

**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO. 22 of 1991

10 December 1991

**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

MEMBERS OF THE COMMITTEE

**Mrs E Grassby, MLA (Presiding Member)
Mr B. Collaery, MLA
Mr B Stefaniak, MLA**

**Secretary: Mr T Duncan
Legal Advisor: Emeritus Professor D Whalan**

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature (including a regulation, rule or by-law) made under an Act consider whether the instrument –
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; and
 - (d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (3) the Committee shall with respect to the clauses of bills introduced into the Legislative Assembly consider whether such bills –
 - (a) unduly trespass on personal rights and liberties;
 - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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.

ROLE OF THE COMMITTEE

The Committee examines all Bills and delegated legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The Terms of Reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and delegated legislation that comply with the high ideals set out in the Terms of Reference.

SUBORDINATE LEGISLATION

(a) Subordinate Legislation - No comment offered.

The Committee has examined the following subordinate legislation and offers no comment.

ACT Regulations 1991 No. 31 being Associations Incorporation Regulations provide machinery relating to completion of documents, particulars relating to the register of members, the rate of commission payable to the Registrar on disposal of property and a set of model rules.

ACT Regulations 1991 No. 32 being Door-to-Door Trading Regulations prescribe the form of notice of a consumer's right to cancel a "Door-to-Door" contract and the form of notice for a consumer to cancel a "Door-to-Door" contract.

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Griffith Section 96 Blocks 1 and Forrest Section 24 Blocks 4 and 5.

(b) Subordinate Legislation upon which Comment is Offered

The Committee has examined the following subordinate legislation and offers the following comments:

ACT Determination No. 102 of 1991 made under section 105A of the Liquor Act 1975, provides for liquor licence fees for a particular licensee specified in the Determination.

ACT Determination No. 103 of 1991 made under section 105A of the Liquor Act 1975, provides that, in relation to three licensees specified in the Determination, although they may not meet the hours required for an "On" licence, the fees to be paid shall be the same as those paid by "On" licensees.

(i) Switched Numbering of Explanatory Statements

The Determinations appear to be totally in order and the Explanatory Statements are very satisfactory. However, if Members are checking the legislation, they are advised that the Explanatory Statement for Determination 102 of 1991 is numbered 103 and that for Determination 103 of 1991 is numbered 102.

Declaration of Approved Manufacturer of Darts
under regulation 7 of the **Weapons Regulations** declares a specified body to be an approved manufacturer of darts under the **Weapons Act 1991**.

(ii) Missing Explanatory Statement

No Explanatory Statement for this Declaration appears to have been received.

BILLS

(a) No comment offered

The Committee has examined the following Bills and offers no comment:

Audit (Amendment) Bill (No. 2) 1991

This Bill amends aspects of the principal Act relating to borrowings, guarantees and financial exposure management and also alters some aspects of the payment of moneys and transfers between parts of the appropriated funds up to a limit of 5%.

Crimes (Amendment) Bill (No. 7) 1991

This Bill amends the principal Act to relocate a section to a more suitable place in the Act and enables the Executive to grant pardons or remit sentences.

Dog Control (Amendment) Bill 1991

This Bill amends the provisions of the principal Act relating to the control of dogs, increases penalties for offences and introduces a new regime for registration and licensing.

Gas Levy Bill 1991

This Bill introduces a levy on the sale of natural gas in the Territory.

Public Trustee (Amendment) Bill (No. 2) 1991

This Bill amends the principal Act to provide that the Public Trustee is to keep accounts on the more stringent commercial basis under the Audit Act 1989.

Rates and Land Tax (Amendment) Bill (No. 4) 1991

This Bill amends the principal Act to exempt residential properties from the incidence of land tax.

Taxation (Administration) (Amendment) Bill 1991

This Bill amends the principal Act to ensure that powers under that Act apply to the sale of gas.

(b) Bills upon which Comment is Offered

The Committee has examined the following Bills and offers the following comments:

Agents (Amendment) Bill 1991

This Bill establishes a Fidelity Guarantee Fund to protect persons dealing with licensed agents.

(i) A Possible Wrong Reference

Clause 13 inserts a number of new sections, including section 57A. Section 57A(5) defines "relevant month" and paragraph (a) of the definition refers to "the Agents (Amendment) Act 1990." The Committee has been unable to locate an Agents (Amendment) Act 1990, but possibly the present Bill is intended, if, and when, it becomes "the Agents (Amendment) Act 1991".

(ii) Other Sexist Language not Removed

Clause 9 repeals and substitutes section 37(3), clause 13 inserts new section 57C and clause 15(f) inserts section 71(4). They are carefully drafted so as not to include sexist language. However, the opportunity has not been taken to remove other illustrations of sexist language that occur in the principal Act.

For instance, although sexist language has not been included in section 37(3), section 37(1) does still offend.

Commercial Tenancies Bill 1991

This Bill provides for the control over a number of aspects of commercial and retail leases.

(iii) Two Possible Small Errors

There may be two small errors in the draft.

First, clause 15, dealing with deposit of rental bonds, refers in paragraph 15(1)(b) to "a notice in accordance with subsection (6)". There is no notice referred to in subsection (6), but perhaps subsection (7) is intended.

Secondly, in the Disclosure Statement in the Schedule there is a reference in the second line on page 17 of the Bill to the fact that the tenant mix "may be changes from time to time". Perhaps "may be changed from time to time" would be better.

Disability Services Bill 1991

This Bill establishes a system for the administration of funding for persons with disabilities and providers of services for persons with disabilities.

(iv) Some Possible Incorrect References to Sections

In clause 4 "grant " is defined to mean "a grant under subsection 5(1)". There is no subsection 5(1), but perhaps "subsection 6(1)" is intended.

In paragraph (h) of the definition of "research and development activity" in clause 4 there is a reference to "any other activities approved under section 8". Probably "section 9" is intended, as there is a reference back to paragraph (h) of the definition of "research and development activity". In addition, unfortunately the reference back is to "section 3", whereas "section 4" would appear to be the correct reference.

Incidentally, the Explanatory Memorandum appears to confirm that these suggested changes need to be made.

Fire Brigade (Administration) (Amendment) Bill (No.2) 1991

This Bill inserts a section to provide for the payment of lump sum superannuation payments to firefighters who retire compulsorily at age 60.

(v) A Possible Small Error

Clause 3 refers to the omission and substitution of "Division 2 of the Principal Act". It would appear that the repeal and substitution should refer to "Division 2 of Part III of the Principal Act".

Legal Practitioners (Amendment) Bill (No. 3) 1991

This Bill updates references to the Solicitors' Mutual Indemnity Fund, provides for remuneration for the Secretary of the Disciplinary Committee and reviews penalties in the principal Act.

(vi) Two Possible Small Errors

There are two possible small errors in the Bill.

First, in clause 21(a), there is a reference to "Division 2 of Part III" in the new South Wales Legal Profession Act 1987. The New South Wales Act uses Arabic numbers to refer to Parts, so the reference should probably read "Division 2 of Part 3".

Secondly, and more seriously, clause 31 amends section 76 and refers to "paragraph (1)(c)". There is no such paragraph, but perhaps "paragraph (2)(c)" is intended.

(vii) Other Sexist Language not Removed

Clauses 4 and 5 amend sections 6 and 6B respectively of the principal Act and, in doing so, also remove sexist language. However, the opportunity has not been taken to remove other illustrations of sexist language that occur in the principal Act. For instance, although sexist language has been removed from section 6(9), similar language used in section 6(10) has been overlooked.

Liquor (Amendment) Bill (NO. 3) 1991

This Bill extends the exemptions contained in the principal Act by providing that an offence is not committed if liquor is

consumed on licensed premises or on premises at which food is sold for consumption on those premises or within 50 metres of such premises using furniture or facilities provided for that purpose by the proprietor or licensee of such premises.

(viii) Retrospectivity

This Bill is retrospective in operation to the date when the Liquor (Amendment) Act 1991 commenced. However, this could only be of benefit to people.

Proceeds of Crime Bill 1991

This Bill provides for the freezing and confiscation of property arising from the commission of indictable offences.

(ix) The Effect of a possible Later Amendment

Clause 4(1) of the Bill defines "Crimes Act" to mean "the Crimes Act, 1900 of the State of New South Wales in its application in the Territory".

This is presently a perfectly proper description of the Crimes Act. However, if the Crimes Legislation (Status and Citation) Bill 1991 is passed before the present Bill, it would then be sufficient to cite the Act as the Crimes Act 1900.

(x) A Tiny Misprint

Clause 14(1) should probably have another comma and read as follows:

"Where a person is convicted of an indictable offence, the DPP may, subject to subsections (2), (3) and (4), [sic] apply"

(xi) Reversal of the Onus of Proof

Clause 26 deals with the assessment of pecuniary penalties. Clause 26(6) provides as follows:

"Where an application is made for a pecuniary penalty order against a person in relation to a serious offence or offences

(a) all property of the person at the time the application is made; and

(b) all property of the person at any time -

(i) within the period between the day the offence, or the earliest offence, was committed and the day on which the application is made; or

(ii) within the period of 5 years immediately before the day on which the application is made;

whichever is the shorter;

shall be presumed, unless the contrary is proved, to be property that came into the possession or under the control of the person by reason of the commission of the offence or offences."

This is clearly a reversal of the onus, although it may be possible to argue that the information is peculiarly within the knowledge of the defendant. However, the provision does cast a very wide net.

(xii) The Customary Consent Provisions are Missing

Clauses 38 and 67 confer entry and search powers which can be exercised either with consent or under a search warrant.

Neither set of provisions contains the now usual complementary provisions in ACT laws which ensure that the consent really is a freely given consent.

There are many precedents for these consent provisions, but the two most recent that the Committee can find are the sets of provisions contained in the proposed new section 23H in the Workers' Compensation (Amendment) Bill 1991 presently before the Assembly and that in the (then) Land (Planning and Environment) Bill 1991. In the latter case there was an inconsistency between 2 provisions and the Minister, Mr Connolly, in his response to the Committee of 4 November 1991, graciously agreed to insert the usual consent provision in the provision, the (then) subclause 151(2), that departed from the ACT norm.

(xiii) Possible Different Lengths of Life for Search Warrants

Clauses 39 and 68 provide for the issue of search warrants for searching for tainted property and for searching for property-locating documents respectively. Clause 39(7)(d) provides that a

"search warrant shall ... specify a time, not later than the prescribed time, upon which the warrant ceases to have effect." (Emphasis added.)

Clause 68(7)(d) provides that there

"shall be stated in a search warrant issued under this section - ... a date, not being later than one month after the day of issue of the warrant, upon which the warrant ceases to have effect." (Emphasis added.)

Two comments are made.

First, is there any reason for the inconsistency?

Secondly, it will be remembered that recently the Committee raised this matter also in relation to the (then) Land Planning and Environment) Bill 1991 where the inconsistent terms of "one month" and "28 days" for the life of a search warrant were given. The Committee opted for the more certain "28 days" and the Minister agreed with the Committee in his response of 4 November 1991. Perhaps the same period would be appropriate in the present instances.

(xiv) Strict Liability Offence

Clause 75 provides for an offence of receiving, possessing, concealing, disposing of or bringing into the Territory money or other property reasonably suspected of being the proceeds of crime. There is a defence, if the person charged can

"satisfy the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realized, directly or indirectly, from some form of unlawful activity."

This places the onus of proof on the defendant.

(xv) Explanatory Statement and the Bill become out of kilter in their Numbering

The Explanatory Memorandum is very helpful. However, Members should note that from clause 77 of the Bill to the end of the Bill, the Bill and the Explanatory Memorandum are "out of kilter", because the Bill seems to have had one clause dropped from it. Thus the Explanatory Memorandum's explanation of clause 77 is numbered 78 and so on to the end.

Proceeds of Crime (Consequential Amendments) Bill 1991

This Bill provides for the proceeds of confiscated articles from the Crimes Act, 1990 of the State of New South Wales in its application in the Territory (as it is presently called) to be paid into the Confiscated Assets Trust Fund to be set up by the Proceeds of Crime Bill 1991.

(xvi) A Possible Later Amendment

A similar comment can be made here as was made above about the Proceeds of Crime Bill 1991. Clause 3 defines the "Principal Act" to mean "the Crimes Act, 1990 of the State of New South Wales in its application in the Territory". If the Crimes Legislation (Status and Citation) Bill 1991 is passed before the present Bill, it would then be unnecessary to give the full definition.

GOVERNMENT RESPONSES

The Committee has received two responses to comments made in earlier reports, which are listed accordingly:

Weights and Measures (Amendment) Bill 1991 (Report No. 15 of 1991)

Air Pollution Amendment Bill (No. 2) 1991 (Report No. 20 of 1991)

Copies of these responses are attached. The Committee thanks the Attorney-General and the Minister for the Environment, Land and Planning for their positive response.



Ellnor Grassby, MLA
Presiding Member

December 1991

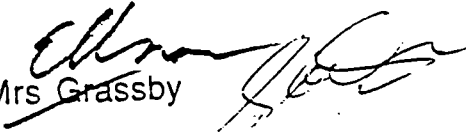


A.C.T. GOVERNMENT
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Presiding Member
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Dear Mrs Grassby 

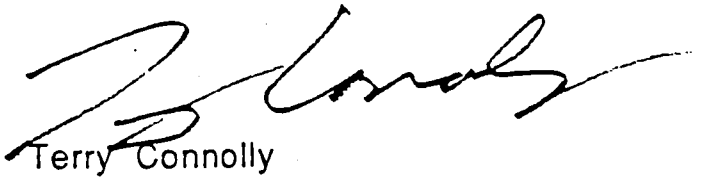
I refer to the Committee's Report No 15 of 1991 dated 17 September 1991 in which comments were made in relation to the *Weights and Measures (Amendment) Bill 1991*. I apologise for the delay in responding.

As you are aware, this Bill was part of a package of legislation arising from a Commonwealth/State/Territory Agreement for the adoption of uniform trade measurement legislation throughout Australia. The purpose of this particular Bill was to amend the existing *Weights and Measures Act 1929* so that it related only to the trade measurement of bread. This was necessary in order to preserve the existing sale of bread provisions until such time as uniform provisions could be agreed by the States and Territories for incorporation into the new Trade Measurement Act.

It appears that neither of the two errors is sufficient to invalidate the amended Act or to cause any difficulty in its interpretation. However, I share the Committee's concern for accuracy and I have requested that the necessary amendments be included in a Statute Law Revision (Miscellaneous Provisions) Bill which I expect will be introduced into the Assembly during the Autumn 1992 sittings.

I thank the Committee for drawing these errors to my attention and regret that I did not have the opportunity to put the necessary amendments before the Assembly before the Bill was passed.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Terry Connolly', with a stylized, cursive script. The signature is written over the printed name 'Terry Connolly'.

3 DEC 1991



A.C.T. GOVERNMENT
BILL WOOD MLA

MINISTER FOR EDUCATION AND THE ARTS
MINISTER FOR THE ENVIRONMENT, LAND AND PLANNING

1 Constitution Ave Canberra ACT 2601

Mrs Ellnor Grassby MLA
Presiding Member
Standing Committee on Scrutiny of Bills
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ACT Legislative Assembly
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Dear Ms Grassby

I refer your Committee Report No 20 of November 1991 which made comments on the Air Pollution (Amendment) Bill No 2 1991 and the the Air and Water Pollution Acts. I am writing to advise:

1. that the Government will introduce an amendment to the Air Pollution (Amendment) Bill No 2 1991, which includes provisions relating to Section 42E(1)(b) along the lines that :

a person is not guilty of an offence against this section if the defendant adduces evidence that the defendant reasonably believed that the petrol to which the charge relates was petrol which did not contain more than 0.40 grams of lead per litre.

and insert "and 42BB(1)" after 42BA(1).

2. that the Government notes comments about other matters contained in the Air Pollution Act 1984 and the Water Pollution Act 1984 regarding sexist language. Amendments will be considered at the next opportunity to address this issue.

I trust these actions will address the concerns of the Standing Committee of which you are the Presiding Member.

Yours sincerely

Bill Wood

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