

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

REPORT NO. 18 OF 1995

14 December 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

Bill - Comment

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

Fire Brigade (Amendment) Bill 1995

This Bill provides for applications to be made to a magistrate for the issue of an authorisation to the Chief Officer of the Brigade to issue improvement notices, occupancy notices or closure notices and for the Chief Officer to have powers relating to such notices.

Authority to Lay an Information

Among other provisions in clause 6 there is a repeal and substitution of section 12A. Subsection (1) of the new section provides for the laying of an information before a magistrate seeking the authorisation of the Chief Officer to issue an improvement notice, an occupancy notice or a closure notice.

There appears to be no restriction on who may lay such an information. This is a change from the previous position where the old section 12A provided that only the Chief Officer could apply for a closure order.

Despite the fact that any person can apply to the Magistrates Court, it is the Chief Officer who is authorised to issue such notices and who is largely responsible for their carriage.

Overlapping of Court's and Chief Officer's Functions

This leads to a comment on the overlapping of the functions of the Magistrates Court and those of the Chief Officer.

It is the function of a magistrate to authorise the issue of all three types of notice under section 12A; and section 12AH provides that the "Magistrate's Court, on application of the Chief Officer or the occupier or owner of premises, may vary or revoke a notice under subsection 12A (1)".

It is the Chief Officer who actually issues the notices (subsection 12A (1)) and serves copies on the occupier and owner of the premises (subsections 12A (3) and (4)). The Chief Officer has power to extend the period set by a magistrate in an improvement notice (subsection 12AA (2)). Also the Chief Officer has power actually to revoke an occupancy notice or closure notice that has been issued under an authorisation given by a magistrate and must revoke an improvement notice in certain circumstances (section 12AG).

These actions can apparently happen without any involvement of, or knowledge being given to, the court.

Owner may not know of the issue of a Notice

Subsections 12A (3) and (4) require the Chief Officer to serve a copy of the notice on the occupier and also to serve a copy of the notice on the owner of the premises. However, subsection 12A (5) provides that the effectiveness of a notice is not affected by a failure to comply with the provision requiring service on the owner.

This means that an owner, who may be affected in relation to leasing, mortgaging or other kinds of financial or other rights or obligations relating to the premises, may have no formal knowledge that there is anything happening in relation to the building.

Even rights that are conferred under the present amendments will be denied to the owner, if the owner is not served and has no knowledge of what is happening. For example, the owner will be denied the right to apply to the Magistrates Court under section 12AH for the variation or revocation of a notice or to apply to the Chief Officer under section 12AG for revocation of a notice.

This seems to be an erosion of the rights of owners of premises.

Is the Intention of Subsection 12AG (1) accurately Expressed

The new subsection 12AG (1), referred to above, provides as follows:

“12AG (1) The Chief Officer may, on his or her own motion or on written application by the occupier or owner of the relevant premises, revoke an occupancy notice or a closure notice if satisfied that -

- (a) it is reasonable for him or her to do so; and
- (b) the variation or revocation, as the case requires, does not increase a risk referred to in subsection 12A (1).”

If it was intended to confer a power of variation on the Chief Officer the provision does not appear to do so. If, on the other hand, it was intended to confer only a power to revoke, paragraph 12AG (1) (b) needs to be amended.

Usual Protective Provisions for Entry on Premises not Inserted

The presentation speech states that the emergency powers in the food legislation relating to unhygienic food preparation and the powers in the building legislation relating to *Legionella* bacteria are analogous to the powers conferred by the present Bill.

However, the present provisions do not appear to confer the protection relating to the powers of entry provided in either Part VII of the *Food Act 1992*, which deals with Inspection and Analysis, or sections 9B and 9C of the *Building Act 1972*, which deal with inspections for *Legionella* bacteria. Both sets of provisions have the usual provisions about production of identity cards, not remaining on premises if proper identification is not produced and about consent to entry. The one exception, which is in section 9C of the *Building Act 1972*, is mentioned below.

Section 15A of the *Fire Brigade Act 1957*, which was inserted by the *Fire Brigade (Amendment) Act 1994*, provides for the issue of identity cards by the Chief Officer and each member of the Brigade. In addition, section 12D, which was also inserted last year, contains the usual provision about not remaining on premises if proper identification is not produced. Thus there is no lack of precedent which could be used to insert the usual identification provisions in the present Bill.

Similarly, the *Food Act 1992* and many other Acts have simple precedents for the "consent" provisions.

In some emergency cases, these protective provisions are modified. This is so in the case of section 9C of the *Building Act 1972* dealing with the emergency of an actual outbreak of Legionnaires' disease mentioned above. In that section the consent provision is omitted, but the provisions about proper identification and not being permitted to remain on premises without such proper identification are retained.

These provisions about identification were not included in the emergency provisions of section 12D of the *Fire Brigade Act 1957*, which deals with the "emergency elimination of fire hazard" (to quote the section heading). However, there is no suggestion in the present Bill that the present notices are to be used exclusively in the cases of such dire emergency.

Modifications of Appeal Provisions

Section 12B of the *Fire Brigade Act 1957* provides for appeals to the Supreme Court against a decision of the Magistrates Court. Clause 7 of the present Bill amends this section and the Committee makes two comments on it.

First, the section is amended in several places to refer to "authorisations". However, the Committee notes that the first line of subsection 12A (1) still refers to "an order or direction" given under the Act. Would it now be appropriate also to refer to a notice or authorisation at this point?

Secondly, the present Bill omits the provision that provided that the hearing on appeal to the Supreme Court should be by way of a re-hearing. No reason is given for this change to appeal rights in either the explanatory memorandum or the presentation speech.

Could Existing Legal Rights be Affected

The presentation speech candidly states as follows:

"The catalyst for the present Bill was a fire engineering report ... in relation to premises the subject to an appeal currently before the Administrative Appeals Tribunal against an occupancy loading determined by the Registrar of Liquor Licences. The report ... concluded that the occupancy loadings that had been determined by the Registrar were greatly excessive from a fire engineering/safety point of view. ... [I]f a fire were to break out in the premises when it is at the determined capacity, there is an unacceptable risk of people being burnt to death or being seriously injured.

[There is no] ... legal power to require the risk to public safety to be reduced pending finalisation of the appeal proceedings which have been adjourned to mid-February."

The following comments are made without full knowledge of the facts or legal details of the case mentioned in the presentation speech. Of course, such full knowledge could affect the views expressed here.

None of the provisions relating to the appeal processes in progress in the case are being directly amended by this Bill. They are probably taking place under the provisions of the *Liquor Act 1975*.

However, if the present amendments become law in their current form before the case is concluded, it seems that it would then be possible for any person to lay an information before a magistrate in relation to the possible issue by the Chief Officer of any one or more of the three kinds of notice provided for by the amendments.

If the magistrate granted an authorisation to the Chief Officer, and if the Chief Officer acted on the authorisation, then it seems that rights that are presently subject to the AAT process could possibly be affected.



Paul Osborne, MLA
Chair

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