Legislative Assembly for the Australian Capital Territory

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Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 2 OF 1999

9 March 1999

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
Assistant Secretary (Scrutiny of Bills and Subordinate Legislation): Ms Celia Harsdorf

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.

Courts and Tribunals (Audio Visual and Audio Linking) Bill 1999

This Bill proposes changes to the law which would complement the changes proposed by the Evidence (Amendment) Bill 1999. It would do so by amending a number of Territory statutes under which judicial or administrative proceedings are conducted by courts and tribunals. The effect of the amendments would be that those who conduct such proceedings may give directions that evidence is to received by means of audio visual and audio linking technology in accordance with the law proposed by the Evidence (Amendment) Bill 1999. In addition, this Bill would amend the *Magistrates Court Act 1930* and the *Supreme Court Act 1930* to the effect that, subject to a contrary direction by the presiding judicial officer, a bail application must be conducted by means of an audio visual link.

Evidence (Amendment) Bill 1999

This Bill would amend the *Evidence Act 1971* by the insertion in it of a new Part XIIAA. The Bill would enable Territory courts, tribunals and some other bodies which receive evidence to do so by means of audio visual and audio linking technology. The evidence might be taken from persons within the Territory, or, in the case of persons interstate, from such persons where the relevant State is a participating State. The courts and the like of a participating State may likewise receive evidence from persons in the Territory.

Bills - Comment

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

Dangerous Goods (Amendment) Bill 1999

This Bill would amend the *Dangerous Goods Act 1975* of New South Wales in its application to the Territory. Subsection 33(1) of this Act provides that proceedings for an offence under this Act may be commenced summarily. Subsection 33(2) provides that notwithstanding any other law, such proceedings may be instituted within two years after the act or omission alleged to constitute the offence. The effect of clause 4 of this Bill would be to make subsection 33(2) subject to a proposed new subsection 33(4). This new provision would provide that if it appears from a coroner's report that an offence has been committed against the Act, proceedings in respect of that offence may be commenced before either (a) before the expiration of two years after the act or omission alleged to constitute the offence, or (b) the expiration of one year after the day on which the coroner's report was made or the relevant coronial inquest or inquiry was concluded, as the case may be.

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

Retrospectivity - an introduction

This Committee, and others like it in Australia, are concerned with provisions in proposed laws which have a retrospective effect. This concern may be traced to the long established principle of the common law (as well established any other principle, according to Fullagar J in *Maxwell v Murphy* (1957) 96 CLR 261 at 285) that a statute should be construed in such a way so as to avoid its having a retrospective operation. In this context, the notion of a retrospective operation "is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law" (ibid).

It is clear that the changes proposed by the Bill would have a retrospective operation. The object of the Bill is to enlarge the time within which a prosecution may be commenced. The change in the law would affect "the legal consequences, of events which happened before it became law". The events are, of course, the actions of a person which constitute an offence under the *Dangerous Goods Act 1975*.

The principle of the common law is a principle to guide the interpretation of statutes. It is not a limitation of the power of the law-making body. The High Court of Australia has made it clear that no such limitation may be found in the Constitution of the Commonwealth, and it is unlikely that there is any such limitation on the powers of the Legislative Assembly (leaving aside Bills of Attainder): see *Polyukhovich v Commonwealth* (1991) 101 ALR 545.

The effect of the principle of the common law is that the courts will give an interpretation to a statute which will avoid the statute having retrospective effect. Of course, the interpretation given must be one which is consistent with the purpose of the law. That interpretation must also be one which can be accommodated to the words of the statute. If it is clear that the statute is intended to have a retrospective operation, the courts must respect that intention and give effect to the statute.

The Legislative Assembly is not a court of law which is called upon to apply the principle that a statute should be construed as not having a retrospective operation. What the Assembly needs to consider is whether a law which conflicts with this principle should be enacted. The Assembly may, however, be guided by the approach of the courts.

What must be first appreciated is that the principle has a wide application. The "classic example of retrospective operation ... imagines a person performing a discrete and completely lawful action on one day, and on the next having criminal sanctions attached to his or her action despite the fact that it is already in the past" (A Palmer and C Sampford, "Retrospective Legislation in Australia: Looking Back at the 1980s" (1994) 22 Federal Law Review 217 at 221). But the principle is not confined to laws which make criminal acts which were not, at the time they were committed, criminal.

Many different kinds of laws may be given a retrospective operation. They may affect some kind of civil liability, or they may regulate some activity, or they may impose taxation. Each year, a legislature of an Australian jurisdiction passes many such non-criminal laws which have a retrospective operation. No objection is taken to many of them in terms of the principle that a law should not have a retrospective operation. As was said by Dawson J in *Polyukhovich* at 638, in some situations, "justice may lay almost wholly upon the side of giving remedial legislation a retrospective operation where that is possible". (There is an extensive consideration of the variety or such laws, and a useful scheme for analysis of them, in A Palmer and C Sampford, above).

The rationale for the principle against retrospectivity

There are many judicial decisions which have applied this principle of interpretation, and they are a useful guide to when a statute might be considered to have a retrospective effect. They are also a guide as to weight which the principle against retrospectivity might be thought to have in varying circumstances. For example, the courts give greater weight to the principle in relation to laws imposing criminal liability than they do to other kinds of laws. The courts also distinguish between laws which affect substantive rights and liabilities and laws which merely regulate matters of procedure concerning rights and liabilities. The point here is that the principle is applied to laws of the former kind, but not to laws of the latter kind. Although this distinction may be criticised as illusory, it is often adopted by the courts.

The distinction between laws imposing criminal liability and other kinds of laws is of crucial significance.

In respect of non-criminal laws, "the key argument against retrospective laws is ... that of protecting the reliance citizens may reasonably place upon their expectation that the laws which will be applied to their actions and transactions by courts will be the same as the laws which applied at the time they acted or transacted" (A Palmer and C Sampford, above, at 233, and see too at 229). Thus, when the courts (or the

legislatures) consider retrospective non-criminal laws, the key matter for consideration is whether the persons who will be affected by the laws may be said to have relied on the 'old' law which it is sought to amend or affect retrospectively.

The reliance argument may apply to some kinds of criminal laws. This is where the law is only "regulatory" - in the sense that the activity regulated is not intrinsically blameworthy in a moral sense, but needs to be regulated for the public good. There may be, of course, debate about just what activities are devoid of moral blame. Car-parking is perhaps an example, but it is accepted that the law needs to regulate this activity. Laws governing the sale of adulterated food are often described as merely regulatory, although a degree of moral blame attaches to this activity. The line is hard to draw, but the point is that there are some kinds of activities which a person may justifiably rely on being lawful at the time the activity is undertaken.

But there are other kinds of activities which a person could not justifiably rely on being lawful at the time the activity is undertaken. This is where the activity is one which is obviously contrary to the moral code of society. There are a number of reasons why it might be the case that this activity was not subject to the criminal law at the time of the activity. There may be some technical loophole in the law, (see *R v Phillips* (1970) 125 CLR 93, and the subsequently enacted *Commonwealth Places (Application of Laws) Act 1970* (Cth)). It may be that some technological development provides some means for undertaking an activity that is criminal if undertaken in other ways. It may be that the activity is clearly of a kind (such as, for example, making a new dangerous drug) which would be made criminal once the legislature was made aware of the activity.

Thus, the reliance argument may have no relevance to some kinds of retrospective criminal laws. But, in the case of criminal laws, there is another justification for the application of the principle against retrospectivity. This is that a person has a right not to be made subject to such laws.

The concern of English lawyers with laws of this kind is long standing. Several Justices of the High Court in *Polyukhovich* noted what had been said by Blackstone about a law making past conduct a crime and inflicting punishment on the person who committed it:

> Here it is impossible that the party could foresee that an action, innocent when it was done, should afterwards be converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All law should be therefore made to commence *in futuro*, and be notified before their commencement: ... (*Commentaries*, 17th ed (1830), Vol 1, 45-46, quoted by Mason CJ in (1991) 101 ALR 545 at 556).

There are many human rights documents, including some international treaties, which state the principle in terms which are concerned only with retrospective criminal laws; (see the statement in *Polyukhovich* at 671-672 per Toohey J). Thus, Article 15.1 of the International Convention on Civil and Political Rights (ICCPR) states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

The application of the principle to the Dangerous Goods (Amendment) Bill 1999

The law proposed by the Dangerous Goods (Amendment) Bill 1999 is not a law which imposes criminal liability on past conduct. It is perhaps a matter for debate whether the law might, in terms of Article 15.1 of the ICCPR, be characterised as one which would impose "a heavier penalty ... than the one that was applicable at the time when the criminal offence was committed". If the approach of the courts were followed, this Bill would not be so regarded; (see the analysis in F A Bennion, *Statutory Interpretation* (2nd ed, 1992), para 98).

What the Bill does is to enlarge the time within which a prosecution may be commenced. Looking at the matter in terms of the approach of the courts, it is necessary to distinguish two kinds of situation.

The first is where, in relation to a particular case, the time for prosecution under the 'old' law (here, being within two years after the act or omission alleged to constitute the offence: subsection 33(2) of the *Dangerous Goods Act 1975*) had expired at the time the 'new' law commenced to operate. In this situation, it has been a matter of debate among the judges as to whether the new law should be regarded as a law having a retrospective operation. In *Maxwell v Murphy* (1957) 96 CLR 261 there was a difference of opinion between the High Court judges. Two judges - Dixon CJ and Williams J - regarded such a law as having retrospective operation within the common law concept of such a law. Sir Owen Dixon regarded it as a law which "destroyed a prescription already acquired" (at 270). Williams J regarded it as a law which took away a defence which was formerly open to the person charged (at 278). But Fullagar J regarded the law as merely affecting the procedure for prosecution of the existing offence, and thus did not, in terms of the common law, have a retrospective operation. The views of Dixon CJ and Williams J probably represent the view an Australian court would take on the matter, (and see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) at 10.20).

The contrasting situation is where, in relation to a particular case, the time for prosecution under the 'old' law had not expired at the time the 'new' law came into effect. Here courts would regard the new law as having only a procedural effect on the operation of the old law: *Maxwell v Murphy* (1957) 96 CLR 261 and would not thus attempt to construe the new law in such a way as to not have a retrospective operation.

A court faced with a provision such as is proposed by clause 4 of this Bill would in the first place accept that the Legislative Assembly had power to enact the law irrespective of whether it was seen as having retrospective effect. Then, if the court followed the majority of judicial opinion, it would seek to interpret the proposed new subsection 33(4) of the Act so that it did not apply in a case where the time for prosecution under the 'old' law had expired at the time when subsection 33(4) came into effect.

While the point is debatable, and while the Committee does not offer a legal opinion on the point, it may be that this is how a court would interpret the proposed new subsection 33(4) of the Act. If that interpretation was adopted, then there would (if the common law approach was accepted) be little ground for an objection to the Bill on the ground that it would have a retrospective operation.

The Committee cannot, however, be certain as to how a court would interpret the proposed new subsection 33(4) of the Act. Thus, the Assembly should proceed on the basis that the proposed new subsection 33(4)

of the Act would be held by the courts to apply in a situation where the time for prosecution under the old law (being section 33 of the *Dangerous Goods Act 1975* as it now stands) had expired before the date on which the Bill could be enacted. (This view of the law would be the one more consistent with the object of the Bill as stated in the Explanatory Memorandum.)

But of course the views of the courts as may be found in the precedents do not bind the Assembly. Moreover, the difference in judicial opinion upon the question of whether a law such as is proposed in this Bill should be characterised as having a retrospective operation illustrates how minds may differ in relation to laws which alter limitation provisions.

Without wishing to attempt to canvass all relevant perspectives, there are two competing viewpoints here. On the one hand, no weight should be given to an argument that a person who is charged with an offence under the *Dangerous Goods Act 1975* as it now stands committed the offence in reliance on the currently operative limitation period for the bringing of charges. (Perhaps some people do commit offences hoping to avoid detection until the expiry of a limitation period, but no credit should be given to any such reliance.) On the other hand, this Bill would in some circumstances (unless it is read down by the courts) give a retrospective operation to a law imposing criminal liability, and the policy of the common law, now reflected in instruments such as the ICCPR, has always been hostile to such laws.

Apart from these general considerations, the Assembly must of course evaluate the particular justifications offered in the Explanatory Memorandum.

Occupational Health and Safety (Amendment) Bill 1999

This Bill would amend the *Occupational Health and Safety Act 1989* provide that if it appears from a coroner's report that an offence has been committed against the Act, proceedings in respect of that offence may be commenced within one year after the day on which the coroner's report was made or the relevant coronial inquest or inquiry was concluded, as the case may be. At present, such proceedings must be commenced within one year after the commission of the offence (see section 31 if the *Magistrates Court Act 1930*).

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

The issues of principle which arise in relation to this Bill are the same as those which arise under the Dangerous Goods (Amendment) Bill 1999, and the Committee offers no additional comment.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Determination No 257 of 1998 made under subsection 10(2) of the *Legislative Assembly (Members' Staff) Act 1989* is an approval by the Chief Minister of arrangements for the employment of persons as members of the staff of Members of the Legislative Assembly.

Determination No 9 of 1999 made under paragraph 87(1)(a) of the *Occupational Health and Safety Act 1989* revokes Determination No 164 of 1992 and approves the Code of Practice "ACT Manual Handling Code of Practice".

Determination No. 10 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place in the Division of Gungahlin (being The Valley Avenue).

Determination No. 11 of 1999 made under subsection 66(2) of the *Drugs of Dependence Act 1989* appoints a specified person as a member of the Drugs Advisory Committee.

Determination No. 12 of 1999 made under subsection 66(2) of the *Drugs of Dependence Act 1989* appoints a specified person as a member of the Drugs Advisory Committee.

Determination No. 13 of 1999 made under subsection 66(2) of the *Drugs of Dependence Act 1989* appoints a specified person as a member of the Drugs Advisory Committee.

Determination No. 14 of 1999 made under section 12G of the *Roads and Public Places Act 1937* specifies a number of objects as prescribed objects for the purposes of subsection 12F(5) of the Act.

Other instruments

Management Standard No 5 of 1998 made by the Chief Minister under section 251 of the *Public Sector Management Act 1994* is an amendment in various ways of Management Standard No 1 of 1994.

Management Standard No 6 of 1998 made by the Chief Minister under section 251 of the *Public Sector Management Act 1994* is an amendment in various ways of Management Standard No 1 of 1994.

INTERSTATE AGREEMENTS

The Committee, acting as a Scrutiny of Bills and Subordinate Legislation Committee, has a function under the *Administration (Interstate Agreements) Act 1997*. The nature of these functions is best understood in the context of the Act.

Outline of the scheme

The Act applies only to an "interstate agreement", being an agreement, including a proposed agreement, "between governments, whether negotiated at an official forum or otherwise, the implementation of which could reasonably be expected to require legislation to be passed by the Legislative Assembly" (section 4). A "government" means "the executive of any of the States, the Territories or the Commonwealth" (section 4).

A Minister who "proposes to participate in a negotiation for an interstate agreement

(i) must, in writing, inform each Member of the Assembly of the nature of and timetable for the negotiation, of any legislation which may be proposed, and of "any position the Minister is taking, or intends to take, in the negotiation" (section 6); and

(iii) must, "if practicable", consult "regarding matters to be considered at the negotiation" with a Standing Committee of the Assembly nominated for that purpose by the Speaker and with the Standing Committee on Justice and Community Safety (subsection 7(3)).

If the Speaker has nominated a Standing Committee, the obligation on the Minister to consult with the Standing Committee on Justice and Community Safety may be discharged if he or she consults with the latter committee "when it is performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee in so far as its terms of reference in that capacity are relevant" (subsection 7(4)).

The Act does not define the nature of a consultation, but, in accordance with the approach taken by the courts, a relevant committee should be given adequate information about the matters to be considered at the negotiation, and adequate time to make a recommendation. An assessment of adequacy in these respects would depend on the nature of the relevant interstate agreement.

Any recommendation made by a relevant committee following a consultation under subsection 7(3) is important in three respects.

First, "[i]participating in a negotiation, the Minister shall have regard to" any such recommendation (subsection 7(5)).

Secondly, a Minister must "in considering whether to enter into an interstate agreement, have regard to any recommendations" which have been made by a committee (subsection 8(2)).

Thirdly, subsection 8(1) provides that a Minister shall not, on behalf of the Territory, enter into a proposed interstate agreement until either a recommendation by a committee consulted under section 7 has been received, or "6 days have elapsed since the consultation was undertaken in accordance with section 7".

Having regard to the nature of a consultation (see above), it may not be sufficient to begin the counting of the 6 day period from the date on which the Minister has first contact with a committee under section 7. It may be argued that a consultation cannot be said to have been undertaken until the relevant committee has been be given adequate information about the matters to be considered at the negotiation, and adequate time to make a recommendation.

Finally, where a Minister reaches an interstate agreement, he or she shall "within 7 days, inform in writing each Member of the Legislative Assembly of the terms of the interstate agreement and any commitments made on behalf of the Territory" (section 9).

It should also be noted that the obligations imposed on a Minister by sections 6, 7 and 8 are displaced if the Minister is satisfied on reasonable grounds that compliance with those provisions would have certain effects. In such circumstances, the Minister must inform Member of the Legislative Assembly of the relevant opinion for displacement "within 7 days of commencing the negotiations" (section 10).

Section 11 governs the situation where two or more Minsters are jointly engaged in negotiations.

The role of this Committee

When acting as a Scrutiny of Bills and Subordinate Legislation Committee, this Committee must be consulted by a Minister once he or she proposes to participate in a negotiation for an interstate agreement. That consultation will be in regard to "the matters to be considered at the negotiation".

The Committee may then make recommendations with regard to those matters, but only in so far as its terms of reference as a Scrutiny of Bills and Subordinate Legislation Committee would permit a recommendation to be made be in regard to "the matters to be considered at the negotiation".

Given that its recommendations are relevant to the operation of section 8, the Committee also has an interest in compliance by Ministers with the obligations stated in section 8.

Committee reports

The Committee will report (i) on any communication it receives from a Minister with respect to this Act; (ii) on any consultation undertaken under subsection 7(4); and (iii) otherwise on any matter of interest to the Committee in so far as it relates to its functions under the Act.

The first matter to report is that on 30 December 1998 the Chair of the Committee was informed by the Attorney-General that as a consequence of resolutions agreed to by the Australasian Police Ministers' Council, he would propose amendments to the *Firearms Act 1996*.

It would appear that, having regard to the date of commencement of the *Administration (Interstate Agreements) Act 1997*, and the date of the meeting of the Australasian Police Ministers' Council, that the Attorney-General did not have any obligation to consult with this Committee. Thus, the Committee had no role to play in relation to this agreement.

The Committee does, however, thank the Minister for his letter of 30 December 1998.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Attorney-General, in response to its Report No. 15 of 1998 concerning the Emergency Management Bill 1998;
- the Attorney-General, in response to its Report No. 13 of 1998 concerning Determination No. 240 of 1998;
- the Attorney-General, in response to its Report No. 13 of 1998 concerning the Custodial Escorts Bill 1998;

The Committee thanks the Ministers for their responses.

The Committee has also received a response from the Attorney-General in response to its Report No. 15 of 1998 concerning the Duties Bill 1998, the Gaming and Racing Control Bill 1998, and the Taxation Administration Bill 1998. The Committee proposes to include in its next report a response to the comments of the Attorney-General in relation to the privilege against self-incrimination.

Paul Osborne, MLA
Chair

March 1999