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. 5 of 2001

23 April 2001

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 comment on them.

Appropriation Bill 2000-2001 (No 3)

This is a Bill for an Act to appropriate money for the purpose of the Territory for the financial year 2000-2001.

Children and Young People Amendment Bill 2001

This Bill would amend the *Children and Young People Act 1999* to provide for the transfer interstate of care and protection orders to jurisdictions that do not possess laws that correspond to the child welfare laws of the Territory.

Education Amendment Bill 2001

This Bill would amend the *Education Act 1937* to create an offence of trespass on school premises and similar offences.

Electoral Amendment Bill 2001 (No 2)

This Bill would amend the *Electoral Act 1992* to facilitate the increase in the number of Robson rotation versions of the ballot papers to be printed for an election of Members to the Legislative Assembly.

Electoral (Entrenched Provisions) Amendment Bill 2001

This Bill would amend the *Electoral Act 1992* to increase in the number of Robson rotation versions of the ballot papers to be printed for an election of Members to the Legislative Assembly.

Legislation (Consequential Amendments) Bill 2001

This Bill would amend a great many of the Acts and subordinate laws of the Territory with the object of bringing them into line with the provisions of the *Legislation Act 2001*. In particular, the Bill will insert into the Acts and subordinate laws provisions concerning the notification of the making of new laws. Under the *Legislation Act 2001*, notification is now to be done by electronic registration on the legislation register (rather than by a short form notice in the *Gazette*). The Bill would also insert into the Acts and subordinate laws provisions concerning the standard form of provisions that bear on the approval of forms to be used by persons in connection with some scheme, and provisions concerning the determination of fees.

Low-alcohol Liquor Subsidies Amendment Bill 2001

This Bill would amend the *Low-alcohol Liquor Subsidies Act 2000* to extend its operation indefinitely until a date to be specified in regulations.

Bills - Comment

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

Bail Amendment Bill 2001

This Bill would amend the *Bail Act 1992* in various ways. In particular, it would create a presumption against bail in respect of persons who, whilst on bail in respect of a serious offence, are charged with another serious offence. In such a case, the court or authorised officer must not grant bail to the person in respect of the later charge unless satisfied that special or exceptional circumstances exist justifying the grant of bail. The other amendments relate to the definition of "authorised officer" and the issuance by a court of an arrest warrant for a person who fails to appear.

Para 2(c)(i) – undue trespass on rights and liberties

The right to liberty and the presumption of innocence

As it stands, the *Bail Act* reflects the generally accepted principle that there is a presumption that a person charged with an offence is entitled to bail. (The International Covenant on Civil and Political Rights states that "It shall not be the general rule that persons awaiting trial shall be detained in custody …": art 9.3). This approach is reflected in sections 8, 22 and 23 of the Act. (The principle is qualified in respect of some offences and in some particular situations - see sections 5, 8A and 9 – and applies more liberally in respect of minor offences – see sections 7 and 7A.) Section 22, which applies in respect of the granting of bail to adults, requires the court or authorised officer to have regard to a number of matters. Generally speaking, these are: the probability that the person will appear in court, the interests of that person (including the need to obtain legal advice and prepare for the trial), and the protection of the community (including the views of the victim).

The Bill would further qualify the general principle. Proposed new subsection 9A(1) of the Act applies where the person alleged to have committed a serious offence (the second offence) is alleged to have done so whilst on bail for another serious offence (the first offence). By proposed new subsection 9A(2), a court or an authorised officer "must not grant bail to the accused person unless satisfied that special or exceptional circumstances exist justifying the grant of bail". (In addition, in such a case, all other provisions of the Act that restrict and structure the exercise of a decision to grant bail continue to apply). A serious offence is one punishable by imprisonment for 5 years or more.

As the Presentation Speech observes, the Bill in this respect "creates a presumption against bail for people accused of committing a serious offence whilst on bail for a serious offence". It is argued: "Cases in which a defendant on bail *has re-offended* and again been granted bail create considerable unease within the community. It is appropriate to require there to be special or exceptional circumstances before such persons are granted bail. The protection of the community should be given priority

over the defendant's liberty in these cases, particularly when serious cases are involved" (emphasis added).

A person who is on bail for the first serious offence is only alleged to have committed an offence. Similarly, the charge in relation to the second offence is only an allegation that the person has committed an offence. With respect to the Attorney-General, it is not therefore appropriate to speak of a person who is charged with the first offence as having re-offended when he or she is charged with the second offence.

Given that a person on bail is only a person charged with an offence, is entitled to the presumption of innocence, and has not in any sense been tried on that charge, our legal tradition has long been concerned that the law concerning bail not be oppressive. Denial of bail affects the ability of the person to prepare a defence, and thus qualifies the presumption of innocence. By reason of the person being detained, they are of course deprived of their right to liberty.

A denial of an application for bail results in the person being detained in custody, in circumstances not unlike that of a jail. The effects on that person and on others were noted by Hunt CJ at CL in *R v Kissner* (Supreme Court, NSW, 17 January 1992, unreported; quoted in *Chau v DPP (Commonwealth)* 132 ALR 430 at 433):

> the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and to his family, and usually with severe effects upon the applicant's business or employment, his finances, and his abilities to prepare his defence and to support his family.

Recognition of such effects may underlie the statement of general principle stated by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-8:

> putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is ''ruled by the law, and by the law alone and ''may with us be punished for a breach of the law, but he can be punished for nothing else". … The most important [qualification which must be made is] the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the "ancient common law" jurisdiction "before and since the conquest", to order that a person committed to prison while awaiting trial be admitted to bail.

The High Court has not yet considered whether there are constitutional limits to the extent to which the law of the Commonwealth, of a State, or of a Territory may restrict the entitlement of a person to bail. Such limitations might derive from the right of a person to a fair trial, and/or from the principle that a court cannot be

required to exercise functions that are inconsistent with the exercise of judicial power. (How such limitations apply in the Australian Capital Territory are particularly difficult to predict.) These questions were raised before the Court of Criminal Appeal of NSW in *Chau v DPP (Commonwealth)* 132 ALR 430, in relation to certain provisions of the *Bail Act* of NSW. Observations made by the judges indicate that wide latitude will be permitted to the legislature.

What was said in this case may be of assistance to the Legislative Assembly in its consideration of this Bill.

In relation to the scope of an entitlement to bail, Gleeson CJ said:

> There is no common law right in a person who has been arrested and charged with a serious crime to be at liberty or on bail pending the resolution of the charge. (The principles applied by courts in making discretionary decisions as to bail are reviewed, for example, in *R v Watson* (1947) 64 WN(NSW) 100 and *R v Light* [1954] VLR 152.) In any event if there were such a right, it could be modified by statute: *Chau v DPP (Commonwealth)* 132 ALR 430 at 436.

Kirby P said:

> Before the enactment of the New South Wales Act, the common law already applied stringent criteria for the grant of bail for the most serious offences. Bail would be granted to someone charged and committed to trial for murder only where exceptional circumstances were shown to exist: see, eg *R v Watson* (1947) 64 WN(NSW) 100at 102 (SC): ibid at 448

As to the extent to which the supervisory jurisdiction of the Supreme Court might be regulated, Glesson CJ said:

> A law of general application, which seeks in some respects to govern the exercise of a jurisdiction which it confers, does not trespass upon the judicial function: Leeth v Commonwealth (1992) 174 CLR 455 at 470; 102 ALR 672. A law conferring a discretion on a court can determine the factors to which the court must have regard in exercising the discretion, or the relative weight to be given to different factors, or it can provide that there is a presumption that the discretion should be exercised in a particular way, save in exceptional circumstances. The current sentencing laws of the Commonwealth, and of New South Wales, provide examples: ibid at 437-438.

(What Kirby P said was to the same effect; ibid at 446-447.)

It is generally accepted that bail might be denied out of concern for the administration of justice – including the interests of potential witnesses – and more generally out of concern for the welfare of the community. As it stands, the *Bail Act 1992* strikes this balance by stipulating a set of criteria that must be taken into account by a court or authorised officer when a decision to grant bail is made; see sections 22 – 23A of the Act.

The question for the Assembly is whether it is appropriate to create a legislative presumption against the granting of bail where a person on bail has been *charged*

with another serious offence. Is this a circumstance warranting special treatment, or is this step an undue trespass on the personal rights of the accused? The rights in issue are the right to liberty and the presumption of innocence.

Race and Sports Bookmaking Bill 2001

This is a Bill for an Act to regulate race and sports bookmaking in the Territory. It provides for the licensing of race and sports bookmakers and their agents, for the designation of sports bookmaking venues, for the resolution of betting disputes, and for the taxation of bookmakers.

Para 2(c)(i) – undue trespass on rights and liberties

Privileges to refuse to disclose information

Under subclause 41, the Commission (the Gaming and Racing Commission) may require an applicant for a licence to provide information and documents relevant to the application. The person may decline on the basis that he or she has a "reasonable excuse" for the failure (subclause 41(2)).

There are other provisions (such as clauses 58 and 59) that require persons to give information to the Commission.

The Bill does not spell out whether the person may or may not claim the privileges against self-incrimination and legal professional privilege as a reason to decline to provide information. In this respect, it compares unfavorably with the *Tree Protection Bill 2000*, which does deal specifically with these privileges; (see clauses 71 and 72).

Lack of clarity in respect of the settlement of betting disputes

Clause 55 provides for two means to resolve a dispute between a backer and a bookmaker. The first, in relation only to race bookmakers, is in accordance with the rules of the relevant racing club (subclause 55(3)). The second, in relation to both race bookmakers and sports bookmakers, is by reference to the Commission.

A point of uncertainty here is whether the availability of the first means precludes resort to the second. It is noted that the Explanatory Memorandum does not mention the possibility of reference to the Commission, even in respect of disputes with sports bookmakers.

This is a matter that might be clarified.

Procedural fairness and Commission determinations of betting disputes

On the referral of a betting dispute to the Commission, it may require both the backer (see clause 58) and the bookmaker (see clause 59) to give information to the Commission. Subclause 60(1) then provides simply that on a referral, the Commission must "give a written direction about the dispute as soon as practicable".

There is no provision governing the procedure to be followed by the Commission in making this direction. In particular, there is no provision governing the extent to

which the disputing parties must be given an opportunity to be heard. If the matter were to be reviewed by the Administrative Appeals Tribunal, quite extensive procedural fairness (natural justice) would be afforded under the provisions of the *Administrative Appeals Tribunal Act 1989*. It would appear desirable that some provision for natural justice be made at the stage of a decision by the Commission.

Lack of clarity concerning a written direction by the Commission in relation to a betting dispute

Reading clauses 60 and 61 without reference to subclause 60(4), the impression is that a written direction by the Commission (or, a review by the AAT) to a bookmaker that he or she pay an amount to the backer is binding on the bookmaker. A failure to pay could be remedied by the backer taking civil proceedings to recover the amount (see subclause 61(5)), in which case all that would be in issue was the existence of the direction by the Commission or the AAT.

But subclause 60(4) suggests that the direction of the Commission (and presumably of the AAT) is only prima facie evidence of the matters stated in the direction. This suggests that in a civil proceeding a backer would be put to proof of the bet and its terms, and so forth.

There is no guidance to be obtained from the Explanatory Memorandum. It mentions subclause 60(4), but not subclause 61(5).

This is a matter that might be clarified.

Burden of proof provisions

In various reports (see Report No 4 of 2001) the Committee has commented on the lack of clarity as to which person (loosely speaking, either the prosecutor or the defendant) bears a burden of proof in relation to some issue of ultimate fact that must or might be involved in the application of a penalty provision.

The kind of difficulty that can arise is illustrated by clause 77. Subclause 77(1) provides that a person must not "without reasonable excuse" do something. Ordinarily, this might be interpreted by a court to the effect that the person bore an evidential burden to adduce some evidence that he or she had a reasonable excuse, but, that burden having been discharged, the prosecutor would bear a legal burden to show that there was no reasonable excuse.

But this reading of subclause 77(1) may not be possible given subclause 77(2). This provides that "It is a defence to a prosecution for an offence against subclause (1) if the defendant [establishes certain matters]". The existence of subclause (2) suggests that the issue of the non-existence of a reasonable excuse is an element of the offence stated in subclause (1), thus casting on the prosecutor both an evidential and legal burden in this respect. That is, the fact that subclause 77(2) deals specifically with matters of defence suggests that subclause 77(1) states all the elements of the offence.

This is a matter that might be clarified.

Para 2(c)(ii) – insufficiently defined administrative powers

Clause 62

Clause 62 is a wide unconfined discretion vested in the Commission to give written directions to the holder of a licence as to the conduct of the licensee's "operations as the holder of a licence".

The Committee suggest

- first, that there should be some guidance given as to the circumstances (even if expressed non-exhaustively) in which this power might be exercised and
- secondly, that the Commission (or the Minister) might also be empowered to state guidelines as to how this power might be exercised – in this respect, see clause 14 of the *Tree Protection Bill 2001*.

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

Clause 65 vests in the Minister a power to determine a rate of tax in relation to the tax on bookmaking (see too clause 64).

The issue for the assembly is whether it wishes to authorize a Minister to levy a tax. (This general issue was canvassed by the Committee in its Report No 14 of 1999.)

Tree Protection Bill 2001

This is a bill for an Act to provide for the protection of trees in the Territory. The major elements of the scheme are : (i) a prohibition on the causing of damage to a "significant tree" except in accordance with an approval from the conservator of flora and fauna; (ii) a power in the conservator to approve an activity that would damage a significant tree; (iii) a power in the conservator to register (or to provisionally register) a tree as a significant tree; (iv) the creation of a Significant Tree Assessment Committee; (iv) provisions concerning the relationship between this Committee and the conservator; and (v) provisions in relation to the enforcement of this scheme.

Para 2(c)(ii) – insufficiently defined administrative powers

The power to structure a significant discretion

The Committee commends the inclusion of clause 14, being a power in the Minister to state criteria to govern the exercise of the power of the conservator to approve under clause 15 an activity that would damage a significant tree.

The power to determine fees

Subclause 79(1) provides that "The Minister may determine fees payable under this Act". One reading of this provision is that the power may be exercised only where some other provision of the Bill explicitly or implicitly provides for the imposition of a fee.

An example of this latter kind of provision is subsection 14(1) of the *Freedom of Information Act 1989*. This provides that a person may make an application for

access to a document, and it is clearly implied in the text of subsection 14(1) that the Minister may determine a fee payable upon the making of an application. There are then two other provisions of this Act that empower the Minister to determine such a fee. Subsection 4(6) is such a power, and, in addition, paragraph 80(1)(a) provides that the Minister by notice in the Gazette may "determine the amounts of application fees under this Act". In accord with these provisions, Instrument No. 37 of 2001 refers to subsection 4(6) and paragraph 80(1)(a) as the sources of power for a declaration by the Minister that fixes the application fees payable under subsection 14(1) of the *Freedom of Information Act 1989*.

Turning now to the Tree Protection Bill 2001 clause 15 provides that a person may apply to the Conservator for approval for an activity that would damage, or is likely to damage, a significant tree. The Note that follows clause 15 of the Bill assumes that the Minister may under subclause 79(1) determine a fee in respect of the making of an application for an approval by a person to engage in an activity that would damage a tree. Yet clause 15 does not explicitly or implicitly warrant the imposition of a fee in this regard.

The issue whether subclause 79(1) is a power to determine such a fee is of considerable importance.

First, the assumption made by the drafter of the Note to clause 13 is made in relation to other provisions of this Bill and in relation to provisions of other Bills (see Instrument 29 of 2001).

Secondly, if this assumption is correct, then, looking at this Bill, the Minister may select any activity of the conservator or other person and attach to it an obligation to pay a fee on the part of some person who might be said to benefit from that activity. (This assumes that a court would read a fee as a fee for some service provided to the payer of the fee).

The Committee considers that this is a matter to be clarified.

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

By paragraph 7(1)(a), damage to a tree may occur where there is "lopping or topping the tree within the meaning of AS 4373". AS 4373 is described in the dictionary to the Bill as "the Australian Standard entitled 'AS 4373-1996 Pruning of amenity trees', as in force from time to time".

There are two problems here:

- first, the ability of the ordinary person to obtain access to this document, and,

- secondly, that by this provision the Bill delegates to whatever person or body makes this standard the power to vary the law of the Territory from time to time.

Tree Protection (Interim Scheme) Bill 2001

This is a bill for an Act to provide for the interim protection of trees in the Territory pending the establishment of a Significant Tree Register under the proposed Tree

Protection Act (see the Tree Protection Bill). The major elements of the scheme under the Tree Protection (Interim Scheme) Bill are similar to the scheme under the Tree Protection Bill.

See above the comments on the Tree Protection Bill 2000.

Subordinate Legislation - No Comment

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

Road Transport (Third-Party Insurance) Regulations Amendment – Subordinate Law 2001 No 5 made under the *Road Transport (General) Act 1999* amends the Principal Regulations to provide that if a vehicle is continuously registered, the third party insurance premium is calculated from the previous registration expiry date as a consequence of amendments to the *Road Transport (Vehicle Registration) Regulations 2000* to insert provisions to allow for continuous registration.

Road Transport (Offences) Regulations Amendment – Subordinate Law 2001 No 6 made under the *Road Transport (General) Act 1999* amends the Principal Regulations to insert two new short descriptions and penalty provisions as a consequence of amendments to the *Road Transport (Vehicle Registration) Regulations 2000* to insert provisions to allow for continuous registration and to streamline the process for renewing vehicle registration. Further the short description of an offence in Part 14 of Schedule 1 is reworded.

Road Transport (Vehicle Registration) Regulations Amendment – Subordinate Law 2001 No 7 made under the *Road Transport (Vehicle Registration) Regulations Amendment* amends the Principal Regulations to insert provisions to allow for continuous registration and to streamline the process for renewing vehicle registration.

Determination No. 29 of 2001 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 184 of 2000 (notified in Gazette S25, dated 20 June 2000 and determines the fees payable, as specified in the Schedule, for transactions relating to vehicle registration under the *Road Transport (Vehicle Registration) Regulations 2000.* This instrument also reflects the charges in Part 2 of the Schedule to the *Road Transport Charges (Australian Capital Territory) Act 1993* of the Commonwealth as amended by the *Road Charges (Australian Capital Territory) Amendment Act 2000,* as specified on page 7 of the Schedule.

Determination No. 30 of 2001 made under subregulation 31 (4) of the *Road Transport (Vehicle Registration) Regulations 2000* declares vehicles used in primary production, heavy vehicles, motorcycles, and caravans to be seasonal vehicles.

Determination No. 31 of 2001 made under subregulation 68 (1) of the *Road Transport (Vehicle Registration) Regulations 2000* declares that the maximum

period for which a seasonal vehicle may be registered in any 12 month period shall be 9 months.

Determination No. 32 of 2001 made under section 18 of the *Public Health Act 1997* declares the operation of a private hospital to be a public health risk activity under subsection 18 (1) of the Act and a licensable public health risk activity under paragraph 18 (3) (a) of the Act.

Determination No. 34 of 2001 made under subsection 10 (1) of the *Health Promotion Act 1995* appoints a specified person to be a member of the ACT Health Promotion Board from 15 March 2001 to and including 9 February 2003.

Determination No. 35 of 2001 made under subsection 6 (1) of the *Cemeteries Act 1933* appoints specified persons as trustees of the Canberra Public Cemeteries Trust until 1 December 2003.

Determination No. 36 of 2001 made under section 42 of the *Taxation Administration Act 1999* approves special arrangements, for specified classes of persons, for the lodging of returns required under the specified provisions of the *Payroll Tax Act 1987*, the *Debits Tax Act 1997* and the *Duties Act 1999* by electronic means.

Determination No. 48 of 2001 being the Financial Management Guidelines Amendment 2001 made under the *Financial Management Act 1996* amends the *Financial Management Guidelines 2000* to provide for land and property to be included as a department under section 6 and insurance management to be prescribed as a department for the preparation, auditing and tabling of financial reports.

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Determination No. 28 of 2001 made under paragraph 30 (2) (b) of the *Canberra Institute of Technology Act 1987* appoints a specified person to be a member of the Canberra Institute of Technology Advisory Council from 1 September 2000 until 30 June 2002.

Retrospectivity and section 7 of the *Subordinate Laws Act 1989*

The Committee notes that this instrument appointing a specified person to be a member of the Canberra Institute of Technology Advisory Council appeared in the Gazette on 8 March 2001 and was to take effect from 1 September 2000.

Comment

In the above case, there is a gap in time between the date on which the instrument purports to come into effect and the date of gazettal of the instrument.

The explanatory statement states:

> "because of an oversight this appointment was not gazetted at the appropriate time and retrospective gazettal is required".

However, there is no mention in the explanatory statement of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant period of retrospectivity.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance to these appointments. It provides as follows:

> "7. A subordinate law shall not be expressed to take effect from a date before the date of its notification in the *Gazette* where, if the law so took effect –
>
> (a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or
>
> (b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;
>
> and where any subordinate law contains a provision in contravention of this subsection, that provision is void and of no effect."

In the case of this instrument, the Committee considers that the Assembly should be advised that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

Determination No. 33 of 2001 made under subsection 5A (1) of the *Surveyors Act 1967* appoints a specified person to be the Chief Surveyor for a period not exceeding six months from 26 February 2001.

Instrument not disallowable?

The Committee notes that the explanatory statement states that this determination is a disallowable instrument for the purpose of section 10 of the *Subordinate Laws Act 1989*. Under paragraph 6 (b) of the *Statutory Appointments Act 1994* an appointment of less than six months is not a disallowable instrument. The Committee queries whether this is a disallowable instrument.

Notice made under subsection 15E (1) of the *Nature Conservation Act 1980* appoints specified persons to be the members of the Flora and Fauna Committee until 15 February 2004.

Notice made under subsection 15F(1) of the *Nature Conservation Act 1980* appoints specified persons to be Chairperson and Deputy Chairperson of the Flora and Fauna Committee until 15 February 2004.

Incorrect manner of gazettal

The Committee draws attention to the manner of gazettal of the above instruments of appointment. They appear to be disallowable instruments under section 4 of the *Statutory Appointments Act 1994* but they were gazetted as notices in Gazette No. 11, dated 15 March 2001 and not as disallowable instruments.

Separation of appointments into notices and instruments

The Committee also notes that the explanatory statement states that subsection 15E (1) of the Act:

> "provides that the Minister shall appoint seven members, two of whom shall not be public servants".

As the appointment of a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994* it would be preferable for appointments to be separated into notices for public servants and disallowable instruments for non public servants.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

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

- Public Health Act – Determination No. 346 of 2000 (Report No. 1 of 2001) (Minister for Health, Housing and community Services, dated 28 February 2001).
- Canberra Institute of Technology Act – Determinations Nos 352-357 of 2000 (Report No. 2 of 2001) (Minister for Education, dated 28 March 2001).
- Board of Senior Secondary Studies Act – Determinations Nos 383-395 of 2000 (Report No. 2 of 2001) (Minister for Education, dated 28 March 2001).

- Gungahlin Development Authority Act – Determination No. 360 (Report No. 2 of 2001) (Treasurer, dated 6 April 2001).
- Road Transport (General) Act and the Road Transport (Third-Party Insurance) Regulations 2000 – Determination No. 378 of 2000 (Report No. 2 of 2001) (Minister for Urban Services, dated 2 April 2001).
- Road Transport (General) Act – Determination No. 1 of 2001 (Report No. 2 of 2001) (Minister for Urban Services, dated 2 April 2001).
- Children and Young People Act – Determinations Nos 11-16 of 2001 (Report No. 3 of 2001) (Minister for Health, Housing and Community Services, dated 16 April 2001).

Copies of the responses are attached.

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

Paul Osborne, MLA
Chair

April 2001