

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

REPORT NO. 1 OF 1994

22 February 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) or 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) or 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
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.

SUBORDINATE LEGISLATION

Subordinate Legislation Upon Which no Comment is Offered

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

Subordinate Law No. 48 of 1993 being the *Motor Traffic Regulations (Amendment)* specifies penalties for new offences created by the *Motor Traffic (Amendment) Act (No. 3) 1993*.

Subordinate Law No. 49 of 1993 being the *Supreme Court (Fees) Regulations (Amendment)* increases a fee and introduces fees for appeals from the Master and for taxing of bills of costs in excess of \$2,000.

Subordinate Law No. 52 of 1993 being the *Canberra Sewerage and Water Supply Regulations (Amendment)* requires all new installations of closet-pans and cisterns to be of the reduced-flush type and renumbers the subregulations in regulation 80.

Subordinate Law No. 53 of 1993 being the *Land (Planning and Environment) Regulations (Amendment)* puts in place a number of changes to the manner in which betterment is determined.

Subordinate Law No. 54 of 1993 being the *Building (Design and Siting) Regulations (Amendment)* extends the exemption relating to design and siting approval for "prescribed works" for which funding from revenues, loans and other money received by the Territory from 1 January 1994 to 1 May 1994, provides for the date within which objections must be made and makes changes to side and rear setbacks to make them consistent with the Territory Plan.

Determination No. 171 of 1993 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land in the Division of Nicholls to be Quist Place.

Determination No. 172 of 1993 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land in the Division of Ngunnawal to be Violet's Park.

Determination No. 173 of 1993 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land in the Division of Ngunnawal to be Barunga Street.

Subordinate Law No. 1 of 1994 being the *Magistrates Court (Civil Jurisdiction) Regulations (Amendment)* prescribes the rate of pre-judgment interest at 9% from 1 February 1994.

Determination No. 1 of 1994 made under the *Housing Assistance Act 1987* revokes Determination No. 123 of 1992 and determines new fees for the occupancy of a site in a long stay caravan park.

Determination No. 2 of 1994 made under section 4 of the *Motor Omnibus Services Act 1955* determined cash fares for special Route 000 services between Old Parliament House and Exhibition Park each way on Saturday 22 January 1994.

Determination No. 3 of 1994 made under section 11A of the *Public Health Act 1928* revokes Determination of Fees No. 159 of 1992 and determines fees for the purposes of the Public Health (Barbers' Shops) Regulations, the Public Health (Boarding-houses) Regulations and the Public Health (Piggeries) Regulations.

Determination No. 4 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the names of public places that are Territory Land in the Division of Amaroo.

Determination No. 5 of 1994 made under paragraph 21(1)(b) of the *Animal Diseases Act 1993* determines a number of diseases to be endemic stock diseases.

Determination No. 6 of 1994 made under paragraph 21(1)(c) of the *Animal Diseases Act 1993* determines bovine brucellosis and tuberculosis to be endemic stock diseases for the purposes of compensation under section 28.

Determination No. 7 of 1994 made under paragraph 21(1)(a) of the *Animal Diseases Act 1993* determines any vertebrate other than man to be stock for the purposes of the Act.

Determination No. 8 of 1994 made under subsection 12(1) of the *Animal Diseases Act 1993* determines a number of diseases to be exotic animal diseases.

Determination No. 9 of 1994 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land to be Margaret Timpson Park.

Subordinate Legislation Upon Which Comment is Offered

The Committee has examined the following subordinate legislation and offers the following comments:

Subordinate Law No. 50 of 1993 being the *Proceeds of Crime Regulations* prescribes a number of aspects relating to the Act's inter-relationship with corresponding State and Territory laws, defines "government business enterprise", "distributable funds" and "suspended funds", sets out narcotic substances for the purposes of the Act, prescribes forms of application and provides for the functions, powers, duties and remuneration of the Public Trustee.

Is There a Possible Error?

Regulation 4 defines "distributable funds", but excludes:

"an amount in respect of which notice has been given to the Public Trustee under subregulation 12(2) or (3)."

There is no subregulation 12(3), so there must be a mistake. Regulation 12 does refer to the giving of notices to the Public Trustee, so it could possibly be intended. However, notices are also required to be given to the Public Trustee by subregulations 11(2) and (3) and the context of these perhaps suggests that they are just as likely to be intended by regulation 4.

A check should be made.

Determination No. 170 of 1993 made under section 4 of the *Public Place Names Act 1989* determines the name of a public place that is Territory Land in the Division of Ngunnawal to be Gula Place.

Is There Duplication of a Determination and of an Error?

In Report No. 22 of 1993 the Committee reported on Determination No. 151 of 1993, which seems to be almost identical with the present determination. The Committee made the following comment about Determination No. 151 of 1993 and the same comment applies to the present determination:

"The map in the Schedule to the determination states that Gula Place is in the "Division of Ngunnawal". The correct name of the Division as entered on the Territory Plan is "Ngunnawal". The heading in the Schedule and the entry under the significance of the name as well as the Explanatory Statement give the spelling "Ngunnawal".

It is suggested that the incorrect spelling is unlikely to render the determination invalid."

Perhaps a check should be made to see if there is duplication of determinations. Even if there is, it is suggested that there is no problem with validity. However, in the future there could be confusion in referring to the determination of the street name if two determinations for the same street remain in place.

Subordinate Law No. 51 of 1993 being the *Bushfire Regulations (Amendment)* changes the name of the principal regulations consequent upon the changing of the name of the Act, prescribes various classes of fire that it will be permissible to light during a period of acute fire danger and removes sexist language and a reversal of the onus of proof.

Removal of Sexist Language and a Reversal of the Onus of Proof

The Committee is pleased to note that, while changing the name of the regulations and prescribing fires that may still be lit during fire danger periods, the opportunity was taken to remove sexist language and also to remove what the Explanatory Statement calls "an unacceptable formulation which reverses the onus of proof". The latter is believed to be a first and is to be commended.

Determination No. 179 of 1993 made under section 4 of the *Motor Omnibus Services Act 1955* determines a cash fare of \$4.00 for special Route 333 for journeys operating on New Year's Eve and up to 6.00 am on New Year's Day.

A Possible Duplication

This determination was signed on 23 December 1993, but not published in the *Gazette* until 14 January 1994.

Section 6(1) of the *Subordinate Laws Act 1989* provides that a subordinate law is to be notified in the *Gazette* and takes effect from the day of notification or another date set by the subordinate law. There is no date set in the present case, so it took effect on 14 January 1994.

Thus the determination did not authorise the legal collection of the fare for New Year's Eve - New Year's Day 1993-94, but does authorise the legal collection of such a fare for future years.

A search of the *Gazette* shows that a Determination of Charges, which appears to be identical in every respect to the present determination except for the fact that it is numbered Determination of Charges No. 178 of 1993 and the present one is numbered Determination of Charges No. 179 of 1993 was published in *Gazette* No. S278 of 24 December 1993.

The Explanatory Statement for the present determination makes no mention of the publication on 24 December 1993, nor is any explanation given as to why this seeming duplication has occurred.

Nevertheless, as there was publication in the *Gazette* before New Year's Eve/New Year's Day 1993-94, it would appear to give legal authority for the collection of the special fare at that time.

Perhaps it might be appropriate to seek confirmation for Members that this is so and ask why an apparent duplication occurred. Perhaps it occurred because there was already a Determination No. 178 of 1993, which dealt with fees for disposal of garbage. That determination is the subject of a comment under the next heading.

Determination No. 177 of 1993 made under section 3F of the *Building and Services Act 1924* revokes Determination of Fees No. 37 of 1993 and determines new fees for the disposal of garbage at ACT Government landfills.

Determination No. 178 of 1993 made under section 3F of the *Building and Services Act 1924* also revokes Determination of Fees No. 37 of 1993 and determines new fees for the disposal of garbage at ACT Government landfills.

Another Possible Duplication

These determinations appear to be identical except for the numbering. If they are identical there is no problem of validity as both provide that the new fees commence on 1 January 1994 and both were published in the *Gazette* before that date. They thus complied with the provisions of section 6(1) of the *Subordinate Laws Act 1989* referred to under the previous heading.

Here, too, perhaps a check should be made to see if they are, in fact, identical and, if they are, consideration should perhaps be given to revoking one to end confusion.

Determination No. 176 of 1993 made under section 65 of the *Building Act 1972* revokes Determination of Fees Nos 87 and 88 of 1993 and determines new fees for the purposes of the Act.

Undertaking Fulfilled and Errors Corrected

The Committee commented on a number of problems with Determinations Nos 87 and 88 of 1993 in its Report No. 13 of 1993. The Committee received a very helpful reply from the Attorney-General, Mr Connolly, of 20 October 1993, which was attached to the Committee's Report No. 19 of 1993, undertaking to correct the problems.

The present determination fulfils the undertaking given by the Attorney-General and acknowledges the part played by the Committee in the process.

GOVERNMENT RESPONSES

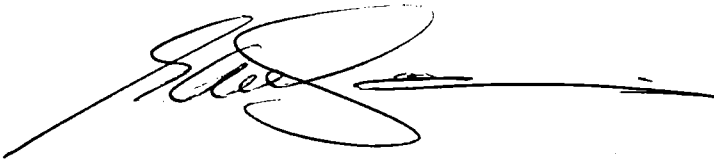
The Committee has received responses to comments made concerning the following Bills:

- . Judicial Commissions (Consequential Amendments) Bill 1993 (Report No. 24 of 1993); and
- . Electoral (Amendment) Bill 1993 (Report No. 24 of 1993).

Copies of the responses are attached.

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

The Attorney-General, Mr Connolly, also wrote to the Committee concerning the notification of legislation and availability of legislation and explanatory documentation to members of the public.

A handwritten signature in black ink, appearing to read 'Ellnor', followed by a long horizontal line extending to the right.

Ellnor Grassby, MLA
Chairperson

22 February 1994



A.C.T. GOVERNMENT

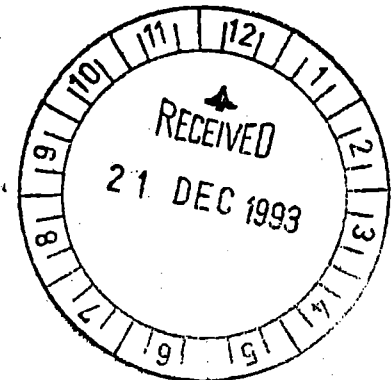
TERRY CONNOLLY MLA

ATTORNEY GENERAL

1 Constitution Ave, Canberra ACT 2601

Phone (06) 20 50011

Mrs Elnor Grassby
Presiding Member
Standing Committee on Scrutiny of Bills and
Subordinate Legislation
ACT Legislative Assembly
1 Constitution Avenue
CANBERRA ACT 2601



Dear Mrs *Elnor* Grassby

The Attorney-General's Department, in conjunction with the Corporate Services Bureau in the Department of Urban Services, recently conducted a review of the process of notifying the making of legislation in the ACT Gazette and of the availability of explanatory documentation to members of the public. The Publications and Public Communication Section (P&PC) in the Bureau is responsible for the gazettal of legislation and the sale of legislation and explanatory documentation to the public.

As a consequence of the review it is proposed that from 1 January 1994 the notification of the making of a disallowable instrument will follow the approach taken regarding the notification in the Gazette of Acts and Regulations, and accord strictly with the requirements of the Subordinate Laws Act 1989, by notifying the making of the instrument and the place at which a copy may be purchased. As you will be aware, the approach which has previously been taken is to publish the entire instrument in the Gazette.

It is proposed that disallowable instruments will be available for purchase from P&PC at its Allara House office in Canberra City and associated explanatory statements will also be available for purchase at that office. Explanatory statements are not presently available for purchase by the public.

Regulations will continue to be available for purchase from the City shopfront. The review revealed that explanatory documentation for regulations also are not available for purchase. To overcome this P&PC will also make this documentation available from Allara House but, in recognition that this may prove inconvenient to some purchasers, P&PC will arrange postage of the document on request.

Present arrangements concerning Bills and Acts and their explanatory memoranda will continue. This means that Bills and explanatory memoranda will be available at the City shopfront until passed by the Assembly when the Act will also become available. After a short period of time the Bill and explanatory memorandum will be withdrawn, for the reasons outlined below, from which time all Bills, explanatory memoranda and Acts will be available from P&PC's Allara House office. Acts will continue to be available from the City shopfront as well.

Although the availability of legislation from different locations may appear disjointed it has been brought about in part by resource difficulties at the shopfront associated with storage and cataloguing and also because of the wide range of competing services which are provided from that facility. Further, it is anticipated that the demand for legislation and explanatory documentation which will be provided from Allara House will be minimal and therefore the degree of inconvenience to the public is expected to be negligible.

It should also be noted that P&PC makes all legislation and explanatory documentation available to ACT public libraries for community use.

I trust that the foregoing information is helpful to the Committee. I believe that the changed arrangements will considerably improve access to Territory legislation by its citizens.

Yours sincerely



Terry Connolly

20 DEC 1993



A.C.T. GOVERNMENT

TERRY CONNOLLY MLA

ATTORNEY GENERAL

1 Constitution Ave, Canberra ACT 2601

Phone (06) 20 50011

Mrs Elnor Grassby
Presiding Member
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Dear Mrs Grassby

On 20 December 1993 I wrote to you outlining, among other things, a proposal to bring the notification of disallowable instruments in the Gazette into line with the procedures for the notification of all other legislation. This would entail the publication in the Gazette of a simple notice of the making of a disallowable instrument and advice of the place at which a copy of the instrument may be purchased. At present notification entails the publication in the Gazette of the entire disallowable instrument.

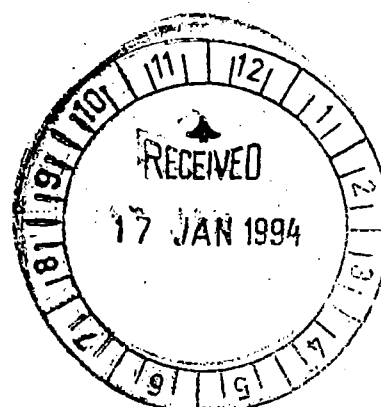
However since I wrote to you an impediment to the proposed course of action has been discovered. Paragraph 6 (1) (a) of the Subordinate Laws Act 1989 provides that a subordinate law shall be notified in the Gazette. However the effect of subsection 6 (2), which provides for the mechanism of a notice of making and advice of the place at which the legislation may be purchased, is restricted to 'regulations, rules or by-laws' and does not include a disallowable instrument as defined in subsection 6 (12) or as described in section 10. This appears to be unintended.

I consider it desirable that the matter be clarified before a change to the existing arrangements is made. Accordingly I propose to introduce a Bill into the Assembly as soon as practicable for this purpose and to delay implementation of the changed arrangements until the Bill is passed. The other initiatives outlined in my letter of 20 December 1993 are not affected.

Yours sincerely


Terry Connolly

4 JAN 1994





A.C.T. GOVERNMENT

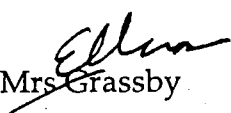
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Dear Mrs  Grassby

In its Report No. 24 of 1993 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Judicial Commissions (Consequential Amendments) Bill 1993.

The Committee suggested that the intention behind the proposed new section 10J of the *Magistrates Court Act 1930* could be frustrated by the making of a term appointment which extends beyond the proposed retiring age of 70 years for Special Magistrates.

I agree with this assessment. Assuming that the Judicial Commissions legislation is passed by the Assembly, I have asked my Department to include an amendment to the *Magistrates Court Act*, when that Act is next amended, to prevent a term appointment being made which would extend beyond the appointee's 70th birthday. In the meantime, the intention of the amendment will be implemented administratively to ensure that Special Magistrates are not appointed beyond the age of 70 years.

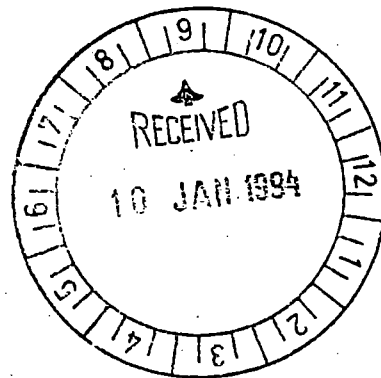
I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

10 JAN 1994





A.C.T. GOVERNMENT

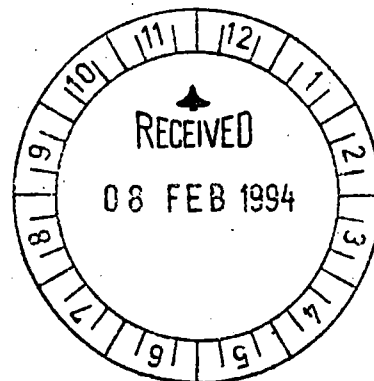
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Ellnor
Dear Mrs Grassby

In its Report No. 24 of 1993 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on a number of provisions of the Electoral (Amendment) Bill 1993 ("the Bill").

Firstly, the Committee noted that proposed section 130 contains an incorrect cross-reference to "receipt of a ballot paper under section 170". The provision should refer to a ballot paper received under proposed section 129, the section dealing with persons claiming an ordinary vote at a polling place. This error will be corrected by a Government amendment to the Bill.

The Committee queried whether suppressed addresses appear on a certified list of electors. In short, the answer is no. Proposed section 71 provides for the suppression of electors' addresses "from any extract from the roll". Proposed section 117, which provides for the preparation of certified lists of electors, states that a certified list "is an extract from the roll". Consequently suppressed addresses are not to be printed on certified lists of electors. The names of electors with suppressed addresses are still printed on the certified lists.

The answer to the Committee's query concerning how a person on a certified list, but whose address is suppressed, may vote is that all electors who have suppressed addresses must cast a declaration vote, either:

- by post before polling day (proposed subsections 132(1), (2) and (4));
- in person before an officer in the ACT prior to polling day (proposed paragraph 132(1)(b), subsection 132(2) and paragraph 132(6)(a));
- in person before an officer interstate on or before polling day (proposed paragraph 132(1)(b), subsection 132(2) and paragraph 132(6)(b)); or
- at a polling place on polling day (proposed subparagraph 131(1)(a)(ii), and subsection 131(4)).

Electors with suppressed addresses are required to cast declaration votes prior to polling day or interstate in the same manner as any other elector who votes other than at a polling place. Electors with suppressed addresses are required to cast declaration votes at polling places on polling day as it is not possible for such electors to verify their right to receive an ordinary vote by stating an address which can be found on the certified list.

To compensate for this minor inconvenience, electors with suppressed addresses are able to cast a declaration vote at any time from the 19th day before polling day without having to claim that they are unable to attend a polling place on polling day (proposed paragraph 132(1)(b)).

Details of suppressed addresses shown on declaration vote certificates are not made available for public inspection (proposed subsection 134(2)).

In light of the above, no changes to the Bill are necessary to meet the Committee's concerns.

The Committee noted that no review process was provided for a number of discretions conferred in the Bill and suggested that some of these may warrant consideration for possible review. Each of the decisions identified by the Committee has been considered and a response in respect of each is set out below.

(a) *Proposed subsection 74(3) — removal of a name from a closed roll by the Commissioner*

Proposed subsection 74(3) is based on section 106 of the *Commonwealth Electoral Act 1918*, which gives the Divisional Returning Officer of an electoral Division the power to remove a name from a roll on receipt of a certificate from the Australian Electoral Officer for the relevant State or Territory stating that a person had secured enrolment pursuant to a false statement made in an enrolment claim. The Commonwealth Electoral Act does not give a right of review of this decision.

This provision is aimed at preventing any person (particularly any candidate) benefiting from fraudulent enrolment, in the (probably unlikely) event that the facts of the fraudulent enrolment came to the attention of the Electoral Commissioner prior to polling day. Because of the time constraints — rolls close 29 days before polling day, and certified lists are printed soon thereafter — it would not be possible to allow a normal review process to take place in this case.

However, any person whose name was removed from the roll as a result of this process and consequently was not listed on the certified list would be eligible to cast a declaration vote. In that case the Commissioner would be required to determine for a second time (under Schedule 3) whether the person's name was removed from the roll in error. If the Commissioner decided not to admit the declaration vote for further scrutiny on the basis that the person was not entitled to be enrolled, that decision would be reviewable by the Supreme Court sitting as the Court of Disputed Elections in the event of the election being disputed under Part XVI.

After the relevant election, any person whose name was removed from the roll under this provision could reapply for enrolment. If the person's claim for enrolment at that stage was rejected, the person would have the normal review rights applicable to ordinary claims for enrolment.

- (b) *Proposed subsection 75(4) — rejection by the Commissioner of an objection to enrolment on the grounds that the Commissioner believes the objection is frivolous or vexatious*

The omission of a review right for this decision was an oversight in the Bill. The Government will move an amendment to the Bill to insert a review right in respect of such a decision.

- (c) *Proposed section 84 — refusal by the Commissioner to accept an application for registration of a party because the applicant has not provided information requested by the Commissioner*

The omission of a review right for this decision was an oversight in the Bill. The Government will move an amendment to the Bill to insert a review right in respect of such a decision.

- (d) *Proposed section 104 — rejection by the Commissioner of a nomination on the grounds that the nomination is not substantially in conformity with proposed section 99*

This decision is explicitly made reviewable by only the Court of Disputed Elections in the event of an election being disputed under proposed section 252. Proposed paragraph 252(2)(a) states that the acceptance or rejection of a nomination of a candidate by the Commissioner is to be taken as disputing the validity of an election, in which case the only means of review is by application to the Court of Disputed Elections.

This provision is intended to prevent the electoral process from being disrupted by legal proceedings prior to polling day. Ballot papers are printed within 24-48 hours of the close of nominations to allow pre-poll voting to commence. If ballot papers could not be finalised in this time because of a dispute over a nomination, the successful conduct of an election could be jeopardised. It is usual practice in other jurisdictions, including the Commonwealth, to restrict appeal rights related to rejected nominations to the courts of disputed elections.

The Government does not therefore consider it appropriate to provide for an additional review mechanism in this case.

- (e) *Proposed section 110 — rejection of a voting ticket by the Commissioner*

As the Chief Minister has announced, all the provisions in the Bill relating to ticket voting are to be removed from the Bill by Government amendment, including this provision.

(f) *Proposed subsection 189(4) — rejection of an application to contest a casual vacancy*

This decision is analogous to the decision under proposed section 104, referred to above, in that it relates to the acceptance or rejection of an application to contest a vacancy in the Assembly. Again, it is intended that this decision should only be reviewable by disputing the result of an "election" to fill a casual vacancy by application to the Court of Disputed Elections under Part XVI.

(g) *Proposed paragraph 206(4)(b) — discretion on the part of the Commissioner to allow a longer period for the making of a claim for election funding*

The omission of a review right for this decision was an oversight in the Bill. The Government will move an amendment to the Bill to insert a review right in respect of such a decision.

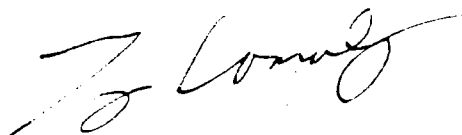
(h) *Proposed section 238 — rejection by the Commissioner of a request to correct an error or omission in a claim or return*

The omission of a review right for this decision was an oversight in the Bill. The Government will move an amendment to the Bill to insert a review right in respect of such a decision.

The final matter which the Committee raised concerned the right of access to copies of documents seized under warrant. The Committee's suggestion for the inclusion of access provisions will be taken up and a Government amendment to the Bill will be moved to insert a right along the lines suggested.

I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

- 7 FEB 1994