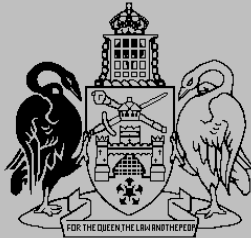


Legislative Assembly for the Australian Capital Territory



Standing Committee on Justice and Community Safety

**(incorporating the duties of a
Scrutiny of Bills and Subordinate
Legislation Committee)**

**The electronic version of this report does not contain attachments,
these can be obtained from the committee office**

SCRUTINY REPORT NO. 11 OF 2000

28 August 2000

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
Acting Secretary: Mr Mark McRae
(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 comments on them.

Duties Amendment Bill 2000 (No 3)

This Bill would amend the *Duties Act 1999* to the effect of reducing to \$20 the duty payable in respect of the establishment of a trust, the transfer of property from one superannuation fund to another, and the transfer to trustees or custodians of superannuation funds or trusts

Environment Protection Legislation Amendment Bill 2000

This Bill would amend the *Environment Protection Act 1997* and the Environment Protection Regulations to regulate the sale of firewood.

Supervised Injecting Place Trial Amendment Bill 2000

This Bill would amend the *Supervised Injecting Place Trial Act 1999* to insert a new subsection 5(1A) to the effect that the Minister may not make a declaration under section 5 before 1 January 2002 at the earliest.

Surveyors (Consequential Amendments) Bill 2000

This is a Bill for an Act to repeal the *Surveyors Act 1967* and the Surveyors (Examination and Registration) Regulations, and to amend various other laws.

Taxation Administration Amendment Bill 2000

This Bill would amend the *Taxation Administration Act 1999* in respect of the provisions concerning interest and penalty tax on defaults in the payment of tax.

Bills - Comment

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

Crimes (Forensic Procedures) Bill 2000

This is a Bill for an Act to create a scheme for the taking and the use of forensic material – and, in particular, of DNA material – for criminal investigation. The major purpose of the Bill is to facilitate the use of DNA profiles as an investigative tool. It provides for the creation of a DNA data base system, and other provisions enable this base to be linked to

other such bases established in Australia to form a national data base. As an investigative tool, this data base may be used to compare DNA profiles from crime scenes with DNA profiles from known offenders and from those who are suspected of committing the crime under investigation.

In respect of the latter, the Bill would enable the police to obtain from a person a wide range of forensic samples, such as blood, hair and other genetic matter. A key variable here is whether the procedure to obtain the sample is an “intimate forensic procedure” as distinct from a “non-intimate forensic procedure”. Another key variable is the status of the person from whom the sample is to be obtained. The Bill will operate differently depending on whether the person is a suspect, a serious offender, a volunteer, or a child or “incapable person”. The operation of the provisions will also turn on matters such as whether the person does or does not consent to the taking of the sample and the nature of the sample to be taken. The power to require a sample to be taken is vested in either a police officer or a magistrate. The latter are empowered to act in those cases where the demands placed on the person are more serious in terms of an interference with their privacy. The taking of a sample is in most cases to be done by a doctor, a nurse, or a dentist.

The provisions of the Bill deal with other matters. In particular, there are provisions for: (i) the information that must be given to the subject person; (ii) the matters which the person making the requirement must consider; (iii) the way in which the taking of a sample must be carried out; (iv) the information which must be given to the subject person; (v) the admissibility of evidence of the sample; and (vi) the destruction of the forensic material obtained under the Bill.

The Bill is based closely on a Model Forensic Procedures Bill drafted under the auspices of the Standing Committee of Attorneys General. The Explanatory Memorandum notes those points where this Bill departs from that Model Bill. The Committee commends the clarity of the Presentation Speech and the Explanatory Memorandum.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

This Bill may be assessed from a number of rights perspectives. A valuable commentary is P C Giannelli, “Forensic Science: Seizing Evidence from Suspects for Forensic Analysis” (1995) 31 *Criminal Law Quarterly* 161. The author considered analogous laws of the USA in terms of the Bill of Rights in the Constitution of the USA.

The privilege against self-incrimination.

The Supreme Court of the USA has held that this privilege reaches only an accused person’s communications, and that it does not apply where the suspect is compelled to be a source of real or physical evidence. This approach would apply to the bulk of this Bill.

On the other hand, some courts do see a problem where on a trial the prosecution seeks to adduce evidence that a suspect refused to submit to the taking of a sample. These courts note that the value of this evidence is that it “it is reflective of the knowledge, understanding, and thought processes of the accused”. That is, that it is a basis for an argument that by the act of refusal, the accused has manifested a consciousness of her or his guilt of the crime charged. The refusal “rises to the level of a self-accusation”. In *RPS v The Queen* [2000] HCA 3, the High Court of Australia has interpreted section 20 the *Evidence Act* 1995 (which applies in the Territory) in such way as to maximise the protection afforded by law to an accused against a compulsory self-accusation. The High Court adverted to the presumption of innocence.

This rights perspective is relevant to an assessment of clause 89 of the Bill. This provides that evidence that a suspect refused to comply with a reasonable direction in connection with the carrying out of a forensic procedure inadmissible in evidence against the suspect in a court in relation to the offence in relation to which the forensic procedure was carried out. The court or the jury may draw such inferences from the evidence as appeared to it to be proper in the circumstances, having regard to any evidence given by or on behalf of the suspect.

The Committee draws this to the attention of the Legislative Assembly. On one view, the refusal of the suspect to comply with a reasonable direction has some value in an assessment of the guilt of the suspect on a trial. On another view, clause 89 is an inroad on the privilege against self-incrimination, or, more generally on the presumption of innocence.

Right to legal counsel

Again, the Supreme Court of the USA has held that this right attaches only to the initiation of adversary judicial proceedings, and does not apply in the investigatory phase. The Committee notes that the Bill does provide those who may be required to provide samples with extensive rights to legal advice.

Search and seizure & privacy interests

The USA Bill of Rights states a right to be free from unreasonable governmental searches and seizures. This applies where evidence is seized from a person, and is clearly relevant to the taking of forensic samples. Where the person is subjected to restraint for the purpose of the taking of the sample, a key issue here is whether the restraint was justified. The USA courts have recognised that this is justified where there was a ‘reasonable suspicion’ that the person committed the relevant crime. The Committee that the definition on “suspect” in clause 8 of the Bill incorporates this standard.

A guarantee against unreasonable searches and seizures applies also to the seizure of the forensic sample itself. The view has been taken that there is no constitutionally protected ‘search’ if what is taken is something that the person shows to the public, such as her or

his handwriting, or voice. But many kinds of evidence of a person's physical characteristics are seen as subject to protection – such as blood, or urine, or a fingernail scraping. For the main part, this Bill deals with such matter.

The issue then is whether the provisions of the Bill permitting the seizure of such matter are reasonable. On the one hand, the courts assess the extent of the invasion of the privacy and human dignity interests of the subject person. The greater the degree of intrusion into the realm of the physical integrity of the person, the greater the privacy interest. On the other hand, the courts assess the interests of the public and any person harmed by the crime in the investigation of the crime.

The Committee draws attention in particular to that aspect of the Bill that permits a forensic procedure to extend to the search of the mouth of a person. This is an exception to the general rule that a forensic procedure does not include “any intrusion into a person's body cavities” (see subclause 5(3)). The Explanatory Memorandum acknowledges that in comparison to the Model Code Bill, this Bill makes it easier to collect samples of DNA by buccal swab; (at page 2-3). The Committee draws attention to the justification offered in the Explanatory Memorandum.

Gaming Machine Amendment Bill 2000

This Bill would amend the *Gaming Machine Act* 1987 in various ways. The provisions of the Bill affect: (i) the level of community contributions that must be made by clubs in lieu of paying a tax in that regard; (ii) that clubs with a gaming machine licence and an annual gross revenue of more than \$500,000 must be incorporated under the Commonwealth Corporations Law; (iii) to enhance the control of clubs by its voting members; and (iii) to remove a harsh provision concerning the late payment of taxes.

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

Proposed new section 60G of the Act (see clause 14 of the Bill) would provide that the required community contribution to be made by a licensee is the proportion of the club's net revenue as stated in subsection 60G(1) “or such other proportion as may be determined by the Minister”.

The community contribution is akin to a tax. A tax is “a compulsory exaction of money by a public authority for public purposes, enforceable at law and is not a payment for services rendered” (*Mathews v Chicory Marketing Board of Victoria* (1938) 60 CLR 263 at 276 per Latham CJ). The community contribution is not payable to the State, and it is not an exaction for the purposes of expenditure out of a Treasury fund. The objects to which a contribution must be directed (see proposed new section 60B) indicate, however, that the object of the scheme is to direct private money towards public purposes. Moreover, an organisation that does not make the full amount of a community contribution it is required to make must pay a “community contribution shortfall tax”.

In these circumstances, the Legislative Assembly may wish to consider whether it is appropriate to vest in the Minister (by subsection 60G(1)) a power to vary by determination the amount of the community contribution that must be paid by those liable to make the payment. This might be viewed as vesting in the Minister a power to vary the rate of a tax. The Committee notes that a determination is a disallowable instrument.

The Committee refers to discussions of this general issue in its Report No 5 of 2000.

Paragraph 2 (c) (ii) - rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

The Committee commends the drafting and policy in proposed new section 60B (see clause 14). This provision enables the Minister to issue guidelines to govern the exercise by the Commissioner of the power in subsection 60B(1), such guidelines being disallowable instruments.

Gas Safety Bill 2000

This is a Bill for an Act to create a scheme to ensure the safety of gas burning appliances and consumer piping systems. It provides for: (i) the conduct of gasfitting work and appliance work; (ii) the responsibility of owners of premises on which there is a consumer piping system, and of the owners of appliances; (iii) for the approval of appliances, and the prohibition of the sale of unsafe appliances; (iv) for the reporting of serious gas accidents; (v) for the enforcement of the scheme of regulation in the Bill; and (vi) for the determination of fees.

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

The Committee notes that subclause 65(5) expressly authorises the Minister determine a fee, charge or other amount payable under the gas safety legislation in such a way that the impost would amount to a tax. The effect of this is that the amount of the impost need bear no relation to the services rendered in return for the payment of the impost.

The Committee refers to discussions of this general issue in its Report No 5 of 2000.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The Committee finds that the scheme for the enforcement of the scheme of regulation in the Bill meets the standards it has applied when reviewing such schemes in other laws.

Surveyors Bill 2000

This is a Bill for an Act to create a scheme to regulate the practice of land surveying. It provides for the position of Commissioner for Surveys, a statutory office to be appointed

by the Minister. The Commissioner determines applications by persons for registration as a surveyor, and exercise disciplinary powers, which may result in the cancellation of the registration, in respect of surveyors. The exclusive functions of registered surveyors are defined, and the Minister may give directions (which are disallowable instruments) about the practice of surveying. The powers of surveyors to enter land are stated, and there is provision for the payment of compensation to those affected by the exercise of these powers.

Paragraph 2 (c) (ii) - rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

The Committee notes that the power of the Commissioner to delegate “all or any of the commissioner’s powers” is not limited by the exclusion of that power of delegation. This may be an oversight, a change in drafting style, or perhaps a deliberate policy choice. If the last mentioned, the policy should be justified.

Subordinate Legislation - No Comment

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

Subordinate Law 2000 No 23 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Rules Act 1933* amends the Supreme Court Rules dealing with adoption (Order 76) by replacing references to “the Director” with references to “the chief executive” and updates language in the rules amended in accordance with drafting practice.

Subordinate Law 2000 No 24 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Rules Act 1933* amends the Supreme Court Rules by inserting a new Division 2 in Order 39 which provides the procedural mechanism for the making of an application for a direction under subsection 18 (2) of the *Evidence (Miscellaneous Provisions) Act 1991* including: the manner by which an application for a direction may be made; the content required in an affidavit in support of an application; relevant considerations by the court in deciding whether to grant an application; and directions that the Court may give when an application is granted.

Subordinate Law 2000 No 25 being the Road Transport (Third-Party Insurance) Regulations Amendment made under the *Road Transport (General) Act 1999* amends the principle Regulations by revising the maximum CTP premiums that can be charged for the various premium classes.

Determination No. 137 of 2000 made under section 96 of the *Road Transport (General) Act 1999* determines a ten dollar fee payable in respect of subsection 27 (2) of the *Road Transport (Safety and Traffic Management) Act 1999* for one copy of an image taken by a traffic offence detection device. The fee is the same as previously determined under the *Motor Traffic Act 1936*.

Determination No. 140 of 2000 made under section 145 of the *Interactive Gambling Act 1998* determines fees payable for interactive gambling licences.

Determination No. 145 of 2000 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 167 of 1998 and determines new fees, in accordance with the Schedule, to allow builders to use unleased Territory land for storage and other purposes under a short term licence arrangement during the construction of a development.

Determination No. 146 of 2000 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 231 of 1997 and determines new fees, in accordance with the Schedule, for permits in relation to placement of objects for outdoor cafes.

Determination No. 147 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* specifies that part 10 of the Act, which relates to compulsory third party insurance, does not apply for the period from the first moment of Thursday 8 June 2000 to the last moment of Monday 12 June 2000 to: (f) the owner of any competing vehicle; (g) any competing vehicle; (h) any driver while driving or in control of a competing vehicle; (i) the owner of any support vehicle while the vehicle is being used in a designated activity; and (j) the driver of any support vehicle while the vehicle is being used in a designated activity.

Determination No. 148 of 2000 made under section 20 of the *Remuneration Act 1995* determines the fees and allowances for members of the Remuneration Tribunal.

Determination No. 149 of 2000 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 74 of 2000 and determines the fee payable in respect of the provisions of the *Road Transport (Safety and Traffic Management) Act 1999* in relation to vehicle impounding and seizure and speed/reliability tests as specified in the Schedule.

Determination No. 150 of 2000 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints a specified person to be a Justice of the Peace.

Determination No. 151 of 2000 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 68 of 2000 and determines the fee payable, as specified in the Schedule, in respect of the provisions of the Road Transport (Vehicle Registration) Regulations 2000 made under the *Road Transport (Vehicle Registration) Act 1999* in relation to transactions relating to number plates.

Determination No. 152 of 2000 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 70 of 2000 and determines the fee payable, as specified in the Schedule, in respect of the provisions of the Road Transport (Safety and Traffic Management) Regulations 2000 made under the *Road Transport (Safety and Traffic Management) Act 1999* in relation to transactions relating to parking permits.

Determination No. 153 of 2000 made under subsection 22A (1) of the *Cemeteries Act 1933* revokes all cemetery fees and determines that the fees payable for the purposes of the Act shall be as set out in the schedule.

Determination No. 154 of 2000 made under section 80 of the *Energy and Water Act 1988* revokes Determination No. 97 of 1999 and determines fees payable for the purposes of the Act in accordance with the schedule.

Determination No. 155 of 2000 made under section 27C of the *Workers' Compensation Act 1951* revokes Determination No. 38 of 1992 and determines fees payable, in accordance with the Schedule, for applications to be an approved insurer or an exempt employer.

Determination No. 156 of 2000 made under section 6B of the *Scaffolding and Lifts Act 1957* revokes Determination No. 141 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 157 of 2000 made under section 4A of the *Machinery Act 1949* revokes Determination No. 133 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 158 of 2000 made under section 12A of the *Dangerous Goods Act 1984* revokes Determination No. 123 of 2000 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 159 of 2000 made under section 27B of the *Hawkers Act 1936* revokes Determination No. 121 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 160 of 2000 made under section 12A of the *Dangerous Goods Act 1984* revokes Determination No. 136 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 161 of 2000 made under section 3F of the *Building and Services Act 1924* revokes Determination No. 143 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 162 of 2000 made under section 116 of the *Unit Titles Act 1970* revokes Determination No. 139 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 163 of 2000 made under section 52A of the *Surveyors Act 1967* revokes Determination No. 140 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 164 of 2000 made under section 45A of the *Plumbers, Drainers and Gasfitters Board Act 1982* revokes Determination No. 142 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 165 of 2000 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determination No. 134 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 166 of 2000 made under section 104 of the *Electricity Act 1971* revokes Determination No. 135 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 167 of 2000 made under section 65 of the *Building Act 1972* revokes Determination No. 137 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 168 of 2000 made under section 39B of the *Architects Act 1959* revokes Determination No. 138 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 169 of 2000 made under section 42 of the *Stock Act 1991* revokes Determination No. 178 of 1997 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 170 of 2000 made under section 7 of the *Pounds Act 1928* revokes Determination No. 137 of 1998 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 171 of 2000 made under section 83A of the *Nature Conservation Act 1980* revokes Determination No. 128 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 172 of 2000 made under section 5A of the *Lakes Act 1976* revokes Determination No. 122 of 1999 and determines fees, in accordance with the Schedule, in relation to the granting of a permit to use a power boat in the Molonglo River.

Determination No. 173 of 2000 made under section 40A of the *Dog Control Act 1975* revokes Determination No. 130 of 1999 and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 174 of 2000 made under section 110 of the *Animal Welfare Act 1992* revokes Determination No. 131 of 1999 and determines fees, in accordance with the Schedule, for a licence to use or breed an animal for the purpose of research or teaching, a circus permit and commercial and private trapping permits.

Determination No. 175 of 2000 made under section 63 of the *Animal Diseases Act 1993* revokes Determination No. 139 of 1998 and determines fees, in accordance with the Schedule, for the provision of emergency tail tags in case the original tags are missing at the point of sale or slaughter which are used for disease tracing.

Determination No. 176 of 2000 made under section 78 of the *Water Resources Act 1998* revokes Determination No. 79 of 1999 and determines fees in accordance with the Schedule.

Determination No. 177 of 2000 made under section 40A of the *Dog Control Act 1975* determines fees, in accordance with the Schedule, for the provision of a certified copy of a certificate of registration.

Determination No. 179 of 2000 made under section 30 of the *Construction Practitioners Registration Act 1998* revokes Determination No. 263 of 1998 and determines fees, in accordance with the Schedule, for applications for registration and annual renewal of registration as a construction practitioner.

Determination No. 180 of 2000 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 73 of 2000 and determines the fees, as specified in the Schedule, for transactions relating to permit application fees under the *Road Transport (Dimensions and Mass) Act 1990*. Permit fees relating to vehicles with a loaded mass exceeding 125 tonnes are calculated by referred to the formula in Part 3 of the Schedule to the *Road Transport Charges (Australian Capital Territory) Act 1993* of the Commonwealth.

Determination No. 181 of 2000 made under section 4 of the *Motor Omnibus Services Act 1955* revokes Determination No. 258 of 1998 and determines that the charges for travel in a motor omnibus shall be as specified in the Schedule.

Determination No. 183 of 2000 made under subregulation 20 (2) of the Road Transport (Offences) Regulations is a declaration of declared holiday periods:

- (1) from the first moment of Friday 9 June 2000 to the last moment of Monday 12 June 2000 (inclusive);
- (2) from the first moment of Friday 29 September 2000 to the last moment of Monday 2 October 2000 (inclusive);
- (3) from the first moment of Friday 22 December 2000 to the last moment of Tuesday 26 December 2000 (inclusive).

Determination No. 187 of 2000 made under section 274A of the *Land (Planning and Environment) Act 1991* appoints a specified person as the Commissioner for Land and Planning for a period of three years from 22 June 2000.

Determination No. 188 of 2000 made under paragraph 75 (1) (b) of the *Tenancy Tribunal Act 1994* is a variation to the Commercial and Retail Leases Code of Practice to ensure that commercial agreements governed by the Code concerning the payment of GST are not frustrated by the Code.

Determination No. 189 of 2000 made under section 139 of the *Taxation Administration Act 1999* revokes Determination No. 44 and modifies, as from 1 July 2000, the existing Home Buyer Concession Scheme.

Determination No. 190 of 2000 made under section 139 of the *Taxation Administration Act 1999* revokes Determination No. 99 of 1996 dealing with payments under the *Payroll Tax Act 1987* sets, as from 1 July 2000, both the annual wages thresholds above which an employer is required to pay payroll tax and the monthly wages thresholds below which no employer is required to lodge returns; determines the pay payroll tax levels to 30 June 2001, 30 June 2002 and from 1 July 2002 and determines the payroll tax rates for the 2000-2001, 2001-2002 and 2002-2003 and future financial years.

Determination No. 191 of 2000 made under section 18 of the *Public Sector Management Act 1994* appoints a specified person as Commissioner for Public Administration for a period of three years from 22 June 2000.

Determination No. 237 of 2000 being the Superannuation Management Guidelines 2000 made under paragraph 11 (1) (c) of the *Territory Superannuation Provision Protection Act 2000* states the prescribes investments for the purposes of the Act.

Subordinate Legislation - Comment

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

Determination No. 133 of 2000 made under section 4 of the *Public Place Names Act 1989* revokes the name of a street published in Gazette No. P9 of 4 June 1982 and determines the name, origin and significance of a new street name in the Division of Narrabundah.

Determination No. 134 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of 11 streets in the Division of Amaroo.

Determination No. 135 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name, origin and significance of a park in the Division of Nicholls.

Determination No. 136 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of two streets in the Division of Gungahlin.

Determination No. 138 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name, origin and significance of a park in the Division of Narrabundah.

Determination No. 139 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of two streets in the Division of Gordon.

Discrepancies in schedules attached to the determinations

The Committee notes discrepancies in the initialling, by the Delegate of the Minister, of schedules attached to the above determinations. The Committee points out the omission of the Delegate's initials on a large proportion of these schedules.

Determination No. 141 of 2000 made under subsection 26C (2) of the *Domestic Violence Act 1986* appoints a specified person to be the Domestic Violence Project Coordinator for the period commencing on 20 May 2000 and ending on 19 May 2003.

Determination No. 142 of 2000 made under subsection 14 (2) of the *Victims of Crime Act 1994*, appoints a specified person to be the Victims of Crime Coordinator for the period commencing on 20 May 2000 and ending on 19 May 2003.

Are these instruments disallowable?

The Committee notes that the explanatory statements to these appointments give no indication as to whether or not the specified person is a public servant. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

Determination No. 144 of 2000 made under section 9A of the *Roads and Public Act 1937* revokes Determination No. 132 of 1999 and determines new fees, in accordance with the Schedule, for road carriageway and footpath, driveway and gutter opening permits.

Incorrect naming of Act in Instrument

The Committee notes that the instrument is made pursuant to section 9A of the *Roads and Public Act 1937* and has therefore been incorrectly notified in the Gazette. The instrument should have been made pursuant to section 9A of the *Roads and Public Places Act 1937*.

Determination No. 182 of 2000 made under section 8 of the *Canberra Tourism and Events Corporation Act 1997* appoints a specified person to be a member of the Canberra Tourism and Events Corporation (CTEC) Board from 1 June 2000 to 31 May 2003.

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 tourism and Events Corporation (CTEC) Board appeared in the Gazette on 8 June 2000 and was to take effect from 1 June 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. To this extent, the instrument purports to be retrospective.

There is, however, 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.

Is this instrument disallowable?

The Committee also notes that the explanatory statement to this appointment gives no indication as to whether or not the specified person is a public servant. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

Determination No. 178 of 2000 made under section 13 of the *Stock Act 1991* revokes a Determination and determines fees for the purposes of the Act in relation to stock units and stock levy.

Presentation not in accordance with paragraph 6 (1) (c) of the *Subordinate Laws Act*

The Committee notes that there was no need to revoke a Determination, notified in Gazette No. 3, dated 20 January 2000, which ceased to have effect on 2 March 2000 as it was not presented to the Assembly in accordance with paragraph 6 (1) (c) of the *Subordinate Laws Act 1989*.

Notices (4) made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and in accordance with the provisions of paragraph 8 (1) of the *Medical Practitioners Act 1930* appoint specified persons to be the chairperson and members (3) of the Medical Board of the ACT from 15 June 2000 to 5 June 2003.

Incorrect manner of gazettal

The Committee draws attention to the manner of gazettal of these instruments of appointment. The explanatory statement quite correctly states the instruments are disallowable. However the Committee notes they were gazetted as notices and not given appropriate instrument numbers as disallowable instruments in Gazette No. 24, dated 15 June 2000.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

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

- Smoking Products Legislation Amendment Bill 2000 – Report No. 7 of 2000 (Minister for Health and Community Care – 1 August 2000)
- Interpretation Amendment Bill 2000 (Attorney-General – 27 June 2000)
- Utilities Bill 2000 and Utilities (Consequential Amendment) Bill 2000 (Report No. 2 of 2000) (Treasurer – 22 June 2000)
- Electricity Amendment Bill 2000 (Report No. 6 of 2000) (Treasurer – 22 June 2000)
- Optometrists Act – Determination No. 119 of 2000 (Report No. 10 of 2000) (Minister for Health and Community Care - 6 July 2000)
- Radiation Act – Determinations Nos 121 and 122 (Report No. 10 of 2000) (Minister for Health and Community Care - 6 July 2000)
- Road Transport (Driver Licensing Act) – Determination No. 129 of 2000 (Report No. 10 of 2000) (Minister for Urban Services – 7 July 2000)

The Committee thanks the Attorney-General, the Minister for Health and Community Care and the Minister for Urban Services for their helpful responses.

Paul Osborne, MLA
Chair
28 August 2000