

# **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)**

**The electronic version of this report does not contain attachments,  
these can be obtained from the committee office**

**SCRUTINY REPORT NO. 14 OF 2000**

**27 November 2000**

## 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**  
**Acting Secretary: Mr Mark McRae**  
**(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 - Comment

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

#### **Construction Practitioners Registration Amendment Bill 2000**

This Bill would amend the *Construction Practitioners Registration Act 1998* to alter the details of the professional indemnity insurance required to be held by private building certifiers under that Act. It will enable those persons to insure against their potential liability in negligence.

#### **Electoral Amendment Bill 2000 (No 2)**

This is a Bill for an Act for the introduction of electronic voting in the Australian Capital Territory.

#### **Electronic Transactions Bill 2000**

This is a Bill for an Act enable commercial and business dealings, within the private sector, or with government, to be conducted by electronic communication. The basic principles are that a transaction is not invalid simply by reason that it took place by means of an electronic communication, but that the conduct of such transactions will require the prior consent of the relevant parties.

#### **Legislative Assembly (Members' Staff) Amendment Bill 2000**

This Bill would amend the *Legislative Assembly (Members' Staff) Act 1989*. It clarifies the circumstances in which the employment conditions of such staff are to be ascertained by reference to the *Public Sector Management Act 1994* and the Management Standards. It makes provision for the review of relevant employment decisions, and for the reintegration of staff back into the ACT public service.

#### **Liquor Amendment Bill 2000**

This Bill would amend the *Liquor Act 1975* to enable the making of a regulation that will restrict the sale of liquor in certain kinds of containers at certain times.

#### **Rates and Land Rent (Relief) Amendment Bill 2000**

This Bill would amend the *Rates and Land Rent (Relief) Act 1970* to the effect that all persons in the Territory that hold a Gold Card issued by the Commonwealth government are entitled to the same land rates concessions provide to pensioners.

## Bills - Comment

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

|  |
|--|
| <b>Crimes Amendment Bill 2000 (No 2)</b> |
|--|

This Bill would amend the *Crimes Act 1900* to make new provision in relation to the offence of stalking by the repeal the existing section 34A of the Act and insert a new section 34A in its stead.

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

The proposed law would make criminal a wide range of what would, apart from the limitations in the law, be ordinary activities in the dealings between persons in their personal, social and business lives. It is therefore important that the Legislative Assembly make a careful review of just what are these limitations.

What is constituted by stalking is stated in proposed new subsection 34A(2). It includes a wide range of what are normal activities (such as telephoning or otherwise contacting a person) where that activity occurs, in relation to the stalked person, on at least 2 occasions.

The person doing the stalking does not, however, commit an offence unless he or she does so “with intent” to produce certain results, being: “to cause apprehension, or fear of harm, in the person stalked or someone else”, or to “cause harm the person stalked or someone else”, or “to harass the person stalked”. Two matters should be noted:

- The concept of “harm”, rather than the existing “serious harm”, is employed. The Explanatory Memorandum says that the latter “is an unnecessary impediment to prosecutions under the section and is not defined”.
- The notion of harassment is not defined. The Explanatory Memorandum indicates that proof of harassment will not require evidence from experts such as psychiatrist or psychologists.

The notion of intent is further refined in subsection 34A(4). In addition to having an actual intention, a person will have the requisite intent where he or she “knows that, or is reckless about whether, stalking the other person would be likely “to cause apprehension, or fear of harm, in the person stalked or someone else”, or “to harass the person stalked”. Three matters should be noted:

- The notion of reckless conduct in this regard is not defined.
- Where the person has not considered the possible consequences of their actions, they may be dealt with under the system for restraining orders. In this way, (and in others, such as by being warned or asked to desist), they will then be apprised of the possible consequences of their actions.

- Proposed new subsection 34A(3) provides protection for persons who engage in “reasonable conduct” as part of their employment.

It is for the Assembly to consider whether these limitations are sufficiently precise to provide clear guidance as to what activity will constitute an offence punishable by imprisonment for 2 years Or 5 years if in contravention of a court order).

The Explanatory Memorandum appears to accept that it is vaguely worded when it says (in relation to the concept of what is ‘harm’ without the qualifier ‘serious’) that:

Police and prosecutorial discretion may be relied upon (as they are in relation to the operation of the criminal law generally) to exclude innocent or random acts, or vexatious attempts to use the provision.

It is for the Assembly to consider whether in this context, the administration of the law should be placed in the hands of the police and the prosecutors.

### **Law Reform (Miscellaneous Provisions) Amendment Bill 2000**

This Bill would amend the *Law Reform (Miscellaneous Provisions) Act 1955* to deal with the consequences of a decision of the High Court in *Asley v Austrust Pty Ltd* (1999) 73 ALJR 403. This decision is said to have disturbed the common understanding of the effect of certain provisions of the Act. In particular, the court held that a contractual claim in damages was not liable to be reduced where the person suing had contributed to the damages he or she suffered. These amendments would provide a rule for reduction in such circumstances. The rule would be the same as that which applies where the person made a claim for damages in tort (such as negligence), rather than in contract.

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

#### Retrospective operation of the law

The proposed law would have a retrospective operation in as much as the new rule would operate where the acts that give rise to the action in contract occurred prior to the commencement of the changes to be made by the Bill.

The Committee considered this issue of the rights issues involved with retrospective laws in **Report No 2 of 1999**.

The justification offered here is that this Bill gives effect to what was the common understanding of the effect of the relevant provisions of the Act.

It is for the Assembly to judge whether this justification is acceptable. The Committee notes that any such common understanding would have been held by some of legal profession and perhaps some in the insurance industry.



## Leases (Commercial and Retail) Bill 2000 [ No 2]

This is a Bill for an Act to regulate the nature of commercial and retail lease, and to vest in the Magistrates Court jurisdiction to hear disputes, or to make various orders, in relation to such leases.

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

### In general

The provisions of the bill do restrict the common law liberty of both lessors and lessees to enter into contractual arrangements. In this area, however, such restrictions are accepted to be justifiable in the interests of those directly affected and the general public. The fact that the Bill is the result of a thorough and balanced consideration of the existing law, and the needs of those involved in the activities of commercial and retail leasing, give confidence that the provisions are not an undue trespass on the right to contract.

### The power of the Magistrates Court to assess whether there has been unconscionable or harsh and oppressive conduct

Subclause 22 proscribes conduct that is unconscionable or harsh and oppressive, and empowers the Magistrates Court to assess whether such conduct has occurred. The matters which the court may take into account are specified. The result is that the court has a very wide degree of choice in making the assessment.

The questions for the Legislative Assembly are whether it is appropriate that a commercial dealing might be upset on such broad grounds, and also whether it is appropriate that a court should be the body to make such a decision.

### Dispute resolution by the Magistrates Court

Part 14 of the Bill, dealing with dispute resolution, will confer on the Magistrates Court a very wide power to fashion its procedure in relation to matters arising under the regime created by this Bill.

The Committee points out that such provisions are at times not very helpful in providing guidance. For example, clause 136 provides that the court “must, when hearing a proceeding, (a) act as quickly as possible; and (b) ensure, as far as practicable, that all relevant material is disclosed to the court to allow it to decide the matters in dispute”.

Paragraph (b) is a direction to the court that it intervene and make decisions concerning the evidence that is placed before it, notwithstanding the decisions in this regard that may have been taken by the parties and their legal advisers. If taken seriously, such a direction will add to the cost – to both the parties and the public – of these hearings. In this way, the aim in paragraph (a) will be defeated.

It is also fashionable to permit administrative tribunals and the Magistrates Court to dispense with the rules and evidence and decide on their own procedures; see clause 137.



There is in this policy a risk that parties will not be accorded a proper measure of natural justice.

In this respect, the Committee suggests that the Assembly consider whether the Magistrates Court be specifically obliged to observe natural justice, and that any decisions it makes as to its procedures be made in the form of a disallowable instrument.

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

This is a law that will affect the daily activities of many people in the Territory. It is important, therefore, that it be clear in what it provides. In this respect, The Committee draws attention to a lack of clarity in some provisions.

In some provisions (for example, subclause 105(2)), the Magistrates Court has an unfettered discretion to 'order otherwise'. It is the committee's view that it is generally desirable that a law defines carefully the factors relevant to an exercise of discretionary power. The fact that the power is vested in a court does not mitigate this point where the power is essentially administrative (rather than judicial) in character.

*Paragraph 2 (c)(iv) – inappropriate delegation of legislative power*

A Henry 8<sup>th</sup> clause

The Committee notes that by clauses 154 and 155, regulations made under the proposed Act may modify provisions of the Act. It is noted, however, that this is a limited power, and will expire 2 years after the Act commences.

**Territory and Infrastructure Legislation Amendment Bill 2000**

This is a Bill for an Act to amend, in minor respects, the *First Home Owners Grant Act 2000*, the *Gaming Machine Act 1987*, and the *Rates and Land Tax Act 1926*.

Retrospective operation of the law

The proposed law would have a retrospective operation in as much as that citizens of New Zealand that reside permanently in Australia may, retrospectively, be eligible for a first home owner grant.

This is a beneficial effect, and does not raise any concern.

**SUBORDINATE LEGISLATION**

There is no subordinate legislation for comment in this report.

**INTERSTATE AGREEMENTS**

The Committee has received advice from the Chief Minister concerning an interstate agreement in relation to the implementation of a national food regulatory framework. The Committee notes that it has already made comment upon the Model Food Bill, and drawn

attention to the respects in which it does not make appropriate provision according to the principles applied by the Committee under its terms of reference.

## **GOVERNMENT RESPONSES**

The Committee has received responses in relation to comments made concerning:

- Road Transport (Public Passenger Services) Bill 2000 Report No.13 of 2000
- Surveyors Bill 2000 (Report No. 11 of 2000).  
(Mr Smyth, Minister for Urban Services – 21 November 2000)
- Animal Welfare Amendment Bill 2000 (Report No.13 of 2000).
- Domestic Animals Bill 2000 (Report No.13 of 2000).  
(Mr Smyth, Minister for Urban Services – 21 and 24 November 2000)

Copies of the responses are attached.

The Committee thanks the Minister for Urban Services for his responses and furthermore expresses its appreciation of the fact that the Minister has accepted several of the Committee's recommendations and has proposed amendments accordingly.

Paul Osborne, MLA  
Chair

November 2000