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)

The electronic version of this report does not contain attachments, these can be obtained from the committee office

SCRUTINY REPORT NO. 8 OF 2000

23 May 2000

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 Adviser: Mr Peter Bayne
Acting Secretary: Mr Mark McRae
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Celia Harsdorf
(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.

Comment on the Government's response on the First Home Owner Grant Bill 2000 (Report No. 6 of 2000)

The Committee offers these additional comments in the First Home Owner Grant Bill 2000 in the light of the letter of the Treasurer of 10 May 2000 to the Chair of the Committee.

Clause 39

The Committee notes that it is the intention of the government that the burden of proof in relation to the issue of whether a defendant had a "reasonable excuse" will lie on the defendant.

The Treasurer's response indicates that it is thought that a court would read the provision in this way in the light of the application in the Territory of section 14 of the *Crimes Act 1914* (Commonwealth). The application of this provision is said to follow from section 33G(1) of the *Interpretation Act 1967,* which provides:

> **33G Application of certain sections of Commonwealth Crimes Act to Territory Acts**
>
> (1) The provisions of sections 13, 14, 15, 17, 19A, 21, 21B and 21 C of the Crimes Act 1914 of the Commonwealth shall, so far as they are applicable, apply in relation to all Acts as if an Act were a law of the Commonwealth.

Section 14 of the *Crimes Act 1914* provides:

> **Proof of exceptions etc.**
>
> Where any person is charged, before a court of summary jurisdiction, with an offence against the law of the Commonwealth, any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the section of the law creating the offence, may be proved by the person charged, but need not be specified or negatived in the information, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant.

The Committee had thought that the matter was governed by section 59 of the *Magistrates Act 1930* of the Territory. It provides:

> ### 59. Proof of negative etc.
>
> If the information in any case negatives any exemption, exception, proviso, or condition contained in the Act, Ordinance or law on which the information is framed, it shall not be necessary for the informant to prove the negative; but the defendant may prove the affirmative in his or her defence.

It might be argued that section 14 of the Commonwealth Act is not, in the words of subsection 33G(1) of the *Interpretation Act 1967* "applicable" in the Territory by reason that section 59 of the *Magistrates Act 1930*.

If both provisions do apply in the Territory, there may be a question whether they have a different effect. There is some difference in the wording.

The Committee's primary response to the Treasurer's comments is that these sorts of provisions do not have much, if any, bearing on whether the defendant has a burden of proof under a provision such as clause 39 of the First Home Owner Grant Bill 2000.

This is because the courts have interpreted these sorts of provisions in a way that makes them almost a dead-letter. As one writer has put it, "These provisions cannot change what on a proper construction of a statute is an element of an offence into an exception, exemption, proviso, excuse or qualification": E Edwards, *Cases on Evidence in Australia* (3rd ed, 1981), 108.

Whether some ultimate issue of fact that falls to be determined in the application of a statutory offence punishable summarily - in relation to clause 39, whether a defendant had a "reasonable excuse" – is in substance an "exception, exemption, proviso, excuse, or qualification" (section 14 of the *Crimes Act 1914*), or an "exemption, exception, proviso, or condition" (section 59 of the *Magistrates Act 1930),* depends on whether the court classifies that ultimate issue as an element of the offence or a matter of defence.

Notwithstanding how, as a matter of the form of the statutory provision, it may be described, if, as a matter of substance the ultimate issue of fact is an element of the offence, both the evidential and legal the burden of proof in relation to that issue will be on the prosecution.

It is only if, as a matter of substance, the ultimate issue of fact is a matter of defence, that the burden of proof in relation to that issue will be on the defendant. Furthermore, in this case, it will still be a question whether this is only an evidential burden, or both an evidential and legal burden.

This is illustrated by *Donoghue v Terry* [1939] VLR 165. The relevant offence applied where "[A] person … takes or in any manner uses any motor car without the consent of the owner …". In the light of a Victorian provision similar to section 14 of the of the *Crimes Act 1914* and section 59 of the *Magistrates Act 1930*, the prosecutor argued that "the law threw the onus of proving consent on the defendant …". Justice Lowe said in response:

> Whether that ground … is sound depends upon the proper construction [of the offence provision]. It seems to me that s 214 of the *Justices Act* 1928 (Vic) can have no application, if the proper reading of the section to which it is sought to apply it requires that in the offence itself there must be proved that which is alleged to be an exception, exemption, proviso, excuse or qualification".

His Honour held that on the proper reading of the offence provision, "the absence of consent is of the essence of the offence itself and is not a matter of exception, excuse or qualification". (See too *Francis v Flood* [1978] 1 NSWLR 113.)

The means by which the courts determine what is the "proper reading" of a provision is dealt with in a number of cases. The most recent lengthy exposition is in *Chugg v Pacific Dunlop* (1990) 170 CLR 249.

(We note here that, given the relevant legal history, the effect of section 14 of the *Crimes Act 1914* and section 59 of the *Magistrates Act 1930* may be to require the prosecution to allege the exception, etc in the information before these provisions apply. In other words, they may have a restrictive and not a liberating effect on the conduct of the prosecution; see P Waight and R Williams, *Evidence: Commentary and Materials* (5th ed, 1998), 92-93.)

It is the light of the general approach taken in cases such as *Donoghue v Terry* that the Committee says that section 14 of the of the *Crimes Act 1914* and section 59 of the *Magistrates Act 1930* would not have much, if any, bearing on whether the defendant has a burden of proof under a provision such as clause 39 of the First Home Owner Grant Bill 2000.

As to how the matter might be addressed in the *Interpretation Act 1967*, it might be desirable to provide that where the phrase "reasonable excuse" is employed, the burden of proof in relation to that issue lies on the defendant. Furthermore, it would be useful to provide separately for the evidential and legal burdens. Having said this, the Committee would need to consider the desirability of such a provision were it put forward.

Clause 43

The Committee does not appreciate why the privilege against self-incrimination should be more restricted in taxation and other revenue legislation. It is to be noted that the context here is one in which the privilege cannot prevent a prosecution as stated in subclause 43(2). It is in relation to other kinds of offences that the limited protection would have the effect that answers that are compelled by subclause 43(1) could be used as a source to derive other information useful in a prosecution. It is our impression that most Territory laws prevent this kind of derivative use of answers that are compelled.

We noted that in subclause 43(2) applies only in relation to a small range of offences. The Treasurer considers that this range "is in line with other ACT legislation". We point out, however, that it is usual to provide that provisions such as subclause 43(2) usually apply to certain offences created by the Act of which the equivalent to subclause 43(2) is a part. See, for example, paragraph 39(3)(a) of the Water and Sewerage Bill 2000, and proposed new paragraph 89W(3)(a) of the *Electricity Act 1971* (see clause 23 of the Electricity Amendment Bill 2000).

The Committee does not appreciate why there cannot be explicit protection for legal professional privilege. The fact that many other laws afford such explicit protection may allow a successful argument that the legislature did *not* intend that this privilege be capable of being claimed under clause 43; (see, for example, clause 40 of the Water and Sewerage Bill 2000, and proposed new section 89X of the *Electricity Act 1971* (see clause 23 of the Electricity Amendment Bill 2000).

Clause 45

The Committee did appreciate that the effect of subclauses 45(2) and 45(3) was to create an offence of strict liability. Its concern is that this is contrary to the principle that the prosecution should prove that a defendant had an intention to do the acts that constitute the *actus reus* of the offence. The point of placing the burden of proof on the prosecution in relation to the issue of "reasonable excuse" is to modify the effect of the strict liability imposed by the clauses as they stand.

Guidelines to structure administrative discretion

If Revenue Circulars are issued, the Committee can see little harm, and much good, in providing a statutory base for this practice. The good lies in the public being informed that guidelines may exist, and the encouragement that such provisions may give to making such guidelines. If it turns out that the first (or a subsequent) set of guidelines need revision, they may be revoked and new guidelines issued. It is true that this is a more formal process than that involved in simply withdrawing a circular, but this inconvenience is outweighed by the good consequences of guidelines provisions.

Clause 25

> The Committee notes that it is said that these provisions owe their origin to "template legislation".

The Committee is concerned that Territory laws are being drafted in a style that is not usual in the Territory to follow the lead of a "template" law that has been drafted elsewhere. This points to one of the problems caused by national scheme laws.

Paul Osborne, MLA
Chair

May 2000