# 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. 8 of 2001

13 June 2001

# 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**

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**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.

**BILL**

Bill - Comment

The Committee has examined the following Bill and offers this comment on it.

# Electoral Amendment Bill 2001

This is a Bill for an Act to amend the *Electoral Act 199*2, and the *Referendum Machinery Provisions) Act 1994*. The amendments would affect provisions dealing with: disclosure by MLAs; the making and witnessing of enrolment forms; the party registration scheme; the registration of ballot group names for use by Independent MLAs; the provision of an up to date copy of a party constitution to the Electoral Commissioner; a procedure for objection to the use of certain names by a political party; the rejection by the Commissioner of the use of certain names by individual candidates; the end-use of electoral rolls; voting outside a polling place; the start of the pre-poll period; the authorisation of printed electoral matter; the definition of "electoral matter"; and some other minor matters.

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

**POLITICAL RIGHTS**

*Introduction*

The regulation of the electoral process brings a number of personal rights into focus. In Australian law, these rights may be seen as aspects of the "freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors": *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 106-107. In this case, confirming earlier case-law, held that arising from ss 7 and 24 of the Australian Constitution there was a "freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors".

The High Court said "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government" (ibid at 106). That is, "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government as it was understood at federation" (ibid). Thus, "legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election" (ibid).

The Court added a qualification:

> However, the freedom of communication which the Constitution protects is not absolute (citations omitted). It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end (ibid at 107-108).

It is not yet clear how far this right operates as a restriction on laws made by the Legislative Assembly. It is very likely that this will have some, perhaps full effect in relation to laws of the Legislative Assembly. In any case, Members of the Assembly may take this right into account in their assessment of the desirability of the provisions of a bill.

In addition, Members may have regard to some provisions of the International Covenant on Civil and Political Rights when assessing whether proposed laws trespass on personal rights and liberties. In relation to this Bill, note may be taken of the following articles.

> ***Article 19***
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> 1. Everyone shall have the right to hold opinions without interference.
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> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
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> (a) For respect of the rights or reputations of others;
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> (b) For the protection of national security or of public order (ordre public), or of public health or morals.
>
> ***Article 22***
>
> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Under the Constitution of the United States of America, the Supreme Court has dealt with challenges to ballot-access laws and the regulation of political parties in the light of the recognition by the Court of the right to free speech, to political association, and to equal treatment under the law.

In the comments that follow, the committee does not seek to take a view on the desirability or otherwise of the particular provisions or parts of the Bill that are mentioned below. Rather, it seeks to promote some debate in the Assembly on the rights issues involved in what the Bill proposes. In general, the Committee suggests that Members of the Assembly ask two general questions:

- could a particular provision have an adverse impact (and then how much) on the exercise of some political right?
- if so, is this nevertheless justified in order to protect some other more compelling interest?

*The right of free speech*

The definition of "electoral matter"

While the definition of "electoral matter" in section 4 of the Act has been modified, it remains very broad. The deeming aspect of the definition in proposed new subsection 4(2) appears, for example, to encompass comment on the performance of a previous government or opposition, and of a former MLA. This definition needs to be read with proposed new section 292, which makes criminal the dissemination of electoral matter unless the name and address of the authorising person, or the name of the relevant party, etc, is in "the approved position". There are qualifications to section 291 in sections 293, 294 and the proposed new 295. Nevertheless, the requirement in section 292 may well encompass statements on political matters that have no connection with an election.

There are two rights perspectives here. The first is the making criminal of what some would regard as activity that could have no influence on the conduct of an election, including, of course, the conduct of voters. The penalising of speech about political matters in any context raises a significant rights issue.

There is a second dimension to this free speech perspective. The Supreme Court of the USA has recognised that there may be circumstances where a law that requires a person to identify themselves as a member or supporter of a political party may burden that person's right to free speech. This is so where such a public identification might cause the person to be subject to governmental or private hostility; (*Brown v Socialist Workers '74 Campaign Committee* (1982) 459 US 87. The Court thus held

invalid a statute that required every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements (ibid at 88).

It applied the principle that the free speech clause of the US Constitution prohibited the compulsory disclosure by a minor political party that could show a reasonable probability that the compelled disclosures would subject those identified to threats, harassment or reprisals (ibid). It said:

> The Constitution expressly protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment" [the free speech clause] (citations omitted).

It also said, quoting other decisions:

> "Inviolability of privacy of group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs". The right to privacy in one's political associations and beliefs will yield only to a "'subordinating interest of the State that is compelling,'", and then only if there is a "substantial relation between the information sought and [an] overriding and compelling state interest" (ibid at 92).

In the context of laws that regulate the reporting and disclosure requirements imposed on political parties, the Court quoted an earlier case to the point that there were

> … three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures: the enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations. The Court stressed, however, that in certain circumstances the balance of interests requires exempting minor political parties from compelled disclosure (ibid).

It quoted from *Buckley v Valeo* (1976) 424 US 1 at 71:

> … the damage done by disclosure to the associational interests of the minor parties and their members and to the supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

We have quoted these passages at some length in order to show, first, that taking free speech and association seriously has ramifications for laws that regulate access to the ballot and political parties, and, secondly, that the way these rights operate needs to be understood in the particular context concerned.

Section 93

This view of the scope of free speech – that is, that it sometimes encompasses the right to anonymity when speaking – also has ramifications for subsection 93(1). This imposes a requirement on a party or group seeking to be registered to establish to the Commissioner that it has 100 members who are ACT electors. This is the kind of requirement that was invalidated by the Supreme Court in the case just cited. It is understood that proposed new section 90 limits the use to which the Commissioner may make of information concerning party membership (although the proposed amendments to the *Freedom of Information Act* should perhaps be seen and enacted before these provisions under review here come into force). There still remains a question whether a public official should be empowered to require a political party to reveal its membership.

Similar comments may be made about proposed new section 95A, which deals with auditing by the Commissioner of a party's entitlement to continue to be registered.

Election funding and financial disclosure

A view of free speech that encompasses the right to anonymity when speaking also has ramifications for several of the provisions proposed for the Act that deal with election funding and financial disclosure. It is not proposed to review these provisions. Rather, the Committee suggests that Members of the Assembly ask two general questions: could these provisions have a chilling effect on the willingness of individuals to express their support for political parties and groups? If so, is this nevertheless justified in order to protect some other more compelling interest?

Section 110

This is a new provision that gives to the Commissioner a considerable discretion to refuse to accept the nomination of a person as candidate on the ground that the name under which the person seeks to be registered is obscene, frivolous, or has been "assumed for a political purpose".

These matters – and in particular the second and the third – are matters for judgment about which minds might easily differ. Is it desirable that a public official has this power to restrict access to the ballot?

There may be an 'equal protection' issue here. The names of political parties are often "assumed for a political purpose". Why should individuals be limited in their choice of name on this ground? This appears to be a direct restriction on political communication.

The contrary viewpoint here is that the voters will see the practices at which this provision is aimed for what they are and vote accordingly. The question is whether the undesirable affects that these practices have on the electoral process are such that these restrictions on political rights are necessary.

*Equal access to the law*

Proposed new section 89A provides that an MLA who is not a member of a registered party may apply to the Commissioner "to register a ballot group".

If this facility is not available to other candidates, then there is a question whether there is lack of equality in the application of the law.

*The right to political association*

Sections 93 and 95

The provision of proposed new section 93, which states a list of requirements for party or group seeking to be registered, bears on the right to political association. Subsection 93(1) requires on a party or group seeking to be registered to establish to the Commissioner that it has 100 members who are ACT electors. Subsection 93(2) limits the use of names by such a party or group. The application of this latter provision will in some key respects be in the discretion of the Commissioner, who may be called upon tho make judgments that will bear directly and significantly on the fortunes of political parties at elections.

The breadth of some of the provisions in subsection 93(2), when read with the definition of "another political party" in subsection 93(4), might be examined. If say, a 'Consumer Rights Party' was registered in Tasmania, the Commissioner might determine that a 'Consumer Protection Party' could not be registered in the Territory.

It is understood that the object of this provision is to protect the voters from being confused, and thus the integrity of the electoral process. The other view is that voters have the capacity to distinguish between parties and groups with similar sounding names. In Australian history, there are examples of parties that have competed and succeeded at elections that, under these provisions, might not have been able to be registered under this Bill. Those who favour less restriction in this area may also point to the advantage enjoyed by those who happen to register a particular name earlier than others who have similar objectives.

The issue here is whether there is sufficient justification for these restrictions on the right to access to the ballot. This right may be seen as an aspect of the right to political association, and/or to equal treatment under the law.

Similar comments may be made about proposed new section 95A, which deals with the case where two related parties split, and the one later registered seeks to use a name similar to that first registered.

Section 99

This provides that where the registration of a party or ballot group is cancelled, that name or a relevantly similar name cannot be registered again until after the next general election after the cancellation. The issue here is why this time limit is imposed. If the proponents of the re-registration of the party can satisfy the requirements for registration, it is hard to see any need for time barrier.

## OTHER RIGHTS

*Privileges in respect of the disclosure of information*

Under proposed new sections 237 and 237A, the Commissioner has powers to require persons to produce documents, and/or to give evidence. There do not appear to be provision in the Bill, or in the Act as it stands, that provides an answer to the question whether such persons may claim the benefit of the privilege against self-incrimination, and of legal (or client) professional privilege.

*Some points that might be clarified*

In proposed new section 91A (in clause 12 of the Bill) it is not clear on what grounds a person may object to the registration of a political party of ballot group. Do the objections need to be related to a ground of refusal in proposed new section 93?

*Para 2(c)(ii) – do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers*

*Administrative discretions*

A broad discretion

The Commissioner must cancel the registration of a political party if he or she "believes on reasonable grounds" that "the registration of the party or group was obtained by fraud or misrepresentation" (paragraph 98(6)(b)). The question arises – misrepresentation as to what?

Variation in the language of discretions

The Committee notes that the discretionary powers of the Commissioner are expressed in different ways. For example,

- in proposed new paragraph 95A(1)(a) – "if the commissioner is satisfied";
- in proposed new subsection 98(6) – "if the commissioner believes on reasonable grounds";
- in proposed new subsection 110(2) - "if the commissioner is satisfied on reasonable grounds";
- in proposed new subsection 237(1) – "in the commissioner's opinion"; and
- in proposed new subsection 237(2) – "the commissioner may give".

He question that arises is whether some different effect is intended when different language is used. A court might well take the view that that is the intention of the Assembly when it enacts these amendments.

## INTERSTATE AGREEMENTS

The Committee has received from the Chief Minister

- on May 12, advice that the Prime Minister had sought agreement to a national framework for the regulation of gene technology, and attaching a copy of the proposed Gene Technology Agreement;
- on 7 June, advice that the government intends to sign the Gene Technology Agreement; and
- on 7 June, advice that the Prime Minister has proposed nationally consistent legislation to prohibit human cloning and to regulate assisted reproductive technology and related emerging human technologies.

In relation to the third matter, the Chief Minister noted that the ACT Law reform Commission was reviewing the law relating to assisted reproductive technology. In these circumstances, the Committee cannot comment on any matter relating to its terms of reference.

In relation to the first matter, the Committee has reviewed the Gene Technology Agreement, and it noted recommendations for provisions that would require the wide dissemination of information of commercial value. There is a rights issue here, and the Committee notes that the Agreement also makes a proposal as to how it might be accommodated. The problem with this proposal – which is to penalise further dissemination of the information – is that it might not be workable where there has been wide dissemination among the governments of Australia. This is an issue that may require further comment if a Bill is proposed.

## GOVERNMENT RESPONSE

The Committee has received a response in relation to comments made concerning:

- Utilities (Telecommunications Installations) Bill 2001 (Report No. 7 of 2001) (Treasurer – 12 June 2001).

A copy of the response is attached.

The Committee thanks the Treasurer for his helpful response.

Paul Osborne, MLA
Chair

June 2001