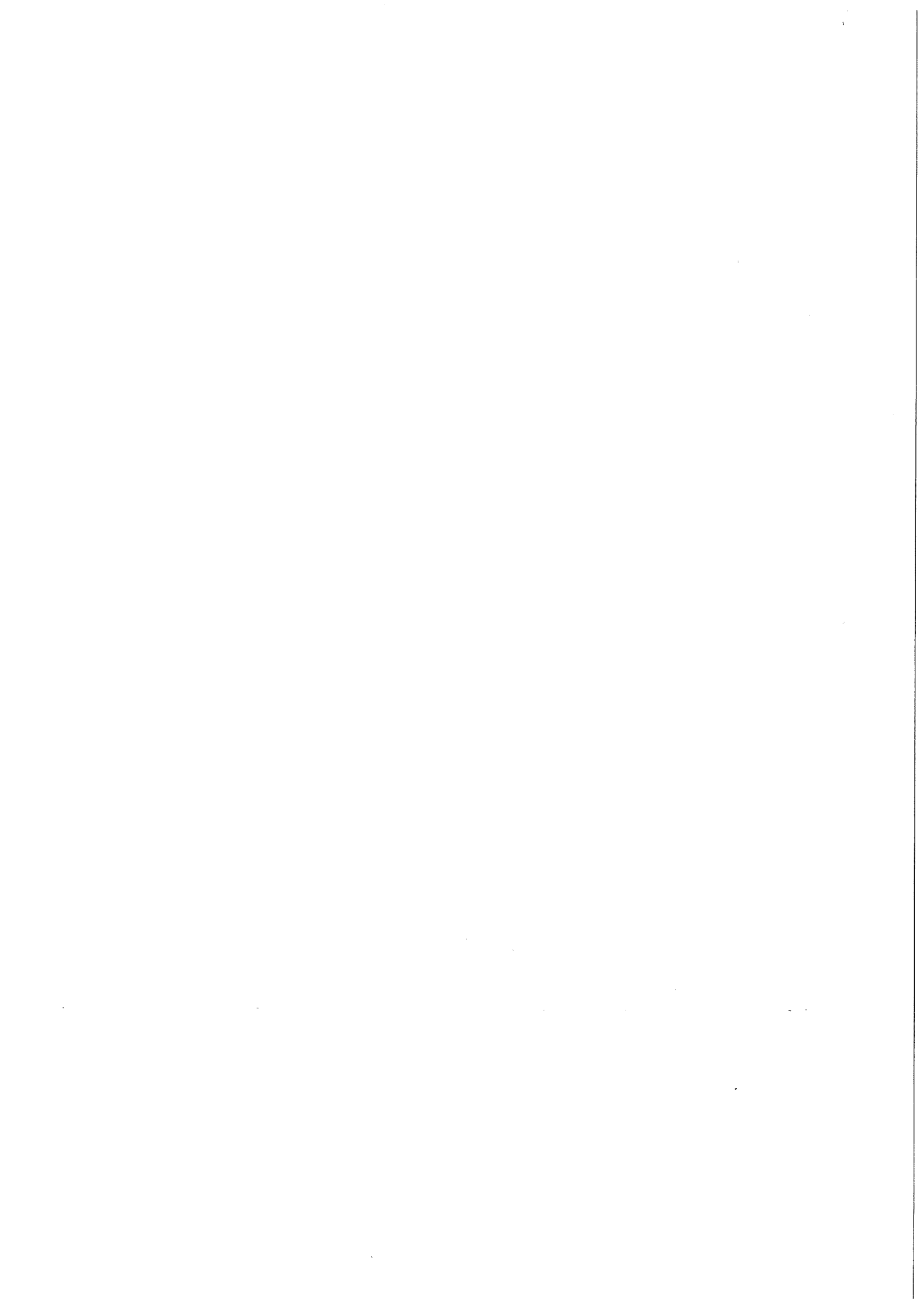


**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO. 6 OF 1997

21 May 1997



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Civic Square, London Circuit
CANBERRA ACT 2601
GPO Box 1020

STANDING COMMITTEE ON SCRUTINY OF
BILLS AND SUBORDINATE LEGISLATION

Telephone: (06) 2050171
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Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr *Greg* Cornwell

Please find enclosed a copy of Report No. 6 of 1997 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 6 of 1997.

Yours sincerely

Bill Wood

Bill Wood, MLA
Chair

21 May 1997

Greg Cornwell
Approved
Greg Cornwell, MLA

21 May 1997

TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of three 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 Bill Wood, MLA (Chair)
Mr Paul Osborne, MLA (Deputy Chair)
Mr Harold Hird, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM
Secretary: Mr Tom Duncan

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:

Commissioner for the Environment (Amendment) Bill 1997

This Bill alters the dates and requirements for the State of the Environment Report and authorises the Minister to direct the Commissioner to conduct an investigation in public.

Juries (Amendment) Bill 1997

This Bill gives the Judge a discretion to direct that a panel of up to 16 members be empanelled, provides for confidentiality for jurors and for their deliberations and for exemption for new categories from jury service.

Legal Practitioners (Amendment) Bill 1997

This Bill provides for recognition of inter-state legal practitioners as part of a mutual recognition process.

Motor Traffic (Amendment) Bill (No. 2) 1997

This Bill makes changes relating to the cancellation of licences, the disqualification of drivers and the grant of special licences.

Motor Traffic (Alcohol and Drugs) (Amendment) Bill 1997

This Bill makes changes relating to penalties for drink-driving offences, the cancellation of licences, the disqualification of drivers and the grant of special licences.

Vocational Education and Training (Amendment) Bill 1997

This Bill updates the provisions relating to annual reporting and deems training providers registered prior to 1996 to be registered under the Principal Act.

Bills - Comment

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

Environment Protection Bill 1997

This Bill provides a scheme for the protection of the environment.

A Cross-reference should perhaps be Checked

In the Committee's comments below on the Environment Protection (Consequential Provisions) Bill 1997, the Committee refers to possible incorrect cross-references in that Bill to clauses in Schedule 2 of the present Bill.

When doing this checking, the Committee discovered a cross-reference within Schedule 2 of the present Bill itself that perhaps needs to be checked.

Clause 8 of Schedule 2 prohibits the sale of leaded petrol unless it is low lead. Clause 9 then provides that the Authority can grant an exemption in certain specified circumstances.

Subclause 8(4) creates an offence for the sale, distribution or possession for sale of leaded petrol that contains more than the maximum lead concentration per litre where the person has petrol "in the course of the distribution or wholesaling of petrol".

Subclause 8(4) also provides that no offence is committed if the vendor has been "exempted by the Authority under clause 9". This is, of course, a perfectly logical and appropriate provision.

Subclause 8(5) creates a similar offence to that in subclause 8(4), where a person has petrol "otherwise than in the course of the distribution or wholesaling of petrol". (Emphasis added)

As with subclause 8(4), there is also no offence committed if there is an exemption. However, in subclause 8(5) there is a cross-reference to an "exemption by the Authority under clause 8".

This cross-reference should perhaps also be to clause 9 as is the cross-reference in subclause 8(4).

Environment Protection (Consequential Provisions) Bill 1997

This Bill makes amendments consequential on the passing of the Environment Protection Bill 1997, including repealing current legislation in the environmental law area.

Are these Cross-references Correct?

Division 1 of Part V of the Bill provides for transitional provisions in relation to the *Air Pollution Act 1984*, which is repealed by the present Bill.

Clause 8 of the present Bill deals with the transitional operation of a certificate of compliance in the following terms:

"8. A certificate of compliance under subsection 24A(3) of the repealed Act in force immediately before the commencement day shall, on and after that day, be taken to be a certificate of compliance under subclause 3(3) of Schedule 2 of the new Act." (That is, the Environment Protection Act 1997.)

There is, in fact no subclause 3(3) in Schedule 2 of the new Act. However, subclause 4(3) of Schedule 2 does set out provisions for the granting of a certificate of compliance for the approval of equipment in the future. In fact, the provisions set out in subclause 4(3) are the same as those set out in section 24A of the repealed *Air Pollution Act 1984*.

Thus it appears that the reference in clause 8 of the present Bill should be to subclause 4(3) of Schedule 2.

The possible mistakes do not end there. There also appear to be incorrect cross-references in clauses 11-13 of the present Bill. Here, too, clauses 11-13 provide for the transitional application of actions taken under the repealed Act, which are in similar form to the provisions in Schedule 2 of the new Act that are to apply for the future.

The Committee will not set out each of the provisions in detail but merely give the number of the relevant clause of the present Bill and refer in brackets to the possibly correct provision in Schedule 2 of the Environment Protection Bill 1997. The references are as follows: clause 11 of the present Bill (clause 6 of Schedule 2), clause 12 (clause 8) and clause 13 (clause 9).

Public Health Bill 1997

This Bill sets up a new regimen for the handling of public health matters and repeals existing Acts.

No Review of Decisions to Suspend or Cancel Activity or Procedure Licences

Clause 130 of the Bill provides for review of decisions by the Administrative Appeal Tribunal where the Minister refuses to grant an activity licence or a procedure licence, refuses to vary an activity licence or a procedure licence or refuses to approve the transfer of an activity licence. Clause 132 also confers rights to appeal to the Supreme Court from decisions of the Magistrates Court in relation to prohibition orders, abatement orders and public health orders.

Clause 39 provides for the suspension or cancellation of an activity licence by the Minister in specified circumstances and clause 40 provides for suspension of an activity licence by the Minister in specified emergency situations. Clauses 53 and 54 provide in similar terms for the suspension or cancellation and emergency suspension of a procedure licence. In addition, clause 48 provides for the suspension and possible ultimate cancellation of a procedure licence for the non-payment of the annual fee.

Suspension or cancellation of an activity licence or a procedure licence are obviously serious matters for the holders of licences, yet there are no provisions for the review of decisions to suspend or cancel such licences.

It is understandable that there are no provisions for the review of emergency suspensions under clauses 40 and 54 and there are protective provisions written into clause 48, which deals with simple failure to pay a renewal fee. But the Explanatory Memorandum and Presentation Speech do not indicate why there is no review of the Minister's decision to suspend or cancel licences in a non-emergency situation.

Possible Errors in the Explanatory Memorandum and in the Bill

There is a helpful Explanatory Memorandum, but the Committee makes two comments on it.

First, unfortunately, at about clause 70, the numbering of the clauses in the Bill and the numbering in the Explanatory Memorandum part company.

For quite a few numbers there is a difference of only one number, but things hot up a bit later on. Indeed, by the time we reach the explanations for several provisions in Divisions 2 and 3 of Part VI, not only is the numbering wrong, but there appear to be some provisions in the Bill for which there is no explanation and at least one explanation given for a provision that does not appear to be in that form in the Bill.

When using the Explanatory Memorandum, Members could keep these discrepancies in mind.

Secondly, clause 19 of the Bill provides for the imposition of differential fees and refers to the fee-determining provision as "section 130". Probably as a result of the changes in the numbering discussed above, the fee-determining provision now appears in clause 137.

Taking of Samples for Analysis

Division 4 of Part V provides for testing of samples by analysis.

Clause 94 provides that where an authorised officer takes a sample for submission for analysis, the officer "shall give notice of his or her intention to have the sample analysed".

There is no provision in Division 4 which requires the officer to divide the sample and give part of the sample to the person from whose premises the sample is taken. If there is such division of a sample, this enables the person to have an independent analysis done on that person's part of the sample.

Paragraph 96(1)(d) provides that the Analyst's certificate must state "the results of the analysis". Subclause 96(2) then provides that

"In any proceedings for an offence against this Act, a certificate under subsection (1) purporting to be signed by an Analyst is evidence of the matters stated in the certificate and of the facts on which they are based."

Subclause 96(5) does permit cross-examination of the Analyst giving evidence for the prosecution in relation to the analysis. But this does not overcome the defendant's disadvantage of not having had the opportunity to have an independent analysis made of part of the sample.

These provisions in the present Bill are to be contrasted with the more usual provisions contained in the Environment Protection Bill 1997, which, by chance, is also considered in the present Report.

Clause 93 of the Environment Protection Bill deals with the inspection of premises and paragraph 93(1)(c) provides that an authorised officer may "take samples for analysis".

Then subclause 93(3) provides as follows:

"(3) Where an authorised officer takes a sample under paragraph (1)(c), the officer shall -

- (a) divide the sample into 3 parts;
- (b) place each of those parts in a separate container and seal each container;
- (c) deliver 1 of the 3 containers to each of the following persons;
 - (i) the person apparently in charge of the premises;
 - (ii) an analyst;
 - (iii) the Authority [that is the Environment Management Authority.]

Such a procedure is more protective of the rights of the person than the present provisions of the Public Health Bill.

Residential Tenancies Bill 1997

This Bill provides a framework for residential tenancies.

Retrospectivity

Subclause 4(1) of the Bill provides as follows:

"4(1) Subject to sections 5 and 6, this Act (other than Division 1 of Part II) applies in relation to any residential tenancy agreement, whether commencing before, on or after the commencement day."

This means that, in many respects, the new provisions will apply to residential tenancies existing on the commencement day.

Wrong Numbering in part of the Explanatory Memorandum

As with the Public Health Bill 1997, this Bill, too, has a helpful Explanatory Memorandum. But, as with that Bill, when Members use it they will need to note that the numbering of part of the Explanatory Memorandum is incorrect.

The numbering of the Explanatory Memorandum for the part of the Bill dealing with the clauses of the body of the Bill are correct. However, the numbering for all except the first 4 clauses of the explanations for the Schedule to the Bill are out by two.

This error may have occurred in this way. The explanation for clause 4 of the Bill is that it "Defines fixed term and periodic tenancies".

In fact, clause 4 only defines a fixed term tenancy. Clause 5 defines a periodic tenancy. Then clause 6 introduces a definitional term relating to notices to vacate, for which there is no explanation given in the Explanatory Memorandum.

This means that clause 7 of the Schedule itself goes on to deal with the cost of preparation of a tenancy agreement and the explanation for this clause is given in the Explanatory Memorandum as the explanation for clause 5. This error then continues throughout the rest of the Explanatory Memorandum.

No Existing Acts Repealed

The Presentation Speech indicates that there is a number of old Acts and provisions that the present Bill will replace.

However, unlike the repeals of existing Acts by clause 3 of the Public Health Bill 1997, the present Bill does not repeal some Acts and provisions that it appears to over-ride.

Admittedly, the present Bill does not replace old Acts as clearly as the Public Health Bill does, so perhaps formal repeals will be considered in a consequential provisions Bill, as is done in the Environmental Protection (Consequential Provisions) Bill 1997, which complements the Environment Protection Bill 1997.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Determination No. 66 of 1997 made under section 6 of the *Trading Hours Act 1996* provided that large supermarkets had extended hours for trading (7.00 am to 10.00 pm) on 24 April 1997.

Determination No. 67 of 1997 made under section 39A of the *Bookmakers Act 1985* revokes the existing determinations and determines events as sporting events for the purposes of the Act.

Determination No. 68 of 1997 made under section 39B of the *Bookmakers Act 1985* revokes the existing determination and determines the directions for the operation of the sports betting venue at the Canberra Racecourse.

Determination No. 69 of 1997 made under section 39C of the *Bookmakers Act 1985* revokes the existing determination and determines the rules for sports betting.

Determination No. 71 of 1997 made under section 54 of the *Chiropractors and Osteopaths Act 1983* revokes Determination No. 169 of 1996 and determines the fees payable under the Act.

Determination No. 75 of 1997 made under section 6 of the *Trading Hours Act 1996* provides that large supermarkets may trade from the first moment to the last moment of any day.

GOVERNMENT RESPONSES

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

- Determination No. 296 of 1996 made under the *Building and Services Act 1924* (Report No. 1 of 1997).
- Determinations No. 267 of 1996 made under the *Dental Technicians and Dental Prosthetists Registration Act 1988* (Report No. 1 of 1997).
- Bail (Amendment) Bill 1997 (Report No. 4 of 1997).
- Mediation Bill 1997 (Report No. 4 of 1997).

A copy of the response is attached. The Committee thanks the Attorney-General for his helpful response.



Bill Wood, MLA
Chair

21 May 1997



Gary Humphries MLA

Attorney General
Minister for the Environment, Land
and Planning
Minister for Police
Minister for Emergency Services
Minister for Arts and Heritage
Minister for Consumer Affairs

Member for Molonglo
Australian Capital Territory

Mr Bill Wood MLA
Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
ACT Legislative Assembly
South Building
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CANBERRA ACT 2601

HW 9/5
for check

Dear Mr Wood ^{Pill}

I refer to the Standing Committee's Report No. 1 of 1997 (25 February 1997) and Report No. 4 (22 April 1997). I am now in a position to refer to some of the matters raised in those reports.

In Report No. 1, you noted that the Guidelines for the Preparation of Disallowable Instruments were not followed in the preparation of the Explanatory Statement for Determination No. 296 of 1996, made under the *Building and Services Act 1924*. I am advised that all operational areas of the ACT Department of Urban Services have been again informed of the requirements of the Guidelines and of Departmental procedures for the preparation of statutory instruments. In addition, I am advised that the Departmental Legal Adviser will now review all Explanatory Statements.

In Report No. 1, you raised several queries concerning Determination No. 297 of 1996, which appointed members and a Chair to the Dental Technicians and Dental Prosthetists Board. You noted that there was a hiatus in membership of the Board between 5 December 1996, when the previous memberships expired and 20 December 1996, when new instruments of appointment were signed. You also queried the period of retrospectivity of the appointments between 20 December 1996, when the instruments were signed, and 31 December 1997, when the Determination was notified in the Gazette. I am advised that the Board did not meet between 5 December 1996 and

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31 December 1996. No expenses were paid to members during that period and no decisions were made.

In Report No. 4, you noted that Note 1 to the Bail (Amendment) Bill 1997 did not refer to the reprint of the *Bail Act 1992* of 1 January 1997. I am advised that when the Act is printed Note 1 will be updated to include reference to the reprint.

In Report No. 4, you commented on the omission from the Mediation Bill 1997 of independent merits review of the exercise of the discretion by an agency approved by the Minister to refuse to grant or renew registration to mediators. Careful consideration was given to the inclusion of an independent review mechanism in the Bill. The Mediation Bill (when enacted) will establish an essentially private scheme. It will not prevent a person who is not registered from offering his or her services as a mediator. In order to provide the most cost effective and efficient scheme, it was considered that the establishment of internal review mechanisms by the relevant private agencies would be preferable.

You also noted that paragraph 12(2)(e) of the Mediation Bill 1997 contained a small typographical error. I am advised that this matter will be attended to.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Gary Humphries', with a long horizontal line extending to the right.

Gary Humphries MLA
Attorney-General

8 MAY 1997

