LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Public Accounts Committee

Report of Ministerial Correspondence on Subordinate Legislation

June 2017 - July 2018

August 2018

Contents

Chair's Preface

In August 2017 the Assembly added two duties to the Public Accounts Committee's terms of reference. The first is consideration of the reports by statutory bodies tabled in the Assembly and the second is to review all subordinate legislation (the role previously performed by the Subordinate Legislation and Publications Committee). It is this second duty that is relevant to this report.

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.

On behalf of the Committee I would like to thank Ministers for their responses to the Committee's queries. 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.

The Committee also acknowledges the significant contribution made by Professor Aughterson, and thanks him for his diligence in advising the Committee, both for this report and over the last 13 years. Professor Aughterson has been advising the relevant Assembly Committee on subordinate legislation since 2005 and is now taking up an appointment as a Senior Member of the Queensland Civil and Administrative Tribunal. His contribution to the scrutiny of subordinate legislation in the Northern Territory is greatly appreciated.

Mrs Kate Worden MLA

Chair

Committee Members

	**Mrs Kate Worden MLA:** Member for Sanderson	
	Party:	Territory Labor
	Committee Membership	
	Chair:	Public Accounts Committee
	**Mr Terry Mills MLA:** Member for Blain	
	Party:	Independent
	Committee Membership	
	Deputy Chair	Public Accounts Committee
	**Mrs Lia Finocchiaro MLA:** Member for Spillett	
	Party:	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition
	Committee Membership	
		Social Policy Scrutiny Committee Privileges Committee Public Accounts Committee
	**Mr Paul Kirby MLA:** Member for Port Darwin	
	Party:	Territory Labor
	Parliamentary Position:	Government Whip
	Committee Membership	
		Public Accounts Committee Standing Orders Committee Select Committee on Northern Territory Harm Reduction Strategy for Addictive Behaviours
	**Mr Tony Sievers MLA:** Member for Brennan	
	Party:	Territory Labor
	Committee Membership	
	Chair	Economic Policy Scrutiny Committee House Committee Public Accounts Committee
	**Mr Gerry Wood MLA:** Member for Nelson	
	Party:	Independent
	Committee Membership	
		Economic Policy Scrutiny Committee Privileges Committee Public Accounts Committee
On 15 February 2017, Member for Stuart, Mr Scott McConnell MLA was discharged from the Committee and replaced by Member for Brennan, Mr Tony Sievers MLA. On 23 June 2017, Member for Nhulunbuy, Mr Yingiya Guyula MLA was discharged from the Committee and replaced by Member for Nelson, Mr Gerry Wood MLA.		

Committee Secretariat

First Clerk Assistant:	Mr Russell Keith
Senior Research Officer:	Ms Elise Dyer
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Terms of Reference

Sessional Order 13

Public Accounts Committee

(1) Standing Order 177 is suspended and the Public Accounts Committee appointed under that Standing Order shall continue with following terms of reference.

(2) The Public Accounts Committee has the following duties:

(a) to examine the accounts of the receipts and expenditure of the Northern Territory and each statement and report tabled in the Legislative Assembly, pursuant to the *Financial Management Act* and the *Audit Act*

(b) to report to the Legislative Assembly with such comments as it thinks fit, any items or matters in or arising in connection with those accounts, statements or reports, or in connection with the receipt or disbursement of the moneys to which they relate, to which the committee is of the opinion that the attention of Parliament should be drawn

(c) to report to the Legislative Assembly any alteration which the committee thinks desirable in the form of the public accounts or in the method of keeping them or in the method of receipt, control, issue or payment of public moneys

(d) to inquire into and report to the Legislative Assembly on any question in connection with the public accounts of the Northern territory

(i) which is referred to it by a resolution of the Assembly or

(ii) which is referred to it by the Administrator or a Minister

(e) to inquire into and report to the Legislative Assembly on any matters within the executive authority of Ministers of the Territory to which the committee is of the opinion that the attention of the Assembly should be drawn

(f) the reports by statutory bodies tabled in the Assembly, including the recommendations of the Electoral Commissioner tabled under section 313 of the *Electoral Act*

(g) in relation to any instruments of a legislative or administrative character which the Assembly may disallow or disapprove:

(i) whether that instrument has sufficient regard to the rights and liberties of individuals, including whether the instrument:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(ii) whether that instrument has sufficient regard to the institution of Parliament, including whether an instrument:

(A) is within the authorising law which allows the instrument to be made: and

(B) is consistent with the policy objectives of the authorising law; and

(C) contains only matter appropriate to subordinate legislation; and

(D) amends statutory instruments only; and

(E) allows the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons and if authorised by an Act.

(3) The Committee will consist of six Members.

(4) The Committee will elect a Government Member as Chair.

(5) The Committee will provide an annual report of its activities to the Assembly.

(6) This resolution does not change the Chair, membership or existing inquiries of the Committee.

(7) Standing Order 176 is suspended and the Subordinate Legislation and Publications Committee is dissolved.

(8) The Public Accounts Committee will have access to the records of the former Subordinate Legislation and Publications Committee and may continue the consideration of any matter commenced by that Committee.

Adopted 24 August 2017

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 subclause 2(g) 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 3.

[1] *Interpretation Act,* ss 7 and 63
[2] *Interpretation Act,* s 63(3)(c)

2 Disallowance of Subordinate Legislation

2.1 The Legislative Assembly can disallow any subordinate legislation by motion if the notice of motion is given within 12 sitting days of the instrument's tabling in the Assembly (s 63(9) of the *Interpretation Act*).

2.2 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.

2.3 The Assembly has given the Public Accounts Committee the role of examining all subordinate legislation against a range of criteria so the Committee can alert the Assembly to issues that may reflect inappropriate use of the law-making power and may warrant disallowance of the regulation or some other action.

2.4 If the Committee identifies issues of concern, it will first seek to resolve the matter with the responsible Minister. If the Committee cannot otherwise resolve the matter, it will report it to the Assembly and may recommend that the Assembly disallow all or part of the instrument.

2.5 The majority of issues identified are resolved without the need to report to the Assembly. The purpose of this report is place on the public record the Committee's correspondence with Ministers on issues raised.

Protective Disallowance Notices

2.6 The Committee's role is to report on instruments which the Assembly may disallow or disapprove. It is vital that the Committee 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 so that the Assembly is able to give effect to any recommendation to disallow the instrument.

2.7 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.

2.8 The Committee invariably would rather receive prompt responses to questions it may raise than use this somewhat unwieldly device to extend its time for considering the instrument.

3 Ministerial Correspondence on Subordinate Legislation

3 of 2017 Barramundi Fishery Management Plan Amendment 2017

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019:46

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: Barramundi Fishery Management Plan Amendment 2017 [No. 3 of 2017]

The Subordinate Legislation and Publications met on Thursday 17 August and considered the above Management Plan amendment.

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

17 August 2017

Enc.

GPO Box 3721, DARWIN NT 0801
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Legal Advice from Professor Aughterson

Barramundi Fishery Management Plan Amendment 2017 [No. 3 of 2017]

When the Management Plan is next amended, a minor typo might be corrected: the example for clause 12(1)(a) should read 'the licence number may be marked…'

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Mr Jeff Collins MLA
Chair
Subordinate Legislation and Publications Committee
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Jeff

Dear Mr Collins

Thank you for your letter of 17 August 2017, on behalf of the Subordinate Legislation and Publications Committee.

I have noted Professor Aughterson's advice on the typographical error in the Barramundi Fishery Management Plan, and will ensure that my Department of Primary Industry and Resources implements the proposed correction the next time the Plan is being amended.

Yours sincerely

KEN VOWLES 8/9/17

NORTHERN TERRITORY GOVERNMENT

PARLIAMENTARY COMMITTEES
15 SEP 2017
RECEIVED

11 of 2017 Bushfires Management (General) Regulations

DEPARTMENT OF THE LEGISLATIVE ASSEMBLY
13th Assembly

Subordinate Legislation and Publications Committee

REF: COMM2016/00019:47

Hon Lauren Moss, MLA
Minister for Environment and Natural Resources
Legislative Assembly of the Northern Territory
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Bushfires Management (General) Regulations [No. 11 of 2017]

The Subordinate Legislation and Publications met on Thursday 17 August 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

17 August 2017

Enc.

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Legal Advice from Professor Aughterson

Bushfires Management (General) Regulations [No. 11 of 2017]

Comment is made in the context of the infringement notice offences under these regulations as set out in the Schedule. It is noted that some of those offences carry significant penalties. For example, each of sections 73(1), 74(1), 82(1) and 86(1) carry penalties of 500 penalty units or imprisonment for 5 years. In contrast, the infringement notice penalty is only 4 penalty units. It is a question of whether these are appropriate offences for the issuing of infringement notices or whether the infringement penalty is appropriate.

The original idea of infringement notice offences was that they be issued for minor matters, such as minor traffic offences, to simplify procedures and to save time and cost. To encourage the person to take up that option, the infringement notice indicated a lesser penalty than might be imposed if the matter went to court. The issuing of infringement notices is allowed by s 65D of the *Interpretation Act,* while s 9 of the *Fines and Penalties (Recovery) Act* provides only a general definition of the term 'infringement notice'. There is no guidance as to the sort of offences in relation to which they should be issued: compare s 5 of the Victorian *Infringements Act* 2006, which provides that the Attorney-General may make guidelines with respect to the offences and the level of penalty suitable for being subject to infringement notices. I don't know whether, independent of the legislation, such guidelines exist in the Northern Territory (compare the quite different guidelines provided under s 114 of the NT *Fines and Penalties (Recovery) Act).*

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Ms Kate Worden, MLA
Chair
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Dear Ms ~~Worden~~ Kate

On 17 August 2017, Mr Jeff Collins wrote to me as Chair of the Subordinate Legislation and Publications Committee, regarding the Bushfires Management (General) Regulations (Regulations), in which he sought my comment on legal advice provided to the Subordinate Legislation and Publications Committee by Professor Ned Aughterson.

As that Committee has now been dissolved and its functions transferred to the Public Accounts Committee I write to you in your capacity as Chair of the Public Accounts Committee.

In his advice Professor Aughterson noted a number of serious offences in the *Bushfires Management Act* carry significant penalties, in particular those prescribed under sections 73(1), 74(1), 82(1) and 86(1), and he questions whether these offences were appropriate for issuing infringement notices as currently captured under the Regulations.

Taking into consideration the Committee's concern and following advice from the Department of Attorney General and Justice, I advise that it is the Department of Environment and Natural Resources (DENR) intention to amend the Regulations to remove the above offences from the Schedule. As part of the amendment process DENR will consider similar but less serious conduct as an alternative infringement notice offences in the Regulations.

NORTHERN TERRITORY GOVERNMENT

I would like to thank you for bringing this matter to my attention and hope that this action will address the concerns raised by the Committee.

Yours sincerely

LAUREN MOSS
5th October 2017

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Ms Kate Worden
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Dear Ms Worden

Further to my letter of 5 October 2017, regarding the Bushfires Management (General) Regulations (Regulations), I wish to clarify the intention of the Department of Environment and Natural Resources (DENR) to amend the Regulations to remove a number of serious offences from the Schedule.

This follows concerns raised by the Committee and advice from the Department of Attorney General and Justice that it would be inappropriate to treat these serious offences by way of an infringement notice.

In my letter, I identified a number of serious offences, prescribed under sections 73(1), 74(1), 82(1) and 86(1), for removal.

Upon review I would like to clarify that these were only examples as per the legal advice provided by Professor Aughterson and that it is DENR's intention to review and, where appropriate, amend the Regulations to remove all serious offences from the Schedule.

DENR advises that they intend to carry out this work within a 12 month period.

I hope this clarifies the matter further. I am happy to provide the Committee with any further detail in relation to this matter as required.

Yours sincerely

Lauren Moss

LAUREN MOSS

NORTHERN TERRITORY GOVERNMENT

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.109

Hon Lauren Moss MLA
Minister for Environment and Natural Resources
GPO Box 3146
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Dear Minister

Re: Bushfires Management (General) Regulations

Thank you for your letters of 5 and 11 October 2017 regarding the Bushfire Management (General) Regulations. The Public Accounts Committee considered your correspondence at its 11 October 2017 meeting.

The Committee welcomes the Department of the Environment and Natural Resources' (DENR) intention to review and, where appropriate, amend the Regulations to remove all serious offences from the Schedule in the Regulations. In regard to this, the Committee has agreed to forward to you the attached further advice from the Committee's legal counsel outlining factors relevant to whether it is appropriate to provide for infringement notice for offences. The Committee considers that both the severity and the inclusion of fault elements militates against a number of the offences included in the Schedule being appropriate for infringement notices.

The Committee is concerned, however, at the Department's 12 month timeframe for implementation of amendments. The Committee notes that allowing infringement notices in inappropriate circumstances can lead to a range of injustices including inconsistent application of the law, the administrative imposition of fines without adequate regard to the existence of fault elements, or the inappropriate expiation of serious offences. Such deficiencies should be addressed promptly. The Committee therefore seeks your assurance that the Bushfire Management (General) Regulations will be amended within the next three months to remove the provision for infringement notices for offences where this does not comply with the principles in the attached advice.

The Committee also considers that there should be adequate processes to ensure such issues are properly considered before providing for infringement notices. The Committee therefore recommends that consideration be given to the adoption of guidelines across Government similar to those provided by the Victorian Attorney-General.

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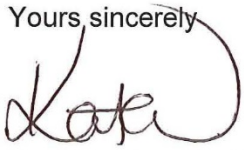
As it is the responsibility of the Committee to report to the Assembly before the end of the time allowed for disallowance if it has concerns about a regulation, it seeks your commitment by Monday, 16 October 2017 that the Regulations will be amended within 90 days of the date of this letter. If you cannot make this commitment the Committee may give notice on Thursday, 19 October 2017 of a motion to disallow the Regulations.

Thank you for your prompt attention to this matter.

Yours sincerely



Mrs Kate Worden MLA
Chair

11 October 2017

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NED AUGHTERSON
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10 October 2017

PUBLIC ACCOUNTS COMMITTEE
Infringement Notice offences

1 This note is intended as a short and general advice as to how an assessment might be made as to which offences should be classified as infringement notice offences. Any determination as to which offences are suitable for such classification rests on a balancing of a number of interests, including:

(a) The public interest:

(i) (on the one hand) in the provision of a timely and cost-effective process for dealing with the significant number of minor offences that are committed on a day-to-day basis, which would otherwise attract significant administrative and court costs

(ii) (on the other hand) in ensuring that there is an open and transparent system in the prosecution of offences (so that it is not simply a matter of executive or administrative discretion) and, where there is proven wrongdoing, in ensuring that the penalty reflects the seriousness of the offence (the public interest here includes the interests of any victim of the offence). A question here is whether the nature of the offending conduct is such that a conviction should be recorded where the offence is established (there is no recorded conviction with an infringement notice offence).

(b) The individual interest:

(i) (on the one hand) in having the matter dealt with expeditiously, paying a relatively lower penalty, avoiding court and associated costs, and avoiding a potential conviction

(ii) (on the other hand) in ensuring that individual rights are protected, particularly where the issues are complex such as where, for example, intention, recklessness or intention must be established or where there are possible justifications or excuses.

2 While it is difficult to establish a simple formula as to which offences should or should not be infringement notice offences, guidelines such as those adopted by the Commonwealth and Victoria are useful.[1] Potential considerations include:

[1] See *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*; *Attorney-General's Guidelines to the Infringements Act 2006 (Vic)*

(i) Strict liability offences are prime candidates for infringement notices. That is because the offending is more readily identifiable by the enforcement officer, as guilt depends purely on observable conduct. Where there is no subjective element to the offence such as intention, or no potential justification for the conduct, the assessment by the enforcement officer is a reliable indication of guilt.

(ii) Indictable offences should not be included, as the clear intention in relation to any such offence is that there may be trial by jury, or, in any event, the nature of the offence is such that any proceeding should be by open and public hearing.

(iii) There should be care in allowing as an infringement notice offence any offence that has fault elements (such as intention) or which are complex offences (where excuses or exceptions are available). That is not to say that such offences should never be infringement notice offences, but rather the balancing factors noted above should be considered. Also, other factors, such as where there is an identifiable victim, might militate against it being an infringement notice offence.

3 A difficulty with infringement notice offences in the NT is that it seems that they are established separately by the various regulators or agencies. That gives rise to inconsistency and, as a result, potential unfairness or lack of public confidence in the regulatory system. That could be avoided either by setting clear (as possible) criteria for the establishment of infringement notice offences or by adopting the approach taken in Victoria.

4 While Victoria does provide guidelines, it has also established a process that militates against inconsistency. Under that process, any proposal to establish an infringement notice offence must be submitted to the 'Infringement Systems Oversight Unit' (see Victorian Guidelines at p. 11). Then, if approved, the offence is included in the *Infringement (General) Regulations* (see Guidelines at p. 10). Under those regulations, all Victorian infringement notice offences from 2006 are set out in schedules to the regulations. That process also has the advantage of providing a single reference point for infringement notice offences and a ready reference as to the types of offences that have been so classified.

5 Please advise if further detail or clarification is required.

Ned Aughterson

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Mrs Kate Worden, MLA
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Public Accounts Committee
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Dear Ms Worden Kate

Thank you for your letter of 11 October 2017 regarding the Bushfire Management (General) Regulations.

Taking into consideration the Committee's concern and following advice from Office of the Parliamentary Counsel, I advise that the Department of Environment and Natural Resources intends to amend the Regulations in line with the advice of Professor Aughterson. This will involve removing from the Schedule of Infringement notice offences and prescribed amounts, nine of the 21 currently included offences. The nine to be removed include all of the offences which have a maximum penalty greater than 100 penalty units.

The proposed amendment to the Regulations will be presented for Executive Council's consideration when it meets in December 2017.

I would like to thank the Public Accounts Committee for its advice in this matter and hope that this action will address the Committee's concerns.

Yours sincerely

LAUREN MOSS
13th October 2017

NORTHERN TERRITORY GOVERNMENT

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.117

Hon Lauren Moss MLA
Minister for Environment and Natural Resources
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Bushfires Management (General) Regulations

Thank you for your letter of 13 October 2017 outlining the Department of Environment and Natural Resources' intention to present amendments to the Bushfires Management (General) Regulations for the Executive Council's consideration in December 2017.

The Committee considers that the proposed amendments will address its concerns with the Regulations and thanks you for your prompt response to this matter.

Yours sincerely

Mrs Kate Worden MLA
Chair

17 October 2017

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Mrs Kate Worden, MLA
Chair
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GPO Box 3721
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Dear Ms Worden Kate

Following advice from the Public Accounts Committee, I wrote to you on 13 October 2017 to advise that the Department of Environment and Natural Resources intended to amend the Bushfires Management (General) Regulations in line with your committee's advice. The proposed amendments were to be presented for the Executive Council's consideration when it met in December 2017.

As a result of changes to the Cabinet and Executive Council meeting schedule in December, it was not possible to fulfil that undertaking. A consequence of the next scheduled meeting of the Executive Council being in the following year resulted in a further delay relating to the requirement for the Parliamentary Counsel to make changes to date references in the amendment instrument.

The proposed amendment to the Regulations is now scheduled to be presented for Executive Council's consideration when it meets on 27 February 2018. The Department put measures in place in October 2017 to ensure that, in the interim, the infringement notice arrangements programmed for removal are not used.

I can assure your committee that all reasonable steps have been taken to meet the original timeframe, and I seek the committee's acceptance of the adjusted timeframe.

Yours sincerely

LAUREN MOSS
29th January 2018

NORTHERN TERRITORY GOVERNMENT

12 of 2017 Litchfield Council (Dog Management) By-Laws 2017

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.108

Hon Gerry McCarthy MLA
Minister for Housing and Community Development
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Litchfield Council (Dog Management) By-Laws [No 12 0f 2017]

The Public Accounts Committee considered the Litchfield Council (Dog Management) By-Laws [No 12 0f 2017] on 11 October 2017 and resolved to refer the comments received from its legal counsel to you for your consideration.

I would therefore be grateful if you could provide the Committee with your response to the attached comments.

I note that as the Committee is to consider the Regulations within the 12 sitting days that they are subject to disallowance, your prompt response would be of assistance.

Yours sincerely

Mrs Kate Worden MLA
Chair

11 October 2017

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Legal Advice from Professor Aughterson

Litchfield Council (Dog Management) By-Laws 2017 [No 12 of 2017]

By-Law 2 and 31: An offence arises under by-law 31 where a person 'abandons' a dog in the Council area. The term 'abandon' is defined in by-law 2 to include deliberately 'leaving' a dog at premises or in a public place. The term 'leaving' is not defined. A person deliberately leaves a dog at premises when, for example, they go to work. Presumably that would not be intended to create an offence. The meaning of the term 'leaving' might be clarified.

By-Law 4: This provision allows certain material to be admitted as evidence before a court, without the need to call oral evidence. By-law 4(2) is potentially confusing. It allows for the admission of details contained in 'an entry' in a register, but then refers to matters that might not appear in any specific entry in the register. The words 'in an entry' appear to be superfluous and their removal might more clearly express what seems to be intended by the provision.

By-Law 8(2)(b) and 21(5): Under by-law 8(2)(b) the Council may refuse to register a dog if the dog is dangerous and if within the specified period the owner has 'contravened' by-law 21(1) more than once. Also, by-law 21(5) provides that if the owner of a dangerous dog 'contravenes' the specified obligations within the specified period, the owner may be required to show cause why the dog registration should not be cancelled. Under these provisions, how is the fact of a contravention to be determined? The term contravention is usually used in provisions where a court is to assess whether there has been a contravention. See for example by-laws 10(1) and 11(2) of the present by-laws. Compare also, for example, s 29 of the *Public and Environmental Health Act*, where the provision is cast in terms of whether the Chief Health Officer 'reasonably believes' that a relevant contravention has occurred. Accordingly, the by-law might be better framed, for example, in terms of where a specified person believes there has been a contravention or where there has been a finding that an offence has been committed as a consequence of the contravention.

By-Law 9(1)(a): The provision creates an offence where a person keeps a dog in the Council area for a period of 3 months or longer. It is not clear whether the period must be continuous or whether it can be cumulative. Compare by-law 13(4)(b).
By-Law 11: The by-law places the obligation on the person who acquires ownership of a registered dog (which means registered under these by-laws: see by-law 2 definition of 'registered'), to notify the CEO of any change of ownership. If that person is from another council area they might not be aware of these by-laws, yet an offence arises under by-law 11(2) (though note the defence under 11(4) of reasonable excuse). In any event, would it to be preferable to place the obligation on the person transferring ownership, who, presumably, will be from the Council area. Compare by-law 21(3)(b)?

By-Law 17: There is difficulty with the time frames prescribed by this by-law. If the Council proposes to cancel, vary or suspend a licence, it must give the owner an opportunity to show cause why that step should not be taken and the Council must consider any response from the owner: by-law 17(1) and (2). There is no time frame set within which the owner must give his/her response. Yet by-law 17(3) provides that the Council must give its decision in not less than 14 days after the initial notice to show cause was given and after, presumably, it has considered the owner's response. A notice of the Council's determination under by-law 17(3) cannot be given

outside the 14 days. It begs the question of what the Council is to do where a response is not received from the owner within that time frame, and in circumstances where there is no obligation on the owner to respond within the 14 days. The same difficulty arises with by-law 21(5) to (7).

By-Law 45(2): The by-law states that strict liability applies to clause 1(b). That clause simply identifies the person who is not to be obstructed. It is not clear how strict liability can arise in those circumstances. By s 43AN(2) of the *Criminal Code*, strict liability means that there are no 'fault elements' for the offence. The usual fault elements are intention, knowledge, recklessness and negligence: s 43AH *Criminal Code*. By s 43ACA(3) of the *Criminal Code*, if a fault element is specified that is the only fault element for the offence. In other words, with an offence of strict liability it is not a defence that the action, for example, was unintended or that the person had no knowledge of certain facts. If by-law 45(2) is intended to mean that it is no excuse that he or she does not know that the person being obstructed is an officer etc., it would appear to be contrary to clause (1)(c), which requires knowledge that the person being obstructed is acting in an official capacity. It would seem that if the person knows that the other person is acting in an official capacity, they must be aware of their status or of their right to act in that capacity. The offence itself cannot be one of strict liability, as clause 1(a) requires intention.

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Mrs Kate Worden MLA
Chair
Public Accounts Committee
GPO Box 3721
DARWIN NT 0801

Dear Chair

Thank you for the Public Accounts Committee's queries regarding the Litchfield Council (Dog Management) By-laws.

I have set out your queries (in italics) and the responses from the Office of the Parliamentary Counsel and Litchfield Council, as applicable.

By-laws 2 and 31: An offence arises under by-law 31 where a person 'abandons' a dog in the Council area. The term 'abandon' is defined in by-law 2 to include deliberately 'leaving' a dog at premises or in a public place. The term 'leaving' is not defined. A person deliberately leaves a dog at premises when, for example, they go to work. Presumably that would not be intended to create an offence. The meaning of the term 'leaving' might be clarified.

The Office of the Parliamentary Counsel thanks Professor Aughterson for the comments on the definition and the offence of abandoning. The Office of the Parliamentary Counsel advises that it agrees that these could be improved and will amend them when the By-laws are next amended.

By-law 4: this provision allows certain material to be admitted as evidence before a court, without the need to call oral evidence. By-law 4(2) is potentially confusing. It allows for the admission of details contained in 'an entry' in a register, but then refers to matters that might not appear in any specific entry in the register. The words 'in an entry' appear to be superfluous and their removal might more clearly express what seems to be intended by the provision.

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The Office of the Parliamentary Counsel advises that it accepts that the words identified by Professor Aughterson could be omitted without loss of clarity, but does not agree that it is necessary. Every detail contained in a register will be a part of an entry. The Office of the Parliamentary Counsel advises that it will follow the suggestion for future by-laws, but does not consider this to be something that needs to be changed for Litchfield.

By-Law 8(2)(b) and 21(5): Under by-law 8(2)(b) the Council may refuse to register a dog if the dog is dangerous and if within the specified period the owner has 'contravened' by-law 21(1) more than once. Also, by-law 24(5) provides that if the owner of a dangerous dog 'contravenes' the specified obligations within the specified period, the owner may be required to show cause why the dog registration should not be cancelled. Under these provisions, how is the fact of a contravention to be determined? The term contravention is usually used in provisions where a court is to assess whether there has been a contravention. See for example by-laws 10(1) and 11(2) of the present by-laws. Compare also, for example, section 29 of the Public and Environmental Health Act, where the provision is cast in terms of whether the Chief Health Officer 'reasonably believes' that a relevant contravention has occurred. Accordingly, the by-law might be better framed, for example, in terms of where a specified person believes there has been a contravention or where there has been a finding that an offence has been committed as a consequence of the contravention.

Litchfield Council advises that the policy intent is for the Chief Executive Officer (CEO) or an authorised person to decide whether a contravention has occurred. If one of the conditions is considered to have been contravened, Council can prosecute for an offence against by-laws 10 and 11.

By-Law 9(1)(a): The provision creates an offence where a person keeps a dog in the Council area for a period of 3 months or longer. It is not clear whether the period must be continuous or whether it can be cumulative. Compare by-law 13(4)(b).

The Office of the Parliamentary Counsel advises that it does not agree that this is unclear. The provision talks of "a period of 3 months". A period is not constituted by two or more discontinuous periods. Indeed, Professor Aughterson compares by-law 13(4)(b), where different wording is used to make it clear that two or more discontinuous periods can be taken into account for that provision. The lack of the second limb in by-law 9(1)(a) makes it clear that such discontinuous periods cannot be taken into account for by-law 9(1).

By-Law 11: The by-law places the obligation on the person who acquires ownership of a registered dog (which means registered under these by-laws: see by-law 2 definition of 'registered'), to notify the CEO of any change of ownership. If that person is from another council area they might not be aware of these by-laws, yet an offence arises under by-law 11(2) (though note the defence under 11(4) of reasonable excuse). In any event, would it to be preferable to place the obligation on the person transferring ownership, who, presumably, will be from the Council area. Compare by-law 21(3)(b).

Litchfield Council advises that once a dog leaves the Litchfield municipality the owner is no longer bound by these By-laws. The dog (and owner) will be subject to the By-laws of the Council which they now reside in. It is the new owner's responsibility to know the By-laws of the Council in which they reside. Not notifying Litchfield Council means that Council has a record of a dog on file which no longer resides in the municipality. This is rectified when renewal notices are sent out because if the registration is not renewed, the dog is removed from the Council's database.

By-Law 17: There is difficulty with the time frames prescribed by this by-law. If the Council proposes to cancel, vary or suspend a licence, it must give the owner an opportunity to show cause why that step should not be taken and the Council must consider any response from the owner: by-law 17(1) and (2). There is no time frame set within which the owner must give his/her response. Yet by-law 17(3) provides that the Council must give its decision in not less than 14 days after the initial notice to show cause was given and after, presumably, it has considered the owner's response. A notice of the Council's determination under by-law 17(3) cannot be given outside the 14 days. It begs the question of what the Council is to do where a response is not received from the owner within that time frame, and in circumstances where there is no obligation on the owner to respond within the 14 days. The same difficulty arises with by-law 21(5) to (7).

Litchfield Council advises that the deadline will be stated in the notice and that no action will be taken before the 14 day period has expired.

By-Law 45(2): The by-law states that strict liability applies to clause (1)(b). That clause simply identifies the person who is not to be obstructed. It is not clear how strict liability can arise in those circumstances. By section 43AN(2) of the Criminal Code, strict liability means that there are no 'fault elements' for the offence. The usual fault elements are intention, knowledge, recklessness and negligence: section 43AH Criminal Code. By section 43ACA(3) of the Criminal Code, if a fault element is specified that is the only fault element for the offence. In other words, with an offence of strict liability it is not a defence that the action, for example, was unintended or that the person had no knowledge of certain facts. If by-law 45(2) is intended to mean that it is no excuse that he or she does not know that the person being obstructed is an officer etc., it would appear to be contrary to clause (1)(c), which requires knowledge that the person being obstructed is acting in an official capacity. It would seem that if the person knows that the other person is acting in an official capacity, they must be aware of their status or of their right to act in that capacity. The offence itself cannot be one of strict liability, as clause (1)(a) requires intention.

The Office of the Parliamentary Counsel advises that this is a standard provision developed by the Office of the Parliamentary Counsel over the last 10 years. It is widely used and can be found throughout the Northern Territory Statute Book. Discussion of physical elements of an offence, fault elements and strict liability is very technical. In this provision, by-law 45(1)(b) is setting out a circumstance that must be satisfied for the offence to be made out. The offence is structured according to the Department of the Attorney-General and Justice's policy preferences. It is intended that strict liability (that is, the absence of a mental element) applies only in relation to the circumstance and not the entire offence.

I thank the Public Accounts Committee for its interest in local government matters and I trust that this advice addresses the committee's queries.

Yours sincerely

GERRY MCCARTHY
24/10/2017

20 of 2017 Termination of Pregnancy Law Reform Regulations 2017

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.107

Hon Natasha Fyles MLA
Minister for Health
GPO Box 3146
DARWIN NT 0801

Dear Minister

Re: Termination of Pregnancy Law Reform Regulations 2017 [No 20 of 2017]

The Public Accounts Committee considered the Termination of Pregnancy Law Reform Regulations 2017 [No 20 of 2017] on 11 October 2017 and resolved to refer the comments received from its legal counsel to you for your consideration.

I would therefore be grateful if you could provide the Committee with your response to the attached comments.

I note that as the Committee is to consider the Regulations within the 12 sitting days that they are subject to disallowance, your prompt response would be of assistance.

Yours sincerely

Kate

Mrs Kate Worden MLA
Chair

11 October 2017

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Legal Advice from Professor Aughterson

Termination of Pregnancy Law Reform Regulations [No 20 of 2017]

Reg. 3: By this regulation, the CHO may set the credentials required for suitably qualified medical practitioners. It is not indicated how those credentials are to be made known to potential applicants or the general public. Compare regulations 5(1) and 6(1) re the gazettal of standards and guidelines and the specification of how a copy of the standards and guidelines might be obtained. See also regulation 7.

Reg. 4(5): It is not clear what is intended by this strict liability clause. By s 43AN(2) of the Criminal Code, strict liability means that there are no 'fault elements' for the offence. The usual fault elements are intention, knowledge, recklessness and negligence: s 43AH Criminal Code. By s 43ACA(3) of the Criminal Code, if a fault element is specified that is the only fault element for the offence. Against that background, regulation 4(5) provides that strict liability applies to sub-regulations (3)(b) and (4)(b). Yet those sub-regulations require the fault element of knowledge, so that strict liability cannot arise. Also, it is not clear how strict liability operates in terms of sub-regulation 12(2). That sub-regulation applies strict liability to the obtaining of confidential information under sub-regulation 12(1)(a). Does that mean that it is removing a requirement that the person knows that it is confidential or, for example, that they know that they are at a place where confidential information is being discussed? If so, how does that relate to the substantive offence under 12(1)(c) – can a person be reckless in disclosing confidential information if they don't know that it is confidential? Also, to what conduct does sub-regulation 12(1)(b) relate? That specifies a need that the person intentionally engages in conduct – does that refer to conduct under both sub-regulations (a) and (c)? If it relates to (c) only, that intent would be made clear by combing (b) and (c); that is 'the person intentionally engages in conduct that results in the disclosure of … '. If it relates to (a) as well as (c), how does that stand with the prescription of strict liability under sub-regulation 12(2)?

Reg. 8: (the following question is based on my limited knowledge of medical procedures). Regulation 8(1)(a) and (b) set out the information that must be provided where a termination is performed at not more than 14 weeks. Separate information is specified depending on whether the termination is performed using a drug or surgical procedure. There is no specified reporting requirement where some other means of termination is used. Yet, by regulation 8(1)(c), where the termination is performed at more than 14 weeks information as to the 'method of termination' must be provided, while regulation 8(2) indicates that the 'method of termination' might be by drugs or surgical procedure, or a combination of those, or by neither. In other words, it anticipates that there is some other available means of termination. That begs the question of what is the reporting arrangement where that other means of termination is used at not more than 14 weeks. It is presumed that where both drugs and a surgical procedure are used, then there must be compliance with the reporting requirements of both 8(1)(a) and 8(1)(b). Perhaps that should be made clear.

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Ms Kate Worden MLA
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Dear Ms Worden Kate

Thank you for your letter of 11 October 2017, in your capacity as Chair of the Public Accounts Committee.

You requested a response to the questions arising from legal counsel to the Public Accounts Committee who considered the *Northern Territory Termination of Pregnancy Law Reform Regulations 2017* [No 20 of 2017].

Appendix A provides a detailed response to the questions raised by legal counsel. A copy of the Northern Territory Clinical Guidelines for Termination of Pregnancy is also attached to provide further information to the Public Accounts Committee and legal counsel.

In responding to the questions raised by legal counsel regarding Regulation 4 it has been noted that subregulation (5) is problematic and the Department of Health will commence procedures for seeking approval from me and the Administrator to repeal subregulation (5) to address the issue arising through the conflicting provisions as identified by the Public Accounts Committee.

My thanks to you and the Public Accounts Committee for bringing these matters to my attention.

Yours sincerely

Natasha

NATASHA FYLES

06 NOV 2017

NORTHERN TERRITORY GOVERNMENT

APPENDIX A

Responses to questions raised by Legal Counsel for Public Accounts Committee reviewing the *NT Termination of Pregnancy Law Reform Regulations 2017*

Question 1
Regulation 3: By this regulation, the CHO may set the credentials required for suitably qualified medical practitioners. It is not indicated how those credentials are to be made known to potential applicants or the general public. Compare regulations 5(1) and 6(1) re the gazettal of standards and guidelines and the specification of how a copy of the standards and guidelines might be obtained. See also regulation 7.

Department of Health Response

Section 4 of the *Termination of Pregnancy Law Reform Act* (the Act) has these definitions:

- ***credentialed*** which means "*having the verified qualifications, training, experience, professional standing and other relevant professional attributes of a medical practitioner used for the purpose of forming a view about the competence, performance and professional suitability of the medical practitioner*"; and
- ***suitably qualified medical practitioner*** which means "*a medical practitioner who: (a) is an obstetrician or gynaecologist; or (b) is credentialed in the provision of advice, performance of procedures and giving treatment in the area of fertility control*".

Section 18(2)(f) of the Act provides for the making of Regulations by the Administrator which may "*provide for the setting and verification of, by the CHO, the credentials for suitably qualified medical practitioners*"…

Regulation 3 provides that "*The CHO may set the credentials required for suitably qualified medical practitioners*" [emphasis added].

Applying the definition of "***credentialed***" and "***suitably qualified medical practitioner***" to Regulation 3, provides medical practitioners with some guidance on the level of *qualifications, training, experience, professional standing and other relevant professional attributes* that will be required in order to meet the definition of "suitably qualified medical practitioner".

Regulation 6 provides that the CHO may set, by *Gazette* notice, the "*guidelines relating to the policies, procedures and requirements involved in the performance of terminations*" [emphasis added].

Pursuant to Regulation 6 the CHO has by *Gazette* notice set guidelines. Version 1 of guidelines is titled "Northern Territory Clinical Guidelines for Termination of Pregnancy" first published in June 2017. At Item 1.4 of the Guideline the CHO has set the credentials as those being required for recognition as a 'suitably qualified medical practitioner' as follow:

- *AHPRA registration as a specialist obstetrician or gynaecologist*
- *an award of the DRANZCOG Advanced qualification from the Royal Australian and New Zealand College of Obstetricians and Gynaecologists*
- *AHPRA registration as a medical practitioner who is currently certified under the Therapeutic Goods Administration licensing conditions to prescribe MS- 2Step*
- *AHPRA registration as a medical practitioner, who also has sufficient experience in the surgical performance of termination of pregnancy to be deemed, by an*

independent practising gynaecologist, as being competent to perform surgical termination procedures independently and safely.

- *A registrar in obstetrics and gynaecology or general practice may act as a suitably qualified medical practitioner, if acting under the supervision of a suitably qualified medical practitioner. A registrar's ability to prescribe MS-2Step in such circumstances depends on his/her certification under the Therapeutic Goods Administration (TGA) licensing conditions.*
- *A suitably qualified medical practitioner's scope of practice depends on his/her credentials. A suitably qualified medical practitioner whose credentials are restricted to TGA prescriber certification only cannot undertake surgical termination procedures. A suitably qualified medical practitioner whose credentials are restricted to surgical procedures only cannot undertake medical terminations of pregnancy.*

In accordance with Regulation 7, the CHO has made the Guidelines available on the Department of Health website and the NT Government Central website. Clearly marked links "termination of pregnancy" are visible on the homepages of these websites, which link health professionals and consumers to information about credentialing for suitably qualified medical practitioners.

A Fact Sheet on credentialing is available through these sites, which explains the relevant aspects of the credentialing process as well as a credential checklist offered as a guide for health professionals to meet their obligations. See the following link for details:

https://health.nt.gov.au/professionals/termination-of-pregnancy-abortion/credentialing-for-medical-practitioners

Prior to the commencement of the Act and Regulations on 1 July 2017 the CHO wrote to each medical provider who had indicated an interest in or willingness to perform termination of pregnancy services in the Northern Territory. The letter explained the credentialing process and provided copies of the credentialing fact sheets and sample checklist.

In addition the Women's Health Strategy Unit (WHSU) emailed and sent letters to every medical practice in the NT and the NT Primary Health Network (NTPHN) informing them of the legislative reform, the regulations, the guidelines and offering them a contact number and email to call should they have any queries.
WHSU have also offered and provided information sessions regarding termination of pregnancy law reform to all public and private medical, nursing and health professional organisations in the NT. Approximately 200 participants have attended these sessions in the period from 14 June 2017 to date.

Question 2

Regulation 4(5): It is not clear what is intended by this strict liability clause. By s 43AN(2) of the Criminal Code, strict liability means that there are no 'fault elements' for the offence. The usual fault elements are intention, knowledge, recklessness and negligence: s 43AH Criminal Code. By s 43ACA(3) of the Criminal Code, if a fault element is specified that is the only fault element for the offence. Against that background, regulation 4(5) provides that strict liability applies to sub-regulations (3)(b)and (4)(b). Yet those sub-regulations require the fault element of knowledge, so that strict liability cannot arise. Also, it is not clear how strict liability operates in terms of sub-regulation 12(2). That sub-regulation applies strict liability to the obtaining of confidential information under sub-regulation 12(1)(a). Does that mean that it is removing a requirement that the person knows that it is confidential or, for example, that they know that they are at a place where confidential information is being discussed? If so, how does that relate to the substantive offence under 12(1)(c) – can a person be reckless in disclosing confidential information if they don't know that it is confidential? Also, to what conduct does sub-regulation 12(1)(b) relate? That specifies a need that the person intentionally engages in conduct - does that refer to conduct under both sub-regulations (a) and (c)? If it relates to (c) only, that intent would be made clear by combiningg (b) and (c); that is 'the person intentionally engages in conduct that results in the disclosure of... '. If it relates to (a) as well as (c), how does that stand with the prescription of strict liability under sub-regulation 12(2)?

Department of Health Response:

Regulation 4 is intended to provide for the credentialing of suitably qualified medical practitioners. Reading subregulation (1) with subregulation (2) it becomes apparent that the CHO is to perform a function of credentialing based on information provided by a medical practitioner for that purpose. The medical practitioner is required to provide true and accurate information to the CHO for the purpose of the CHO confirming the medical practitioner is a suitably qualified medical practitioner.

If false or misleading information were to be provided by the medical practitioner then the CHO's verification of the medical practitioner as a 'suitably qualified medical practitioner' would be based on the false or misleading information, and the CHO may verify the medical practitioner is a suitably qualified medical practitioner when in fact they would not meet the criteria for this. If such circumstances were to arise it is considered it would be appropriate to apply the provisions of Part IIAA of the *Criminal Code Act* (having elements of an offence, including knowledge/intention) rather than having an offence of strict liability.

The Department has sought legal advice from the Solicitor for the Northern Territory and the Office of Parliamentary Counsel in relation to the provisions in Regulation 4 and it is agreed subregulation (5) is problematic. The Department will commence the procedure for seeking the Minister's and the Administrator's approval to repeal subregulation (5) to address the issue arising through the conflicting provisions as identified by the Public Accounts Committee.

In relation to the question about the offence of "disclosure" of confidential information in Regulation 12, the Department of Health has been advised:

> *The confidentiality of information provision has been drafted to adopt the 'standard' confidentiality offence. The reason why strict liability generally applies to the obtaining of the information in the standard provision is because it was considered that it should cover passively 'obtaining information'. Obtaining information is conduct. The default fault element would therefore be intention. However as a matter of policy, the offence should (generally) apply to unintentional obtaining of information. It doesn't matter if a*

person intended to obtain the information or not- the crux of the offence is the unauthorised disclosure of the information, however the information was obtained.

On the basis of this advice the Department of Health considers subregulation 12(2) should remain as drafted.

Question 3

Reg. 8: (the following question is based on my limited knowledge of medical procedures). Regulation 8(1)(a) and (b) set out the information that must be provided where a termination is performed at not more than 14 weeks. Separate information is specified depending on whether the termination is performed using a drug or surgical procedure. There is no specified reporting requirement where some other means of termination is used. Yet, by regulation 8(1)(c), where the termination is performed at more than 14 weeks information as to the 'method of termination' must be provided, while regulation 8(2) indicates that the 'method of termination' might be by drugs or surgical procedure, or a combination of those, or by neither. In other words, it anticipates that there is some other available means of termination. That begs the question of what is the reporting arrangement where that other means of termination is used at not more than 14 weeks. It is presumed that where both drugs and a surgical procedure are used, then there must be compliance with the reporting requirements of both 8(1)(a) and 8(1)(b). Perhaps that should be made clear.

Department of Health Response

Medical or surgical terminations of pregnancy may be performed in the Northern Territory at any time up to 23 weeks.

One of the significant differences under this Act is the ability to 'perform' a medical termination in an 'out of hospital' setting. This means that a woman may attend a medical clinic for the prescription and, subject to the meeting of all other requirements, the woman may take the drugs and the termination will be performed in a place other than in a hospital, day surgery or other clinic facility, that is, she may go home or to other accommodation.

In relation to the question about "other means" the Department of Health advises that at the time of passing the former termination of pregnancy provision under the *Medical Services Act* it was only possible to perform a surgical termination of pregnancy. In developing this Act and Regulations it was considered appropriate to allow for a similar development in medical technology to that which has occurred with the development of the termination drugs. It is possible that new technology, methodology or pharmacology will be developed and, under the regulatory framework for health services already existing in Australia, there is potential for such new services to be delivered in the Northern Territory where the Act and Regulations permit such advances. This not to say that any new method of termination would automatically be applicable or permitted in the Northern Territory. However where another means is appropriately developed and gains suitable authorisation from the relevant authorities (such as the Therapeutic Goods Administration (TGA), professional bodies) then the suitably qualified medical practitioners performing such services will be required to provide the CHO with the information.

In relation to the question about the timing of terminations (in terms of method and gestational period) the Department of Health advises that the TGA is the regulatory body responsible for the regulation of therapeutic goods in Australia. The TGA has licensed only one specific brand of medicine (which contains 2 drugs taken separately) for use in medical terminations in 'out of hospital' settings. The TGA has also imposed a condition on that licence that the drugs must only be used in an 'out of hospital' setting where the pregnancy to be terminated is not more than 63 days gestation (9 weeks).

A medical termination can still be performed after the 63 days or 9 weeks, but this must occur within a hospital setting.

Also relevant to the 14 week gestation distinction, is the application of section 9 of the Act. At that stage of the gestation two suitably qualified medical practitioners are to assess the woman and consider whether the termination of the pregnancy is appropriate in all of the

circumstances. The method of termination to be conducted is not restricted by the number of weeks of gestation, but by the location at which the termination can be performed and the requirement for two suitably qualified medical practitioners to have been consulted.

The ' NT Clinical Guidelines for Termination of Pregnancy' contains a useful diagram at page 20 which illustrates the decision making pathway for suitably qualified medical practitioners, in relation to gestational period, method of termination and locations and the relevant practice points to apply from the guidelines in each situation. These are attached for reference.

The prescribed information which is to be provided by the suitably qualified medical practitioner who performs any termination in the Northern Territory addresses the various methods of termination performed at various locations, at different gestations, but is also measuring this performance against the legislative requirements and the professional standards that apply to the suitably qualified medical practitioners. The CHO has developed an "approved form" in accordance with Regulation 11, which sets out the prescribed information to be provided by the suitably qualified medical practitioner following the performance of a termination of pregnancy. The form is consistent with the Act and Regulations.

The Northern Territory Clinical Guidelines for Termination of Pregnancy which were also attached to this letter are available at:
http://digitallibrary.health.nt.gov.au/prodjspui/bitstream/10137/1305/1/NT%20Clincal%20Guidelines%20for%20Termination%20of%20Pregnancy.pdf

36 of 2017 Racing and Betting Amendment Regulations 2017

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.169

Hon Natasha Fyles MLA
Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General

Re: Racing and Betting Amendment Regulations 2017 [No.36 of 2017]

The Public Accounts Committee considered the Racing and Betting Amendment Regulations [No 36 of 2017] on 13 March 2018 and agreed to refer the comments received from its legal counsel to you for your consideration.

I would therefore be grateful if you could provide the Committee with your response to the attached comments, particularly regarding whether Regulation 2A is within the authorising law which allows the instrument to be made.

I ask that you provide advice on this matter by 13 April 2018 to enable the Committee to conclude its consideration of this matter before the expiry of the disallowance period for the Regulations

Thank you for your assistance.

Yours sincerely

Kate

Mrs Kate Worden MLA
Chair

13 March 2018

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Comments on the Racing and Betting Amendment Regulations [No 36 of 2017]

Reg. 2A:[1] Section 69C(1)(a)(i) of the Racing and Betting Act allows the sports control body to impose a fee for approval to use NT sports information 'as prescribed by regulation'. Regulation 2A(2)(a) provides that for specified betting exchange operators the fee must be calculated 'as a percentage of the amount of commission retained or received by the betting exchange operator from bets on the specified event', while, for other betting service provides, reg. 2A(2)(b) sets a fee of not less than 1.5% and not more than 3% of the total bets. The question is whether there is a 'fee imposed as prescribed by regulation' where the regulation merely provides that it is to be calculated by reference to a percentage of an amount received, without stating what that percentage is. The regulation could be seen as delegating the authority to determine the percentage to the sports control body, without any express authority in the legislation to do so.

Compare, for example, the NSW Racing Administration Regulations, which, at reg. 16, sets a fee that does not exceed a given percentage of turnover (2.5 or 4%). However, the NSW Racing Administration Act is framed differently. While the NT Act refers to a fee 'imposed as prescribed by regulation', s 33A(2) of the NSW Act allows the racing control body to impose a fee 'in accordance with any requirements prescribed by regulations'. With the latter, it is the 'requirements' that are to be prescribed by regulations, while the actual fee is to be imposed by the racing control body 'in accordance with' those requirements. Presumably, prescribed 'requirements' can include mechanisms for the calculation of the fee, rather than setting the actual fee itself. In relation to the NT provision, there does not appear to be any other Australian legislation that uses the expression 'a fee imposed as prescribed by regulation'. However, under that provision as framed the term 'prescribed by regulations' operates directly on the words 'imposed fee' (or the latter is qualified by the former). On that basis, it seems that it is the imposed fee that must be prescribed by the regulation.

[1] See Public Accounts Committee Terms of Reference, Sessional Order 14(2)(g)(ii)(A)

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Mrs Kate Worden MLA
Chair
Public Accounts Committee
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DARWIN NT 0801

Via email: PublicAccountsCommittee.LA@nt.gov.au

Dear Mrs Worden Kate

Thank you for your letter dated 13 March 2018, where the Public Accounts Committee (the Committee) raised concerns regarding the legality of recent amendments to the Racing and Betting Regulations. Please accept my apology for the delay in the time it has taken me to respond to the Committee.

I am informed the insertion of regulation 2A(2)(a) was intended to support amendments to the *Racing and Betting Act* (the Act) in 2016 to introduce a licence that the NT Racing Commission could grant to a betting exchange operator, and to provide powers to an NT sports control body to charge a wagering operator a fee for the use of the sporting bodies information when the wagering operator frames or informs a betting market.

The Department of the Attorney-General and Justice (the Department) sought advice from the Office of the Parliamentary Counsel during the process of drafting the Regulation to ensure proper exercise of power to calculate the fee. The advice at the time of preparation of the Regulation was that it was legally valid.

The Department has since reconsidered the legality of regulation 2A(2)(a) and sought advice from the Solicitor-General. The Solicitor-General has recommended clarification of the specific percentages of commission that apply to the calculation of the fee for the purposes of regulation 2A(2)(a). I have instructed the Department to work with the Office of the Parliamentary Counsel to prepare a new regulation.

Yours sincerely

Natasha

NATASHA FYLES

1 MAY 2018

NORTHERN TERRITORY GOVERNMENT

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

Public Accounts Committee

REF: COMM2016/00010.189

Hon Natasha Fyles MLA
Attorney-General and Minister for Justice
GPO Box 3146
DARWIN NT 0801

Dear Attorney-General

Re: Racing and Betting Amendment Regulations 2017 [No.36 of 2017]

Thank you for your letter dated 1 May 2018 regarding the Racing and Betting Amendment Regulations.

The Committee was pleased to see you have instructed your Department to prepare a new regulation having obtained the advice of the Solicitor-General.

The Committee seeks your advice as to the timeframe for the making of the new regulation.

Thank you for your assistance.

Yours sincerely

Kate

Mrs Kate Worden MLA
Chair

8 May 2018

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Ms Kate Worden MLA
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Via email: pac@nt.gov.au

Dear Ms Worden

I write in response to your letter of 8 May 2018, where the Public Accounts Committee requested the likely timeframe for an amendment to be made to an invalid regulation, identified in the Racing and Betting Regulations.

While the amendment is relatively straightforward, the current legislative workload at the Office of the Parliamentary Counsel will see a drafting period of six to eight weeks. Given the normal processes required to amend regulations, including the consideration by the Regulation Impact Committee, I have been advised that the amended regulation will be provided to the Executive Committee for consideration at their meeting of 13 August 2018.

Yours sincerely

Natasha

NATASHA FYLES
15 MAY 2018

NORTHERN TERRITORY GOVERNMENT

4 Appendix A: List of Ministerial Correspondence on Subordinate Legislation

No.	Title of Regulation/Bylaw	Minister	Letter to Minister	Minister's Response
3 of 2017	Barramundi Fishery Management Plan Amendment 2017	Hon. Ken Vowles	17/08/17	08/9/17
11 of 2017	Bushfires Management (General) Regulations	Hon. Lauren Moss	17/08/17	05/10/17
11 of 2017	Bushfires Management (General) Regulations	Hon. Lauren Moss	11/10/17	13/10/17
11 of 2017	Bushfires Management (General) Regulations	Hon. Lauren Moss	17/10/17	N/A
12 of 2017	Litchfield Council (Dog Management) By-Laws 2017	Hon. Gerry McCarthy	11/10/17	24/10/17
20 of 2017	Termination of Pregnancy Law Reform Regulations 2017	Hon. Natasha Fyles	11/10/17	06/11/18
36 of 2017	Racing and Betting Amendment Regulations 2017	Hon. Natasha Fyles	13/03/18	01/05/18
36 of 2017	Racing and Betting Amendment Regulations 2017	Hon. Natasha Fyles	08/05/18	15/05/18

5 Appendix B: Subordinate Legislation commented on in 13th Assembly

Report	No.	Title of Regulation/Bylaw	Minister	Date
June 2017 – July 2018	36 of 2017	Racing and Betting Amendment Regulations 2017	Hon. Natasha Fyles	13/03/18
	20 of 2017	Termination of Pregnancy Law Reform Regulations 2017	Hon. Natasha Fyles	11/10/17
	12 of 2017	Litchfield Council (Dog Management) By-Laws 2017	Hon. Gerry McCarthy	11/10/17
	11 of 2017	Bushfires Management (General) Regulations	Hon. Lauren Moss	17/08/17
	3 of 2017	Barramundi Fishery Management Plan Amendment 2017	Hon. Ken Vowles	17/08/17
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