

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

**REPORT NO. 20 of 1991**

**27 November 1991**



**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION**

**MEMBERS OF THE COMMITTEE**

**Mrs E Grassby, MLA (Presiding Member)**  
**Mr B. Collaery, MLA**  
**Mr B Stefaniak, MLA**

**Secretary: Mr T Duncan**  
**Legal Advisor: Emeritus Professor D Whalan**

**TERMS OF REFERENCE**

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature (including a regulation, rule or by-law) made under an Act consider whether the instrument –
  - (a) is in accord with the general objects of the Act under which it is made;
  - (b) unduly trespasses on rights previously established by law;
  - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; and
  - (d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (3) the Committee shall with respect to the clauses of bills introduced into the Legislative Assembly consider whether such bills –
  - (a) unduly trespass on personal rights and liberties;
  - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (d) inappropriately delegate legislative powers; or
  - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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.

## **ROLE OF THE COMMITTEE**

The Committee examines all Bills and delegated legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The Terms of Reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and delegated legislation that comply with the high ideals set out in the Terms of Reference.

## SUBORDINATE LEGISLATION

### (a) No comment offered

The Committee has examined the following subordinate legislation and offered no comment.

ACT Determination No. 98 of 1991 made under section 4 of the Public Place Names Act 1989 determines the names of two streets in the division of Greenway.

ACT Determination No. 99 of 1991 made under section 4 of the Public Place Names Act 1989 determines the name of a street in the division of Page.

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Lyons Section 5 Block 27 (Part).

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Calwell Section 71 Block 2.

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Melba Section 60 Block 1 and Block 3.

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Lyneham Section 59 Block 12 and Block 22 (Part).

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with O'Malley Section 32 Blocks 2, 3, 4, 5, 6, 16 and part Taronga Place.

Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Weston Section 74 Block 2 (Part).

**Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Ainslie Section 35 Blocks 1 to 7.**

(b) Subordinate Legislation upon which comment is offered

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

**The Building Code of Australia 1990 and Amendments prepared by the Australian Uniform Building Regulations Co-ordinating Council.**

Adoption of the Building Code

Amendments were made to the Building Act 1972 by the Building (Amendment) Act (No. 2) 1991 under which the existing Division 4 of Part II was repealed and substituted. The new section 24 provides as follows:

"24. (1) The Minister shall cause a code, to be called the Building Code, to be prepared and published for the purposes of this Act.

(2) For the purposes of subsection (1), the Minister may -

(a) by instrument, adopt all or part of the provisions of the Building Code of Australia prepared and published by the Australian Uniform Building Regulation [sic] Co-ordinating Council, as in force at a particular time, with such modifications (if any) as are specified in the instrument; and

(b) cause to be prepared and published an Australian Capital Territory Appendix to the Building Code of Australia.

(3) The Building Code prepared in accordance with this section, and each instrument under paragraph (2)(a), is a disallowable instrument for the purposes of section 10 of the Subordinate Law Acts 1989.

(4) The Building Code, or any amendment, takes effect on the day on which notice of it is published in the Gazette pursuant to section 25." (Emphasis added.)

The Committee has no substantive comments to make about the contents of the Building Code of Australia 1990 and Amendments, but raises two matters.

First, it is uncertain how much of the Code is adopted by the instrument of Adoption. Is it intended to cover only Parts A to H and the Index and Abbreviations and Symbols, or those segments plus the A. C. T. Appendix, or the whole Code, including all Appendices?

It would appear that Amendment No. 2, dated 30 September 1991 which is included in the Building Code as presented by the Minister may not be covered by the Minister's instrument of adoption which covered the Code "as amended and in force from 26 August 1991.

In passing, it is also noted that there may be a tiny error in section 24(2)(a). It refers to the Building Code of Australia prepared and published by the "Australian Uniform Building Regulation [sic] Co-ordinating Council , whereas the volume states the name of the organization as the Australian Uniform Building Regulations Co-ordinating Council.

## **BILLS**

### **(a) No comment offered**

The Committee has examined the following Bills and offers no comment.

#### **Air Pollution (Amendment) Bill 1991**

This Bill enables the Authority or an inspector to issue pollution abatement notices in relation to the emission of polluting substances.

#### **Crimes Legislation (Status and Citation) Bill 1991**

This Bill provides that the Crimes Act 1900, which the ACT inherited from New South Wales, is to be treated and cited as if it had been an Act passed by the Legislative Assembly.

#### **Districts (Amendment) Bill 1991**

This Bill inserts a definition of Chief Surveyor and replaces a reference to the Commonwealth Surveyor-General with a reference to the Chief Surveyor.

### **Real Property (Amendment) Bill 1991**

This Bill inserts a definition of Chief Surveyor and replaces a reference to the Surveyor-General for Australia with a reference to the Chief Surveyor.

### **Superannuation (Legislative Assembly Members) Bill 1991**

This Bill establishes a superannuation scheme for Members of the Legislative Assembly.

### **Surveyors (Amendment) Bill 1991**

This Bill provides for the appointment of a Chief Surveyor for the A. C. T. and replaces references to Commonwealth officers with references to the Chief Surveyor.

#### **(b) Bills upon which comment is offered**

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

### **Credit (Amendment) Bill 1991**

This Bill, which adds to the uniform consumer credit legislation that operates in the A. C. T., New South Wales, Victoria and Western Australia, makes a number of amendments relating to the operation of the civil penalty provisions of the legislation, widens the scope of insurance to include insurance against unemployment and amends the provision relating to the setting of account charges to permit alteration by regulation.

#### **(i) Retrospectivity**

Several of the major provisions of the Bill (clauses 4, 5, 7, 8, and 9) are deemed to have come into operation as from the date when the Credit Act 1985 came into operation, 28 February 1985. Some of the retrospective provisions will advantage credit providers and some could benefit consumers.

### **Powers of Attorney (Amendment) Bill 1991**

This Bill amends the principal Act to provide for a simple form of general power of attorney, to provide that general powers of attorney or enduring powers of attorney are to be deemed to take effect as deeds, to provide for a medical certificate as to



incapacity, to update the form of the enduring power of attorney and to make minor technical amendments.

(ii) Retrospectivity

The provision in the new section 3AA as to general powers of attorney is deemed to have come into force on 24 December 1956, which is a record for retrospectivity that I have seen in our legislation. Section 11 also ensures that existing powers of attorney are to have effect as if the provisions of the present Bill had been in operation when the power of attorney came into effect. Each of these provisions seems to be appropriate in the circumstances.

**Lakes (Amendment) Bill 1991**

This Bill provides for the charging of a fee for the use of power boats, alters the provisions for the carrying of lights by power boats and for the carrying of specified lights by sailing vessels, widens the provisions for seeking review of decisions under the Act and removes the sexist language aspects of the Act.

(iii) Removal of Sexist Language

It is pleasing to see that the opportunity has been taken to remove sexist language from the principal Act, the Lakes Act 1976, when other amendments are being made to the Act.

**Air Pollution (Amendment) Bill (No. 2) 1991**

This Bill prohibits the sale of leaded petrol containing more than 0.40 grams of lead per litre unless an exemption is in operation.

(iv) Strict Liability Offences

There is a number of strict liability offences created by the Bill. Perhaps arguments can be made that most of these provisions are justified. However, that created by the new paragraph 42E(1)(b) inserted by clause 5 might be worthy of reconsideration on two grounds.

At present it provides as follows:

"42E(1) A person shall not - ...

(b) except when a notice under subsection 42BA(1) is in effect, fuel with petrol that contains more than 0.40 grams of lead per litre any other motor vehicle that is designed to operate on petrol.

Penalty:

(a) if the offender is a natural person - \$500;

(b) if the offender is a body corporate - \$2,500."

First, it is noted that the paragraph refers only to the exemption provided for in subsection 42BA(1) granted by the Minister. Perhaps it should also refer to exemptions granted by the Authority under section 42BB. Otherwise it appears that a person could commit an offence for fueling a car with petrol with a lead content greater than 0.40 per litre, even although it may have been sold to him, her or a company perfectly legally under an exemption in operation under section 42BB.

Secondly, there is no reasonable excuse defence to a charge under the provision. This could possibly operate unjustly. The Committee offers the following illustration.

The usual process for an ordinary consumer to get petrol is for a supplier to fill up the local service station's petrol tanks and for the consumer to fill up at the pump. Suppose a supplier breaks the law and supplies petrol with a greater lead level than 0.40 grams per litre. The service station proprietor demands and gets a warranty (false as it happens) from the supplier under section 42BA(6). The ordinary consumer fills up at the pump and thus commits an offence under paragraph 42E(1)(b).

In contrast to the service station owner, who has a defence under section 42BA(8), the consumer seems to have no defence. The only way for consumers to ensure that they were not committing an offence would be to test the petrol every time at the pump. Not only would that test the patience of most service station owners, but it would test the scientific ability of most of us ordinary consumers.

(v) Non-removal of Sexist Language

The Committee has already noted with approval that trouble has been taken to remove the sexist language from the Lakes Act 1976 by the Lakes (Amendment) Bill 1991 considered above when other amendments are being made. It would be good if the opportunity could be taken in either the present Bill or the Air Pollution (Amendment) Bill 1991 also considered above to remove the many instances of sexist language in the Air Pollution Act 1984.

Although many instances of sexist language still remain in the Act, inconsistently, section 10, which deals with delegation of powers by the Authority, has already been corrected.

**Water Pollution (Amendment) Bill 1991**

This Bill enables the Authority or an inspector to issue pollution abatement notices in relation to the discharge of pollutants.

(vi) Non-removal of Sexist Language

As with the Air Pollution (Amendment) Bills, it would be good if the opportunity were taken here, too, to remove the many examples of sexist language from the Water Pollution Act 1984 as the present amendments are being made.

As contrasted with the Air Pollution Act 1984, in this Act not even the delegation of power section, section 8, has been updated.

**Motor Traffic (Alcohol and Drugs) (Amendment) Bill 1991**

This Bill varies the provisions for approval of breathalyser instruments, requires a person to supply a sufficient amount of breath to enable analysis, eases the privacy requirements in relation to breathalysing and varies the provisions relating to certificates as to evidence.

(vii) Non-removal of Sexist Language

Here, too, it is suggested that the sexist language could be removed from the Motor Traffic (Alcohol and Drugs) Act 1977 as the present amendments are being made.

In this Act there is a considerable mixture of sexist and non-sexist provisions. The sexist provisions still out-number the corrected provisions, but it would be good to have a consistent pattern of non-sexist language in the Act.

(viii) A General Comment on Sexist Language

In the present group of Bills we find that, in one case, care has been taken to remove sexist references. In the case of three other Bills this has not happened, even although the principal Acts that are being amended are, at present, internally inconsistent on this matter.

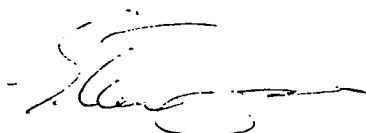
The Committee suggests that, whenever an amendment is being made to an existing Act, an endeavour is made to remove sexist language from that Act. Provided that the Act is in a data base, it would be a very simple matter to search and discover the offending provisions.

In the present instances, all three offending Acts, the Air Pollution Act 1984, the Motor Traffic (Alcohol and Drugs) Act 1977, and the Water Pollution Act 1984 have been reprinted very recently, so they presumably will be in a data base.

GOVERNMENT RESPONSE - HUMAN RIGHTS AND EQUAL OPPORTUNITY BILL 1991

The Committee commented on the abovementioned Bill in its Report No. 17 of 1991, dated 22 October 1991. The Committee has since received a response, dated 19 November 1991, which is attached.

The Committee thanks the Attorney-General for his response.



Ellnor Grassby, MLA  
Presiding Member  
November 1991



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*Elnor*  
Dear Mrs Grassby

In its Report No. 17 of 1991 the Committee commented on the Human Rights and Equal Opportunity Bill 1991.

The Committee noted that several clauses allow alterations to the principal legislation to be made by regulation.

Clause 34(2)(j), clause 41(2)(e) and clause 47(d)

Clause 34, clause 41 and clause 47 allow discrimination in employment on the ground of sex, race and impairment respectively where the position is one in relation to which it is a genuine occupational qualification to be of a particular sex or race or to have a particular impairment. Clause 34(2), clause 41(2) and clause 47 simply list some examples of the general proposition. Clause 34(2)(i) provides, for example, that it is a genuine occupational qualification to be of a particular sex where the duties of the position involve providing persons of the relevant sex with welfare services where those services can most effectively be provided by a person of that sex. This would allow a rape crisis centre to advertise for, and employ, only women.

Most of these examples have been added to legislation in other jurisdictions as a result of requests for clarification or following a restrictive interpretation by the courts. As clauses 34(2)(j), 41(2)(e) and 47(d) merely allow the addition of further examples of a particular rule and not a substantive change to the scope of the legislation it seems appropriate to make these additions by regulation rather than amending Act.

#### Clause 40(2)(d)

Clause 40 allows discrimination on the ground of sex in competitive sport where the strength, stamina or physique of competitors is relevant. Clause 40(2)(d) allows specific sporting activities to be prescribed by regulation as outside this exception, that is, as a sporting activity in which it is unlawful to discriminate. Any such exception would be promoting the objects of the principal legislation which is to eliminate discrimination as far as possible.

#### Clause 123

Clause 123 allows regulations to be made which create exceptions from the principal legislation. Exception by regulation will be appropriate where, for example, another piece of legislation requires discrimination or in other circumstances where discrimination is considered acceptable. Legislation dealing with adoption, for example, discriminates on the basis of marital status.

#### Clause 105

While exceptions made by regulation under clause 123 are of a more permanent nature, exemptions granted by the Commissioner under clause 105 are intended to be temporary and to be subject to periodic review. Thus the exemption is for an initial period of up to three years at the end of which time the Commissioner will review the exemption before deciding whether to extend it. In exercising this power the Commissioner is required to have regard to such things as the need to promote an acceptance of, and compliance with, the principal legislation. As the Committee notes, this power is subject to review by the Administrative Appeals Tribunal.

#### Clause 7(1)(k)

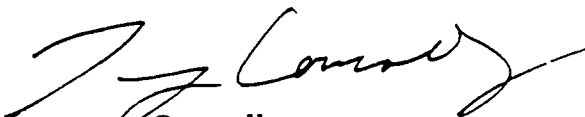
After considering the Committee's comment on this provision the Government has decided that adding other grounds of unlawful discrimination to the Bill is a matter which is of such a substantive nature that it should be dealt with by amending Act rather than by regulation. The Government will therefore move an amendment to the Bill during the detail stage to omit clause 7(1)(k).

## Reversal of the Onus of Proof

I note the Committee's comments on clause 83(2). The exceptions, excuses, qualifications or exemptions which this clause requires the respondent to show are in the nature of defences and the ability to establish them lies peculiarly with that party. It seems appropriate, therefore, that the respondent be required to establish them.

I hope that this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

19/11/91

