

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. 5 OF 1999

4 May 1999

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 comments on them.

Electricity (Amendment) Bill 1999

This Bill would amend the *Electricity Act 1971* in order to enable (a) a trainee and (b) a secondary college student, undertaking an accredited course, to perform electrical wiring work while undergoing the course. The amendments proposed would also exempt telecommunication workers who have undergone accredited training from the requirement to obtain an electrician's licence.

Territory Owned Corporations (Amendment) Bill 1999

This Bill would amend the *Territory Owned Corporations Act 1990* to the effect (primarily) of (a) expanding the statement of the principal objects of a Territory owned corporation to include require it to "exhibit a sense of social responsibility", and to conduct its operations in compliance with "the principles of ecologically sustainable development"; (b) requiring the directors to include persons of certain kinds; (c) to this end, requiring the shareholders of a corporation to pursue a particular process in making appointments of such persons; and (d) giving the Legislative Assembly a role in the making of appointments.

Bills - Comment

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

Crimes (Amendment) Bill 1999

This Bill would amend the *Crimes Act 1900* in various ways. The Explanatory Memorandum is a full and careful statement of the nature of these changes against the background of the Act and the review of the Act which has been undertaken since March 1997. The Committee commends those who drafted the Explanatory Memorandum.

The major elements of the Bill are described carefully in the Explanatory Memorandum. In broad terms they cover the topics of:

- the fitness to plead by a defendant who suffers from a mental illness;
- the manner of dealing with persons who seek to be acquitted on the grounds of mental illness;
- the referral of such persons to the Mental Health Tribunal; and
- the powers of the Magistrates Court to deal with such persons.

In general, the amendments proposed are designed to limit the extent to which such provisions may be an undue trespass on personal rights and liberties of a person. The Committee is of the view that a comment that there is such an undue trespass would not be warranted. In particular, it draws attention to, and commends, the amendments which would ensure that a person charged with an offence who is detained (rather than being convicted and sentenced) cannot be detained for a period longer than the maximum sentence of imprisonment that could be imposed for the offence charged.

Gaming Machine (Amendment) Bill 1999

This Bill would amend the *Gaming Machine Act 1987* to provide for a scheme under which licensed clubs would be obliged to make category A and category B community contributions. The total amount of contributions would at the outset be 5% of net gaming revenue, rising to 7.5% over a three year period.

The Commissioner for ACT Revenue would make a discretionary judgment whether to approve a contribution made by a licensed club as either a category A or a category B contribution. An exercise of the power to approve would be reviewable by the Administrative Appeals Tribunal. The Minister would have a discretion to issue guidelines for approving category A and category B community contributions, which guidelines would be disallowable instruments.

A licensee would be required by proposed new section 60C and to keep records relating to the community contributions they make, and by proposed new section 60D to give these records, and a report, to the Commissioner.

If a licensee did not make the required level of contributions, it would make a “community contribution shortfall” (see proposed new section 60H), upon which would be imposed a tax at the rate of 100% (see proposed new section 60I). Revenue raised by this tax would be paid by the Commissioner to the Community Services Grants program fund, which is administered by the Department of Education and Community Services.

The sanction for non-compliance by a licensed club with the central provisions of this scheme would be the suspension or cancellation of the licence.

By proposed new section 60G (2), the Commissioner would have a discretion to set the level of contributions to both categories at less than those that would be prescribed in proposed new section 60G (1) of the Act. This power could be exercised only where the Commissioner was satisfied that the gross revenue of the club would be less than \$200,000 in a financial year, and that the application of proposed new section 60G (1) would be such that it would not be just and equitable that the section should apply.

Paragraph 2 (c) (ii) - insufficiently defined administrative powers

The Commissioner would have two important discretionary powers:

- in proposed new sub-sections 60B (1) and (2) - to approve a contribution made by a licensed club as either a category A or a category B contribution; and
- in proposed new sub-sections 60G (2) - to set the level of contributions to both categories at less than those that would be prescribed.

Both are stated in such a way that although the Commissioner must be satisfied of certain matters, the Commissioner has an open-ended discretion to decline to exercise the power even if so satisfied. It is possible that a court would read these provisions to the effect that, upon being satisfied of certain matters, the Commissioner would have a duty to exercise the powers. Given that it cannot see what matters would be relevant to the exercise of these powers other than those specifically stated, the Committee considers that the provisions should be worded to impose a duty on the Commissioner in the manner suggested.

The Committee has a concern that key concepts in the Bill are very vague and will require the making of discretionary judgements. This is, of course, characteristic of many laws. In the context of this proposed law there is, however, a particular difficulty. This is that these laws must, in effect, be administered by the licensees when they make their judgements as to the kinds of community A and B contributions that they must make in order to comply with the law. In this context, the law should be as clear as possible.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights

The Committee notes that the discretion in proposed new subsection 60G (2) - to set the level of contributions to both categories at less than those that would be prescribed - would not be reviewable. Given the role accorded to the Administrative Appeals Tribunal by the Act, some justification should be given for not giving it a role in review of the discretion in proposed new subsection 60G (2).

Paragraph 2 (c) (iv) - inappropriate delegation of legislative power

By proposed new subsection 60G (1), the total amount of contributions to be made by a club in a financial year would, at the outset, be 5% of net gaming revenue, rising to 7.5% over a three year period. But proposed new subsection 60G(1) also provides: “or such other proportions as may be determined by the Minister under section 139 of the Administration Act”. This latter Act is the *Taxation Administration Act 1999*, and the specific reference would appear to be the power of the Minister (for the purposes of that Act) under paragraph 139 (1) (b). To act under this provision, the Minister may make a determination by notice in the *Gazette*. Any determination is a disallowable instrument.

The question for the Assembly is whether it is, in the circumstances of this Bill and of proposed new section 60G in particular, desirable to permit the use of section 139 of the *Taxation Administration Act 1999*.

In a context in which the Minister may, at any time, alter the rate of the contributions that must be made by licensees, it would be difficult for those licensees to plan ahead. It would appear that given the nature of the task of making community contributions, the licensed clubs must plan ahead. Furthermore, if the Minister were to exercise the power in section 139 so as to acquire certain levels of category A and category B community contributions some licensed clubs might need to amend their articles of association so as to permit them to comply with the law. (The Committee does not assume that an exercise of the power in section 139 in this way would be valid.)

The Committee also has a note of concern about the reference in proposed new subsection 60G (1) to “the Administration Act”. There is an *Administration Act 1989*, but this is not what is referred to in proposed new subsection 60G (1). It is only by reference to the existing provisions of the *Gaming Machine Act 1987* that a reader becomes aware that the reference is to the *Taxation Administration Act 1999*. The Committee appreciates that shorthand references to legislation are convenient, but, in some circumstances, the use of shorthand may easily confuse.

Mental Health (Treatment and Care) (Amendment) Bill 1999

This Bill would amend the *Mental Health (Treatment and Care) Act 1994* in various ways. The Explanatory Memorandum is a full and careful statement of the nature of these changes against the background of the Act and the review of the Act which has been undertaken since March 1997. The Committee commends those who drafted the Explanatory Memorandum.

The major elements of the Bill which are of direct relevance to the work of this Committee are:

- the repeal of sections 26 to 29 of the Act and their replacement by provisions which state the kinds of mental health orders which may be made by the Mental Health Tribunal in relation to a person. The two basic types of order are (i) a psychiatric treatment order, and (ii) a community care order. In addition, the Tribunal may make a restriction order to accompany either of the two primary orders. Proposed new section 28 indicates how these orders might operate;
- proposed new section 29 states the role of the chief psychiatrist or a care coordinator in relation to a person subject to a mental health order;
- proposed new section 32A states the terms under which a person who is subject to a mental health order may be detained where the person does not comply with the order;

- proposed amendments to section 37 of the Act amplify the extent of the power to detain a person in an emergency, and similar provision is made by a proposal to amend section 41 in relation to the involuntary detention of a person; and
- the insertion of a new Part XI of the Act to create a scheme for the appointment of official visitors of mental health facilities.

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

These amendments bear on the extent to which a person who suffers from a mental dysfunction or a mental illness may be deprived of her or his personal liberty. It is, however, accepted that there are circumstances in which such deprivation may be justified, both in the interests of that person, and in the interests of others. The Committee's review of the provisions of this Bill has not revealed any instance in which, on the face of it, there is an undue trespass on personal rights and liberties of a person. It has also taken into account the fact that there has been extensive consultation between government and those most directly concerned with the working of the existing Act, and of the fact that the ACT Discrimination Commissioner has reviewed of the Bill.

It is also apparent that this Bill differs from the Mental Health (Treatment and Care) (Amendment) Bill 1998 in ways which would, in comparison to the 1998 Bill, give greater protection to personal rights and liberties.

In its Report No. 13 of 1998, in commenting on the Mental Health (Treatment and Care) (Amendment) Bill 1998, the Committee expressed particular concern about what that Bill proposed as a new section 36A of the Act. That would have enabled the Supreme Court to make a preventive detention order in relation to a person. The Committee notes that there is no such proposal in the Mental Health (Treatment and Care) (Amendment) Bill 1999.

Drafting points

1. There is a reference in proposed new subsection 28 (4) of the Act (see clause 13) to a "mental health order"; (and this concept is also used in other provisions in the Bill - see in clause 17). This concept is defined in existing section 4 of the Act to mean an order made by the Tribunal and of a kind described in section 29. Section 29 describes the various kinds of orders which may be made by the Tribunal.

But clause 13 of the Bill would repeal section 29, and replace it with a new section 29 which does not deal at all with the kinds of orders which may be made by the Tribunal. If this analysis is correct, the concept of a "mental health order" under the amended act would have lacked meaning, and, at the least, would make the Act less intelligible.

2. In clause 28, which would insert a new section 38A in the Act, the words "of the Crimes Act" should probably be inserted after the reference to "paragraph 428 (1) (a)". See the similar provision in clause 21.

INTERSTATE AGREEMENTS

No matters to report.

Subordinate Legislation - No Comment

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

Determination No. 46 of 1999 made under subsection 14 (2) of the *Victims of Crime Act 1994* appoints a specified person to be the Victims of Crime Coordinator for the period commencing on 18 March 1999 and ending on 31 December 1999.

Determination No. 47 of 1999 made under subsection 26C (2) of the *Domestic Violence Act 1986* appoints a specified person to be the Domestic Violence Project Coordinator for the period commencing on 25 May 1999 and ending on 31 December 1999.

Determination No. 48 of 1999 made under section 39A (1) of the *Bookmakers Act 1985* revokes Determination No. 67 of 1997 and determines that each of the sporting or other events listed on the schedule shall be an approved sporting betting event.

Determination No. 49 of 1999 made under section 39B (1) of the *Bookmakers Act 1985* revokes Determinations Nos 17, 32 and 102 of 1996 and determines that the location of sports betting venues at Bruce Stadium shall be on the concourse level at the east and west sides of the stadium.

Determination No. 50 of 1999 made under section 39B (2) of the *Bookmakers Act 1985* revokes determination No. 64 of 1998 and determines that the directions for the operation of the sports betting venue at Bruce Stadium be as set out in the schedule.

Determination No. 51 of 1999 made under section 7 and item 1 of the Schedule of the *Auditor-General Act 1996* appoints John Alexander Parkinson as Auditor-General for the Territory for a period of 5 (five) years. This appointment takes effect from 10 February 1999.

Determination No. 52 of 1999 made under paragraph 11 (1) (b) of the *University of Canberra Act 1989* appoints a specified person to be a member of the University of Canberra Council until 12 September 2002.

Determination No. 53 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the names of certain streets in the Division of Garran.

Determination No. 54 of 1999 made under section 7 of the *Public Health Act 1997* appoints a specified person to be the Chief Health Officer

Determination No. 55 of 1999 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons as Justices of the Peace.

Determination No. 56 of 1999 made under paragraph 7 (c) of the *Health Act 1993* appoints the Clinical Privileges Committee of the Department of Health and Community Care.

Determination No. 57 of 1999 made under paragraph 11 (1) (b) of the *University of Canberra Act 1989* appoints a specified person to be a member of the University of Canberra Council until 31 January 2003.

Determination No. 58 of 1999 made under paragraph 11 (1) (b) of the *University of Canberra Act 1989* appoints a specified person to be a member of the University of Canberra Council until 31 January 2003.

Determination No. 59 of 1999 made under paragraph 204 (a) of the *Land (Planning and Environment) Act 1991* approves the Tidbinbilla Nature Reserve Plan of Management.

Determination No. 60 of 1999 made under subsection 32 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 66 of the *Nurses Act 1988* appoints a specified person to assist the Nurses Board of the ACT in all matters arising out of, or incidental to, its inquiry into the matter of Mr Garry Bagnell and the Nurses Board.

Determination No. 61 of 1999 made under subsection 66 (7) of the *Drugs of Dependence Act 1989* appoints the Chairperson of the Drugs Advisory Committee until January 2002.

Determination No. 62 of 1999 made under section 6 of the *Architects Act 1959* appoints specified persons to be members of the Architects Board of the Act for a period expiring on 12 September 2001.

Subordinate Legislation - Comments

The Committee has examined the following subordinate legislation and offers these comments:

Determination No. 45 of 1999 made under subsection 15E (1) of the *Nature Conservation Act 1980* appoints a specified person to be a member of the Flora and Fauna Committee until 11 January 2001.

Determination No. 63 of 1999 made under subsection 112 (5) of the *Residential Tenancies Act 1997* appoints specified persons to be members of the Residential Tenancies Tribunal for the period up to and including 31 March 2002.

Unfortunately, neither of the Explanatory Statements for these two Determinations indicates that there has been consultation about the appointments with the Legislative Assembly as required by the *Statutory Appointments Act 1994*.

Determination No. 44 of 1999 made under section 139 of the *Taxation Administration Act 1999* replaces Determination No. 34 of 1997 made under the repealed *Taxation (Administration) Act 1987* and establishes the amount of stamp duty payable and the eligibility criteria for home buyers and their spouses for stamp duty concessions in respect of grants and transfers of land from 1 March 1999.

The Committee doubts whether there is a basis in law for the determination of duty in respect of the class of “eligible homebuyers”. This is not a class of persons for which provision is made in Part VI (Concessional Rates of Duty) of the *Duties Act 1999*. Section 66 of that Act provides: “Duty of \$20 is chargeable in respect of a grant or transfer of land to a prescribed person”. It does not, however, appear that “eligible homebuyers” have been prescribed by regulation made under section 253 of that Act. It would not appear that such prescription could be made under section 139 of the *Taxation Administration Act 1999*.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Minister of Health and Community Care, in response to its Report No. 2 of 1999 on the Explanatory Memorandum to the Public Health (Consequential Amendments) Bill 1999.
- the Minister for Health and Community Care, in response to its Report No. 15 of 1998 on the Drugs of Dependence (Amendment) Bill (No. 2) 1998.

The Committee thanks the Minister for his responses.

Copies of the responses are attached.

Paul Osborne, MLA
Chair

4 May 1999