

Legislative Assembly for the Australian Capital Territory



**Standing Committee on Justice and
Community Safety**

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

SCRUTINY REPORT NO. 7 OF 1998

1 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 - No Comment

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

Administrative Appeals Tribunal (Amendment) Bill 1998

This Bill would amend the *Administrative Appeals Tribunal Act 1979* to repeal Schedule 1 to the Act and to insert a new Schedule 1. The existing and the proposed Schedules prescribe the form of oath or affirmation to be taken by a member of the Tribunal.

The effect would be to delete a reference in the oath to allegiance to Her Majesty Queen Elizabeth the Second.

Coroners (Amendment) Bill 1998

This Bill would amend the *Coroners Act 1997* to repeal Schedule 1 to the Act and to insert a new Schedule 1. The existing and the proposed Schedules prescribe the form of oath or affirmation to be taken by a member of the Tribunal.

The effect would be to delete a reference in the oath to allegiance to Her Majesty Queen Elizabeth the Second.

Limitation (Amendment) Bill 1998

This Bill would amend the *Limitation Act 1985* to provide that an action on a cause of action for defamation is not maintainable if brought after the expiration of one year from the date of publication of the matter complained of, or, if it was not reasonable for the plaintiff to have known about the publication within one year, if brought within two years from the date of publication of the matter complained of.

Motor Traffic (Amendment) Bill 1998

This Bill would amend section 143 of the *Motor Traffic Act 1936* to omit "60" and insert "50".

The effect would be to reduce the maximum speed applicable to a public street to 50 kph.

Oaths and Affirmations (Amendment) Bill 1998

This Bill would repeal section 6A of the *Oaths and Affirmations Act 1984* and insert a new section 6A in its stead. This new provision would provide that notwithstanding section 9 of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth, a member of the Legislative Assembly shall make and subscribe an oath or affirmation in accordance with the form specified in Schedule 1A of the *Oaths and Affirmation Act 1984*. Clause 5 of the Bill would then amend Schedule 1A.

The effect would be to delete a reference in the oath to allegiance to Her Majesty Queen Elizabeth the Second.

Supreme Court (Amendment) Bill (No. 2) 1998

This Bill would amend the *Supreme Court Act 1933* to repeal the Schedule to the Act and to insert a new Schedule. The existing and the proposed Schedules prescribe the form of oath or affirmation to be taken by the Chief Justice, a Justice, the Master and the Registrar of the Supreme Court.

The effect would be to delete a reference in the oath to allegiance to Her Majesty Queen Elizabeth the Second.

Bills - Comment

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

Administration (Interstate Agreements) (Amendment) Bill 1998

This Bill would amend the *Administration (Interstate Agreements) Act 1997* in order to improve the clarity of the provisions of the Act. There is no change of substance.

During the Third Assembly the predecessor of this Committee, the Standing Committee on Scrutiny of Bills and Subordinate Legislation, presented a discussion paper and a position paper on the issue of scrutiny of national uniform legislation. The Committee's view, (shared by all scrutiny committees around Australia) was that there should be scrutiny of national uniform legislation prior to any legislation being presented to each of the Parliaments.

In this context the Committee welcomes the provisions of the Administration (Interstate Agreements) (Amendment) Bill 1998. However, as presently drafted, the agreements will not be considered by this Committee performing its scrutiny function. Rather, it will be referred to each of the Standing Committees performing their policy role. The terms of reference for this Committee performing its scrutiny function currently do not allow us to examine interstate agreements - only clauses of Bills introduced into the Assembly can be examined.

In order to enable this Committee (performing its scrutiny role) to examine interstate agreements, it may be necessary to amend proposed paragraph 7 (3) (a) of the Principal Act to omit "or" and substitute "and" and also to amend proposed paragraph 7 (3) (b) to read: "The Standing Committee on Justice and Community Safety (performing its duties as a Scrutiny of Bills and Subordinate Legislation Committee) in accordance with its terms of reference".

Health Regulation (Abortions) Bill 1998

This is a Bill for a *Health Regulation (Abortions) Act 1998*. The Act would provide a legislative basis for the performance of an abortion; establish the circumstances in which an abortion may and may not be performed; and require the provision of certain information to the woman and to the Minister. A key aspect of the Bill is that the circumstances in which an abortion may and may not be performed will turn on the nature of the risk to the health of the woman and the developmental stage of the foetus.

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

In other countries such as Canada and the United States of America, the debate over the extent to which the law may regulate the circumstances in which an abortion may and may not be performed has centred on the rights provisions of the constitutional law of those countries.

What is clear is that a rights analysis does not provide a clear answer one way or the other. Both the proponents of measures to prescribe the circumstances in which an abortion may and may not be performed, and those who oppose such measures, may draw support from a rights analysis.

This is illustrated by the various judgments of the Justices of the Supreme Court of Canada in *R v Morgentaler* [1998] 1 SCR 30. In this case, the plaintiff doctors challenged the validity of provisions of the Criminal Code which restricted the circumstances in which an abortion was lawful. The central argument was that such restrictions infringed article 7 of the Canadian Charter of Rights and Freedoms. This provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Some Justices found that the law was an interference with the “right to security” of the woman seeking the abortion, on the basis that it was an interference with her bodily integrity. One Justice argued that the “right to security” guaranteed to each individual a degree of personal autonomy over important decisions affecting their private life, and that the law in question here breached that right; (this is similar to the approach taken in the USA). Another line of argument was that the law in question breached the guarantee of freedom of conscience stated in Article 2 (a) of the Charter.

On the other hand, these Justices recognised that the State had an interest in the protection of a foetus, and that in this respect the developmental stage of the foetus was a relevant consideration.

These Justices did not decide whether the foetus itself was included in the notion of “everyone” in Article and had a right to life. That the foetus does have a right to life is of course the central argument of those who advocate strict regulation of abortions.

Other Justices who sat in the *Morgentaler* case firmly disagreed with the arguments noted above. They held that Article 7 did not guarantee a right to an abortion except where the health of the women was at risk. They also criticised the other judges on the basis that their expansive interpretation of Article 7 of the Charter was inconsistent with the democratic values of the Charter. The nub of this latter point is that the judges had exceeded their proper role by going beyond interpretation to invention, and had paid insufficient respect to the role of the democratically elected legislature.

This review of the *Morgentaler* case illustrates the complexity of any rights analysis of a law which regulates the circumstances in which an abortion is and is not lawful. It is moreover merely a short summary of the arguments addressed in one Canadian decision. In the literature will be found a much wider rights analysis.

The Committee leaves it to the Assembly to decide whether any aspect of the amendments proposed by the Health Regulation (Abortions) Bill 1998 unduly trespass on rights and liberties.

Stamp Duties and Taxes (Amendment) Bill 1998

This Bill would amend the *Stamp Duties and Taxes Act 1987* to remove doubt concerning the validity of past stamp duty assessments made by the Commissioner for ACT Revenue on share buy-back transactions and to enable the Commissioner to continue to assess buy-back transactions for duty.

The commencement of the amendments to be made by clauses 5, 6 and 7 is made retrospective to 1 November 1989, that being the date on which share buy-back transactions were authorised under the *Companies Act 1981*.

The commencement of the amendments to be made by clause 8 is retrospective to 1 September 1994, that being the date of the commencement of section 49F of the *Stamp Duties and Taxes Act 1987*.

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

The Committee draws to the attention of the Assembly the retrospective nature of some of the amendments. It is a matter for the Assembly to assess whether this is justified. It is noted that the purpose is to remove double concerning the validity of past stamp duty assessments.

Paul Osborne, MLA
Chair

1 September 1998