



Legislative Assembly for the ACT

STANDING COMMITTEE ON LEGAL AFFAIRS
(performing the duties of a Scrutiny of Bills and
Subordinate Legislation Committee)

Scrutiny Report

23 AUGUST 2006

Report 31

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.

Human Rights Act 2004

Under section 38 of the Human Rights Act, this Committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

MEMBERS OF THE COMMITTEE

Mr Bill Stefaniak, MLA (Chair)
Ms Karin MacDonald, MLA (Deputy Chair)
Dr Deb Foskey, MLA

Legal Adviser (Bills): Mr Peter Bayne
Legal Adviser (Subordinate Legislation): Mr Stephen Argument
Secretary: Mr Max Kiermaier
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Anne Shannon
(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 these comments on it:

REMUNERATION TRIBUNAL AMENDMENT BILL 2006

This Bill would amend the *Remuneration Tribunal Act 1995* to amend elements of the framework for the making of determinations by the Tribunal about remuneration, allowances and entitlements for various public offices.

**Report under section 38 of the *Human Rights Act 2004*
Has there been a trespass on personal rights and liberties?**

Proposed subsection 11(1) preserves the current rule (in section 11 of the Act) that the Tribunal cannot make a determination concerning an allowance or an entitlement where an allowance or an entitlement *of that kind* is to be paid or granted to the holder under a territory law or a law of the Commonwealth.

By proposed subsection 11(2) however, the Tribunal will now be able to make a determination in relation to an allowance or an entitlement *of the kind* provided for in an instrument of appointment of a person, *but* it appears that the terms of a particular instrument will prevail over any determination (see proposed subsection 11(2)). This rule will however apply only to persons appointed after 1 July 2006.

Proposed subsection 11(2) would also provide that the terms of any Territory or Commonwealth law (including one made subsequent to the determination) prevail over the determination. This rule will also apply only to persons appointed after 1 July 2006; see proposed subsection 11(3). Some comment on this aspect of proposed subsection 11(2) is necessary.

(The Committee notes that it may well have been the case that a provision of any determination of the Tribunal made under current law would be subject to displacement by provision in any subsequent Territory or Commonwealth law. It is not clear why it is thought necessary to make particular provision in this respect. The Committee leaves this issue aside and considers the Bill on its face.)

The Presentation Speech notes that the *Public Sector Management Act 1994* and the Management Standards made under that Act constitute a significant body of Territory law regulating employment conditions of public officers. It further indicates that in relation to superannuation entitlements, and provision of vehicles as part of a remuneration package, changes to the Management Standards will prevail over any determination with respect to a person appointed after 1 July 2006.

The principle against the retrospective operation of the law

Are the changes proposed objectionable on the ground that they would have a retrospective operation?

It is generally accepted, as a common law right, that a law should not have a retrospective operation.

The essential idea of a legal system is that current law should govern current activities. ... Retrospective legislation ‘is contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the existing law’: F A R Bennion, *Statutory Interpretation* (3rd ed, 1997) 235, citations omitted.

Adapting the words of an English judge “Parliament [should not] alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them”: *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712 at 724. The statement from Bennion points to one way in which a retrospective law is unfair – that is, that it disappoints the expectations of those who assumed that the quality of their past acts would be assessed on the basis of the law as it then stood.

This common law right is the basis for the presumption that an enactment is not intended to have a retrospective effect. An enactment may however displace the presumption if it manifests an intention that the law operate retrospectively; see *Legislation Act 2001* section 75B.

It is arguable that, apart from the provision made by proposed subsection 11(3), the rule in proposed subsection 11(2) would apply only to persons appointed after the commencement of the Act that would result from the passage of this Bill. In terms however of section 75B of the *Legislation Act 2001*, proposed subsection 11(3) makes explicit provision to the contrary and would apply proposed subsection 11(2) to persons appointed after 1 July 2006.

The question for the Assembly is whether this apparent derogation from the principle that a law should not have a retrospective operation is justifiable.

One matter to consider in any context where a law has a retrospective operation is whether the proponent of the change to the law indicated publicly, in advance of the date on which the law is to commence (retrospectively), that the law would have this effect. (The Committee has accepted that such announcements may justify changes to taxation law that take effect retrospectively.)

The Committee notes that the government did announce on 6 June that it proposed that from 1 July 2006 “all new entrants to the ACT public service will receive an employer superannuation contribution rate of 9 percent”: Budget 2006-2007, *Paper No 2 at a Glance*, p 37. It also notes that in Budget 2006-2007, *Paper No 3 Budget Overview*, p 102 there is reference to the intention to progressively replace six-cylinder sedans with four-cylinder cars.

There may be other relevant statements of which the Committee is unaware.

The Explanatory Statement does not address this rights issue, and the Committee considers that Assembly debate would be assisted by an explanation by the Chief Minister as to whether the government perceives that the Bill would have retrospective effect and, if so, why that is justifiable.

SUBORDINATE LEGISLATION

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

There is no matter for comment in this report.

Bill Stefaniak, MLA
Chair

23 August 2006