

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. 13 OF 2000

13 October 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
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 comments on them.

Insurance Authority Amendment Bill 2000

This Bill would amend the *Insurance Authority Act 2000* to require the Minister to provide to the Assembly certain information concerning third party indemnities granted under section 15 of the Act.

Road Transport Legislation Amendment Bill 2000 (No 2)

This Bill would amend various laws of the Territory. It is necessary to accommodate the changes to the law proposed by the Road Transport (Public Passenger Services) Bill. There is also clarification of the concept of “found guilty”.

Subordinate Laws Amendment Bill 2000

This Bill would amend the *Subordinate Laws Act 1967* to make provision for a scheme of regulatory impact statements.

Bills - Comment

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

Animal Welfare Amendment Bill 2000

This Bill would amend the *Animal Welfare Act 1992*. It would make a number of amendments to the law concerning the humane treatment of animals. In particular, it makes it an offence for a person other than a veterinary surgeon, to remove the tail of a dog (and other parts of a dog). A veterinary surgeon may take such action only for prophylactic or therapeutic purposes.

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

Clauses 12 and 12A

It is not clear why there is no “reasonable excuse” provision attaching to the offences prescribed by subclauses 12A(1) and (2). There is such a provision in respect of the offences prescribed by subclauses 12(1) and 12 A(2). The Committee cannot discern why there is different treatment.

Paragraph 2 (c) (iii) - rights, liberties and/or obligations unduly dependent upon non-reviewable decisions

The Committee considers that an exercise of power by the authority under proposed new subsection 49B(3), (see clause 12), should be subject to an obligation to give reasons and to review by the Administrative Appeals Tribunal. This could be affected by amendments to section 107 of the Act. It is noted that there is such provision in respect of the exercise of similar powers under sections 28 and 34 of the Act.

Dangerous Goods Amendment Bill 2000

This Bill would amend the *Dangerous Goods Act 1975* to the effect that in certain circumstances a person might be prosecuted for an offence against the Act notwithstanding that the usual limitation period had expired.

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 provision would operate where the acts that give rise to the offence occurred prior to the commencement of the changes to be made by the Bill.

The Committee considered this matter in relation to an earlier version of this Bill. See **Report No 2 of 1999**.

Domestic Animals Bill 2000

This is a Bill for an Act to regulate the keeping of dogs and cats, and to regulate certain activities of those animals and their keepers and carers. It replaces and updates the *Dog Control Act 1975* and the *Animal Nuisance Act 1975*.

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

Burden or proof issues.

General

The Committee has drawn attention to this issue in earlier reports. As a matter of general approach, it has suggested that, so far as practicable, a law that creates an offence, or that creates a new head of civil liability, should make it clear whether the defendant bears either or both of an evidential or legal burden in respect of some ultimate issue of fact that might arise for decision by the court in the application of the law.

It has suggested that such an issue arises where, as is commonly the case, a law provides that a person must not, “without reasonable excuse”, do something. Subclause 23(1) of this Bill is illustrative, (and there are other examples in the Bill). A court of the Territory might well hold that while the defendant had an evidential burden of proof – so that he or

she must adduce evidence from which the court *might* find that there was a “reasonable excuse” – the prosecution bore the legal burden of proof (beyond reasonable doubt in a criminal matter) of proving that the defendant did not have the kind of “reasonable excuse” he or she has relied upon in the particular case.

What makes this a likely reading of a provision such as subclause 23(1) is that in two other provisions of the Bill – subclauses 44(5) and 55(5) – it is provided that the defendant must prove a particular kind of defence.

In relation to a provision such as subclause 23(1), the issue might be settled by including in the provision a phrase such as “without reasonable excuse, the burden of proof of which lies upon the person”, instead of simply “without reasonable excuse”.

Clauses 45 and 48

The Committee asks whether a provision such as that in subclause 44(5) should be inserted in subclauses 45 and 48. The three situations governed by these clauses appear to be analogous.

Authority to prosecute offences under the law.

The Bill contains a number of provisions that make it an offence to engage in activities that are commonly engaged in by those who keep dogs; see, for example, clauses 42 and 46. The Committee does not raise any question about the policy behind these provisions. It draws attention to the fact that if the Bill becomes law, such common activities will amount to criminal offences.

It suggests therefore that the Assembly might consider whether to limit the authority to prosecute a person for an offence under the Bill to the registrar.

The point made has particular relevance to a prosecution under clause 110. Given the role of the registrar in relation to nuisance notices, there is a case to limit authority to prosecute to the registrar.

Complaints about animal nuisance

The concept of animal nuisance is very broadly defined in clause 109. Under clause 111 “a person” may complain to the registrar about such a nuisance. (The Committee notes that there is no limitation to a ‘person affected’, or such like.) Then, by subclause 111(2), the registrar “must investigate the complaint”, and by paragraph 111(3)(a), give written notice to the complainant if the registrar decides not to issue a nuisance notice.

The Committee is concerned that in their operation, these provisions could give rise to a significant workload for the registrar and perhaps exacerbate a particular situation of conflict over the activities of dogs and cats. In particular, there appears to be nothing to

prevent a person making repeated complaints, and thus repeatedly requiring the registrar to intervene.

Should the registrar have a discretion to refuse to investigate where it is considered that the complaint is frivolous or vexatious?

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

Clause 7. 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 this clause.

On application by a person for registration of a dog, subclause 7(1) gives to the registrar a choice – to register or not to register. Subclause 7(2) then provides that the registrar must not register the dog “if the applicant is disqualified from keeping a dog”. There are two uncertainties concerning the meaning of this provision.

First, one reading of it is that while subclause 7(2) stipulates one circumstance in which the registrar must choose not to register, it remains lawful for the registrar to take any other relevant factor into account in making a choice in a particular case. It is only by comparing this provision with other provisions of the Bill that it can be seen that it is intended that subclause 7(2) stipulates the only circumstance in which the registrar must choose not to register. See for example clause 20, which confers on the registrar discretion to grant a multiple dog licence. Subclause 20(3) states a number of factors that the registrar must consider. Subclause 20(4) then states that “Subsection 3 does not limit the number of matters the registrar may consider”. The omission of such a provision from clause 7 suggests that subclause 7(2) stipulates the only circumstance in which the registrar must choose not to register.

The Committee suggests that subclause 7(2) would read more clearly if it provided that the registrar must not register the dog “**only** if the applicant is disqualified from keeping a dog”.

This is an issue that arises under other provisions of the Bill, and the comments below will refer back to the comments just made.

The second matter is that subclause 7(2) gives no indication of when a person “is disqualified from keeping a dog”. The reference appears to be to clause 72, which enables a court to disqualify a person convicted of certain offences “from keeping an animal for a period decided by the court”. The Committee suggests that a note to clause 7 making a cross reference to clause 72 would enable a reader to understand clause 7 more easily.

Clause 13. This clause provides that the only circumstance in which the registrar may cancel the registration of a dog is where the registrar is told by the keeper of the dog that he or she is no longer the keeper.

The Committee asks whether the registrar should be obliged to cancel a registration where the keeper becomes disqualified from keeping a dog.

Clause 21. Is subclause 21(2) exhaustive of the relevant factors? See the comments on clause 7 above.

Clause 22. Is subclause 22(3) exhaustive of the relevant factors? See the comments on clause 7 above.

Clause 33. Is subclause 33(4) exhaustive of the relevant factors? See the comments on clause 7 above.

Clause 50. Under paragraph 50(4)(a), a court is given a wide discretion – in terms of whether there are “special circumstances” - to refrain from ordering that a dog be destroyed (and to take other specified action). The Committee points out that this provision is to be contrasted with those other provisions of the Bill that carefully define the factors relevant to an exercise of the discretionary powers created by those provisions. It considers that some justification should be given for the great width of paragraph 50(4)(a). (The Committee is aware that this provision is closely based on section 25 of the *Dog Control Act 1975*.)

Clause 71. Subclause 71(1) confers on the registrar a wide discretion to return an impounded dog to its keeper “if satisfied that it would be in the public interest to do so”. This power is, in effect, a wide power to dispense with several of the provisions of the Bill in favour of a particular person.

As a matter of general policy, the Committee considers that widely expressed dispensing powers are undesirable. They give to executive office-holders a power to set aside the usual operation of the law with the effect of benefiting certain individuals. In this way, they run counter to the key element of the notion of the rule of law – that in form, the law should apply to all persons in the same manner.

The Committee considers that there should be some justification given for clause 71. The same comment applies to subclause 71(4).

The Assembly may also wish to consider whether there be inserted in the Bill a provision to the same effect as clause 95. That is, that the Minister may issue guidelines about the exercise of the registrar’s discretions under clause 71. Such guidelines would be disallowable by the Assembly.

Clause 74. It is not apparent how a person would be able to ascertain whether the registrar had been satisfied in terms of paragraph 74(3)(c) that it would be detrimental to the health of a dog or a cat were it to be de-sexed. There is no procedure for this step to occur. The process for obtaining a permit is quite separate. It would be inappropriate in

the circumstances started in paragraphs 74(3)(a) and (b), thus suggesting that it is not designed to cover the circumstance started in paragraphs 74(3)(c).

Clause 76. Is subclause 76(2) exhaustive of the relevant factors? See the comments on clause 7 above.

Clause 79. There is no other reference in the Bill to a “ranger”. Should this be to an “authorised person”? It is to be noted that the latter have identification cards – see clause 124.

Clause 102. The Committee notes the power of a sub-delegate to further delegate a power “to anyone else”. The Committee considers that such a wide power of delegation should be justified.

Occupational Health and Safety Amendment Bill 2000 (No 3)

This Bill would amend the *Occupational Health and Safety Act 1989* to the effect that in certain circumstances a person might be prosecuted for an offence against the Act notwithstanding that the usual limitation period had expired.

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 provision would operate where the acts that give rise to the offence occurred prior to the commencement of the changes to be made by the Bill.

The Committee considered this matter in relation to an earlier version of this Bill. See **Report No 2 of 1999**.

Road Transport (Public Passenger Services) Bill 2000

This is a Bill for an Act to regulate bus transport. It would provide for the accreditation of bus operators. The Minister may approve standards for this and other purposes. The Bill would also allow the government to enter into contracts with accredited operators for the latter to provide regular route services in the Territory.

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

A power to dispense with the law

Subclause 30(1) confers on the Minister a wide discretion to exempt a vehicle or person from the Act (or a stated provision of the Act). The discretion to exempt is without any express limitation. An exercise of this power must be notified in the Gazette.

As a matter of general policy, the Committee considers that widely expressed dispensing powers are undesirable. They give to executive office-holders a power to set aside the usual operation of the law with the effect of benefiting certain individuals. In this way, they run counter to the key element of the notion of the rule of law – that in form, the law should apply to all persons in the same manner.

The Committee is also concerned that this discretion is without any express limitation. It is very unusual to find such provisions in legislation.

The Committee considers that there should be some justification given for clause 30. If the clause is retained, it is suggested that any instrument of exemption under this provision be a disallowable instrument.

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

The extent of the power

The Committee notes that the system for the accreditation of bus operators would not be prescribed in the Act, but would be prescribed by regulations made under the Act. It is

appreciated that there are many aspects of the scheme of regulation that are appropriate for regulations. But some significant matters – for example, those in clause 15 relating to eligibility for accreditation and the powers of the body that accredits – are, in regulatory schemes, usually dealt with in the Act. The Committee is also concerned with the extent of the power given by clause 26, concerning the conduct of passengers.

The Committee considers that there should be justification given for the extensive delegation of legislative power proposed by this Bill.

A Henry 8th clause

The Committee notes that by clause 34, regulations made under the proposed Act could modify provisions in Part 4. It is noted, however, that this is a limited power, and will expire on 1 April 2002.

Subordinate Legislation - No Comment

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

Subordinate Law 2000 No 35 being the Building and Services Regulations 2000 made under the *Building and Services Act 1924* provides a simple process for the installation of communication infrastructure.

Determination No. 278 of 2000 made under subsection 5 (1) of the *Health Professionals (Special Events Exemptions) Act 2000* declares the Olympic Games football tournament, to be held continuously during the period 2 September 2000 to 27 September 2000, and the Olympic and Paralympic Games, to be held continuously during the period 20 August 2000 to 12 October 2000, to be Special Events.

Determination No. 279 of 2000 made under section 34 of the *Health Records (Privacy and Access) Act 1997* revokes Determination No. 122 of 1998 (notified in Gazette S167, dated 29 June 1998) and determines fees payable for various purposes of the Act.

Determination No. 280 of 2000 made under section 3F of the *Building and Services Act 1924* revokes Determination No. 161 of 2000 (notified in Gazette S20, dated 8 June 2000) and determines that the fees for the purposes of the Act shall be in accordance with the Schedule.

Determination No. 281 of 2000 made under subsection 23 (2) of the *Domestic Violence Act 1986* appoints a specified person as Chairperson of the Domestic Violence Prevention Council of the Australian Capital Territory for a period commencing on 1 September 2000 and ending on 31 August 2002.

Determination No. 282 of 2000 made under subsection 23 (6) of the *Domestic Violence Act 1986* appoints specified persons as members of the Domestic Violence Prevention Council of the Australian Capital Territory for a period commencing on 1 September 2000 and ending on 31 August 2002.

Determination No. 283 of 2000 made under subsection 23 (6) of the *Domestic Violence Act 1986* appoints specified persons as members of the Domestic Violence Prevention Council of the

Australian Capital Territory for a period commencing on 1 September 2000 and ending on 31 August 2002.

Determination No. 284 of 2000 made under paragraph 96 (3) (b) of the *Road Transport (General Act 1999)* determines the method to be used to work out a fee payable by persons eligible for a concession in relation to fees payable for vehicle registration and driver licensing in accordance with the Schedule.

Determination No. 285 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name of a certain street in the Division of Weston Creek.

Determination No. 286 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name of certain streets in the Division of Nicholls.

Determination No. 289 of 2000 made under sections 28, 31, 48 and 50 of the *Radiation Act 1983* revokes Determination No. 224 of 1999 (notified in Gazette No. 37, dated 15 September 1999) and determines new fees payable for various purposes of the Act.

Determination No. 290 of 2000 made under the *Fisheries Act 2000*:

Prohibits, under section 13, the taking of fish from the waters and under the conditions set out in Annexure 1;

Declares, under section 15, the fish which are of prohibited size;

Declares, under section 16, the quantity of the listed species of fish that may be taken in a day; and

Declares, under section 17 the gear that may be used for taking fish is that appearing in Annexure 2.

INTERSTATE AGREEMENTS

The Committee notes a letter and attachments from the Chief Minister, dated 3 October 2000 advising of a proposal to enter into negotiations with the Commonwealth, States and Northern Territory to introduce a national regulatory framework to provide a safe food supply to all Australians with consistency and surety across Australian jurisdictional borders. (Copies available from Committee Secretary).

It does not appear from the forwarding correspondence that the consultation with the relevant subject matter standing committee (Health and Community Care) has taken place in accordance with the instrument of nomination made pursuant to paragraph 7 (a) of the *Administration (Interstate Agreements) Act 1997* which was tabled in the Assembly on 25 August 1998.

Below are the Committee's comments on the Model Food Provisions

Annex A

Parts 2 - Offences relating to food

Clarity of the scheme

In relation to the offences in Division 1, the prosecution would need to prove *mens rea* – a guilty mind – on the part of the defendant.

In relation to the offences in Division 2, the prosecution would need to prove much less than this. In general, it would need to prove only that the defendant did the acts – such as, in clause 12(2), that the defendant sold food that was unsafe – in order to cast on the defendant a burden of proof to show some facts that would provide a defence.

These inroads into the common law principle that *mens rea* is an element of a criminal offence should be justified.

It is not until one reads Division 3 – that provides for a number of defences – that this effect of Division 2 becomes clear. The clarity of the Bill might be assisted were there to be a note at the start of Division 2 drawing attention to the defences in Division 3 and noting that they qualify the operation of the offence provisions in Division 2.

Clause 15

The concept that food is “not of the nature or substance demanded by the purchaser” is lacking in clarity. It is very vague, and it may be asked whether this is an appropriate standard against which to assess criminal liability.

The use of the word “demanded” may create problems. Contrast the use of the word “request” in clause 18(2). Is some difference in meaning intended? On the face of the Bill it is, in which case the concept of a demand appears to be narrower than a request.

Knowing the law

Clauses 17 and 18 create offences by reference to provisions of another document – the Food Standard Code. This is defined in the *Australia New Zealand Food Authority Act 1991*. The relevant definition is:

"Australia New Zealand Food Standards Code" means the code published under the name "Food Standards Code" in the "Gazette" on 27 August 1987 together with any amendments of the standards in that code:

(a) approved by the Council before [this Act](#) commenced and published in the "Gazette" as forming part of that code; or

(b) made under [this Act](#).

This technique raises the problem that a reader of the law will not be able to know what is a criminal activity. He or she will have to find the Food Standards Code. The use of this technique should be justified.

Removal of defence of mistaken and reasonable belief

Clause 23 expressly provides that a defendant may not raise a defence that he or she had a mistaken but reasonable belief as to the facts that constituted the offence.

Such a substantial inroad into the common law principle that *mens rea* is an element of a criminal offence should be justified.

Drafting issues

It is noted that in clauses 20(1), 21(1), and 25, there is reference to “a defence for a person to prove” (or similar). On the other hand, in clauses 22 and 24, it is only said that “it is a defence if it is proved”. In context, both kinds of provision probably refer to proof by the person charged. There is no apparent reason why different terms are used.

Annex B

Part 2 – Offences in relation to food

Clauses 5, 6 and 7 do not require the prosecution to *mens rea*. These inroads into the common law principle that *mens rea* is an element of a criminal offence should be justified.

Part 4 – Inspection and seizure powers

Clause 9 - clarity

The clarity of some of the paragraphs of subclause 9(1) might be improved, say by further subdivision. For example, see paragraph 9(1)(f).

Clause 9 – legal professional privilege

Paragraph 9(1)(i) empowers an authorised officer seize and remove from premises records or documents. Entry to the premises will not necessarily be by way of a search warrant. The particular concern here is that there is nothing to suggest that this power to seize and remove should not be exercised so as to obtain documents and records in respect of which a person might be able to make a claim of legal professional privilege.

The Bill might be read by a court so as to impose such a limitation on the scope of the power in paragraph 9(1)(i). It is also the case that a person who failed to comply with a requirement of an authorised officer would be able to raise a claim of legal professional privilege as a “reasonable excuse” for non-compliance. (It is to be noted, however, that action taken by an authorised officer under paragraph 9(1)(i) need not involve any need to secure the compliance of the relevant person, so that there would be no occasion for the person to refuse to comply by raising a claim of legal professional privilege).

The general point here is that if it is intended that the common law right of legal professional privilege be respected by an authorised officer acting under clause 9(1)(i) – or under any other powers in clause 9 - that should be clearly spelt out.

If that is not intended, then there needs to be justification for the abrogation of this right.

Clause 9 – power to require names and addresses

The Committee has commented on this matter in Report No 6 of 1999, page 17.

The Committee draws the attention of the Assembly to the fact that the exercise of this power under clause 9 is not limited to a situation in which the authorised officer considers that the person might be able to provide information relevant to the detection of an offence under the law. In this respect it might be thought to go beyond what is desirable.

Clause 10 – self incrimination

Clause 10 abrogates the common law right against self-incrimination. This needs to be justified. If such a clause is retained, the present clause is objectionable on the basis that it does not protect against a derivative use of the information, etc obtained as a result of the person providing the information.

Part 5 – Improvement notices and prohibition orders

Clause 37 – offence provision

Is this intended to be an offence of strict liability? Even if *mens rea* must be proved, is there any reason why a defendant might not raise a “reasonable excuse” defence”?

Part 6 – taking and analysis of samples

Clause 44 – Henry 8th dimension?

Clause 44(1) may have the effect that this provision may be in effect amended by a provision of the Food Standards Code. There should be justification for this provision.

Clause 48 – unconfined discretion

Under clause 48, the relevant authority has a completely undefined discretion to grant or refuse an application for approval of a laboratory under this Division.

As a matter of general principle, this is undesirable. As far as practicable, an Act should spell out the factors relevant, (and irrelevant if that be appropriate), to an exercise of a discretionary power. Of course, a court would spell out limits by reference to the court’s understanding of how the discretion should be exercised so as to promote the objects and purposes of the Act. This is not sufficient for two reasons. First, the reader of the Act should be able to understand what factors are relevant. Secondly, what a court may say may not conform to the drafter’s conception of what would promote the objects and purposes of the Act. The unconfined discretion confers a legislative function on a court.

In addition, it is generally desirable that an Act that confers discretionary powers also empower some person to issue guidelines to structure or confine the scope of the discretion. If discretion were structured, the repository of the power might still have regard to matters other than those specified in the guidelines, so long as those matters were ones to which it may, as a matter of law, have regard. If the discretion were confined, the repository of the power might have regard to only those matters specified in the guidelines.

The person who might be empowered to issue guidelines might be the repository of the power, or it might be – as is commonly the case – the responsible Minister.

It is also commonly the case that guidelines are disallowable instruments.

In this light, two comments are made concerning clause 48. The first is that it should spell out the factors relevant, (and irrelevant if that be appropriate), to an exercise of the power to approve – or not approve - of a laboratory.

The second is that the Bill should contain a provision that would permit some person – such as the relevant authority or the Minister – to issue guidelines in respect of as many as practicable of the discretionary powers that are to be found in the Bill. (These comments do not attempt to specify all discretionary powers in the Bill.)

It may be that clause 85 of the Bill is intended to operate in this way. This is a matter that should be clarified.

Clause 51 - unconfined discretion

There is an unconfined discretion to vary the conditions of the approval of a laboratory, and a somewhat limited discretion to cancel or suspend an approval (but note the width of clause 51(2)(e)). See what is said concerning clause 48.

Clause 54 - unconfined discretion

See what is said concerning clause 48.

Clause 57 - unconfined discretion

See what is said concerning clauses 51 and 48.

Part 7 – auditing

Clause 60 – a limited discretion

This discretion to approve a natural person to be a food auditor is limited, and it is to be noted that in this instance the repository or the power – the relevant authority – is empowered to issue guidelines that spell out relevant criteria.

The power to set conditions appears however to be unconfined; see clause 60(5).

Clause 63 - unconfined discretion

See what is said concerning clause 48.

Clause 66(4) - unconfined discretion

See what is said concerning clause 48.

Part 8

Clauses 75 and 76) - unconfined discretion

See what is said concerning clause 48.

Clause 78 - unconfined discretion

See what is said concerning clauses 51 and 48.

Part 9 – administration

Clause 104 – diminution of the rights of defendant on a trial

Notwithstanding the provision in clause 104(3) that empowers a court to act in the interests of justice, clauses 104(1) and (2) are a substantial qualification on the rights of defendant to seek to resist a prosecution in the manner that is traditionally permitted to defendants. This should be justified.

Part 11 – miscellaneous

Clause 113 – regulation making by incorporation

Clauses 113(3) and (4) enable a regulation to be made by the adoption or incorporation of another document – widely expressed as “any standard, code or other document” – “as in force from time to time or as in force at a particular time”.

Such provisions raise obvious problems about how a person is to know what the law is, and should be justified.

Clause 115 – Henry 8th clause

Although it is limited to transitional or savings provisions, clause 115(2) is a Henry 8th clause. It should be justified.

GOVERNMENT RESPONSES

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

- Health and Community Care Services Act – Determinations Nos 268 and 269 Report No. 12 of 2000 (Minister for Health and Community Care – 13 September 2000)
- Health Professions Boards (Procedures) Act and the Medical Practitioners Act Report No. 11 of 2000 (Minister for Health and Community Care – 31 August 2000)
- Gaming Machine Amendment Bill 2000 – Report No 11 of 2000 (Treasurer – 11 September 2000)
- Surveyors Bill 2000 – Report No. 11 of 2000 (Minister for Urban Services – 20 September 2000)
- Public Place Names Act – Determinations Nos 133, 134, 135, 136, 138 and 139 of 2000 – Report No. 11 of 2000 (Minister for Urban Services – 20 September 2000)
- Roads and Public Places Act – Determination No. 144 of 2000 – Report No. 11 of 2000 (Minister for Urban Services – 20 September 2000)
- Stock Act – Determination No. 178 of 2000 – Report No. 11 of 2000 (Minister for Urban Services – 20 September 2000)
- Dentists Act – Determination No. 275 of 2000 – Report No. 12 of 2000 – Letter dated September 2000 (Minister for Health and Community Care – 21 September 2000).
- Occupational Health and Safety Act – Determination No. 221 – Report No. 12 of 2000 (Minister for Urban Services – 3 October 2000).
- Long Service Leave (Cleaning, Building and Property Services) Act – Determinations Nos 251, 252, 253, 254 and 255 of 2000 – Report No. 12 of 2000 (Minister for Urban Services – 3 October 2000).
- Low-alcohol Liquor Subsidies Bill – Report No. 12 of 2000 (Treasurer – 10 October 2000).
- Taxation Administration Act – Determination No. 193 of 2000 (Treasurer – 10 October 2000).

Copies of the responses are attached.

The Committee thanks the Treasurer, the Minister for Urban Services and the Minister for Health and Community Care for their helpful responses.

Paul Osborne, MLA
Chair

13 October 2000