

Legislative Assembly for the Australian Capital Territory



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Standing Committee on Justice and Community Safety

**(incorporating the duties of a
Scrutiny of Bills and Subordinate
Legislation Committee)**

SCRUTINY REPORT NO. 8 OF 1998

22 September 1998

TERMS OF REFERENCE

- (1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).
- (2) The Committee will consider whether:
 - (a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:
 - (i) meet the objectives of the Act under which it is made;
 - (ii) unduly trespass on rights previously established by law;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.
 - (b) the explanatory statement meets the technical or stylistic standards expected by the Committee.
 - (c) clauses of bills introduced in the Assembly:
 - (i) do not unduly trespass on personal rights and liberties;
 - (ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
 - (d) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of four members.
- (4) If the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation.
- (5) The Committee be provided with the necessary additional staff, facilities and resources.
- (6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and
Subordinate Legislation): Ms Celia Harsdorf

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - Comment

The Committee has examined the following Bills and offers these comments on them.

Crimes (Amendment) Bill (No. 5) 1998

This Bill would insert a new section 423A in the *Crimes Act 1900* which would, first, provide in subsection 423A(1) that in a trial on indictment, “the closing address for the defence may be given after the closing address for the prosecution”, and secondly, provide in subsection 423A(2) that where, in the closing address for the defence upon a trial on indictment, the defence asserts “relevant facts” “which are not supported by any evidence that is before the jury”, the trial judge may permit the prosecution to address the jury further “in reply to any such assertion”.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The Explanatory Memorandum notes that the *Crimes Act 1900* does not currently provide for the order of addresses upon a trial on indictment. The matter would then lie in the discretion of the trial judge and be exercised having regard to the needs of justice on the particular trial.

The Committee has some concerns with the amendment proposed. The form of proposed subsection 423A(1) suggests that the usual order of addresses is that the defence follows the prosecution, and, while this may usually be the case, a defendant may in a particular case wish to submit that the interests of justice require a reversal of that order. The Explanatory Memorandum offers no justification for proposed subsection 423A(1).

The Committee is also concerned on the effect on the conduct of a trial of the rule stated in proposed subsection 423A(2). On the face of it, it will result in a situation where at the end of the trial, and just before the trial judge delivers the summing up, the trial judge will be called upon to evaluate all the factual material in evidence and make a decision as to whether some particular relevant fact which has been asserted by the defendant is “supported by any evidence that is before the jury”. In many cases where subsection 423A(2) is invoked by the prosecution, it is likely that the prosecution will argue that there is more than one particular relevant fact which has been asserted by the defendant; (or, at least, there will be argument about just what is the relevant fact which has been asserted).

(As a drafting point, it might make this provision clearer if the words “to exist or not to exist” followed the words “are asserted” where they occur in subsection 423A(2)).

The Committee draws attention to a number of problems.

First, there is the diversion of time to deal with an issue of the application of subsection 423A(2). Time will be taken up in argument of counsel - which could be quite extensive given the nature of the debate which subsection 423A(2) invites - and in the ruling of the trial judge. The trial judge will need to review all of the evidence to make a judgment. The concept of “any evidence” is not easy to apply, and, where the assertion of fact is an inference drawn from other facts, (which is often the case), the issue is more difficult. The interruption to the trial could be quite significant.

Secondly, there is a danger that the jury may be aware (through knowledge of one of its members) that if the usual order of addresses has been changed, that was because the defendant had made an assertion of fact which was not supported by “any evidence”. The problem here is that, being so aware, the jury may draw inferences adverse to the defendant beyond those which would be warranted. If this occurs, (and it would not be apparent to the trial judge that it had), the presumption of innocence would be undermined.

The Committee wonders if subsection 423A(2) is necessary. If, in a particular case, a trial judge considers that the defendant had made an assertion of fact which was not supported by “any evidence”, then the trial judge may in her or his summing up make a comment to the jury that they should ignore the defendant’s submission. Such a comment may be tailored to the circumstances of the case. It is moreover unclear just what the prosecutor would say in reply under subsection 423A(2). If there is no evidence to support some assertion of fact by the defendant, that is all the prosecutor would be permitted to say. This comment may be made with as much effect as the trial judge. Under subsection 423A(2) there is a danger that the prosecutor would go further than would be permitted by subsection 423A(2) and seek to strengthen the case against the defendant, thus triggering a request by the defendant for a reply.

The Committee considers that the Explanatory Memorandum should canvass further the way it is envisaged that subsection 423A(2) would work, to the end that its justification is more apparent.

Director of Public Prosecutions (Amendment) Bill 1998

This Bill would amend the *Director of Public Prosecutions Act 1990* (the DPP Act) by repealing the existing subsection 20(5) and inserting in its stead a new subsection 20(5). The effect of this amendment would be that any directions of a general nature given by the Attorney-General to the Director of Public Prosecutions (DPP) by an instrument under subsection 20(1) of the Act would be disallowable by the Assembly in accordance with sections 6 and 7 of the *Subordinate Laws Act 1989* (see section 10 of that Act when read with proposed subsection 20(5)).

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

This Bill raises some complex and difficult questions of constitutional law. The exercise by the Assembly of the power of disallowance could in particular circumstances “trespass on personal rights and liberties” of individuals.

It should be noted, however, that while an instrument made under subsection 20(1) might be disallowed by the Assembly, the Assembly could not amend that instrument under subsection 6(11) of the *Subordinate Laws Act 1989* (see subsection 6(18) of that Act). Nevertheless, the disallowance of an instrument made by the Attorney-General could well impact on the exercise of the powers of the DPP, even, depending on the precise context, in relation to a particular case. This would depend on the context in which the directions were given under subsection 20(1), notwithstanding that subsection 20(3) provides that a direction or a guideline “shall not refer to a particular case”.

The power to prosecute is a function of the executive branch of government, and in a system of responsible government, the notion of separation of powers has little relevance to relations between the legislature and the executive. Ordinarily, as the Explanatory Memorandum notes, there is no difficulty in the Assembly disallowing instruments of a legislative nature, and there are indeed many instances where an instrument of an executive nature may be disallowed.

In relation to the DPP, there are, however, at least two complicating factors. First, the exercise of the power to prosecute is ancillary to the judicial power, and is generally thought to require an independent exercise, either generally or in relation to particular cases. Secondly, of course, in the Territory the office of the DPP has a status in law under the DPP Act which has given effect to a policy of independence.

On the other hand, it is of course subsection 20(1) of the DPP Act which gives a limited power of direction to the Attorney-General, and these amendments to that Act would not enhance the power of the Attorney. And, as noted, the Assembly could not supplant the Attorney by amending an instrument made under subsection 20(1).

Nevertheless, it might be argued that if the Assembly has a power of disallowance, the conflict between the Attorney and the Assembly would serve to politicise the exercise of powers by the DPP to an undesirable

level. The Assembly has other ways of calling the Attorney to account which would not so directly implicate the DPP.

The Committee draws these considerations to the attention of the Assembly.

Food (Amendment) Bill 1998

This Bill would amend the *Food Act 1992* by inserting a new section 24C which relates to the sale of certain treated food.

Comments on the Explanatory Memorandum

There does not appear to be an Explanatory Memorandum in relation to this Bill.

Subordinate Legislation - No Comment

The Committee has examined the following subordinate legislation and offers no comment on them.

Subordinate Law No. 18 of 1998 being the Canberra Public Cemeteries Regulations (Amendment) made under section 23 of the *Cemeteries Act 1933* amends the Canberra Public Cemeteries Regulations to amend the definition of “vault” and to make consequential amendments

Subordinate Law No. 20 of 1998 being the Drugs of Dependence Regulations (Amendment) made under section 206 of the *Drugs of Dependence Act 1989* amends the Drugs of Dependence Regulations by repealing Schedules 1, 2 and 3 of the Regulations and inserting new Schedules 1, 2 and 3 in their stead. Schedule 1 lists those drugs defined for the purposes of the Act as drugs of dependence, and Schedule 2 lists those drugs defined for the purposes of the Act as prohibited substances. Each of these Schedules states in relation to each drug the amount which will be a traffickable quantity and the amount which will be a commercial quantity. Schedule 3 relates to regulation 4 of the Regulations. The effect of these changes is limited to very few drugs and the changes are in accordance with recommendations in the Standard for the Uniform Scheduling of Drugs and Poisons.

Subordinate Law No. 21 of 1998 being the Land (Planning and Environment) Regulations (Amendment) made under section 288 of the *Land (Planning and Environment) Act 1991* amends regulations 13 and 15 of the Land (Planning and Environment) Regulations to the effect of permitting the Minister, acting under subsection 184C(1) of the Act, to remit the whole of the change of use charge for the variation of a lease within a Local Centre

Subordinate Law No. 22 of 1998 being the Motor Vehicle (Third Party Insurance) Regulations (Amendment) made under section 218 of the *Motor Traffic Act 1936* amends regulation 16 and Part II of Schedule 1 of the Motor Vehicle (Third Party Insurance) Regulations to the effect of revising the maximum compulsory third party premiums that may be charged

Subordinate Law No. 25 of 1998 being the Rates and Land Rent (Relief) Regulations (Amendment) made under section 48 of the *Rates and Land Rent (Relief) Act 1970* repeals existing regulation 3 of the Rates and Land Rent (Relief) Regulations and inserts a new regulation in its stead to the effect of clarifying the operation of regulation 3 and fixing at 16.5% the interest payable on unpaid rates where payment has been deferred or a deferral has been revoked

Subordinate Law No. 28 of 1998 being the Motor Traffic Regulations (Amendment) made under section 218 of the *Motor Traffic Act 1936* amends Schedule 1 and makes other minor changes to the Motor Traffic Regulations to the effect of revising the penalties for parking and traffic infringements

Determination No. 273 of 1997 made under subregulation 33(4) of the Motor Traffic Regulations declares a holiday period

Determination No. 274 of 1997 made under subsection 149(1) of the *Motor Traffic Act 1936* revokes a prior determination of 7 November 1996 relating to Class B classes of motor vehicles and determines that a class of motor vehicle listed in the Schedule to Determination No. 274 of 1997 is a Class B motor vehicle

Determination No. 275 of 1997 made under section 217A of the Motor Traffic Act 1936 revokes Determination No. 127 of 1997 and determines fees payable for the purposes of the Act in relation to Class B vehicles

Determination No. 276 of 1997 made under subsection 17(1) of the *Hotel School Act 1996* appoints a specified person as Chairperson of the Australian International Hotel School Board of Management

Determination No. 277 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 278 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 279 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 280 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 281 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 282 of 1997 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 283 of 1997 made under section 13 of the *Children's Services Act 1986* appoints a specified person as a member of the Children's Services Council

Determination No. 284 of 1997 made under paragraph 40(c) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No. 285 of 1997 made under paragraph 30(1)(a) of the *Canberra Institute of Technology Act 1987* appoints a specified person as Chairperson of the Canberra Institute of Technology Advisory Council

Determination No. 286 of 1997 made under paragraph 30(1)(c) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council

Determination No. 287 of 1997 made under paragraph 30(1)(c) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council

Determination No. 288 of 1997 made under paragraph 30(1)(c) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council

Determination No. 289 of 1997 made under paragraph 30(1)(c) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council

Determination No. 290 of 1997 made under subsection 13(1) of the *Occupational Health and Safety Act 1989* appoints specified persons as members of the Occupational Health and Safety Council

Determination No. 291 of 1997 made under subsection 22(1) of the *Occupational Health and Safety Act 1989* appoints a specified person as an acting member of the Occupational Health and Safety Council

Determination No. 1 of 1998 made under subsection 172(2) of the *Land (Planning and Environment) Act 1991* determines the fees payable under paragraph 172(2)(g) of the Act in relation to the grant of a further lease for other than residential or rural purposes

Determination No. 2 of 1998 made under section 105A of the *Liquor Act 1975* revokes Determination No. 141 of 1997 and determines fees payable for the purposes of the Act

Determination No. 3 of 1998 made under subsection 186(1A) of the *Land (Planning and Environment) Act 1991* makes policy directions for the purposes of paragraph 186(1)(d) of the Act

Determination No. 4 of 1998 made under subsection 3(1) of the *Justices of the Peace Act 1989* appoints specified persons as a Justice of the Peace

Determination No. 7 of 1998 made under section 21 of the *Nature Conservation Act 1980* revokes Determination No. 89 of 1997 and declares that certain species, or a community, of flora or fauna, to be vulnerable or endangered

Determination No. 11 of 1998 made under subsection 161(5) of the *Land (Planning and Environment) Act 1991* determines the criteria for the grant of a particular lease under paragraph 161(1)(d) of the Act; (the lease relates to Block 4 and Part Block 6 section 83 Nicholls)

Determination No. 12 of 1998 made under subsection 161(5) of the *Land (Planning and Environment) Act 1991* determines the criteria for the grant of a lease under paragraph 161(1)(d) of the Act to an educational institution

Determination No. 13 of 1998 made under section 217A of the *Motor Traffic Act 1936* determines the fees payable in respect of paragraph 13D(1)(b) of the Act (and relates to the fee payable for the renewal of the certificate of an accredited driving instructor)

Determination No. 14 of 1998 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 135 of 1996 and determines fees payable for the purposes of sections 15E and K of the Act (which relate to the fees payable by builders for the use of unleased Territory land for storage purposes)

Determination No. 15 of 1998 made under section 23 of the *Rates and Land Rent (Relief) Act 1970* revokes Determination No. 162 of 1997 and fixes rates of interest for the purposes of subsection 23(1) of the Act (in relation to amounts of rates the payment of which has been deferred, or in relation to unpaid rates after the revocation of a determination of relief)

Determination No. 18 of 1998 made under subsection 32(3) of the *Betting (ACTTAB Limited) Act 1964* revokes Determination No. 137 of 1996 and for the purposes of subsection 32(1) of the Act determines that 4% shall be the percentage of the amount of bets accepted by the company in any previous month which shall be paid to the Territory

Determination No. 20 of 1998 made under section 7 of the *Legal Aid Act 1977* appoints a specified person as a Commissioner of the Legal Aid Commission of the Australian Capital Territory

Determination No. 21 of 1998 made under subsection 248A(1) of the *Magistrates Court Act 1930* and subsection 94(1) of the *Coroners Act 1997* revokes Determination No. 106 of 1997 and determines fees payable for the purposes of section 248B of the *Magistrates Court Act 1930* and section 95 of the *Coroners Act 1997*

Determination No. 22 of 1998 made under subsection 37(1) of the *Supreme Court Act 1933* revokes Determination No. 105 of 1997 and determines fees payable for the purposes of section 37A of the Act

Determination No. 23 of 1998 made under subsection 171A(2) of the *Land (Planning and Environment) Act 1991* determines the fees for and the conditions under which the Executive shall grant a further rural lease under subsection 171A(1) of the Act

Determination No. 24 of 1998 made under paragraph 31A(1)(b) and subsection 31A(2) of the *Motor Vehicles (Dimensions and Mass) Act 1990* is a Notice of exemption from sections 9 and 24 of the Act in relation to a certain heavy vehicle (a B-Double) which is operated in accordance with the Schedule to this Determination, and also exempts a person from compliance with subsection 37(2) of the Act in relation to the operation of such a vehicle

Determination No. 25 of 1998 made under subsection 8(3) of the *National Exhibition Trust Act 1976* appoints a specified person as a member of the National Exhibition Centre Trust

Determination No. 26 of 1998 made under subsection 8(3) of the *National Exhibition Trust Act 1976* appoints a specified person as a member of the National Exhibition Centre Trust

Determination No. 28 of 1998 made under subsection 4(1) of the *Health Promotion Act 1965* appoints a specified person as a member of the Health Promotion Board

Determination No. 29 of 1998 made under subsection 7(1) of the *Health Professions Boards (Procedures) Act 1989* appoints a specified person as a member of the Veterinary Surgeons Board

Determination No. 30 of 1998 made under subsection 8(1) of the *Medical Practitioners Act 1930* appoints a specified person as a member of the Medical Board

Determination No. 31 of 1998 made under section 4 of the *Public Place Names Act 1989* determines the names of certain streets in the Division of Nicholls

Determination No. 32 of 1998 made under section 14 of the *Gungahlin Development Authority Act 1996* appoints a specified person as a member of the Gungahlin Development Authority

Determination No. 33 of 1998 made under section 16 of the *Nature Conservation Act 1980* declares that members of certain species of wildlife have special protection status

Determination No. 34 of 1998 made under section 4 of the *Public Place Names Act 1989* determines the names of a public place in the Division of Nicholls

Determination No. 35 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person the Chairperson of the Board of Senior Secondary Studies

Determination No. 36 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 37 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies of the Board of Senior Secondary Studies*

Determination No. 38 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 39 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 40 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 41 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 42 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies

Determination No. 43 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 44 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Chairperson of the Board of Senior Secondary Studies

Determination No. 45 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 46 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 47 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 48 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 49 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 50 of 1998 made under paragraph 41(b) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Accreditation and Registration Council

Determination No. 51 of 1998 made under subsection 17(2) of the *Hotel School Act 1996* appoints a specified person as Deputy Chairperson of the Australian International Hotel School Board of Management

Determination No. 52 of 1998 made under paragraph 15(b) of the *Hotel School Act 1996* appoints a specified person as a member of the Australian International Hotel School Board of Management

Determination No. 53 of 1998 made under paragraph 40(g) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No. 54 of 1998 made under paragraph 40(h) of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No. 55 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 56 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 57 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 58 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 59 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 60 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 61 of 1998 made under subsection 119(1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person as a Mental Health Officer

Determination No. 62 of 1998 made under subsection 3(1) of the *Justices of the Peace Act 1989* appoints specified persons as a Justice of the Peace

Determination No. 63 of 1998 made under subsection 39B(1) of the *Bookmakers Act 1985* revokes Determination No. 31 of 1996 and Determination No. 250 of 1997 and determines the location of a sports betting venue at the Canberra Racecourse

Determination No. 64 of 1998 made under subsection 39B(2) of the *Bookmakers Act 1985* revokes Determination No. 48 of 1997 and determines the directions for the operation of a sports betting venue at Bruce Stadium

Determination No. 65 of 1998 made under subsection 11(2) of the *Legislative Assembly (Members Staff) Act 1989* determines the conditions under which certain persons may be re-engaged in accordance with subsection 10(1) of the Act

Determination No. 66 of 1998 made under subsection 6(2) of the *Legislative Assembly (Members Staff) Act 1989* determines the conditions under which certain persons may be re-engaged in accordance with subsection 5(1) of the Act

Determination No. 67 of 1998 made under subsection 10(2) of the *Legislative Assembly (Members Staff) Act 1989* is an approval of arrangements for the employment of persons as members of the staff of Members of the Assembly

Determination No. 68 of 1998 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 98 of 1991 and determines the names of public places in the Division of Greenway

Determination No. 69 of 1998 made under section 4 of the *Public Place Names Act 1989* amends Determination No. 4 of 1994 and determines the names of public places in the Division of Amaroo

Determination No. 70 of 1998 made under section 4 of the *Public Place Names Act 1989* determines the names of a public place in the Division of McKellar

Determination No. 71 of 1998 made under subregulation 33(4) of the *Motor Traffic Regulations* declares a holiday period

Determination No. 72 of 1998 made under subsection 10(2) of the *Legislative Assembly (Members' Staff) Act 1989* is an approval of arrangements for the employment of persons as members of the staff of Members of the Assembly

Determination No. 73 of 1998 made under subsection 5(2) of the *Legislative Assembly (Members' Staff) Act 1989* is an approval of arrangements for the employment of persons as members of the staff of the Speaker of the Assembly

Determination No. 74 of 1998 made under subsection 11(2) of the *Legislative Assembly (Members' Staff) Act 1989* determines the conditions under which persons may be employed as members of the staff of Members of the Assembly

Determination No. 75 of 1998 made under subsection 6(2) of the *Legislative Assembly (Members' Staff) Act 1989* determines the conditions under which persons may be employed as members of the staff of Members of the Assembly

Determination No. 76 of 1998 made under section 120A of the *Agents Act 1968* revokes Determination No. 62 of 1997 and determines fees payable for the purposes of the Act

Determination No. 77 of 1998 made under subsection 48(2) of the *Environment Protection Act 1997* specifies that subsection 48(1) of the Act shall not apply to certain activities. Subsection 48(1) requires the public advertisement by the Environment Management Authority of applications received by the Authority for environmental authorisations. Determination No. 77 will exempt certain kinds of such applications from the requirements of subsection 48(1). The Explanatory Memorandum states the justifications.

Determination No. 78 of 1998 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 46 of 1994

Determination No. 194 of 1998 made under paragraph 75(1)(b) of the *Tenancy Tribunal Act 1994* is a variation of the Commercial and Retail Leases Code of Practice

Determination No. 195 of 1998 made under subsection 8(1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies

Determination No. 196 of 1998 made under subsection 161(5) of the *Land (Planning and Environment) Act 1991* determines the criteria for the grant of a particular lease under paragraph 161(1)(d) of the Act (the lease relates to Block 13 Paddys River)

Determination No. 197 of 1998 made under section 16 of the *Nature Conservation Act 1980* revokes Determination No. 33 of 1998 and Determination No. 31 of 1997 and declares that members of certain species of native animals or native plants have special protection status

Determination No. 208 of 1998 made under sections 15 and 16 of the *Independent Pricing and Regulatory Commission Act 1997* is a reference to the Independent Pricing and Regulatory Commission of the matter of the provision of directions about prices for regulated services in electricity, water and sewerage and for the requirements in relation to that investigation

Subordinate Legislation - Comment

The Committee has examined the following subordinate legislation and offers these comments on them.

Subordinate Law No. 29 of 1998 being the Mediation Regulations made under section 13 of the *Mediation Act 1997* prescribes in regulation 4 certain bodies to be approved agencies under the Act and provides in regulation 5 that a document titled “ACT Competency Standards for Mediators” published by the ACT Community Services and Health Industry Training Advisory Board Inc is an instrument for the purposes of section 4 of the Act

Proposed regulation 5 raises some problems. Section 4 of the *Mediation Act 1997* provides that the standards of competency required for the registration of a person as a mediator “are the standards specified in an instrument prescribed for the purposes of this section, being an instrument as in effect, in force or existing at a particular time or from time to time”.

It has been assumed that such prescription may be made by a regulation made under section 13 of the Act, and, while section 13 is somewhat narrower than the usual form of a regulation making power, this is probably correct. The question, however, is whether the regulation must itself specify the competency standards.

Paragraph 8(1)(b) of the *Subordinate Laws Act 1989* permits a subordinate law (which includes a regulation) to make provision for a matter by applying, adopting or incorporating “any matter contained in any other instrument or writing as in force or existing at the commencement of the [regulation]”. (Subsection 8 (1) also permits the regulation to apply to the other document as it is in force or exists “from time to time”, but where this is expressly permitted (presumably by a law). This is not relevant here.)

The document titled “ACT Competency Standards for Mediators” probably cannot be described as an instrument or writing “in force” at the commencement of regulation 5. The difficult question is whether it can be said to be an instrument or writing “existing” at that time. This is not so straightforward given the association of the word “existing” with the words “in force”. It could be argued that a document must have some legal effect to be “existing”. This problem arises frequently and the Committee considers that it calls for a response from the Executive.

Moreover, regulation 5 points to the common problem of identifying just what is the document titled “ACT Competency Standards for Mediators”. No such document has been provided to the Committee.

It is also noted that while section 4 of the Act permits specification of an instrument “in effect, in force or existing at a particular time or from time to time” (emphasis added), proposed regulation 5 refers only to an existing document. This will need to be kept in mind by those who administer this Act.

Determination No. 5 of 1998 made under subsection 15E(1) of the *Nature Conservation Act 1980* appoints specified persons as members of the Flora and Fauna Committee

There is no indication in the Explanatory Statement that there has been consultation in accordance with the *Statutory Appointments Act 1994*

Determination No. 6 of 1998 made under subsection 15F(1) of the *Nature Conservation Act 1980* appoints specified persons as Chairperson and Deputy Chairperson of the Flora and Fauna Committee

There is no indication in the Explanatory Statement that there has been consultation in accordance with the *Statutory Appointments Act 1994*

Determination No. 8 of 1998 made under paragraph 25(a) of the *Building Act 1972* is a notice of the preparation of the Building Code

The text of Determination No. 8 states that it is Determination No. 8 of 1997. The reference should be to Determination No. 8 of 1998

Determination No. 9 of 1998 made under paragraph 24(2)(a) of the *Building Act 1972* revokes Determination No. 170 of 1997 and adopts the provisions of the Building Code of Australia as the Building Code under the Act

The text of Determination No. 9 states that it is Determination No. 9 of 1997. The reference should be to Determination No. 9 of 1998

Determination No. 10 of 1998 made under paragraph 24(2)(b) of the *Building Act 1972* is a statement of the Australian Capital Territory Appendix to the Building Code of Australia

The text of Determination No. 10 states that it is Determination No. 10 of 1997. The reference should be to Determination No. 10 of 1998. This Determination also omits to state that it revokes Determination No. 171 of 1997.

Determination No. 16 of 1998 made under section 23 of the *Rates and Land Rent (Relief) Act 1970* revokes Determination No. 160 of 1997 and fixes rates of interest for the purposes of subsection 22(3) of the Act (in relation to amounts of rates and land tax which are unpaid)

The statement of notification in the *Gazette* appears to be garbled given the manner in which it is set out. It is suggested that care be taken in the typesetting to avoid the appearance of an error in the notification

Determination No. 17 of 1998 made under section 28B of the *Rates and Land Rent (Relief) Act 1970* revokes Determination No. 161 of 1997 and fixes rates of interest for the purposes of subsection 22(3) of the Act (in relation to an overpayment of rates and land tax)

The statement of notification in the *Gazette* appears to be garbled given the manner in which it is set out. It is suggested that care be taken in the typesetting to avoid the appearance of an error in the notification

Determination No. 19 of 1998 made under section 31 of the *Intoxicated Persons (Care and Protection) Act 1994* prescribes the standards according to which a person licensed to provide a “sobering-up” facility under the Act shall provide that service

According to the Explanatory Statement, this instrument appears to replace a previous instrument made in 1995. There is however no reference to any previous instrument in the text of Determination No. 19 of 1998

Determination No. 27 of 1998 made under section 40 and subsection 42(3) of the *University of Canberra Act 1989* is the amendment of a statute of the University of Canberra relating to courses and awards. This Determination incorporates the statute made by the Council of the University under section 40 and the approval of the Executive under subsection 42(3)

It is noted that the statute does not indicate that it is made under section 40 of the Act.

Other documents

The role of this Committee in respect of the two instruments which follow derives from section 29 of the *Land (Planning and Environment) Act 1991*.

Variation to the Territory Plan No. 91 changes the policy in relation to signage. Before the Committee was a document of approval of this variation made by the Executive pursuant to paragraph 26(1)(a) of the Land Act

See comment below on the incorrect reference to the Land Act. The Committee notes that in the Explanatory Memorandum the reference to the date 8 November 1998 should be 8 November 1997.

Variation to the Territory Plan No. 93 changes the land use policy for Section 34 Block 16 and Part Block 27 Narrabundah from Open Urban Space to Restricted Access Recreation. Before the Committee was a document of approval of this variation made by the Executive pursuant to paragraph 26(1)(a) of the Land Act

The reference in these instruments of approval to the Land Act is wrong. The reference should be to the *Land (Planning and Environment) Act 1991*. The Committee also notes that the instruments of approval do not record whether the Executive complied with subsection 26 (2) of the Act, which requires the Executive to have regard to any recommendations of a committee of the Assembly under section 25.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments made concerning:

- Unclaimed Moneys (Amendment) Bill 1998 (Interim response) (Report No. 1 of 1998)
- Public Sector Management Standard No. 2 of 1997 (Report No. 3 of 1998).
- Crimes (Amendment) Bill (No. 4) 1998 (Report No. 3 of 1998).
- Domestic Violence (Amendment) Bill 1998 (Report No. 3 of 1998).
- Subsidies (Liquor and Diesel) Bill 1998 (Report No. 3 of 1998).
- Financial Institutions Duty (Amendment) Bill 1998 (Report No. 5 of 1998).
- Insurance Levy Bill 1998 (Report No. 5 of 1998).
- Workers' Compensation (Amendment) Bill 1998 (Report No. 5 of 1998).
- Health (Amendment) Bill 1998 (Interim response) (Report No. 5 of 1998).

Copies of the responses are attached.

The Committee thanks the Chief Minister, the Attorney-General and Minister for Health and Community Care for their helpful responses.

Paul Osborne, MLA
Chair

22 September 1998