Act 2001 revokes DI2017-149 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-161 being the Electricity Safety (Fees) Determination 2018 made under section 64 of the Electricity Safety Act 1971 revokes DI2017-151 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-165 being the Heritage (Fees) Determination 2018 made under section 120 of the Heritage Act 2004 revokes DI2017-155 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-167 being the Planning and Development (Fees) Determination 2018 made under section 424 of the Planning and Development Act 2007 revokes DI2017-157 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-169 being the Unit Titles (Fees) Determination 2018 made under section 179 of the Unit Titles Act 2001 revokes DI2017-159 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-173 being the Public Unleased Land (Fees) Determination 2018 (No 1) made under section 130 of the Public Unleased Land Act 2013 revokes DI2017-186 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-174 being the Legal Aid (Review Committee Panels) Appointment 2018 (No 2) made under section 37 of the Legal Aid Act 1977 appoints specified persons as part-time members of the Legal Aid Commission review committee panel.


• Disallowable Instrument DI2018-179 being the Taxation Administration (Amounts Payable—Land Tax) Determination 2018 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-141 and determines the fixed charge and percentage rates for land tax and a flat percentage rate for the foreign ownership surcharge for the purposes of the Land Tax Act 2004.

• Disallowable Instrument DI2018-180 being the Taxation Administration (Amounts Payable—Land Rent) Determination 2018 (No 1) made under section 139 of the Taxation Administration Act 1999 revokes DI2017-140 and determines the percentages and income threshold amounts for the purposes of the Land Rent Act 2008.


• Disallowable Instrument DI2018-182 being the Adoption (Fees) Determination 2018 (No 1) made under section 118 of the Adoption Act 1993 repeals DI2017-185 and determines fees payable by intercountry and step-parent adoption applicants to Child and Youth Protection Services.

• Disallowable Instrument DI2018-183 being the Road Transport (General) (Pay Parking Area Fees) Determination 2018 (No 2) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-74 and determines relevant parking fees for Territory-operated pay parking areas.
• Disallowable Instrument DI2018-184 being the Juries (Payment) Determination 2018 made under sections 49 and 51 of the Juries Act 1967 revokes DI2017-115 and determines payments made to jurors for the purposes of the Act.

• Disallowable Instrument DI2018-185 being the Legislative Assembly (Members’ Staff) Members’ Salary Cap Determination 2018 (No 1) made under subsections 10(3) and 20(4) of the Legislative Assembly (Members’ Staff) Act 1989 revokes DI2017-119 and determines the conditions under which Members may employ staff and engage consultants or contractors.

• Disallowable Instrument DI2018-186 being the Victims of Crime (Fees) Determination 2018 (No 1) made under section 50 (1) of the Victims of Crime Regulation 2000 revokes all previous Victims of Crime Regulation 200 (Fees) determinations and determines the fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-187 being the Legislative Assembly (Members’ Staff) Speaker’s Salary Cap Determination 2018 (No 1) made under subsections 5(3) and 17(4) of the Legislative Assembly (Members’ Staff) Act 1989 revokes DI2017-117 and determines the conditions under which the Speaker may employ staff and engage consultants or contractors.


• Disallowable Instrument DI2018-201 being the Public Sector Management Amendment Standards 2018 (No 1) made under section 251 of the Public Sector Management Act 1994 introduces a revised executive classification structure, and adjusts the allowance in lieu of an executive vehicle.

• Disallowable Instrument DI2018-203 being the Canberra Institute of Technology (Institute Board Chair) Appointment 2018 made under section 9 of the Canberra Institute of Technology Act 1987 and section 79 of the Financial Management Act 1996 appoints a specified person, a non-elected member with expertise and knowledge of industry and business, as chair of the Institute Board.

• Disallowable Instrument DI2018-204 being the Canberra Institute of Technology (Institute Board Deputy Chair) Appointment 2018 made under section 9 of the Canberra Institute of Technology Act 1987 and section 79 of the Financial Management Act 1996 appoints a specified person, a non-elected member with expertise and knowledge of industry and business, as deputy chair of the Institute Board.

• Disallowable Instrument DI2018-205 being the Canberra Institute of Technology (Institute Board Member) Appointment 2018 (No 1) 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 member of the Institute Board, with expertise 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 law.
• Disallowable Instrument DI2018-206 being the Canberra Institute of Technology (Institute Board Member) Appointment 2018 (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 member of the Institute Board, with expertise 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 law.


• Disallowable Instrument DI2018-210 being the Road Transport (Safety and Traffic Management) Parking Authority Declaration 2018 (No 1) made under subsection 33(2) of the Road Transport (Safety and Traffic Management) Regulation 2017 revokes DI2006-77 and declares the Director-General of ACT Health to be a parking authority for The Canberra Hospital, Brian Hennessey House and the University of Canberra Hospital.

• Disallowable Instrument DI2018-211 being the Blood Donation (Transmittable Diseases) Blood Donor Form 2018 (No 1) made under subsection 10(3) of the Blood Donation (Transmittable Diseases) Act 1985 revokes DI2017-198 and AF2017-184 and approves the blood donation declaration form.

• Disallowable Instrument DI2018-212 being the Nature Conservation (Scientific Committee) Appointment 2018 made under section 36 of the Nature Conservation Act 2014 appoints specified persons as chair, deputy chair and members of the Scientific Committee.

• Disallowable Instrument DI2018-213 being the Public Place Names (Taylor) Determination 2018 (No 2) made under section 3 of the Public Place Names Act 1989 determines the names of 11 roads in the Division of Taylor.

• Disallowable Instrument DI2018-214 being the Public Place Names (Throsby) Determination 2018 made under section 3 of the Public Place Names Act 1989 determines the name of a park in the Division of Throsby.

DISALLOWABLE INSTRUMENTS—COMMENT

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

Issues with fees determinations


• Disallowable Instrument DI2018-110 being the Machinery (Fees) Determination 2018 made under section 5 of the Machinery Act 1949 revokes DI2017-103 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-111 being the Scaffolding and Lifts (Fees) Determination 2018 made under section 21 of the Scaffolding and Lifts Act 1912 revokes DI2017-107 and determines fees payable for the purposes of the Act.
• Disallowable Instrument DI2018-112 being the Workers Compensation (Fees) Determination 2018 made under section 221 of the Workers Compensation Act 1951 revokes DI2017-104 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-125 being the Road Transport (General) Vehicle Registration and Related Fees Determination 2018 (No 2) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-80 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-126 being the Road Transport (General) Driver Licence and Related Fees Determination 2018 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2017-212 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-127 being the Road Transport (General) Numberplate Fees Determination 2018 (No 2) made under section 96 of the Road Transport (General) Act 1999 revokes DI2018-81 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-128 being the Road Transport (General) Refund and Dishonoured Payments Fees Determination 2018 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2017-135 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-129 being the Road Transport (General) Fees for Publications Determination 2018 (No 1) made under section 96 of the Road Transport (General) Act 1999 revokes DI2017-136 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-140 being the Births, Deaths and Marriages Registration (Fees) Determination 2018 made under section 67 of the Births, Deaths and Marriages Registration Act 1997 revokes DI2017-69 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-144 being the Prostitution (Fees) Determination 2018 made under section 29 of the Prostitution Act 1992 revokes DI2017-74 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-175 being the Domestic Animals (Fees) Determination 2018 (No 2) made under section 144 of the Domestic Animals Act 2000 revokes DI2018-77 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-177 being the Tree Protection (Fees) Determination 2018 (No 1) made under section 109 of the Tree Protection Act 2005 revokes DI2017-179 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-188 being the Associations Incorporation (Fees) Determination 2018 made under section 125 of the Associations Incorporation Act 1991 revokes DI2017-84 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-189 being the Land Titles (Fees) Determination 2018 made under section 139 of the Land Titles Act 1925 revokes DI2017-190 and determines fees payable for the purposes of the Act.


• Disallowable Instrument DI2018-191 being the Partnership (Fees) Determination 2018 made under section 99 of the Partnership Act 1963 revokes DI2017-86 and determines the fee payable for an application for registration as an incorporated limited partnership.


• Disallowable Instrument DI2018-195 being the Unlawful Gambling (Charitable Gaming Application Fees) Determination 2018 made under section 48 of the Unlawful Gambling Act 2009 revokes DI2017-91 and determines the fee to accompany an application by a charitable organisation to conduct charitable gaming under the Unlawful Gambling Act 2009.

• Disallowable Instrument DI2018-196 being the Casino Control (Fees) Determination 2018 made under section 143 of the Casino Control Act 2006 revokes DI2017-88 and determines fees payable for the purposes of the Act.

• Disallowable Instrument DI2018-199 being the Public Trustee and Guardian (Fees) Determination 2018 made under section 75 of the Public Trustee and Guardian Act 1985 revokes DI2017-112 and determines fees payable for the purposes of the Act.
STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY (LEGISLATIVE SCRUTINY ROLE)

- **Disallowable Instrument DI2018-200** being the Unit Titles (Management) (Fees) Determination 2018 made under section 119 of the Unit Titles (Management) Act 2011 revokes DI2017-97 and determines fees payable for the purposes of the Act.

- **Disallowable Instrument DI2018-209** being the Court Procedures (Fees) Determination 2018 made under section 13 of the Court Procedures Act 2004 revokes DI2017-110 and determines fees payable for the purposes of the Act.

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*[^1]. 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

For the batch of fees determinations considered for this Scrutiny Report, while the Committee considers that the standard of the determinations (in terms of them meeting the Committee’s long-held views about fees determinations) is much-improved from, say, 10 years ago, there is still a level of inconsistency in the extent to which the current batch of fees determinations meet the Committee’s expectations. Issues identified by the Committee, in relation to the current batch of fees determinations, are set out below.

The first five instruments mentioned (DI2018-109 to DI2018-113) above set fees payable under various Acts. In each case, the explanatory statement for the instrument states:

Fees in the 2018-19 Financial Year have been generally increased from fees in the previous Financial Year by an indexation of 4% and rounded to an appropriate value.

The Committee notes that, in the case of the first five instruments mentioned above, the various fees increases are quantified but the reasons for the increases are not given.

In making this comment, the Committee notes that explanatory statements for other instruments considered by the Committee for this Scrutiny Report indicate that a 4% increase in fees is “in accordance with Government policy regarding regulatory fees increases for 2018-2019” (see, eg, DI2018-115—Lotteries (Fees) Determination 2018 (No 1)). Further, the Committee notes that the explanatory statement for DI2018-120—Road Transport (General) (Parking Permit Fees) Determination 2018 (No 2) states the reasons for both the 4% fees increases and the other common fees increase, being 2.5%, stating:

The instrument applies a 4% increase to the regulatory fees, rounded down to the nearest ten cents, and applied a 2.5% increase (the forecast Wage Price Index for the 2018-19 budget) to the administration fees, rounded down to the nearest ten cents. This gives effect to the Government’s policy for fee increases as announced in the 2015-16 Budget and [the Chief Minister, Treasury and Economic Development Directorate’s] Fees and Charges Policy and Guidelines.

The Committee notes that the application of a 4% increase to “regulatory” fees and a 2.5% to “administration” fees is applied with relative consistency, throughout the various fees determinations considered by the Committee, for this Scrutiny Report. Though there are exceptions to this approach, eg DI2018-134—Cemeteries and Crematoria (Public Cemetery Fees) Determination 2018 (No 1) where fees increases particular to the relevant Act are specified (and explained).

The Committee also notes that, unlike the majority of other fees determinations considered by the Committee for this Scrutiny Report (see, eg, DI2018-106—Electoral (Fees) Determination 2018, and DI2018-114—Dangerous Goods (Road Transport) Fees and Charges Determination 2018)), the basis of any rounding of the fees is not specified. ²

The same issue (ie the reason for the fees increase not being specified) arises in relation to:

- DI2018-140—Births, Deaths and Marriages Registration (Fees) Determination 2018.
- DI2018-175—Domestic Animals (Fees) Determination 2018 (No 2).
- DI1018-177—Tree Protection (Fees) Determination 2018 (No 1).

² The Committee notes that the issue of “appropriate” rounding also arises in the explanatory statements for DI2018-154 to DI2018-171, inclusive.
A slightly different manifestation of the same issue arises in relation to the explanatory statements for:

- DI2018-192—Security Industry (Fees) Determination 2018
- DI2018-194—Race and Sports Bookmaking (Fees) Determination 2018

For example, the explanatory statement for DI2018-188—Associations Incorporation (Fees) Determination 2018 states:

Fees in the 2018-19 financial year have been increased from fees in the previous financial year by indexation of 4%. 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.

Again, no reason is provided for the relevant fees increases.

In relation to DI2018-125—Road Transport (General) Vehicle Registration and Related Fees Determination 2018 (No 2), the Committee notes that the explanatory statement for the instrument states:

Vehicle registration fees have been increased by 5%, rounded down to the nearest ten cents. Other fees and charges have been increased by 4%, rounded down to the nearest ten cents.

Later in the explanatory statement, there is the following statement:

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.

Despite the statement immediately above, no reasons are actually provided in relation to the various fees increases mentioned.

The same issue arises in relation to the explanatory statements for:

- DI2018-126—Road Transport (General) Driver Licence and Related Fees Determination 2018 (No 1).
- DI2018-127—Road Transport (General) Numberplate Fees Determination 2018 (No 2).
- DI2018-128—Road Transport (General) Refund and Dishonoured Payments Fees Determination 2018 (No 1).
- DI2018-129—Road Transport (General) Fees for Publications Determination 2018 (No 1).
That is, despite a statement about the Committee’s preferences, no reasons are provided for the various fees increases.

In making these comments, the Committee notes that there is no legislative basis for its requirements but that, rather, the Committee relies on principle (2) of the Committee’s terms of reference, which requires it to consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

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

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

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

**HUMAN RIGHTS ISSUES**

Disallowable Instrument DI2018-124 being the Children and Young People (Care and Protection Organisation) Guidelines 2018 (No 1) made under section 887 of the *Children and Young People Act 2008* makes the Children and Young People Care and Protection Organisation Standards, May 2018.

The Committee notes that this instrument sets standards, under section 887 of the *Children and Young People Act 2018*, in relation to the approval of “suitable entities” for care and protection purposes. In particular, the standards set require organisations that seek to be approved as a “suitable entity”, for a care and protection purpose, to demonstrate that they have the capacity to comply, and are likely to comply, with the standards.

The instrument states (on page 4, under “Purpose”):

> The Standards establish the minimum requirements for demonstrating compliance as a suitable entity for the provision of a care and protection service, based on the statutory responsibilities of the service providers as described in the Children and Young People Act 2008.

> The Standards reflect the child focussed priority of the a Step up for our Kids Strategy and seek outcomes that ensure the rights of children and young people are upheld, that services are child safe and child friendly and children, young people and their families receive quality services.

> The rights of children and young people arise from the United Nations Convention on the Rights of the Child, the *Human Rights Act 2004* (ACT), the *Children and Young People Act 2008*, the *Children and Young People (ACT Out of Home Care) Standards 2016* and the Charter of Rights for Children and Young People in Out of Home Care in the ACT.

The Committee notes that, in addition to the reference (in the paragraph immediately above) to the *Human Rights Act 2004*, the instrument refers, on various pages (see pages 10, 11, 13, 18, 22, 24, 31 and 44), under the heading “Further Guidance”, to various human rights instruments, including the United Nations Convention on the Rights of the Child. However, there is no discussion of human rights issues in the explanatory statement for the instrument. In the circumstances, the Committee would have expected to see some discussion of human rights issues in the explanatory statement.
The Committee seeks the Minister’s advice as to any human rights issues arising from this instrument.

This comment requires a response from the Minister.

HAVE THE PERSONS APPOINTED BY THESE INSTRUMENTS BEEN PROPERLY APPOINTED?

- Disallowable Instrument DI2018-130 being the Work Health and Safety (Work Safety Council Employee Representative) Appointment 2018 (No 1) made under Schedule 2, section 2.3 of the Work Health and Safety Act 2011 appoints a specified person as a member of the Work Safety Council, representing the interests of employees.


The first instrument mentioned above appoints a specified person to the Work Safety Council, “to represent the interests of employers”. The explanatory statement for the instrument indicates that the appointment is made under paragraph 2.3(a) of Schedule 2 to the Work Health and Safety Act 2011. Section 2.3 of Schedule 2 provides:

2.3 Membership

The council consists of—

(a) 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employees; and

(b) 4 members appointed by the Minister after consultation with the people or bodies that the Minister considers represent the interests of employers; and

(c) 4 other members appointed by the Minister; and

(d) the commissioner.

Note 1 For the making of appointments (including acting appointments), see the Legislation Act, pt 19.3.

Note 2 In particular, a person may be appointed for a particular provision of a law (see Legislation Act, s 7 (3)) and an appointment may be made by naming a person or nominating the occupant of a position (see Legislation Act, s 207).

Note 3 Certain Ministerial appointments require consultation with an Assembly committee and are disallowable (see Legislation Act, div 19.3.3).
The explanatory statement for the instrument states that the specified person is appointed “to represent the interest of employees for a period of 3 years, commencing on the day after notification”. However, there is no mention of any person or body representing the interests of employees being consulted, prior to the Minister making the appointment. While it might be assumed that the Minister would not have made the appointment without having first undertaken such consultation, the Committee’s firm preference is that the explanatory statement for an appointment instrument expressly address any pre-conditions for an appointment.

In its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps³, the Committee states:

**INSTRUMENTS OF APPOINTMENT**

Another issue has arisen in relation to appointments that require that a person nominated by a particular body (eg a professional association) be appointed or that a person be appointed from a list of persons submitted by a particular body. These requirements are usually mandatory (demonstrated by the use of the word “must”). In these situations, it assists the Committee if the Explanatory Statement for an instrument of appointment indicates that the relevant requirements have been met. Recently, the Committee has commented on Explanatory Statements in which, say, there is a statement that the person appointed is the nominee of a particular body when, in fact, the requirement is that a person be appointed from a list of persons submitted by a particular body. The point is that the Committee (and the Legislative Assembly) is assisted if the Explanatory Statement correctly recites the relevant requirement and indicates that the requirement has been met.

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

The Committee seeks the Minister’s assurance that, in the case of each instrument of appointment mentioned above, the relevant person or body was consulted, prior to the appointment being made.

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

This comment requires a response from the Minister.

**MINOR DRAFTING ISSUE**


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The Committee notes that this instrument appoints a specified person as the Chair of the Building and Construction Industry Training Fund Authority Board. The formal parts of the instrument, and the explanatory statement for the instrument, state that the appointment is made under section 7 of the *Building and Construction Industry Training Levy Act 1999* (which deals with the appointment of the Board) and section 78 of the *Financial Management Act 1996*. As the specified person is appointed as Chair of the Board (and as recognised by a Note to section 7), the appointment also relies on section 79 of the Financial Management Act, which provides an over-arching power to appoint a chair and deputy chair to a board of a Territory authority, where there is no power to do so in the relevant Act.

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

**Disapplication of subsection 47(6) of the Legislation Act 2001**


This instrument, made under section 73 of the *Utilities (Technical Regulation) Act 2014*, approves a technical code (Code) for “listed dams” (as defined by section 69 of the Utilities (Technical Regulation) Act) that are covered by that Act. As noted in the explanatory statement for the instrument, the purpose of the Code that is approved by the instrument is “to identify and regulate the safety of dams that have the potential for a failure which could have a significant adverse effect on the community.”

Section 6 of the Code provides:

6. **APPLICABLE GUIDELINES**

Under section 73(2) of the Act, this Code adopts the current ANCOLD Guidelines (the guidelines), as guidelines for the purpose of this Code.

Section 47(6) of the Legislation Act does not apply in relation to the ANCOLD Guidelines adopted above (see section 47(7) of the Legislation Act). Therefore, the ANCOLD Guidelines do not need to be notified on the Legislation Register. The ANCOLD Guidelines may be purchased at [https://www.ancold.org.au/](https://www.ancold.org.au/).

The explanatory statement for the instrument states (in relation to the ANCOLD Guidelines):

The Code adopts the Australian Committee on Large Dams (ANCOLD) Guidelines as the basis for dam safety. The ANCOLD guidelines are accepted by professionals in Australia as outlining requirements for good practice in dam ownership, and are referenced as the basis for the regulation of dam safety in all eastern states of Australia.

Section 73 of the Utilities (Technical Regulation) Act provides:

73 **Technical codes for listed dams—approval**

(1) The Minister may approve a technical code for listed dams as recommended by the technical regulator if the Minister is satisfied on reasonable grounds that—

(a) section 72 has been complied with; and
(b) the code is—

(i) consistent with the objects of this Act; and

(ii) not inconsistent with another technical code.

(2) An approved technical code may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time.

(3) The Legislation Act, section 47(6) does not apply in relation to an AS or AS/NZS applied, adopted or incorporated under subsection (2).

Note An AS or AS/NZS does not need to be notified under the Legislation Act because s 47 (6) does not apply (see Legislation Act, s 47(7)). An AS or AS/NZS may be purchased at www.standards.org.au.

(4) An approval is a disallowable instrument.

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

The effect of subsection (3) is that it disapplies subsection 47(6) of the Legislation Act 2001 only in relation to the application, adoption or incorporation of an AS or an AS/NZS in a technical code. The concepts of “AS” and “AS/NZS” are defined in section 164 of the Legislation Act, which provides:

164 References to Australian Standards etc

(1) In an Act or statutory instrument, a reference consisting of the words ‘Australian Standard’ or ‘AS’ followed by a number is a reference to the standard so numbered published by or on behalf of Standards Australia.

(2) In an Act or statutory instrument, a reference consisting of the words ‘Australian/New Zealand Standard’ or ‘AS/NZS’ followed by a number is a reference to the standard so numbered published jointly by or on behalf of Standards Australia and Standards New Zealand.

Examples—s 164

1  AS 4608-1999
2  AS/NZS 4906: 1994

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

It is not clear to the Committee how the ANCOLD Guidelines fit within the exemption provided by subsection 73(3) of the Utilities (Technical Regulation) Act. The ANCOLD website states:

The Australian National Committee on Large Dams Incorporated (ANCOLD Inc) is an incorporated voluntary association of organisations and individual professionals with an interest in dams in Australia. ANCOLD was formed in 1937 as the Australian national committee of the International Commission on Large Dams (ICOLD), a non-government organisation established in 1928, and is one of 100 member countries.

4 www.ancold.org.au
ANCOLD’s mission is to be the industry body, representing its Members and Associates, disseminating knowledge, developing capability and providing guidance in achieving excellence for all aspects of dam engineering, management and associated issues.

This would seem to put the ANCOLD Guidelines outside of the definition of AS and AS/NZS in section 164 of the Legislation Act, making the ANCOLD Guidelines a “notifiable instrument”, under subsection 47(5) of the Legislation Act.

The Committee seeks the Minister’s advice in relation to the application of subsection 73(3) of the Utilities (Technical Regulation) Act 2014 to the ANCOLD Guidelines.

The Committee draws the attention of the Legislative Assembly to this instrument, on the basis that is may not be in accord with the general objects of the Act under which it is made, contrary to principle (1)(a) of the Committee’s terms of reference.

This comment requires a response from the Minister.

RELIANCE ON AUSTRALIAN STANDARDS – POSITIVE COMMENT


The Committee notes that the technical code approved by this instrument, under section 14 of the Utilities (Technical Regulation) Act 2014, indicates that it relies on Australian Standards. These standards are generally only available to users of the legislation on payment of a not-insubstantial fee (to SAI Global, which publishes such standards). However, the Committee notes with approval that section 4 of this instrument provides:

4 Public access

The Code is available for inspection upon request by the public between 8:30 am and 4:30 pm, from Monday to Friday except for public holidays, at Access Canberra, South Building, Dame Pattie Menzies House, 16 Challis Street Dickson ACT. Copies of the Australian Standards incorporated in the Code can also be made available upon request.


The Committee notes that this mechanism facilitates (free) public access to all the material relevant to an understanding of the technical code that is approved by the instrument. The Committee commends this approach to other agencies.

This comment does not require a response from the Minister.

HUMAN RIGHTS ISSUES

Disallowable Instrument DI2018-216 being the Road Transport (Public Passenger Services) Taxi Licence Waiting List Exemption 2018 made under section 127 of the Road Transport (Public Passenger Services) Act 2001 approves exemptions from taxi licence waiting list requirements for the purposes of the Act.
This instrument, made under section 127 of the Road Transport (Public Passenger Services) Act 2001, provides for certain exemptions from the operation of the Road Transport (Public Passenger Services) Act. In particular, it exempts (until 7 August 2019):

(a) the road transport authority from its obligation to remove a pre-approval holder from the taxi licence waiting list under subparagraph 84(4)(a)(i) of the Road Transport (Public Passenger Services) Regulation 2002; and

(b) an existing pre-approval holder from the requirement to make an application for pre-approval under section 85 of the Road Transport (Public Passenger Services) Regulation 2002, on expiry of the term of their existing pre-approval.

The effect of the exemption mentioned in paragraph (a) above is to allow the road transport authority to keep a “pre-approval holder” (which is defined in the instrument) on the “taxi licence waiting list” (which is a list of pre-approval holders). Subparagraph 84(4)(a)(i) would otherwise require the road transport authority to remove a pre-approval holder from the taxi licence waiting list on the expiration of the person’s pre-approval term, as defined in subsection 88(2) of the Road Transport (Public Passenger Services) Regulation, which provides that a pre-approval expires 2 years after the day it is issued.

The effect of the exemption mentioned in paragraph (b) above is to exempt an existing pre-approval holder from the requirement to re-apply, if the person’s pre-approval term ends and they are still on the taxi licence waiting list.

By way of background, the explanatory statement for the instrument states:

In 2015 the ACT Government undertook a review of the ACT taxi industry to examine the possible use of new technologies and how to reduce unnecessary regulation in the local taxi industry. The resulting reforms acknowledged the evolving nature of the ACT taxi industry and new business models providing on-demand transport. The ACT Government committed to evaluating the 2015 reforms two years after implementation. This evaluation commenced in 2017 and is in the process of being finalised and recommendations put to the Government. The 2015 reforms saw the introduction of the waiting list process for issuing taxi licences. Prior to this an ad hoc ballot system existed. The intention was that the waiting list would increase certainty for applicants by enabling the supply of taxis to be consistent and lower the wait-time.

The current waiting list process commenced on 1 August 2016 and operates so that once an eligible applicant is pre-approved for a taxi licence they are placed on the waiting list in the order that pre-approval is granted. Pre-approvals come into force on the date of issue and expire two years after that date. When a single licence is issued to a person with pre-approval for multiple licences, the pre-approval holder moves to the bottom of the waiting list for further licences. This is to permit opportunities for different parties to obtain licences. When a licence becomes available the road transport authority must offer it to the next person on the waiting list. The person then has 14 days to apply for the available licence. If they apply for a licence and are only approved for one licence, their pre-approval expires. If they are pre-approved for multiple licences, the number of licences for which they are pre-approved is reduced by one and they are moved to the bottom of the waiting list. If they do not apply and are only approved for one licence, their pre-approval expires. If the person does not apply and they are pre-approved for multiple licences then they are moved to the bottom of the waiting list.

Section 4 of the instrument is the substantive provision for the operation of the instrument. By way of explanation of section 4, the explanatory statement for the instrument states:
Clause 4 exempts existing pre-approval holders from the requirement to apply for pre-approval on expiry of the term of their current pre-approval for the term of this exemption. It also exempts the road transport authority from the requirement to remove a pre-approval holder from the waiting list if the pre-approval term expires. This means that a pre-approval holder who is currently on the waiting list will maintain their position on the waiting list until this instrument expires. That is any existing pre-approval holders whose approval term expires during the term of this instrument will not lose their position on the waiting list. The term of all existing pre-approvals are being extended for the duration of this instrument.

The explanatory statement for the instrument then goes on to discuss (in detail) the human rights implications of the instrument. It states:

**Human rights implications**

Section 28 of the HRA provides that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

(a) the nature of the right affected

(b) the importance of the purpose of the limitation

(c) the nature and extent of the limitation

(d) the relationship between the limitation and its purpose

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

An assessment of this instrument against section 28 of the HRA is provided below.

**Recognition and equality before the law**

This instrument could be seen to be limiting a person’s right to recognition and equality before the law under section 8 of the *Human Rights Act 2004* (HRA).

Section 8 of the HRA provides that everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination. This means that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory way.

Section 8 can be engaged by activities that provide for the delivery of an entitlement or service to some groups but not others or where steps are taken to diminish or eliminate conditions that could have resulted in the specific groups within society being disadvantaged (positive discrimination).

**Nature of the right affected**

The regulatory settings for taxi licences in the ACT consist of a process where people can apply to be pre-approved for a licence and be placed on the waiting list waiting. [sic] When taxi licences become available they are offered in order to people on the waiting list. This instrument could be seen to engage this right through taking active steps to ensure that persons
currently on the taxi licence waiting list are not disadvantaged by the existing waiting list process should a decision be made in the next 12 months to release more taxi licences.

**The importance of the purpose of the limitation**

In February 2017, the ACT Government lifted its freeze on the release of taxi licences. Twenty taxi licences have been made available to the market since the freeze was lifted. The release comprised 10 standard-taxi licences in March 2017, five wheelchair-accessible taxi licences in June 2017 and five standard taxi licences in September 2017. There has been no release since September 2017. There are currently 297 standard licences available to the market and 31 WAT licences. All available licences have been issued.

To ensure that those persons currently on the waiting list are not disadvantaged during finalisation of the current evaluation of the reforms, the ACT Government has decided to retain the existing waiting list order should additional licences be released in the near future. More than 95% of the current pre-approval terms are due to expire throughout August.

**The nature and extent of the limitation**

This instrument has been prepared to ensure that those people currently on the waiting list are not disproportionately impacted by decisions of the Government about availability of taxi licences.

**The relationship between the limitation and its purpose**

There is no limit on the number of people that can be pre-approved and placed on the waiting list and therefore retaining the current list order does not put people who apply for pre-approval now or in the future at a disadvantage.

**Less restrictive means reasonably available to achieve this purpose**

It is not considered that there are any less restrictive means to achieve the purpose of maintaining the status of the existing waiting list. To allow the existing pre-approvals to expire and require these people to re-apply for approval and reset their position on the waiting list would impose additional administrative burden on these people, be unequitable and would not achieve the objectives of the waiting list process.

The Committee draws the attention of the Legislative Assembly to the discussion of human rights issues set out above.

This comment does not require a response from the Minister.

**SUBORDINATE LAW—NO COMMENT**

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

Subordinate Law SL2018-11 being the Road Transport Legislation Amendment Regulation 2018 (No 1) made under the Road Transport (General) Act 1999, Road Transport (Safety and Traffic Management) Act 1999 and Road Transport (Vehicle Registration) Act 1999 amends specified road transport legislation to implement updated national load restraints for vehicles guidelines, and a decision of the Transport and Infrastructure Council to no longer issue or require heavy vehicles to display registration labels.
The Committee has examined the following subordinate laws and offers these comments on them:

**STRICT LIABILITY OFFENCES – POSITIVE COMMENT**

**Subordinate Law SL2018-9 being the Waste Management and Resource Recovery (Container Deposit Scheme) Amendment Regulation 2018 (No 1), including a regulatory impact statement, made under the Waste Management and Resource Recovery Act 2016 determines arrangements for a container deposit scheme under the Waste Management and Resource Recovery Amendment Act 2017.**

This subordinate law, made under the Waste Management and Resource Recovery Act 2016, provides detail on the arrangements for the introduction of a “container deposit scheme”, which started operation in the ACT on 30 June 2018. According to the explanatory statement for the subordinate law, the subordinate law...

... provides clear regulatory requirements to participants in the container deposit scheme. These requirements include indicating to the beverage industry:

i) The types of containers and beverages which are, and are not, included in the container deposit scheme;

ii) The refund marking which will be required to be printed on eligible beverage containers to indicate they are part of the scheme, and

iii) The requirement to enter into an arrangement to make contributions to fund the scheme.

The regulation also provides requirements about the establishment of the scheme and container collection network including:

i) The process to apply for, and be granted approvals for collection network arrangements and collection point arrangements;

ii) The suitability requirements for the organisations appointed to run the scheme; and

iii) The offences for failing to ensure collected containers are recycled.

The regulation ensures the community has access to the scheme including setting requirements for:

i) Collection points to be in convenient and accessible locations and able to accept containers and provide refunds in an efficient way;

ii) A ramp-up over time of the minimum number of collection points, and the minimum opening hours and days to ensure they are accessible to the community;

iii) Involvement of charities and employment opportunities for people with disabilities in delivering the scheme; and

iv) The refund amount being set at 10 cents per eligible container.

As indicated above, the subordinate law includes offences for failing to ensure collected containers are recycled. The Committee notes, in particular, that new subsection 24W(1) of the Waste Management and Resource Recovery Regulation 2017 creates strict liability offences in relation to the disposal, by a “material recovery facility operator”, of a container in landfill, if the operator has claimed a processing refund in relation to the container. The maximum penalty for such an offence is 15 penalty units.
The Committee notes with approval that the regulatory impact statement for the subordinate law contains a detailed justification for this strict liability offence, in accordance with the preferences expressed by the Committee, in its document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps.

This comment does not require a response from the Minister.

Reliance on “Henry VIII” clause

Subordinate Law SL2018-10 being the Public Sector Management (Transitional Provisions) Regulation 2018 made under the Public Sector Management Act 1994 rectifies a technical legal issue in relation to the re-engagement of SES members engaged prior to 1 September 2016.

The Committee notes that the effect of this subordinate law is to modify the Public Sector Management Act 1994, as if a new section 293A was inserted. The new section 293A (set out in section 3 of this subordinate law) is to provide for “the consecutive engagement of the Head of Service, Directors-General and executives engaged prior to 1 September 2016 to be re-engaged as a long-term [Senior Executive Service] member and associated provisions under the [Public Sector Management] Standards 2016.”

The subordinate law relies on section 299 of the Public Sector Management Act, which provides:

299 Transitional regulations

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.

(2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.

(3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

The Committee notes that it has consistently queried whether, in fact, a provision such as subsection 299(3) correctly reflects the law in the ACT (see, eg, Scrutiny Report 35 of the 8th Assembly, dated 10 August 2015, at page 21). As the Committee has consistently noted, provisions such as subsection 299(3) would appear to contradict the power of the Legislative Assembly, under the Australian Capital Territory (Self-Government) Act 1988 (Cwlth), to make laws from time to time, including (of course) at a time subsequent to the making of the earlier law. It might also be seen as an ineffective attempt to entrench a regulation made under subsection 299(3).

That issue aside, the Committee notes that section 299 of the Public Sector Management Act is a “Henry VIII” clause, in that it allows (in effect) the amendment of primary legislation (ie the Public Sector Management Act) by subordinate legislation (ie this subordinate law). For further discussion of the use of “Henry VIII” clauses, see the Committee’s publication titled Henry VIII clauses—Fact sheet.
The Committee notes that, by way of explanation for the use of the mechanism provided by section 299, in this instance, the explanatory statement for this subordinate law states:

In 2016 changes were made to the [Public Sector Management] Act to formally establish the Senior Executive Service, modernising their employment conditions, facilitating executive mobility and further embedding the concept of a values-based service by vesting all employment powers to the Head of Service.

Sections 291, 292 and 293 of the PSM Act provides for the employment contracts for the Head of Service, Directors-General and executives entered into prior to 1 September 2016 to continue until the contract ends. This also provides for the other employment conditions, including the Public Sector Management Standards 2006, applying immediately before 1 September 2016 to continue to operate, even though the PSM Standards 2006 have subsequently been repealed. This was the policy intent at the time of the changes in 2016.

Section 55 of the Public Sector Management Standards 2016 (PSM Standards 2016) provides for a consecutive long-term re-engagement of an SES member. A re-engagement provision has been in place within the executive employment framework for a number of years. Section 55 allows for a long-term SES member to be re-engaged without an additional merit process if the engager is satisfied that during the engagement, the SES member has met all the expectations set out in the relevant performance agreement. As part of the re-engagement process, an appraisal process is undertaken. If it is decided that the SES member will be re-engaged, the SES member’s engager certifies that it is in the effective and operational interests of the ACT Public Service to re-engage the SES member, and a new employment contract is entered into.

Given the operation of sections 291, 292 and 293 of the PSM Act, it has been identified that it is difficult to apply section 55 of the PSM Standards 2016 to executives engaged prior to 1 September 2016, when the PSM Standards 2016 commenced. This is a technical and legal issue which is inconsistent with the policy intent of section 55.

In order to rectify this technical legal issue, the Public Sector Management (Transitional Provisions) Regulation 2018 has been prepared as a transitional arrangement to allow long-term executives that were engaged prior to 1 September 2016 to be re-engaged as a long-term SES member and associated provisions under the PSM Standards 2016.

The Committee notes that, while (on the basis of the explanation in the explanatory statement) it seems clear that this subordinate law deals with an issue that (in the Executive’s opinion) is not, or is not adequately or appropriately, dealt with in the Public Sector Management Act, it would be preferable if all transitional issues were appropriately dealt with at the time that relevant changes to an Act are made (ie, in this case, at the time of the 2016 amendments). If this was the case, it would not be necessary to rely on provisions such as section 299 of the Public Sector Management Act.

This comment does not require a response from the Minister.

**Strict Liability Offences**

The Committee notes that (as reflected by the explanatory statement) amendments made by this subordinate law have (among other things) the effect of increasing the penalties applicable to various strict liability offences contained in the Domestic Animals Regulation 2001. For example, in relation to the amendments that are effected by new table items 5 and 6 in Part 1.1 of the substituted Schedule 1 to the Domestic Animals Regulation, the explanatory statement to this subordinate law state that the new provisions

... [substitute] the current infringement penalty of $50 for the strict liability offences against sections 16(1) and 16(2) with a penalty of $150. This increase is considered reasonable and proportionate to the offence.

A similar explanation is provided in relation to the other offences (including the non-strict liability offences) for which increased penalties are provided.

However, more detail is provided in relation to the amendments effected by new table items 14 to 16, in relation to which the explanatory statement states that the new provisions

... [increase] the infringement penalty amounts for the strict liability offences against sections 39D(1) and 39G(1). The current amount of $150 is not proportionate and does not act as a deterrent given the fees for obtaining registration and a racing greyhound licence that were established on 30 April 2018 are $612 and $640 respectively. The infringement penalty increase to $1,000 is considered reasonable and proportionate and sufficient to act as a deterrent.

Similarly, in relation to the amendments effected by new table items 19 to 22, the explanatory statement states that the new provisions

... [reflect] increased maximum penalties for offences under sections 42(1)–(4) consequential on the change to the penalties for these strict liability offences made by the Domestic Animals (Dangerous Dogs) Legislation Amendment Act 2017. The infringement penalties for sections 42(2)–(4) have also been increased from $75 to $150. The infringement penalty for section 42(1) has been increased to $350 to reflect the relatively serious nature of this offence. These increases are commensurate with the increase in the maximum penalty for the offences and are considered reasonable and proportionate.

The Committee notes that the subordinate law does not appear to create any new strict liability offences. As a result, there may be an argument that there is no need for the explanatory statement to address the Committee’s long-held views in relation to the justification of strict liability offences (see, eg, the Committee’s document titled Subordinate legislation—Technical and stylistic standards—Tips/Traps). However, the Committee suggests that it might have been appropriate, given the number of strict liability offences affected by this subordinate law, for the explanatory statement to this subordinate law to have addressed (and justified) the strict liability offence issue more directly than this explanatory statement actually does, especially given that strict liability offences engage the right to the presumption of innocence, protected by section 22 of the Human Rights Act 2004.

This comment does not require a response from the Minister.

REGULATORY IMPACT STATEMENTS—NO COMMENT

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


REGULATORY IMPACT STATEMENT—COMMENT

The Committee has examined the regulatory impact statement for the following subordinate law and offers the following comments on it:

POSITIVE COMMENT

Subordinate Law SL2018-9 being the Waste Management and Resource Recovery (Container Deposit Scheme) Amendment Regulation 2018 (No 1).

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 with approval that the regulatory impact statement for this subordinate law contains a comprehensive and helpful discussion of the consistency of this subordinate law with the Committee’s principles. In particular (and as noted elsewhere in this Scrutiny Report), the Committee notes that the regulatory impact statement contains a very helpful explanation of the new strict liability offence that is created by new section 64W of the Waste Management and Resource Recovery Regulation 2017. The Committee commends this approach to other agencies.

This comment does not require a response from the Minister.

GOVERNMENT RESPONSES


These responses can be viewed online.

The Committee wishes to thank the Minister for the Environment and Heritage, the Minister for Disability, Children and Youth and the Minister for Transport and City Services for their helpful responses.

Bec Cody MLA
Acting Chair

7 August 2018
OUTSTANDING RESPONSES

BILLS/SUBORDINATE LEGISLATION

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

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

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

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

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