



Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)

Subordinate Legislation— Technical and Stylistic Standards

TIPS / TRAPS

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1. General

- 1.1. Paragraph (10)(d)(vi) of the Committee’s resolution of appointment requires the Committee to “consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee”. Many of the issues identified below involve things that the Committee considers ought to be addressed in the explanatory statement for a piece of subordinate legislation. Many involve the Committee seeking assurance that particular requirements, etc have been met in the making of the legislation. While this assurance may not be formally a requirement, the Committee considers that the kinds of information sought are matters in relation to which the Committee (and the Legislative Assembly) is entitled to receive assurance, in that it assists the Committee in being confident that subordinate legislation has been properly made (for example). This both assists the Committee in this scrutiny role and does so in a way that the Committee considers does not impose an undue burden on the makers of legislation.
- 1.2. A further point is that addressing potential issues expressly in explanatory statements, etc can help to avoid unnecessary further work for legislation-makers. If the Committee identifies a possible issue in a piece of legislation, the Committee will draw the issue to the attention of the Legislative Assembly. This will, in turn, require the relevant Minister to respond to the Committee’s comments. Often, the explanation is something that could have been included in the explanatory statement for a piece of subordinate legislation. It may involve no more than a sentence (eg “this is not a public servant appointment”, this retrospectivity is non-prejudicial). The Committee assumes that the inclusion of the explanation in or with the original instrument will generally involve significantly less bureaucratic effort than would be involved in the preparation of a Ministerial response to the Committee’s comments.

2. Accessibility of legislation / incorporation of material by reference

- 2.1. The Committee considers that, as far as possible, legislation should be freely available to the general public. This goal can be undermined where legislation incorporates other legislation (including legislation of other jurisdictions) and, even, non-legislative material “by reference”. That is, legislation can provide that the legislation of another jurisdiction or the content of an Australian Standard applies to the regulation of a particular subject matter in the ACT. This can create an accessibility issue, in that the referenced material may not be available in the same way that other ACT legislation is available to the public – through the ACT Legislation Register.

- 2.2. One of the innovations of the *Legislation Act 2001* is that it deals with the accessibility of material that is incorporated by reference by making it “notifiable” (see subsections 47(5) and (6) of the *Legislation Act*). This general rule is able to be displaced, however. The power to displace the general rule is often exercised, thereby limiting the access to legislation that making material “notifiable” would otherwise provide.
- 2.3. The Committee accepts that there may be plausible reasons why the general rule of section 47 can be displaced. An example is where legislation incorporates an Australian Standard and where there is only a certain class of people that can be expected to be concerned by the requirements of the Standard. Australian Standards are generally copyrighted documents and the publishers of such Standards recoup the costs of publishing them by charging (often sizeable) fees for persons wishing to have access to the Standards. While still not an ideal situation, this is one in which the Committee generally considers that it may be acceptable to disapply section 47 of the *Legislation Act*.
- 2.4. That said, the Committee considers that legislation that disapplies section 47 of the *Legislation Act* should be accompanied by an explanation as to why it is considered to be necessary to disapply section 47. The Committee also considers that, in some circumstances, it is appropriate that legislation nevertheless provide that the general public may inspect a copy of the material that is incorporated by reference at a particular place (eg an ACT Government office), within certain hours.

3. Instruments of appointment

- 3.1. Various issues regularly arise in relation to appointments. The most obvious is the absence of a statement that “this is not a public service appointment”. Under paragraph 227(2)(a) of the *Legislation Act 2001*, an instrument of appointment is not disallowable if it appoints a public servant. As a result, it assists the Committee (and the Legislative Assembly), if the explanatory statement for an instrument of appointment contains a statement to the effect that “the person appointed is not a public servant”.
- 3.2. Some appointments require that an appointee meet certain requirements (eg be legally qualified or be a doctor) or not have certain disqualifying attributes (eg, in some circumstances, people must not be appointed to positions if they are legally-qualified or if they are doctors). These requirements are usually mandatory (demonstrated by the use of the word “must”). In both situations, it assists the Committee (and the Legislative Assembly) if the explanatory statement for the appointment contains a statement that the person appointed has a required qualification or attribute or does not have a disqualifying qualification or attribute.

- 3.3. Another issue has arisen in relation to appointments that require that a person nominated by a particular body (eg a professional association) be appointed or that a person be appointed from a list of persons submitted by a particular body. These requirements are usually mandatory (demonstrated by the use of the word “must”). In these situations, it assists the Committee if the explanatory statement for an instrument of appointment indicates that the relevant requirements have been met. Recently, the Committee has commented on explanatory statements in which, say, there is a statement that the person appointed is the nominee of a particular body when, in fact, the requirement is that a person be appointed from a list of persons submitted by a particular body. The point is that the Committee (and the Legislative Assembly) is assisted if the explanatory statement correctly recites the relevant requirement and indicates that the requirement has been met.
- 3.4. Some instruments of appointment rely on the generic appointment provisions contained in sections 78 and 79 of the Financial Management Act 1996. In short, these provisions apply (in the absence of entity-specific provisions in individual Acts) to the appointment of members and chairs/deputy chairs of territory authorities with governing boards. If these provisions apply to an appointment, it is preferable that the correct provision is identified. If an instrument merely appoints a person as a member of a governing board, for example, there is no need for the instrument to refer to the section that deals with the appointment of chairs and deputy chairs (ie section 79). See also the discussion below on the over-reliance on “templates” and “precedents”.

4. Correction of errors

- 4.1. The Committee accepts that, unfortunately, legislation is sometimes required as a result of errors in earlier legislation. If that is the case, the Committee considers that it is preferable that legislation expressly indicate that the legislation is required to correct an error. If the correction of the error requires retrospective operation, the Committee would prefer that the legislation (or any explanatory statement) expressly indicate that any retrospectivity is “non-prejudicial”.
- 4.2. The Committee looks closely at any legislation that revokes and re-makes earlier legislation soon after the earlier legislation was made, as this can suggest that an error is being corrected. If there is an error being corrected, it is preferable that this be expressly stated, rather than the Committee seeking an explanation as to why legislation is being revoked and re-made shortly after being made.

5. Empowering provisions

- 5.1. The Committee prefers that subordinate legislation correctly identify the provision (eg of an Act) under which it is made. While the Committee accepts that there are legislative mechanisms and case-law principles that can operate to “save” instruments that incorrectly identify the empowering provision, it is obviously preferable that the correct provision be identified. Apart from anything else, having the correct provision identified allows the Committee (and the Legislative Assembly) to be more confident about the content of the instrument.

6. Fees determinations

- 6.1. The Committee prefers that instruments that determine fees indicate (either in the instrument itself or in the explanatory statement) the amount of the “old” fee, the amount of the new fee, any percentage increase and also the reason for any increase (eg an adjustment based on the CPI). Given the importance of fees to the administration of the ACT, it assists the Committee (and the Legislative Assembly) if fees determinations expressly identify the magnitude of any fees increases.
- 6.2. The Committee also prefers that fees determinations expressly address the mandatory requirements of subsection 56(5) of the *Legislation Act 2001*, which provides that a fees determination must provide:
 - by whom the fee is payable; and
 - to whom the fee is to be paid.

7. Offences

- 7.1. The Committee would prefer that any offences that could result in imprisonment not be set out in subordinate legislation. The Committee’s view is that offences involving imprisonment should generally be set out in primary legislation.
- 7.2. Similarly, the Committee prefers that offences provided for in subordinate legislation involve offences of not more than 60 penalty units.

8. Regulatory impact statements

- 8.1. Paragraph (10)(d) of the Committee’s resolution of appointment requires it to consider whether (among other things) any regulatory impact statement meets the technical or stylistic standards expected by the Committee. Section 35 of the *Legislation Act 2001* sets out mandatory requirements for the content of regulatory impact statements. The

Committee scrutinises regulatory impact statements to ensure that the requirements of section 35 are met. In particular, the Committee expects the regulatory impacts statements to meet the requirement set out in paragraph 35(h) of the Legislation Act, which is that a regulatory impact assessment contain:

- (h) a brief assessment of the consistency of the proposed law with the scrutiny committee principles and, if it is inconsistent with the principles, the reasons for the inconsistency.

9. Requirements for the making of legislation

- 9.1. Similar to the issue with pre-requisites for the making of appointments (discussed above) there are sometimes mandatory pre-requisites (demonstrated by the use of the word “must”) for the making of subordinate legislation. The most common one is that an entity be consulted before legislation is made or that a Minister approve the making of the legislation. Again, in these situations, it assists the Committee if the explanatory statement for an instrument of appointment indicate that the relevant requirements have been met. The point is that the Committee (and the Legislative Assembly) is assisted if the explanatory statement correctly recites the relevant requirements and indicates that the requirements have been met.

10. Retrospectivity

- 10.1. The Committee would generally prefer that subordinate legislation not have a retrospective operation. The Committee accepts, however, that retrospective application is occasionally required. Section 76 of the *Legislation Act 2001* provides (in simple terms) that only “non-prejudicial” retrospectivity is permissible. Subsection 76(4) provides that a provision is “prejudicial” if it operates adverse to the rights of individuals or if it imposes liabilities on individuals. Retrospectivity that is prejudicial to the Territory or to a territory authority, etc is permitted.
- 10.2. While the Committee may be entitled to assume that any provision that has a retrospective operation must not have a prejudicial operation (ie on the basis that the Committee is entitled to assume that legislation would not be drafted in breach of section 76), it assists the Committee (and the Legislative Assembly) if that issue is expressly dealt with in the explanatory statement. That is, it assists the Committee if there is a statement to the effect that “this legislation does not have a prejudicial operation”.

11. Strict and absolute liability offences

11.1. As a rule, the Committee would prefer that any offences created by primary or subordinate legislation require that a mental element (ie intent) be evidenced before the offence is proved. Strict and absolute liability offences are, clearly, at odds with this preference. The Committee accepts, however, that practical reasons require that some offences involve strict or (in limited circumstances) absolute liability. What the Committee requires is that the explanatory statement for a subordinate law that involves strict or absolute liability expressly identify:

- the reasons a particular offence needs to be one of strict liability; and
- the defences to the relevant offence that are available, despite it being one of strict or absolute liability.

12. Issues arising from the use of templates and precedents

12.1. The Committee often identifies issues that appear to arise from the use of previous instruments as templates or precedents for new instruments. The kinds of issues that arise are references to the plural in instruments that appoint only one person (and vice versa) and references to, say, provisions relating to the appointment of chairs and deputy chairs to governing boards when the particular instrument appoints a person only as a member. This suggests to the Committee that a previous instrument (or the explanatory statement for a previous instrument) has been used as a template or a precedent, without sufficient care being taken to ensure that the previous instrument or explanatory statement is adapted to fit the new situation. The Committee accepts that instruments and explanatory statements will be used as templates and precedents but cautions instrument makers that caution must be taken to ensure that the earlier document is adapted to fit the new situation.