LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Subordinate Legislation and Publications Committee

Report of Ministerial Correspondence on Subordinate Legislation and Publications

October 2016 - May 2017

May 2017

Contents

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 pleasing to note that during the current reporting period all agencies, independent officers, statutory authorities, and government owned corporations met their relevant reporting requirements.

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.

Mr Jeff Collins MLA

Chair

Committee Members

	**Mr Jeff COLLINS MLA:** Member for Fong Lim	
	Party	Territory Labor
	Committee Membership	
	Standing	Legal and Constitutional Affairs, Subordinate Legislation and Publications
	Select	Opening Parliament to the People
	Chair	Legal and Constitutional Affairs, Subordinate Legislation and Publications, Opening Parliament to the People
	**Mrs Lia FINOCCHIARO MLA:** Member for Spillett	
	Party	Country Liberals
	Parliamentary Position	Deputy Leader of the Opposition, Opposition Whip
	Committee Membership	
	Standing	Legal and Constitutional Affairs, Subordinate Legislation and Publications, Public Accounts, Privileges
	Deputy Chair	Legal and Constitutional Affairs, Subordinate Legislation and Publications
	**Mr Terry MILLS MLA:** Member for Blain	
	Party:	Independent
	Committee Membership	
	Standing:	Legal and Constitutional Affairs, Subordinate Legislation and Publications, Public Accounts
	**Mr Tony SIEVERS MLA:** Member for Brennan	
	Party	Territory Labor
	Committee Membership	
	Standing	Legal and Constitutional Affairs, Subordinate Legislation and Publications, Public Accounts, House.
	**Ms Selena UIBO MLA:** Member for Arnhem	
	Party	Territory Labor
	Committee Membership	
	Standing	Legal and Constitutional Affairs, Subordinate Legislation and Publications

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Terms of Reference

Standing Order 176

(1) A Subordinate Legislation and Publications Committee must be appointed at the commencement of each Assembly to 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 must consist of five Members.

(3) The Committee will, 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.

(4) The Committee, if it is of the opinion that an instrument ought to be disallowed or disapproved –

(a) will 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

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

(5) 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.

(6) The Committee will 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) For the purposes of this Standing Order, “instrument of a legislative or administrative character” has the same meaning as that defined in the *Interpretation Act*.

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 3 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. It is pleasing to note that during the current reporting period all agencies, independent officers, statutory authorities, and government owned corporations met their relevant reporting requirements.

[1] *Interpretation Act,* ss 7 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 176(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(9) 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.[3] 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 six months of the disallowance, unless the Assembly rescinds its resolution. Subordinate legislation made in contravention of this provision is of no effect.

[3] *Interpretation Act,* s 63(9)

3 Ministerial Correspondence on Subordinate Legislation

NT Public Sector Employment and Management By-Laws

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.4

The Hon. Gerald McCarthy, MLA
Minister for Public Employment
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Northern Territory of Australia Public Sector Employment and Management By-Laws

The Subordinate Legislation and Publications Committee met on 27 October 2016 and considered the above by-laws.

As highlighted in the attached enclosure from our independent legal counsel, the Committee is particularly concerned that by-laws 47.1, 47.2, 47.5, 47.6 and 47.7 may contravene ss 5 and 6 of the *Sex Discrimination Act 1984 (Cth).* The Committee therefore asks that you provide it with a response to the concerns raised in the attached advice by Wednesday 16 November 2016 so the Committee can conclude its examination of the by-law before the expiry of the disallowance period.

I note that if the Committee cannot conclude its examination of the by-law before the expiry of the disallowance date it may be necessary to give notice of a motion to disallow the by-law to extend the time available for consideration. I would therefore be grateful for your urgent attention to this matter.

Yours sincerely

Mr Jeff Collins, MLA
Chair

27 October 2016

Enc.

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Legal Advice from Professor Aughterson

Northern Territory of Australia Public Sector Employment and Management By-Laws

By-Law 8.2 and 8.3: By-law 8 deals with long service leave. By-law 8.2(a) allows 3 months long service leave after completing 10 years of continuous service, while by-law 8.2(b) allows an additional 9 days long service leave for each subsequent year of continuous service. By-law 8.3 then provides for when the leave must be taken. By-law 8.3(a) requires the leave to be taken within 3 years of 'the 10 year entitlement accruing', 'or' within 3 years of 'the 11 to 20 year entitlement accruing'. It is not clear what that means. The use of 'or' rather than 'and' might suggest that the leave can be taken either after the 10 years or after 20 years (though by-law 8.4 might suggest that the leave must be taken within 3 years of the 10 years).

Also, it is not clear what is meant by within 3 years of 'the 11 to 20 year entitlement accruing'. As noted above, by-law 8.2(b) provides that leave accrues each year after the 10th year, so that there will be a separate, additional entitlement of 9 days at the end of the 11th year and at the end of each subsequent year. Given that by-law 8.3(b) is expressed in terms of requiring the leave to be taken within 3 years of 'the 11 to 20 entitlement accruing', does that mean that employees have to take the leave within 3 years of the 11th year entitlement accruing and within 3 years of each additional year accruing?

By-Law 9.2: the first 3 rows of the Table at 9.2(a) appear to be incorrect to the extent that they refer to 'ordinary maternity' rights as extending to the 'primary care-giver'. At 9.1(i), 'primary care-giver' means an employee who has primary responsibility for the care of the child. However, it is evident from the terms of by-law 9.3(a) that the rights referred to in those rows of the Table apply only to a 'pregnant employee'.

By-Law 9.19: by-law 9.19(a) confines the operation of this provision to female employees (superannuation contributions while on parental leave), whereas in 9.19(b) reference is made to an employee who is the 'primary carer' (in the case of adoption), who might be a male.

By-Law 17: the rationale for this provision is not clear. It allows for the granting of leave to an employee to attend 'an arbitration proceeding'. In particular, why is it confined to arbitration proceedings as distinct from court or mediation proceedings? Also, it is confined to attending an arbitration proceeding as a member of a 'claimant' organisation. Why not also as a member of a 'respondent' organisation? Third, why only as a member of an 'organisation', rather than attending in the employee's own right?

By-Law 21.1: the rationale for allowing leave with pay where an employee is subpoenaed or called as a witness 'for the Crown', but not for another party, is not clear. For example, if one employee is called as a witness for the Crown in a criminal case and another employee is subpoenaed as a witness for the defence in the same case, why should the former be given leave with pay and not the latter? I presume that the Commissioner is impartial in such criminal proceedings. It is also noted that the provision does not extend to where an employee is called as a witness under a law of a State.

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By-Law 22: there is an inconsistency between the provisos in 22.1 and 22.2(g). The former allows for reimbursement of the loss or damage where it is caused by a third party and 'the employee cannot reasonably be expected to take legal action to recover the amount of the loss or damage from a person who may be liable to pay compensation for that loss or damage'. On the other hand, 22.2(g) provides that the CEO will not approve reimbursement where the employee is entitled to recover the loss or damage from a person liable for such loss or damage. It might be that this will be read subject to the specific proviso in 22.1, but perhaps it should be so expressed.

By-Laws 30 and 30A: it is not clear whether the granting of a living away from home allowance is mandatory or at the discretion of the CEO. By-laws 30.1 and 30A.1 use the word 'shall', while 30A.2 is expressed as 'may' (pay the allowance).

By-Law 32: should there be an 'or' after by-law 32.2(a)?

By-Law 46: the term 'maximum' is used in 46.2, but not in 46.1. Should it be used in both?

By-Law 47.1 and 47.2: why are female compulsory transferees treated differently in relation to air fare entitlements? Does that also mean that the restriction on entitlement in by-law 33.4 also applies to females only? Note also the gender differentiation in 47.5, 47.6, 49.4 and 49.5. In that context, see s 5 and 6 of the *Sex Discrimination Act (Cth)*. Without knowing the rationale for the different approaches taken under by-laws 47 and 49, it is not clear whether there is any justification in terms of the Commonwealth Act.

By-Law 47.5 to 47.7: in relation to air fare entitlements under by-law 47 there is also reference to 'married' and 'unmarried' employees. Elsewhere in the by-laws, in relation to other entitlements, there is recognition of a 'de facto partner': see, for example, 26.1, 33.1, 44.1.

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Mr Jeff Collins
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr Collins

Thank you for your recent correspondence relating to the Subordinate Legislation and Publications Committee's review of the Northern Territory of Australia Public Sector Employment and Management By-laws and the matters identified by your independent legal counsel, Professor Ned Aughterson.

The above By-laws were made pursuant to section 60 of the *Public Sector Employment and Management Act* by the Commissioner for Public Employment (the Commissioner). A copy of the letter was sent to the Commissioner for consideration and response. The Commissioner's response to the matters is provided at Attachment A.

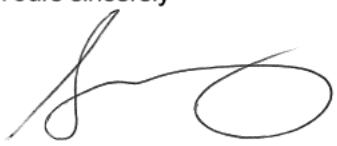
The Public Sector Employment and Management By-laws were re-introduced on the 27 April 2016 and the Commissioner has advised that a routine review was scheduled for six months after the By-laws commenced. Consequently, the Office of the Commissioner for Public Employment has commenced a review due for completion in January 2017.

The Commissioner for Public Employment "the employer" sets the terms and conditions as per the *Public Sector Employment and Management Act* and welcomes reporting back to the Committee following our review.

NORTHERN TERRITORY GOVERNMENT

Should you require any further clarification about this response, please do not hesitate to contact Cheryl Winstanley, Director Employee Relations or Ms Helena Glew, Principal Consultant Employee Relations, Office of the Commissioner for Public Employment on telephone 8999 4173.

Yours sincerely



GERRY McCARTHY

18/11/2016

Attachment A

REVIEW OF THE PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT BY-LAWS BY THE SUBORDINATE LEGISLATION AND PUBLICATIONS COMMITTEE

The Commissioner for Public Employment (the Commissioner) responds to the matters raised by Professor Aughterson as follows:

By-laws 8.2 and 8.3

Legal Advice from Professor Aughterson:

By-law 8 deals with long service leave. By-law 8.2(a) allows 3 months long service leave after completing 10 years continuous service, while By-law 8.2(b) allows an additional 9 days long service leave for each subsequent year of continuous service. By-law 8.3 then provides for when the leave must be taken. By-law 8.3(a) requires the leave to be taken within 3 years of 'the 10 year entitlement accruing', 'or' within 3 years of the '11 to 20 year entitlement accruing'. It is not clear what that means. This use of 'or' rather than 'and' might suggest that the leave can be taken either after the 10 years or after 20 years (though By-law 8.4 might suggest that the leave must be taken within 3 years of the 10 years).

Also, it is not clear what is meant by within 3 years of 'the 11 to 20 year entitlement accruing'. As noted above, By-law 8.2(b) provides that leave accrues each year after the 10th year, so that there will be a separate, additional entitlement of 9 days at the end of the 11th year and at the end of each subsequent year. Given that By-law 8.3(b) is expressed in terms of requiring leave to be taken within 3 years of 'the 11 to 20 [year] entitlement accruing', does that mean that employees have to take the leave within 3 years of the 11th year entitlement accruing and within 3 years of each additional year accruing?

Response:

It should first be noted that these provisions are long-standing Public Sector Employment and Management By-law provisions which have existed in all superseded By-laws, in the current or a similar form, since at least 1998 and it appears have been applied without issue. However, it is acknowledged that the current wording in By-law 8.3(a) and (b) could be made clearer as to the requirement to utilise long service leave within a stipulated period.

The Commissioner will seek to clarify the operation of the provisions when the By-laws are next reviewed by making the following changes:

- Substitute 'or' for 'then' in By-law 8.3(a).
- The addition of an explanatory note following By-law 8.3(b) to explain that all entitlements accrued for service between the 11th and 20th year of employment, and which have not already been utilised, must be taken within 3 years of the 20 year entitlement accruing.

By-law 9.2

Legal Advice from Professor Aughterson:

The first 3 rows of the Table at 9.2(a) appear to be incorrect to the extent that they refer to 'ordinary maternity' rights as extending to the 'primary care-giver'. At 9.1(i), 'primary care-giver' means an employee who has primary responsibility for the care of the child. However,

it is evident from the terms of By-law 9.3(a) that the rights referred to in those rows of the Table apply only to a 'pregnant employee'.

Response:

The table in clause 9.2(a) summarises entitlements set out in By-law 9 and must be read in the context of the whole By-law. Ordinary maternity leave is taken pursuant to By-law 9.3 and is available to a female pregnant employee who will be the primary care-giver of the child whilst on leave in accordance with By-law 9.3(a) and (d)(ii).

The Commissioner will seek to clarify all eligibility requirements for By-law 9.3 entitlements in the summary table in By-law 9.2(a) when the By-laws are next reviewed.

By-law 9.19

Legal Advice from Professor Aughterson:

By-law 9.19(a) confines the operation of this provision to female employees (superannuation contributions while on parental leave), whereas in 9.19(b) reference is made to an employee who is the 'primary carer' (in the case of adoption), who might be male.

Response:

By-law 9.19 is intended to apply to female employees on any form of unpaid parental leave. By-law 9.19(b) must be read subject to By-law 9(a).

For clarity, the Commissioner will insert 'female' before 'employee' in By-law 9.19(b) when the By-laws are next reviewed.

By-law 17

Legal Advice from Professor Aughterson:

The rationale for this provision is not clear. It allows for the granting of leave to an employee to attend 'an arbitration proceeding'. In particular, why is it confined to arbitration proceedings as distinct from court or mediation proceedings? Also, it is confined to attending an arbitration proceeding as a member of a 'claimant' organisation. Why not also as a member of a 'respondent organisation'? Third, why only as a member of an 'organisation', rather than attending in the employee's own right?

Response:

It should first be noted that these provisions are long-standing Public Sector Employment and Management By-law provisions which provide entitlements in a specific circumstance. These are not entitlements intended for broader application in circumstances or to persons referred to by Professor Aughterson. There are other leave provisions in the By-laws and enterprise agreements available should an employee require leave for the circumstances to which Professor Aughterson's refers.

The Commissioner is satisfied no amendments to By-law 17 are required.

By-law 21.1

Legal Advice from Professor Aughterson:

The rationale for allowing leave with pay where an employee is subpoenaed or called as a witness 'for the Crown', but not for another party, is not clear. For example, if one employee is called as a witness for the Crown in a criminal case and another employee is subpoenaed as a witness for the defence in the same case, why should the former be given leave with pay and not the latter? I presume that the Commissioner is impartial in such criminal proceedings. It is also noted that the provision does not extend to where an employee is called as witness under a law of a State.

Response:

Similarly, these provisions are long-standing Public Sector Employment and Management By-law provisions which provide entitlements in a specific circumstance (i.e. where an employee is subpoenaed or called as a witness for the Crown to give evidence under a law of the Commonwealth or the Territory). These are not leave entitlements intended for any legal proceeding in which an employee may be involved. There are other leave provisions in the By-laws and enterprise agreements available should an employee require leave for the circumstances to which Professor Aughterson's refers.

The Commissioner is satisfied no amendments to By-law 21.1 are required.

By-law 22

Legal Advice from Professor Aughterson:

There is an inconsistency between the provisos in 22.1 and 22.2(g). The former allows for reimbursement of the loss or damage where it is caused by a third party and 'the employee cannot reasonably be expected to take legal action to recover the amount of the loss or damage from a person who may be liable to pay compensation for that loss or damage'. On the other hand, 22.2(g) provides that the CEO will not approve reimbursement where the employee is entitled to recover the loss or damage from a person liable for such loss or damage. It might be that this will be read subject to the specific proviso in 22.1, but perhaps it should be so expressed.

Response:

The Commissioner will seek to rectify this inconsistency when the By-laws are next reviewed with the addition of the phrase 'subject to By-law 22.1' at the beginning of By-law 22.2(g).

By-laws 30 and 30A

Legal Advice from Professor Aughterson:

It is not clear whether the granting of a living away from home allowance is mandatory or at the discretion of the CEO. By-laws 30.1 and 30A.1 use the word 'shall', while 30A.2 is expressed as 'may' (pay the allowance).

Response:

The granting of By-law 30 Travelling Allowance or By-law 30A Living Away from Home Allowance is not discretionary. The use of 'shall' and 'may' in the clauses identified by Professor Aughterson are not clear.

The Commissioner will seek to clarify the operation of the provisions and access to the entitlements when the By-laws are next reviewed by the substitution of 'may' for 'shall' in By-laws 30.3 and 30A.2.

By-laws 32

Legal Advice from Professor Aughterson:

Should there be an 'or' after By-law 32.2(a)?

Response:

The Commissioner will seek to rectify this omission when the By-laws are next reviewed to insert 'or' after By-law 32.3(a).

By-laws 46

Legal Advice from Professor Aughterson:

The term 'maximum' is used in 46.2 but not in 46.1. Should it be used in both?

Response:

The Commissioner will seek to rectify this omission when the By-laws are next reviewed and insert 'maximum' in By-law 46.1.

By-laws 47.1 and 47.2

Legal Advice from Professor Aughterson:

Why are female compulsory transferees treated differently in relation to air fare entitlements? Does that also mean that the restriction on entitlement in By-law 33.4 also applies to females only? Note also the gender differentiation in 47.5, 47.6, 49.4 and 49.5. In that context, see s 5 and 6 of the *Sex Discrimination Act (Cth)*. Without knowing the rationale for the different approaches taken under By-laws 47 and 49, it is not clear whether there is any justification in terms of the Commonwealth Act.

Response:

By-law 47 preserves specific entitlements and rights for a group of employees who were compulsorily transferred by Commonwealth Acts into the Northern Territory Public Service from the Commonwealth Public Service or other (e.g. Commonwealth Teaching Service) following Northern Territory self-government under the *Northern Territory (Self-Government) Act 1978* (Cth). These entitlements and rights, previously provided under federal legislation, have existed in Northern Territory Public Service legislation and/or subordinate legislation (e.g. By-laws) since that time. Industrially, the provisions are 'grandparenting' clauses which will continue to exist until such time as there are no longer any compulsorily transferred employees (in accordance with By-law 45.1 definition) in the Northern Territory Public Service. The entitlements cannot be accessed or applied to any other employee.

As at 9 November 2016, there are 161 compulsory transferees who may be eligible for entitlements under By-law 47. The entitlements apply under the same conditions as those granted under federal legislation.

Notwithstanding these are grandparenting provisions, the Commissioner undertakes to review the application of the entitlements and consider if an alternate instrument for these individuals is more appropriate.

By-laws 47.5 and 47.7

Legal Advice from Professor Aughterson:

In relation to air fare entitlements under By-law 47 there is also reference to 'married' and 'unmarried' employees. Elsewhere in the By-laws, in relation to other entitlements, there is recognition of a 'de facto partner': see, for example, 26.1, 33.1, 44.1.

Response:

Similarly, By-laws 47.5 and 47.7 are preserved historical entitlements that reflect the language used at the time the entitlements commenced.

The Commissioner undertakes to review the language in the next By-law review provided the entitlements are not enhanced.

11 of 2016 NT Civil and Administrative Tribunal Rules

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.5

The Hon. Natasha Fyles MLA
Attorney-General and Minister for Justice
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General and Minister for Justice

Re: Northern Territory Civil and Administrative Tribunal Rules
[No 11 of 2016]

The Subordinate Legislation and Publications Committee met on Thursday 27 October 2016 and considered the above rules.

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 Jeff Collins, MLA
Chair

27 October 2016

Enc.

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Legal Advice from Professor Aughterson

Northern Territory Civil and Administrative Tribunal Rules [No.11 of 2016]

Rule 9(6): there is a question of who is to serve the evidence summons on the party required to appear. If it is the applicant for the summons, then should that applicant be given the original sealed summons, rather than a copy? – see rule 9(5).

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

Dear Mr Collins Jeff

Thank you for your letter of 27 October 2016 inviting comment on the Subordinate Legislation and Publications Committee's independent legal advice regarding the Northern Territory Civil and Administrative Tribunal Rules [No. 11 of 2016] (the NTCAT Rules), and in particular, an ambiguity in rule 9(6).

The Department of the Attorney-General and Justice (the Department) advises that the matter has been brought to the attention of Mr Richard Bruxner, President of the Northern Territory Civil and Administrative Tribunal (NTCAT). The Department of the Attorney-General and Justice understands that the NTCAT rules committee will consider the matter and take the necessary steps to resolve the ambiguity in rule 9(6) in due course.

The Department of the Attorney-General and Justice notes that while it would be prudent to amend rule 9(6) to remove any ambiguity, the Department is of the view that rule 9(6) is not fatal to the operation of the NTCAT Rules generally. The NTCAT Rules differ from traditional regulations insofar as the NTCAT Rules are promulgated by the NTCAT to provide guidance in the processes of the NTCAT, and can be dispensed with at the NTCAT's discretion. With the matter now drawn to the NTCAT's attention, the Department of the Attorney-General and Justice is of the view that the NTCAT will make necessary orders to counter the ambiguity pending amendment.

In regard to the actual questions raised, the Department of the Attorney-General and Justice notes that by implication of the subject matter covered by rule 9, the question as to who is to serve the evidence summons would be resolved in favour of the person applying for the summons, i.e. rule 9(6) implies that the person applying for the summons must then serve it. The question relating to whether the summons is the original or a copy can be resolved through the NTCAT providing both to the applicant, or otherwise through ancillary orders/endorsements under rule 9(4)(a)(v).

NORTHERN TERRITORY GOVERNMENT

I trust that this assists the Subordinate Legislation and Publications Committee's consideration of the NTCAT Rules.

Yours sincerely

NATASHA FYLES

25 NOV 2016

12 of 2016 Medical Services (Royal Darwin Hospital Parking) Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.6

The Hon. Natasha Fyles, MLA
Minister for Health
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Medical Services (Royal Darwin Hospital Parking) Regulations [No. 12 of 2016]

The Subordinate Legislation and Publications Committee met on Thursday 27 October 2016 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 Jeff Collins, MLA
Chair

27 October 2016

Enc.

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

Legal Advice from Professor Aughterson

Medical Services (Royal Darwin Hospital Parking) Regulations [No. 12 of 2016]

Reg. 3: regulation 3 creates offences where a person parks a vehicle contrary to the provisions of the Act. In other words, the offence is committed by the person parking the vehicle, who might or might not be the owner of the vehicle. A difficulty can arise in identifying who in fact parked the vehicle. It is noted that under regulation 17(2) the infringement notice can be given to the owner of the vehicle. However, it remains that the offence was committed by the person parking the vehicle (see regulation 3), as an 'infringement notice offence' in regulation 16(1) is simply an offence against reg. 3.

Compare the Darwin Waterfront Corporation By-law 88, which imports into those by-laws Part 3 Division 4 of the Traffic Regulations. Included in that Division of the Traffic Regulations is regulation 53, which provides that if the name of the offender is not ascertained at the time of the offence the owner of the vehicle at the time the offence occurs is taken to have committed the offence.

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Mr Jeff Collins MLA
Chair
Subordinate Legislation and Publications Committee
GPO Box 3721
DARWIN NT 0801

Dear Mr Collins

I refer to your letter of 27 October 2016 sent on behalf of the Subordinate Legislation and Publications Committee in relation to the *Medical Services (Royal Darwin Hospital Parking) Regulations* No. 12 of 2016. A response to the Committee's enquiry is set out below.

The enquiry related to enforcement of infringements under Regulation 3 against the owner of a motor vehicle if the identity of the driver was not ascertained at the time of the infringement. The enquiry noted the operation of *Darwin Waterfront Corporation By-law* 88, which adopts (with necessary modification) Regulation 53 of the *Traffic Regulations*. Those regulations operate to deem the owner of the vehicle responsible for an offence where the identity of the driver has not been ascertained, whether or not the owner committed the offence.

It is noted that section 16(4) of the *Medical Services Act* similarly provides that for the purposes of the regulations the owner of the vehicle is deemed to have control of the vehicle at any time an infringement occurs.

It is also noted that consideration is currently being given to the most suitable legislative instrument to best provide for regulation of car parking and other personal conduct on Northern Territory hospital campuses, including Royal Darwin Hospital.

Thank you for writing to me about this matter.

Yours sincerely

NATASHA FYLES

25 NOV 2016

NORTHERN TERRITORY GOVERNMENT

21 of 2016 Local Court (General) Rules

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.7

The Hon. Natasha Fyles MLA
Attorney-General and Minister for Justice
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General and Minister for Justice

Re: Local Court (General) Rules [No. 21 of 2016]

The Subordinate Legislation and Publications Committee met on Thursday 27 October 2016 and considered the above rules.

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 Jeff Collins, MLA
Chair

27 October 2016

Enc.

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Legal Advice from Professor Aughterson

Local Court (General) Rules [No. 21 of 2016]

Rule 2: pursuant to s 74(1) of the *Local Court Act,* rule 2(1) delegates to registrars 'all of the powers' of the Court in the exercise of its civil jurisdiction, except the powers excluded by subrule (2) and the powers that 'another Act' (that is, an Act other than the *Local Court Act*) requires to be exercised by a judge or one or more JPs. Subrule (2) excludes the power to make certain 'orders'. The rule does not acknowledge the qualification in s 74 itself; that is, there cannot be a delegation of the power to hear and determine a claim or conduct the hearing of an appeal.

Rule 2(2): the reference should be to the 'Civil Jurisdiction' Rules, rather than the 'Civil Proceedings' Rules.

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Mr Jeff Collins MLA
Chair, Subordinate Legislation and
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GPO Box 3721
DARWIN NT 0801

Dear Mr Collins Jeff

Thank you for your letter dated 27 October 2016 concerning the Local Court (General) Rules [No.21 of 2016] in which you sought my comment on issues raised by the independent legal counsel to the Subordinate Legislation and Publications Committee.

I note that the Local Court (General) Rules [No.21 of 2016] were made by the Local Court Judges under section 48 of the *Local Court Act*.

Departmental officers have discussed the issues with the Chief Judge and the Acting Chief Parliamentary Counsel.

Officers and the Chief Judge agree that the reference in Rule 2(2) to "Civil Proceedings" should be amended so as to be a reference to "Civil Jurisdiction".

The outcome of the discussions concerning rule 2(1) is agreement that the rule, on its face, does not make it clear that it operates subject to section 74 of the *Local Court Act*. The likely legal position is that rule 2(1) operates so as to only permit the delegations that can be made under it. Despite this view, I understand that the Chief Judge is agreeable to suggesting to his Local Court judicial colleagues that rule 2(1) be amended so that it is plainer that it does not read as it is permitting delegations that are prohibited by section 74(2)-(4) of the *Local Court Act*.

I will provide a copy of our correspondence to the Chief Judge of the Local Court.

Yours sincerely

NATASHA FYLES

17 NOV 2016

NORTHERN TERRITORY GOVERNMENT

32 of 2016 Petroleum (Environment) Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.19

The Hon. Ken Vowles MLA
Minister for Primary Industry and Resources
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Petroleum (Environment) Regulations [No. 32 of 2016]

The Subordinate Legislation and Publications Committee met on Wednesday 23 November 2016 and considered the above regulations.

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

Please feel free to contact to discuss further if necessary.

Yours sincerely

Mr Jeff Collins, MLA
Chair

23 November 2016

Enc.

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Legal Advice from Professor Aughterson

Petroleum (Environment) Regulations [No. 32 of 2016]

Regulation 9: relates to the 'approval criteria' for an environmental management plan. By regulation 9(1)(c) the plan must demonstrate that the proposed activity will be carried out in a manner that reduces environmental impacts to a level that is (i) as low as reasonably practicable and (ii) 'acceptable'. It is not clear what 'acceptable' means: acceptable to the Minister (it is noted that by regulation 11(2) the Minister must be satisfied that the plan meets the approval criteria), acceptable to the environment, acceptable to stakeholders. The term 'acceptable' is also used in regulations 2 and 3 (definition of 'environmental outcome'. It is noted that under related Western Australia legislation the term 'acceptable level' is used: see regulation 11(1)(c) *Petroleum Pipelines (Environment) Regulations;* regulation 11(1)(c) *Petroleum (Submerged Lands) (Environment) Regulations;* regulation 11(1)(c) *Petroleum and Geothermal Energy Resources (Environment) Regulations.* the term 'acceptable level' was also used in the *Petroleum (Submerged Lands (Management of Environment) Regulations 1999 (Cth)* at regulation 11(1)(c).

Regulation 11(1): should regulation 11(1) be made subject to regulation 11(2)(c)? There are two contradictory 'musts' in those sub-regulations. It is understandable that more than 90 days might be required, given the potential for the Minister to require further information pursuant to regulation 10. The 90-day time frame does not expressly take account of delays that might arise where the Minister requires further information. It is not clear that sub-regulation 10(3) has the effect of amending the time at which the submission is made. See also sub-regulations 11(3) and 11(3)(c).

Regulations 11(3): as framed, it seems that the Minister must give resubmission notices ad infinitum. Is that intended?

Regulation 27(5): refers to a contravention mentioned in sub-regulation (1)(a). Sub-regulation 1(a) refers to contraventions under the Act and the regulations. Presumably the intent is to refer to contravention of the regulations only – there would be a question of power to amend the scope of offences under the Act and, in any event, the 'current plan' is not relevant to offences under the Act. Should sub-regulation (5) expressly refer to contravention 'of the regulations' mentioned in sub-regulation (1)(a)?

Regulation 27(5) gives rise to other potential confusion. It provides than an offence for contravention of the 'current' plan under regulation 31(1), for example, can arise even where the current plan has been revoked. At the same time, the definition of 'current plan' under regulation 3 means a plan approved under regulation 11 and 'in force'. In other words, it must be 'in force' in order to be a 'current plan', so that, arguably, if revoked there is not plan 'in force' on which regulation 27(5) can operate.

Regulations 31 and 32: create offences where there is contravention of the 'current plan' or, in relation to regulation 32, where the offending activity is not provided for in the 'current plan'. The term 'current plan' is defined in regulation 3 to mean a plan 'approved under regulation 11'. Section 31 does not seem to cater for plans revised under Division 3. compare regulation 32(2).

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Mr Jeff Collins, MLA
Chair
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Jeffo

Dear Mr Collins

I write in response to your letter dated 23 November 2016, following your committee's consideration of the Petroleum (Environment) Regulations. A detailed response to each of the issues identified by the independent legal counsel is at Attachment A.

My department has taken advice from the Solicitor for the Northern Territory and the Office of the Parliamentary Counsel about the issues you raised. Whilst the overall intent and structure of the regulations achieve their intended outcomes, it is acknowledged they were prepared under some time pressure and the wording of some of the clauses might be improved in some cases. These are identified in the attachment. I am pleased to advise you that I will progress these improvements through a Statute Law Revision Bill, or other convenient vehicle, within a reasonable period of time.

Yours sincerely

KEN VOWLES

NORTHERN TERRITORY GOVERNMENT

ATTACHMENT A

DPIR comments about issues raised by Professor Aughterson

1. **Issue 1**

The Minister must approve a plan if the Minister is reasonably satisfied that the environment management plan will reduce environmental impacts and risks to levels that are *both* as low as reasonably practicable (**ALARP**) and acceptable (regulation 9(2), 11(2)). Counsel has suggested that there is some uncertainty as to what an "acceptable" level of impact or risk is. Specifically, is that level determined by (a) the Minister, (b) stakeholders or (c) the environment?

It is noted that the term "acceptable" is not defined in the regulations. This was deliberate. This allows the regulations to be interpreted by the courts consistent with applicable statutory interpretation rules and principles. It is likely that the ordinary meaning of the term, construed in context and consistent with the purpose of the regulations, will prevail. This interpretation may have some flexibility over time depending on matters that come before the courts and evidence presented. Generally the criterion that involves an assessment of what level of risk or impact is "acceptable" is expected to provide an additional environmental protection function within the framework of the regulations.

a. A level acceptable to the Minister?

As Counsel notes, the Minister is the decision maker under regulation 11(2) and the Minister alone decides whether or not the environment plan has successfully demonstrated that the impacts and risks are reduced to the required levels (i.e. that they will be reduced to levels that are ALARP and acceptable).

It follows that the Minister will also make a determination about what an "acceptable" level of risk is. As per the discussion below, it is not possible for stakeholders, the broader community or the environment to make such a determination. These entities do not have any legal rights or interests in the petroleum resources, nor do they have any decision making powers under the *Petroleum Act* or regulations.

Further, regulation 11(3) places an important constraint on the Minister's determination of what an "acceptable" level of impact or risk is by requiring the Minister to take into account any recommendations made by the NT EPA and the principles of ecologically sustainable development. Those principles are set out in regulation 4 and will have a bearing on what an "acceptable" level of risk is.

b. A level acceptable to Stakeholders?

Stakeholders are not decision makers under the regulations – nor do they give the Minister advice on what an "acceptable level" of impact or risk might be for the purposes of regulation 9(1)(c)(ii). The extent of stakeholder involvement under the *Petroleum (Environment) Regulations* is set out regulation 7, which gives persons that are directly affected by the proposed activity an opportunity to provide their views on the plan to the interest holder. Schedule 1, Clause 9 requires the results of any stakeholder engagement (including an assessment of the merits of any objection or claims, and the interest holder's response) to be included in the plan submitted to the Minister. The Minister will have that information and will be able to require further information as to whether the plan

demonstrates that the activity will be carried out in a manner by which the environmental impacts and environmental risks of the activity will be reduced to a level that is acceptable.

Stakeholders are not required to make any comment or determination about whether the proposed environmental impacts and risks set out in the plan are reduced to levels that are "acceptable". As discussed above, a determination of acceptable levels and whether or not plans reduce impacts and risks to those levels is a matter reserved exclusively for the Minister taking into account principles of ESD and recommendations from the NT EPA. It is noted that some stakeholder engagement may occur under the *Environmental Assessment Act*. It is also a matter of policy as to whether that stakeholder engagement is sufficient, particularly where a full public environmental report or environmental impact statement is not required for a particular proposed action.

Stakeholders' rights and interests are also an important consideration for the Minister when s/he makes a decision under regulation 11 about the approval criteria in regulation 9. The definition of "environment" comes from the *Petroleum Act* and includes the well-being of humans as well as social, economic and cultural conditions. Therefore, when considering the impact and risk of an activity on "the environment" the Minister must consider the impact and risk of the proposed activity on stakeholders. Again, however, whether or not the impacts and risks are reduced to acceptable levels remains a matter for the Minister.

At a fundamental policy level there may be a question of how and to what extent stakeholders should be involved in determining the acceptable level of risk.

c. A level acceptable to the environment?

The environment is not a decision maker under the regulations, however the Minister must take into account principles of ESD and recommendations made by the NT EPA when making a decision under regulation 9(1)(c)(ii). This adds a layer of certainty for the Minister when making the decision.

The Department reiterates that the current drafting was modelled off the petroleum environment regulations in Western Australia and the Commonwealth offshore waters, which are widely regarded as examples of best practice regulation. In light of strong community concern surrounding regulation of the onshore gas industry, public scrutiny of the regulations, and the fact that the "acceptability" test adds an additional layer of environmental protection on top of the ALARP test (both the acceptability and ALARP tests must be satisfied), the Department saw significant benefit in preserving the "acceptability" test in the Northern Territory regulations.

2. Issue 2

An explanation of how this regulation is intended to operate follows. Notwithstanding this explanation, the department accepts that the wording is unwieldy. The Parliamentary Counsel has advised the wording of regulation 11 could be improved and this will be pursued.

Explanation

It is not necessary to make regulation 11(1) subject to regulation 11(2)(c). These provisions can operate in isolation.

- Regulation 11(1) relates to the *timing* of the Minister's decision under regulation 11(2): s/he must make a decision within 90 days of receiving a plan.
- Regulation 11(2) sets out each of the decisions that the Minister must make in the event the Minister is satisfied of certain matters within the initial 90 day timeframe. That is, approve the plan, issue a resubmission notice, or make a decision to postpone a decision about the plan. The "must" does not relate to the *timing* of the decision, which is the initial 90 day timeframe.

Regulation 10 and Regulation 11 should remain separate because regulation 10 relates to the timing of when *further information should be provided* to the Minister and regulation 11 relates to the timing of when the Minister makes a *decision* about a plan. These events (i.e. the receipt of the additional information and the making of the Minister's decision) do not need to be linked in the regulations as the Minister considers them in context. The Minister will determine whether more time should be provided for under regulation 11(2)(c) looking at the facts in each circumstance, such as whether information has been requested under regulation 10(2) and how long is reasonable for the interest holder to provide it. However such a notice will not always delay the making of a decision under regulation 11(2)(a) or (b), as it may only be requesting a small amount of easily available information.

It is not intended that section 10(3) should amend the date on which the submission was made and/or restart the 90 day clock as set out in regulation 11(1). A submission that is made on Date "A" under section 6 has, and will always have, a submission date of Date "A" regardless of whether or not the Minister requests additional information under regulation 10. If additional time is required because additional information has been requested, a regulation 11(2)(c) decision must be made identifying the proposed timetable.

3. Issue 3

Resubmission notices do not need to be given ad infinitum.

If an applicant submits a non-compliant plan in the first instance, the regulations do not permit the Minister to refuse the plan outright. Regulation 11(2)(b) requires that the Minister must give the applicant a resubmission notice. This effectively gives the applicant at least one chance to revise the document.

If, however, after receiving a resubmission notice under regulation 11(2)(b), the applicant submits another non-compliant plan, it is open to the Minister to either:

(a) give another resubmission notice (regulation 11(3)(b)(i)) or
(b) refuse the plan (regulation 11(3)(b)(ii)).

It is at the Minister's discretion whether or not the plan is refused or a resubmission notice issued. It may be appropriate to issue resubmission notices where there has been a genuine attempt to submit a compliant plan. Other circumstances may warrant a refusal.

Regulation 11(3)(b)(ii) ensures that resubmission notices do not need to be given ad infinitum.

4. Issue 4

An explanation of how this regulation is intended to operate is below. Notwithstanding this explanation, the department accepts that the wording is unwieldy. The Parliamentary Counsel has advised the wording of this regulation could be improved and this will be pursued.

Explanation

Regulation 27(1) provides a discretion to the Minister to revoke the approval of a plan if there has been a contravention of the environmental offence provisions of the Act. In paragraph 1 Counsel suggests that the regulations may have the effect of amending the scope of the offences under the Act, with the implication this should be considered further.

The issue is presumably that in practice, if a person contravenes the environmental offence provisions of the Act, that person will not only be penalised by the penalty provisions of the Act but also by the provisions of the regulations (i.e. they may have the approval of their environment plan, if any, revoked).

The environmental offence provisions in the Act have their own penalty provisions and the regulations do not amend the scope of the offences or penalties. Rather, the environmental offence provisions merely operate as a trigger for a possible revocation of a plan under the regulations.

A relevant legal principle is that "where the operation of a regulation has an incidental punitive effect but is clearly within the authority given to make delegated legislation, the incidental effect will not result in the invalidity of the regulation."[1]

The regulation making power introduced in section 118(3) of the *Petroleum Act* confirms regulations prescribing matters for the protection of the environment are able to provide for the way in which the Minister may exercise a discretion. Thus regulation 27(1) is within the authority under which the regulations were made.

The Department notes comparable provisions in the Western Australia regulations (regulation 27(2)) and the Commonwealth environment regulations (regulation 25(2)), which have the same effect as regulation 27(1(a) and (5) of the Northern Territory regulations. Specifically, those provisions refer to contraventions under the Act and the regulations.

With regard to Counsel's second paragraph, the Department agrees that a current plan that has had its approval revoked is no longer "in force". It is for this reason that regulation 27(5) has been included in the regulations. The effect of regulation 27(5) is that, notwithstanding that the approval of a plan has been revoked and the plan is no longer "in force", the interest holder can still be guilty of an offence under, say, regulation 31, as though the plan was still "in force".

[1] Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 270 [16.7].

5. Issue 5

The Parliamentary Counsel indicates that it would be appropriate to revisit regulations 31 and 32 to improve clarity. This will be pursued.

Explanation

A proposed revision of a current plan that is approved is a "current plan" and is catered for in regulation 31.

As Counsel has noted, regulation 3 defines a "current plan" as an environment management plan approved under regulation 11 and in force. "Environment management plan" is also defined in regulation 3 to include a "proposed revision of a current plan, submitted under regulation 6 for approval". A "proposed revision" is defined in regulation 3 to mean a "... plan as it is proposed to be revised as required under Part 2, Division 3".

Regulation 15 provides that Divisions 1 and 2 of Part 2 (i.e. the submission and approval process) also apply to revisions of current plans. In other words, a proposed revision of a current plan must be submitted for approval under section 6 and approved in accordance with the process set out in regulation 11 and the approval criteria in regulation 9. If the plan is approved then it is a "current plan" as defined in regulation 3. This interpretation is consistent with regulation 32(2), which anticipates the submission and approval of proposed revisions under Division 1 and 2 of Part 2.

34 of 2016 Guardianship of Adults Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019.20

The Hon. Natasha Fyles MLA
Minister for Health
Legislative Assembly of the Northern Territory
GPO Box 3146
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Dear Minister

Re: Guardianship of Adult Regulations [No. 34 of 2016]

The Subordinate Legislation and Publications Committee met on Wednesday 23 November 2016 and considered the above regulations.

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

Please feel free to contact to discuss further if necessary.

Yours sincerely

Mr Jeff Collins, MLA
Chair

23 November 2016

Enc.

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Legal Advice from Professor Aughterson

Guardianship of Adults Regulations [No. 34 of 2016]

Regulation 3: By s 23(2) of the Act a guardian cannot make a consent decision about health care action of 'restricted health care' for the represented adult. Regulation 3 seems to exclude consent to participation in reputable trials of new forms of treatment. Is that intended?

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The Hon. Jeff Collins MLA
Chair
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Dear Minister / Jeff

Thank you for your letter of 23 November 2016 on behalf of the Subordinate Legislation and Publication Committee, regarding Regulation 3 of the Guardianship of Adults Act (the Act).

As you are aware, the Act provides a framework for the making of decisions for adults with impaired decision-making capacity in the Northern Territory. The Act was developed in accordance with the National Standards of Public Guardianship, which provide the minimum expectations of Public Guardians when acting as legal decision-makers on behalf of people with decision-making disabilities.

The national standards include the requirement to protect represented adults from harm by third parties, including from exploitation. The Act contains several safeguards in adherence with this standard, including Section 23(2) which states that a guardian cannot make a consent decision about health care actions for 'restricted health care'. Under Regulation 3 of the Act, "a 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", is included in the definition of 'restricted health care'. As such, "participation in reputable trials of new forms of treatment" is considered 'restricted health care' under the Act.

The intention of the provision

The restricted health care provisions and the exclusions regarding medical research are an intentional inclusion in the Act and are consistent with guardianship legislation in other jurisdictions.

The Northern Territory Personal Planning Act includes the same provision under its definition of "restricted health matters". Regulation 3 of the Guardianship of Adults Act ensures the two Acts are harmonised on this matter. Additionally, the provision addresses key concerns that were raised by stakeholders during the drafting of the Act.

NORTHERN TERRITORY GOVERNMENT

Process for applying for a restricted health care action

A guardian or 'interested person' (as defined by the Act) can seek approval from the Northern Territory Civil Administrative Tribunal (NTCAT) to consent to a 'restricted health care' action. The applicant would need to complete an Application for a Consent Decision about Health Care Action which can be accessed through the NTCAT website. In weighing the decision, NTCAT would consider the rationale for seeking the health care action and evaluate the request in accordance with the Guardianship Principles (detailed in Section 4 of the Act) to determine whether the action is in the best interest of the represented adult.

If you have any further queries about this issue or any other matter concerning the Guardianship of Adults Act and Regulations, please do not hesitate to contact Beth Walker, Public Guardian, at the Office of the Public Guardian at 08 8985 8148.

Yours sincerely

Natasha

NATASHA FYLES

07 FEB 2017

Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/Bylaw	Minister	Letter to Minister	Minister's Response
N/A	NT Public Sector Employment and Management By-Laws 2016	Hon. Gerry McCarthy	27/10/16	18/11/16
11 of 2016	NT Civil and Administrative Tribunal Rules	Hon. Natasha Fyles	27/10/16	25/11/16
12 of 2016	Medical Services (Royal Darwin Hospital Parking) Regulations	Hon. Natasha Fyles	27/10/16	25/11/16
21 of 2016	Local Court (General) Rules	Hon. Natasha Fyles	27/10/16	17/11/16
32 of 2016	Petroleum (Environment) Regulations	Hon. Ken Vowles	23/11/16	31/01/17
34 of 2016	Guardianship of Adults Regulations	Hon. Natasha Fyles	23/11/16	07/02/17

Appendix B: Subordinate Legislation commented on in 13th Assembly

Report	No.	Title of Regulation/Bylaw	Minister	Date
October 2016 – May 2017	34 of 2016	Guardianship of Adults Regulations	Hon. Natasha Fyles	23/11/16
	32 of 2016	Petroleum (Environment) Regulations	Hon. Ken Vowles	23/11/16
	21 of 2016	Local Court (General) Rules	Hon. Natasha Fyles	27/10/16
	12 of 2016	Medical Services (Royal Darwin Hospital Parking) Regulations	Hon. Natasha Fyles	27/10/16
	11 of 2016	NT Civil and Administrative Tribunal Rules	Hon. Natasha Fyles	27/10/16
	N/A	NT Public Sector Employment and Management By-Laws 2016	Hon. Gerry McCarthy	27/10/16