



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Legal and Constitutional Affairs Committee**

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**Report of Ministerial  
Correspondence on Subordinate  
Legislation and Publications**

**August 2021 – July 2022**

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**July 2022**



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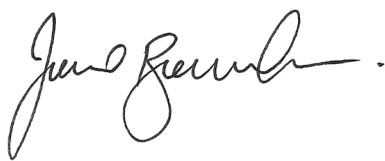
## Chair's Preface

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

During the reporting period, the Committee considered 29 pieces of subordinate legislation. As detailed in this report, the Committee's legal counsel identified concerns regarding three regulations.

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 obligations.






I thank my fellow Committee members for their bipartisan approach in seeking to ensure a high standard of rules and regulations in the Northern Territory. On behalf of the Committee, I would also 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.



**Mr Joel Bowden MLA**  
**Chair**



## Committee Members

	<b>Mr Joel Bowden</b> Member for Johnston	
	<b>Party:</b>	Territory Labor
	<b>Parliamentary Position</b>	Deputy Speaker
	<b>Committee Membership</b>	
	<b>Standing:</b>	Legal and Constitutional Affairs House Public Accounts
	<b>Chair:</b>	Legal and Constitutional Affairs Public Accounts
	<b>Deputy Chair:</b>	House
	<b>Ms Marie-Clare Boothby MLA</b> Member for Brennan	
	<b>Party:</b>	Country Liberals
	<b>Committee Membership</b>	
	<b>Standing</b>	Legal and Constitutional Affairs Standing Committee on the ICAC
	<b>Mr Steve Edgington MLA</b> Member for Barkly	
	<b>Party:</b>	Country Liberals
	<b>Committee Membership</b>	
	<b>Standing:</b>	Legal and Constitutional Affairs
	<b>Mr Mark Monaghan MLA</b> Member for Fong Lim	
	<b>Party:</b>	Territory Labor
	<b>Parliamentary Position</b>	Government Whip, Acting Deputy Speaker
	<b>Committee Membership</b>	
	<b>Standing:</b>	Legal and Constitutional Affairs Public Accounts Standing Orders and Members' Interests House
	<b>Deputy Chair:</b>	Legal and Constitutional Affairs Public Accounts
	<b>Mr Dheran Young</b> Member for Daly	
	<b>Party</b>	Territory Labor
	<b>Committee Membership</b>	
	<b>Standing</b>	Legal and Constitutional Affairs House
On 24 September 2021 Mr Lawrence Costa MLA, Member for Arafura, was discharged from the Committee and Mr Dheran Young MLA, Member for Daly was appointed.		

## **Committee Secretariat**

Committee Secretary: Julia Knight

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## Terms of Reference

### Standing Order 178

#### ***Legal and Constitutional Affairs Committee***

- (1) A Legal and Constitutional Affairs Committee will be appointed at the commencement of each Assembly to inquire into and report on such constitutional and legal matters as may be referred to it by:
  - (a) the Attorney-General, or
  - (b) a resolution of the Assembly.
- (2) The Committee will consist of 5 members.

### Sessional Order 10

#### ***Subordinate Legislation and Publications Committee Duties Assigned to Legal and Constitutional Affairs Committee***

The Assembly suspends the requirement to appoint a separate Subordinate Legislation and Publications Committee as required under Standing Order 176 and assigns all of the duties under that Standing Order to be undertaken by the Legal and Constitutional Affairs Committee as established under Standing Order 178.

### Standing Order 176

#### ***Subordinate Legislation and Publications Committee***

- (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 should 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, and
  - (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 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*.

Adopted 20 October 2020

# 1 Introduction

- 1.1 Pursuant to Sessional Order 10, the Legal and Constitutional Affairs Committee has been given the duties of the Subordinate Legislation and Publications Committee to examine and report on all instruments of a legislative or administrative character that the Assembly may disallow or disapprove and advise the Assembly whether the instrument has sufficient regard to the rights and liberties of individuals and the institution of Parliament.
- 1.2 Committees to examine subordinate legislation against such terms are common in Westminster style Parliaments. This scrutiny assists the Parliament to ensure other bodies use their delegated power to make laws according to certain principles. Those principles are detailed in Standing Order 176(3) of the Committee's Terms of Reference.
- 1.3 Subordinate legislation is any regulation, rule or by-law made under an Act.<sup>1</sup> Subordinate legislation takes effect from the time it is notified in the *Northern Territory Government Gazette*, or from the time specified in the legislation.<sup>2</sup> 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 1978*, there is a statutory requirement for all such instruments to be presented to the Assembly within six sitting days of its notification in the *Gazette*.<sup>3</sup>
- 1.4 However, as provided for in section 63C(1) of the *Interpretation Act*, a failure to table subordinate legislation in the Assembly does not affect the validity of the subordinate legislation, but may be the subject of a referral by the Assembly to the committee responsible for the examination of instruments of a legislative character or another committee of the Assembly.
- 1.5 The Committee obtains independent legal advice on whether an instrument raises any issues. It will then refer issues raised to the relevant Minister for response. If issues arise warranting the Assembly's immediate attention, the Committee reports that subordinate legislation to the Assembly. It also provides periodic reports such as this to the Assembly of its correspondence with Ministers to account to the Assembly for the work it has done and place on the public record the issues noted and the explanations given.
- 1.6 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 section 28 of the *Public Sector Employment and Management Act 1993* and section 12 of the *Financial Management Act 1995*, all Northern Territory government departments are required to present annual reports and audited financial statements to the appropriate Minister for tabling in the Assembly.

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<sup>1</sup> *Interpretation Act 1978* (NT), ss 17, 63 & 63A

<sup>2</sup> *Interpretation Act 1978* (NT), s 63(B)

<sup>3</sup> *Interpretation Act 1978* (NT), ss 63(b) & 63A (2)(b)

- 1.7 Independent Officers, such as the Auditor-General, Ombudsman and Independent Commissioner Against Corruption; 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 in the current reporting period all agencies, independent officer, statutory authorities, and government owned corporations met their relevant reporting requirements.

## 2 Disallowance of Subordinate Legislation

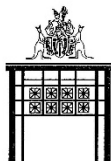
- 2.1 Pursuant to section 63C(3) of the *Interpretation Act*, the Assembly may disallow subordinate legislation by motion; notice of which must be given within 12 sitting days of the tabling of the subordinate legislation. This disallowance power enables the Assembly to supervise how other bodies such as the Administrator uses the Assembly's law-making power that has been delegated to them.
- 2.2 As indicated previously, if the Committee identifies issues of concern, it will first seek to resolve the matter with the responsible Minister. However, if the Committee cannot otherwise resolve the matter and is of the opinion that subordinate legislation, or a provision of subordinate legislation, ought to be disallowed, Standing Order 176(4) stipulates that the Committee:
  - (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 and
  - (b) if the Assembly is not meeting, may refer its opinion and the grounds thereof to the authority by which the instrument was made.
- 2.3 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.
- 2.4 Where the Assembly passes a resolution of disallowance, section 64 of the Act places 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.

### Protective Disallowance Notices

- 2.5 Given the Committee's role in relation to subordinate legislation, it is vital that it concludes its consideration of an instrument before the end of the disallowance period to meet the requirements of the Committee's terms of reference, and to enable the Assembly to give effect to any recommendations to disallow the instrument.
- 2.6 If it appears the 12 sitting day disallowance period for an instrument will expire before the Committee can resolve any concerns, it may ask the Chair to give the Assembly a notice of motion to disallow the regulation in order to extend the disallowance period. The effect of this is to extend the disallowance period until the notice of motion is finally dealt with.

### 3 Ministerial Correspondence on Subordinate Legislation

#### Local Government (General) Regulations No. 9 of 2021



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Legal and Constitutional Affairs Committee

REF: COMM2020/00013.39

Hon Chanston Paech MLA  
Minister for Local Government  
Legislative Assembly of the Northern Territory  
GPO Box 3146  
Darwin NT 0801

Dear Minister

*Chansey,*  
**Re: Local Government (General) Regulations (No. 9 of 2021)**

The Legal and Constitutional Affairs Committee is considering the Local Government (General) Regulations (No. 9 of 2021) in accordance with Standing Order 176(3).

The Committee has received the attached comments on the regulations from its independent legal counsel and seeks your advice on the issues raised.

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 15 October 2021.

Thank you for your assistance.

Yours sincerely

*Joel Bowden*  
Mr Joel Bowden MLA  
Chair  
21 September 2021



## Advice from Professor Aughterson to the Legal and Constitutional Affairs Committee

### ***Local Government (General) Regulations 2021 (No 9 of 2021)***

Reg 59:<sup>1</sup> this regulation details the content of minutes of meetings, including council meetings. At 59(g), it includes details of times where a member arrives late for a meeting or leaves early. However, it does not require the recording of attendance; that is, whether the member attended at all. This is relevant to reg 101 (see below), which deals with absences without permission of the council. This issue is also relevant to the payment of allowances: see regs 65 to 67.

Regs 65-67:<sup>2</sup> these regulations relate to the payment of allowances, including attendance at meetings of the council. It is noted that for 'the extra meeting allowance' under reg 67, a proportion of the allowance can be claimed if the member was present for at least 75% of the meeting, while with attendance at ordinary meetings of council under reg 66(b) no percentage of attendance is specified.

Reg 101:<sup>3</sup> section s 47(2)(o) of the Act provides that a person is disqualified from office as a member of a council if the person is absent, without permission of the council *in accordance with the regulations*, from 2 consecutive ordinary meetings of the council. Reg 101, which implements the regulatory power under s 47(1)(o), deals with the recording of a resolution of absence and notification to the member. However, neither the Act nor regulations define what is meant by 'absent'. For example, if a member is present for only a small fraction of the meeting are they absent from the meeting? There is a further issue in that, as noted above, under reg 59 it is not required that the minutes of the meeting record absences, only late arrival and early departure.

Regs 71-81:<sup>4</sup> ss 120ff of the Act deal with complaints made against council members. While certain processes are set out in the Act, s 122(4) provides that the 'regulations may prescribe any other procedures to be undertaken by the CEO or council on receipt of a complaint'. Complaints may be dealt with by the council, a council panel, a third party, or by the 'prescribed corporation' (the Local Government Association: see reg 98): s 122(2) and s 124 of the Act. Where the complaint is referred to the prescribed corporation, s 128(5) of the Act provides:

The prescribed corporation panel may obtain information in any way it considers appropriate and is not bound by the rules of evidence, however the rules of natural justice apply

Any referral to a third party is only a preliminary step, in the sense that the third party provides advice to the council and it is the council that makes the final decision: see s 125 of the Act.

Where the decision is to be made by the council or a council panel, as distinct from the prescribed corporation, the processes and procedures are left to be determined by regulations: see s 122(4) of the Act. However, unlike s 128(5) of the Act which applies to the prescribed corporation (see above), in relation to the council and council panel there is nothing in the regulations going to the issue of procedural fairness. Also, there is no reference to any capacity of the council or council panel to call for or consider any additional material or evidence or of any right of the complainant and respondent to appear before and address the council or council panel. Compare s 128(3) where the matter is referred to the prescribed corporation:

<sup>1</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(g).

<sup>2</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(g).

<sup>3</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(g).

<sup>4</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(b) and (3)(g).

If the prescribed corporation panel decides to proceed to consider the complaint, the prescribed corporation panel must give the complainant and the respondent an opportunity to make representations to the panel.

Contentious issues might arise, that require clarification by the decision maker. Also, as the regulations stand there is no opportunity for the complainant to respond to anything said or allegations made by the council member in the latter's response to the complaint. It would seem appropriate to at least give the council and council panel the right to obtain further evidence or material and to include an obligation to afford procedural fairness.

As a separate issue, reg 75 deals with information to be given to the decision maker. While regs 75(1) and 75(3) require the CEO to give both the applicant's and respondent's material to the prescribed corporation, the CEO is required to give to the council or council panel (as appropriate) only the response of the respondent. It is noted that by s 120 of the Act, the complaint is lodged with the CEO.

Reg 88:<sup>5</sup> this regulation deals with the review or correction of errors relating to specified municipal parking decisions. Subregulation 88(7) provides: 'A decision under subregulation (6) is reviewable'. While generally, that might be consistent with the general power under s 343 of the Act, in the present case reg 88(7) appears to be inconsistent with s 322(1) of the Act, in the sense of extending the operation of that provision. Section 322(1) provides:

*A reviewable decision* is a decision that is designated as reviewable:

- (a) by this Act (or a by-law under this Act); or
- (b) by resolution of the council.

There is no provision for designation by regulation. Also, decisions, reviewable by NTCAT are specified at s 327 and Schedule 2 of the Act and do not extend to reviewable decisions designated by regulation.

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<sup>5</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order176(3)(a).



MINISTER FOR LOCAL GOVERNMENT

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Mr Joel Bowden MLA  
Chair  
Legal and Constitutional Affairs Committee  
GPO Box 3721  
DARWIN NT 0801

Dear Mr Bowden

Joel

Thank you for your letter of 21 September 2021, seeking responses to comments on the *Local Government (General) Regulations 2021* received from the Legal and Constitutional Affairs Committee's independent legal counsel, Professor Ned Aughterson.

A response has been prepared for each of the comments, providing the policy intent and rationale for the regulations, provisions in the *Local Government Act 2019* and the *Interpretation Act 1978* that complement or support the regulations. The comments and responses are provided at **Attachment A**.

I thank the Committee for its interest in local government matters.

Yours sincerely

CHANSEY PAECH

## Attachment A

### LOCAL GOVERNMENT (GENERAL) REGULATIONS 2021 (NO 9 OF 2021)

Below are responses to comments made on the *Local Government (General) Regulations 2021* from the Legal and Constitutional Affairs Committee's independent legal counsel.

*Regulation 59: this regulation details the content of minutes of meetings, including council meetings. At 59(g), it includes details of times where a member arrives late for a meeting or leaves early. However, it does not require the recording of attendance; that is, whether the member attended at all. This is relevant to reg 101 (see below), which deals with absences without permission of the council. This issue is also relevant to the payment of allowances: see regs 65 to 67.*

**CM&C response** – Section 101(2)(a)(i) of the *Local Government Act 2019* (the Act) requires that the minutes of a council meeting (or audit committee, council committee and local authority meetings) to be in writing and set out the names of the members present at the meeting. This is where attendance at the meeting is recorded.

*Regs 65-67: these regulations relate to the payment of allowances, including attendance at meetings of the council. It is noted that for 'the extra meeting allowance' under reg 67, a proportion of the allowance can be claimed if the member was present for at least 75% of the meeting, while with attendance at ordinary meetings of council under reg 66(b) no percentage of attendance is specified.*

**CM&C response** – The ordinary allowance is paid to a council member for being a member to assist in carrying out their role and is not only for attending ordinary meetings but also preparing for meetings, attending social functions as a representative of the council, constituency responsibilities, and representing the council outside the local government area, among other things, (see regulation 66(1)). It is for this reason that payment of the ordinary allowance is not tied to a member being present at ordinary meetings as it encompasses more roles than that. However, if a council member is absent without permission of the council from two consecutive ordinary meetings, the council member is disqualified from office (see section 47(1)(o) of the Act).

In contrast, the extra meeting allowance is paid for attendance at a meeting that is not an ordinary meeting of the council. That is, payment for a role that is over and above what is covered under the ordinary allowance. The extra meeting allowance is paid on a per-meeting basis. The policy rationale for the extra meeting allowance being tied to a percentage of attendance at an extra meeting is to ensure that this allowance is paid for genuinely attending and participating in that extra meeting. As a standard rule, 75% of attendance at the extra meeting was considered to provide some comfort that a council member genuinely attended and participated in the meeting.

*Reg 101: section s (sic) 47(2)(o) of the Act provides that a person is disqualified from office as a member of a council if the person is absent, without permission of the council in accordance with the regulations, from 2 consecutive ordinary meetings of the council. Reg 101, which implements the regulatory power under s 47(1)(o), deals with the recording of a resolution of absence and notification to the member. However, neither the Act nor regulations define what is meant by 'absent'. For example, if a member is present for only a small fraction of the meeting are they absent from the meeting? There is a further issue in that, as noted above, under reg 59 it is not required that the minutes of the meeting record absences, only late arrival and early departure.*

**Attachment A**

**CM&C response** – The ordinary meaning of ‘absent’ is relied upon. The *Macquarie Dictionary* (6<sup>th</sup> ed, 2013) defines absent as: ‘not in a place at a given time; away’. The date and time for a council meeting is set; a council member who is absent for the whole time that the meeting is running is taken to be absent. Usually, council members who know that they will absent for a meeting (i.e. will not attend the meeting at any time, as opposed to running late or leaving the meeting early or for some time during the meeting), send their apologies beforehand.

Whether a council member is present is recorded in the meeting minutes in accordance with section 101(2)(a)(i) of the Act. If a council member is absent, the council resolves whether or not to give permission for the absence.

A council member who is repeatedly absent from ordinary council meetings and does not provide an apology is likely to not receive permission from the council for such absences. This would trigger a disqualification under section 47(1)(o) of the Act if the member is absent without permission from the council from two consecutive meetings.

If a council member is repeatedly late to council meetings without an acceptable reason, this may be raised as a contravention of the code of conduct (see Schedule 1 of the Act). For example, the member may be held to be acting without reasonable care and diligence in performing official functions, or showing a lack of courtesy.

*Regs 71-81: ss 120ff of the Act deal with complaints made against council members. While certain processes are set out in the Act, s 122(4) provides that the ‘regulations may prescribe any other procedures to be undertaken by the CEO or council on receipt of a complaint’. Complaints may be dealt with by the council, a council panel, a third party, or by the ‘prescribed corporation’ (the Local Government Association: see reg 98): s 122(2) and s 124 of the Act. Where the complaint is referred to the prescribed corporation, s 128(5) of the Act provides:*

*The prescribed corporation panel may obtain information in any way it considers appropriate and is not bound by the rules of evidence, however the rules of natural justice apply*

*Any referral to a third party is only a preliminary step, in the sense that the third party provides advice to the council and it is the council that makes the final decision: see s 125 of the Act.*

*Where the decision is to be made by the council or a council panel, as distinct from the prescribed corporation, the processes and procedures are left to be determined by regulations: see s 122(4) of the Act. However, unlike s 128(5) of the Act which applies to the prescribed corporation (see above), in relation to the council and council panel there is nothing in the regulations going to the issue of procedural fairness. Also, there is no reference to any capacity of the council or council panel to call for or consider any additional material or evidence or of any right of the complainant and respondent to appear before and address the council or council panel. Compare s 128(3) where the matter is referred to the prescribed corporation:*

*If the prescribed corporation panel decides to proceed to consider the complaint, the prescribed corporation panel must give the complainant and the respondent an opportunity to make representations to the panel.*



## Attachment A

*Contentious issues might arise, that require clarification by the decision maker. Also, as the regulations stand there is no opportunity for the complainant to respond to anything said or allegations made by the council member in the latter's response to the complaint. It would seem appropriate to at least give the council and council panel the right to obtain further evidence or material and to include an obligation to afford procedural fairness.*

*As a separate issue, reg 75 deals with information to be given to the decision maker. While regs 75(1) and 75(3) require the CEO to give both the applicants and respondent's material to the prescribed corporation, the CEO is required to give to the council or council panel (as appropriate) only the response of the respondent. It is noted that by s 120 of the Act, the complaint is lodged with the CEO.*

**CM&C response** – The policy rationale behind a council (or council panel) dealing with a code of conduct complaint is to have a peer-based review of the conduct for a member who is alleged to have contravened the code of conduct. It is not intended to be an adversarial system with a punitive approach, but rather a complaint resolution approach that encourages good behaviour and provides a timely decision within 90 days of the receipt of the complaint (see section 126(2) of the Act). It is for this reason that one of the roles of the principal member is to promote behaviour among members of the council that meets the standards set out in the code of conduct (see section 59(1)(d) of the Act).

When dealing with a code of conduct complaint, the council will do so at a confidential session. Given that it is a peer-based review of behaviour, it is contemplated that the other council members will seek to understand the events that occurred that led to the complaint in line with their role to be properly informed to enable participation in the deliberations of the council (see section 44(1)(d) of the Act). This may include obtaining further evidence or material.

Under section 121 of the Act, a council is required to adopt a policy in relation to a contravention of the code of conduct. This policy is approved by council resolution. Such a policy would likely detail the objectives of the council's approach to handling code of conduct complaints, and could, for example, clarify that the council will seek further evidence or material from parties when appropriate. All council policies are publicly available and therefore subject to public scrutiny.

In contrast, the prescribed corporation panel provides an independent and sector-focused consideration of the complaint. It is for this reason that the prescribed corporation is provided with the power to obtain information in any way it considers appropriate (without being bound by the rules of evidence) including giving the complainant and the respondent an opportunity to make representations. However, the prescribed corporation panel must abide by the rules of natural justice.

With regards to the separate issue raised, while the complaint is lodged with the CEO of the council, section 122(1) of the Act requires the CEO to refer the 'complaint' received under section 120 of the Act to the council as soon as practicable. The 'complaint' is made in the approved form, which includes the allegations as well any attachments (such as witness statements). Of note, the council determines whether the complaint will be referred to a council panel.

For reference, a copy of the approved form of the complaint is available here:  
[https://cmc.nt.gov.au/data/assets/pdf\\_file/0017/1020950/breach-code-conduct-complaint-form-210706.PDF](https://cmc.nt.gov.au/data/assets/pdf_file/0017/1020950/breach-code-conduct-complaint-form-210706.PDF).

## Attachment A

*Reg 88: this regulation deals with the review or correction of errors relating to specified municipal parking decisions. Subregulation 88(7) provides: 'A decision under subregulation (6) is reviewable'. While generally, that might be consistent with the general power under s 343 of the Act, in the present case reg 88(7) appears to be inconsistent with s 322(1) of the Act, in the sense of extending the operation of that provision. Section 322(1) provides:*

*A reviewable decision is a decision that is designated as reviewable:*

- (a) by this Act (or a by-law under this Act); or*
- (b) by resolution of the council.*

*There is no provision for designation by regulation. Also, decisions, reviewable by NTCAT are specified at s 327 and Schedule 2 of the Act and do not extend to reviewable decisions designated by regulation.*

**CM&C response** – Sections 21 and 51 of the *Interpretation Act 1978* applies to section 322(1)(a) of the Act and provides that the phrase 'by this Act' also means 'by the regulations'. In other words, a reviewable decision can be designated under regulations made under the Act. For reference, the relevant provisions of the *Interpretation Act 1978* are extracted below:

**21 By, under or pursuant to Act**

*In an Act, **by, under, pursuant to or in pursuance of** that Act or another Act means by, under, pursuant to or in pursuance of that Act or other Act or a statutory instrument under that Act or other Act.*

**51 Reference to Act includes reference to statutory instruments under Act**

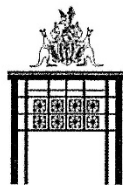
*(1) In an Act, a reference (either generally or specifically) to a law or statutory instrument, or a provision of a law or statutory instrument, includes a reference to the statutory instruments in force under the law, instrument or provision.*

*(2) In this section:*

***law** includes an Act of the Commonwealth or a State or Territory.*

This is the intended interpretation, noting that sections 38(1)(b), 188(4)(a) and (d) and 189 of the Act also contemplate that Act also includes regulations made under the Act.

A reviewable decision under regulation 88(6), if pursued, would result in a decision under section 325 of the Act or no decision by the council (see section 326). Sections 325 and 326 of the Act are specified in the fourth and fifth entries in Schedule 2 of the Act, which designate these as NTCAT reviewable decisions (see section 327 of the Act).



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Legal and Constitutional Affairs Committee

REF: COMM2020/00013.51

Hon Chanston Paech MLA  
Minister for Local Government  
Legislative Assembly of the Northern Territory  
GPO Box 3146  
Darwin NT 0801

Dear Minister

*Chansey,*  
**Re: Local Government (General) Regulations (No. 9 of 2021)**

Thank you for your correspondence of 5 October 2021 responding to the advice received from the Committee's independent legal counsel, Professor Ned Aughterson, regarding the aforementioned regulations.

Following consideration, at its meeting of 26 October 2021 the Committee resolved to refer your response relating to regulations 71 – 81 to Professor Aughterson for further advice given its concern regarding reliance on the adoption of policies that are not legally enforceable to ensure that administrative decision-makers accord procedural fairness to those affected by the decisions.

In order to finalise its consideration of the regulations before the end of their disallowance period, the Committee seeks your response to the issues raised in the attached additional advice from Professor Aughterson by close of business Wednesday 17 November 2021.

Thank you for your assistance in this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joel Bowden', followed by a period.

Mr Joel Bowden MLA  
Chair  
14<sup>th</sup> November 2021



## **Additional Advice from Professor Aughterson to the Legal and Constitutional Affairs Committee**

### **General Comments**

- 1 As is noted below, the ministerial responses include reference to the adoption of policies or administrative processes to meet shortcomings in the regulations. However, the difficulty with any such response is that policies and guidelines are not statutory instruments and, as such, they are not legally enforceable (compare the question of the extent to which they can or should be taken into account in the exercise of an administrative discretion). For an overview of the considerable case law in relation to this issue, see *Save Beeliar Wetlands (Inc) v Jacob* [2015]WASC 482, [123]-[149].
- 2 It is of course axiomatic that generally the rights and obligations of citizens are prescribed by Acts or subordinate legislation, with any issues in relation to those rights and obligations ultimately being settled by the courts. Where, pursuant to delegated authority under legislation, administrative bodies or individuals make decisions that impact rights, those decisions are subject to judicial review. The difficulty with judicial review (leaving to one side the question of whether individual citizens are aware of the right or have the capacity to seek judicial review), is that the scope of the review is narrowly confined. It is not a rehearing on the merits.
- 3 In those circumstances, and given that generally policies are not legally enforceable, it is generally preferable to set out relevant obligations in relation to procedural fairness in the Act or regulations – as was done here in relation to matters before the prescribed corporation panel. The advantage of clearly setting out those rights in the Act or regulations is that it informs the decision maker and the persons affected by any decision as to what steps should be taken, does not leave the process to uncertain and potentially inconsistent administrative action, and makes clear when any legally enforceable breach arises.

### **General Regulations 71-81**

- 4 In my original notes, a distinction was drawn between the procedures set in place under the Act and regulations for a prescribed corporation panel, on the one hand, and for a council or council panel on the other hand. In particular, it was said in relation to the latter that:
  - (a) There is no provision relating to procedural fairness;
  - (b) No provision allowing the complainant and respondent to appear before and address the council or council panel; and
  - (c) No reference to any capacity of the council or council panel to call for or consider any additional material or evidence.
- 5 In relation to (a) and (b), as is noted above, in the Ministerial response it is stated that the policy objective is to have a peer-based review of the alleged conduct and that:

It is not intended to be an adversarial system with a punitive approach, but rather a complaint resolution process that encourages good behaviour and provides a timely decision within 90 days of the receipt of the complaint (see section 126(2) of the Act). It is for this reason that one of the roles of the principal member

is to promote behaviour amongst members of the council that meets the standards set out in the code of conduct (see section 59(1)(d) of the Act).

However, this overlooks that there are consequences of a punitive nature for the council member of any finding of a contravention of the code of conduct. Where there is such a finding, then by s 123(3)(b) of the Act the council or council panel can issue a reprimand and/or recommend that the person attend training, mediation or counselling, while by s 126(2) of the Act notice of the decision is given to the complainant. Also, by reg 80(3), the CEO must table a summary of the decision at the next ordinary meeting of the council, which, presumably, could impact the standing of the council member. The only difference between these powers under the Act and that of the prescribed corporation panel is that the latter may also make any other recommendation it considers appropriate. Also, in relation to the prescribed corporation panel, its decision is reviewable before NTCAT (see Schedule 2 of the Act) and, by s 130, where there is a 'recommendation', application may be made to NTCAT to deal with any failure to comply with that recommendation.

- 6 It remains that the decision by the council or council panel does impact the rights of the council member, so that the usual principles relating to procedural fairness should apply. As stated in *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, [30] in 'the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions'. Individual rights are affected by any council or panel decision relating to conduct and it is not simply a decision that affects the public at large, in which event there is not likely to be a duty to provide procedural fairness: see *Kioa v West* (1985) 159 CLR 550, 582, 584, 619-620, 632-633. That individual rights are impacted by the council or council panel decision is not altered by the fact that under s 126(3) of the Act, the complainant or respondent may apply to the prescribed corporation for consideration of the complaint. It is also noted that where such an application is made and as the regulations are presently framed, the prescribed corporation panel might be looking at different material than was before the council or council panel.
- 7 Also in relation to (a) and (b), in the ministerial response it is stated that by s 121 of the Act a council is required to adopt a policy in relation to a contravention of a code of conduct and that any policy would 'likely' detail the objectives and 'could' clarify that the council will seek further evidence or material from parties 'when appropriate'.
- 8 The difficulty with the enforceability of policies is noted above under the heading 'General Comments'. Also, the use of words such as 'likely' and 'could' are indicative of the uncertainty of policies. The use of the term 'when appropriate' suggest another difficulty. Policies tend to deal with the factors to be taken into account in the exercise of an administrative discretion. They are not binding on the decision maker, as that would constitute a fettering of the administrative discretion: see discussion in *Minister for Immigration and Border Protection*, referred to under the heading 'General Comments'.
- 9 In relation to (c), with reference to the capacity of the council or council panel to call for or consider any additional material or evidence, in the ministerial response a distinction is drawn between the role of the council or council panel

and a prescribed corporation panel, which ‘provides an independent and sector-focused consideration of the complaint’. It is added that it is ‘for this reason that the prescribed corporation is provided with the power to obtain information in any way it considers appropriate’ (see s 128(5) of the Act). In relation to the council or council panel it is stated:

When dealing with a code of conduct complaint, the council will do so at a confidential session. Given that it is a peer-based review of behaviour, it is contemplated that the other council members will seek to understand the events that occurred that led to the complaint in line with their role to be properly informed to enable participation in the deliberations of the council (see section 44(1)(d) of the Act). This may include obtaining further evidence or material.

In relation to the obtaining of further evidence or material, that raises the question of the authority of the council or council panel to require the production of additional material or evidence, in the absence of any power given under the Act or regulations. As has been noted, generally policies are not legally enforceable.

- 10 With regard to the ‘separate issue’ raised in the last paragraph of my original note and the ministerial response, I overlooked s 121(1) of the Act and agree with the ministerial response on that issue.



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Mr Joel Bowden MLA  
Chair  
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Via email: [LA.Committees@nt.gov.au](mailto:LA.Committees@nt.gov.au)

Dear Mr Bowden

Thank you for your letter of 4 November 2021, seeking responses to further comments on the *Local Government (General) Regulations 2021* (the General Regulations) received from the Legal and Constitutional Affairs Committee's independent legal counsel, Professor Ned Aughterson.

Professor Aughterson has identified that the *Local Government Act 2019* (the Act) provides the following in relation to the prescribed corporation panel that considers code of conduct complaints:

- the panel must give the parties to a complaint an opportunity to make representations to it;
- the rules of natural justice apply; and
- the panel may obtain information in any way it considers appropriate.

Neither the Act nor General Regulations have equivalent provisions for councils or council panels that consider such complaints.

Professor Aughterson's further advice has been considered and it is agreed that spelling out these matters in the legislation is preferable.

It is intended that after the local government sector has dealt with a reasonable number of complaints under the new system in the Act, the code of conduct complaint provisions as a whole will be reviewed to identify any issues that have emerged and determine what improvements can be made to the system. The matters identified by Professor Aughterson will be addressed as part of the review.

- 2 -

As an interim measure, given the review will not commence until at least 2022-23, it is intended to develop a Ministerial Guideline under the Act on these topics. While such a guideline cannot mandate any of the matters identified by Professor Aughterson for councils and council panels, it will give all 17 local government councils useful guidance on these important procedural matters.

I thank the Committee for its interest in local government matters.

Yours sincerely



CHANSEY PAECH

16/11/2021

## Local Government (Electoral) Regulations No. 11 of 2021



### LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Legal and Constitutional Affairs Committee

REF: COMM2020/00013.40

Hon Chanston Paech MLA  
Minister for Local Government  
Legislative Assembly of the Northern Territory  
GPO Box 3146  
Darwin NT 0801

Dear Minister

*Chansey,*  
**Re: Local Government (Electoral) Regulations (No. 11 of 2021)**

The Legal and Constitutional Affairs Committee is considering the Local Government (General) Regulations (No. 11 of 2021) in accordance with Standing Order 176(3).

The Committee has received the attached comments on the regulations from its independent legal counsel and seeks your advice on the issues raised.

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 15 October 2021.

Thank you for your assistance.

Yours sincerely

*Joel Bowden*  
Mr Joel Bowden MLA  
Chair  
21 September 2021



## Advice from Professor Aughterson to the Legal and Constitutional Affairs Committee

### *Local Government (Electoral) Regulations 2021 (No 11 of 2021)*

Reg 7(4)(b):<sup>1</sup> this regulation provides that a nomination form *must* be accompanied by a recent photograph (compare reg 35(2) and (4) in relation to postal vote elections, where the photograph is optional). However, it is not apparent what consequences flow from not providing a photograph, as reg 9(2) provides that the returning officer 'must *not* reject a nomination on the ground that it is not accompanied by a photograph under regulation 7(4)(b)'. Also, it is apparent from reg 12(2)(b)(ii) that the photograph does not have to appear on the ballot paper.

Also, the Tabling Note states that 'candidate photograph requirements are modernised to allow for electronic images as well as printed photographs'. It is not evident where this is indicated in the regulations or Act: see reg 86.

Reg 8(2):<sup>2</sup> this regulation provides for the withdrawal of a candidate's nomination. Reg 8(2) provides that it must be withdrawn before 12 noon on nomination day. By reg 3, 'nomination day' for a general election is the 23<sup>rd</sup> day before election day. That begs the question of how a candidate withdraws if they wish to do so between nomination day and election day.

Reg 10(4):<sup>3</sup> this regulation provides that the Electoral Commission may determine that a candidate is not eligible to stand for the election in specified circumstances. There does not appear to be any review rights under the Act in relation to such a decision, though presumably there is the avenue of judicial review. Also, compare reg 35(8), where, in relation to postal vote elections, the returning officer may reject a candidate statement. By reg 35(9) the candidate has the opportunity to lodge an amended statement. See also reg 36(7). For the purposes of reg 10(4), there is a question of whether it would be appropriate to require advice to the candidate as to why they are ineligible and also to give them an opportunity to respond for the purposes of any reconsideration of the decision.

Reg 16(5):<sup>4</sup> regulation 16 deals with the number of scrutineers entitled to be present at a voting centre or scrutiny centre and provides that they are entitled to observe the process. Reg 16(5) then provides: 'A scrutineer who contravenes this regulation is no longer entitled to be at the voting centre or scrutiny centre'. However, there are no apparent consequences for non-compliance. Reg 77 deals with offences arising from conduct at voting a voting centre, including at reg 77(3) failure to comply with a direction given by the authorised officer. Accordingly, no consequence arises from a breach of reg 16, unless a direction has been given by the authorised officer.

Regs 50 and 51:<sup>5</sup> these regulations provide for arrangements where persons require assistance to vote. Reg 50 applies where assistance is required at the voting booth, while reg 51 applies where the person, because of their condition, is unable to enter the voting booth, so that voting takes place outside but close to the voting centre. In both cases there is provision for other persons to be present, including scrutineers. However, while reg 51(3) allows one scrutineer representing each candidate to be present, reg 50 merely provides for 'a scrutineer' to be present. It is not clear why there is a difference and it begs the question of how the scrutineer is to be selected by the authorised officer. It could lead to allegations of bias. While, by s 24(2)(a) of the

<sup>1</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(a)

<sup>2</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(g)

<sup>3</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(b)

<sup>4</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(e)

<sup>5</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(e)

*Interpretation Act*, words in the singular include the plural, it remains that there is no obligation to ensure an appropriate balance of scrutineers as with reg 51(3).

Reg 65:<sup>6</sup> this regulation deals with the scrutiny of postal voting papers. Reg 65(2)(a) provides that an authorised officer must reject postal voting papers if the authorised officer is satisfied that the postal voting papers were signed after 6 pm on election day. Consistent with that provision, reg 31(1) requires the postal voter to sign and insert the date and time on the postal vote certificate (although implicit, for greater clarity it could refer to the date and time *of signing*). However, reg 28(3) prescribes the information that must appear on the postal vote certificate and while it includes space for the person's name and signature it does not refer to the date and time of signing.

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<sup>6</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(e)





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Mr Joel Bowden MLA  
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Dear Mr Bowden

Thank you for your letter of 21 September 2021, seeking responses to comments on the *Local Government (Electoral) Regulations 2021* (the Electoral Regulations) received from the Legal and Constitutional Affairs Committee's independent legal counsel, Professor Ned Aughterson.

A response has been prepared for each of the comments, providing the policy intent, rationale and practical operation for the relevant Electoral Regulations. The comments and responses are provided at **Attachment A**.

I thank the Committee for its interest in local government matters.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Ch' followed by a stylized flourish.

CHANSEY PAECH

18/10/2021

## **LOCAL GOVERNMENT (ELECTORAL) REGULATIONS 2021 (NO 11 OF 2021)**

Below are responses to comments made on the *Local Government (Electoral) Regulations 2021 (the Regulations)* by the Legal and Constitutional Affairs Committee's independent legal counsel. For convenience, the original comments are included below in text boxes.

*Reg 7(4)(b): this regulation provides that a nomination form must be accompanied by a recent photograph (compare reg 35(2) and (4) in relation to postal vote elections, where the photograph is optional). However, it is not apparent what consequences flow from not providing a photograph, as reg 9(2) provides that the returning officer 'must not reject a nomination on the ground that it is not accompanied by a photograph under regulation 7(4)(b)'. Also, it is apparent from reg 12(2)(b)(ii) that the photograph does not have to appear on the ballot paper.*

*Also, the Tabling Note states that 'candidate photograph requirements are modernised to allow for electronic images as well as printed photographs'. It is not evident where this is indicated in the regulations or Act: see reg 86.*

**CM&C response** – Regulation 9(2), when read in conjunction with regulation 7(4)(b), means that a nominee is asked to provide a photograph alongside their nomination and that a failure to provide a photograph is not grounds to reject their nomination.

The policy intent is that while it is preferable that a candidate supply a photograph, failure to do so will not prevent a candidate from nominating. Stricter photograph requirements under previous legislation are considered to have been a barrier to people nominating, particularly in remote areas.

The repealed *Local Government (Electoral) Regulations 2008* relied on regulation 3 of the *Electoral Regulations 2004*, which require the photographs, among other matters, to be black and white and be signed on the reverse side by the nominee.<sup>1</sup> By removing these requirements, electronic images can now be submitted.

*Reg 8(2): this regulation provides for the withdrawal of a candidate's nomination. Reg 8(2) provides that it must be withdrawn before 12 noon on nomination day. By reg 3, 'nomination day' for a general election is the 23rd day before election day. That begs the question of how a candidate withdraws if they wish to do so between nomination day and election day.*

**CM&C response** – As with nominations for Legislative Assembly candidates under the *Electoral Act 2004*, nominations cannot be withdrawn between nomination day and election day.

Shortly after nominations close at 12.00pm on nomination day, the returning officer declares the names of the duly nominated candidates and, for any ward or council without wards where there are more nominees than positions, draws lots to determine the order of candidates on the ballot paper.<sup>2</sup>

<sup>1</sup> *Local Government (Electoral) Regulations 2008* reg 7(2)(b); *Electoral Act 2004* s 32(1)(f); *Electoral Regulations 2004* reg 3(1).

<sup>2</sup> *Local Government (Electoral) Regulations 2021* reg 10(1).

Allowing candidates to withdraw their nominations prior to election day would create a number of administrative difficulties. Ballot papers would have to be re-printed to reflect the amended list of candidates. There could be instances where it is not possible to get the new ballot papers to all voting locations in time for the election. Especially in relation to early voting centres. It could also impact on candidates that have designed and printed how to vote flyers or posters, relying on the original ballot paper draw.

*Reg 10(4): this regulation provides that the Electoral Commission may determine that a candidate is not eligible to stand for the election in specified circumstances. There does not appear to be any review rights under the Act in relation to such a decision, though presumably there is the avenue of judicial review. Also, compare reg 35(8), where, in relation to postal vote elections, the returning officer may reject a candidate statement. By reg 35(9) the candidate has the opportunity to lodge an amended statement. See also reg 36(7). For the purposes of reg 10(4), there is a question of whether it would be appropriate to require advice to the candidate as to why they are ineligible and also to give them an opportunity to respond for the purposes of any reconsideration of the decision.*

**CM&C response** – Under section 143 of the *Local Government Act 2019*, a prospective candidate whose nomination is rejected has standing to apply to the Northern Territory Civil and Administrative Tribunal to dispute the validity of the election.

It is contemplated that common law natural justice requirements, which in some circumstances may involve giving a prospective candidate an opportunity to respond to the grounds on which the nomination is being considered for rejection, would apply to a decision of the Electoral Commissioner under regulation 10(4) to determine that a prospective candidate is not eligible to stand for the election. However, due to the timing of lodgement of nominations, it may be administratively impractical to allow a candidate an ability to respond to a finding of ineligibility, as the prospective candidate may lodge their nomination form very close to the deadline.

As a standard approach, the Electoral Commissioner does not make determinations of eligibility at this stage, as there is insufficient time to make an assessment, gather evidence and give a prospective candidate an opportunity to respond. Nonetheless, this may still be a discretion that is appropriate to exercise in extraordinary circumstances.

*Reg 16(5): regulation 16 deals with the number of scrutineers entitled to be present at a voting centre or scrutiny centre and provides that they are entitled to observe the process. Reg 16(5) then provides: 'A scrutineer who contravenes this regulation is no longer entitled to be at the voting centre or scrutiny centre'. However, there are no apparent consequences for non-compliance. Reg 77 deals with offences arising from conduct at voting a voting centre, including at reg 77(3) failure to comply with a direction given by the authorised officer. Accordingly, no consequence arises from a breach of reg 16, unless a direction has been given by the authorised officer.*

**CM&C response** – The policy intent is that a scrutineer who contravenes the regulation can be directed to leave the voting centre or scrutiny centre by the authorised officer and lose their entitlement to be a scrutineer. Should a scrutineer leave the voting centre or scrutiny centre as directed, it is not intended that the scrutineer be subject to any further consequences such as exposure to fines or penalties.

However, should the scrutineer intentionally fail to follow a direction to leave from the authorised officer, the scrutineer could potentially commit an offence against regulation 77(3) and be liable to criminal penalty or an infringement notice for \$100.<sup>3</sup>

*Regs 50 and 51: these regulations provide for arrangements where persons require assistance to vote. Reg 50 applies where assistance is required at the voting booth, while reg 51 applies where the person, because of their condition, is unable to enter the voting booth, so that voting takes place outside but close to the voting centre. In both cases there is provision for other persons to be present, including scrutineers. However, while reg 51(3) allows one scrutineer representing each candidate to be present, reg 50 merely provides for 'a scrutineer' to be present. It is not clear why there is a difference and it begs the question of how the scrutineer is to be selected by the authorised officer. It could lead to allegations of bias. While, by s 24(2)(a) of the Interpretation Act, words in the singular include the plural, it remains that there is no obligation to ensure an appropriate balance of scrutineers as with reg 51(3).*

**CM&C response** – The policy intent is to maximise the secrecy of the person's vote and to ensure a transparent process.

Having only one scrutineer when assistance to vote is provided inside the voting centre gives an independent balance to the authorised officer but minimises the number of people that may be aware of how the person requiring assistance voted. The authorised person is the assisting person, while the scrutineer is the "witness". The authorised person would choose a scrutineer who is available. All other scrutineers are still "present" in the voting centre, such as in other parts of the room.

When voting outside the voting centre, reg 51 ensures that the scrutineers are notified and can go outside and therefore be "present" when the vote happens, such as standing around the voter's vehicle. This is the same entitlement as being in the room while someone votes in a voting compartment.

If the person voting outside the voting centre does not need further assistance, neither the authorised officer or the scrutineers should be aware of who the person voted for. If the person voting outside the voting centre does need further assistance, regulation 51 relies on the provisions of regulation 50, meaning only one scrutineer will witness the authorised officer assisting the person, therefore minimising the number of people that may be aware of how the person requiring assistance voted.

*Reg 65: this regulation deals with the scrutiny of postal voting papers. Reg 65(2)(a) provides that an authorised officer must reject postal voting papers if the authorised officer is satisfied that the postal voting papers were signed after 6 pm on election day. Consistent with that provision, reg 31(1) requires the postal voter to sign and insert the date and time on the postal vote certificate (although implicit, for greater clarity it could refer to the date and time of signing). However, reg 28(3) prescribes the information that must appear on the postal vote certificate and while it includes space for the person's name and signature it does not refer to the date and time of signing.*

<sup>3</sup> Local Government (Electoral) Regulations 2021 reg 78, Schedule 2.

**CM&C response** – Regulations 28(3) and 39(2) do not mention that the postal vote certificate must include a space for the date and time of the voter signing. However, this is addressed at an administrative level by the Northern Territory Electoral Commission by including spaces for the date and time of the voter signing on the postal vote certificate, effectively prompting postal voters on the regulation 31 requirements and allowing postal voters to easily comply with the regulation. Regulations 28(3) and 39(2) prescribe the minimum requirements for the postal vote certificate but do not limit the additional content that can be included on it.



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Legal and Constitutional Affairs Committee

REF: COMM2020/00013.52

Hon Chanston Paech MLA  
Minister for Local Government  
Legislative Assembly of the Northern Territory  
GPO Box 3146  
Darwin NT 0801

Dear Minister

*Chansey*  
**Re: Local Government (Electoral) Regulations (No.11 of 2021)**

Thank you for your correspondence of 18 October 2021 responding to the advice received from the Committee's independent legal counsel, Professor Ned Aughterson, regarding the aforementioned regulations.

Following consideration, at its meeting of 26 October 2021 the Committee resolved to refer your response relating to regulation 65 and the drafting of regulations 28(3) and 39(2) to Professor Aughterson for further advice given its concern regarding reliance on administrative processes that are not legally enforceable to meet shortcomings in the regulations

In order to finalise its consideration of the regulations before the end of their disallowance period, the Committee seeks your response to the issues raised in the attached additional advice from Professor Aughterson by close of business Wednesday 17 November 2021.

Thank you for your assistance in this matter.

Yours sincerely

*Joel Bowden*  
Mr Joel Bowden MLA  
Chair  
17 November 2021

**Additional Advice from Professor Aughterson to the Legal and Constitutional Affairs Committee**

The issue here relates to the content of the postal vote certificate as required by reg 28(3). While reg 31(2) requires the voter to insert the date and time on the certificate (though it does not say date and time 'of signing'), reg 28(3) does not specify that such a space must appear on the form. The ministerial response indicates that in fact space for the date and time of the voter signing is included on the certificate. That would seem to obviate any practical problem, providing the form with that content remains extant. On the other hand, it would seem to be a simple step to include such a requirement for the certificate in reg 28(3), given the importance of the time and date of signing in the light of reg 65(2)(a), which provides for the rejection of a vote where the authorised officer is satisfied that it was signed after 6 pm on election day.

**Note:** the aforementioned comments also relate to the drafting of reg 39(2).





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Chair  
Legal and Constitutional Affairs Committee  
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DARWIN NT 0801

Via email: [LA.Committees@nt.gov.au](mailto:LA.Committees@nt.gov.au)

Dear Mr Bowden

Thank you for your letter of 4 November 2021, seeking responses to further comments on the *Local Government (Electoral) Regulations 2021* (the Electoral Regulations) received from the Legal and Constitutional Affairs Committee's independent legal counsel, Professor Ned Aughterson.

Professor Aughterson indicated that the Electoral Regulations require a voter to insert the date and time on a postal vote certificate, but do not require these spaces for the date and time on the certificate to be provided.

It is acknowledged that including a requirement for such spaces to be on the certificate is appropriate given that the certificates must be signed before 6.00pm on election day.

The Northern Territory Electoral Commission is currently conducting a review of the 2021 Local Government Elections, with input from a steering committee that has representatives from the Local Government Association of the Northern Territory and the Department of the Chief Minister and Cabinet. It is anticipated that this review will result in recommendations for legislative changes to the Electoral Regulations, and an amendment to accommodate this change will be recommended as part of that process.

I thank the Committee for its interest in electoral matters.

Yours sincerely

CHANSEY PAECH

16/11/2021





## Residential Tenancies Amendment Regulations No. 23 of 2021



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Legal and Constitutional Affairs Committee

REF: COMM2020/00013.65

Hon Selena Uiibo MLA  
Attorney-General and Minister for Justice  
Legislative Assembly for the Northern Territory  
GPO Box 3146  
Darwin NT 0801

Dear Attorney-General and Minister for Justice,

*Selena,*

**Re: Residential Tenancies Amendment Regulations (No. 23 of 2021)**

The Legal and Constitutional Affairs Committee is considering the Residential Tenancies Amendment Regulations (No. 23 of 2021) in accordance with Standing Order 176(3).

The Committee has received the attached comments on the regulations from its independent legal counsel and seeks your advice on the issues raised.

To enable the Committee to complete its consideration of the regulations before the end of their disallowance period, the Committee requests this advice by 22 April 2022.

Thank you for your assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joel Bowden', written over the typed name and title.

Mr Joel Bowden MLA  
Chair

22 March 2022

## Advice from Professor Aughterson to the Legal and Constitutional Affairs Committee

### ***Residential Tenancies Amendment Regulations 2021 (No. 23 of 2021)***

Reg 19<sup>1</sup>: this regulation amends the prescribed residential tenancy agreement, by including a clause in relation to the keeping of pets. The prescribed residential tenancy agreement arises by virtue of s 19 of the *Residential Tenancies Act*. While s 19(1) of the Act allows the parties to settle their own tenancy agreement, s 19(4) provides that in the absence of such agreement, in terms specified by s 19(1), the tenancy agreement prescribed by regulations applies. A tenancy agreement is prescribed by reg 10 of the Regulations and appears at Schedule 2 of the Regulations.

It is not clear why reg 19 is required, given that s 65A of the Act imports the same term into all tenancy agreements, regardless of whether they arise under s 19(1) or 19(4) of the Act. Reg 19 mirrors s 65A(2) to (6) of the Act. If the intention is to include all relevant terms in the prescribed agreement, including those arising under the Act, so that the parties need to have recourse to only one document, then it begs the question of why the additional provisions at s 65A(7) and (8) of the Act were not included in reg 19. Sub-section 65A(7) provides that a notice may apply to more than one pet, while sub-section 65A(8) makes the tenant's rights subject to any prohibitions arising under certain parts of the *Unit Titles Act* and the *Unit Title Schemes Act*.

However, there is a perhaps more important issue. From the terms of the Act and the Regulations, it is not clear how, as a general proposition, the prescribed tenancy agreement under s 19(4) of the Act is to be applied: are the parties bound by the s 19(4) prescribed tenancy agreement as it existed at the time that the tenancy commenced or are they bound by the agreement as it exists from time to time; that is, as amended? In other words, because of any general approach taken to the application of the prescribed tenancy agreement, does the additional term imported by reg 19 purport to apply to tenancies that commenced prior to that amendment? If it does, then there is a conflict with s 175 of the Act. Section 175 provides that the keeping of pets provision in s 65A of the Act does not apply to a tenancy agreement entered into before the commencement of s 6 of the *Residential Tenancies Legislation Amendment Act 2020*.

In any event, where the prescribed tenancy agreement applies, there is potential for confusion on the part of landlords and tenants as to whether the amendment applies to tenancies that commenced prior to the 2020 Amendment Act, or as to whether they should have reference to reg 19 or s 65A of the Act (with its additional sub-sections) to determine their rights and obligations. Also, if the prescribed tenancy agreement that existed at the time of the commencement of the tenancy applies, it might be that there are several different operative versions of the prescribed agreement. In that event, tenants and landlords might have difficulty in isolating the version that applies to them.

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<sup>1</sup> Legal and Constitutional Affairs Committee, Terms of Reference, Standing Order 176(3)(g)



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Dear Mr  Bowden

Thank you for your letter of 22 March 2022 seeking advice on issues raised by the independent advisor to the Legal and Constitutional Affairs Committee, Professor Ned Aughterson, concerning the *Residential Tenancies Amendment Regulations 2021* (No. 23 of 2021) (the Amendment Regulations).

The Amendment Regulations amend the prescribed residential tenancy agreement contained in Schedule 2 of the *Residential Tenancies Regulations 2000* (the Regulations) by inserting clause 19 for the keeping of pets. Clause 19 mostly mirrors section 65A of the *Residential Tenancies Act 1999* (the Act) which applies from 1 January 2021 onwards.

Section 19(4) of the Act in conjunction with regulation 10 of the Regulations provides for the application of the Schedule 2 prescribed agreement in circumstances where an agreement is not signed by all parties to the agreement or is not in accordance with criteria set in section 19(1) of the Act. The prescribed agreement also applies to oral tenancies where there is no written agreement in place.

Professor Aughterson's advice raises the need for clause 19 of the prescribed agreement, given section 65A(1) of the Act already applies as a term of a tenancy agreement that a tenant may only keep a pet on premises in accordance with section 65A of the Act. This extends to all tenancy agreements including the prescribed one.

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Section 65A is an important term which should be replicated in every tenancy agreement including the prescribed one to make both parties aware of their fundamental rights and responsibilities as set out in the Act. Similar to clause 19, other clauses in the prescribed agreement match provisions in the Act for the same reason: see for example, the requirement that the tenant not maintain premises in an unreasonably dirty condition (section 51(1)(a) of the Act and clause 7(1) of the prescribed agreement) and the requirement that the landlord only enter the premises in accordance with the Act (section 68 of the Act and clause 5 of the prescribed agreement).

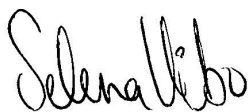
Professor Aughterson's advice notes that if the intention of clause 19 of the prescribed agreement was to mirror section 65A of the Act so the prescribed agreement need only be referred to as a complete document then it is still missing provisions mirroring section 65A(7) and (8) of the Act. Section 65A(7) and (8) are administrative in nature, clarifying the operation of the written notice to a landlord, and the interaction with the *Unit Titles Act 1975* and the *Unit Title Schemes Act 2009*. The nature of the prescribed agreement is to set out the fundamental terms of a tenancy in the absence of any valid written agreement. It is not intended to mirror the Act's provisions verbatim.

Professor Aughterson also states that it is unclear from the terms of the Act and the Regulations how the prescribed tenancy agreement is to be applied, questioning whether the prescribed agreement as it was prior to the amendments, or after the amendments, would apply to a tenancy that commenced prior to the amendments coming into effect (i.e. tenancies prior to 1 January 2021).

There are a numerous factors that may influence how the prescribed agreement might come to operation, however the underlying reason is due to the absence of a valid written agreement. Sections 65A and 65B apply to all tenancy agreements entered into after 1 January 2021, regardless of the content of the prescribed agreement, due to the operation of section 175 of the Act.

As noted above, the objective of the amendment was to make both parties aware of their fundamental rights and responsibilities. The timing of that amendment does not alter the application of the underlying rights and responsibilities set out in the Act. Accordingly I do not consider there is a need to amend the regulations.

Yours sincerely



SELENA UIBO

17 APR 2022

## Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/By-law	Minister	Letter to Minister	Minister's Response
9 of 2021	Local Government (General) Regulations	Hon Chanston Paech	21/09/21 04/11/21	05/10/21 16/11/21
11 of 2021	Local Government (Electoral) Regulations	Hon Chanston Paech	21/09/21 04/11/21	18/10/21 16/11/21
23 of 2021	Residential Tenancies Amendment Regulations	Hon Selena Uibo	22/03/22	17/04/22

## Appendix B: Subordinate Legislation commented on in 14<sup>th</sup> Assembly

Report	No.	Title of Regulation/By-Law	Minister	Date
<b>Current</b>	23 of 2021	Residential Tenancies Amendment Regulations	Hon Selena Uiho	22/03/22
	11 of 2021	Local Government (Electoral) Regulations	Hon Chanston Paech	21/09/21 04/11/21
	9 of 2021	Local Government (General) Regulations	Hon Chanston Paech	21/09/21 04/11/21
<b>October 2020 – July 2021</b>	3 of 2021	Building Amendment Regulations	Hon Eva Lawler	11/05/21
	2 of 2021	Liquor Amendment Regulations	Hon Natasha Fyles	11/05/21
	31 of 2020	Petroleum Regulations	Hon Nicole Manison	23/03/21
	N/A	Batchelor Institute of Indigenous Tertiary Education (Gift Fund) By-Laws 2020	Hon Lauren Moss	17/02/21 23/03/21
	18 of 2020	Plant Health Amendment Regulations	Hon Nicole Manison	17/02/21
	6 of 2020	Environment Protection Regulations	Hon Eva Lawler	11/11/20