STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO 1 of 1991

11 January 1991

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

1 Constitution Avenue
CANBERRA A.C.T.2601
GPO Box 1020
Telephone: (06) 275 8570
Fax: (06) 275 8108

STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION

Mr B Stefaniak MLA
Acting Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear ~~Mr~~ Bill Stefaniak

Please find enclosed a copy of report No. 1 of 1991 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under the 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. Accordingly, I seek your approval to print and circulate Report No. 1 of 1991.

Yours sincerely

Carmel Maher MLA
Presiding Member

11 January 1991

Approved
Bill Stefaniak MLA

11 January 1991

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MEMBERS OF THE COMMITTEE

Ms C Maher MLA (Presiding Member)
Mr T Connolly MLA
Mr B Stefaniak MLA

Secretary: Mr T Duncan
Legal Advisor: Emeritus Professor D Whalan

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 (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-viewable decisions; and
(d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(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) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
(d) inappropriately delegate legislative powers; or
(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(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.

ROLE OF THE COMMITTEE

The Committee examines all Bills and delegated 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 delegated legislation that comply with the high ideals set out in the Terms of Reference.

BILLS UPON WHICH NO COMMENT IS OFFERED.

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

Drugs of Dependence (Amendment) Bill 1990

This Bill would complement the Poisons and Drugs (Amendment) Bill 1990 by updating the lists of drugs of dependence in the principal Act.

Poisons and Drugs (Amendment) Bill 1990

This Bill would update the poisons and drugs lists in the principal Act.

Royal Commissions and Inquiries (Consequential Provisions) Bill 1990

This Bill would repeal the Enquiry Act 1938 and make amendments to a number of Acts consequential to the passing of the Royal Commissions Act 1990 and the Inquiries Act 1990.

BILLS UPON WHICH COMMENT IS OFFERED.

Inquires Bill 1990

This Bill would authorise the Executive to appoint a Board of Inquiry to inquire into a specified matter which does not need a Royal Commission.

(a) Self-incrimination.

Clauses 27 and 28 create offences for witnesses who fail to attend or produce documents when summoned or refuse to take an oath or make an affirmation. Subclauses 27(4) and 28(3) provide that it is not a reasonable excuse for any failure or refusal that to comply would tend to incriminate the person.

However, clause 19 provides that a statement or disclosure made, or a document or thing produced or anything that comes out incidentally to an appearance by a witness, is not admissible in evidence against that witness in any proceedings except "proceedings for an offence against this Act". As with the similar provisions in the Royal Commissions Bill 1990 and the Trade Measurement Bill 1990, the Committee suggests that this form of provision is not inappropriate in the circumstances.

(b) Reversal of Onus of Proof.

Clause 31 creates offences relating to the intimidation or dismissal of witnesses or potential witnesses. Clause 31(2) provides that an employer shall not dismiss an employee or prejudice an employee in employment because an employee appeared, or is to appear, as a witness before a Board of Inquiry, or because of any evidence given by the employee. Clause 31(3) provides as follows:

"(3) If all the elements of an offence against subsection (2) other than the reason for the employer's action are proved, the onus of proving that the dismissal or prejudice was not because the employee appeared or was to appear as a witness or gave evidence is on the employer."

This provision reverses the onus of proof. Possibly it could be argued that the reversal may be reasonable in the circumstances on the basis that the facts are such that are peculiarly within the knowledge of the employer. But, as there is a reversal of the onus of proof, the Committee draws attention to the matter.

(c) Clauses in the Royal Commissions Bill 1990 that could possibly be included in the Inquiries Bill 1990.

The Committee noted that while the Royal Commissions Bill 1990 and the Inquiries Bill 1990 were very similar, a number of clauses were not included in the latter Bill. The Committee is aware that the Royal Commissions Bill is designed for more wide ranging and significant inquiries, and therefore it is to be expected that the Bill should be more comprehensive in setting out its powers and procedures. Whilst the Committee does not comment on policy matters, it nevertheless draws the Assembly's attention to three largely technical clauses that have been included in the Royal Commissions Bill 1990 which could possibly be included in the Inquiries Bill 1990. One (clause 27) provides that a Royal Commission has power to do all things necessary as incidental to the performance of its functions, another (clause 35) sets out procedures for arrest of witnesses who fail to appear, while a third (clause 47) provides for the protection from personal liability of certain officers who have exercised powers under the Bill.

Royal Commissions Bill 1990.

This Bill would authorise the Executive to appoint a Royal Commission. There are similar provisions for comment to those in the Committee's comments in paragraphs (a) and (b) on the Inquiries Bill 1990.

(a) Self-incrimination.

Clause 36 and 37 create offences for witnesses who fail to attend or produce documents when summoned or refuse to take an oath or make an affirmation. Subclauses 36(4) and 37(3) provide that it is not a reasonable excuse for any failure or refusal that to comply would tend to incriminate the person.

However, clause 24 provides that a statement or disclosure made, or a document or thing produced or anything that comes out incidentally to an appearance by a witness, is not admissible in evidence against that witness in any proceedings except "proceedings for an offence against this Act". The Committee suggests that this form of provision is not inappropriate in the circumstances.

(b) Reversal of Onus of Proof.

Clause 40 creates offences relating to the intimidation or dismissal of witnesses or potential witnesses. Subclause 40(2) provides that an employer shall not dismiss an employee or prejudice an employee in employment because an employee appeared, or is to appear, as a witness before a Royal Commission or because of any evidence given by the employee. Subclause 40(3) provides as follows:

> "(3) If all the elements of an offence against subsection (2) other than the reason for the employer's action are proved, the onus of proving that the dismissal or prejudice was not because the employee appeared or was to appear as a witness or gave evidence is on the employer."

This provision reverses the onus of proof. Possibly it could be argued that the reversal may be reasonable in the circumstances on the basis that the facts are such that are peculiarly within the knowledge of the employer. But, as there is a reversal of the onus of proof, the Committee draws attention to the matter.

Trade Measurement Bill 1990.

This Bill would regulate the measurement of trading goods and provides for the inspection of measuring instruments, the licensing of people servicing measuring instruments and for labelling requirements for pre-packaged goods.

(a) Cross-references to a Complementary Bill.

There are several cross-references in the Bill to the Trade Measurement Administration Act 1990. This does not cause much difficulty in scrutinizing the present Bill, but when the Administration Bill becomes available there will need to be some cross-checking done.

However, one amendment that will need to be made to the present Bill is in subclause 3(1) where "Administration Act" is defined to mean "the Trade Measurement Administration Act 1990" as no such Act exists.

(b) Conclusive Presumptions.

Clause 27 provides that for the purposes of determining the value in respect of a transaction or the amount of tax, rate, toll, charge or other impost, it is to be conclusively presumed that the mass of a vehicle determined by direct measurement of the mass of the vehicle is more accurate than the mass determined by the "end-to-end" (that is the total of axle loads) measurement. Similarly, the mass of a railway vehicle determined when the vehicle is stationary is conclusively presumed to be more accurate than the mass determined when the vehicle is in motion.

Despite the fact that they do involve conclusive presumptions, these factual situations may well provide circumstances where such conclusive presumptions are reasonable.

(c) Powers of Entry.

Subclause 60(1) provides for powers of entry by an inspector for the purpose of investigating possible offences. Subclause 60(2) provides that an inspector is not entitled to enter a part of the premises used for residential purposes except with the consent of the occupier or pursuant to a search warrant.

Two points can be made, although it is recognized that it is possible that the following two provisions may be being included in the complementary Administration Bill that is yet to come. First, the now customary provision in ACT law that ensures that consent to entry is really genuine consent is not included. An illustration of the provision is s. 236 of the Credit Act 1985, which Act would seem to involve the same kind of issues as the present Bill. Section 234 allows the Director of Consumer Affairs or an investigating officer to enter and search the premises and seize things with the consent of the occupier. Section 236 then contains detailed provisions relating to the consent. It provides as follows:

> 236 (1) Before obtaining the consent of a person for the purposes of section 234, the Director or an investigating officer shall inform the person that he may refuse to give his consent.
>
> (2) Where the Director or an investigating officer obtains the consent of a person for the purposes of section 234, he shall ask the person to sign a written acknowledgement -
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> (a) of the fact that he has been informed that he may refuse to give his consent;
>
> (b) of the fact that he has voluntarily given his consent; and
>
> (c) of the day on which, and the time at which, he gave his consent.
>
> (3) An entry by the Director or an investigating officer by virtue of the consent of a person is not lawful unless the person voluntarily consented to the entry.
>
> (4) Where it is material, in any proceedings, for a court to be satisfied of the voluntary consent for the purposes of section 234 and an acknowledgement, in accordance with sub-section (2), signed by the person is not produced in evidence, the court shall assume, unless the contrary is proved, that the person did not voluntarily give such a consent."

Apart from the use of sexist language in the section, it is suggested that it is a good precedent for giving proper protection to ensure that consent to entry is true consent.

Secondly, the Bill does not include any provision in relation to the issue of a search warrant to an inspector. There are several ACT precedents for the issue of search warrants to statutory officers, but here, too, the Credit Act 1985 contains a suitable precedent in s. 235 that could be adapted for use in the present Bill.

(d) Self-incrimination.

There is a number of provisions in Part VII of the Bill, dealing with inspectors, which enable inspectors to require people to answer questions or produce records. Subclause 66(1) provides that a person is not excused from answering or producing documents on the ground that to do so may tend to incriminate the person. However, subclause 66(2) provides that an answer given or document produced in compliance with a requirement in this Part "is not admissible against the person in any criminal proceedings other than proceedings for an offence under section 73."

The Committee suggests that this form of provision is not inappropriate in the circumstances.

(e) Retention of Records.

Clauses 61 and 62 provide for seizure and retention of various articles and records. Retention of many articles may well be necessary for the prosecution of an offence. There are adequate provisions in clause 64 for dealing with certain seized property, although there is no mention of records in that clause.

Records that are seized may well contain material relevant to the continuation of the person's business. Paragraphs 61(c) and 62(1)(d) make provision for the making of copies of records, but they do not specifically provide that copies are to be given to the person, so that business is not impaired. Quite coincidentally, clause 26 of the Royal Commissions Bill 1990 contains provisions for making copies of documents available, although those provisions may be a little more elaborate than might be appropriate here.

(f) Vicarious Liability.

Subclause 71(1) provides that, if an employee contravenes a provision, the employer is also deemed to have contravened the provision. This is so, even if the employee contravened the provision without the employer's authority and even if the employee acted contrary to the employer's orders or instructions. This seems a strong provision rendering a person vicariously criminally liable for the acts of another. This is emphasised when it is noted that subclause 71(3) provides that the employer can be proceeded against and convicted even if the employee is not proceeded against or convicted.

Under subclause 71(2) the employer does have the defence of showing that the employer had no knowledge of the contravention and could not, by the exercise of due diligence, have prevented the contravention. This defence still appears to leave open possible circumstances where an employee could act maliciously against an employer in contravention of an innocent employer's orders or instructions.

Clause 72(1) provides that, if a body corporate contravenes any provision, each person who is a director or who is concerned with management is deemed to have contravened the provision. However, in this case a director or manager is only liable "if the person knowingly authorised or permitted the contravention". This seems to be a fair provision.

(g) Reversal of Onus of Proof.

Subclause 77(1) provides that, unless the contrary is established, an article is presumed to be a pre-packed article if it is found in premises where articles of the same kind are packed for sale or are kept after being packed for sale. Although this is a reversal of the onus of proof, it can be argued that it may be reasonable in the circumstances.

(h) No Retrospectivity.

Clause 80 repeals the existing Weights and Measures (Packaged Good) Acts and provides that, if an articles was packed before the present Bill comes into force as an Act and would have complied with the old law, there is no contravention of the new provisions. This very properly ensures that the new provisions do not operate retrospectively.

Carmel Maher MLA
Presiding Member

January 1991