LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legal and Constitutional Affairs Committee

Performing the functions of the

Subordinate Legislation & Publications Committee

Report of Ministerial Correspondence on Subordinate Legislation and Publications

November 2014 – November 2015

December 2015

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Chair's Preface

As rules, regulations and by-laws affect people in their day to day lives, it is important that the Assembly maintains a sufficient level of scrutiny of subordinate legislation to ensure that they keep within the purpose of the laws under which they are made and do not unduly affect people's rights. As part of that scrutiny, the Committee obtains advice from its independent legal counsel, Professor Ned Aughterson, and writes to responsible Ministers regarding any questions or concerns the Committee has with a regulation. Ministers reply with clarification about the intended operation of the regulations, or undertakings to correct any errors. This report places those letters on the public record and allows interested persons to see those clarifications or undertakings.

The Committee is also responsible for monitoring compliance with statutory reporting requirements. For example, all Northern Territory Government departments and a range of other organisations are required to provide annual reports on their activities to the Speaker or relevant Minister for tabling in the Assembly. It is noted that within the current reporting period there were no breaches of statutory reporting requirements.

During the current reporting period, the Committee determined that Regulation 4N(2) of the Motor Accidents (Compensation) Amendment Regulations ought to be disallowed on the grounds that it went beyond the power conferred by its enabling legislation. In accordance with its terms of references, the Committee reported this matter to the Assembly and is the subject of a separate report.

On behalf of the Committee I would like to thank Ministers for their responses to the Committee's queries. The Committee also acknowledges the significant contribution made by Professor Aughterson, and thanks him for his diligence in advising the Committee. I also thank the members of the Committee for their efforts and bipartisan approach in seeking to ensure a high standard of rules and regulations in the Northern Territory, and compliance with legislative reporting requirements.

Nathan Barrett MLA

Chair

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	Chair:	Public Accounts, Estimates & Government Owned Corporations Scrutiny.
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	Hon Kezia PURICK MLA: Member for Goyder	
	Party:	Independent
	Parliamentary Position:	Speaker
	Committee Membership	
	Standing:	Legal & Constitutional Affairs, Subordinate Legislation & Publications, House, Standing Orders.
	Chair:	House.
	Ms Lynne WALKER MLA: Member for Nhulunbuy	
	Party:	Territory Labor
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	Committee Membership	
	Standing:	Legal & Constitutional Affairs, Subordinate Legislation & Publications, Privileges.

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Terms of Reference

1. A Standing Committee on Subordinate Legislation and Publications to consist of 5 Members shall be appointed at the commencement of each Assembly. The Committee shall examine and report upon all instruments of a legislative or administrative character and other papers which are required by statute to be laid upon the Table.

2. The Committee shall, with respect to any instrument of a legislative or administrative character which the Legislative Assembly may disallow or disapprove, consider –

   (a) whether the instrument is in accordance with the general objects of the law pursuant to which it is made;

   (b) whether the instrument trespasses unduly on personal rights or liberties;

   (c) whether the instrument unduly makes rights and liberties of citizens dependent upon administrative and not upon judicial decisions;

   (d) whether the instrument contains matter which in the opinion of the committee should properly be dealt with in an Act;

   (e) whether the instrument appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

   (f) whether there appears to have been unjustifiable delay in the publication or laying of the instrument before the Assembly; and

   (g) whether for any special reason the form or purport of the instrument calls for elucidation.

3. The Committee, if it is of the opinion that an instrument ought to be disallowed or disapproved –

   (a) shall report that opinion and the grounds thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of that instrument may be given to the Assembly; and

   (b) if the Assembly is not sitting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.

   For the purposes of these Standing Orders, “instrument of a legislative or administrative character” has the same meaning as that defined in the *Interpretation Act.*

4. The Committee, if it is of the opinion that any matter relating to any paper which is laid upon the Table of the Assembly should be brought to the notice of the Assembly, may report that opinion and matter to the Assembly.

5. All petitions and papers presented to the Assembly which have not been ordered to be printed shall stand referred to the Committee, which shall report from time to

time as to what petitions and papers ought to be printed and whether wholly or in part.

6. The Committee shall inquire into and report, from time to time, on the printing, publication and distribution of publications or such other matters as are referred to it by the Speaker or the Assembly.
7. The Committee shall have power to send for persons, papers and records, to sit in public or private session notwithstanding any adjournment of the Assembly and to adjourn from place to place.
8. The Committee shall have power to consider, disclose and publish the Minutes of Proceedings, evidence taken and records of the Subordinate Legislation, Tabled Papers and Publications Committees established in this Assembly and all previous Assemblies.

1 Introduction

1.1 Subordinate legislation is any regulation, rule or by-law made under an Act.[1] Subordinate legislation takes effect from the time it is notified in the *Northern Territory Government Gazette*, or from the time specified in the legislation. However, where any Act confers the power to make or amend statutory rules, regulations and by-laws subject to disallowance under section 63 of the *Interpretation Act* 2011, there is a statutory requirement for all such instruments to be presented to the Assembly within three sitting days of its notification in the *Gazette*.[2]

1.2 Pursuant to clause 2 of the Committee's Terms of Reference, after examining subordinate legislation tabled in the Assembly and obtaining advice from its independent legal counsel, the Committee may raise any questions or issues of concern with the responsible Minister. These letters, and the Ministers' responses, are set out below in Chapter 2.

1.3 In addition to its scrutiny of subordinate legislation, the Committee is responsible for monitoring compliance with the statutory reporting requirements of Government entities. For example, under the *Public Sector Employment and Management Act* and the *Financial Management Act*, all Northern Territory government departments are required to present annual reports and audited financial statements to the appropriate Minister for tabling in the Assembly.

1.4 Independent Officers, such as the Auditor-General, Ombudsman, and Information Commissioner; statutory authorities; government owned corporations; and a number of other regulatory bodies are also required to submit annual reports, audited financial statements, and inquiry reports to the Speaker or relevant Minister for tabling pursuant to their respective enabling legislation. Chapter 3 sets out correspondence with Ministers regarding outstanding annual reports and any other issues raised by the Committee in relation to annual reports tabled in the Assembly.

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[1] *Interpretation Act,* ss7 and 63
[2] *Interpretation Act,* s 63 (3)(c)

2 Disallowance of Subordinate Legislation

2.1 If the Committee is of the opinion that subordinate legislation, or a provision of subordinate legislation, ought to be disallowed, Standing Order 20 (3) stipulates that the Committee:

a) shall report that opinion and the grounds thereof to the Assembly before the end of the period during which any notice of the motion for disallowance of that instrument may be given to the Assembly; and

b) if the Assembly is not sitting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.

2.2 As provided for under s 63 (8) of the interpretation Act, notice of a motion for disallowance can be given at any time within the 12 sitting days following the tabling of the instrument in the Assembly. Following consideration of the Committee's report, the Assembly may pass a resolution disallowing subordinate legislation which has the effect of repealing the legislation. In the case of subordinate legislation amending or repealing other legislation, the disallowance restores the other legislation from the date of the disallowance.

2.3 Where the Assembly passes a resolution of disallowance there are restrictions on the making of subordinate legislation that is the same in substance or has the same effect as the disallowed legislation within 6 months of the disallowance, unless the Assembly rescinds its resolution. Subordinate legislation made in contravention of this provision is of no effect.

2.4 Within the current reporting period, the Committee determined that Regulation 4N(2) of the Motor Accidents (Compensation) Amendment Regulations (see pp.22-8) ought to be disallowed on the grounds that it went beyond the power conferred by its enabling legislation. A copy of the Committee's subsequent report to the Assembly on this matter is available on the Committee's website.

3 Ministerial Correspondence on Subordinate Legislation

11 of 2014 Public and Environmental Health Recommendations

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2014/1242 -RJL

Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett

Thank you for your recent correspondence relating to your review of the Public and Environmental Health Regulations and the recommendations of your independent legal counsel, Professor Aughterson.

Professor Aughterson's recommendations to include a defence provision for Regulation 42 and appeal provisions for regulations 84, 94 and 99 have been considered and will be actioned.

Professor Aughterson's query about the appropriateness of applying an offence of strict liability to regulations 55, 60 and 61 was reviewed by the Legal Policy Section of the Department of the Attorney General and Justice, as well as relevant officers at the Department of Health. An explanation is provided at Attachment A as to why an offence of strict liability is considered to be suitable for the purposes of the Public and Environmental Health Regulations.

Should you require any further clarification about this response, please do not hesitate to contact Mr Xavier Schobben, Director Environmental Health on telephone 8922 7149.

Thank you for bringing this matter to my attention.

Yours sincerely

ROBYN LAMBLEY

14/10/14

Northern Territory Government

Attachment A

REVIEW OF THE PUBLIC AND ENVIRONMENTAL HEALTH REGULATIONS BY THE SUBORDINATE LEGISLATION AND PUBLICATIONS COMMITTEE

Department of Attorney General and Justice response to Regulations 55, 60 & 61 of Public and Environmental Health Regulations

The following explanation is provided as to why an offence of strict liability is considered to be suitable.

Regulation 55

This offence replicates the offence at regulation 40 of the now repealed Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations. The offence was formerly a regulatory offence.

Under section 22 of the Criminal Code, regulatory offences are excluded from the criminal responsibility concepts of Part II of the Criminal Code (except for prescribed matters, notably lawful justification). In summary, there is no requirement to prove intention, recklessness, negligence or knowledge for a regulatory offence.

When converting offences so they comply with Part IIAA of the Criminal Code, the offences must comply with one or more of the criminal responsibility elements stated at sections 43AH-43AO.

When converting a regulatory offence, the closest possible Part IIAA equivalent is absolute liability; however strict liability is also applicable. For both strict liability and absolute liability, no fault elements (intention, reckless, negligence or knowledge) are prescribed for the physical elements (conduct, result or circumstance) of the offence, however all criminal defences apply to strict liability offences and all criminal defences, except for mistake of fact, apply to absolute liability offences.

Regulation 55 was drafted on the basis that the legal concepts of the previous regulations be maintained, that is, no fault elements be prescribed for the physical elements. Strict liability was prescribed rather than absolute liability as it provides the additional mistake of fact defence.

Importantly, the prosecuting authorities must still prove the facts given rise to regulation 55(1)(a) and (b) and 55(2)(a) and (b) beyond reasonable doubt and must still disprove the existence of a criminal defence beyond reasonable doubt under sections 43BQ-BS of the Criminal Code.

Regulation 60.

The offence provision at subregulation 60(3) imposes a duty on a responsible person under subregulation 60(1) to provide the Chief Health Officer with the required information, as stated in subregulation (1), within 28 days.

Professor Aughterson questioned the appropriateness of expecting the mother to provide information to the CHO in the event that a medical practitioner, midwife or Aboriginal and Torres Strait Islander Health practitioner was are not present during the episode as required under 60(2) and of applying an offence of strict liability.

To clarify, the mother does not commit an offence under 60(3) if she fails to provide the required information. The offence only applies to the responsible person under 60 (1) namely the medical practitioner, or midwife or Aboriginal and Torres Strait Islander Health.

Attachment A

It was therefore considered to be appropriate that the offence should be one of strict liability. The same policy position underpins a number of offences in the Public Environmental Health Regulations where a person has a duty to notify, for example regulation 13.

The maximum penalty, 10 penalty units, is based on the fact that the offence is strict liability

Regulation 61.

The offence provision at subregulation 61(3) imposes a duty on a responsible person under subregulation 61(1) to provide the Chief Health Officer with the required information, as stated in subregulation (1), within 42 days.

Professor Aughterson questioned the appropriateness of expecting the mother to provide information to the CHO in the event that a medical practitioner, midwife or Aboriginal and Torres Strait Islander Health practitioner was are not present during a notifiable death as required under 61(2) and of applying an offence of strict liability.

To clarify, the mother does not commit an offence under 61(3) if she fails to provide the required information. The offence only applies to the responsible person under 61 (1) namely the medical practitioner, or midwife or Aboriginal and Torres Strait Islander Health

It was therefore considered to be appropriate that the offence should be one of strict liability. The same policy position underpins a number of offences in the Public Environmental Health Regulations where a person has a duty to notify, for example regulation 13.

The maximum penalty, 10 penalty units, is based on the fact that the offence is strict liability.

49 of 2013 Alice Springs (Waste Management Facility) By-Laws

CHIEF MINISTER
MINISTER FOR LOCAL GOVERNMENT AND REGIONS

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
Legislative Assembly of the Northern Territory
GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett Nathan

Thank you for your letter dated 20 August 2014, to the former Minister for Local Government and Regions, providing comments by the Subordinate Legislation and Publications Committee on the recently introduced Alice Springs (Waste Management Facility) by-laws 2013.

The above by-laws were made under the *Local Government Act* by special resolution of the Alice Springs Town Council on 25 November 2013. In accordance with section 190(1)(c) of the *Local Government Act*, the council provided certification from a legal practitioner, certifying that the by-laws were made consistently with the principles prescribed by the Act.

A copy of your letter was sent to the Alice Springs Town Council for consideration and response. The Council has now provided a response to the matters raised (attached).

Yours sincerely

ADAM GILES

2 8 OCT 2014

Chief Executive's Office

3 October 2014

Mr David Willing
Executive Director
Department of Local Government and Regions
GPO Box 4621
DARWIN NT 0801

Dear Mr Willing

RE: ALICE SPRINGS (WASTE MANAGEMENT FACILITY) BY-LAWS

Thank you for your letter of 27 August 2014 directed to Mayor Ryan and the enclosed comments from the Chairman of the Subordinate Legislation and Publications Committee in relation to the above recently introduced By-laws.

Council responds to the request of Mr Barrett MLA as follows:

By-law 3

Council will seek to rectify this omission when it next reviews the by-laws.

By-law 7(1) and (2)

Similarly, Council will seek to substitute '*provide*' for '*state*'.

By-laws 10 and 11

Council considers that the scenarios raised by Professor Aughterson will be avoided by the exercise of discretion in the issuance of infringement notices.

By-laws 10(3) and 11(2)

Council will give consideration to Professor Aughterson's comments when it next reviews the by-laws.

By-law 18

Council will seek to include an intent element. In the meantime, however, Council is confident that again the exercise of prosecutorial discretion will avoid any injustice in the application of this by-law.

Yours faithfully

Rex Mooney
CHIEF EXECUTIVE OFFICER

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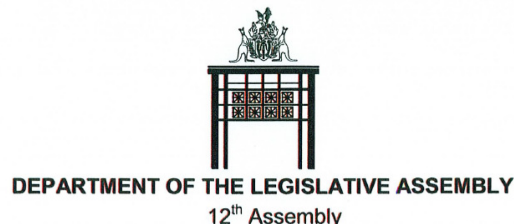
4 of 2014 Advance Personal Planning Regulations



DEPARTMENT OF THE LEGISLATIVE ASSEMBLY

12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.94

Hon John Elferink, MLA
Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General

Re: Advanced Personal Planning Regulations [No 4 of 2014]

As per the attached, on 7 May 2014 I forwarded a copy of the advice from our independent legal counsel regarding the above regulations for your consideration and comment. However, the Committee is yet to receive a response.

As the Committee is keen to finalise this matter, at its meeting of 22 October 2014 it was resolved that I write to you requesting a response by Friday 7 November 2014.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett, MLA
Chair

22 October 2014

Enc.

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DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.72

Hon John Elferink
Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General

Re: Advance Personal Planning Regulations [No 4 of 2014]

The Subordinate Legislation and Publications Committee met on 7 May 2014 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett MLA
Chair

7 May 2014

Enc

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Legal Advice from Professor Aughterson

Advance Personal Planning Regulations [No 4 of 2014]

Reg.4: The *Advance Personal Planning Act* enables adults to appoint a 'decision maker' to make decisions for them if they lose their own decision-making capacity. Section 20 of the Act allows the decision maker to make a decision for the represented adult that they could have made if they had full legal capacity. That is qualified by s 25(2) of the Act, which provides that there cannot be a consent decision on behalf of the represented person in relation to what is called 'restricted health care action'. That term is defined in the Act, and includes health care action prescribed by regulation. Regulation 4 lists four matters as falling within restricted health care action, including 'special medical research and experimental health care'. In other words, there cannot be consent to subject the represented person to medical research or experimental health care. The term 'special medical research and experimental health care' is then defined in regulation 4(2), and means:

medical research or experimental health care

(a) relating to a condition the adult has or to which the adult has a significant risk of being exposed; or

(b) intended to gain knowledge that can be used in the diagnosis, maintenance or treatment of a condition the adult has or has had.

There are a couple of observations, though they are made with limited understanding of the scope and context of medical research and experimentation. First, there does not appear to be any clarification as to what falls within the ambit of 'research' or what constitutes 'experimental' health care. There is a question of whether the regulations are unintentionally prohibiting medically approved procedures that are still the subject of ongoing research or that are still experimental in the sense, for example, that their long-term effects are not absolutely clear or they have yet to be tested on persons having the precise background or drug regime of the represented adult. In that context, might it prohibit a doctor from prescribing a new drug as part of the person's treatment options? It might be that there are clear professional guide lines as to what constitutes 'research' or 'experimentation', though if that is the case should reference be made to those guide lines in the regulations? Second, it is noted that the restriction applies only to research or health care relating to a condition the represented adult has, has had, or to which s/he has a significant risk of being exposed. Does that mean there can be consent to having the represented person exposed to research or experimental health care which does not relate to any past or present condition of the person; for example, research in relation to the general well-being of people or into the side-effects of certain drugs?

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
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DARWIN NT 0801

Dear Mr Barrett

I refer to your letter dated 7 May 2014 seeking comment on advice provided to the Subordinate Legislation and Publications Committee from the Committee's independent legal counsel, Professor Ned Aughterson, in relation to regulation 4 of the Advance Personal Planning Regulations 2014.

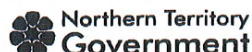
I apologise for the delay in my response. The provisions in the *Advance Personal Planning Act 2013* and Regulations relating to restricted health matters were developed in consultation with the Department of Health. Accordingly, consideration of the issues has required extensive consultation between officers of the Department of the Attorney-General and Justice and the Department of Health.

Professor Aughterson's concerns revolve specifically around the definition of 'special medical research or experimental research', noting that there does not appear to be any clarification as to what falls within the ambit of the terms. His issues appear to relate to three separate issues which are addressed below.

1. Whether the definition in regulation 4(2) unintentionally prohibits medically approved procedures that are still the subject of ongoing research or that are still experimental, for example, whether it prohibits a doctor from prescribing a new drug as part of a person's treatment option?

Response:

It should be first noted that regulation 4(2) must be read in the context of the whole regulation. As mentioned above, regulation 4(3) clarifies that 'psychological research or approved clinical research' is not special medical research or experimental health care.



The Chief Medical Officer has considered the meanings of the terms and advised that the definition of 'special medical research' is generally accepted as applying to research that is only intended 'to gain knowledge' that can be used in the diagnosis of a condition (and therefore not strictly to diagnose, maintain or treat a condition that the person is suffering from).

Experimental research on the other hand can be described as research this is experimental to test probability, or predict something, 'but without a therapeutic benefit for the person'. Similarly, experimental health care is care that is not approved, not tested and/or found 'not to have a beneficial effect for the person'.

On the other hand, 'medical or clinical research' is a form of medical research intended to diagnose, maintain or treat 'a condition affecting the person'.

Regulation 4(2) appears to expand the professionally accepted definition of 'special medical research or experimental health care' so that it may cover such research or care that relates to a condition the person has or has had or is at risk of having. But it would not extend the definition so far as to cover approved clinical research or psychological research, due to the clarification in regulation 4(3).

It is therefore highly probable that the prescription of a new drug in the circumstances proposed by Professor Aughterson would fall into the category of clinical research and would be permitted under the regulation.

However, the question of whether a particular treatment is 'restricted' under regulation 4 will not always be entirely clear and will depend on the circumstances such as the nature of the research being undertaken and the approvals and authorisations granted for the research by the relevant authority or institution.

Generally, a trial that is conducted with the necessary ethical approvals and authorisations and by an appropriate body (such as a university or hospital) is likely to fall within the scope of the definitions above and would therefore be a matter that a decision maker could make a decision about.

Finally, it should be noted that section 25(2)(d) does not exclude decisions about such health care all together. If there is an identified need for a person to receive any treatment which falls under the definition of 'restricted health matter', an application can be made to the court which has the ability to make these decisions on behalf of the person.

2. Whether there are any professional guidelines as to what constitutes 'research' or 'experimentation' and, if there are accepted professional guidelines, whether they should be referenced in the regulations?

Response:

There are a number of professional guidelines that exist to guide health professionals. The National Health and Medical Research Council publishes the Australian Code for the Responsible Conduct of Research http://www.nhmrc.gov.au/guidelines/publications/r39.

Individual research programs will be governed by the relevant research institution.

3. Given that the restriction applies only to research of health care relating to a 'condition the adult has or to which the adult has a significant risk of being exposed', whether this means that this inadvertently allows a decision maker to consent to the person being exposed to research or experimental care which does not relate to any past or present condition of the person?

Response:

Conceivably this could occur however such experimental research has no therapeutic benefit and is unrelated to the person's condition. There may be scope to tighten up the provision to include 'experimental research' as a category of restricted health care. However, such an amendment is not considered critical to the operation of the provision, particularly given the other safeguards in the *Advance Personal Planning Act*.

As already mentioned, it should be noted that regulation 4(2) needs to be read in the context of the whole regulation and indeed the whole legislative framework.

For example, there still remains the general exclusion under regulation 4(1)(b) of 'new health care of a kind that is not yet accepted as evidence-based, best practice health care by a substantial number of health care providers specialising in the relevant area of health care'. This again would be a question of fact and would depend on the circumstances – noting the answers above.

Additionally, where someone with an interest in the person (such as another family member or another person providing medical treatment to the person) is concerned about decisions made by the decision maker in relation to the person's health care, there remains the option of making an application to the court under section 66 of the *Advance Personal Planning Act* for a declaration under section 58 to the effect that the decision of the decision maker is invalid.

Additionally, the medical professional involved could be subject to disciplinary procedures under the national health professional registration framework, depending on the circumstances.

Before summing up, I also note that section 25 of the *Advance Personal Planning Act* and the accompanying regulation 4 reflect the approaches in other jurisdictions, most notably Queensland's *Powers of Attorney Act 1998*.

Overall, in taking the advice of the Department of Health in developing these specific provisions, it was accepted that it would never be possible to define these matters with absolute certainty. There will always be scope for interpretation, as is not unusual with many legislative terms. The view of the Department of the Attorney-General and Justice is that section 25 and regulation 4, as currently drafted, address concerns and ensure people who no longer have decision making capacity are adequately protected in this sphere. The provisions, while not completely watertight, are consistent with current medical practice and the ethical research framework and this, coupled with the safeguards contained in the *Advance Personal Planning Act*, means that they are considered adequate.

I trust that this response will assist the Committee in its deliberations.

Yours sincerely

21: 1412
18/11/14

JOHN ELFERINK

19 of 2014 Motor Accidents (Compensation) Amendment Regulations[3]

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.91

Hon Adam Giles, MLA
Chief Minister
GPO Box 3146
DARWIN NT 0801

Dear Chief Minister

Re: Motor Accidents (Compensation) Regulations [No 19 of 24]

The Subordinate Legislation and Publications Committee met on 22 October 2014 and considered the above regulations.

As highlighted in the attached enclosure from our independent legal counsel, it is argued that regulation 4N(2) goes beyond the power conferred by s 20A(5) of the *Motor Accidents (Compensation) Act* under which it is made. The Committee is of the view that a regulation purporting to impose laws that are beyond its power should be disallowed. The Committee therefore asks that you provide it with a response to the concerns raised in the attached advice by Friday, 7 November 2014 so, if necessary, it can report on this matter prior to the expiry of the disallowance period for this regulation.

I note that under Standing Order 20(3)(a), the Committee must report any opinion that an instrument ought to be disallowed before the end of the period during which any motion may be given, so the Committee must conclude its consideration of this issue before 26 November 2014. I would therefore be grateful for your urgent attention to this matter.

Yours sincerely

Mr Nathan Barrett, MLA
Chair

22 October 2014

Enc: Legal Advice from Professor Aughterson

[3] See also: *Report on the Motor Accidents (Compensation) Amendment Regulations 2014: Subordinate Legislation No. 19 of 2014*, http://www.nt.gov.au/lant/parliamentary-business/committees/subordinate%20legislation%20and%20publications/reports.shtml

Legal Advice from Professor Aughterson

Motor Accidents (Compensation) Regulations [No 19 of 24]

Reg. 4N: arguably, regulation 4N(2) is beyond power. Authority for the regulation rests on s 20A(5) of the Act. Section 20A allows for the reduction of benefits where the influence of alcohol or a drug contributed to the accident: see s 20A(1)(c). Section 20A(2) creates a presumption that alcohol contributed to the accident 'if the circumstances prescribed in the regulations exist in relation to the person, unless the contrary is established'. Section 20A(5) provides that if the Office determines that benefits are to be reduced, they must be reduced in accordance with the regulations.

However, s 20A(4) provides that any reduction is to be a proportion of the benefit otherwise payable having regard to the extent to which the influence of alcohol contributed to the accident. The presumption in s 20A(2) seems to go only to establishing that alcohol contributed to the accident where the circumstances prescribed in the regulations exist (which circumstances might include alcohol concentration readings), whereas s 20A(4) goes to the separate question of the actual extent to which alcohol contributed to the accident. In that context, it would seem that a permissible regulation might, for example, determine that a 50% alcohol-induced contribution to the accident gives rise to a 50% reduction of benefits. However, the table in regulation 4N(2) is framed in terms of alcohol concentration readings, so that, for example, an alcohol concentration range of 0.080 to 0.133 gives rise to a 30% reduction. The difficulty is that there is no necessary correlation between an alcohol concentration and the extent to which alcohol contributed to the accident. On that basis, arguably the table impermissibly avoids the statutory requirement of the Office to make a determination in each case of the extent to which alcohol contributed to the accident.

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett Nathan

I refer to your letter dated 22 October 2014 regarding the Subordinate Legislation and Publication Committee's review of the Motor Accidents (Compensation) Regulations.

I have considered the advice from Professor Aughterson in consultation with the Department of Treasury and Finance, the Territory Insurance Office (TIO) and the Office of Parliamentary Counsel and it is agreed that regulation 4N goes beyond the power conferred by section 20A(5) of the *Motor Accidents (Compensation) Act* (MACA). As such, it is proposed that regulation 4N be repealed at the Executive Council meeting of 16 December 2014.

Repealing regulation 4N does not affect TIO's ability to reduce benefits for people injured in a motor vehicle accident where the influence of alcohol or a drug contributed to the accident. However, rather than relying on regulations for their decision making process TIO would need to refer to section 20A(4) of the MACA and reduce benefits by a proportion considered appropriate having regard to the extent to which the influence of alcohol contributed to the accident. This will require TIO to justify reductions on a case by case basis rather than applying a blanket approach.

Yours sincerely

ADAM GILES

17 NOV 2014

Northern Territory Government

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY

12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.103

Hon Adam Giles MLA
Chief Minister
GPO Box 3146
DARWIN NT 0801

Dear Chief Minister

Re: Motor Accidents (Compensation) Amendment Regulations [No. 19 of 2014]

Thank you for your letter of 17 November 2014 regarding the above regulations. The Committee welcomes your advice and proposed course of action to remedy this matter. However, the Committee considers that as a matter of principle it should not allow its jurisdiction over the regulation to expire before the matter is finally resolved.

Consequently, at its meeting of 24 November, the Committee resolved to:

a) recommend to the Assembly that it accept your proposal that regulation 4N of the Motor Accidents (Compensation) Amendment Regulations 2014 be repealed at the Executive Council meeting of 16 December as an alternative to recommending its disallowance;
b) give notice of a motion to disallow the Regulation to be moved on 17 February 2015 to ensure that the regulation's disallowance period does not expire prior to its repeal; and
c) request that the Committee be provided with confirmation when Regulation 4N of the Motor Accident (Compensation) Amendment Regulations 2014 has been repealed as proposed.

The Committee proposes that the notice of motion to disallow the Regulation will be withdrawn following the repeal of the Regulation and prior to it being moved in the 2015 sittings.

In accordance with Standing Order 20(3), the Committee will be reporting on this matter before the end of the disallowance period for the regulation and I have attached a copy of that report for you as the responsible Minister. I note that under the Standing Orders this report may not be made public prior to its tabling in the Assembly.

Should you have queries or require any further information regarding this matter, please do not hesitate to contact me.

Yours sincerely

Mr Nathan Barrett
Chair

24 November 2014

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Mr Nathan Barrett MLA
Chair
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GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett Nathan

I refer to your letter dated 24 November 2014 regarding the proposal to repeal Regulation 4N of the Motor Accidents (Compensation) Regulations 2014 at the Executive Council meeting of 16 December 2014.

I write to confirm that this has occurred as proposed. Regulation 4N has been repealed through the Motor Accidents Compensation Amendment Regulation (No. 2) 2014, which came into effect on 24 December 2014 (refer Northern Territory Government Gazette No. G51).

Yours sincerely

ADAM GILES

27 JAN 2015

Northern Territory Government

23 of 2014 Sentencing Amendment Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.93

Hon John Elferink, MLA
Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General

Re: Sentencing Amendment Regulations [No 23 of 2014]

The Subordinate Legislation and Publications Committee met on 22 October 2014 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel at your earliest convenience.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett, MLA
Chair

22 October 2014

Enc.

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Legal Advice from Professor Aughterson

Sentencing Amendment Regulations [No 23 of 2014]

Schedule, Form 6, Part A, clause 3(b): this clause is potentially confusing. For the purposes of setting the sentence for an offence of which the person has been convicted, section 107 of the *Sentencing Act* allows the court to 'take into account' other offences which the person admits committing, but in relation to which there has been no conviction. In that event the person is not to be taken to have been convicted of those other offences: see s 107(10) of the Act. In other words, they are to be 'taken into account' only for the purpose of setting the appropriate sentence for the offence for which there has been a conviction.

In that context, the wording in Form 6, clause 3(b) is potentially confusing. It reads: 'the Court may not impose a sentence on you in respect of a charge set out above in excess of the maximum penalty for the offence with which you are charged'. The language used creates the impression that the 'charge set out above' is different from 'the offence with which you are charged'. However, it seems that 'the charge set out above' is the offence charged and in relation to which there has been a conviction, as strictly the sentence is not imposed 'in respect of' the other offences that are to be taken into account (also s 107 of the act uses the words 'in respect of the offence' when referring to the offence for which there has been a conviction). Clause 3(b) might better read 'the Court may not impose a sentence on you in respect of a charge set out above in excess of the maximum penalty for that offence' (see the wording in s 107(3) of the Act).

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and
Publications Committee
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DARWIN NT 0801

Dear Mr Barrett

Thank you for your letter dated 22 October 2014 in relation to the Sentencing Amendment Regulations (No. 23 of 2014). In your letter, you indicated that you had obtained independent legal advice which noted concern with the amended wording of clause 3(b) of Form 6 as provided in the Sentencing Regulations.

I accept that the alternate wording proposed in your letter is consistent with that used in amended section 107(3) of the *Sentencing Act*. However, when drafting the amendment to Form 6, careful consideration was given to the specific wording of the form. The decision was made to use the term 'the offence with which you are charged' so that Form 6 was internally consistent.

At this stage, I do not consider any further amendment is necessary to Form 6 but, should the forms be reviewed in the future, the Department of the Attorney-General and Justice will consider the suggested amendment.

If you have any further queries or concerns please do not hesitate to contact me.

Yours sincerely

JOHN ELFERINK
20:49
27/11/14

Northern Territory Government

40 of 2014 Work Health and Safety (National Uniform Legislation) Amendment Regulations (No 2)

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.110

Hon Peter Styles
Minister for Business
GPO Box 3146
DARTWIN NT 0801

Dear Minister

Re: Work Health and Safety (National Uniform Legislation) Amendment Regulations (No 2) [No 40 of 2014]

The Subordinate Legislation and Publications Committee met on 25 March 2015 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett MLA
Chair

25 March 2015

Enc

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Legal Advice from Professor Aughterson

Work Health and Safety (National Uniform Legislation) Amendment Regulations (No 2) [No 40 of 2014]

Reg. 288B-D: Regulation 288B allows the regulator to cancel the registration of an item of plant (see the definition of 'plant' in s 4 of the Act) if satisfied that it is unsafe. However, there is a process for cancellation under regulation 288C: the registration holder must be given 28 days to make submissions in relation to the proposed cancellation and, after considering the submissions, the regulator may then cancel the registration.

There is a question of whether plant that imposes a serious risk should still be available for use for a month pending the decision. It would seem that use of a prohibition notice under Part 10 Division 2 of the Act would not be a suitable solution where the issue relates purely to plant which may be mobile. Compare the provision for immediate suspension of an asbestos removal licence under regulation 524 and a major facility licence under regulation 606 where the risk is imminent. However, it is noted that elsewhere in the regulations the cancellation or suspension of licences is effected only after a 28 day submission period. See also s 21 of the Act.

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
Department of the Legislative Assembly

Dear ~~Mr Barrett~~ Nathan

Thank you for your letter dated 25 March 2015 regarding the Work Health and Safety (National Uniform Legislation) Amendment Regulations (No 2) [No 40 of 2014] made by the Administrator of the Northern Territory on 17 December 2014.

I understand that the Committee's independent legal counsel, Professor Aughterson, has a concern with the new regulations 288A to 288D. His concern is that an item of plant (which is mobile) that is having its registration cancelled under these new regulations should not continue to be in use while the appeal period is underway. However he has not clearly set out his concerns – if the issue identified by NT WorkSafe does not relate to the mobility of the item of plant, how can NT WorkSafe prohibit a mobile crane from driving on the road, if the issue only relates to the crane, winch or load arm, and not the road worthiness of the crane.

I am advised that NT WorkSafe often issues Prohibition Notices when dealing with unsafe items of plant. This gives the owner/operator an opportunity to rectify the situation prior to the Regulator having to cancel an item of plant's registration. Any Prohibition Notice (including on mobile plant) would be explicit in what operations may not be conducted. Additionally, as the penalties for breaching a Prohibition Notice are high (up to $500 000 for a business), it would be in the best interests of the business to rectify the situation rather than move the plant elsewhere and continue to operate it.

I am satisfied that no further amendments to the Regulations are required.

Yours sincerely

PETER STYLES
11 JUN 2015

Northern Territory Government

43 of 2014 Gaming Control (Reviewable Decisions) Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY

12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.111

Hon Peter Styles
Minister for Racing, Gaming and Licensing
GPO Box 3146
DARTWIN NT 0801

Dear Minister

Re: Gaming Control (Reviewable Decisions) Regulations [No 43 of 2014]

The Subordinate Legislation and Publications Committee met on 25 March 2015 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett MLA
Chair

25 March 2015

Enc

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Legal Advice from Professor Aughterson

Gaming Control (Reviewable Decisions) Regulations [No 43 of 2014]

Reg. 4: Should the word 'and' appear at the end of regulation 4(a)(iii)? Regulations 4(a) and (b) deal with separate issues.

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
Department of the Legislative Assembly
GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett Nathan

Thank you for your letter dated 25 March 2015 regarding the Gaming Control (Reviewable Decisions) Regulation [No 43 of 2014] made by the Administrator of the Northern Territory in December 2014.

I understand that the Committee's independent legal counsel, Professor Aughterson, has a concern with the wording in regulation 4(a), and in particular the use of the conjunction 'and'.

I am advised that the conjunction is correct, in that the regulation is prescribing the persons mentioned in paragraph (a) for certain decisions **and** the persons mentioned in paragraph (b) for other decisions for the purposes of the definition of affected persons in section 68CB of the *Gaming Control Act*.

Should you have any further queries concerning this matter, please contact Mr Seán Parnell, Director-General of Licensing, Department of Business on telephone 8999 1308 or via email at sean.parnell@nt.gov.au

Yours sincerely

PETER STYLES

13 MAY 2015

Northern Territory Government

48 of 2014 Land Title Amendment Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.112

Hon John Elferink
Attorney-General and Minister for Justice
GPO Box 3146
DARTWIN NT 0801

Dear Attorney-General

Re: Land Title Amendment Regulations [No 48 of 2014]

The Subordinate Legislation and Publications Committee met on 25 March 2015 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett MLA
Chair

25 March 2015

Enc

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Legal Advice from Professor Aughterson

Land Title Amendment Regulations [No 48 of 2014]

Reg. 8: Section 54(1)(b) of the *Land Title Act* provides that if a development is to be terminated under the *Termination of Units Plans and Unit Title Schemes Act* there must be produced to the Registrar-General certain documents, including 'the written consent of persons as prescribed by regulation'. Regulation 8 lists the persons from whom consent is required for termination of developments under Parts 3, 4 and 5 of the *Termination Act*.

The Tabling Note seems to indicate that the consent should be obtained from each person in the relevant category of people (for example, mortgagees, lessees etc.). However, regulation 8 is framed in terms of, for example, 'a' mortgagee of a unit etc. rather than 'each' mortgagee of a unit. Compare the wording in regulations 5 and 4.

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr Barrett

Thank you for letter dated 25 March 2015 regarding the Land Title Amendment Regulations 2014 (No 48 of 2014).

You advise that legal adviser to the Subordinate Legislation and Publications Committee, Professor Aughterson, has identified a possible inconsistency between regulation 8 and the explanatory material provided in respect of the regulations.

Regulation 8 lists, in paragraphs (a), (b) and (c) the persons from whom consent is required for the various types of terminations. Each of the paragraphs is worded in the singular (eg consent is required from "an owner" or "a mortgagee"). Professor Aughterson points out that the explanatory material indicated that consent was required from all of the owners, all of the mortgagees and so on.

The explanatory material accurately states the intent of the regulations. That is, consent should be obtained from all affected persons rather than only from one person in each class of affected persons.

The Department of the Attorney-General and Justice has consulted with both the Executive Director, Parliamentary Counsel and Professor Aughterson regarding whether the drafting of the regulations achieves the objectives.

The regulations have been drafted relying on section 24(2)(a) of the *Interpretation Act* ("words in the singular include the plural"). Additionally, the word "each" used in the introductory words also suggests "each owner", "each mortgagee" etc.

It is quite plain that the regulation 8 would be easier to understand if its subparagraphs used the word "each" rather than "a" or "an". However, to the extent that there is ambiguity it is most likely that a court would find that the intended meaning has been achieved in the drafting of regulation 8.

The Department of the Attorney-General and Justice has requested that Parliamentary Counsel take account of Professor Aughterson's views in the drafting of regulations of this kind.

Yours sincerely

JOHN ELFERINK

21:01
26/4/15

5 of 2015 Marine (General) Amendment Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.119

Hon Peter Chandler
Minister for Transport
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Marine (General) Amendment Regulations [No. 5 of 2015]

The Subordinate Legislation and Publications Committee met on 18 March 2015 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett MLA
Chair

18 June 2015

Enc

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Legal Advice from Professor Aughterson

Marine (General) Amendment Regulations [No 5 of 2015]

Regulation 8A:

1 the regulation applies to 'small sailing vessels' and creates an offence where the person operating the vessel is not wearing an appropriate 'floatation device'. By regulation 8A(3) it is an offence of 'absolute liability' (in other words, the defence of mistake of fact is not available – see s 43AO of the Criminal Code). On the other hand, failure to wear a floatation device on other water craft is an offence of 'strict liability' (in other words, the defence of mistake of fact is available – see s 43AN of the Criminal Code). See (for strict liability):
   - Re 'personal water craft': regulation 8(5) and 8(8)
   - Re 'towed water sports': regulation 6(1) and 6(3)

   It may be that there is good reason for that differentiation.

2 Also, there is a difference between 8A(3) (absolute liability) and 8A(5) (strict liability). The latter provision creates an offence of strict liability on the part of the operator of the boat where a passenger or crew under the age of 16 is not wearing a floatation device. Presumably, the distinction here is justified on the basis that there is not the same level of responsibility for others – though it is noted that the responsibility under the regulation is for a child under 16.

3 There is also a difference between regulations 8(7) and 8A(4), on the one hand, and regulation 6(2), on the other hand. The former provisions create an offence on the part of an operator of the craft or vessel where a passenger or crew is not wearing a floatation device, but only where the operator is at least 16 years of age. Whereas regulation 6(2) creates an offence on the part of the operator where the person being towed is not wearing a floatation device, and the offence arises regardless of the age of the operator (subject to the general law re the age for criminal responsibility: see s 43AP and 43AQ of the Criminal Code).

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
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Dear ~~Mr Barrett~~ Nathan

Thank you for letter of 18 June 2015, providing the Subordinate Legislation and Publications Committee independent legal counsels advice when considering the *Marine (General) Amendment Regulations*.

I have been informed that the *Marine (General) Amendment Regulations* are an amalgamation of an assortment of previous marine regulations that were still required after the implementation of the Australian Maritime Safety Authority and the national law in July 2013. Additionally, I am aware that further amendments have occurred after this time with the review of the recreational vessel regulations in 2014.

From this information, I can advise that as a consequence of the offence provisions coming from an array of differing marine regulations and review processes, some inconsistencies with the offences were not identified when changes for similar provisions in the regulations were made.

Taking into account your independent legal counsel's guidance on the above regulations, I have endorsed the following amendments to the *Marine (General) Amendment Regulations:*

a) change the offence provision for section 8A(3) to a strict liability offence;

b) limit the application of the operator offence in regulation 6 to operators who are at least 16 years of age; and

c) agree that these amendments be included in current changes that are being drafted by the Office of Parliamentary Counsel for approved legislative changes to the Australian Builders Plates.

Yours sincerely

PETER CHANDLER

13 JUL 2015

Northern Territory Government

13 of 2015 Ports Management Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly
Subordinate Legislation and Publications Committee

REF: COMM2012/00025.122

Hon Peter Chandler, MLA
Minister for Transport
Legislative Assembly of the Northern Territory
GPO Box 3146
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Dear Minister

Re: Ports Management Regulations [No 13 of 2015]

The Subordinate Legislation and Publications Committee met on 17 September 2015 and considered the above regulations.

As highlighted in the attached enclosure from our independent legal counsel, it is argued that regulation 10 goes beyond the power conferred by ss 81 and 156 of the *Ports Management Act.* The Committee is of the view that a regulation purporting to impose laws that are beyond its power should be disallowed. The Committee therefore asks that you provide it with a response to the concerns raised in the attached advice by Friday, 16 October 2015 so, if necessary, it can report on this matter prior to the expiry of the disallowance period for this regulation.

I note that under Standing Order 20(3)(a), the Committee must report any opinion that an instrument ought to be disallowed before the end of the period during which any motion may be given, so the Committee must conclude its consideration of this issue before the December sittings. I would therefore be grateful for your urgent attention to this matter.

Yours sincerely

Mr Nathan Barrett, MLA
Chair

17 September 2015

Enc: Legal Advice from Professor Aughterson

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Legal Advice from Professor Aughterson

Ports Management Regulations [No 13 of 2015]

Reg. 10: this regulation creates offences where a licensed pilot demands or receives any reward in relation to pilotage services or where a person associated with a vessel offers or provides such a reward. The legislative authority for this regulation is not clear. Offences that might be committed by pilots are set out in s 81 of the Act. The offence in regulation 10 is not included. Regulation 10 does not simply provide a penalty for breach of a permissible regulation; rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. Regulation 10 does not seem to fall within any of the specific matters in relation to which regulations may be made under the Act.

To the extent that the regulation depends on the so called Henry VIII clause in s 156 of the Act is of concern. Section 156(1) provides: 'The Administrator may make a regulation that amends this Act (other than this section) in relation to any matter'. In other words, such clauses allow legislation to be overridden by the executive and have earned their name because they were used by the autocratic King Henry VIII. Because such provisions effectively transfer unfettered legislative power to the executive they should be used only in very special circumstances. For example, they were used in New Zealand for a period following the Christchurch earthquake to enable appropriate measures to be set in place. Sometimes they are used for a transitional period (in the present case s 156 does expire after one year) in order to allow for an immediate response to unanticipated eventualities that might arise in relation to new legislation. However, such regulations should be used sparingly and it is difficult to see the urgent need for intervention by the executive in the context of regulation 10, particularly given that it creates an offence and carries sanctions.

There is also a question of whether regulation 10 is a valid exercise of the power under s 156 of the Act. One issue is whether the power to 'amend' allowed by s 156 includes the power to extend the scope of the Act. For example, such clauses have sometimes been used to allow waiver of the operation of certain provisions of an Act for an initial period because of uncertainty as to how new legislation might operate in practice. On the other hand, regulation 10 serves to add to the provisions of the Act, including beyond the transition period.

Regulation 10 might also be held to be an invalid use of s 156 of the Act because of the general principle that a penalty cannot be imposed under subordinate legislation unless authorised by the empowering Act. There is no such express authorisation under s 156 and, despite the potentially broad nature of such clauses, it is not clear that such a power would be implied.

The courts have indicated a dislike for such clauses and it is likely that it will be strictly construed. As noted by Dennis Pearce and Stephen Argument in 'Delegated Legislation in Australia', 3rd ed. 2005, with reference to Henry VIII clauses:

> The questionable nature of this practice leads one to think that legislation that affects the operation of an Act will be interpreted narrowly to achieve the least change in the Act that the language permits. However, there appears to be no authority for this principle. The closest one that comes to it are observations in the House of Lords decisions of *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198 at 204 and *R v Environment Secretary; Ex parte Spath Holmes Ltd* [2001] 2 AC 349 at 382. They suggest that a power permitting the making of delegated legislation that will amend an Act should be restrictively interpreted if there is any doubt about the scope of the power. It would seem that the same approach would be applicable to the interpretation of the delegated legislation made under such a power.

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See also *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v State of New South Wales* [2014] NSWCA 116 at [103]; *Keri & Wilfred* [2012] Fam. CA 1114 at [60-80]. In *Public Service Association* at [107] Basten JA stated: "It follows that there can be no reason in principle not to follow the English approach of caution with respect to the scope of Henry VIII clauses".

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Mr Nathan Barrett MLA
Chair
Subordinate Legislation and Publications Committee
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Dear ~~Mr~~ Nathan Barrett

Thank you for your letter of 17 September 2015, raising concerns with the Port Management Regulations (No 13 of 2015).

I requested the Department of Transport to engage its legal counsel to review the *Port Management Act* and Regulations in the context of the issues raised in your letter.

The purpose of this Act is to provide for the control, management and operations of ports and related purposes. The regulation power under section 155 (1) is broad and allows regulations to be made to deal with a myriad of issues that ensure the safe operation of the Port without fear or favour, and needs to be read in the context of sub-section 65(1) and 65A of the *Interpretation Act*. The *Interpretation Act* provides that a regulation making power enables subordinate legislation to be made with respect to any matter that is necessary or convenient, to give effect to the intent of the Act and that the power may be exercised by prohibiting the matter or any aspect of the matter.

Section 156 of the *Port Management Act* is not relevant in this context. Section 156 is a Henry VIII clause and covers transitional issues that might have been overlooked and as such expires one year after commencement of the Act.

Regulation 10 ensures that a Pilot is not open to "incentives" that compromise the safe management of the port operations and thus is consistent with the purposes of the Act and does not go beyond power. It should be noted this is not a new provision. Rather, it is a provision that has been carried over from the Port By-laws. It is considered to be fit and proper in its current form and should not be disallowed.

I trust this addresses your concerns; however please do not hesitate to contact me if I can further assist.

Yours sincerely

PETER CHANDLER

- 9 OCT 2015

Northern Territory Government

Additional Legal Advice: Port Regulations No. 13 of 2015

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22 October 2015

SUBORDINATE LEGISLATION AND PUBLICATIONS COMMITTEE

Re Regulation 10 *Ports Management Regulations No 13 of 2015.*

1 I refer to an email communication from the Committee Secretary, Ms Julia Knight, of 12 October 2015, and attached letter of 9 October 2015 from the Minister for Transport, requesting that I provide comment/advice on the response from the Minister for Transport regarding my previous advice in relation to regulation 10 of the *Ports Management Regulations*. In my earlier notes to the Committee I suggested that the legislative authority for regulation 10 was questionable. In part, I said:

> Regulation 10 does not simply provide a penalty for breach of a permissible regulation; rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. Regulation 10 does not seem to fall within any of the specific matters in relation to which regulations may be made under the Act.

I then raised the question of whether it was intended that regulation 10 depend for its validity on the so called Henry VIII clause under section 156 of the *Ports Management Act* (the Act), though it is noted that under the Tabling Note for the regulations, reliance is placed only on the general power to make regulations under s 155 of the Act.

2 In the letter of the Minister it is confirmed that section 156 is not relevant and that reliance is placed on the general power under s 155(1) of the Act. In that letter it is said that the power under s 155(1) "is broad and allows regulations to be made to deal with a myriad of issues that ensure the safe operation of the Port without fear

or favour, and needs to be read in the context of sub-section 65(1) and 65A of the *Interpretation Act*".

3 Section 155(1) of the Act provides:

> 'The Administrator may make regulations under this Act'.

Section 65(1) of the *Interpretation Act* provides:

> If an Act authorises or requires the making of subordinate legislation under the Act, the power enables subordinate legislation to be made with respect to any matter that:
> (a) is required or permitted to be prescribed by the Act; or
> (b) is necessary or convenient to be prescribed for carrying out or giving effect to the Act. (emphasis added)

Section 65A of the *Interpretation Act* simply provides that where an Act authorises a matter to be regulated by subordinate legislation, the matter may also be prohibited.

4 The highlighted words in s 65(1), 'for carrying out or giving effect to the Act', are limited in effect. In *Carbines v Powell* (1925) 36 CLR 88 at 91-92, Isaacs J stated:

> To 'carry out' the Act means to enforce its provisions. To 'give effect' to an Act is to enable the provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operations as that marked out in the Act itself. It cannot be supposed that Parliament gave permission to the Executive to enlarge legislatively that field at discretion.

It was added, at 92, that a regulation "may for weighty reasons be necessary", but "the question for the Court is not whether the power should, but whether it does exist". It was further stated, at 92: "In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power". Rich J noted, at 96, that a provision in terms of s 65(1) of the *Interpretation Act NT* "does not give carte blanche to enact independent legislation". See also at 95, per Higgins J; 97 per Starke J; 90 per Knox J.

5 Also, in *Shanahan v Scott* (1957) 96 CLR 245 at 250, the High Court stated that a general provision such as in the present case:

> does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary

> means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a provision will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.

See also *Willocks v Anderson* (1971) 124 CLR 293 at 299; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 380; *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at [51]-[55].

6 As set out in my note of 9 September 2015, regulation 10 creates offences where a licensed pilot demands or receives any reward in relation to pilotage services or where a person associated with a vessel offers or provides such a reward. Unrelated offences that might be committed by pilots are set out in s 81 of the Act. Regulation 10 does not simply 'carry out' or 'give effect to' provisions of the Act' rather it creates a new offence that might be committed by or in relation to pilots, effectively extending the range of offences beyond those set out in s 81 of the Act. There is no express power to do so.

7 There is another relevant factor here. Without clear words to that effect, it is unlikely that parliament intended the Executive "to create a wider sphere of substantive criminal law": see *Carbines* at 94. It is generally accepted that a penalty cannot be imposed for breach of subordinate legislation unless it is authorised by the empowering Act: see, for example, The Australian Senate Standing Committee on Regulations and Ordinances, 'Delegated Legislation Monitor No 17 of 2014', at 38. It is there stated that provisions dealing with offences are not authorised by a general regulation-making power and that if such provisions "are required for an Act that includes only a general rule-making power, it would be necessary to amend the Act to include a regulation making power that expressly authorises the provisions". See also the 'Queensland Legislation Handbook', Queensland Government at 6.9. See further AGS Legal Briefing No 102 of 26 February 2014 at 5.

8 As stated in Pearce and Argument's 'Delegated Legislation in Australia', 3rd ed. at p 201:

> As might be expected, the courts have shown considerable reluctance to hold delegated legislation to be valid where it imposes a penalty or some other liability upon an individual and there is no clear authorisation for such a provision in the empowering Act …

> … the cases do show that the general attitude of the courts will be that penalties and forfeitures may only be imposed when permitted by the empowering Act and then must accord with the provisions of the Act.

Reference is made to *Re Port Adelaide Corporation; Ex parte Groom* [1922] SASR 35; *Bishop v MacFarlane* (1909) 9 CLR 370; *Coleman v Marine Board of Victoria* (1899) 5 Argus LR 138.

9 It is also noted in the Minister's letter that regulation 10 is not a new provision. Rather, it is a provision that has been carried over from the Port By-laws. Certainly, By-law 47 of the *Port By-laws* provided that 'A licensed pilot shall not demand or receive and a master shall not offer to any pilot any reward of remuneration in respect of pilotage services except as provided in these By-laws', while By-law 85 created an offence for breach of the By-laws. However, such provision was expressly allowed under the old *Darwin Port Authority Act*. Section 48(1) of that Act allowed for the making of By-laws 'for the control, regulation and management of the Port', and in particular in relation to:

> (zb) the regulation and control of the conduct and behaviour of persons within the Port and the conditions upon which persons may be admitted to or excluded from any part of the Port;
> (zd) the imposition of penalties (not exceeding a fine of $10,000) for a contravention of or failure to comply with the By-laws.

No such express power exists under the present Act.

10 It follows that in my view regulation 10 should be disallowed. However, given that my view is inconsistent with the advice evidently given by legal counsel for the Department of Transport, the Committee might consider it appropriate to refer the matter to Parliamentary Counsel for further advice, prior to reporting the matter to the Assembly.

11 Please advise if further clarification is required.

Ned Aughterson

19 of 2015 Fisheries Amendment (Coastal Line Fishery and Other Matters) Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
12th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2012/00025.124

Hon Willem Westra van Holthe, MLA
Minister for Primary Industry and Fisheries
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Fisheries Amendment (Coastal Line Fishery and Other Matters) Regulations [No 19 of 2015]

The Subordinate Legislation and Publications Committee met on 17 September 2015 and considered the above regulations.

The Committee seeks your comment on the attached enclosure from our independent legal counsel.

Please feel free to contact me to discuss further if necessary.

Yours sincerely

Mr Nathan Barrett, MLA
Chair

17 September 2015

Enc: Legal Advice from Professor Aughterson

GPO Box 3721, DARWIN NT 0801
Telephone: 08 8946 1485 E-mail: slpc@nt.gov.au

Legal Advice from Professor Aughterson

Fisheries Amendment (Coastal Line Fishery and Other Matters) Regulations [No 19 of 2015]

Reg. 78G and 78J: where the holder of a CLF licence intends (prior to the commencement of the voyage) to take fish in the CLF Western Zone, they must notify the Director of certain matters (78G) and ensure that certain fish are not on board at the commencement of the voyage (78J). The latter provision presumably allows checking of the amount of fish taken during the voyage. If that is the case, there does not seem to be anything to prevent the licence holder from deciding after the commencement of the voyage to fish in the Zone in question, whether or not other fish were on the boat at the time of departure. Though it is noted that by regulation 78L there cannot be mixed catches during the one voyage. The operation of regulation 78Q also is confined to where the holder of a CLF licence intends, prior to the voyage, to take fish in the CLF Western Zone. Could at least the 78Q(1)(a) requirement be made to apply to the next time the licence holder in fact takes fish in that zone?

There is also a question of whether allowing the regulation 78G notice to be given orally will cause evidential difficulties should a breach be alleged: see regulation 78G(3). In the days of email it should not cause great difficulty to require written notification?

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Mr Nathan Barrett MLA
Chair Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear ~~Mr Barrett~~ Nathan,

Thank you for your letter dated 17 September 2015 requesting comment on the advice from your independent legal counsel regarding Fisheries Amendment (Coastal Line Fishery and Other Matters) Regulations [No 19 of 2015]. I acknowledge Professor Aughterson's advice relating to the recent amendments to the Fisheries Regulations associated with the notice of intention to fish in the Coastal Line Fishery Western Zone (WZ).

In considering the advice it should be noted that the precedent for these provisions is contained in the Fisheries Regulations under the Demersal and Timor Reef Fisheries. I provide the following comments to the Subordinate Legislation and Publication Committee:

1. The risk of a commercial fisher deciding to fish in the WZ after commencing a voyage to fish outside the zone, and not providing a notice of intent to fish in the WZ, is considered low. This situation is not likely to occur due to the structure and operation of the Fishery; consisting of large trailerable vessels and no accessible launch points that provide easy access to both inside and outside of the WZ. In addition, it is also not considered realistic in the context of how commercial fishing operations are undertaken.

2. Removing the "intends to take" aspect of the compulsory monitoring of operations provision is not considered a necessary amendment. My decision takes into account the precedent for this provision in other Fisheries and that many requirements in the Fisheries Regulations already operate effectively by reference to the next occasion a commercial fisher intends to take fish.

3. The purpose of allowing a notice of intent to be given verbally is to provide operational flexibility to commercial fishers. It is reasonable to contemplate that the initial provision of the notice of intent be made in writing; however, operational difficulties are likely to occur when fishers are required to inform of any changes to the information provided in the notice of intent during the voyage i.e. a change in the estimated time and place of unloading. If the oral provision was removed most fishers would not have the capability on-board to submit written notifications while at sea.

Further to the information provided above, it is likely that an electronic Vessel Monitoring System (VMS) will be mandated in the near future for commercial fishers operating in the WZ of the Fishery. VMS will allow compliance and management agencies to track vessels, meet them for product unloads, and confirm areas of operation. The implementation of VMS would help to mitigate any risks associated with alleged breaches contained in the legal advice.

When VMS is introduced it would be appropriate to review of existing regulations governing the operation of this fishery to avoid unnecessary reporting burden or duplication on licence holders.

Yours sincerely

WILLEM WESTRA VAN HOLTHE

19 OCT 2015

Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/Bylaw	Minister	Letter to Minister	Minister's Response
49 of 2013	Alice Springs (Waste Management Facility) By-Laws	Hon David Tollner Hon Adam Giles	20/08/14 ----------	----------- 28/10/14
11 of 2014	Public and Environmental Health Regulations	Hon Robyn Lambley	20/08/14	14/10/14
4 of 2014	Advance Personal Planning Regulations	Hon John Elferink	07/05/14 22/10/14	----------- 18/11/14
19 of 2014	Motor Accidents (Compensation) Regulations[4]	Hon Adam Giles	22/10/14 24/11/14	17/11/14 27/01/15
23 of 2014	Sentencing Amendment Regulations	Hon John Elferink	22/10/14	27/11/14
40 of 2014	Workplace Health and Safety (National Uniform Legislation) Amendment Regulations	Hon Peter Styles	25/03/15	11/06/15
43 of 2014	Gaming Control (Reviewable Decisions) Regulations	Hon Peter Styles	25/03/15	13/05/15
48 of 2014	Land Title Amendment Regulations	Hon John Elferink	25/03/15	26/04/15
5 of 2015	Marine (General) Amendment Regulations	Hon Peter Chandler	18/06/15	13/07/15
13 of 2015	Ports Management Regulations	Hon Peter Chandler	17/09/15	09/10/15
19 of 2015	Fisheries Amendment (Coastal Line Fishery and other Matters) Regulations	Hon Westra van Holthe	17/09/15	19/10/15

[4] See also: *Report on the Motor Accidents (Compensation) Amendment Regulations 2014: Subordinate Legislation No. 19 of 2014*, http://www.nt.gov.au/lant/parliamentary-business/committees/subordinate%20legislation%20and%20publications/reports.shtml

Appendix B: Subordinate Legislation Commented on in 12th Assembly

Report	No.	Title of Regulation/Bylaw	Minister	Date
November 2014 – November 2015	19 of 2015	Fisheries Amendment (Coastal Line Fishery and Other Matters0 Regulations	Hon Westra van Holthe	17/09/15
	13 of 2015	Ports Management Regulations	Hon Peter Chandler	17/09/15
	5 of 2015	Marine (General) Amendment Regulations	Hon Peter Chandler	18/06/15
	48 of 2014	Land Title Amendment Regulations	Hon John Elferink	25/03/15
	43 of 2014	Gaming Control (Reviewable Decisions) Regulations	Hon Peter Styles	25/03/15
	40 of 2014	Workplace Health and Safety (National Uniform Legislation) Amendment Regulations	Hon Peter Styles	25/03/15
	23 of 2014	Sentencing Amendment Regulations	Hon John Elferink	22/10/14
	19 of 2014	Motor Accidents (Compensation) Amendment Regulations[5]	Hon Adam Giles	22/10/14
	4 of 2014	Advance Personal Planning Regulations	Hon John Elferink	22/10/14
	11 of 2014	Public and Environmental Health Regulations	Hon Robyn Lambley	20/08/14
	49 of 2013	Alice Springs (Waste Management Facility) By-Laws	Hon David Tollner	20/08/14
December 2013 – October 2014	11 of 2014	Public and Environmental Health Regulations	Hon Robyn Lambley	20/08/14
	49 of 2013	Alice Springs (Waste Management Facility) By-Laws	Hon David Tollner	20/08/14
	4 of 2014	Advance Personal Planning Regulations	Hon John Elferink	07/05/14
	1 of 2014	Traffic Amendment Regulations	Hon Peter Styles	19/03/14
	45 of 2013	Domestic and Family Violence Amendment (Drug and Alcohol Testing) Regulations	Hon John Elferink	19/03/14
	44 of 2013	Bail Amendment (Drug and	Hon John Elferink	19/03/14

[5] See also: *Report on the Motor Accidents (Compensation) Amendment Regulations 2014: Subordinate Legislation No. 19 of 2014*, http://www.nt.gov.au/lant/parliamentary-business/committees/subordinate%20legislation%20and%20publications/reports.shtml

Report	No.	Title of Regulation/Bylaw	Minister	Date
December 2013 – October 2014		Alcohol Testing) Regulations		
	42 of 2013	Victims of Crime Assistance Amendment Regulations	Hon John Elferink	19/03/14
		Charles Darwin University (Site and Traffic) Amendment By-Laws	Hon Peter Chandler	12/02/14
	35 of 2013	Mining Management Amendment Regulations	Hon Willem Westra van Holthe	28/11/13
	34 of 2013	Supreme Court Amendment (Commercial Arbitration) Rules	Hon John Elferink	28/11/13
	57 of 2012	Alice Springs (Management of Public Places) Amendment By-Laws	Hon David Tollner	23/11/13
No.2 of 2013 May 2013 – November 2013	25 of 2013	Marine (General) Regulations	Hon Peter Styles	09/10/13
	57 of 2012	Alice Springs (Management of Public Places) Amendment By-Laws	Hon Alison Anderson	21/05/13
	44 of 2012	Building (RBI and Fidelity Fund Schemes) Regulations	Hon Peter Chandler	27/03/13
	43 of 2012	Building (Resolution of Residential Building Works Disputes) Regulations	Hon Peter Chandler	27/03/13
No.1 of 2013 May 2012 – April 2013	By-Law	Bayview Estate Amendment By-Laws 2012	Hon John Elferink	28/11/12
	1 of 2012	Darwin Port Corporation (Darwin Marine Base) Regulations	Hon Adam Giles	31/10/12
	20 of 2012	Radiation Protection Amendment Regulations	Hon David Tollner	31/10/12