

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

REPORT NO. 17 OF 1997

1 December 1997

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Civic Square, London Circuit
CANBERRA ACT 2601
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STANDING COMMITTEE ON SCRUTINY OF
BILLS AND SUBORDINATE LEGISLATION

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Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Speaker

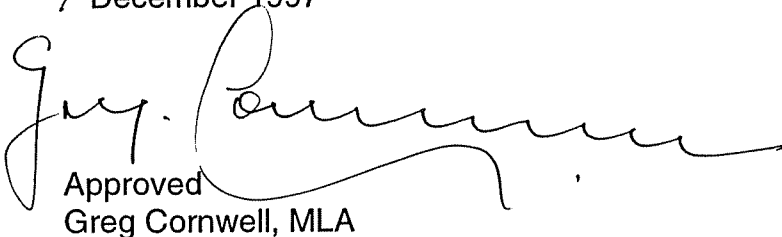
Please find enclosed a copy of Report No. 17 of 1997 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 17 of 1997.

Yours sincerely



Bill Wood, MLA
Chair

/ December 1997



Approved
Greg Cornwell, MLA

/ December 1997

TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of three 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 Bill Wood, MLA (Chair)
Mr Paul Osborne, MLA (Deputy Chair)
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan

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:

Legal Aid (Amendment) Bill 1997

This Bill will give effect to an agreement between the Territory and the Commonwealth whereby the latter will provide funds which will be used by the Territory Legal Aid Commission in respect of matters arising under Commonwealth law.

Long Service Leave (Building and Construction Industry) (Amendment) Bill 1997

This Bill would amend the *Long Service Leave (Building and Construction Industry) (Amendment) Act 1996* to extend the sunset clause relating to the Construction Industry Training Fund (CITF) to 30 June 1998.

Remand Centres (Amendment) Bill 1997

This Bill would amend the *Remand Centres Act 1976* in relation to matters that arise from the Prisoners' Interstate Leave Bill 1997. Some other amendments of an administrative nature are also made to the Act.

Tenancy Tribunal (Amendment) Bill 1997

This Bill would amend the *Tenancy Tribunal Act 1994* to widen the range of matters to which the dispute resolution procedures of the Act apply.

Bills - Comment

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

Crimes (Amendment) Bill (No. 6) 1997

This Bill would amend the *Crimes Act 1900* to insert provisions designed to prevent a person from relying upon evidence of intoxication, where that intoxication is self-induced, to establish that the person did not have the intent to commit an act or omission which constitutes an element of the criminal offence or that the person's act was not voluntary. These provisions are based on provisions of a Model Penal Code which has been developed by the Standing Committee of Attorneys-General.

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

The Committee draws attention to two aspects of the provisions of this Bill. The first is that they do qualify a fundamental principle of the common law. The basic notion was stated by Murphy J in *The Queen v O'Connor* (1980) 146 CLR 64 at 112:

“The expression ‘mens rea’ refers to the central idea of the criminal common law that a mental element is present in all crime except in offences of criminal liability. Apart from crimes of specific intent, the theory requires the existence of a generalised element described as guilty mind, criminal intent, or something similar.”

How this theory applied in cases where the defendant was intoxicated at the time he or she was alleged to have committed a crime was explained in the same case by Barwick CJ:

“...an accused in the state of intoxication which has rendered his acts involuntary or precluded the formation of a relevant intent and which has been brought about by the act of another could not be found guilty of any common law offence” (ibid at 73).

The Chief Justice went on to hold that the fact that the defendant’s state of intoxication resulted from his or own acts did not warrant exclusion of evidence as to their physical or mental condition.

The views of Barwick CJ and Murphy J were part of the 4:3 majority of the High Court in this case.

The Committee merely draws attention to the fact that this Bill will qualify a fundamental principle of the law.

In the second place, it draws attention to the limited nature of this qualification. The definition of “self-induced” intoxication will still enable a defendant to rely upon his or her being in a state of intoxication to argue that he or she did not have the requisite mens rea. One such case is where the intoxication was “involuntary”, which would include the situation where some other person brought about that state (for example, where the defendant’s drinks had been “spiked” by someone else). A more problematic case is where the intoxication was the result of things such as “fraud” or “reasonable mistake”. Would this cover the case of “the person who at dinner does not observe the frequency with which the waiter tops up his glass” (a case posed by Barwick CJ, ibid at 74) Cases where the defendant claims not to have appreciated the potency of a drug or of some alcoholic drink will also be troublesome.

Clearly then, there will be still much scope for a defendant to rely upon his or her being in a state of intoxication to argue that he or she did not have the requisite mens rea.

It should also be noted too that the provisions of the Bill do not attempt to preclude any other ways (apart, that is, from self-induced intoxication) in which a defendant may rely upon some self-induced state which may be said to have prevented him or her from having the requisite mens rea. Examples may be supposed, such as where a person has banged his or her head against a wall.

Comments on the Explanatory Memorandum

It is noted that the Explanatory Memorandum says that these provisions will not prevent a defendant from relying upon his or her being in a state of intoxication to argue that he or she “lacked the specific intent to cause the specific result”, or to “deny that he or she had intent or knowledge with respect to a circumstance constituting an element of an offence”.

It is not very clear just what the drafters of the Explanatory Memorandum have in mind by these comments. It would assist if specific examples could be given which are related to the precise words of the provisions of the Bill.

Health Records (Privacy and Access) Bill 1997

This Bill would introduce a scheme by which personal health information must be collected and held according to a set of Privacy Principles. These principles relate to the collection, storage and security, use and disclosure, and transfer of such

information. They also relate to access to such information by the person concerned and by others, and also to the amendment of this information.

A person to whom a Principle applies must not contravene a Principle. The scheme is enforceable primarily by means of complaints to the Community and Health Services Complaints Commissioner (in which case the scheme for making and dealing with complaints under the *Community and Health Services Complaints Act 1993* comes into operation). The Bill would also amend this Act in some respects, and in particular would enable a person to apply to the Magistrates Court for a review - on hearing *de novo* basis - of a decision of the Commissioner (that is, the Court would rehear the matter, although it could have regard to the proceedings before the Commissioner).

Part III of the Bill deals specifically with access to personal health information. In general, it enables a person to request access to his or her personal health information, and imposes on a record-keeper of that information a duty to provide the information to the requester. The grounds for non-production are limited, and in substance apply primarily where (i) production would contravene a law or an order of a court, (ii) where production would create a risk to the life or health of some person, or (iii) where the information was "subject to confidentiality". (It should also be noted that Privacy Principle 7 relates to the alteration of health records.)

The relevant definitions are very wide. For example, the definition of "health service", embraces "any activity ... claimed (expressly or by implication), by the person performing it, to ... improve or maintain the physical, mental or emotional health of a consumer ...". On this basis, a great many activities will be included. (It is noted that the regulations may exempt services from the coverage of the Act.)

The Act would apply to public and non-public persons and bodies.

One notable aspect of the scheme is clause 30, which provides that a record-keeper who "lacks the skill or training necessary to perform a function under this Act ... shall ... obtain and act on the advice ... of a person possessing such skill and training".

The Bill would make consequential amendments to the *Freedom of Information Act 1989* and to the *Community and Health Services Complaints Act 1993*.

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

The Bill introduces new rights which will be of considerable significance to a great many people in the community. The Committee draws attention however to the fact that the operation of this scheme will impose significant costs on other members of the community. Clause 30 of the Bill appears to require persons to pay others to assist them to comply with the Act. The scheme is very complex, and given the very wide scope of the notion of "health service", a large number of business, voluntary organisations and individuals will be put to considerable expense to meet their obligations under the scheme. The scheme does allow, but only to quite a limited extent, that such persons and bodies may recover their costs.

The Committee also points out that the scheme may well be the vehicle for litigation (such as actions in negligence or for breach of statutory duty) apart from that which will be generated through the specific complaints mechanism of complaint to the Commissioner and review by a magistrate. Merely the threat of such litigation will impose costs.

The Committee makes these comments taking a view that "personal rights and liberties" may embrace the freedom to carry on a business or some other activity which will be affected by the scheme.

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

By clause 4 (definition of "health service") the regulations may exempt services from the coverage of the Act.

The Committee draws attention to this provision given that the exercise of this power will in effect amend the Act. Given the great width of the definition of "health service", some qualification of its scope will probably be necessary, but the Assembly may consider that given the significance of any restriction, qualification should be by amendment to the Act.

Legislative Assembly (Privileges) Bill 1997

This Bill would introduce an Act to state the powers, privileges and immunities of the Legislative Assembly. These powers, privileges and immunities are designed to enable the Assembly to inquire, debate and legislate free from interference. By reason of section 24 of the *Australian Capital Territory (Self-Government) Act 1988* of the Commonwealth, the Assembly cannot imprison or fine a person. This Bill creates offences and provides that a court may impose the relevant punishments.

Comments on the Explanatory Memorandum

The Committee commends the clarity of the Explanatory Memorandum.

Minor drafting comment

The definition of "court" might be redrafted to make it clear that the words "having power, etc." qualify the words "tribunal" and "authority".

Prisoners' Interstate Leave Bill 1997

This Bill would introduce an Act to give effect to a proposed national scheme to provide for prisoners to travel interstate for short periods for various reasons, whilst at the same time they remained in the legal custody of their own jurisdictions.

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

Clause 6 specifies the purposes for which the Administrator (under the *Remand Centres Act 1976*) may grant a leave of absence permit to a prisoner. The effect of paragraph 6 (2) (d) is however that a person who is a member of a particular racial group (that is, is "of Aboriginal or Torres Strait Islands origin") may be granted leave on grounds which may not be relied upon in the case of a prisoner of any other racial group. The additional grounds are that the prisoner is to attend "the funeral or burial service of a member of his or her immediate or extended family", (whereas other persons may attend "the funeral of a person with whom the prisoner has had a long-standing personal relationship"), or to attend "an occasion of special significance to members of his or her immediate or extended family" (whereas there is no such provision in respect of other persons).

Subclause 6 (3) of the Bill defines who is "of Aboriginal or Torres Strait Islands origin".

This provision thus operates according to a racial test, and undermines the principle that all persons are equal under the law. The Committee notes that the otherwise very helpful Explanatory Memorandum does not offer any justification for this respect of clause 6. It is suggested that one be provided.

The Committee also notes that in terms of the definition of who is “of Aboriginal or Torres Strait Islands origin” a person cannot satisfy the test unless, despite being of such descent, and identifying himself or herself as such, he or she “is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Island community”. The result is that some such community may in effect determine the operation of the Act.

GOVERNMENT RESPONSES

The Committee has received 2 responses in relation to comments made concerning:

- Electricity Supply Bill 1997 (Report No. 15 of 1997).
- Electricity (National Scheme) Bill 1997 (Report No. 13 of 1997).

Copies of the responses are attached. The Committee thanks the Minister for Urban Services for his helpful responses.

Bill Wood, MLA
Chair



/ December 1997



Trevor T Kaine M.L.A.

Minister Assisting the Treasurer
Minister for Industrial Relations
Minister for Urban Services
Minister for Tourism
Minister for Regulatory Reform

Member for Brindabella
Australian Capital Territory

Mr Bill Wood
Chair
Standing Committee on the Scrutiny of Bills
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Wood

I am writing in response to the Committee's recent comments on the Electricity Supply Bill.

The Committee commented on two aspects of the Bill:

- that there is no provision for review in relation to powers for ACTEW to prepare standard form customer contracts as set out clause 10 and 13 (presumably 31) of the Bill; and
- whether it is appropriate for provisions in relation to making or dealing with an appeal under subclause 37(1) to be set out in regulations.

Standard form contracts are, in reality, the successors to ACTEW's present general terms and conditions of supply. A contract will cover the vast majority of ACTEW's 127,000 electricity customers who receive the same service. Review powers in relation to the preparation of contracts would be inappropriate and impractical. The Committee instances many additional consumer safeguards introduced in the Bill over and above the current general terms and conditions of supply. One is the Minister's power to impose licence conditions on ACTEW.

Subclause 37(1) provides an appeal right against charges under standard form contracts and the classification of a person as "franchise" or "non-franchise". These matters would affect only a tiny minority of ACTEW's customers. Regulations provide the flexibility necessary for handling such issues, which are likely to involve detailed technical considerations in relation to electricity consumption or connection. Unlike other jurisdictions, the Assembly can both disallow and amend regulations.

Yours sincerely

Trevor T Kaine M.L.A.

- 7 NOV 1997

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Mr Bill Wood MLA
 Chair
 Standing Committee on Scrutiny of Bills and
 Subordinate Legislation
 ACT Legislative Assembly
 CANBERRA ACT 2617

Bill
 Dear Mr Wood

I am writing in response to the Committee's comments on the Electricity (National Scheme) Bill 1997 provided in Report No. 13 of 1997.

The Government has noted the comments in relations to the implications of applications of laws schemes.

The framework set out in the National Electricity (South Australia) Act 1996 is intended to strike a reasonable balance between the following policy objectives:

- to provide for each Government a statutorily defined role in the National Scheme;
- to allow for amendments to the South Australian legislation and regulations to be made without undue delay — full parliamentary processes in each jurisdiction is likely to add many months to even the most uncontentious changes; and
- to provide further safeguards to National Electricity Market participants and future investors that the consistency of the National Scheme across all jurisdictions will be maintained.

The requirement that each Minister agree to the proposal provides a rigorous assessment for any proposal before it is brought before the South Australian Parliament. Ministerial agreement would follow normal Government processes in each participating jurisdiction. These would, of course, vary according to the materiality of each proposal.

In relation to subsection 11(3) of the SA legislation, the regulations that may be made on the recommendation of a majority of Ministers are procedural matters.

Yours sincerely

Trevor T Kaine

Trevor T Kaine MLA

- 7 NOV 1997

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