

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON
LEGAL AFFAIRS
(PERFORMING THE DUTIES OF A SCRUTINY
OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 7

27 MARCH 2002

TERMS OF REFERENCE

- (1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:
 - (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
 - (b) 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
 - (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) 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) report to the Assembly on these or any related matter and 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, publication and circulation.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)
ASSISTANT SECRETARY: MS CELESTE ITALIANO
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)

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 - No Comment

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

Electoral Amendment Bill 2002

This Bill would amend the *Electoral Act 1992* to impose greater disclosure requirements on political parties and members of the Legislative Assembly regarding their electoral funding and expenditure.

Treasury Legislation Amendment Bill 2002

This Bill would amend various laws relating to taxation to provide for an automatic adjustment in respect of matters such as the market rate component of an interest rate, subject to the Minister making a disallowable instrument.

Bills - Comment

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

Drugs of Dependence Amendment Bill 2002

This Bill would amend the *Drugs of Dependence Act 1989* to repeal and replace section 58. This section regulates the power of a doctor to prescribe a drug of dependence with and without the approval of the chief health officer. Proposed new section 75A would validate approvals given by the chief health officer from the date of operation of the Act. Provisions in the Act stipulating fines are amended to bring them into line with general policies governing fines.

Para 2(c)(i) – undue trespass on rights and liberties

Proposed new section 75A would validate approvals given by the chief health officer from the date of operation of the Act. The provision is said to be necessary "because whilst approvals have been sought and given under the Act in good faith since 1989, this may have been without full cover of the law" (Explanatory Memorandum).

There is a potential rights problem with any law that validates retrospectively actions taken by executive officers that may have been invalid. Such a provision should be justified. Justification could lie in the fact that no person relied in good faith upon the action being invalid, so that to validate it retrospectively would not disappoint any person's expectation that it was invalid. This is likely to be the case here. On the other hand, it is likely that many people have expected that the actions taken by the chief health officer were valid. There should nevertheless be a statement assessing the extent to which a retrospective law might adversely affect the rights or expectations of persons.

Duties Amendment Bill 2002

This Bill would amend the *Duties Act 1999* to make some minor amendments; to define "reinsurance"; and add it to the list of exempt insurance to avoid the possibility of double duty.

Para 2(c)(i) – undue trespass on rights and liberties

By clause 2, the substantive provisions of the Act are to be taken to have commenced on 1 March 1999, the date of commencement of the *Duties Act 1999*. No justification is offered for making the amendments retrospective except to state that the object is to ensure that "there is no doubt that all reinsurance is exempt from duty" (Explanatory Memorandum). There should nevertheless be a statement assessing the extent to which a retrospective law might adversely affect the rights or expectations of persons.

Fair Trading Amendment Bill 2002

This Bill would amend the *Fair Trading Act 1992*, primarily by inserting a new section 28A to the effect that a credit provider is prohibited from entering into a credit contract with a debtor, and from increasing the amount of credit available under a credit contract, unless the credit provider "has carried out a satisfactory assessment process".

Para 2(c)(i) – undue trespass on rights and liberties

The Bill raises the general issue of how far a law should restrict the ability of a person to enter into a contract. Freedom to contract is not, and has never been, unqualified by law. It might be argued that the extent of the qualification that may be justified as a reasonable restriction turns to some extent on whether the restriction is imposed on an existing lawful business activity. There will be, of course, many other considerations to be taken into account.

In relation to credit providers, the Explanatory Memorandum notes that under the existing law, a court may 'reopen' credit contracts where the provider has not made an assessment of the debtor's capacity to re-pay the debt. The Memorandum points out that under subsection 70(1) of the Consumer Credit (Australian Capital Territory) Code (see section 4 of the *Consumer Credit Act 1995*, adopting the Queensland Code), a court may reopen a credit contract where satisfied that at the time it was entered into or changed the contract was unjust. Subsection 70(2) lists a number of matters to be considered by the court, including "whether at the time the contract ... was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship".

The Bill would extend the scheme of the Code in that it would make invalid a contract if the credit provider had not carried a "satisfactory assessment process". Under the Code, the court retains a discretion to reopen the contract, and it must have regard to a wide range of factors, including (see above) the nature of the assessment made by the provider. Given this feature of the Code, it is less important for a credit

provider to be able to be sure that they have carried out a "satisfactory assessment process". Under the Bill, this would be more critical.

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

SUBORDINATE LEGISLATION

Subordinate Legislation – No Comment

The Committee has examined the following item of subordinate legislation and offers no comment.

Disallowable Instrument No. 17 of 2002 made under section 3 of the *Public Place Names Act 1989* determines street nomenclature in the Division of Acton.

Subordinate Legislation – Comment

The Committee has examined the following item of subordinate legislation and offers these comments.

Subordinate Law 2002 No 1 being the Radiation Regulations 2002 made under the *Radiation Act 1983* sets out radiation dose limits applicable to radiation workers and members of the public in the ACT.

To which Subordinate Law does the explanatory statement refer?

The Committee notes that the explanatory statement for the above regulations identifies the Regulations by name only. The Committee feels there is a need for this statement to identify the number of the Subordinate Law to which it refers.

GOVERNMENT RESPONSE

There is no matter for comment in this report.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

27 March 2002