

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. 15 OF 1998

23 December 1998

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 Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and
Subordinate Legislation): Ms Celia Harsdorf

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.

Racing Bill 1998

This is a Bill for an Act to establish a legal framework for the regulation and administration of the racing industry in the Territory. Primarily, the Bill:

- provides rules for the control of races for the purposes of betting;
- provides for certain existing bodies to be controlling bodies in relation to certain kinds of racing;
- enables the Minister to approve of an organisation as an Approved Racing Organisation;
- provides for review by the Administrative Appeals Tribunal of the significant powers of the Minister; and
- establishes a Racing Appeals Tribunal to hear appeals from decisions of controlling bodies and Approved Racing Organisations.

Shopping Containers Bill 1998

This is a Bill for an Act to require retail businesses to charge their customers for plastic bags it provides for the purpose of carrying items from the store.

Bills - Comment

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

Drugs of Dependence (Amendment) Bill (No. 2) 1998

This Bill would amend the *Drugs of Dependence Act 1989* by the insertion of a new Part XA, which would:

- give a discretion to the Minister, by notice in the *Gazette*, to declare a place to be a safe injecting place (SIP);
- give immunity to the operators and staff of a SIP for acts, or omissions to act, done in good faith; and
- give immunity to the Territory in respect of claims by users of a SIP in relation to self-inflicted drug related injuries or death.

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

The Explanatory Memorandum notes that “the activities conducted at the SIP will be technically illegal as well as high risk”. In these circumstances, it may well be that those who operate a SIP may commit criminal offences by reason of either or both of their facilitating the self-administration of drugs, or the non-disclosure that offences have occurred. And, of course, the person who self-administers the drug may commit an offence.

An issue of principle is whether a law of the Territory should create circumstances in which persons may commit offences without having a full appreciation of the law. Persons who use a SIP to commit offences in relation to the use of drugs may gain the impression that this law gives them some immunity against prosecution. That is clearly not the case. Apart from the criminal liability of the offender, those who work in a SIP may be a party to the commission of an offence, either as a principal or as an accessory to the commission of the offence. While the explanatory memorandum has acknowledged these difficulties in a

general way, the Committee is concerned that they will not be appreciated by those who resort to and work in a SIP.

Proposed clause 173C would confer legal immunity from civil action on those who work in a SIP. To this extent, it grants immunity in respect of a failure by such persons to exercise any duty of care they may have towards those who use a SIP and, indeed, to others, such as the parents of a user. The Committee considers that there should be a more complete explanation of the extent of the legal immunity which it is considered that clause 173C will provide.

The Committee also notes that the Bill does not attempt to govern the civil liability of other persons who may have a duty of care in respect of those who use a SIP. Social workers, police, and friends of a user may fall into this category. Again, such persons may gain the false impression that this law will provide them with some immunity from legal action.

There may be particular problems in respect of the police. Section 9 of the *Australian Federal Police Act 1979* of the Commonwealth provides that the functions of a member of the AFP include those which are imposed upon her or him by legislation and indeed by the common law. The Committee is aware that there is legal debate as to the extent of the obligation of a police officer to enforce the law. There is no doubt that he or she has a discretion in this respect, but there may be a point where there is a duty to enforce the law in some particular situations. A critical issue is how the provisions of this Bill can be adjusted to the duties and functions of a member of the AFP.

Duties Bill 1998

This is a Bill for an Act to replace the *Stamp Duties and Taxes Act 1987* with a law governing stamp duty. The Bill is written in plainer language than the existing law and is consistent with the law in other jurisdictions in Australia (and in particular with the law in New South Wales). The Bill is a result of the Stamp Duties Rewrite Project, undertaken by the Revenue Offices of New South Wales, Victoria, South Australia, Tasmania and the ACT. In addition to its major objective, the Bill would make some substantive changes to the law of stamp duty in the Territory. The Bill is a companion to the Taxation Administration Bill 1998.

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

By clause 229 there is provision for a transfer (and other such actions) of land to be exempt from duty where it is an 'intergenerational rural transfer'. The operation of the provision is dependent upon the Minister specifying in guidelines which classes of persons may seek the exemption. The Committee notes, however, that these guidelines will be disallowable instruments.

Clause 65 provides that (what would be) a concessional rate of \$20 "is chargeable in respect of a grant of land to a prescribed person". It appears that such persons would be prescribed by regulation made by the Executive under clause 252. There does not appear to be a parallel to this provision in the existing *Stamp Duties and Taxes Act 1987*. The Committee considers that there should be some justification offered for this provision, and, if possible, some illustration given of when it might be used. On its face, it is a wide discretion to dispense with the law.

Duties (Consequential and Transitional Provisions) Bill 1998

This is a Bill for an Act to make consequential and transitional provisions which will be required should the Duties Bill become law. It facilitates the adjustment of the *Stamp Duties and Taxes Act 1987* to various situations which may arise should the Duties Bill become law.

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

Clause 34 of the Bill would permit the Executive to make regulations, within 12 months of the commencement date of the proposed *Duties (Consequential and Transitional Provisions) Act 1998*, which might amend this Act, the proposed *Duties Act 1998*, and any other Act in relation to “any matter arising from, connected with or consequential upon the enactment of the Duties Act”. Such regulations may take effect from a date earlier than the day on which they are notified in the *Gazette*, (thus displacing the general rule stated in paragraph 6(1)(b) of the *Subordinate Laws Act 1989*), but, consistent with section 7 of that Act, such regulations may not retrospectively prejudice rights or impose liabilities.

The power of the Executive to amend legislation by regulation is one which attracts the attention of the Committee. It is, however, a power commonly found in legislation such as the proposed *Duties (Consequential and Transitional Provisions) Act 1998*.

Emergency Management Bill 1998

This is a Bill for an Act to make provision, primarily, for overall management of the various facets of large scale or complex emergencies. In addition, the Bill would provide a statutory base for the operations of the ACT Ambulance Service (and repeal the *Ambulance Service Levy Act 1990*). In relation to its primary objective, the Bill provides for

- the preparation by the Minister of an Emergency Plan;
- the declaration by the Chief Minister that a state of emergency exists, and the publication of any such declaration;
- the appointment by the Minister of a Territory Controller in respect of a declared emergency;
- the creation by the Controller of a management executive;
- a power in the Controller, by instrument, to authorise certain persons to exercise various emergency powers (clauses 27, 29 and 30); and
- a power vested in the Minister to give written directions to the Controller “either generally or in relation to a particular matter” (clause 32).

The Bill also requires the Chief Executive to create an ‘ACT Emergency Service’, to be comprised of a Director (who will be an office-holder in the Public Service), certain public officers, and volunteers.

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

As acknowledged in the Presentation Speech, those provisions of the Bill which vest in the Controller a power, by instrument, to authorise certain persons to exercise various emergency powers (clauses 27, 29 and 30), raise for the Legislative Assembly the question whether there is in this respect an “undue trespass on personal rights and liberties”. This is ultimately a political judgment.

The Committee notes that, from this perspective, three of the most significant powers - see paragraphs 27(1)(a), (b) and (o) - are apparently qualified by subclause 27(11). This last provision permits a person who has a “reasonable excuse” for so doing to contravene a direction under the three paragraphs 27(1)(a), (b) and (o). There is perhaps here the potential for conflict between those seeking to deal with the emergency and those to whom they give directions under these paragraphs. The Committee suggests that consideration be given to some definition of what may amount to a “reasonable excuse”.

The Committee notes that under clause 29, a person might be detained in order to facilitate her or his removal from a place. Such a detention may, however, be effected only for the purpose of such removal. So limited, the detention is probably not to be regarded as an “arbitrary ... detention” under Article 9.1 of the ICCPR (and even if so regarded, may be, in terms of Article 4, a justifiable derogation from Article 9.1).

The Committee also notes that a person may apply for the payment by the Territory of compensation in respect of losses suffered by the person because of the exercise of a power provided for in clause 27. The Administrative Appeals Tribunal may review a decision in relation to a rejection of such a claim, and of the amount awarded in response to a claim (see clause 76).

Another particular matter which the Assembly should consider is the power of the Minister (see clause 32) to give to the Controller written directions “either generally or in relation to a particular matter” (clause 32). While this is consistent with responsible government, there is the question whether the Minister should in some fashion report any such directions to the Assembly. (An illustration of such a provision may be found in subclause 6(5) of the Gaming and Racing Control Bill 1998).

Gaming and Racing Control Bill 1998

This is a Bill for an Act to establish an ACT Gaming and Racing Commission. The Commission would be responsible for regulating and controlling gaming, racing and wagering activities in the Territory.

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

Powers to gather information

The Commission would have extensive powers to make investigations and for that purpose to compel persons to provide information. Clause 17 regulates the power of the Commission to require persons to attend before it to give oral evidence and to produce documents, or to provide it with written information. The Committee notes that, by subclause 17(4), a person may with “reasonable excuse” refuse to comply with a requirement made under clause 17.

Clause 18 regulates the power of an authorised officer of the Commission to enter and inspect premises and documents thereon. The Committee notes that subclause 18(3) requires that the owner or occupier of residential premises must consent to the use of the powers under clause 18. This protection in respect of residential premises is commended by the Committee.

Paragraphs 18(1)(e) and (f) enable an authorised officer to require a person on the premises to answer questions and furnish information, and to give access to documents in that person’s custody and control. It is noted that under clause 22 a person is not excused from compliance with a provision of the Bill on the ground that compliance might tend to incriminate the person, but that if the person makes an objection to compliance on that ground, the information or document is not admissible against the person in any criminal proceeding other than for an offence with respect to providing false or misleading information or for perjury (see subclause 22(2)). The Committee has two comments to make in this regard.

First, it is noted that the protection afforded by subclause 22(2) is not as extensive as might be provided. It does not appear to provide against a derivative use of the information or document which the person is compelled to provide. That is, while this information or document may not be used in any criminal

proceeding, it might be used as a means of deriving other information which might be so used. The Committee considers that there should be justification offered for such a limited protection.

Secondly, (and in contrast to the scope of the protection of subclause 17(4)), a person subject to a requirement made under clause 18 cannot raise a “reasonable excuse” for non-compliance. The particular relevance of this point is that it would appear that an exercise of power under clause 18 may override a claim of client legal privilege (or any other privilege). The Committee considers that there should be justification offered for such a limited protection.

Power to make inquiries

Clause 34 requires or authorises the Commission to conduct inquiries. It is probably the case that these powers would be read down so as to limit the scope of any such inquiry by reference to the objects of the Bill and, in this respect, the functions of the Commission stated in clause 6 would be significant.

The Committee considers it desirable that some such limit be stated in clause 34. Standing alone it appears to authorise any kind of inquiry.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations

The Commission is given by clause 45 a power (among others) to determine the games which may be played in the casino and the rules under which they may be played. The Committee raises the question whether there should be some kind of review of an exercise of this power.

Taxation Administration Bill 1998

This is a Bill for an Act to replace the *Taxation (Administration) Act 1987* and to make general provisions with respect to the administration and enforcement of the tax laws of the Territory. The provisions concern the imposition and collection of tax, exceptions and exemptions from liability to a tax, and entitlements to refunds.

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

The provisions of the Bill concerning the powers of investigation (clause 82), powers of entry (clause 83), and self-incrimination (clause 87) are in substance identical to those similar provisions in the Gaming and Racing Control Bill 1998. See the comments on this Bill under the heading Powers to gather information. The Committee adopts these comments in respect of the provisions of the Taxation Administration Bill 1998.

Taxation Administration (Consequential and Transitional Provisions) Bill 1998

This is a Bill for an Act to make consequential and transitional provisions which will be required should the Taxation Administration Bill become law.

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

The Committee notes that clauses 12, 13 and 14 of the Bill would have the effect of displacing the operation of section 38 of the *Interpretation Act 1967* in respect of various matters. This displacement would in these respects give to *Taxation Administration (Consequential and Transitional Provisions) Act 1998* a retrospective operation. In these contexts, however, such provision appears necessary in order to provide for the transition between the regime under the current law and that which would be introduced by this Bill.

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

Clause 16 of the Bill would permit the Executive to make regulations, within 12 months of the commencement date of the proposed *Taxation Administration Act 1998*, which might amend this Act, the proposed *Taxation Administration Act 1998*, and any other Act in relation to “any matter arising from, connected with or consequential upon the enactment of the Administration Act”. Such regulations may take effect from a date earlier than the day on which they are notified in the *Gazette*, (thus displacing the general rule stated in paragraph 6(1)(b) of the *Subordinate Laws Act 1989*), but, consistent with section 7 of that Act, such regulations may not retrospectively prejudice the rights or impose liabilities.

The power of the Executive to amend legislation by regulation is one which attracts the attention of the Committee. It is, however, a power commonly found in legislation such as the proposed *Taxation Administration (Consequential and Transitional Provisions) Act 1998*.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

The Committee has examined the following subordinate legislation and offers no comment:

Subordinate Law No. 36 of 1998 being the Births, Deaths and Marriages Registration Regulations made under the *Births, Deaths and Marriages Registration Act 1997* provide for the kinds of information to be provided to the Registrar-General for the maintenance of the Register.

Subordinate Law No. 37 of 1998 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* amends regulation 3A of the Principal Regulations to the effect of extending the trading hours during which liquor may be sold for consumption on licensed premises on 1 January 1999 and on 25 April 1999.

Determination No. 250 of 1998 made under section 6 of the *Surveyors Act 1967* appoints specified persons as members of the Surveyors Board of the Territory.

Determination No. 255 of 1998 made under paragraph 55(1)(a) of the *Bookmakers Act 1985* revokes Determination No 235 of 1997 and determines the fee for a sports betting licence.

Determination No. 256 of 1998 made under 54 of the *Podiatrists Act 1994* revokes Determination No. 241 of 1997 and determines fees payable for various purposes of the Act.

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

Determination No. 254 of 1998 made under subsection 39C(1) of the *Bookmakers Act 1985* amends the rules for sports betting as determined by Determination No 69 of 1997.

While subsection 39C(1) of the *Bookmakers Act 1985* authorises “the Minister” to exercise this power, the Determination purports to be made by a person acting as a delegate of the Minister. It is not apparent that the Minister has a power to delegate the exercise of this power.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Attorney-General in response to its Report No 6 of 1998 concerning Determination Nos 81 and 82, and Subordinate Law No 17, and
- the Chief Minister in response to a letter from the Chair of the Committee concerning recent amendments to the *Administration (Interstate Agreements) Act 1997*.

The Committee thanks the Ministers for their responses.

Paul Osborne, MLA
Chair

December 1998