

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

REPORT NO. 19 OF 1994

6 December 1994

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; or
 - (e) the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers;
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny; or
 - (f) the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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

Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan, AM
Secretary: Mr T. Duncan
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comment:

Fire Brigade (Amendment) Bill 1994

This Bill adds provisions relating to the elimination of fire hazards in a built-up area, provides for the issuing of identity cards to the Chief Officer and members of the Brigade and removes sexist language.

Liquor (Amendment) Bill (No. 2) 1994

This Bill provides for the introduction of a proof of age card and associated enforcement provisions, for the regulation of times at which liquor can be sold for consumption off licensed premises, creates an offence for the possession of an open container of liquor in a prescribed public place and other technical amendments including ones relating to exceeding occupancy loading and removing sexist language.

Periodic Detention Bill 1994

This Bill provides for periodic detention as a sentencing option.

Proportional Representation (Hare-Clark) Entrenchment Bill 1994

This Bill aims to entrench the principal principles of the Hare-Clark electoral system including Robson Rotation.

Bills - Comment

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

Rates and Land Tax (Amendment) Bill (No. 3) 1994

This Bill amends the Principal Act to enable rates and land tax payers to retain the right to pay by instalments in the case of non-payment of an instalment and provides that interest will be payable only on the unpaid amount.

Retrospective Operation, But Beneficial To Individuals

The operation of clauses 3, 4 and 5 of the Bill is made retrospective to 16 November 1994. However, the effect of the retrospectivity is beneficial to individual rates and land tax payers. It will permit people who did not pay the instalment due on 15 November 1994 on time to continue to have the advantage of making future payments in instalments.

Incidentally, the explanatory memorandum states that "Clause 5 inserts a new subsection 22 (5)". In fact, the amendment does not insert a new subsection 22 (5), but is drafted purely as a transitional provision. However, the effect of the provision is as suggested in the explanatory memorandum, which is that:

"any monies that were due and payable prior to 16 November 1994 will continue to be recovered under the provisions in force at that time."

Subordinate Laws (Amendment) Bill (No. 3) 1994

This Bill provides that the publication in the *Gazette* of a note of the making of any kind of subordinate law and details of where a copy can be purchased is sufficient to comply with the requirements in an Act or other subordinate law that the subordinate law be published or notified in the *Gazette*.

Retrospectivity

The provisions of the Bill remove any doubts about the effectiveness of the new notification procedure under which the subordinate law need not be published in full in the *Gazette*.

The provision is made retrospective to ensure that any subordinate laws made under the new procedures that have not been published in full in the *Gazette* are to be deemed to be valid.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 36 of 1994 being the *Administrative Appeals Tribunal Regulations (Amendment)* repeals a redundant regulation and makes other amendments consequent upon the commencement of the *Administrative Appeals Tribunal (Amendment) Act (No. 2) 1994*.

Subordinate Law No. 37 of 1994 being the *Smoke-free Areas (Enclosed Public Spaces) Regulations* prescribes the nature, size and location of signs that occupiers of enclosed public places are to use where smoking is prohibited.

Subordinate Law No. 38 of 1994 being the *Discrimination (Remuneration and Allowances) Regulations (Amendment)* repeals and substitutes the provisions relating to the remuneration and allowances of the Discrimination Commissioner.

Subordinate Law No. 39 of 1994 being the *Electoral Regulations (Amendment)* lists the classes of events to be taken as fund-raising events for the purposes of the Election Funding and Financial Disclosure Scheme.

Determination No. 147 of 1994 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and paragraph 7 (1) (a) of the *Dental Technicians and Dental Prosthetists Registration Act 1988* appoints the Chairperson of the Dental Technicians and Dental Prosthetists Board until 4 December 1996.

Determination No. 149 of 1994 made under section 22 of the *Animal Welfare Act 1992* approves the Code of Practice for the Humane Destruction of Kangaroos in the ACT as the appropriate means for such destruction.

Determination No. 150 of 1994 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 52 of 1994 and redetermines fees relating to vehicle licences and permits that are the same as before except for the reduction of the fee for the grant of a licence to use a motor omnibus which brings the fee into line with that in New South Wales.

Determination No. 152 of 1994 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 22 of 1993 and determines differential rates of fees for different types of liquor determined under section 23 of the *Business Franchise (Liquor) Act 1993* and payable under sections 9 and 17 of that Act.

Determination No. 153 of 1994 made under section 125 of the *Electoral Act 1992* approves the methods for the Determination of matters by lot where the Electoral Commissioner is required by section 116 and Schedules 2 and 4 of the Act to determine matters by lot.

Public Sector Management Standard No. 5/1994 made and approved under section 251 of the *Public Sector Management Act 1994* amends *Public Sector Standard 1/1994* to permit the Commissioner for Public administration to approve back-pay to give effect to decisions of the Australian Industrial Relations Commission.

Approval of Variation No. 27 to the Territory Plan made under section 26 of the *Land (Planning and Environment) Act 1991* approves a variation relating to the Symonston Advanced Technology Park being section 1, block 4, Symonston.

Subordinate Legislation - Comment

The Committee has examined the following Subordinate Legislation and offers the following comments:

Determination No. 148 of 1994 being the Code of Practice for the Notification of Reviewable Decisions and Rights of Review approved under subsection 25B(1) of the *Administrative Appeals Tribunal Act 1989* provides for the practices and procedures to be followed to ensure that affected persons are advised of reviewable decisions and are made aware of their rights to seek review of those decisions on the merits.

Are There Specified Requirements For The Giving Of "Public Notice" Of A Decision?

Paragraph 3 sets out the requirements as to who should be given notice of decisions and rights of review. Subparagraph 3(5) provides as follows:

"(5) When you make a reviewable decision in circumstances where—

- (a) some or all of the affected persons are not readily identifiable;
- (b) the number of affected persons is large; or

- (c) the cost of giving notice to the affected persons individually would be substantial;

you should give public notice of the decision and of the rights of review in respect of the decision." (Emphasis added.)

The Code of Practice does not appear to stipulate how this "public notice" is to be given. Do any other provisions in the relevant legislation provide for the practical requirements of giving such "public notice"? If not, should the Code itself indicate possible means?

Determination No. 151 of 1994 made under section 217A of the *Motor Traffic Act 1936* determines the fee payable under subsection 98(2) for the provision for a certified copy of a lost or destroyed licence or registration certificate.

An Undertaking Fulfilled, But Were Any Fees Collected While There Was No Provision Permitting Collection?

In its report No. 12 of 1994, the Committee drew attention to the fact that there may be a gap in the determinations of fees in relation to the collection of a fee payable for a certified copy of a lost or destroyed licence or registration certificate.

In a very helpful letter of 6 October 1994 the Attorney-General, Mr Connolly, confirmed that this fee had been missed in the making of Determination No. 53 of 1994 and advised that the matter would be fixed.

The present Determination carries out this undertaking.

Determination No. 53 of 1994 revoked Determination No. 133 of 1993, in which the power to charge this fee appeared. Thus there has been no power to collect this fee since the time of the revocation until the making of the present Determination. Have any fees been collected during the period in which there was no legal power to do so?

Approval of Variation No. 28 to the Territory Plan made under section 26 of the Land (Planning and Environment) Act 1991 approves a variation relating to the Urambi Hills Nature Park being Part Block 1466 in the District of Tuggeranong.

Two Minor Errors

In relation to Variation No. 28 there appears to be two very minor errors (Annexe D refers to Variation No. 23 instead of 28 and Annexe F refers to the Heritage Council response being at Annexe F instead of Annexe G).

GOVERNMENT RESPONSES

The Committee has received responses to comments made concerning:

- Determination No. 95 of 1994 made under the *Casino Control Act 1988* (Report No. 12 of 1994);
- Business Names (Amendment) Bill 1994 (Report No. 17 of 1994);
- Subordinate Law No. 33 of 1994 being the *Credit Regulations (Amendment)* (Report No. 17 of 1994);

- Statutory Offices (Miscellaneous Provisions) Bill 1994 (Report No. 17 of 1994);
- Nature Conservation (Amendment) Bill (No. 2) 1994 (Report No. 17 of 1994);
- Skin Penetration Procedures Bill 1994 (Report No. 17 of 1994); and
- Rates and Land Tax (Amendment) Bill (No. 2) 1994 (Report No. 17 of 1994).

The Committee thanks the Attorney-General for his positive responses.

A handwritten signature in black ink, appearing to read 'Ellnor', with a large, sweeping flourish extending to the right.

Ellnor Grassby, MLA
Chairperson

6 December 1994



Government of the
Australian Capital
Territory

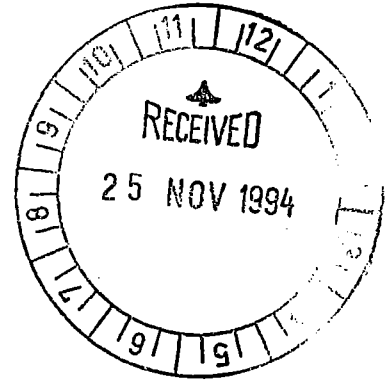
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Mrs Ellnor Grassby MLA
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Dear Mrs *Ellnor* Grassby

In its Report No. 12 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on Determination No. 95 of 1994 made under the Casino Control Act 1988.

The Committee noted that the determination did not revoke previous Determination No. 141 of 1992 and suggested that a court may decide that it was impliedly repealed by Determination No. 95 but requested that a check be made. The Government Solicitor has confirmed the view suggested by the Committee.

The Committee also noted that the determination and its explanatory statement did not follow the Guidelines in several respects. I am advised that steps have been taken to ensure that the Guidelines are followed in future.

In its Report No. 17 of 1994 the Committee, in commenting on the Business Names (Amendment) Bill 1994, noted a possible prejudicial effect in validating the collection of fees under possibly invalid determinations.

The Business Names (Amendment) Bill 1994 is intended to remove any doubt about the fee-determining power in the Principal Act and, to that extent, reflects the suggestion of the Government Solicitor. Determination No. 73 of 1994, which gave rise to the doubt on which the Government Solicitor's advice was sought, was prepared having regard to his advice and is therefore considered to be within power.

The doubt about the fee-determining power arises from amendments made to the Principal Act in 1990. The purpose of those amendments was to remove the need to make a legislative change whenever fees are varied, but unfortunately all the changes which were necessary to identify the matters for which fees could be determined were not incorporated. The Business Names (Amendment) Bill 1994 does this.

A saving provision has been included so as not to leave a hiatus in the Principal Act in the period since 1990 even though all of the determinations made since that time have, of course, been revoked by subsequent determinations. In my view it would be irresponsible to do otherwise. - *This was of course during the Alliance Agreement.*

I believe governments have an obligation to validate prior legislation where technical defects are detected. In the instant case, for example, an option clearly was to do nothing in the expectation that the possible defect (which has gone unnoticed for 5 years) would not be discovered. I think the Committee would agree that would be most unsatisfactory.

In Report No. 17 the Committee queried whether the explanatory statement to Subordinate Law No. 33 of 1994, being the Credit Regulations (Amendment), was accurate in stating that the Act covered loan contracts with a percentage rate of less than 14%. I am advised that the explanatory statement was in error and it should have referred to a rate of more than 14%.

I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

25 NOV 1994



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Dear Mrs Grassby

In its Report No. 17 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Statutory Offices (Miscellaneous Provisions) Bill 1994.

The Committee was concerned about the absence of provisions relating to identity cards under certain Acts and noted some possible errors in respect of other Acts.

The purpose of the bill is to amend Territory legislation to change the appointment mechanism for certain statutory offices. Other related provisions of Territory Legislation, including some provisions relating to identity cards, have been amended in consequence.

It is not a principal objective of the Bill to update provisions relating to identity cards ; the Bill is not intended to be the vehicle for a general review of identity card provisions. Insofar as the Bill amends a number of provisions for identity cards, it does so only to make necessary changes as a result of the new appointment mechanism for the relevant statutory offices. The number of consequential amendments simply reflects the relatively large number of provisions for identity cards to be issued and displayed by statutory office holders whose offices are to be affected by the Bill. It is not within the scope of the Bill to insert provisions for identity cards where none exist at present. This is the case with the Animal Nuisance Control Act 1975, the Apiaries Act 1928 and the Consumer Affairs Act 1973.

The Committee noted possible errors in relation to the Animal Welfare Act 1992 and the Machinery Act 1949 and I am advised that an approach will be made to the Clerk of the Assembly to correct these errors, with the authority of the Speaker, under Standing Order No. 191.

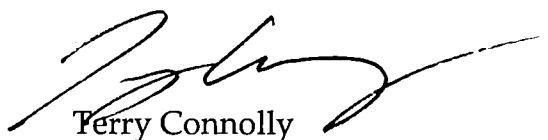
In the Lakes Act 1976 the use of the word "may" is deliberate. Under section 6 of the Act, as currently in force, the Minister is not obliged to appoint a delegate. Proposed new section 6 is expressly drafted to reflect this provision, which it is to replace. The combined effect of subsections 6(1) and 6(2) will be to give the Chief Executive a discretion as to whether to fill the position of Delegate for Lakes. By contrast, if the existing section 6 had required a Minister to appoint a delegate, proposed new subsection 6(1) would have reflected that requirement. The proposed amendment is consistent with the policy adopted throughout the Bill that the nature of existing powers (whether mandatory or discretionary) is to be reflected as closely as possible in the amended provisions.

Proposed subsection 6(2), on the other hand, makes it mandatory for the Chief Executive to "create and maintain an office" for the Delegate. This simply means that the Chief Executive will be required to maintain the position on the establishment of his or her Department; it will not of itself require him or her to fill that position (whether substantively or on an acting basis). The distinction between the existence of an office and its being occupied is fundamental to the operation of Government personnel policy; it is a distinction at the heart of the mechanism for establishing statutory offices proposed in the Bill.

Similarly, proposed subsection 6(3), in the context of the proposed new section 6 as a whole, will not require the filling of the office of Delegate for Lakes. Its clear meaning is that if there is to be a Delegate for Lakes (i.e. if the statutory office is to be filled), it is to be held by the public servant either substantively holding the corresponding Government Service office under subsection 6(2) or the public servant acting in the latter office. It is the Link between the statutory office under subsection 6(1) and the Government Service office under subsection 6(2).

I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

29 NOV 1994



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Dear Mrs Grassby

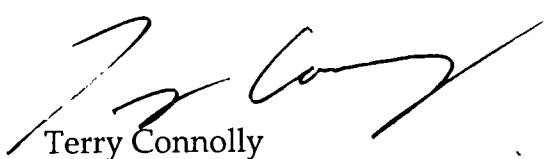
In its Report No. 17 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Nature Conservation (Amendment) Bill (No. 2) 1994. The Committee was concerned that the Bill did not appear to make declarations under section 16 disallowable.

The proposed amendments to section 16 reflect changed definitions within the Principal Act. Section 23E of the Principal Act provides that an instrument made under section 16 shall be a disallowable instrument for the purposes of section 10 of the Subordinate Laws Act 1989.

In its comments on the Skin Penetration Procedures Bill 1994 the Committee questioned whether a reference to a health officer in subclause 49(1) should instead be a reference to an authorised officer so as to be consistent with references in other relevant clauses of the Bill. I am advised that the Committee's observation is correct and that a Government amendment will be prepared to rectify the matter.

I trust this information is of assistance to the Committee.

Yours sincerely


Terry Connolly

29 NOV 1994

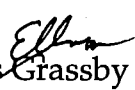
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Dear Mrs  Grassby

In its Report No. 17 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Rates and Land Tax (Amendment) Bill (No. 2) 1994.

The Committee sought confirmation as to the intention of new subsection 10(4) given that it appeared that there could exist a prejudicial retrospectivity if the subsection was to apply to errors of duplication that are presently in the system and come to light after the amendments commence operation.

I am advised that the Committee's assessment of likely prejudicial retrospectivity is correct. Under the Principal Act as it presently applies the Commissioner has the power to go back 3 years and correct a "clerical" error which has occurred in the valuation process. The extension of the provision to cover all types of errors removes an inequity in the valuation process which, currently, inadvertently creates different classes of rate and land tax payers.

The extent to which any change in an unimproved land value will be prejudicial is debateable. In the initial instance, if the error had not occurred, then the rate or land tax payer would have paid rates and land tax on the correct value all along (whether or not this value was higher or lower).

Where an erroneous unimproved land value is corrected the rate or land tax payer may object to the Commissioner on the new value. If he or she is still not satisfied after the Commissioner makes a decision on the objection then an appeal may be lodged with the Administrative Appeals Tribunal. These processes clearly provide an affected person with the opportunity to have the new value determined at a reasonable and acceptable level.

In addition, under section 21A of the principal Act there would be no effect on an owner who bought a property which subsequently had the unimproved value redetermined at a date prior to that person's acquisition, providing a certificate which showed no liability was obtained from the Commissioner prior to buying the property.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Terry Connolly', with a stylized, cursive script.

Terry Connolly

- 5 DEC 1994

