



**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. 29

on the

*Eighth Australasian & Pacific
Conference on
Delegated Legislation and
Fifth Australasian & Pacific
Conference on the Scrutiny of Bills*

4-6 February 2003

Parliament House, Hobart
Tasmania

31 MARCH 2003

TERMS OF REFERENCE

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 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.

Introduction

This is a report on the Committee's attendance at the Eighth Australasian and Pacific Conference on Delegated Legislation and the Fifth Australasian and Pacific Conference on the Scrutiny of Bills. The Conference was held at Parliament House in Hobart, Tasmania, from 4 to 6 February 2003 and was hosted by the Tasmanian Subordinate Legislation Committee of the Parliament of Tasmania.

The Conference was attended by representatives of scrutiny committees from Australia, New Zealand, Canada, South Africa, Tonga, retired Senator Mr Barney Cooney and former New South Wales member Mr Peter Nagle. Delegates from Sri Lanka were unable to attend. A list of the Conference attendees is at Attachment 1.

The ACT was represented by Mr Bill Stefaniak MLA (Chair), Mr John Hargreaves MLA (Chair), Ms Kerrie Tucker MLA, Mr Tom Duncan, Secretary, Mr Peter Bayne, Legal Adviser and Ms Celia Harsdorf, Assistant Secretary.

The Conference was held over three days from Tuesday, 4 February to Thursday, 6 February 2003 in the Legislative Assembly Chamber in the Tasmanian Parliament.

Resolutions passed

The Conference agreed to the following resolutions on 6 February 2003:

1. (a) In the interests of retaining and perpetuating concepts of integrity, credibility and legitimacy, and retaining corporate memory, this Conference adopts the concept of creating Conference Patrons.
- (b) This Conference agrees to invite former Senator Barney Cooney and Dame Catherine Tzard, former Governor-General of New Zealand as Co-Patrons for the 2005 Conference.
- (c) That future Conferences, by resolution, appoint, or re-appoint, Patrons for subsequent Conferences.

The host of the next Conference to ensure invitations are sent to the Co-Patrons.

2. (a) The secretariats of the Australian Scrutiny Committees prepare a discussion paper on National Scrutiny principles.
- (b) The next meeting of Chairs and Deputy Chairs consider the discussion paper with a view to whether such principles would further the work of the committees in relation to National Scheme Legislation.

And that to facilitate this Resolution the Secretariat of the Co-Chairs of the Working Group to arrange a meeting later in the year to consider the discussion paper.

3. That Wellington, New Zealand be the venue for the next conference.

And that the ACT host the Conference in April 2005 if New Zealand is not able to host.

4. Each jurisdiction monitor their definition of a disallowable instrument and report to other jurisdictions any changes.
5. A letter be sent to Professor Pearce congratulating him on his elevation to Order of Australia.

The Conference Proceedings

Detailed below is a short description of the conference proceedings. The full conference agenda is attached at Attachment 2. Copies of the conference papers may be inspected by contacting the Committee Secretary (Mr Tom Duncan – Telephone 620 50171).

Official Opening of Conference by the Chief Justice and Lieutenant Governor of Tasmania

The Chief Justice and Lieutenant Governor of Tasmania, the Hon. Mr Justice WJE Cox, AC, RFD, ED, Chief Justice and Lieutenant Governor of Tasmania, opened the Conference with a welcoming speech to all delegates.

Papers delivered to the Conference

How do we prevent parliamentary scrutiny by-pass

The Hon. GB Squibb MLC, Chair, Joint Standing Committee on Subordinate Legislation, Tasmania presented a paper considering the matter of bypass of scrutiny by the parliaments. He outlined the problems which Tasmania had been experiencing and touched on the instruments examined in other States.

Regulation-Making Powers in Bills

Senator David Johnston, Senate Standing Committee for the Scrutiny of Bills presented a paper on the regulation-making power in bills. The paper canvassed regulations, their function and the trends to be alert to in the legislative process.

Parliament's part in preserving Australia's civil society or in praise of scrutiny committees

Retired Senator and retired member of Parliamentary Scrutiny Committees, Mr Barney Cooney presented a paper which considered the parliament's part in preserving Australia's civil society. The paper, among other things, focussed on the energy scrutiny committees give to a dimension of Parliament essential to the quality of the civil life based as it is on human rights and liberties.

The notion of personal rights in the modern era

Mr Bill Stefaniak MLA, Chair, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) presented a paper which reflected on the task of scrutinising bills in the ACT. (See Attachment 4).

The scrutiny of bills in South Africa with specific reference to the Province of the Eastern Cape

Mr Herlu Smith, Acting Secretary to the Eastern Cape Provincial Legislature, South Africa presented a paper which dealt with the scrutiny of bills in South Africa. The paper noted the uniqueness of the process of the scrutiny of bills in South Africa due to certain provisions of the South African Constitution and how it differed from the practice of the Westminster system and most Commonwealth countries. The paper also canvassed the development and drafting of bills in South Africa and the process of scrutiny of national bills by Provinces.

Entry and search provisions in Commonwealth legislation

Senator Jan McLucas, Chair, Senate Standing Committee for the Scrutiny of Bills gave a paper which described the Committee's investigations into entry and search provisions in Commonwealth legislation, in particular the area of personal rights.

Meddling pedants or guardians of liberty? – A case study

Ms Margaret Quirk, Chair, Joint Standing Committee on Delegated Legislation, Western Australia presented a paper which examined the inevitable tension between disallowance or subordinate legislation in the public interest and the objective to advance legislative agenda through regulation. It used a case study of the *Local Government Act 1995 (WA)* and examined the extent to which that law erodes common law principles or right of entry onto private land to permit local officials to enter onto land for a variety of purposes. It also canvasses the strategies adopted to enhance standards of local law making.

Regulatory Impact Statements – Benefits and pitfalls of close scrutiny

Mr Greg Hogg, Project Officer, Regulation Review Committee of the New South Wales Parliament presented a paper outlining the Committee's approach to the detailed examination of Regulatory Impact Statements and the benefits and pitfalls of this close scrutiny.

Scrutiny in action: Citizens' complaints to the New Zealand Regulations Review Committee

Mrs Dianne Yates MP, Deputy Chairperson, Regulations Review Committee, Parliament of New Zealand presented a paper on an overview of the complaints jurisdiction of the Regulations Review Committee and outlined several case studies.

Reports from participating parliamentary committees

Each Committee in the Commonwealth, the States, Territories and New Zealand gave an account of their operations over the past 3 ½ years since the last conference in Sydney. The Chair of the ACT Committee, Mr Bill Stefaniak MLA presented the Committee's report. (See Attachment 3).

Bill Stefaniak MLA
Chair

March 2003

Delegates Australia

Tasmania

Hon Geoff Squibb MLC (Chair)
Mr Ken Bacon MHA (Deputy Chair)
Hon Doug Parkinson MLC
Hon Sue Smith MLC
Mr Will Hodgman MHA
Ms Wendy Peddle

New South Wales

Mr Gregg Hogg
Mr Peter Nagle (former Member)

Commonwealth

Scrutiny of Bills

Senator Jan McLucas (Chair)
Senator David Johnston

Regulations and Ordinances

Senator Gavin Marshall
Ms Janice Paull

A.C.T.

Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate

Legislation Committee

Mr Bill Stefaniak MLA (Chair)
Mr John Hargreaves MLA (Deputy
Chair)
Ms Kerrie Tucker MLA
Mr Tom Duncan (Secretary)
Mr Peter Bayne (Legal Adviser)
Ms Celia Harsdorf (Assistant
Secretary)

South Australia

Mr John Gazzola MLC (Chair)
Mr Brenton Williamson
Mr Peter Blencowe

Joint Standing Committee – Delegated Legislation

Ms Margaret Quirk (Chair)
Hon Ray Halligan MLA (Deputy
Chair)
Ms Anne Turner
Mr Rod Sweetman MLA
Hon Alan Cadby MLC
Hon Liljianna Ravlich MLA
Ms Jan Paniperis
Mr Peter Watson MLA

Uniform Legislation and General Purposes Committee

Hon Adele Farina MLC (Chair)
Hon Paddy Embry JP MLC
Hon Terry Waldron MLA
Mrs Felicity Mackie

Queensland

Mr Warren Pitt MP (Chair)
Mr Peter Wellington MP (Deputy
Chair)
Ms Bonny Keech MP
Ms Rosa Lee Long MP
Mr Chris Garvey
Ms Anita Sweet

Northern Territory

Ms Delia Lawrie MLA (Chair)
Mr Terry Hanley

Retired Senator

Mr Barney Clooney

Western Australia

Delegates International

South Africa

Western Cape Provincial Parliament

Mr Alan Winde (Chief Whip) Official
Opposition

Ms Aletta (Alta) Rossouw
(Chairperson) NCOP, Genera,
Youth and Disabled Matters and Whip

Eastern Cape Provincial Parliament

Hon Sam Mazosiwe (Chairperson of
Committees)

Mr Herlu Smith (Chief Procedural
Officer and Acting Secretary to the
Legislature)

New Zealand

Regulations Review Select Committee

Mrs Dianne Yates MP (Deputy
Chairperson)

Mr Michael Wilkinson (Clerk of
Committee)

Ms Debbie Angus (Legal Adviser)

Sri Lanka

Hon Siri Andrahennady MP
(Deputy Chairman of Committees)

Mrs Priyanee Wijesekera (Acting
Secretary-General of Parliament)

Canada

Mr Steve Gilchrist MPP
Co-Chair, Red Tape Commission,
Ontario

**EIGHTH AUSTRALASIAN AND PACIFIC CONFERENCE ON
DELEGATED LEGISLATION AND FIFTH AUSTRALASIAN AND
PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS**

**REPORT FROM THE AUSTRALIAN CAPITAL TERRITORY STANDING
COMMITTEE ON LEGAL AFFAIRS (PERFORMING THE DUTIES OF A
SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE)**

**Mr Bill Stefaniak, MLA
Chair**

FELLOW DELEGATES, LADIES AND GENTLEMEN

**AS CHAIR OF THE AUSTRALIAN CAPITAL TERRITORY'S SCRUTINY
COMMITTEE I AM PLEASED TO REPORT ON THE OPERATION OF THE
COMMITTEE SINCE THE LAST CONFERENCE WAS HELD IN 1999 IN
SYDNEY. BEFORE DOING SO, I WISH TO CONGRATULATE THE
TASMANIAN PARLIAMENTARY STANDING COMMITTEE ON
SUBORDINATE LEGISLATION FOR THE EXCELLENT ORGANISATION
OF THIS CONFERENCE. THE LAST CONFERENCE THAT I ATTENDED
WAS IN PERTH IN 1991, AND SO AFTER BEING A MINISTER FOR 6
½ YEARS IN THE INTERVENING PERIOD, IT IS GOOD TO BE BACK IN
A POWERFUL POSITION IE, CHAIR OF A SCRUTINY COMMITTEE!**

NEW COMMITTEE NAME

**AT THE BEGINNING OF THE FIFTH ASSEMBLY A NEW COMMITTEE
WAS ESTABLISHED WHICH REPLACED THE STANDING COMMITTEE
ON JUSTICE AND COMMUNITY SAFETY. AS A RESULT THE
COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION HAS BEEN INTEGRATED WITH THE STANDING
COMMITTEE ON LEGAL AFFAIRS.**

WORKLOAD

THE WORKLOAD OF THE ASSEMBLY CONTINUES TO FLUCTUATE, ALTHOUGH AS CAN BE SEEN FROM THE TABLE BELOW, THERE HAS BEEN A STEADY INCREASE IN THE AMOUNT OF SUBORDINATE LEGISLATION EXAMINED BY THE COMMITTEE.

YEAR	BILLS CONSIDERED	SUBORDINATE LEGISLATION CONSIDERED	REPORTS PRESENTED
1990	88	84	21
1991	171	175	23
1992	111	251	23
1993	128	224	26
1994	110	237	20
1995	80	242	21
1996	101	326	20
1997	140	320	20
1998	120	340	15
1999	88	308	16
2000	113	447	16
2001	91	314	16
2002	60	358	20 (TO 5.11.02)

REGULATORY IMPACT STATEMENTS

THE ASSEMBLY HAS, SINCE THE LAST CONFERENCE, SEEN THE COMMENCEMENT ON 21 JUNE 2001 OF THE *SUBORDINATE LAWS AMENDMENT ACT 2000* WHICH PROVIDED FOR THE REQUIREMENT OF REGULATORY IMPACT STATEMENTS. THE *SUBORDINATE LAWS ACT 1989* WAS SUBSEQUENTLY REPEALED BY THE *LEGISLATION ACT 2001* WHICH COMMENCED ON 14 SEPTEMBER 2001.

SECTION 34 (1) OF THE LEGISLATION ACT PROVIDES THAT IF A PROPOSED SUBORDINATE LAW OR DISALLOWABLE INSTRUMENT IS "LIKELY TO IMPOSE APPRECIABLE COSTS ON THE COMMUNITY OR PART OF A COMMUNITY", THEN, BEFORE THE PROPOSED LAW

IS MADE, THE RELEVANT MINISTER MUST ARRANGE FOR A REGULATORY IMPACT STATEMENT TO BE PREPARED FOR THE PROPOSED LAW AND UNDER SECTION 37 OF THE LEGISLATION ACT A REGULATORY IMPACT STATEMENT MUST BE PRESENTED TO THE ASSEMBLY WITH THE SUBORDINATE LAW OR DISALLOWABLE INSTRUMENT.

HOWEVER, SINCE THE COMMENCEMENT OF THESE ACTS ONLY ONE REGULATORY IMPACT STATEMENT HAD BEEN PRESENTED WITH SUBORDINATE LEGISLATION.

INTERSTATE AGREEMENTS

THE COMMITTEE CONTINUES TO RECEIVE INTERSTATE AGREEMENTS AND HAS SCRUTINISED 7 SINCE THE INTRODUCTION OF *THE ADMINISTRATION (INTERSTATE AGREEMENTS) ACT 1997*.

NEW LEGISLATION REGISTER

12 SEPTEMBER 2001 MARKED THE COMMENCEMENT OF THE *LEGISLATION ACT 2001*. THIS ACT CHANGED THE RESPONSIBILITY OF NOTIFICATION OF ACTS PASSED BY THE ASSEMBLY FROM THE CHIEF MINISTER TO THE PARLIAMENTARY COUNSEL.

AS MY PREVIOUS PAPER HAS TOUCHED ON MANY OF THE DEVELOPMENTS OVER THE PAST TWO YEARS, I WILL FINISH HERE. I LOOK FORWARD TO HEARING OF OTHER COMMITTEE'S EXPERIENCES.

Attachment 4



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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

THE NOTION OF PERSONAL RIGHTS IN THE MODERN ERA

PAPER PREPARED BY PETER BAYNE, LEGAL ADVISER, FOR MR BILL STEFANIAK MLA, CHAIR, STANDING COMMITTEE ON LEGAL AFFAIRS (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE) FOR THE EIGHTH AUSTRALASIAN & PACIFIC CONFERENCE ON DELEGATED LEGISLATION AND FIFTH AUSTRALASIAN & PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS, 4 – 6 FEBRUARY 2003

SCRUTINY OF BILLS IN THE A.C.T. – SOME REFLECTIONS ON THE TASK

INTRODUCTION

The Committee's task is to identify those provisions of a Bill which, having regard to the terms of reference of the Committee, are such as to call for comment.

The terms of reference require the Committee to "consider" whether clauses of Bills have one or more of a number of effects. Putting it in positive terms, the Committee considers whether a clause:

- unduly trespasses on personal rights and liberties;
- make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The Committee also considers whether "the explanatory statement meets the technical or stylistic standards expected by the Committee".

It is accepted that the Committee "does not make any comments on the policy aspects of the legislation".

As to what action it takes after making consideration of clauses in bills, the terms of reference merely state that it shall "report on" the matter to the Assembly.

THE TASK OF GIVING CONSIDERATION

The task of giving consideration to clauses of bills is one that might be discharged in a great many ways. What might amount to appropriate consideration in one context is different to what is appropriate in another.

In every case, the Committee will first attempt to understand what the clause means, and then, secondly, assess whether it has one or more of the effects that trigger a need for a report on the clause.

The first stage is not always straightforward. Quite naturally, those who draft clauses do so against the background of both what is prescribed in the *Legislation Act 2001*, and the standard techniques of interpretation employed by the courts. The Committee takes advice from its legal adviser in these respects, and/or employs its own knowledge of the relevant legal doctrine.

But often a clause is uncertain or ambiguous as to what it conveys to a reader about its meaning. At this point, the Committee looks for guidance in the Explanatory Memorandum, the Presentation Speech, and any other extrinsic material available to it.

CONSIDERING WHETHER A CLAUSE IS AN UNDUE TRESPASS ON PERSONAL RIGHTS

The second stage is often far from straightforward. For example, taking the term of reference that requires comment on whether a clause "unduly trespasses on personal rights and liberties", the first issue concerns just what interests are encompassed by the phrase "personal rights and liberties". The Committee draws on various sources, such as, in particular:

- its own instinct as to what is a right or liberty (which some might describe as 'natural law');
- its understanding of what in our legal tradition have been regarded as rights and liberties. These common law rights are often of relevance because they have been developed by the courts largely in the context of the interpretation of legislation. The courts assume that the legislature would not trespass on these rights without making express provision in this regard. Judicial analysis of the content and nature of these rights and the circumstances in which they might be trespassed upon is often of particular value because the analysis is made in an Australian context, and sometimes in relation to the particular kind of clause under consideration by the Committee;
- any statements of rights and liberties that limit the legislative capacity of the Assembly to make laws that trespass on those rights. The *Constitution of the Commonwealth of Australia* contains a number of provisions of this kind, and any judicial extension of the Constitution (such as through the political free speech doctrine) is also relevant. Also relevant is the *Australian Capital Territory (Self-Government) Act 1988*; (see in particular section 23(1)(a), which precludes a law making an "acquisition of property otherwise than on just terms");
- any statements of rights and liberties that are stated expressly or by implication in legislation of the Territory, or which applies in the Territory. Laws such as the *Privacy Act 1988* (Commonwealth), and the *Discrimination Act 1991* (ACT) are laws of this kind;
- statements of rights and liberties in various international treaties. Of particular relevance is the *International Covenant on Civil and Political Rights*, to which Australia is a party. Other instruments, such as the European Convention on Human Rights, may also provide guidance as to what rights are to be taken into account, or how some right derived from another source might be understood; and
- statements of rights and liberties in the constitutional documents of particular countries, such as the USA, which has a highly developed human rights jurisprudence.

This is a veritable smorgasbord of rights, and allows to a Committee freedom of choice as to what rights may be brought into focus. One may understand that the proponent of a Bill might thus complain that he or she could not have anticipated some comment from the Committee. There is substance to this, but, in the end, the matter of whether the particular clause of the Bill should be passed is for the legislature. The Committee is not like a court, which under a power of judicial review can invalidate a provision of an Act that the court considers trespasses on some right identified by the court.

Once a particular right is isolated, the issue is then whether the clause in the Bill "unduly" trespasses on it. The Committee looks in particular for guidance from Australian courts. The court will have taken account of the Australian context, and its analysis will be relatively free from political standpoint. In the end, however, any judgment about whether there has been a trespass on a right is a political judgment.

Again, one may understand that the proponent of a Bill might complain that the Committee's judgment is their matter of opinion, and he or she does not deserve some adverse comment. Two

matters ameliorate the position somewhat. One is the tendency of a Committee to refrain from commenting too readily to the effect that some clause is an undue trespass on a personal right. The Territory Committee will make such a comment, but generally seeks only to expose the potential for such a trespass, to state the competing arguments, and to draw the issue to the attention of the Legislative Assembly; see below, *'Making a report'*.

The second is the point made above. The Committee is not a court. The legislature determines whether to pass the clause.

MAKING A REPORT

Recognising that human rights talk is the language of politics has a bearing on what the Committee does by way of making a report. The Committee has not considered it necessary or desirable to arrive in every instance at a firm judgment whether some clause of a bill "unduly" trespasses on some "right or liberty". There are at least three constraints.

First, the Committee attempts to avoid voting on these kinds of issues. Constant or even occasional disagreement might well lead to the Committee dividing on party lines and thus affecting adversely the bipartisan spirit of its proceedings.

Secondly, and related, is the consideration that in some cases, the Committee would be clearly making a judgment about the policy of the Bill were it to arrive at a firm judgment. For example, where the policy of the Bill is to acquire or restrict the use of a person's property, a judgment that this amounts to an undue trespass on the right to property takes issue directly with the policy.

In contrast, where the Committee perceives the deprivation of property to be incidental to the scheme and objective of the Bill, it might be more likely to comment adversely on the particular clause.

Thirdly, the Committee is constrained in the extent of its examination of a bill by its resources. Often, it has but a few days to examine the bill and make comment. In some situations, the rights issues are quite complex and all that can be achieved is an outline or indication of the competing considerations.

It is these matters that often lead the Committee to making a report that:

- identifies the rights issue(s);
- sets out some competing considerations; and
- draws the attention of the Assembly to the issues.

On the other hand, there are cases where the report of the Committee may come to a firm judgment whether some clause of a bill "unduly" trespasses on some "right or liberty", and/or where it might be critical of the failure of the proponent of the Bill to provide some justification of the clause. Without being exhaustive, three sorts of case might warrant an adverse comment.

(a) Over time, this Committee, and others like it, have developed an attitude that certain kinds of clauses commonly found in bills are incompatible with rights and thus, on the fact of it, should not be included. Such, for example only, and without being exhaustive, are clauses that:

- give retrospective effect to a provision of the proposed statute;
- oust the jurisdiction of the courts over legal disputes;
- allow for some form of closed justice in the courts;

- abrogate the privilege against self-incrimination, in particular where protection against derivative use of information thus is not proscribed;
 - abrogate legal professional privilege; or
 - deprive a person of their property without just terms compensation.
- (b) An adverse comment is perhaps more likely where a non-partisan body, such as a law reform commission, has made a specific recommendation about the way a particular kind of clause (such as a search and seizure power) should normally be framed (and the clause in the Bill departs from that recommendation).

In this connection, there is a point to be made about cooperation between Scrutiny Committees. To varying degrees, each Committee will have to expect that certain kinds of rights be respected. Some mechanism whereby we can share our experience would be of great value.

CONSIDERING WHETHER A CLAUSE IS AN INAPPROPRIATE DELEGATION OF LEGISLATIVE POWER

What has just been said about the 'undue trespass on rights' term of reference may also be said about other terms of reference. A long standing concern of Scrutiny Committees (and of constitutional lawyers) is that Bill clauses do not inappropriately delegate legislative powers. Two particular concerns are that a clause does not:

- permit subordinate legislation to amend statute law (the Henry 8th clause); or
- confer a dispensing power on a Minister.

A brief comment on each of these grounds of objection to a particular clause will set the context for a broader comment about how Scrutiny Committees might approach their task.

Henry 8th clauses. Scrutiny Committees have long been concerned with provisions of Bills that would, if enacted, empower a person (such as a Minister) or body (such as the Executive) to amend a statute by means of a subordinate law. Such powers derogate from the legislative authority of the legislature. (For (probably invalid) historical reasons, they are often referred to as 'Henry 8th clauses'.) The powers are conferred by the legislature itself, but the point may be made that the electorate elects and entrusts the parliamentarians to make laws, and a delegation of legislative power to amend statutes breaches this trust.

It is, however, apparent that many clauses that are technically of this kind do not in substance encroach on the legislative authority of the Legislative Assembly. Such would be a clause that conferred on the Executive a power, exercisable by regulation, to modify the transitional provisions of the Bill. A recent Explanatory Memorandum to a Territory bill pointed out that the clause in question was limited in relation to:

- subject matter - in that it cannot be used to make changes of a policy nature; and
- time - in that the section would expire one year after it commences.

The Committee has reached the view that where a clause is of this kind, no purpose is served by its drawing attention to it. Nor does it consider that an Explanatory Memorandum need address the issue of whether this is a necessary power. The Committee continues, however, to draw attention to Henry 8th clauses that have a broader application, and expects that Explanatory Memoranda will provide an explanation for any such clause. Occasionally, the Committee does find a Henry 8th clause problematic as involving an inappropriate delegation of legislative power.

Dispensing powers. Such clauses perhaps deserve more attention. They are a more subtle, yet possibly more objectionable form of inappropriate delegation of legislative power. In essence, they empower the Minister to set aside the statutory scheme as it would normally apply. For example, often the effect of such a clause is to permit the executive to (in effect) re-write the Act by taking out of its purview classes of persons who would otherwise be within its scope, and who, it may be presumed, the Assembly, when it passes the Act, intend should be within its scope. The problem is compounded when the power to dispense is cast in the form of a discretion that is completely unconfined. Again, while such powers are conferred by the legislature itself, the point may be made that the electorate elects and entrusts the parliamentarians to make laws, and conferral of a dispensing power breaches this trust.

From these two illustrations, a more general point may be made. This is that Scrutiny Committees need a flexible attitude to the meaning of their terms of reference. Traditional concerns need to be reworked to suit modern circumstances, and new concerns need to be identified. The terms of reference stay the same, but what they mean will vary over time.

THE USE OF THE EXPLANATORY MEMORANDUM

The Committee will look at the Explanatory Memorandum to ascertain if the proponent of the Bill has addressed the rights issue as perceived by the Committee. Were it not to do so, it could be said to have failed to pay sufficient respect to the proponent, and, secondly, to have acted in a way unhelpful to the Assembly.

Quite often, the Explanatory Memorandum will have addressed the rights issue, and the Committee does no more than draw this matter to the attention to the Assembly. Over time, as those who draft the laws are aware of the Committee's concerns, it can be expected that the Explanatory Memorandums will anticipate a comment from the Committee and address the matter. The Committee sees this as a healthy outcome and productive of a rights conscious legislature.

The Committee acknowledges a problem lying in its assuming that those who write the Explanatory Memorandum being able in all, or even in a great many instances, to anticipate a comment by the Committee within its terms of reference. It can see that it may well be unfair for the Committee to point to a lack of explanation in an Explanatory Memorandum of how the drafter saw the rights issue. It acknowledges the need to take care in this regard.

It was noted above that the Committee looks to the Explanatory Memorandum for guidance as the intended meaning of a clause. Given provisions in statutes (such as section 139 of the *Legislation Act 2001*) that permit courts to look at the Explanatory Memorandum for guidance, so too will any person who wishes to form a view about how a court may interpret the clause. In this connection, the Committee has recently noted a problem and an issue.

The Committee might comment that this material does not provide reliable guidance. The Committee considers that such comments are appropriate given its task of considering whether "the explanatory statement meets the technical or stylistic standards expected by the Committee" (paragraph (b) of the Committee's terms of reference).

In this respect, the Committee has recently pointed to a matter that may be of more general interest. It has noted that in respect of some recent Bills, the Explanatory Memorandum does not appear to state accurately what would appear to be the better reading of the provisions of the Bill. Those who write the Explanatory Memorandums are often not lawyers, and in explanation of a what a clause means employ concepts that are not stated in the clause, and which indeed give it a meaning that its words could not reasonably bear. The Committee has observed:

if it is to be the case that the Explanatory Memorandums are not drafted by lawyers familiar with the Bill, the Assembly may need to reconsider the policy that an Explanatory Memorandum may be regarded by the courts as a source for ascertaining the meaning of the relevant Act (or regulation, etc). The task and cost of statutory interpretation will be increased if it is to be the case that Explanatory Memorandums offer interpretations of the Bill that are at variance with what an ordinary reading would suggest: Report No 24 (January 2003).