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

# Scrutiny Report 27

18 FEBRUARY 2019

## 

## The Committee

### Committee Membership

Mrs Giulia Jones MLA (Chair)

Ms Bec Cody MLA (Deputy Chair)

Mr Michael Pettersson MLA

### Secretariat

Ms Julia Agostino (Secretary)

Ms Anne Shannon (Assistant Secretary)

Mr Stephen Argument (Legal Adviser—Subordinate Legislation)

Mr Daniel Stewart (Legal Adviser—Bills)

### Contact Information

Telephone 02 6205 0173

Facsimile 02 6205 3109

Post GPO Box 1020, CANBERRA ACT 2601

Email scrutiny@parliament.act.gov.au

Website www.parliament.act.gov.au

### Role of Committee

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

## Resolution of Appointment

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

1. consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
   1. is in accord with the general objects of the Act under which it is made;
   2. unduly trespasses on rights previously established by law;
   3. makes rights, liberties and/or obligations unduly dependent upon non reviewable decisions; or
   4. 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:
   1. unduly trespass on personal rights and liberties;
   2. make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
   3. make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
   4. inappropriately delegate legislative powers; or
   5. insufficiently subject the exercise of legislative power to parliamentary scrutiny;
4. report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*; and
5. report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Table of Contents

[Bills 1](#_Toc965813)

[Proposed amendments 1](#_Toc965814)

[Subordinate Legislation 1](#_Toc965815)

[Disallowable Instruments—No comment 1](#_Toc965816)

[Disallowable Instruments—Comment 4](#_Toc965817)

[Subordinate Laws—No comment 8](#_Toc965822)

[Subordinate Laws—comment 9](#_Toc965823)

[Regulatory impact statement—No Comment 11](#_Toc965826)

[Responses 11](#_Toc965827)

[Government responses 11](#_Toc965828)

[Government Responses—Comment 12](#_Toc965829)

[Outstanding Responses 14](#_Toc965831)

## Bills

### Proposed amendments

The Committee has considered amendments to the Residential Tenancies Amendment Bill 2018 (No 2) to be moved by Caroline Le Couteur MLA. The amendments to the Bill include requiring any advertisement for the lease of residential premises to include notice of either of the following variations to the proposed residential tenancy agreement, namely:

* a term which is inconsistent with a standard residential tenancy agreement term but which has been endorsed by the ACT Civil and Administrative Tribunal; or
* a term requiring the lessor’s consent to keep an animal on the premises, and any prior approval by ACAT of conditions imposed on the landlord giving such consent.

These amendments may limit the right to freedom of expression protected by section 16 of the *Human Rights Act 2004* (HRA). The Committee was not provided with an explanatory statement to accompany the proposed amendments nor any indication of why these amendments should be considered a reasonable limit that can be demonstrably justified under the framework set out in section 28 of the HRA. While the Committee recognises that private members are generally not required to provide explanatory statements for proposed amendments to Bills, as these proposed amendments have potential impacts under the HRA the Committee asks the member to provide such a statement.

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

## Subordinate Legislation

### Disallowable Instruments—No comment

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

* **Disallowable Instrument DI2018-269 being the Official Visitor (Corrections Management) Visit and Complaint Guidelines 2018 made under section 23 of the** *Official Visitor Act 2012* **makes the Official Visitor (Corrections Management) Visit and Complaint Guidelines.**
* **Disallowable Instrument DI2018-275 being the Cultural Facilities Corporation (Governing Board) Appointment 2018 (No 1) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as chair of the Cultural Facilities Corporation.**
* **Disallowable Instrument DI2018-276 being the Cultural Facilities Corporation (Governing Board) Appointment 2018 (No 2) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 79 of the** *Financial Management Act 1996* **appoints a specified person as deputy chair of the Cultural Facilities Corporation.**
* **Disallowable Instrument DI2018-277 being the Cultural Facilities Corporation (Governing Board) Appointment 2018 (No 3) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **revokes DI2015-324 and appoints a specified person as a member of the Cultural Facilities Corporation.**
* **Disallowable Instrument DI2018-278 being the Cultural Facilities Corporation (Governing Board) Appointment 2018 (No 4) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Cultural Facilities Corporation.**
* **Disallowable Instrument DI2018-279 being the Cultural Facilities Corporation (Governing Board) Appointment 2018 (No 5) made under section 9 of the** *Cultural Facilities Corporation Act 1997* **and section 78 of the** *Financial Management Act 1996* **appoints a specified person as a member of the Cultural Facilities Corporation.**
* **Disallowable Instrument DI2018-281 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 10) made under section 12 of the** *Road Transport (General) Act 1999* **disapplies parking rules in specified areas to support South Fest 2018.**
* **Disallowable Instrument DI2018-284 being the Road Transport (Public Passenger Services) Public Transport Fares Determination 2018 made under sections 23 and 27C of the** *Road Transport (Public Passenger Services) Act 2001* **determines maximum fares payable on regular route bus services and light rail services.**
* **Disallowable Instrument DI2018-285 being the Domestic Animals (Fees) Determination 2018 (No 3) made under section 144 of the** *Domestic Animals Act 2000* **revokes DI2018-175 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2018-286 being the Civil Law (Wrongs) The Law Society of New South Wales Bar Professional Standards Scheme 2018 made under Schedule 4, section 4.10 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council's approval of The Law Society of New South Wales Professional Standards Scheme.**
* **Disallowable Instrument DI2018-287 being the Government Procurement (Secure Local Jobs Audit) Guidelines 2018 made under section 22U of the** *Government Procurement Act 2001* **makes the Secure Local Jobs Audit Guidelines.**
* **Disallowable Instrument DI2018-287 being the Government Procurement (Secure Local Jobs Complaints and Noncompliance Investigation) Guidelines 2018 made under section 22U of the** *Government Procurement Act 2001* **makes the Secure Local Jobs Complaints and Noncompliance Investigation Guidelines.**
* **Disallowable Instrument DI2018-294 being the Health Records (Privacy and Access) (Fees) Determination 2018 (No 1) made under section 34 of the** *Health Records (Privacy and Access) Act 1997* **revokes DI2017-286 and determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2018-296 being the Road Transport (General) Application of Road Transport Legislation Declaration 2018 (No 11) made under section 13 of the** *Road Transport (General) Act 1999* **suspends specified parking rules in specified areas to support the New year's Eve in the City event.**
* **Disallowable Instrument DI2018-297 being the Road Transport (General) Exclusion of Road Transport Legislation (Summernats) Declaration 2018 (No 1) made under section 13 of the** *Road Transport (General) Act 1999* **disapplies specified provisions of the Road Transport (Safety and Traffic) Management Act, the Road Transport (Third-Party Insurance) Act, the Road Transport (Vehicle Registration) Act, the Road Transport (Vehicle Registration) Regulation, and the Road Transport (Driver Licensing) Regulation for vehicles and persons participating in the Summernats 32 Car Festival 2019.**
* **Disallowable Instrument DI2018-298 being the Veterinary Practice (Professional Bodies) Declaration 2018 made under section 143 of the** *Veterinary Practice Act 2018* **declares specified entities to be professional bodies for appointments and regulations.**
* **Disallowable Instrument DI2018-299 being the Veterinary Practice (Fees) Determination 2018 (No 1) made under section 144 of the** *Veterinary Practice Act 2018* **determines fees payable for the purposes of the Act.**
* **Disallowable Instrument DI2018-300 being the Taxation Administration (Amounts Payable—Ambulance Levy) Determination 2018 made under section 139 of the** *Taxation Administration Act 1999* **revokes DI2017-315 and determines the amount RA for the reference months January to December 2019.**
* **Disallowable Instrument DI2018-301 being the Civil Law (Wrongs) The Australian Computer Society Professional Standards Scheme 2018 made under Schedule 4, section 4.10 of the** *Civil Law (Wrongs) Act 2002* **gives notice of the Professional Standards Council of New South Wales' approval of The Australian Computer Society Professional Standards Scheme.**
* **Disallowable Instrument DI2018-302 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2018 (No 4) made under subsection 21(1) of the** *Race and Sports Bookmaking Act 2001* **determines a Tabcorp ACT Pty Ltd temporary location to be a sports bookmaking venue.**
* **Disallowable Instrument DI2018-303 being the Road Transport (General) Exclusion of Road Transport Legislation (Light Rail) Declaration 2018 (No 1) made under section 13 of the** *Road Transport (General) Act 1999* **declares that vehicles undertaking rail maintenance activities are exempt from specified provisions of the Road Transport (Road Rules) Regulation.**
* **Disallowable Instrument DI2019-1 being the Integrity Commission (Commissioner Selection Criteria and Process) Determination 2019 made under section 27 of the** *Integrity Commission Act 2018***determines the selection process and selection criteria that apply to the appointment of the Integrity Commissioner.**
* **Disallowable Instrument DI2019-2 being the Auditor-General Appointment 2019 made under section 8 of the** *Auditor-General Act 1996***appoints a specified person as Auditor-General.**
* **Disallowable Instrument DI2019-4 being the Financial Management (Directorates) Guidelines 2019 (No 1) made under section 133 of the** *Financial Management Act 1996***revokes DI2015-66 and prescribes certain directorates for the purposes of the Act.**
* **Disallowable Instrument DI2019-5 being the Betting Operations Tax Determination 2019 made under section 8 of the** *Betting Operations Tax Act 2018***determines the threshold amount for the 2018/19 financial year.**
* **Disallowable Instrument DI2019-6 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2019 (No 1) made under section 79E of the** *Long Service Leave (Portable Schemes) Act 2009* **and sections 78 and 79 of the** *Financial Management Act 1996***appoints a specified person as an independent chair of the Long Service Leave Governing Board.**
* **Disallowable Instrument DI2019-7 being the Long Service Leave (Portable Schemes) Governing Board Appointment 2019 (No 2) made under section 79E of the** *Long Service Leave (Portable Schemes) Act 2009* **and section 78 of the** *Financial Management Act 1996***revokes DI2016-59 and appoints a specified person as an independent member and deputy chair of the Long Service Leave Governing Board.**
* **Disallowable Instrument DI2019-8 being the Race and Sports Bookmaking (Sports Bookmaking Venues) Determination 2019 (No 1) made under subsection 21(1) of the** *Race and Sports Bookmaking Act 2001***approves sports bookmaking operations at the Manuka Oval, Griffith during the Sydney Thunder Big Bash League match.**

### Disallowable Instruments—Comment

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

#### Were relevant entities actually consulted before these appointments were made?

* **Disallowable Instrument DI2018-289 being the Board of Senior Secondary Studies Appointment 2018 (No 4) made under section 8 of the** *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the ACT Board of Senior Secondary Studies.**
* **Disallowable Instrument DI2018-290 being the Board of Senior Secondary Studies Appointment 2018 (No 5) made under section 8 of the** *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the ACT Board of Senior Secondary Studies.**
* **Disallowable Instrument DI2018-291 being the Board of Senior Secondary Studies Appointment 2018 (No 6) made under section 8 of the** *Board of Senior Secondary Studies Act 1997* **revokes DI2016‑188 and appoints a specified person as a member of the ACT Board of Senior Secondary Studies.**
* **Disallowable Instrument DI2018-292 being the Board of Senior Secondary Studies Appointment 2018 (No 7) made under section 8 of the** *Board of Senior Secondary Studies Act 1997* **appoints a specified person as a member of the ACT Board of Senior Secondary Studies.**

Each of the instruments mentioned above appoints a specified person to the ACT Board of Senior Studies. The appointments are made under section 8 of the *Board of Senior Secondary Studies Act 1997*, which provides:

**8 Membership of board**

(1) The board must consist of the following members:

(a) a chair;

(b) 1 person appointed after consultation with the Canberra Institute of Technology;

(c) 1 person appointed after consultation with vocational education and training organisations;

(d) 1 person appointed after consultation with the Australian National University;

(e) 1 person appointed after consultation with the University of Canberra;

(f) 1 person appointed after consultation with the Australian Catholic University;

(g) 1 person appointed after consultation with the body known as the Association of Independent Schools;

(h) 1 person appointed after consultation with the ACT branch of the Australian Education Union;

(i) 1 person appointed after consultation with the body known as the Catholic Education Commission;

(j) 1 person appointed after consultation with the body known as the ACT Principals' Association Inc.;

(k) 1 person appointed after consultation with the body known as the ACT Council of Parents and Citizens Associations;

(l) 1 person appointed after consultation with the Association of Parents and Friends of the ACT Schools Inc.;

(m) 1 person appointed after consultation with business and industry representative organisations in the ACT;

(n) 1 person appointed after consultation with the ACT Trades and Labour Council;

(o) the director-general.

(2) The Minister must appoint the board members (other than the director-general).

*Note 1* For the making of appointments (including acting appointments), see the [Legislation Act](http://www.austlii.edu.au/au/legis/nt/consol_act/la133/), pt 19.3.

*Note 2* In particular, an appointment may be made by naming a person or nominating the occupant of a position (see s 207).

*Note 3* Certain Ministerial appointments require consultation with a Legislative Assembly committee and are disallowable (see [Legislation Act](http://www.austlii.edu.au/au/legis/nt/consol_act/la133/), div 19.3.3).

(3) The Minister may appoint a person to be a board member only if satisfied that the person has qualifications and expertise relevant to the functions of the board.

The explanatory statements for the particular appointments made by the instruments indicate that they are made under paragraphs 8(1)(e), 8(1)(i), 8(1)(m) and 8(1)(n) of the Board of Senior Secondary Studies Act, respectively. However, the explanatory statements do not actually state that the relevant entities were consulted. While it may be assumed that the Minister would not have made the appointments without first consulting the relevant entities, the Committee considers that it would be preferable if the explanatory statements for the instruments stated that the required consultation had, in fact, taken place.

As the Committee noted in its *Scrutiny Report No 47* of the *7th Assembly* (at pages 29-30), in relation to the Racing Appeals Tribunal Appointment 2011 (No. 5) (DI2011-303), in making this comment, the Committee suggests that it is not merely being pedantic in relation to trying to ensure that any pre-requisites for a particular appointment have been met.

As the Committee has previously noted, in 2011, in the case of [*Kutlu v Director of Professional Services Review* ([2011] FCAFC 94 (28 July 2011)](http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html)*[[1]](#footnote-1)*, the Full Federal Court found to be invalid a series of appointments to the Professional Services Review Panel (PSR Panel), a body provided for by the Commonwealth *Health Insurance Act 1973*, charged with investigating alleged inappropriate practice by medical practitioners. Section 84(3) of the Health Insurance Act required the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before making appointments to the PSR Panel.

In *Kutlu*, a medical practitioner challenged action taken against him on the basis that members of various committees appointed from the PSR Panel that were involved in the action against him were not properly appointed, because the AMA had not been consulted in relation to various appointments. The Full Federal Court considered whether the statutory requirement to consult was a mandatory requirement, or merely direction that would not result in invalidity if not followed. The Court found that it was a mandatory requirement and that the requirements to consult were “essential preliminaries to the Minister's exercise of the power of appointment”. The Full Court found that, as a result, various things done in relation to Dr Kutlu, by various committees, were invalid. The Court stated (at para 32):

[T]he scale of both Ministers’ failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers’ conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices …

The Committee has previously noted that the wider effect of the decision in *Kutlu* was to invalidate scores of other investigations of other medical practitioners. Its effect was extremely damaging – including in a financial sense – to the Commonwealth.

The decision in *Kutlu* (and its consequences) underlines the Committee’s reasons for maintaining its diligence in relation to attempting to ensure that any pre-requisites for appointments that come before the Committee have been met. As the Committee has consistently stated, the Committee does not consider that what it seeks imposes an onerous requirement on those who make appointments.

In the present context, the Committee considers that, similarly, the explanatory statements for each of the instruments should, preferably, also have addressed the requirement in subsection 8(3) of the Board of Senior Secondary Studies Act that the Minister may only appoint a person to be a board member if satisfied that the person has qualifications and expertise relevant to the functions of the board.

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

#### Minor drafting issue

* **Disallowable Instrument DI2018-293 being the Racing Appeals Tribunal (Rules of the Tribunal) 2018 (No 1) made under subsection 45(1) of the** *Racing Act 1999* **revokes DI2007-184 and makes the Rules of the Tribunal.**

This instrument revokes and re-makes the rules of the ACT Racing Appeals Tribunal. The Committee notes that one of the effects of the new rules is to reduce the bond required (previously, by rule 1(1) of Racing Appeals Tribunal (Rules of the Tribunal) 2007 (No 1), DI2007-184) for when an appeal is filed, from $500 to $350. The Committee considers that it might have been of assistance if this change was specifically identified in the explanatory statement.

This comment does not require a response from the Minister.

#### Why are these appointments being re-made, so soon after being originally made?

* **Disallowable Instrument DI2018-295 being the Official Visitor (Children and Young People) Appointment 2018 (No 2) made under section 10 of the** *Official Visitor Act 2012* **revokes DI2018-256 and appoints 3 specified persons as an official visitor for the purposes of the** *Children and Young People Act 2008***.**

This instrument appoints three specified persons as official visitors, for the purposes of the *Children and Young People Act 2008*. The instrument (dated 17 December 2018) also revokes the Official Visitor (Children and Young People) Appointment 2018 (No 1) [DI2018-256], which was made on 4 October 2018. No explanation is provided, in the explanatory statement, as to why it has been necessary to revoke and re-make the instrument, within such a short period of time.

In making this comment, the Committee notes that it commented on the earlier instrument in *Scrutiny Report 23* of the *9th Assembly* (29 October 2018). The Committee identified a minor drafting issue. The Committee notes that the new instrument appears to address that minor drafting issue.

The Committee seeks the Minister’s advice as to why the earlier instrument has been revoked and re-made, so soon after being made.

This comment requires a response from the Minister.

#### Drafting issues

* **Disallowable Instrument DI2019-3 being the Legal Aid (Review Committee Panels) Appointment 2019 (No 1) made under section 37 of the** *Legal Aid Act 1977***appoints specified persons as part-time members of the Legal Aid Commission review committee panel.**

This instrument appoints five specified persons as “part-time” members of a Legal Aid Commission review committee panel. Such panels are provided for by section 37 of the *Legal Aid Commission Act 1977*, which states:

**37 Establishment and constitution of review committees**

(1) For this Act, there shall be such review committees as the chief executive officer establishes in accordance with this part.

(2) A review committee shall consist of—

(a) a person chosen in accordance with subsection (3); and

(b) a person chosen in accordance with subsection (4); and

(c) a person chosen in accordance with subsection (5).

(3) The member of a review committee referred to in subsection (2)(a) shall be a private legal practitioner chosen by the chief executive officer—

(a) from a panel of not more than 14 private legal practitioners nominated by the council of the bar association and approved by the Minister; or

(b) if that council fails to nominate such a panel within 30 days after the receipt by the council of a written request by the Minister to do so—a panel of private legal practitioners chosen by the Minister.

(4) The member of a review committee referred to in subsection (2)(b) shall be a Australian legal practitioner chosen by the chief executive officer—

(a) from a panel of not more than 14 Australian legal practitioners nominated by the council of the law society and approved by the Minister; or

(b) if that council fails to nominate such a panel within 30 days after the receipt by the council of a written request by the Minister to do so—a panel of Australian legal practitioners chosen by the Minister.

(5) The member of a review committee referred to in subsection (2)(c) shall be a person chosen by the chief executive officer from a panel of not more than 14 people (not being legal practitioners, members of the commission or officers of the commission) chosen by the Minister, each of whom has qualifications or experience relevant to the exercise of the function of a review committee.

The particular appointments are made under subsections 37(5), 37(4) and paragraph 37(3)(a), respectively.

The Committee notes that the instrument contains two section 4s. The Committee also notes that the first section 4 does not indicate which of the two paragraphs in subsection 37(4) the specified person is appointed under. This is in contrast to the second section 4. However, the explanatory statement for the instrument states that the specified person was nominated by the council of the Law Society. This indicates that the specified person was appointed under paragraph 37(4)(a).

The Committee notes that section 37 provides for the appointment of “members” to a review committee and that there is no mention of “part-time” members.

This comment does not require a response from the Minister.

### Subordinate Laws—No comment

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

* **Subordinate Law SL2018-21 being the Planning and Development Amendment Regulation 2018 (No 1), including a regulatory impact statement, made under the** *Planning and Development Act 2007* **clarifies that front yard swimming pools, behind courtyard walls, remain exempt from development approval.**
* **Subordinate Law SL2018-23 being the Road Transport (Offences) Amendment Regulation 2018 (No 3) made under the** *Road Transport (General) Act 1999* **amends the Road Transport (Offences) Regulation to provide the administering authority with explicit power to delegate its functions to police officers.**
* **Subordinate Law SL2018-25 being the Court Procedures Amendment Rules 2018 (No 1) made under the** *Court Procedures Act 2004* **amends the Court Procedures Rules 2006 after a consultative review of the rules by the Courts and the Joint Rules Advisory Committee.**
* **Subordinate Law SL2018-26 being the Road Transport (Vehicle Registration) Amendment Regulation 2018 (No 1) made under section 13 of the** *Road Transport (Vehicle Registration) Act 1999* **and section 23 of the** *Road Transport (General) Act 1999* **implements new labelling requirements for electric‑powered and hydrogen-powered vehicles.**
* **Subordinate Law SL2018-27 being the Gaming Machine (Offset Amounts) Regulation 2018 made under the** *Gaming Machine Act 2004* **prescribes the fees, charges and other amounts payable that clubs are eligible to use their offset amount credits for.**
* **Subordinate Law SL2019-1 being the Road Transport (Safety and Traffic Management) Amendment Regulation 2019 (No 1) made under the** *Road Transport (Safety and Traffic Management) Act 1999***amends the Road Transport (Safety and Traffic Management) Regulation to include two additional devices in the definition of laser speed measuring device.**
* **Subordinate Law SL2019-2 being the Public Health Amendment Regulation 2019 (No 1) made under the** *Public Health Act 1997***amends the Public Health Regulation by omitting Part 3 Cervical cytology register and omitting or substituting definitions or provisions that relate to cervical screening in the Dictionary.**

### Subordinate Laws—comment

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

#### Human rights issues

* **Subordinate Law SL2018-24 being the Crimes (Child Sex Offenders) Amendment Regulation 2018 (No 1) made under the** *Crimes (Child Sex Offenders) Act 2005* **prescribes specified events, activities or services as "child related employment" for the purposes of the Act.**

This subordinate law amends the *Crimes (Child Sex Offenders) Regulation 2005*, by inserting a new section 16C, that defines (for the Act) the concept of “child-related employment”. The explanatory statement for the subordinate law explains that the purpose of the subordinate law is the prevention of registered child sex offenders working in child-related employment by making it an offence for them to apply for and engage in such employment. The explanatory statement states:

The exclusion of registered offenders who have been sentenced by a court for a registrable offence, or are the subject of a child sex offender registration order, is a fundamental part of creating safe environments for children.

The Committee notes that the explanatory statement discusses, under the heading “Human Rights Considerations”, the human rights issues raised by the subordinate law and, in particular, the balancing of the rights of registered offenders against the rights of children.

**The Committee draws the Legislative Assembly’s attention to the discussion of human rights issues raised by this subordinate law.**

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

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

* **Subordinate Law SL2018-28 being the Veterinary Practice Regulation 2018 made under the** *Veterinary Practice Act 2018* **determines the operating provisions for the purposes of the Act.**

This subordinate law is made under the *Veterinary Practice Act 2018*. As the explanatory statement indicates, the majority of the provisions of the subordinate law relate to the administrative functions of the Veterinary Practitioners Board established under the Act.

Schedule 1 of the subordinate law deals with “restricted acts of veterinary science”. In essence, these are acts that can only be carried out by a registered veterinary practitioner.

The Committee notes that the definition of ***microchip***, in sub-item 1.1(1) of Schedule 1, relies on 2 Australian Standards AS 5018-2001 and AS 5019-2001, which are also defined in sub-item 1.1(1). Item 1.2 then disapplies subsection 47(6) of the *Legislation Act 2001* in relation to these Australian Standards. It provides:

**1.2 Disapplication of Legislation Act, s 47(6)**

The [Legislation Act](http://www.legislation.act.gov.au/a/2001-14), section 47(6) does not apply to AS 5019-2001 and AS 5018-2001 under this regulation.

Note AS 5019-2001 and AS 5018-2001 may be purchased at [www.standards.org.au](http://www.standards.org.au).

Neither the effect of this disapplication of the Legislation Act nor the reasons for doing so are in any way addressed in the explanatory statement for the subordinate law.

Section 47 of the Legislation Act allows subordinate laws and disallowable instruments to incorporate, by reference, external documents (including the legislation of other Australian jurisdictions), subject to certain conditions that are designed to ensure that users of ACT legislation are able to have access to those external documents. Subsection 47(3) lays down an underlying rule (though it can be displaced) that external documents can only be incorporated *as they exist at a particular time*. This is intended to ensure that users of ACT legislation can rely on a particular version of an external document, rather than having to monitor amendments to the document. It is also intended to ensure that (in effect) the content of ACT legislation is not able to be amended without reference to the Legislative Assembly.

Subsection 47(5) makes any law of another jurisdiction, or an instrument, that is applied by a subordinate law or by a disallowable instrument, as in force from time to time (ie rather than as it exists at the time that the subordinate law or disallowable instrument is made), a “notifiable instrument”. The effect of subsection 47(6) is, in situations where subsection 47(3) is disapplied (as it is here, by the application of AS 5019-2001 and AS 5018-2001 “as in force from time to time”) to make any amendments or revisions of such (external) instruments, etc also notifiable instruments.

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

The Committee notes that the disapplication of subsection 47(6) is not in any way addressed or explained in the explanatory statement for this subordinate law. Given the Committee’s oft-stated expectations on this issue, the Committee considers that this is a deficiency in the explanatory statement.

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

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

### Regulatory impact statement—No Comment

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

**Subordinate Law SL2018-21 being the Planning and Development Amendment Regulation 2018 (No 1).**

## Responses

### Government responses

The Committee has received responses from:

* The Attorney-General, dated 11 February 2019, in relation to comments made in Scrutiny Report 24 concerning the Residential Tenancies Amendment Bill 2018 (No 2).
* The Attorney-General, dated 12 February 2019, in relation to comments made in Scrutiny Report 26 concerning the Electoral Amendment Bill 2018.

[**These response**](https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills)**s*[[2]](#footnote-2) can be viewed online.***

### Government Responses—Comment

#### Electoral Amendment Bill 2018

In its Report No 26, published on 5 February 2018, the Committee made various comments in relation to the *Electoral Amendment Bill 2018*. The Committee received a response from the Attorney–General on 12 February 2018. The Committee thanks the Minister for the speed of his response and helpful comments.

In its report, the Committee expressed concern over transitional provisions included in clause 12 of the Bill which included provision for transitional regulations. Proposed section 518 states:

**518 Transitional regulations**

(1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of the Electoral Amendment Act 2018.

(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 also notes proposed section 519 provides for the expiry of part 33, which includes proposed section 518, after three months from commencement.

The Committee asked the Minister for “a justification to be provided for why a power is included to make regulations which have the effect of modifying primary legislation”.

In response the Minister stated:

The power to make transitional regulations only allows the Executive to respond in a temporary way to matters of a transitional nature which may come up within three months after the commencement, particularly to ensure a smooth transition period, to the new legislative scheme. The ‘amendments’ in a transitional regulation do not actually amend the words of the law they ‘amend’, but rather operate to modify their effect temporarily. The regulation itself is disallowable.

The Committee is concerned that the Minister’s comments may be taken to suggest that any transitional regulation made under proposed section 518 will only have a temporary effect. In the Committee’s view, the effects of a regulation made under proposed section 518 could continue even after the expiry of part 33 of the Act (see *Legislation Act 2001,* section 88 and the definition of repeal in section 82). The Committee notes that subsection 518(2) will limit any transitional regulations to “anything that, in the Executive’s opinion, is not, or is not adequately or appropriately, dealt with in this part” but that this may include regulations whose effects continue after the expiry of the power to make the regulation. The Committee therefore seeks the Minister’s views on why any transitional regulations are necessarily temporary in effect.

**The Committee asks the Minister to respond.**

Giulia Jones MLA

Chair

18 February 2019

## Outstanding Responses

### Bills/Subordinate Legislation

* **Report 7, dated 18 July 2017**
* Crimes (Intimate Image Abuse) Amendment Bill 2017 (PMB).
* **Report 8, dated 8 August 2017**
* Crimes (Invasion of Privacy) Amendment Bill 2017 (PMB).
* **Report 12, dated 21 November 2017**
* Crimes (Criminal Organisation Control) Bill 2017 (PMB).
* **Report 17, dated 4 May 2018**
* Crimes (Consent) Amendment Bill 2018 (PMB).
* **Report 19, dated 24 July 2018**
* Anti-corruption and Integrity Commission Bill 2018 (PMB).
* **Report 26, dated 5 February 2019**
* Controlled Sports Bill 2018
* Disallowable Instrument DI2018-259 – Radiation Protection (Fees) Determination 2018 (No 1)
* Disallowable Instrument DI2018-260 - Public Health (Fees) Determination 2018 (No 1)
* Disallowable Instrument DI2018-261 - Food (Fees) Determination 2018 (No 1)
* Disallowable Instrument DI2018-262 - Medicines, Poisons and Therapeutic Goods (Fees) Determination 2018 (No 1)
* Fuels Rationing Bill 2018
* Heavy Vehicle National Law as applied by the law of States and Territories—Heavy Vehicle (Registration) National Regulation (2018 No 298)
* Heavy Vehicle National Law as applied by the law of States and Territories—Heavy Vehicle National Legislation Amendment Regulation 2018 (2018 No 299)
* Health Practitioner Regulation National Law—Health Practitioner Regulation National Law Regulation 2018 (No 166/2018)

1. <http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/94.html> [↑](#footnote-ref-1)
2. https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role/responses-to-comments-on-bills. [↑](#footnote-ref-2)