

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON JUSTICE AND
COMMUNITY SAFETY**

**(INCORPORATING THE DUTIES OF A
SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 7 OF 2001

25 MAY 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

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.

BILLS

Bills - No Comment

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

Fair Trading Amendment Bill 2001

This is a Bill for an Act to amend the *Fair Trading Act 1992* to the effect of compelling credit providers to conduct an assessment, prior to approving a credit limit increase, of whether a debtor has the capacity to repay the amount of credit increase offered.

Financial Management Legislation Amendment Bill 2001

This is a Bill for an Act to amend the *Financial Management Act 1996* and the *Territory Superannuation Provision Protection Act 2000* to enable the use of financial derivatives for the purposes of investment, subject to the issue of financial management guidelines.

First Home Owners Grant Amendment Bill 2001

This is a Bill for an Act to amend the *First Home Owner Grant Act 2000*. There would be provision for a category of 'special eligible person' who would be entitled to a grant of \$7000 in addition to the grant of the same amount available to an 'eligible person'.

Gaming Machine Amendment Bill 2001

This is a Bill for an Act to amend the *Gaming Machine Act 1987* to extend the expiry date of Division 2A of the Act, which governs the number of gaming machines permitted to be licensed in the Territory.

Guardianship and Management of Property Amendment Bill 2001

This is a Bill for an Act to amend the *Guardianship and Management of Property Act 1991*. It would assimilate the statements in the Act of the circumstances in which the Guardianship and Management of Property Tribunal may appoint first, a guardian for the person, and/or secondly, a manager to manage all or part of the relevant person's property. The Bill would also insert new provisions to state principles to guide decision-making by guardians and managers.

Land (Planning and Environment) Amendment Bill 2001 (No 2)

This is a Bill for an Act to amend the *Land (Planning and Environment) Act 1991* in two main respects. First, the Minister would, in the circumstances stated the regulations, be obliged to impose an increase, or to make a remission, in a particular change of use charge. Secondly, a person seeking a change of use of leased land must, at the time of the application, provide a valuation report and a calculation of the change of use charge.

Rates and Land Tax Amendment Bill 2001

This is a Bill for an Act to amend the *Rates and Land Tax Act 1926* to impose general rates and land tax on property owners in the Territory.

Tobacco Amendment Bill 2001

This is a Bill for an Act to amend the *Tobacco Act 1927* to permit regulations made under the Act to prescribe the identification of what will be a ‘place’ where smoking products are sold within an outlet, and to prescribe the content of a health warning notice.

Bills - Comment

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

Community Title Bill 2001

This Bill provides for the creation and administration of community title schemes. It governs the kinds of arrangements under which land may be parcelled to allow separate ownership of a primary lease, whilst having a shared interest and responsibility over common land on an adjacent Crown lease.

Para 2(c)(ii) – insufficiently defined administrative powers

The wording of some discretionary powers vested in the Minister do not provide any indication of the matters relevant to an exercise of the discretion:

- under clause 9, the Minister “may require” changes to a community title scheme submitted for approval by a developer. (The fact that an exercise of this power is reviewable enhances the desirability of some criteria to guide the AAT);
- under subclause 22(3) the Minister “may defer consideration” of an application to amend a community title scheme;
- under paragraph 64(b)(ii), the Minister has a power to require security to be given by a person who is to acquire title to land; and

- under paragraph 84(1)(a), the Minister has a power to consent to an amalgamation of 2 community title schemes.

The issue here is whether the provision might be drafted so as to indicate at least a non-exhaustive list of relevant matters. The Minister might be empowered to issue guidelines that would provide guidance as to how the discretion might be exercised.

Para 2(c)(iii) – non-reviewable decisions affecting rights

There is in clause 93 good provision for review by the AAT of the exercise of administrative discretions. Regard might also be given to whether there should be review of an exercise of power by the Minister

- under subclauses 22(3), to defer consideration of an application to amend a community title scheme;
- under paragraph 64(b)(ii), to require security to be given by a person who is to acquire title to land; and
- under paragraph 84(1)(a), to consent to an amalgamation of 2 community title schemes.

Drugs of Dependence Amendment Bill 2001

This is a Bill for an Act to amend the *Drugs of Dependence Amendment Act 1989* to provide for a scheme of regulation for the handling, storage and destruction of cannabis seized by the police.

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

Under the scheme proposed, the government analyst may destroy seized cannabis (excepting samples of a seized lot) without the need to obtain an order from a court. The purpose of this change is to relieve the administrative burden the courts. The Bill does, however, recognise that a person charged in relation to the seized cannabis may wish to have all of it retained until the trial. As the Explanatory Memorandum says, “retention would be important to the defence of a charge in cases where there may be doubt regarding the amount or identity of the material seized”.

Thus, proposed new section 193D (see clause 8) provides that a person charged, or who considers that they might be charged, in relation to the seized cannabis, may apply to the Magistrates Court for an order that the cannabis be retained. On the other hand, it is apparent that the government analyst may destroy the cannabis ((excepting samples) within 24 hours of receiving the particular lot of cannabis; see proposed new subsection 193C(5), in clause 8). By proposed new subsection 171B(2) (clause 5), a person charged, or a person who the police officer who seized the cannabis thinks is likely to be charged, must be informed by the officer that unless they make an application for the retention of the cannabis within 24 hours, the cannabis might be destroyed and only a sample preserved.

The question is whether this 24 hour period is long enough. In practice of course, more than 24 hours might elapse from the time of the notification under new subsection 171B(2) and the cessation of the 24 hours after the government analyst receives the particular lot of cannabis. Nevertheless, the period might not be much longer than 24 hours after the time of the notification.

A person who receives a notification might not be in a position to appreciate the point of making an application for the retention of the cannabis until they had taken legal advice. In some cases, only an experienced criminal lawyer would be able to make a proper assessment of whether the defence of a charge would be hampered by the destruction of most of the cannabis seized.

The committee draws this to the attention of the Assembly. It suggests that there be more explanation of why the 24 hour period was chosen.

Long Service Leave (Cleaning, Building and Property Services) Amendment Bill 2001

This is a Bill for an Act to amend the *Long Service Leave (Cleaning, Building and Property Services) Act 1999* to make more effective provision for a portable long service leave scheme for employees in the contract cleaning industry. It deals with the coverage of the Act, the method used to measure service in the industry, and the method used to measure rates of pay and calculate long service leave pay.

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

This law would have a retrospective operation; see clause 2. The Presentation Speech notes however that it would “not be detrimental to any benefits received nor [would it] penalise any breach of the amended Act that took place before the amendments”.

Utilities (Telecommunications Installations) Bill 2001

This is a Bill for an Act to facilitate the installation of telecommunications facilities on Territory land. A person installing the facility will be required to deal with both a land-holder, and the owner of the utility network facility, and to comply with planning requirements. There are provisions concerning the payment of compensation to persons affected by the installation of telecommunications facilities.

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

Rights to property and its use

A lessee of leased Territory land is included within the concept of “land-holder of Territory land” as defined, as will the occupier of such land if it is occupied by someone other than the lessee. On the land concerned may be a utility network facility, such as pipes and poles. The Act would require the person installing the telecommunications facility (the carrier) to deal with both the land-holder and the owner of the utility network facility. The consent of the latter is required, but not of the land-holder.

The powers of the carrier in relation to a particular piece land are quite extensive. Land may be entered, inspected, and be subject to modification such as lopping trees and the removal of soil. The carrier is obliged to notify the land-holder on an intention to enter the land, and is also obliged to carry out the work ways that will minimise damage and restore the land. A land-holder may claim compensation, and such action must be taken in a court of competent jurisdiction.

An issue for consideration by the Assembly is whether the Bill pays sufficient regard to the property rights and interests of land-holders in particular. These interests must of course be balanced against the interest of the Territory community in the installation of telecommunications facilities. Within this context, the provisions concerning compensation are critical. A particular issue here is whether the cost to the ordinary person of mounting claims in courts will deter them from seeking compensation to recover the probably relatively minor damage that will inevitably be caused in some instances.

Waste Minimisation Bill 2001

This is a Bill for an Act to provide a framework for the preparation, implementation, monitoring and enforcement of industry waste reduction plans (IWRP). The power to approve such a plan is vested in the Minister. The Environment Management Authority (EMA) prepares a draft plan, which may be after consultation with relevant industry members. The Bill also contains provisions concerning the disposal of waste.

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

Burden of proof

The Committee notes that a number of provisions provide that a person shall not do something “without reasonable excuse”: see subclauses 11(4), 18(5), 35(2), and 36(3).

The lack of clarity as to whether the defendant would carry any kind of onus of proof under such provisions, (as to which see Report No. 4 of 2001) is compounded by the fact that another provision of the Bill (subclause 53(2)) is structured in such a way that matters of defence are provided for in a separate subsection. The point here is that the presence of subclause 53(2) might be taken to indicate that the issue of fact under subclause 11(4), etc of whether the defendant had a “reasonable excuse” is one to be negated by the prosecution, with the result that the defendant does not carry even an evidential burden in this respect.

Right to property

Of garbage

Clause 23 provides that “[w]hen garbage is collected in the course of a garbage service provided under section 22, it becomes the property of the Territory”. On its face, this makes sense, but should provision be made for at least the circumstances where property of a person is inadvertently placed in the garbage for collection, or deliberately so placed by some other person?

Of information of commercial value

Subclause 11(1) vests in the EMA a discretion to require an industry member to provide information or documents to the EMA where the latter considers that such material is reasonably needed to assist the EMA in the preparation of an IWRP. A non-exhaustive list of the kinds of such material is stated in subclause 11(2).

It is possible that the information provided might be of commercial value to the industry member, or might be of such a kind that its disclosure would, or would reasonably be expected to, adversely affect the person in respect of the lawful business affairs of that person; (this wording is from paragraph 21(j) of the *Environment Protection Act 1997*). There is no provision in this Bill for a member of the public to inspect any information provided under subclause 11(1), but such a person might of course seek access under the *Freedom of Information Act 1989*. (In any event, there appears to be no restriction on the EMA to make this information public. There does not appear to be a secrecy provision in the *Environment Protection Act*.)

There is a case to argue that the Bill should address the issue of what disclosure might be made of information provided under subclause 11(1). Given that this is a situation in which the industry member will be compelled to provide information to the EMA, there is room for an argument that it should be specifically excluded from the *Freedom of Information Act*. It could of course be argued quite persuasively that the exemptions in this Act would exempt such information from access. But the questions would remain as to whether the industry member should be put at any risk of disclosure of the information, or to the expense of participation in an AAT proceeding under that Act.

The issue is one that could be dealt with in the Bill. There are comparable provisions in the *Environment Protection Act*; see sections 19 and 21.

Privileges to refuse to disclose information

The Committee commends the approach taken in clauses 48 and 49. There remains the question whether the situations that might arise under the Bill are ones in which the privilege against self-incrimination should be displaced at all.

Para 2(c)(ii) – insufficiently defined administrative powers

Some discretionary powers vested in the Minister are either unconfined altogether as to the matters relevant to an exercise of the discretion, or are limited by a non-exhaustive list of such matters; see subclauses 9(3), 13(3), 14(2), 15(1) and 17(1).

In the case of the unconfined powers, the issue is whether the provision might be drafted so as to indicate at least a non-exhaustive list of relevant matters. In relation to both kinds of provision, the Minister might be empowered to issue guidelines that would provide guidance as to how the discretion might be exercised.

Para 2(c)(iii) – non-reviewable decisions affecting rights

Clause 44 provides for review by the Administrative Appeals Tribunal (AAT) only in respect of decisions under clause 18 (contravention of an IWRP). Subclause 11(1) vests in the EMA another discretion – to require the member to provide information or documents to the EMA - which could have significant consequences for the member. There is a case to say that the exercise of this discretion should be reviewable by the AAT.

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

Delegation in respect of rights of entry

Paragraph 26(2)(f) would enable regulations to provide for “the entry of persons on land”. The issue is whether this is a subject that should be regulated by subordinate law.

Incorporation by reference

Under clause 16, an IWRP “may apply, adopt or incorporate any instrument, or any provision of an instrument, as in force from time to time”.

There are two issues to note here. The first is whether the Assembly considers that such a provision is justifiable in the circumstances. The second and related issue is whether any such incorporated instrument is a “notifiable instrument” by reason of the application of subsection 47(3) of the *Legislation Act 2001*. On the face of it, subsection 47(3) applies. Yet Note to 2 to the text of clause 16 of the Bill states only that the incorporated instrument “may be taken to be a notifiable instrument that must be notified under the *Legislation Act 2001*”.

If the instrument incorporated under clause 16 is a notifiable instrument that lessens the objection that might be taken to clause 16. (The text of a notifiable instrument must be included in the ACT legislation register; see sections 18 and 19 of the *Legislation Act*.)

Clarification of the government’s position in this respect would assist in the debate on this Bill.

The power to levy taxes

Subsection 45(1) expressly authorises the Minister may “determine fees for this Act”, and by paragraph 45(3)(a), a fee includes “a fee that is a tax”. The effect of this is that the amount of the impost described as a fee need bear no relation to the services rendered in return for the payment of the impost. It is not even clear whether the impost need be in any respect a fee for the provision of service. A tax need not have this character at all.

The Committee refers to discussions of this general issue in its **Report No 5 of 2000**.

It should also be noted that subsection 45(1) provides that the Minister may “determine fees for this Act”. The Committee commented on the uncertainty as to the effect of such a provision in **Report No 5 of 2001**, in relation to the Tree Protection Bill 2001. The issue is more acute in relation to the Waste Minimisation Bill for two reasons. First, unlike the Tree Protection Bill 2001, there are no Notes in the Waste Minimisation Bill to indicate in respect of just what activities a fee might be determined. Secondly, as noted above, subsection 45(1) would empower the Minister to levy a tax on these undefined activities.

The issues raised by subsection 45(1) are of considerable significance in terms of the relation between the legislature and the executive.

Mistake in the Bill

There is a mistake in subclause 7(3). The paragraphs should be (a), (b) and (c), and not, as at present (a), (b) and (a).

Subordinate Legislation - No Comment

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

Subordinate Law 2001 No 8 being the Land (Planning and Environment) Regulations Amendment made under the *Land (Planning and Environment) Act 1991* amends the Land (Planning and Environment) Regulations 1992 by inserting a new regulation 25 to empower the Minister to exempt signs from Part 6 of the Act and by making a minor correction to item 2 of Schedule 6.

Subordinate Law 2001 No 9 being the Environment Protection Regulations Amendment made under the *Environment Protection Act 1997* amends the *Environment Protection Regulations 1997* to improve the operation of the firewood licensing scheme and to allow for more focussed enforcement.

Subordinate Law 2001 No 10 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the Supreme Court Rules to make minor amendments to achieve consistency, delete incorrect references and take account of previous rule changes; amends Order 78 (currently based on the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cwlth) to make reference to the *Jurisdiction of Courts (Cross-Vesting) Act 1993* and amends the post judgement interest rate to 11% [currently 12%] based on a comparison of interest rates in NSW, Victoria as well as the Federal Court.

Determination No. 37 of 2001 made under subsections 4 (6) and 80 (1) of the *Freedom of Information Act 1989* varies the Declaration of application fees and determination of fees and charges made by Determination No. 132 of 1995 (notified in Gazette S242, dated 21 September 1995) [as varied by declaration and Determination No. 168 of 1996 and notified in Gazette S184, dated 26 July 1996] by removing the application fees altogether.

Determination No. 38 of 2001 made under section 4 of the *Public Place Names Act 1989* determines the name, origin and significance of a public place in the Division of Campbell.

Determination No. 39 of 2001 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of a number of streets in the Division of Dunlop.

Determination No. 40 of 2001 made under section 18 of the *Public Health Act 1997* being the Public Health Risk (Centre for Opioid Detoxification using Opioid Antagonists) Declaration 2001 declares the operation, management or control of a private centre for opioid detoxification using opioid antagonists in which rapid detoxification is carried out to be a public health risk activity and further declares the operation, management or control of a centre for opioid detoxification using opioid antagonists to be a licensable public health risk activity. A hospital building is not a detoxification centre for the purpose of this declaration.

Determination No. 42 of 2001 made under subsection 6 (2) of the *Legislative Assembly (Members' Staff) Act 1989* authorises office-holders to negotiate terms and conditions of employment of staff through Certified Agreements or Australian Workplace Agreements in accordance with the *Workplace Relations Act 1996*, subject to any applicable determination made under subsection 6 (2) of the Act.

Determination No. 43 of 2001 made under subsection 11 (2) of the *Legislative Assembly (Members' Staff) Act 1989* authorises Members to negotiate terms and conditions of employment of staff through Certified Agreements or Australian Workplace Agreements in accordance with the *Workplace Relations Act 1996*, subject to any applicable determination made under subsection 11 (2) of the Act.

Determination No. 46 of 2001 made under section 64 of the *Nature Conservation Act 1980* revokes Determination No. 102 of 1995 which determined the criteria the Conservator of Flora and Fauna must observe in granting a licence.

Determination No. 47 of 2001 made under section 64 of the *Nature Conservation Act 1980* determines the criteria the Conservator of Flora and Fauna must observe in granting a licence.

Determination No. 49 of 2001 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of a number of streets in the Division of Bruce.

Determination No. 50 of 2001 made under subsection 6 (2) of the *Legislative Assembly (Members' Staff) Act 1989* varies the terms and conditions of employment of staff of office-holders in Determination No. 333 of 2000 by revoking Schedule 2 and substituting the Schedule 2 to this Determination. This Determination is to apply retrospectively from 9 November 2000 to validate employment contracts entered into since that date, except where an employee's rights are affected in a prejudicial manner or liabilities are imposed on an

employee in respect of any act or omission before the date of notification of this Determination.

Determination No. 51 of 2001 made under subsection 11 (2) of the *Legislative Assembly (Members' Staff) Act 1989* varies the terms and conditions of employment of staff of Members in Determination No. 332 of 2000 by revoking Schedule 2 and substituting the Schedule 2 to this Determination. This Determination is to apply retrospectively from 9 November 2000 to validate employment contracts entered into since that date, except where an employee's rights are affected in a prejudicial manner or liabilities are imposed on an employee in respect of any act or omission before the date of notification of this Determination.

Determination No. 52 of 2001 made under paragraph 5 (2) of the *Health Professions Boards (Procedures) Act 1981* and section 6 of the *Dentists Act 1931* appoints a specified person to be a member of the Dental Board of the ACT from 5 April 2001 to and including 22 February 2004.

Determination No. 59 of 2001 made under section 50 of the *Nature Conservation Act 1980* is a determination of criteria, as specified in Schedule 1 and Schedule 2, in relation to directions issued by the Conservator of Flora and Fauna.

Determination No. 60 of 2001 made under subsection 12 (1) of the *Tree Protection (Interim Scheme) Act 2001* is a determination of criteria for approval to undertake a tree damaging activity.

Determination No. 61 of 2001 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person to be a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 62 of 2001 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person to be an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 63 of 2001 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person to be an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 64 of 2001 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person to be an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 66 of 2001 made under subsection 282 (2) of the *Land (Planning and Environment) Act 1991* determines the criteria for the exemption of signs from the application of the provisions of Part 6 of the Act as specified in Schedules 1 and 2.

Determination No. 87 of 2001 made under subsection 171A (2) of the *Land (Planning and Environment) Act 1991* revokes Determination No. 88 of 2000 and determines the maximum term; and the conditions subject to which; the Executive shall grant a further rural lease in accordance with subsection 171A (1).

Determination No. 89 of 2001 made under subsection 14 (1) of the *Territory Superannuation Provision Protection Act 2000* authorises payment of the amount of \$30,000,000.00 from the ACT Territory Public Account into a superannuation banking account.

Public Sector Management Standard No. 1 of 2001 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the approval of the Chief Minister amends parts of the relevant Management Standard as specified in Schedule A to correct typographical errors, provisions that are inaccurately worded, inconsistent terminology and references and to improve consistency with simplified Awards.

Public Sector Management Standard No. 2 of 2001 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the approval of the Chief Minister amends the following parts of the relevant Management Standard as specified in Schedule A:

- **Standard 1 Part 3 *Fairness and Equity*; renames the Standard *Equity and Diversity* and reflects the *Equity and Diversity Framework for the ACT Public Service* released by the Commissioner in June 2000;**
- **Standard 3 Part 8, makes an amendment to the table of motor vehicle allowance rates and corrects a typographical error in the headings and changes the date of effect to 11 April 2001;**
- **Standard 6 Part 2, makes an amendment to reflect minor changes to the new contract for the provision of travel and related services to the ACT Government which take effect from 1 May 2001.**

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Determination No. 44 of 2001 made under subsection 97 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person to be a member of the ACT Heritage Council for a period of three years from 29 March 2001.

Determination No. 45 of 2001 made under subsection 97 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person to be a member of the ACT Heritage Council for a period of three years from 29 March 2001.

No confirmation by relevant Committee of agreement to the above appointments

The Committee notes no indication has been given in the explanatory statement as to whether the required consultation in relation to these appointments have taken place with the relevant Committee in accordance with subsection 4 (1) of the *Statutory Appointments Act 1994*.

Determination No. 53 of 2001 made under section 11 of the *Kingston Foreshore Development Authority Act 1999* appoints a specified person as a member of the Kingston Foreshore Development Authority Board until 18 March 2004.

Determination No. 54 of 2001 made under sections 19 and 20 of the *Insurance Authority Act 2000* appoints a specified person as a Director of the Board of the Insurance Authority for a period of three years commencing 5 April 2001.

Determination No. 55 of 2001 made under sections 19 and 20 of the *Insurance Authority Act 2000* appoints a specified person as a Director of the Board of the Insurance Authority for a period of three years commencing 5 April 2001.

Determination No. 56 of 2001 made under sections 19 and 20 of the *Insurance Authority Act 2000* appoints a specified person as a Director of the Board of the Insurance Authority for a period of three years commencing 5 April 2001.

Determination No. 57 of 2001 made under sections 19 and 20 of the *Insurance Authority Act 2000* appoints a specified person as a Director of the Board of the Insurance Authority for a period of three years commencing 5 April 2001.

Determination No. 58 of 2001 made under sections 19 and 20 of the *Insurance Authority Act 2000* appoints a specified person as a Director of the Board of the Insurance Authority for a period of three years commencing 5 April 2001.

Are these instruments disallowable?

The Committee notes that the explanatory statements give no indication as to whether or not the persons appointed as a member of the Kingston Foreshore Development Authority Board and as Directors of the Insurance Authority are public servants. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

Determination No. 65 of 2001 made under subsection 15 (1) and subsection 16 (1) of the *Independent Pricing and Regulatory Commission Act 1997* refers a matter to the Independent Competition and Regulatory Commission for an investigation into natural gas prices within the Territory for domestic, commercial and industrial consumers using less than 10 terajoules of natural gas per annum and specifies requirements in relation to the conduct of the investigation.

Determination made under incorrect Act title

The Committee notes Determination No 65 of 2001 has been made under an incorrect Act title. In March 2000 the *Independent Pricing and Regulatory Commission Act 1997* was renamed the *Independent Competition and Regulatory Commission Act 1997* following the enactment of the *Independent Competition and Regulatory Commission Amendment Act 2000*. The Committee queries whether the making of this Determination under an incorrect Act has any effect on its validity.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSE

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

- Legislative Assembly (Legal Assistance) Bill 2000 (Report No. 4 of 2001) (Attorney-General, dated 29 March 2001).

A copy of the response is attached.

The Committee thanks the Attorney-General for his response. The Committee notes that clause 11(3) of the Bill requires the Minister to be satisfied of matters on “reasonable grounds”. It understands, however, that this is directed to the grounds that may be the basis for the Minister’s action, rather than to any procedure that must be followed by the Minister prior to taking that action. On the other hand, the committee accepts that a court would find that the common law principles of natural justice would apply to the procedure that must be followed, simply on the basis of the effect that the action taken might have on the reputation of the Member concerned. (The only reservation here is that the courts are reluctant to intervene in the conduct by a legislature of its internal affairs, but this general policy would probably not apply here.)

Nevertheless, the Committee considers that it is desirable that a law spell out basic procedural guarantees, rather than leaving it to the uncertain operation of the principles of natural justice. It pointed out in Report No 4 that laws do often spell out such basic guarantees.

The Committee took into account that the Minister’s reasons would go to the Legislative Assembly, and then be a matter of public record. In this context, this is a major source of the difficulty, and not a answer to it. Once a Member has been found by a Minister to have acted unreasonably or dishonestly, the opportunity to deal with these findings on the floor of the Assembly will not remove the damage that would have been done to the reputation of the Member. It is this that makes so important the need for a strong guarantee of procedural fairness at stages prior to the Minister making such a finding.

Since the committee first examined the Bill, it has come to the committee's attention that the Bill may not cover all aspects of a Member's duties. Section 6 of the Bill states that the Act applies to a legal proceeding that results from, or involves, an incident arising out of, or happening in the course of a person's official duties as a Minister or Member. The Committee queries whether this includes actions arising from performing the duties of Speaker, committee chair, Leader of the Opposition and other parliamentary positions. It may well be that "Member" covers all such actions, but other Territory legislation (see for example *Legislative Assembly (Members' Staff) Act 1989*) separate the Speaker and Minister from other Members.

Paul Osborne, MLA
Chair

May 2001