

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

**REPORT NO. 10 OF 1995**

**30 August 1995**



## 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 Paul Osborne, MLA (Chair)  
Mr Andrew Whitecross, MLA (Deputy Chair)  
Mr Harold Hird, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM  
Secretary: Mr Tom Duncan  
Deputy Secretary: Ms Beth Irvin

## 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 comment:

#### **Food (Amendment) Bill 1995**

This Bill makes it an offence to sell food that has been irradiated or is derived from a plant or animal that was subjected to genetic engineering unless a notice is displayed at or near the place of sale.

#### **Nature Conservation (Amendment) Bill 1995**

This Bill reinstates an exemption of leased urban land from native tree controls and provides for review of a direction of the Conservator of Flora and Fauna to an owner of a diseased native animal or plant.

### Bill - Comment

The Committee has examined the following Bill and offers the following comment:

#### **Competition Policy Reform Bill 1995**

This Bill is the ACT part of a legislative scheme to put in place Australia-wide changes to competition policy.

#### Commencement Clause is not the Customary "Automatic Commencement After 6 Months Provision"

Subclauses 2(2) and (3) provide as follows:

"(2) The remaining provisions of this Act [that is, other than part I 'Preliminary' and Part VII 'Transitional Rules'] commence on the first day after the period of 12 months after the day on which the *Competition Policy Reform Act 1995* of the Commonwealth received the Royal Assent, but, if the commencement of those provisions is postponed under subsection (3), they commence on the day to which their commencement has been postponed (or the later or latest of those days).

(3) The commencement of the provisions referred to in subsection (2) may be postponed from time to time by the Minister, by notice in the *Gazette*, but any such postponement cannot be effected after the provisions have commenced."

These provisions provide for possibly longer periods before commencement than the normal 6 months default period that is customarily inserted in our legislation.

These provisions were inserted because of the complexities of getting Australia-wide legislation in place. Furthermore, as the explanatory memorandum states:

"The remaining provisions are intended to commence 12 months after the date of assent to the Commonwealth Act. Although the Commonwealth Act contains a number of different commencement dates, virtually all of the Commonwealth Act will have commenced 21 July 1996."

## SUBORDINATE LEGISLATION

### Subordinate Legislation - No Comment

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

Subordinate Law No. 27 of 1995 being the *Supreme Court Rules (Amendment)* varies the rules relating to conduct money and consolidation of actions and inserts Part 11A dealing with registration of orders under the Commonwealth *Mutual Assistance in Criminal Matters Act 1987* and Part 11B dealing with the registration of orders under the *Proceeds of Crime Act 1991*.

Subordinate Law No. 28 of 1995 being the *Magistrates Court (Civil Jurisdiction) Regulations (Amendment)* updates references to some section numbers as a result of the renumbering of the Act and updates the rates of pre-judgment interest.

Subordinate Law No. 29 of 1995 being the *Drugs of Dependence Regulations (Amendment)* transfers a specified drug from the list of prohibited substance to the list of drugs of dependence and specifies the trafficable and commercial quantities for that drug.

Subordinate Law No. 30 of 1995 being the *Motor Omnibus Services Regulations (Amendment)* removes references to conductors on omnibuses, removes sexist language, provides for consistency with the Motor Omnibus Services Regulations and updates the drafting.

Subordinate Law No. 31 of 1995 being the *Motor Omnibus Services Regulations (Amendment)* includes penalties to support infringement notices inserted in the Act by the *Motor Omnibus Services (Amendment) Act 1994*, removes references to conductors on omnibuses, removes sexist language and updates the drafting.

Determination No. 106 of 1995 made under the *Land (Planning and Environment) Act 1991* declares the lease of a specified parcel of land to be a class of leases to which section 167 applies and specifies the criteria under which a transferee or sublessee is to hold that lease.

Determination No. 107 of 1995 made under section 33 of the *Betting (Totalizator Administration) Act 1964* revokes Determination No. 125 of 1994 and determines the proportions of the moneys set aside as a percentage of bets accepted by the ACTTAB that are to be paid to the prescribed racing clubs.

Determination No. 108 of 1995 made under section 31 of the *Intoxicated Persons (Care and Protection) Act 1994* makes the Care and Protection of Intoxicated Persons Standard.

Determination No. 109 of 1995 made under section 4 of the *Public Place Names Act 1989* amends the Determination of Nomenclature published in *Gazette* No. P25 of 31 August 1988 by omitting the names of three streets from the Division of Conder.

Determination No. 110 of 1995 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land to be "Hall Village Reserve".

Determination No. 111 of 1995 made under section 10 of the *Bookmakers Act 1985* appoints a specified person as the Chairperson of the Bookmakers Licensing Committee for a period of three years.

Determination No. 112 of 1995 made under section 9 of the *Bookmakers Act 1985* appoints seven persons as Members of the Bookmakers Licensing Committee for a period of three years.

Determination No. 113 of 1995 made under sections 10 and 12 of the *Tobacco Act 1927* exempts specified tobacco advertising and specified existing contracts relating to tobacco sponsorship and tobacco advertising from the provisions of the Act during the conduct of the cricket match between the Prime Minister's XI and the West Indies Cricket Team on 5 December 1995.

Determination No. 114 of 1995 made under section 4 of the *Public Place Names Act 1989* amends Determination No. 96 of 1991 by omitting Gundaroo Drive in the Division of Forde.

Determination No. 115 of 1995 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of the names of streets in the Division of Symonston.

Determination No. 116 of 1995 made under section 4 of the *Public Place Names Act 1989* amends Determination No. 37 of 1995 by omitting the name of a street and reinserting the street under an expanded name in the Division of Ngunnawal.

Determination No. 117 of 1995 made under the *Building Act 1972* adopts the Building Code of Australia as modified by the Schedule to the instrument adopting the Code and the eighth ACT Amendment to the Code.

Determination No. 118 of 1995 made under section 24 of the *Building Act 1972* revokes the instrument of adoption and modification of the Building Code dated 21 October 1994 and notified in *Special Gazette* No. S235 of 1 November 1994 and being Determination No. 142 of 1994 and adopts all of the provisions of the Building Code as replaced and supplemented by provisions from the ACT Amendment No. 8 to the Building Code of Australia.

Determination No. 119 of 1995 made under section 24 of the *Building Act 1972* prepares and publishes Australian Capital Territory Amendment No. 8 to the Building Code of Australia.

Determination No. 120 of 1995 made under section 4 of the *Public Place Names Act 1989* determines the name, origin and significance of the name of a street in the Division of Hume.

Public Management Standard - 10/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Management with the approval of the Chief Minister amends Public Management Standard - 1/1994 by increasing the pay of non-award employees of ACTTAB.

#### Subordinate Legislation - Comment

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

Determination No. 121 of 1995 made under section 58 of the *Medical Practitioners Act 1930* revokes "all previous determinations" made under specific provisions of the Act and fixes new fees under the Act.

As is required by the Guidelines for the Preparation of Disallowable Instruments of May 1993 prepared by the Attorney-General's Department, the explanatory statement for the present determination very properly sets out the new fees to be charged under the present determination for the year 1995-96 and the fees that were charged prior to this.



As is also required by the Guidelines, the explanatory statement also gives the basis for the level of increases, where there are, in fact, increases. It explains that some increases "reflect the move towards full cost recovery" and one increase aligns it "to the fees charged for the same service provided under similar provisions in other health professions registration Acts".

Unfortunately, a comment made by the Committee when it reported on the predecessor of the present determination, Determination No. 111 of 1993, needs to be repeated. In its Report No. 16 of 1993 the Committee said that "[i]t would have been helpful to have references to the revoked determination" for, as the Guidelines suggests:

"This will enable a member of the Assembly or a member of the community who wishes to check back on the previous situation to do so easily."

Thus the Committee could suggest that, when fees are next changed, the revocation clause and the explanatory statement give references to the determination being revoked.

## GOVERNMENT RESPONSES

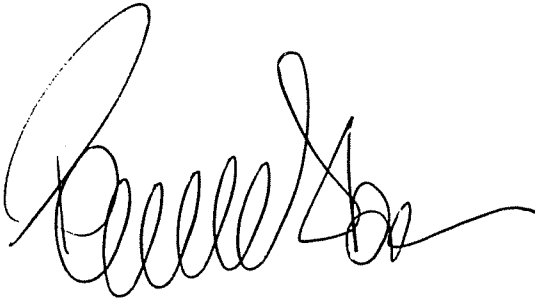
The Committee has received responses to comments made concerning:

- Determination No. 148 of 1994 being the Code of Practice for the Notification of Reviewable Decisions and Rights of Review (Report No. 19 of 1994);
- Determination No. 151 of 1994 made under the *Motor Traffic Act 1936* (Report No. 19 of 1994);
- Consumer Credit Bill 1994 (Report No. 20 of 1994);
- Determination No. 163 of 1994 made under the *Workers' Compensation Act 1951* (Report No. 1 of 1995);
- Determination of Fees and Charges No. 5 of 1995 made under the *Public Health Act 1928* (Report No. 1 of 1995);
- Determination of Fees and Charges No. 16 of 1995 made under the *Meat Act 1931* (Report No. 1 of 1995);
- Consumer Credit Bill 1995 (Report No. 7 of 1995);
- Public Management Standard No. 3 of 1995 (Report No. 7 of 1995);  
and

- Determination No. 38 of 1995 being the Care and Protection of Intoxicated Persons Standard (Report No. 7 of 1995).

A copy of the responses are attached.

The Committee thanks the Attorney-General for his helpful responses.

A handwritten signature in black ink, appearing to read 'Paul Osborne', written in a cursive style.

Paul Osborne, MLA  
Chair

30 August 1995




**Sary Humphries MLA**

Attorney General  
Minister for the Environment, Land  
and Planning  
Minister for Police  
Minister for Emergency Services  
Minister for Arts and Heritage  
Minister for Consumer Affairs

Member for Molonglo  
Australian Capital Territory

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Mr Paul Osborne MLA  
Presiding Member  
Standing Committee on Scrutiny of Bills and  
Subordinate Legislation  
ACT Legislative Assembly  
South Building  
London Circuit  
CANBERRA CITY ACT 2601

  
Dear Mr Osborne

In its Report No. 19 of 1994, the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on Determination No. 148 of 1994, being the Code of Practice for the Notification of Reviewable Decisions and Rights of Review. The Committee asked whether the Code should indicate the means by which public notice should be given of a reviewable decision and rights of review.

I am advised that neither the Code nor any legislative provisions provide for the practical requirements of giving public notice. Whilst the Code could indicate possible means of notifying the public, I am not persuaded that an amendment to the Code at such an early stage after its introduction is desirable. The training of decision makers which followed the introduction of the Code suggested that notification in the circumstances contemplated by paragraph 3(5) should be by notification in a newspaper or the Gazette, as appropriate. One benefit of the present formulation of the Code is that it would permit other appropriate forms of notification. Nevertheless, I have asked my Department to keep in mind the desirability of amending the Code to address the Committee's concern should other issues arise which require its amendment.

In noting that Determination No. 151 of 1994 gave effect to an undertaking to rectify the omission of a fee in determination No. 53 of 1994, the Committee asked whether any fees had been collected during the period when there existed no power to collect the fee. This matter is being examined and I will write to the Committee on this as soon as possible.

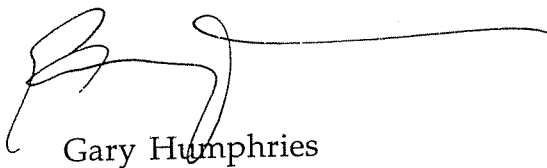
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In its Report No. 20 of 1994, the Committee raised several matters in relation to the Consumer Credit Bill 1994 which was introduced in December last year by the previous Government. As the Committee is aware, the 1994 Bill has been withdrawn and replaced with the new Consumer Credit Bill 1995 which I presented in the Legislative Assembly on 22 June 1995. I note that the Committee has commented on the 1995 Bill in its Report No. 7 of 1995. I will write to the Committee on these and other issues raised in Report No. 7 as soon as possible.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Gary Humphries', with a long horizontal line extending to the right.

Gary Humphries

1 4 AUG 1995



**Sary Humphries MLA**

Attorney General  
Minister for the Environment, Land  
and Planning  
Minister for Police  
Minister for Emergency Services  
Minister for Arts and Heritage  
Minister for Consumer Affairs

Member for Molonglo  
Australian Capital Territory

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Mr Paul Osborne MLA  
Presiding Member  
Standing Committee on Scrutiny of Bills and  
Subordinate Legislation  
ACT Legislative Assembly  
South Building  
London Circuit  
CANBERRA ACT 2601

17 AUG 1995

Dear Mr Osborne

In its Report No. 1 of 1995, the Committee commented on Determination No. 163 of 1994 made under section 15F of the *Workers' Compensation Act 1951*. This Determination approves Protocol No. 1 of 1995 for occupational rehabilitation.

The Committee noted the following two errors in the Protocol approved by the Determination:

- (a) a missing quotation mark, a quotation mark should appear after the word "rehabilitation" in paragraph 5.2.6 of the Protocol; and
- (b) an incorrect section reference, paragraph 3.1 refers to section 15C of the *Workers' Compensation Act* when it should refer to section 15D of the Act.

Advice from the Government Solicitor's Office states that the above errors are typographical errors which do not alter the effect of the Protocol. Notwithstanding this, I am advised that an amending instrument is being prepared.

In its report No. 1 of 1995, the Committee made a number of comments in relation to Determination of Fees and Charges No. 5 of 1995 made under the *Public Health Act 1928*.

The Committee's comments related to three successive Determinations of dairy fees and charges (licensing/registration fees for dairy producers,

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dairy premises, and dairy herds) made under the Public Health (Dairy) Regulations (Dairy Regulations):

- Determination No. 159 of 1992 which established \$70 fees for dairies (and other matters);
- Determination No. 3 of 1994 which revoked and did not replace the dairy fees established by Determination No. 159 of 1992; and
- Determination No. 5 of 1995 which established \$74 fees for dairies.

The Committee asked whether any dairy fees were collected after the revocation of Determination No. 159 of 1992 and if so, under what authority. The Committee noted that if, at the time of the making of Determination No. 5 of 1995, there was no determination applying \$70 fees for dairies in existence then the explanatory statement for Determination No. 5 is incorrect. The statement indicates that Determination No. 5 of 1995 increases dairy fees from \$70 to \$74.

I confirm that the explanatory statement for Determination No. 5 of 1995 is incorrect. There were no dairy fees in existence at the time of the making of the Determination. As noted by the Committee, Determination No. 3 of 1994 revoked and did not replace Determination No. 159 of 1992 in respect of dairies. There was no other determination applying licensing fees for dairies. I regret this error in the statement.

I am advised that no dairy fees under the Dairy Regulations have been collected since the revocation of Determination No. 159 of 1992 and the Department of Health and Community Care has decided that it will not collect any future fees under the Dairy Regulations and will seek the repeal of these regulations and other provisions made unnecessary by the Food Act. I am informed that the then Department of Health did collect fees for a food business licence (in relation to a dairy) under the Food Act in December 1994 for the year expiring in December 1995.

In its report No. 1 of 1995, the Committee also made several comments in relation to Determination of Fees and Charges No. 16 of 1995 made under section 19B of the *Meat Act 1931* for a permit to slaughter under subregulation 5(4) of the Meat Regulations.

The Committee noted that the Determination fixes a fee for renewal of a permit to slaughter required under subregulation 5(4) of the Meat Regulations but does not fix a fee for an initial grant of a permit to slaughter required under subregulation 5(1). I confirm that there is no current instrument which fixes a fee for an initial grant of this permit. I am advised that this omission will be rectified in the next Determination of slaughter fees and that there is and has been for many years only one meat slaughter business in the ACT with the result that in practice, since the establishment of the business, only renewals have been required.

The Committee asked whether there are any prior determinations of fees for a renewal of permit to slaughter as indicated in the explanatory statement to Determination No. 16 of 1995. Until mid 1985, regulation 5 of the Meat Regulations provided that the fee for a renewal or initial grant of permit to slaughter was \$4. In mid 1985, the Meat Act and regulations were amended

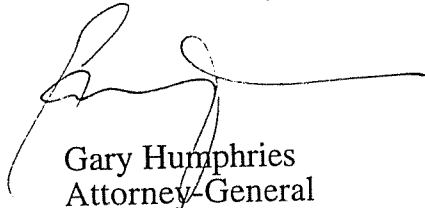
to provide for the Minister to determine fees for the purposes of the Act and regulations (No. 26 of 1985 which commenced operation on 28 June 1985 and subordinate law No. 15 of 1985 which commenced operation on 1 July 1985).

A search by the Department of Health and Community Care indicates that no determination (prior to Determination No. 16 of 1995) for a renewal or initial grant of permit to slaughter has been made since the 1985 amendments noted above. I conclude that there is no preceding determination as referred to in the explanatory statement and therefore no authority to collect fees for renewal or initial grant of permit to slaughter since mid 1985 until the making of Determination No. 16 of 1995. I am advised that a search of records of the Department of Health and Community Care has revealed that an amount of \$421 for renewal of permit to slaughter has been collected during this period when there was no authority to do so and that this amount will be refunded.

The Committee asked whether fees for meat vendors and sellers of prepared meat goods are now collected under the Food Act. I confirm that meat vendors and sellers of prepared meat goods are food businesses for the purposes of the Food Act and license fees for these food businesses are now collected under this Act.

I trust this information is of assistance to the Committee.

Yours sincerely



Gary Humphries  
Attorney-General




ry Humphries MLA

Attorney General  
Minister for the Environment, Land  
and Planning  
Minister for Police  
Minister for Emergency Services  
Minister for Arts and Heritage  
Minister for Consumer Affairs

Member for Molonglo  
Australian Capital Territory

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Mr Paul Osborne MLA  
Presiding Member  
Standing Committee on Scrutiny of Bills and  
Subordinate Legislation  
ACT Legislative Assembly  
South Building  
London Circuit  
CANBERRA ACT 2601

  
Dear Mr Osborne

In its Report No. 7, the Committee raised several matters in relation to the Consumer Credit Bill 1995 which is part of a scheme for uniform credit legislation pursuant to the Uniform Credit Laws Agreement 1993 of the States and Territories. The Consumer Credit Bill 1995 adopts the Consumer Credit Code set out in the appendix to the *Consumer Credit (Queensland) Act 1994* as the law operating in the ACT. I note that the Consumer Credit Bill 1995 replaces the Consumer Credit Bill 1994 which has been withdrawn and on which the Committee commented in its Report No. 20 of 1994.

The Committee is correct in its reasoning for the variation of the usual automatic commencement provision from 6 months to 12 months. I note that the new legislation is set to commence in all jurisdictions not earlier than 30 March 1996.

The Committee suggested that the provisions in relation to consent to enter in section 91 of the Consumer Credit Code do not appear as protective as the standard consent to enter provision in ACT legislation. Subclauses 10(2) and 10(3) of the Uniform Credit Laws Agreement set out the requirements for approval of amending legislation (including additional or amending regulations) by the Ministerial Council.

As the Committee noted, any amendments to the legislation including the Consumer Credit Code must be approved by a resolution of the Ministerial Council which must be passed by a majority of two thirds of members

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present and voting (subclause 10(2) of the Agreement). Accordingly, it was not open to the ACT to resort to its usual consent to enter provisions as to do so would be contrary to the two-thirds majority vote which approved the Queensland consent to enter provisions. This is one instance of changes in practice which are necessary to achieve uniform legislation.

The Committee suggested that the protection of the consent to enter provisions in section 91 of the Consumer Credit Code could be reduced by the making of regulations pursuant to this section. In making these comments, the Committee indicated that the nature of the voting requirements for approval of regulations by the Ministerial Council was not made clear in the explanatory memorandum.

Subclause 10(3) of the Agreement provides that any regulations to be approved before the proclamation of the initial legislation (*Consumer Credit (Queensland) Act 1994 (Qld)*) must be approved by a unanimous resolution of the Ministerial Council. As noted above, the expected proclamation date is not earlier than 30 March 1996. Therefore at present and until 30 March 1996 or, a later date, there is no possibility of regulations to modify the effect of the consent to enter provisions of the Consumer Credit Code without the approval of the ACT.

After the proclamation of the initial legislation, the Ministerial Council may approve new or amending regulations by a resolution passed by a majority of two thirds of members present and who vote (subclause 10(2) of the Agreement). In my view, this is a practical requirement necessary for the development of regulations once the Consumer Credit Code has commenced operation in all the participating jurisdictions. A requirement of a unanimous vote for new or amending regulations for the long term would make it very difficult to change the regulations as may be considered necessary after the Code has been in operation for a period. I note that whatever the voting requirements, any amendments to the Code or regulations must be developed through consultation with all participating jurisdictions. Close consultation on the development of the Code has been the experience to date. The preamble to the Agreement states in part that "there should as far as possible be uniformity both in [consumer credit laws] and their administration in the States and the Territories" and that "as far as possible such uniformity will be achieved by establishing and implementing a cooperative scheme ...".

Notwithstanding this, as a former member of the Committee, I appreciate the Committee's concerns that in adopting the uniform Consumer Credit legislation the Territory is agreeing to the application of provisions relating to consent to enter which offer less protection than the standard provisions in ACT legislation.

Indeed, the fact that the adoption by the ACT of uniform legislation by reference to a model enacted in another jurisdiction has the capacity to

preclude the improvement of ACT legislation through the Scrutiny of Bills Committee process is a matter which also is of concern to me as Attorney-General.

I take seriously the issue of ensuring that uniform drafting exercises don't result in a departure from the drafting standards of which the Committee and its counterparts in other jurisdictions are the defenders, if that can be avoided.

I note that the Working Party of Chairs of the Committees of the Commonwealth, State and Territory Parliaments has recently released a Discussion Paper on the Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles which seeks to address these concerns. I look forward in due course to the Working Party's final recommendations to overcome the present unsatisfactory situation.

The Committee commented on Public Management Standard No. 3 of 1995 made under section 251 of the *Public Sector Management Act 1994*. Standard No. 3 makes various amendments to the Public Management Standard No. 1 of 1995 including the replacement of rule B:6 with rules B:6.1, B:6.2, B:7.1 and B:7.2 concerning leave without pay.

I confirm that there is an error in the numbering of the new rules B:7.1 and B:7.2. These new rules should have been numbered as rules B:6.3 and B:6.4. As the Committee points out, Standard No. 1 already contained rules B:7.1 and B:7.2 concerning temporary employees which continue to exist. There was and is no intention to repeal these rules. I note that as a result of the Committee's comments this error was corrected in Public Management Standard No. 8 of 1995 which was notified in Gazette No. S199 of 14 August 1995.

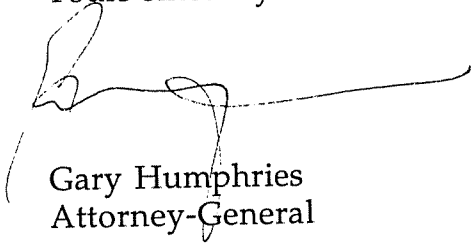
The Committee commented on Determination No. 38, the Care and Protection of Intoxicated Persons Standard (the Standard), made under section 31 of the *Intoxicated Persons (Care and Protection) Act 1994*. The Committee is correct in its assumption that the Act commenced on 15 June 1995 after the purported commencement of the Standard on 2 June 1995.

The Government Solicitor's Office has been requested to consider the implications of this and a copy of its advice is attached for information. The advice concludes that the gazettal of the Standard in Gazette Notice No. S110 of 1995 did not bring the Determination into effect and a fresh gazettal is required for this purpose. This has now been done.

I am advised that no persons were taken into care under the Standard in the period since 2 June and the date of re-gazettal and so no one has been adversely affected by the error.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gary Humphries', with a long horizontal flourish extending to the right.

Gary Humphries  
Attorney-General

22 AUG 1995



AUSTRALIAN CAPITAL TERRITORY  
GOVERNMENT SOLICITOR

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Your Reference:

Our Reference: 93-2-144444  
Dr Doug Jarvis  
Ph: 207 0635

1st Floor  
GIO House  
City Walk  
CANBERRA CITY 2601

13 July 1995

Ms Alison Boyle  
Department of Health  
BY FAX 20 51656

**RE: INTOXICATED PERSONS (CARE AND PROTECTION) ACT 1994 -  
SECTION 31 - MAKING OF STANDARDS PRIOR TO COMMENCEMENT OF  
ACT**

I refer to our telephone conversations of 3 July 1995 and 12 July 1995 concerning the above matter. You have asked for urgent advice about the effectiveness of Standards purportedly made pursuant to section 31 of the Act and gazetted 13 days prior to the commencement of the Act: see *Special Gazette* S110, 2 June 1995. Since my advice to you of 4 July 1995 I have had the opportunity of reading Report No 7 of 1995 of the Scrutiny of Bills Committee. This advice addresses the issue raised in that Report concerning the Standards and is intended to replace my advice of 4 July 1995.

2. The substantive provisions of the Act commenced on 15 June 1995 by virtue of the operation of section 2 of the Act which provides for the standard commencement six months after notification if there has been no earlier commencement by gazettal. I understand that there was no earlier commencement date gazetted, and the Scrutiny of Bills Committee's comments are expressly premised on this assumption. The Act was notified in the *Gazette* on 15 December 1994. The *Subordinate Laws Act* provides in section 5 that, where an Act or a provision of an Act is not to commence on notification, certain powers of making appointments, administrative instruments and subordinate legislation may be exercised in the period

between notification of an Act and its commencement as if the Act had in fact commenced. Section 5 also provides in effect that the relevant instrument takes effect on the same day that the parent Act itself commences or on a later date specified in the instrument, whichever is the later.

3. Report No 7 of 1995 of the Scrutiny of Bills Committee raises the issue that the Standard in paragraph 2 actually provides for a different date of commencement. Paragraph 2 provides, so far as is relevant for present purposes, that the Standard is to commence "on notification of the Standard in the Gazette" (which occurred on 2 June 1995). The Report comments that the Standard was not made "in contemplation" of the commencement provisions of the *Subordinate Laws Act* and that thus it may be "difficult to rely on the provisions of section 5" for the commencement of the Standard. The Committee does not say what the consequences of this might be for the effectiveness of the Standard.

4. The *Subordinate Laws Act* does not require that subordinate laws be made "in contemplation" of section 5. In my opinion section 5 operates according to its terms unless there is a contrary intention in the parent Act. It follows in my opinion that, in the absence of a contrary intention, if a parent Act enables subordinate legislation to be made then section 5 enables it to be made in the period prior to commencement and the subordinate law commences on the dates provided for in section 5. There is no contrary intention in the parent Act (the Intoxicated Persons Act) to the effect that Standards may not be made in the period between notification and commencement of the Act.

5. The general law doctrine of repugnancy of subordinate legislation states that subordinate legislation must be not inconsistent with its parent Act and with other Acts. Clause 2 of the Standard is inconsistent with section 5 of the *Subordinate Laws Act* because it authorises a commencement date which may be - and actually was - different from the dates for which section 5 provides (the earliest date being 15 June 1995 in this case). To the extent that clause 2 authorises such a commencement date it is in my opinion invalid as repugnant to the *Subordinate Laws Act*. It follows in my opinion that the purported notification of the commencement of the Standard on 2 June 1995 was void and of no effect.

6. Subsection 9(3) of the *Subordinate Laws Act* provides to the effect that subordinate laws must be read and construed subject to their parent Acts and that if they would be in excess of the power conferred to make the subordinate law they are nevertheless valid to the extent that they are not in excess of the power. In my opinion subsection 9(3) operates in the present case to the effect that clause 2 of the Standard must be construed as authorising a commencement date no earlier than the commencement date of the parent Act and the clause remains valid to that extent. However, as the purported notification on 2 June 1995 was void it follows that there has, as yet, been no notification which brings the Standard into effect.

**Conclusion**

7. The Standard is validly made pursuant to the enabling power in the *Subordinate laws Act* section 5, but it has not been commenced. A fresh notification in the Gazette is required to bring the Standard into effect (apart from the one clause which is to commence in 1996) and the Standard will commence on the date of that notification.



per.  
ACT GOVERNMENT SOLICITOR