STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO 3 of 1990

21 March 1990

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MEMBERS OF THE COMMITTEE

Ms C Maher MLA (Presiding Member)
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-viewable 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) the majority of members constitutes a quorum of the committee;

(6) the committee be provided with the necessary additional staff, facilities and resources; and

(7) 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 Bills. 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 that comply with the high ideals set out in the Terms of Reference.

The Committee reported on the Clinical Waste Bill 1990 in Report No 1 which was tabled in the Assembly on 22 February 1990. The Committee has since received a response on 21 March 1990 from the Attorney-General which is attached. The Committee makes the following comments in relation to the Government's response.

1. <u>Declarations of clinical waste and prescribed activity by Minister</u>

The committee drew attention to the desirable feature that the instruments are to be tabled and will be disallowable and thus subject to the Assembly's continuing scrutiny and control.

The Committee thanks the Attorney-General for his response and agrees with it.

2. <u>Crown not liable to prosecution</u>

The Committee drew attention to the fact that the Crown was bound by the Act but not liable to be prosecuted for an offence. It also noted that this was a common provision and it was not a matter upon which the Committee took a strong position.

The Attorney-General responded that it was "arguable that the legislature may enact a law which renders the Crown liable to criminal prosecution, all criminal prosecutions are brought by the Crown and there could, without the statutory exemption, be the absurdity of the Crown prosecuting itself. Thus, a law which imposes criminal liability on the Crown as a corporate entity would for practical purposes be unenforceable through the existing criminal justice system."

The Attorney-General also said that it was arguable "that where the Crown is bound by a law, officials of a public body who consciously pursue a policy or course of action which is a breach of that law may be prosecuted for that breach. However, the Law Office is not aware of any direct authority for this view."

The Attorney-General commented "that while a statute may impose criminal liability on the Crown a prosecution would present such procedural difficulties that to do so would be purposeless."

The Committee is aware of instances where Crown instrumentalities have been prosecuted for an offence.

The Committee thanks the Attorney-General for his response and trusts that this exchange of views will assist the Assembly's consideration of the matter.

3. <u>Wide power to delegate</u>

The Committee pointed out in its report that the Controller

The Attorney-General responded that the 'Alliance Government will ensure that an appropriate level of delegation was made.'

The Committee is grateful to the Attorney-General for his positive response. The Attorney-General may wish to consider the comments of the Committee in its Report No 2 under the Motor Vehicles (Dimensions and Mass) Bill 1990

The Attorney-General indicated that the provision is drafted in the way that it is as a matter of central policy to the legislation and, of course, the Committee offers no comment on policy.

The Attorney-General also offers the positive opinion that "it is considered that proposed paragraph 38(b) will provide adequate protection against self-incrimination".

The Committee thanks the Attorney-General for his response and trusts that this exchange of views will assist the Assembly's consideration of the matter.

Secondly, the Committee pointed out the different procedures for the testing of samples in the Pesticides Act 1989 compared with those in the present Bill.

The Attorney-General in his response was favourably disposed to considering the substitution of the Pesticides Act's provisions in the current Bill.

The Committee is grateful to the Attorney-General for his positive response on this matter.

4. Clinical Waste Manual disallowable

The Committee drew attention to the desirable feature that the Clinical Waste Manual and any amendments thereof are to be tabled and will be disallowable and will be subject to the Assembly's continuing scrutiny and control.

The Committee thanks the Attorney-General for his response and agrees with it.

5. Return of Licence

The Committee drew attention to the fact that clause 26(1) provides for a penalty if a licensee does not return a licence within 7 days of notification of a variation, suspension or cancellation . In contrast clause 26(2) imposes no time limit or penalty on the Controller for failure to fulfil the obligation to endorse a variation on a licence and return it to the licensee.

The Committee makes two comments.

First, the Committee respectfully agrees with the Attorney-General's comment that : "Subclause 26(1) would invoke the criminal law while subclause 26(2) is an administrative law

The question raised by the Committee was whether both subclauses should be treated in the same way. That is should they both be criminal or both administrative in character. The Committee thanks the Attorney-General for his response and trusts that this exchange of views will assist the Assembly's consideration of the matter.

Secondly, the Committee thanks the Attorney-General for his response agreeing that the phrase "without reasonable excuse" could be inserted in clause 26(1) to ensure that a possible injustice can be avoided.

6. Review of decisions

The Committee is grateful for the Attorney-General's positive response that the "the Law Office is developing ... a standard notice" to advise a person of his or her rights to have a decision reviewed.

7. Enforcement provisions and entry to premises

The Committee was generally happy with the enforcement and entry provisions which were largely drawn in such a way as to protect the rights of individuals.

The Committee raised two points:

First, the Committee was concerned that it was not clear whether there was a protection against self incrimination.

The Attorney-General responded that the proposed paragraph 38(b) will provide adequate protection against self-incrimination.

Secondly, the Committee noted that the procedure outlined in clause 35 for the tabling of samples is different from that specified in the Pesticides Act 1989.

The Attorney-General responded saying he saw merit in the Committee's suggestion.

The Committee thanks the Minister for his positive response.

STANDING COMMITTEE ON SCRUTINY OF BILLS

AND SUBORDINATE LEGISLATION

REPORT NO.1 OF 1990

CLINICAL WASTE BILL 1990

COMMENTS OF THE ATTORNEY-GENERAL IN

RESPONSE TO THE REPORT

1. **Declarations of Clinical Waste and Prescribed Activity by Minister**

Professor Whalan commented that the Bill defines clinical waste and prescribed activities in some detail and then provides that the Minister may by instrument declare waste to be clinical waste or an activity to be a prescribed activity. The Professor also drew the Committee's attention to the fact that such instruments would be disallowable instruments and as such must be tabled and could be disallowed by the Assembly. This is a standard provision that provides Parliamentary control of the subject matter.

2. **Crown Liable to Prosecution**

The Bill contains the standard provision that binds the Crown but provides that the Crown is not liable to be prosecuted for an offence. The Professor claims that such a provision could weaken the thrust of the legislation as local public hospitals could in theory breach the proposed Act with impunity.

Although it is arguable that the legislature may enact a law which renders the Crown liable to criminal prosecution, all criminal prosecutions are brought by the Crown and there could, without the statutory exemption, be the absurdity of the Crown prosecuting itself. Thus, a law which imposes criminal liability on the Crown as a corporate entity would for practical purposes be unenforceable through the existing criminal justice system.

It is also arguable that where the Crown is bound by a law, officials of a public body who consciously pursue a policy or course of action which is a breach of that law may be prosecuted for that breach. However, the Law Office is not aware of any direct authority for this view.

It would seem therefore that while a statute may impose criminal liability on the Crown a prosecution would present such procedural difficulties that to do so would be purposeless.

3. **Wide Power to Delegate**

The Professor commented on the power of delegation in that the Controller may "delegate in writing to a public servant all or any of his or her powers under the Act". The Professor commented that it would seem inappropriate for the power to grant, refuse, vary, suspend or cancel a licence or the emergency suspension power to be delegated too far down the line. The question of the appropriate level to delegate is a policy issue that should be resolved having regard to the operational needs of the area concerned and not by some statutory regulation. The Alliance Government will ensure that an appropriate level of delegation was made.

4. Clinical Waste Manual Disallowable

The Professor commented that the Clinical Waste Manual and any amendments will be disallowable instruments and that the Committee may feel that the relevant provisions are quite acceptable. The Clinical Waste Manual will contain details relating to the storage, treatment, transportation and disposal of clinical waste. It is assumed that the Professor had no concern about this. It would be inappropriate to include such detail in either an Act or Regulation, and the adoption of a Manual as a disallowable instrument seems the most appropriate method of collating such information and allowing ease of amendment while providing parliamentary control.

5. Return of Licence

The Professor has commented on subclause 26(1) which requires a licensee to return a licence to the Controller within 7 days of the date of effect of a variation, suspension or cancellation and subclause 26(2) which requires the Controller to endorse the licence and return it to the licensee. The Professor's concerns are

(a) although subclause 26(1) requires the licensee to return the licence within 7 days with a penalty of $1000 applying, subclause 26(2) does not impose a time limit on the Controller;

(b) subclause 26(1) specifically creates an obligation on a licensee to return a licence within a set period but does not provide a "reasonable excuse" element.

The comparison between subclauses 26(1) and 26(2) appears inappropriate. Subclause 26(1) would invoke the criminal law while subclause 26(2) is an administrative law issue. In relation to the time element raised in subparagraph (b) above, I consider it is unnecessary to impose a time limitation. There would be an implicit obligation on the Controller to act reasonably and therefore to return the licence within a reasonable time and it is not necessary to impose a statutory limitation.

The offence created by subclause 26(1) is not one of strict liability and therefore in any proceeding it would be necesary to satisfy the mens rea element. However, it has become customary to include the formulation "without reasonable excuse" in similarly worded offences and clause 26(1) could be altered to include the words "without reasonable excuse".

The Professor also drew a comparison between the offences being created by subclause 26(1) and clause 38. The offence created by clause 38 is absolute and it is necessary to include the "without reasonable excuse" formula.

6. Review of Decisions

The Professor raised the issue of what happens if there is a statutory obligation to advise a person of his or her rights and the notice of review rights is deficient. The Professor commented that some Departments have devised a standard form of notification of review right to prevent similar situations arising. The Law Office is developing such a standard notice.

7. Enforcement Provisions and Entry to Premises

The Professor has commented at some length on the enforcement and entry provisions in the Bill. While the relevant provisions are generally acceptable to the Professor in the context of the Bill there are two issues that require clarification. Firstly, paragraph 34(i) will empower an inspector to require any person on the premises the inspector has entered to answer questions relating to the use of the premises in connection with the treatment, storage, transportation or disposal of clinical waste. The Professor is concerned that this power is wider than the equivalent provision in the Pesticides Act 1989 and that in his view there is not the "usual protection against self-incrimination". The Professor does acknowledge that paragraph 38(b) will provide that a person shall not, without reasonable excuse, contravene a requirement of an inspector under clause 34 but suggests it is a moot point whether this provision would protect the common law right not to incriminate oneself.

It is considered that proposed paragraph 38(b) will provide adequate protection against self-incrimination. Given the serious subject matter that the proposed legislation will deal with and the public concern as to the adequacy of safety measures, the ability of inspectors to obtain information about the use of premises in connection with clinical waste is an important feature of the legislation. The deletion of the duty that will be imposed by paragraph 34(i) would unnecessarily hinder inspectors especially as proposed paragraph 38(b) will protect the common law right.

Finally, the Professor has pointed out that the procedure outlined in clause 35 for the tabling of samples is different from that specified in the Pesticides Act 1989. Clause 35 requires an inspector who takes a sample of any material or substance that he or she believe on reasonable grounds to be clinical waste to give a receipt to the occupier of the premises from which the sample was taken. Subclause 35(2) provides that upon the request of the occupier the inspector shall supply a sealed container of part of the sample provided that the request is made within 14 days.

The Pesticides Act 1989 provides that where a sample is taken under the Act the sample shall be split into three parts and one part shall be given to the person concerned. The Professor considers that the procedure outlined in the Pesticides Act 1989 "probably protects both the integrity of the sample and the rights of all concerned" better than the provisions of clause 35.

There would appear to be merit in the suggestion of Professor Whalan.