



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

**Legal and Constitutional Affairs Committee
performing the functions of the
Subordinate Legislation and Publications Committee**

**Report on the Motor Accidents
(Compensation) Amendment
Regulations 2014**

Subordinate Legislation No. 19 of 2014

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Contents

Chair’s Preface	4
Committee Members	5
Committee Secretariat	6
Terms of Reference	7
Recommendations	9
1 Disallowance of Subordinate Legislation.....	10
2 Motor Accidents (Compensation) Amendment Regulations 2014.....	11
3 Committee’s Conclusions	13
Appendix 1: Independent Legal Advice	14
Appendix 2: Regulation 4N.....	15
Appendix 3: Motor Accidents Compensation Act.....	16
Appendix 4: Letter to Treasurer.....	17
Appendix 5: Response from Treasurer.....	19
Bibliography.....	20

Chair's Preface

The Committee routinely scrutinises all rules, regulations and by-laws tabled in the Assembly that are subject to disallowance to ensure that they are fit for purpose. With the assistance of its independent legal counsel, Professor Ned Aughterson, the Committee considers whether subordinate legislation keeps within the purpose and power of the laws under which they are made; whether they unduly affect people's rights and liberties; or whether they call for elucidation. Any questions or concerns the Committee may have are forwarded to the responsible Minister for consideration and comment, and are generally resolved by the Minister's clarification about the intended operation of the regulations, or undertakings to make amendments or correct any errors.

However, in accordance with its Terms of Reference, where the Committee is of the opinion that an instrument, or a provision of such, ought to be disallowed it is bound to report the matter to the Assembly within the disallowance period. In considering the Motor Accidents (Compensation) Amendment Regulations, the Committee formed the view that Regulation 4N(2) is a case in point. Consequently, this report sets out the grounds for the Committee's opinion and subsequent recommendation.

On behalf of the Committee, I would like to thank Professor Aughterson for his attention to detail and diligence in advising the Committee. I also thank the Treasurer and the members of the Committee for their bipartisan approach in seeking to ensure that regulations in the Northern Territory are of the standard the Assembly requires under Standing Orders.



Insert Chair's Signature

Nathan Barrett MLA

Chair

Committee Members

	Mr Nathan BARRETT MLA Member for Blain	
	Party:	Country Liberals
	Parliamentary Position:	Deputy Chairman of Committees
	Committee Membership	
	Standing:	Public Accounts, Estimates & Government Owned Corporations Scrutiny, House, Legal & Constitutional Affairs, Subordinate Legislation & Publications
	Sessional:	Northern Territory's Energy Future
	Select:	Fuel Price Disclosure Bill Scrutiny
Chair:	Legal & Constitutional Affairs, Subordinate Legislation & Publications	
	Ms Kezia PURICK MLA Hon Member for Goyder	
	Party:	Country Liberals
	Parliamentary Position:	Speaker
	Committee Membership	
	Standing:	Legal & Constitutional Affairs, Subordinate Legislation & Publications, House, Standing Orders.
	Select:	Foetal Alcohol Spectrum Disorder.
	Chair:	House Committee, Foetal Alcohol Spectrum Disorder.
	Mrs Lia FINOCCHIARO MLA Member for Drysdale	
	Party:	Country Liberals
	Parliamentary Position:	Government Whip
	Committee Membership	
	Standing:	Legal & Constitutional Affairs, Subordinate Legislation & Publications, Public Accounts, Estimates & Government Owned Corporations Scrutiny, House, Privileges.
	Chair:	Public Accounts, Estimates & Government Owned Corporations Scrutiny.
		Mr Gerry McCARTHY MLA Member for Barkly
Party:		Territory Labor
Parliamentary Position:		Deputy Leader of the Opposition
Committee Membership		
Standing:		Legal & Constitutional Affairs, Subordinate Legislation & Publications.
Sessional:		Northern Territory's Energy Future.
Select:		Foetal Alcohol Spectrum Disorder.
	Ms Lynne WALKER MLA Member for Nhulunbuy	
	Party:	Territory Labor
	Committee Membership	
	Standing:	Legal & Constitutional Affairs, Subordinate Legislation & Publications, Privileges.
Member for Wanguri, Ms Nicole Manison, was discharged from the Committee on 10 November 2014 and Member for Nhulunbuy, Ms Lynne Walker, was subsequently appointed to the Committee.		

Committee Secretariat

Committee Secretary: Ms Julia Knight

Administration/Research Officer: Ms Lauren Orrock

Administration Assistant: Ms Kim Cowcher

Contact Details: GPO Box 3721 DARWIN NT 0801

Tel: +61 08 8901 4149

Email: slpc@nt.gov.au

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.

Recommendations

Recommendation 1

That the Assembly:

- a) agrees that as regulations should not purport to go beyond the power under which they are made, Regulation 4N should not be allowed to stand; and
- b) accepts the Treasurer's proposal that Regulation 4N of the Motor Accidents (Compensation) Amendment Regulations 2014 be repealed at the Executive Council meeting of 16 December 2014, on the grounds that it goes beyond the power conferred by s 20A(5) of the *Motor Accidents (Compensation) Act*.

1 Disallowance of Subordinate Legislation

- 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, 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.
- 1.3 However, if the Committee is of the opinion that an instrument, or a provision of an instrument, ought to be disallowed or disapproved, clause 3 of the Committee's Terms of Reference require that the Committee:
- a) 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.
- 1.4 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 motion, the Assembly may pass a resolution disallowing subordinate legislation, or provisions of subordinate legislation, which has the effect of repealing the legislation or provisions.³ In the case of subordinate legislation amending or repealing other legislation, the disallowance restores the other legislation from the date of the disallowance.⁴
- 1.5 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 six months of the disallowance, unless the Assembly rescinds its resolution. Subordinate legislation made in contravention of this provision is of no effect.⁵

¹ *Interpretation Act* (NT), s 17

² *Interpretation Act* (NT), s 63(1)

³ *Interpretation Act* (NT), s 63(9)

⁴ *Interpretation Act* (NT), s 63(10)

⁵ *Interpretation Act* (NT), s 64(2)(3)

2 Motor Accidents (Compensation) Amendment Regulations 2014

- 2.1 The Motor Accidents (Compensation) Amendment Regulations [No. 19 of 2014], which support the operation of National Injury Insurance Scheme benefits under the Northern Territory's compulsory Motor Accidents Compensation Scheme, were tabled in the Assembly on 20 August 2014. The Committee subsequently considered the regulations and associated advice (Appendix 1) from its independent legal counsel, Professor Ned Aughterson, at its meeting of 22 October 2014.
- 2.2 In relation to Regulation 4N (Appendix 2), Professor Aughterson advised that Regulation 4N(2) goes beyond the power conferred by s 20A(5) of the *Motor Accidents (Compensation) Act* under which it is made. Section 20A of the Act (Appendix 3) sets out the circumstances whereby benefits payable in respect of the death of qualifying persons may be reduced, and the process for determining any reduction of benefits.
- 2.3 Section 20A(1)(c) allows for the reduction of benefits where the influence of alcohol or a drug contributed to the accident. Unless the contrary is established, s 20A(2) creates a presumption that the influence of alcohol contributed to the accident if the circumstances prescribed in the regulations exist in relation to the qualifying person. Regulation 4N(2) prescribes an alcohol concentration reading equal to or greater than 0.080.
- 2.4 Section 20A(4) provides that any reduction of benefits is to be a proportion of the benefits otherwise payable considered appropriate by the Territory Insurance Office (TIO) having regard to the extent to which the influence of alcohol is deemed to have contributed to the accident. Where it is determined that benefits are to be reduced, s 20A(5) provides that benefits are to be reduced in accordance with the regulations.
- 2.5 As Professor Aughterson points out, in the context of s 20A(4) 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, since the table in regulation 4N(2) is framed in terms of alcohol concentration readings it assumes a correlation exists between an alcohol concentration and the extent to which such contributed to the accident. Thus an alcohol concentration range of 0.080 to 0.133, for example, gives rise to a 30% reduction in benefits.
- 2.6 Given that there is no necessary correlation between an alcohol concentration and the extent to which alcohol might be said to contribute to an accident, Professor Aughterson concludes that the table in Regulation 4N(2) impermissibly avoids the statutory requirement of TIO to make a determination in each case as to the extent to which the influence of alcohol contributed to the accident.
- 2.7 As provided for under clause 2(e) of the Committee's Terms of Reference, Regulation 4N(2) therefore "appears to make some unusual or unexpected use of

the powers conferred by the statute under which it is made.” Since the disallowance period for these regulations expires on Wednesday, 26 November 2014, the Committee resolved to forward the legal advice to the Chief Minister, who in his capacity as Treasurer is the responsible minister, for consideration and comment by Friday, 7 November 2014 (Appendix 4).

- 2.8 A response was subsequently received on Monday, 17 November 2014 (Appendix 5). Following consultation with the Department of Treasury and Finance, TIO and the Office of Parliamentary Counsel, the Treasurer advised that it is agreed that Regulation 4N goes beyond the power conferred by its enabling legislation. As such, the Treasurer proposed that Regulation 4N be repealed at the Executive Council meeting of 16 December 2014. Since the offending regulation, 4N(2), is neither self-contained nor capable of standing or falling alone, the Committee notes that it is proposed that regulation 4N be repealed in its entirety.
- 2.9 Importantly, repealing Regulation 4N does not affect TIO’s ability to reduce benefits where the influence of alcohol or a drug is deemed to have contributed to the accident. Rather, as per Professor Aughterson’s advice, it ensures that determinations regarding reductions in benefits are made in accordance with s 20A(4) of the Act. Instead of relying on the regulations for their decision making process and applying an approach attributing contribution on the basis of alcohol concentration, TIO will be required to justify any proposed reductions in benefits payable on the basis of the contribution determined in that case.

3 Committee's Conclusions

- 3.1 The Committee notes that a regulation that purports to go beyond the power under which it is made is of no effect at law and may not be enforced by a court. However, until it is ruled to be beyond power by a court it will be treated as being law. As a matter of principle, therefore, the Committee is of the view that any regulation purporting to go beyond its power should be disallowed at the earliest opportunity.
- 3.2 Given the above, the Committee welcomes the Treasurer's advice and proposed course of action to remedy the 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.
- 3.3 Consequently, at its meeting of 24 November 2014, the Committee resolved that:
 - (a) the Committee accepts the Treasurer's proposal that Regulation 4N of the Motor Accidents (Compensation) Amendment Regulations 2014 be repealed at the Executive Council meeting of 16 December 2014, on the grounds that it goes beyond the power conferred by s 20A(5) of the *Motor Accidents (Compensation) Act* as an alternative to recommending its disallowance;
 - (b) the Chair, on behalf of the Committee, give notice of a motion to disallow to be moved on 17 February 2015 to ensure that the regulation's disallowance period does not expire prior to its repeal; and
 - (c) the Committee advise the Treasurer accordingly and request that the Committee be provided with confirmation when Regulation 4N of the Motor Accidents (Compensation) Amendment Regulations 2014 has been repealed as proposed.

Recommendation 1

That the Assembly:

- a) **agrees that as regulations should not purport to go beyond the power under which they are made, Regulation 4N should not be allowed to stand; and**
- b) **accepts the Treasurer's proposal that Regulation 4N of the Motor Accidents (Compensation) Amendment Regulations 2014 be repealed at the Executive Council meeting of 16 December 2014, on the grounds that it goes beyond the power conferred by s 20A(5) of the *Motor Accidents (Compensation) Act*.**

Appendix 1: Independent Legal Advice

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

Legal Advice from Professor Ned Aughterson

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.

Appendix 2: Regulation 4N

MOTOR ACCIDENTS (COMPENSATION) AMENDMENT REGULATIONS 2014

Subordinate Legislation No. 19 of 2014

4N Reduction of benefits under section 20A of the Act

- (1) For section 20A(5) of the Act, benefits payable in respect of the death of a qualifying person in relation to a motor accident that are to be reduced under section 20A of the Act must be reduced in accordance with this regulation.
- (2) If, at the time of the motor accident, the qualifying person had a concentration of alcohol in a range specified in the Table to this regulation, the benefits payable under section 20A of the Act, as reduced under section 11 of the Act, are to be reduced by the percentage specified in the Table for that alcohol concentration range.

Table Benefit reductions

Alcohol concentration range	Reduction (%)
Equal to or greater than 0.080 but not more than 0.133	30
Equal to or greater than 0.133 but not more than 0.186	45
Equal to or greater than 0.186 but not more than 0.240	60
Greater than 0.240	75

- (3) If the Office determines that benefits are to be reduced under section 20A of the Act due to the influence of a drug or the qualifying person's risky conduct, the reduction is to be a proportion of the benefits otherwise payable as considered appropriate by the Office having regard to the extent to which, in the opinion of the Office, the influence of the drug or the person's risky conduct (as the case requires) contributed to the accident.
- (4) In this regulation:

alcohol concentration means.

 - (a) the concentration of alcohol in the breath measured in grams per 210 litres of exhaled breath; or
 - (b) the concentration of alcohol in the blood measured in grams per 100 millilitres of blood.

Appendix 3: Motor Accidents Compensation Act

Part 5 Payments in respect of death

20 Definition

In this Part:

qualifying person means:

- (a) a person who dies as a result of injuries received in a motor accident occurring in the Territory; or
- (b) a resident of the Territory who dies as a result of injuries received in a motor accident, involving a Territory motor vehicle, occurring outside the Territory.

20A Reduction of benefits in certain cases

- (1) The Office may reduce benefits payable under this Part if:
 - (a) the accident resulting in the death of the qualifying person occurred while that person was driving a motor vehicle; and
 - (b) the qualifying person was under the influence of alcohol or a drug to such an extent that the person:
 - (i) was, by driving a motor vehicle, committing an offence against relevant laws regulating road traffic; or
 - (ii) would have been committing such an offence if the person had been driving the motor vehicle in a public street or public place; and
 - (c) the influence of the alcohol or drug contributed, in the Office's opinion, to the accident.
- (2) The Office must presume that the influence of alcohol contributed to the accident if the circumstances prescribed in the regulations exist in relation to the person, unless the contrary is established.
- (3) The Office may reduce benefits payable under the Part if:
 - (a) the accident occurred while the qualifying person was engaged in conduct that created a substantial risk of injury to the qualifying person, and
 - (b) the qualifying person recklessly ignored the risk.

Note

This subsection applies whether the qualifying person was the driver, a passenger, a cyclist or pedestrian or involved in the accident in some other way.

- (4) A reduction of benefits under this section is to be a proportion of the benefits otherwise payable considered appropriate by the Office having regard to the extent to which the influence of alcohol or the drug or the qualifying person's risky conduct (as the case requires) contributed to the accident.
- (5) If the Office determines that benefits are to be reduced under this section, the Office must reduce the benefits in accordance with the regulations.
- (6) Benefits payable under section 22(1)(a) must not be reduced under this section.

Appendix 4: Letter to Treasurer



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

A handwritten signature in black ink, appearing to read 'N Barrett'.

Mr Nathan Barrett, MLA
Chair

22 October 2014

Enc: Legal Advice from Professor Aughterson

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.

Appendix 5: Response from Treasurer



CHIEF MINISTER
TREASURER

Parliament House
State Square
Darwin NT 0800
chief.minister@nt.gov.au

GPO Box 3146
Darwin NT 0801
Telephone: 08 8928 6500
Facsimile: 08 8928 6577

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

Dear Mr Barrett

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



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