

**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. 10

14 MAY 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.

Districts Bill 2002

This is a Bill for an Act to replace the *Districts Act 1966*. It would enable the written description for each district to be replaced by a deposited plan; and make the integrity of the Digital Cadastral Database a responsibility of the Commissioner for Surveys. It would provide for changes in technology used in preparing deposited plans, and provide for structuring and regulating the allocation and management of street addresses.

Rates and Land Tax Amendment Bill 2002

This Bill would amend the *Rates and Land Tax Act 1926* to adjust the rating assessment for all properties for 2002-2003 by increasing rates charges during 2001-2002 by the actual movement in the CPI in the ACT from December quarter 2000 to December quarter 2001.

Bills - Comment

The Committee has examined the following Bill and offers these comments on it.

Building Amendment Bill 2002

This Bill would amend the *Building Act 1972*, primarily to insert a new Part 5A that will permit the approval, as an alternative to insurance, of a fidelity fund scheme that will provide similar consumer protection to insurance. There is a detailed regulatory framework governing fidelity fund schemes. The Bill also makes changes to Part 3 of the Act so that certificates under an approved industry scheme are acceptable during building approval.

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

Access to law

Proposed new subsection 58K(3) of the Act provides that the approval criteria "may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time". Note 1 to proposed new subsection 58I(3) of the Act notes that "The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the *Legislation Act 2001*, s 47 (5) or (6) is not disapplied (see s 47 (7))."

The Committee notes and commends, that neither s 47 (5) or (6) have been disapplied; cf Report No 4 of 2002 in relation to the *Legislation Amendment Bill 2002*.

A similar comment applies to proposed new paragraph 58O(3)(b).

Para 2(c) (iv) inappropriate delegation of legislative power

Proposed new subsection 58K(3) has the effect that the law of the A.C.T. may, in effect, be amended from time to time by the person or body who makes the law or instrument that is incorporated under this provision. Provisions of this kind always raise the question as to whether there has been an inappropriate delegation of legislative power. The Committee considers that the need for any such provision should be adequately explained in the explanatory memorandum. This has not been done in the memorandum to this Bill. The Committee draws this to the attention of the Assembly.

Para 2(c) (v) insufficiently defined administrative power

Administrative discretion

Under proposed new subsection 58K(1), the Minister "may, in writing, determine requirements (the *approval criteria*) for this Act with which a fidelity fund scheme must comply to be an approved scheme". Proposed new subsection 58K(2) then provides that the approval criteria "must include" certain specified requirements.

On the face of it, these provisions might be read as allowing the Minister to decline to exercise the discretion in subsection 58K(1), and thus to leave at large the matters to which the Minister may have regard when exercising the power in section 58H to approve a fidelity scheme. In general, it is undesirable that statutory discretions be without some restriction. Furthermore, given the "must include" language of subsection 58K(2), it appears that it is intended that the Minister have regard to the matters specified in that provision; and see subsection 58H(3).

The Committee suggests that the word "may" in subsection 58K(1) be replaced by the word "shall" (or other appropriate word).

The comments made above apply also in relation to proposed new section 58O.

Para 2(c) (iii) non reviewable decisions

Review of administrative decisions

The exercise of the Minister's powers that lie at the heart of the regulatory framework governing fidelity fund schemes could have a significant impact on the reputation and livelihood of persons. There appears to be no provision for review of an exercise of these powers, such as by the Administrative Appeals Tribunal. The Committee notes that, as explained in the Explanatory Memorandum, clause 14 excludes review under the *Administrative Decisions (Judicial Review) Act* of decisions about the approval of a scheme or about the suspension or cancellation of a scheme.

The justification offered for clause 14 is that : "The purpose is to avoid the difficulties that may follow delay".

The Committee notes that this justification might be offered in respect of the exercise of every kind of administrative and executive power. It considers that more is required by way of justification for excluding judicial review.

One matter that might be further explained is whether the Supreme Court of the Territory could grant remedies similar to those available under other of its powers to review administrative action - such as the remedies of the declaration and the injunction. In other words, it would appear that the objective of clause 14 will not be achieved if attention were to be paid only to the *Administrative Decisions (Judicial Review) Act*.

Para 2(c) (iv) inappropriate delegation of legislative power

By clause 12, proposed new section 58ZN of the Act would permit the Executive to make regulations that "may modify this Act to make provision in relation to any matter that, in the Executive's opinion, is not, or not adequately, dealt with in provisions 5A.4 and 5A.5".

This is a Henry VIIIth in that it allows the Executive to change an Act. Such provisions are commonly found in transitional provisions and normally raise no issue of principle.

The Committee has taken the view that any such provision should be justified in the explanatory memorandum. In relation to this Bill it is said simply that this provision will allow regulations "to be used to correct errors in the Bill". The Committee does not consider this to be an adequate justification for such a provision. A Bill presented to the Assembly should be free of errors.

It is furthermore concerned about the breadth of the power in this provision, and particular notes that in might be read as empowering the Executive to make provision for change to the Act which would go beyond simply making a technical amendment to make the provisions of the Act more workable. It appears that the provision might be used to make a change of a policy nature.

SUBORDINATE LEGISLATION

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from

- The Deputy Chief Minister of 8 May 2002 with reference to the comments of the Committee in Report No 8 of 2002 in connection with the *Gaming Machine (Women's Sport) Amendment Bill 2002*;

- The Minister for Health of no date with reference to the comments of the Committee in Report Nos 2 and 4 of 2002 in connection with
 - Subordinate Law 2001 No 47;
 - Determination No 221 of 2001;
 - Determination Nos 216-220, 222, 225-237 of 2001;
 - Disallowable Instrument No 318 of 2001;
 - Disallowable Instrument No 328 of 2001; and the
 - The *Gene Technology Bill 2002*; and
- The Chief Minister of no date with reference to the comments of the Committee in Report No 7 of 2002 in connection with
 - The *Drugs of Dependence Amendment Bill 2002*; and
 - Subordinate Law 2002 No 1.

The Committee thanks the Ministers for their responses. The Committee is still examining the response to the *Gene Technology Bill 2002* and it may comment further in its next report.

REGULATORY IMPACT STATEMENTS

The Committee notes that in his letter of no date with reference to the comments of the Committee in Report Nos 2 and 4 of 2002, the Minister for Health has undertaken to ensure that Explanatory Statements accompanying subordinate legislation emanating from the Department of Health will henceforth consider whether a regulatory impact statement was necessary.

The Committee commends this advice and hopes that this practice will extend to all subordinate legislation.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

14 May 2002



Ted Quinlan MLA

DEPUTY CHIEF MINISTER

TREASURER MINISTER FOR ECONOMIC DEVELOPMENT, BUSINESS AND TOURISM
 MINISTER FOR SPORT, RACING AND GAMING MINISTER FOR POLICE, EMERGENCY SERVICES AND
 CORRECTIONS

MEMBER FOR MOLONGLO



Mr Bill Stefaniak MLA
 Chair
 Standing Committee on Legal Affairs
 Legislative Assembly for the Australian Capital Territory
 CANBERRA ACT 2601

Dear Mr Stefaniak 

Re: Gaming Machine (Women's Sports) Amendment Bill 2002

I refer to Report No.8 of the Standing Committee on Legal Affairs (Performing the Duties of a Scrutiny of Bills and Subordinate Legislation Committee) and particularly to comments on the Gaming Machine (Women's Sports) Amendment Bill 2002.

I would like to thank the Committee for its comments contained in the Report on the Bill and would like to offer the following comments in reply.

The Government believes that this measure is justifiable positive discrimination. There is sufficient information available from consultations with the women's sporting bodies, that there is an imbalance between funding for men and women's sports, and the objectives of this law are sufficiently important to justify its existence.

This amendment to the *Gaming Machine Act 1987* (the Gaming Machine Act) will also provide the mechanism for the Government to accurately gauge the extent of the gap and over time enable review of the need or otherwise for the proposed legislative provision to be maintained. This mechanism is the requirement for clubs to separately report on their contributions to women's sport in order to take advantage of the credit. As you will be aware, I am required to table the Gambling and Racing Commission's report on community contributions after each financial year. So, by October 2003, we will be able to make a judgement on the initial success of this measure and the need to continue this policy.

In reference to comments in the report on decisions by the Gambling and Racing Commission relating to the eligibility of community contributions, the report states that the Bill does not contain provision for a review of such decisions. I wish to bring to the attention of the Committee that Section 52(1) of the Gaming Machine Act provides for the review of a decision by the Commission to refuse to approve contributions as community contributions under section 60B.

ACT LEGISLATIVE ASSEMBLY

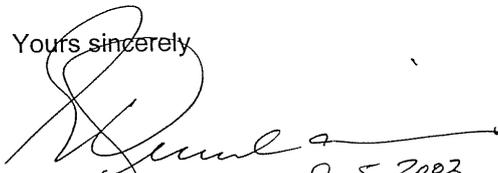
London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
 Phone (02) 6205 0001 Fax (02) 6205 0135

In addition, section 60B of the Act provides that the Minister must prepare written guidelines for approving community contributions. These guidelines are a disallowable instrument. Current guidelines are available on the Commission's website at, www.gamblingandracing.act.gov.au, should the Committee wish to view them.

The Report also states that by providing an incentive to clubs to contribute to women's sport, this may have some adverse financial effect on other persons or bodies that might have otherwise received this support. The Government acknowledges that this may happen. However, our objective is to encourage contributions to women's sport, in addition to clubs contribution to other community purposes. Indeed, the current review of the Gaming Machine Act contemplates addressing this very issue by providing for a minimum set percentage of a club's community contributions which must go to persons or bodies other than for sport.

Thank you again for your comments.

Yours sincerely



Ted Quinlan MLA

P. 5. 2002



Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS
MINISTER FOR WOMEN

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2601

Dear Mr Stefaniak

Bill

I am writing with regard to Scrutiny Reports Nos. 2 & 4 of 2002 in which the Standing Committee commented on the following issues in relation to Health and Community Care Legislation and Subordinate Legislation.

Scrutiny Report No. 2 of 2002 – 19 February 2002

Subordinate Legislation

Subordinate Law 2001 No.47 being the Maternal Health Information Regulations Repeal 2001 made under the Health Regulation (Maternal Health Information) Act 1998.

The Committee queried whether the above subordinate legislation should have been accompanied by a Regulatory Impact Statement when it was tabled in the Assembly. The need for a Regulatory Impact Statement was investigated but as there were no applicable costs on the community or part of the community resulting from this legislation none was needed.

Determination No.221 of 2001 made under ss 5(1) of the Health Professions Board (Procedures) Act 1981, s7 of the Medical Act 1931 and s8(1)(a) of the Medical Practitioners Act 1931

The Committee commented that there appeared to be an incorrect reference in the Determination to the Medical Act 1931 and the Medical Practitioners Act 1931. The Committee is correct in its comment, the Determination should be under only the Health Professions Board (Procedures) Act 1981 and the Medical Practitioners Act 1930. This was an oversight in the original determination and will be re-notified with the correct references.

Determination Nos. 216-219 of 2001 made under ss 5(10) of the Health Professions Boards (Procedures) Act 1981 and s 6 of the Dentists Act 1931
Determination No. 220 of 2001 made under ss 5(1) of the Health Professions Boards (Procedures) Act 1981 and s6(2)(b) of the Chiropractors and Osteopaths Act 1983
Determination Nos. 222 & 225 of 2001 made under ss 5(1) of the Health Professions Boards (Procedures) Act 1981 and s 7(1)(a) of the Optometrists Act 1956
Determination No. 226-230 of 2001 made under ss 5(1) of the Health Professions Boards (Procedures) Act 19981 and s (6) of the Physiotherapists Act 1977
Determination No. 231-234 of 2001 made under ss 5(2) of the Health Professions Boards (Procedures) Act 1981 and s 6(1)(a) of the Pharmacy Act 1931
Determination No.235-237 of 2001 made under ss 5(1) of the Health Professions Boards (Procedures) Act 1981 and s 6 of the Veterinary Surgeons Act 1965

Comment was made that the Explanatory Statements for appointments made to a number of Health Professions Registration Boards gave no indication as to whether consultation in relation to the appointment had taken place with the relevant Committee.

The appointments in question were made in relation to the following boards:

- Medical Board,
- Dental Board,
- Chiropractors and Osteopaths Board,
- Optometrists Board,
- Physiotherapists Board,
- Pharmacy Board, and the
- Veterinary Surgeons Board.

By way of background, the appointments to the above listed boards were all due for consideration by the Minister for Health, Housing and Community Care in mid 2001. At the time, legislation was being prepared which if passed by the Legislative Assembly, had the potential to dramatically affect the day-to-day functioning of the boards. In order to assist the transition of the boards to the new legislation, your Cabinet colleague, Health Minister, Michael Moore, decided to re-appoint the current incumbents for a twelve-month period.

Ministerial approval to the reappointments was gained on 14 June 2001 and the appointments were subsequently made by the Minister on 23 July 2001. The Minister extended the period of the appointments of the incumbents to 30 June 2002. In the normal course of events, the appointments would have been forwarded to the former Standing Committee on Health and Community Care for consideration, prior to the Minister making the appointments. It was the Department's understanding that this consultation took place between 14 June 2001 and 23 July 2001, however, the documentation supporting this claim cannot be located. The former Liberal Government in which you were a Minister failed in its obligation to forward the appointments to the Health and Community Care Committee.

To remedy this error, the Department will seek the views of the Standing Committee on Health on the appointments. As the appointments in question are due for consideration in June 2002, it may be that the Standing Committee will be asked to consider the appointments in light of a further extension. The administrative process to proceed with these appointments has already commenced. The Department will ensure that all due processes occur as required in relation to the forthcoming appointments to the boards.

Disallowable Instrument No. 318 of 2001 made under s7 of the Psychologists Act 1994

In this case the Committee raised its concern at the number of instruments across government which do not include an identifying Determination number on the Explanatory Statement, the above instrument being an example of this. I acknowledge this concern and undertake that all future determinations will have the instrument number on both the instrument and the Explanatory Statement.

Disallowable Instrument No. 328 made under ss 193B(1) of the Drugs of Dependence Act 1989

The Committee noted that no explanatory statement was provided with the above instrument, this has now been rectified and forwarded to the relevant officer in the Parliamentary Counsel's Office.

The Committee also made an across the board statement on all Subordinate Legislation in its closing comment. The request was that Explanatory Statements should note consideration of the necessity of Regulatory Impact Statements. The Department of Health has now included in its proforma a request for this inclusion in all future Subordinate Legislation in line with s34(1) of the Legislation Act 2001.

Scrutiny Report No. 4 of 2002 – 5 March 2002

Legislation

Gene Technology Bill 2002

In this instance the Committee has commented that there has been inappropriate delegation of legislative power, relating to clause 72A of the Bill. This issue can be explained as follows:

- The rationale for the clause is to avoid any arguments about whether the amounts levied are a fair fee for service.
- The Bill is part of a national scheme and, accordingly, we are being consistent with the other States' Acts. Other jurisdictions also have this clause in their legislation (eg. Victorian and Queensland gene technology legislation). We should be consistent

unless there is some compelling reason not to be, which we do not see in this case. We don't want to allow scope for the annual charge [if there is one] to be challenged in this jurisdiction on the grounds that it represents more than a fee for the service, when the charge could not be so challenged in the other States.

- There will also be Assembly oversight because the Assembly has power to disallow regulations.
- It is a policy principle that taxes should only be set by Parliament - it is not specified in law. The Scrutiny of Bills report itself says "Thus, if the power to make the subordinate law does not clearly authorise the imposition of a tax, it will be invalid to the extent that it purports to do so."
- The Bill does clearly authorise the regulations (subordinate law) to impose a tax, so this sentence in the report seems to contradict the Scrutiny of Bills Committee's concern.

The Committee also raised concerns that there seems to be an undue trespass on rights and liberties - relating to clause 148 sub-clause (1) and rights, liberties and/or obligations are unduly dependent upon insufficiently defined administrative powers - relating to clause 148. The response to this concern is as follows:

- The Scrutiny of Bills report says "There is no provision for the person affected to seek relief against forfeiture, although it might be expected that a court would, in the exercise of its undefined discretion, take into account matters pertaining to the personal circumstances of the offender, and the circumstances of the offence."
- It is not unusual to rely on the court's discretion. The court has discretion whether or not to make a forfeiture order and would take into account the circumstances of the case. We think this is adequate and there is no need to provide expressly for a person to be able to apply for relief against forfeiture.
- Various ACT legislation has common forfeiture provisions that require things to be returned or compensated for, unless a court decides otherwise.
- In relation to the concern about "insufficiently defined administrative powers" it is not considered necessary to spell out criteria for the court to take into account when making a decision on forfeiture. The court would take into account anything that seemed to it to be relevant.

- I trust the above allays your Committee's concerns.

Yours sincerely



Jon Stanhope MLA
Minister for Health



Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS
MINISTER FOR WOMEN

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Justice and Community Safety
Legislative Assembly for the Australian Capital Territory
CANBERRA ACT 2601

Dear Mr Stefaniak

I am writing with regard to Scrutiny Reports No. 7 of 2002 in which the Standing Committee commented on the following issues in relation to Health and Community Care Legislation and Subordinate Legislation.

Legislation

Drugs of Dependence Amendment Bill 2002

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

The Bill corrects these deficiencies so that the Act accurately reflects both the original policy intent of the law regarding the prescribing of amphetamines, and the current and longstanding administrative practices regarding applications and approvals to prescribe all drugs of dependence.

The Bill also validates approvals that have been issued in good faith by the Chief Health Officer since 1989 to medical practitioners to prescribe drugs of dependence for their patients. The issue of retrospectivity of this Bill was also raised and it should be noted that the issuing of approvals, and the process of doing so, has never been questioned, by doctors or their patients, since the enactment of the legislation in late 1989. The actions taken by the Chief Health Officer, and delegates, were always taken to be valid in the context of the Act. This conclusion was reached due to the fact that there is no record of any patient or doctor registering a complaint with either the Chief Health Officer or the Health Complaints Commissioner. Therefore, it is considered that the retrospective validation of prior actions taken under the provisions of the Act, would not adversely affect the rights of any person, doctor or patient, in any way whatsoever.

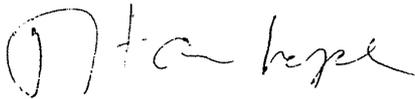
Subordinate Legislation

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

The Committee commented that the explanatory statement for the above regulations identifies the Regulations by name only and that there was a need for it to identify the number of the Subordinate Law to which it refers. This issue has been addressed and a process instituted to ensure that all Regulation explanatory statements have the Subordinate Law No. inserted by the Chief Minister's Department before it is notified.

I trust the above allays your Committee's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Stanhope'.

Jon Stanhope MLA
Minister for Health