

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON JUSTICE AND
COMMUNITY SAFETY**

**(INCORPORATING THE DUTIES OF A
SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 4 OF 2001

27 MARCH 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 2)

This is a Bill for an Act to appropriate additional money for the purpose of the Territory for the financial year that began on 1 July 2000.

Insurance Levy Legislation Repeal Bill 2001

This is a Bill for an Act to abolish the insurance levy from 1 July 2001. It would repeal the *Insurance Levy Act 1998* and the *Insurance Levy Regulations*.

Jurisdiction of Courts Legislation Amendment Bill 2001

This is a Bill to amend four laws of the Territory: the *Competition Policy Reform Act 1996*; the *Gas Pipelines Access Act 1998*; the *Jurisdiction of Courts (Cross-vesting) Act 1993*; and the *National Crime Authority (Territory Provisions) Act 1991*. Apart from those amendments designed to make these laws appear more modern, the amendments are consequential upon changes to the law of the Commonwealth designed to give constitutional validity to the system of cross-vesting of the jurisdiction of courts in relation to a number of national legislative schemes.

Land (Planning and Environment) Amendment Bill 2001

This is a Bill to amend the *Land (Planning and Environment) Act 1991* to the effect of removing certain provisions concerning “defined land” in the Act.

Bills - Comment

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

Cemeteries and Crematoria Bill 2001

This is a Bill for an Act to repeal the existing law concerning cemeteries and to provide a new scheme for their regulation. The Bill would create an Australian Capital Territory Cemeteries Board to manage public cemeteries in the Territory. The Minister appoints the board, and may give directions to it. The Minister may determine codes of practice for cemeteries and crematoria. The Bill would create a perpetual care trust for each cemetery and crematorium, and makes provision for the funds for each trust and the manner in which those funds must be used. The chief executive may give an improvement notice to the operator of a cemetery or crematorium. There are provisions creating certain offences, and for the review by the Administrative Appeals Tribunal of certain decisions.

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

The burden of proof

In relation to provisions that create offences, the Committee has in several reports pointed to a lack of clarity in the provision as to which party – the prosecutor or the defendant – bears the onus of proof in relation to some issue of fact (or of mixed fact and law) that may or must arise on the prosecution.

A rights issue arises where a burden of proof of either kind is placed on a defendant. The right that is qualified or disregarded (depending on just how the provision is framed) is the presumption of innocence – that a person charged with a criminal offence shall be presumed innocent until proved guilty; (see *R v DPP; ex parte Kebeline* [1999] UKHL 43). There is a view that, in general, the placing of the legal burden of proof in relation to some issue on the defendant violates this right, but that placing only an evidential burden on the defendant does not; (*R v DPP; ex parte Kebeline*, per Lord Hope). But this distinction is too simple, for, as Lord Hope himself pointed out, where the evidential burden is placed “can have a vital bearing on the outcome of the trial, depending on how easy or difficult it is for the accused to rebut the presumption [of fact to which the evidence adduced by the accused must be directed]”. The more difficult it is for the defendant to discharge the evidential burden the more the presumption of innocence is qualified.

The general issues involved here were canvassed in Report No 8 of 1999; noting the government response in Report No 11 of 1999. Other reports of relevance are Nos 2, 5, 6, 8 (relating to another government response), 12 and 13 of 2000.

In this report, the Committee seeks to advance the debate a little further. First, however, it points to 2 provisions of the Bill that raise the issues.

Clause 15 provides that “The operator of a cemetery or crematorium must not, without reasonable excuse, fail to end a contravention ...”. Does the defendant carry a legal burden of proof in relation to whether he or she had a “reasonable excuse”? If so, the general rule is that the defendant must prove on the balance of probabilities that he or she had a “reasonable excuse”. Or, does the defendant carry only an evidential burden of proof in relation to whether he or she had a “reasonable excuse”? In this second case, if the defendant adduced evidence on the basis of which the court could, acting reasonably, conclude that he or she had a “reasonable excuse”, the prosecution would then need to establish beyond reasonable doubt that the defendant did *not* have a “reasonable excuse”. (There is a third, but very unlikely reading to the effect that the prosecution carries both an evidential and legal burden of disproof.)

Subclause 17(2) provides that a person must not cremate human remains at a crematorium unless he or she has a permit to that effect. Subclause 17(3) then provides: “Subclause (2) does not apply ... if the chief health officer has given a public health direction ...”. How would the evidential and legal burdens of proof in relation to proof of whether the chief health officer had given a public health direction be distributed between the parties?

The Committee does not propose to consider how these particular questions might be answered. (The Committee acknowledges that in its responses, the government has taken a different view to that of the Committee concerning how these questions might be answered where the offence is tried summarily; see Report No 6 of 2000 concerning the First Home Owner Grant Bill 2000, and the government response discussed in Report No 8 of 2000.)

In its first response to the concerns of the Committee in this area, the government indicated that it would review the issue in the light of the development of a model criminal code; (see Report No 11 of 1999, letter of the Attorney-General of 30 August 1999).

The Committee notes there are provisions in the *Criminal Code 1995* of the Commonwealth that bear on this matter; (references below to the ‘Code’ are to this statute).

In terms of theory, the courts reason that the prosecution bears a legal burden of proof – to the standard of beyond reasonable doubt - in relation to the elements of an offence; (see subsection 13.1.)

On the other hand, the defendant bears at least an evidential burden of proof in relation to a defence to the offence. This is the case in relation to the ‘common law’ defences (self-defence and the like), except for the defence of insanity, where the defendant also bears the legal burden of proof that he or she is insane. These common law defences have been codified in the Code, and in relation to the burden of proof, the common law has been followed.

In relation to statutory offences – which are the kinds of offences of concern to the Committee --the Code again re-states the common law position, with one major change.

Subsection 13.3(3) of the Code provides: “A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.”

The Code does not attempt to explain any further how one might determine whether a particular issue of fact that might arise for resolution in the application of an offence provision is an “exception, exemption, excuse, qualification or justification”. In a particular case, (such as in relation to the 2 examples cited above in this Cemeteries and Crematoria Bill 2001), a court would have to apply the very vague tests stated in a series of High Court cases; (see Report No 11 of 1999).

The major change made by the Code is that it does however state general principles that do give a clear answer to some of the questions that arise. Subsection 13.3(1) states that “a burden of proof that a law imposes on a defendant is an evidential burden only”. (It may be that this provision substantially, if not wholly, overlaps with section subsection 13.3(3).) Thus, if an analysis of a statutory offence provision, a burden of proof is placed on a defendant, that will be an evidential burden.

Subsection 13.3(1) (and presumably subsection 13.3(3)) is qualified by section 13.4. This latter provision states the circumstances in which it may be taken that the law imposes a legal burden on a defendant. This is the result if the law expressly

- “(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove a matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.”

Adoption of the Code provisions in the Territory (with perhaps some clarification) would address only some of the issues the Committee has raised. *What they do not do* is give any guidance as to how the reader of a statutory offence provision is to distinguish between what is an element of an offence (where the prosecution will bear both an evidential and legal burden), and what is a matter of “exception, exemption, excuse, qualification or justification” (where the defendant will bear only an evidential burden to show that the exception, etc applies).

The Committee considers that drafting techniques could make this question easier to answer. For one example, in relation to the commonly found “reasonable excuse” provision, it would be much clearer if this matter were stated in a separate subsection of the offence. Thus, clause 15 of this Bill (see above) might be drafted in the form:

- (1) “The operator of a cemetery or crematorium must not fail to end a contravention ...”.
- (2) Subsection (1) does not apply if the person has a reasonable excuse.”

(This style is now commonly found in statutes of the Commonwealth.)

An express statement as to which party bears the burden of proof could achieve greater clarity. For example, subclause 17(2) of this Bill (see above) might contain a statement to the effect that the prosecution (or the defendant, as the case may be) must prove that the chief health officer has given a public health warning. (Although here, if section 13.4 of the Code were adopted in the Territory, care would have to be taken to see that a *legal* (as against only an evidential) burden was not unintentionally placed on the defendant.)

The Committee does not consider that it has provided a complete statement as to how the uncertainties surrounding burdens of proof in relation to statutory offences might be solved. (And what will always be in issue is the question – which is a rights question – as to whether a burden of proof should be placed on a defendant.)

In making these comments, the Committee responds to suggestions made in government responses that it provides some practical commentary on how to approach the matter.

The mental element of the offences created

Another area of uncertainty to be found in statutory offences concerns the issue of the mental element (if any) that must accompany the performance of the physical acts that are elements of the offence.

In this Bill, there could be much argument as to whether certain offences are ones of strict liability; see subclauses 8(1), 9(3), 12(1) and (2), and 13(1) and (2).

Again, the tests and approaches applied by the courts are such that it is hard to predict what a court would find.

In this respect, the Committee commends for consideration the relevant provisions of the *Criminal Code 1995* of the Commonwealth. As the government may be aware, statutes of the Commonwealth are now drafted in the light of the framework provided by these provisions.

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

Some discretionary powers are stated without any indication of the matters relevant or irrelevant to their exercise. See

- paragraph 6(3)(b) – the power of the Minister to approve a purpose of a perpetual care trust (although noting that such an approval is a disallowable instrument);
- subclause 19(1) - the power of the Minister, a magistrate, or a special magistrate to prohibit the cremation of stated human remains; and
- clause 21 – the power of the Minister to permit the burial of human remains at a place other than a cemetery.

The Committee asks whether it would be possible to (a) state the scope of these discretions in more limited terms; and/or (b) to provide that a person – such as the Minister – might issue guidelines to govern the exercise of these discretions.

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

By subclause 5(3), a code of practice “may apply, adopt or incorporate an instrument, or a provision of an instrument, as in force from time to time”. The Explanatory Memorandum notes that thereby the Minister might determine “that another document such as an Australian Standard be a code of practice ...” be adopted.

The effect of this provision is that some other person – being the maker of the other instrument – may from time to time determine the content of the law of the Territory. The Committee considers that such a provision should be justified.

Para 2(c)(iii) – non-reviewable decisions affecting rights

Clause 38 provides that an exercise of some significant administrative powers is subject to review by the Administrative Appeals Tribunal. On the other hand, there is no provision for review of an exercise of the power of the Minister under clause 21 to permit the burial of human remains at a place other than a cemetery.

Legislative Assembly (Legal Assistance) Bill 2001

This is a Bill for an Act to authorise the provision of legal assistance to Members of the Legislative Assembly, and to Ministers, in relation to legal proceedings connected with their official duties.

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

Natural justice for applicants

An application for legal assistance is made to the Attorney-General (or to another Minister in certain circumstances – subclauses 8(3) and (4)). By subclause 11(3), the deciding Minister must not authorise the provision of assistance if satisfied, on reasonable grounds, that the applicant became a party to legal proceedings, or liable to pay damages and the like, (partly) because of an act or omission of the applicant that was “unreasonable, or that was not done or omitted to be done honestly”.

It is noted that there is no obligation imposed on the deciding Minister to seek the views of the applicant prior to making the judgement that the applicant has acted unreasonably or dishonestly. A provision imposing such an obligation is commonly found in statutes that empower or require an administrative decision-maker to make these kinds of judgement about a person.

The issue is given greater point by reason of the duties imposed by clause 12 on the deciding Minister to publish her or his reasons on the application. It is to be noted that:

- The obligation extends not only to the decision on the application, but also to “some aspect of the application”. In this latter respect, such a requirement is unusual, and could in a particular matter require a number of reasons statements to be prepared and published;
- The obligation to give “reasons” is quite extensive*, and will require that at least the major elements of the factual basis of the decision to be stated;
- The reasons statement must be given to the applicant; and
- must be “presented to the Legislative Assembly within 6 sitting days after the day it is signed”.

*The obligation to give reasons must be read with section 13C of the *Interpretation Act 1967*: “**Content of statements of reasons for decisions** - Where an Act requires a tribunal, body or person making a decision to give written reasons or the decision, whether the expression “reasons”, “grounds” or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.”]

There is no explicit provision as to when the reasons statement must be made and signed, but on general principle, this must be within a reasonable time after the making of the decision on the application, or on some aspect of the application.

Thus, on the face of it, applicants for legal assistance may not become aware that their application has been refused on the ground that they have acted unreasonably or dishonestly until so notified by the deciding Minister. At that point, the Minister would then be obliged to make the reasons for the decision public by presenting them to the Legislative Assembly.

The Committee considers that there is a case for the express statement of an obligation on the deciding Minister to seek the views of the applicant prior to making the judgement that the latter has acted unreasonably or dishonestly.

This is not a matter appropriate to be left to the regulations.

Clarity of the law

Subclause 7(1) states that “The regulations may approve guidelines with respect to the provision of legal assistance ...”. Subclause 7(2) then provides that “approved guidelines” may make provision about certain defined topics.

The wording of these provisions might cause some confusion.

In substance, these guidelines will be part of the relevant regulations. It is hard to follow why it is said that the regulations “may approve guidelines”. There appears to be no document which the regulations could “approve”, since the regulations do not authorise any person to make guidelines. Moreover, there is no provision to the effect that the regulations might incorporate some other document that might be called ‘guidelines’.

On the face of it, it would be simpler to provide that the regulations might make provision with respect to the provision of legal assistance and the more particular topics.

A further point is that subclause 19(2) might be read to the effect that a regulation could not make provision about the matters stated there unless at that particular time “no Minister is available to be consulted as required by the consultative provisions”. This reading may not have been intended.

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

Many aspects of this scheme are not spelt out in the Bill, but are to be left to the Executive to state in regulations – see clause 7. It is apparent that several matters of substance – such as “the circumstances in which, and the conditions subject to which, the provision of legal assistance may be provided” (paragraph 7(2)(a)) – may be provided for in the regulations.

The Committee raises for consideration whether it is appropriate for such matters of substance to be dealt with in this way.

Subordinate Legislation - No Comment

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

Determination No. 21 of 2001 made under subsection 39A (1) of the *Bookmakers Act 1985* varies Determination No. 48 of 1999 (notified in Gazette S15, dated 17 March 1999) adds the XFL football league to the American Football events already approved under the rules of sports betting.

Determination No. 22 of 2001 made under paragraph 8 (1) (a) of the *Canberra Tourism and Events Corporation Act 1997* appoints a specified person to be Chairperson of the Canberra Tourism and Events Corporation Board for a period of three years commencing 22 February 2001.

Determination No. 23 of 2001 made under paragraph 8 (1) (a) of the *Canberra Tourism and Events Corporation Act 1997* appoints a specified person to be a member of the Canberra Tourism and Events Corporation Board for a period of three years commencing 22 February 2001.

Determination No. 24 of 2001 made under paragraph 8 (1) (a) of the *Canberra Tourism and Events Corporation Act 1997* appoints a specified person to be a member of the Canberra Tourism and Events Corporation Board for a period of three years commencing 22 February 2001.

Determination No. 25 of 2001 made under paragraph 8 (1) (a) of the *Canberra Tourism and Events Corporation Act 1997* appoints a specified person to be a member of the Canberra Tourism and Events Corporation Board for a period of three years commencing 22 February 2001.

Determination No. 26 of 2001 made under section 22 of the *Animal Welfare Act 1992* approves a Code of Practice entitled the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*.

Determination No. 27 of 2001 made under paragraph 87 (1) (a) of the *Occupational Health and Safety Act 1989* revokes Determination No. 17 of 1994 (notified in Gazette S55, dated 24 March 1994) and approves the revised “National Standard for Occupational Noise” and the “National Code of Practice for Noise Management and Protection of Hearing at Work”, 2nd Edition, July 2000, as a code of practice for the purposes of the Act.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSE

The Committee has received a response in relation to comments made concerning:

- Determination No. 346 of 2000 made under the *Public Health Act 1997* (Report No. 1 of 2001) (Minister for Health, Housing and Community Services – 28 February 2001)

A copy of the response is attached.

The Committee thanks the Minister for Health, Housing and Community Services for his helpful response.

Paul Osborne, MLA
Chair

March 2001