

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

REPORT NO 2 of 1990

20 March 1990

**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

MEMBERS OF THE COMMITTEE

**Ms C Maher MLA (Presiding Member)
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) the majority of members constitutes a quorum of the committee;
- (6) the committee be provided with the necessary additional staff, facilities and resources; and
- (7) 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 Bills. 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 that comply with the high ideals set out in the Terms of Reference.

The Committee has examined the following Bills:

Motor Traffic (Amendment) 1990
Motor Vehicles (Dimensions and Mass) 1990
Domestic Violence (Amendment) 1990
Weapons 1990
Publications Control (Amendment) 1990
Publications Control (Amendment) 1990 [No.2]

In relation to the Motor Traffic (Amendment) Bill 1990, the Domestic Violence (Amendment) Bill 1990 and the Publications Control (Amendment) Bill 1990 [No.2] the Committee offers no comment.

MOTOR VEHICLES (DIMENSIONS AND MASS) BILL 1990

This Bill was introduced into the Assembly on 13 February 1990 by Mr Duby (Minister for Finance and Urban Services). The Bill enacts comprehensive provisions regulating the dimensions, loads and weights of heavy vehicles.

(a) Crown not liable to prosecution

As with the provisions of the Clinical Waste Bill to which the Committee referred in Report No. 1, clause 5 of the present Bill provides that, although the Act is to bind the Crown, the Crown may not be prosecuted for an offence.

The Committee pointed out that such provisions are quite common and that seeking to have them changed was not of fundamental importance. In the present case, the Committee suggests that probably there is even less reason to seek change.

(b) Power to delegate

Clause 6 of the Bill gives a power to the Registrar to delegate his or her powers, except the power to appoint inspectors. In Report No. 1 the Committee raised the question of the very wide power of delegation that was given to the Controller under the Clinical Waste Bill. In contrast, here there are not such extensive powers given to the Registrar. Indeed, the power to appoint inspectors is perhaps the most significant power conferred and the Bill ensures that it is exercised by the Registrar personally.

The Committee concludes that the power of delegation given in the present Bill is a proper one.

Indeed, the form of delegation and exception that is used in the present instance could be a possible formula for use in the Clinical Waste Bill. If it were adopted there, the most significant powers of granting, varying, suspending or cancelling licences given to the Controller could be excepted and be exercisable only by the Controller.

(c) Penalties for offences

There is a number of offences and defences created by clauses 32- 40 and monetary penalties are prescribed. Then clause 46 sets out the requirements relating to a Notice of Offence, and clause 46(5) sets out different penalties to be specified in a Notice of Offence for those same offences in clauses 32-26.

The following is a simple illustration. Clause 34 prescribes a penalty of \$1000.00 for unlawful use of a trailer with an articulated vehicle. For the same offence, clause 46(5)(i) prescribes a penalty of \$200.00 to be specified in a Notice of Offence.

The Committee's understanding is that, if a person who receives a Notice of Offence pays the \$200.00 within 21 days or the extended time that the Registrar may allow then, under the provisions of clause 46(6), that is the end of the matter: all liability goes, no further proceedings can be taken and a person is not to be regarded as having been convicted. That is, if the person pays up, the slate is wiped absolutely clean. However, if the person fails to pay, or disputes any matter, and it goes to Court, then the maximum penalty could be up to \$1,000.00.

The Committee would welcome confirmation of its understanding of the operation of these clauses where there are different penalties being mentioned for the same offences.

(d) Right to review

Clause 54 deals with the right to review of decisions by the ACT Administrative Appeals Tribunal. Once again, the Committee repeats a point made in Report No. 1. Clause 54(3) provides that the validity of the decision is not affected if the notice on review rights is defective and this formula has proved necessary in many pieces of legislation.

However, here too, it might be appropriate for there to be standard forms that automatically include the information about review rights.

(e) Evidentiary provisions

There is a number of clauses that deal with the manner in which evidence may be given.

Clause 40 provides that a defendant is not guilty of certain offences if evidence is adduced as to reasonable mistake, reasonable reliance on information supplied or that the offending act was due to some other person's fault and the defendant acted reasonably to avoid committing the offence and that evidence is not rebutted by the prosecution. This clause is, in the Committee's opinion, very properly drawn.

The Committee offers the following illustration of where it could operate. Clause 34 creates an offence of driving a trailer with an articulated vehicle if a trailer is coupled to the vehicle. Clause 37(2) provides that the owner of the equipment also

commits an offence as well as the driver. If clause 40 were not there, a thief could steal the equipment, use it unlawfully and the owner would have no defence to a charge.

Also, there are evidentiary provisions relating to official certificates or notices in clauses 46(7)-(9), 49, 50, 52 and 56. In the Committee's opinion, these provisions, too, comply with the conventions relating to such certificates and notices.

WEAPONS BILL

This Bill was introduced into the Assembly on 22 February 1990 by Mr Collaery (Attorney-General). The Bill enacts comprehensive provisions regulating the possession and use of weapons in the ACT.

(a) Power to delegate

Clause 10 of the Bill gives a power to the Registrar to delegate any of his or her powers under the Act. There are very significant powers given to the Registrar including powers to grant, refuse, suspend or cancel licences. It may be thought that many of these powers should not be delegated too far down the line.

In Report No.1 the Committee raised the question of the very wide power of delegation that was given to the Controller under the Clinical Waste Bill. The Committee notes that the power to delegate is general in the present Bill and not restricted to public servants as it was in the case of the Clinical Waste Bill. In contrast, in the Motor Vehicles (Dimensions and Mass) Bill restrictions were imposed to ensure that the most significant power conferred by the Bill (appointing inspectors) is to be exercised by the Registrar personally.

There has not yet been time for the Minister to respond to the Committee's queries on the Clinical Waste Bill and the Motor Vehicles (Dimensions and Mass) Bill referred to earlier in this report. It may be that there are some powers that should be exercised by the Registrar ("Controller" in the Clinical Waste Bill), some that it is appropriate to delegate only to officers at Senior Executive Service level and other minor or less intrusive powers that can properly be delegated to more junior officers.

The Committee is concerned at the differing powers of delegation given to officials in these three Bills, and would see benefit in a standard approach being adopted.

(b) Return of Licences or Surrender of Weapons

Because there are several different kinds of licences and a number of provisions under which licences or weapons are to be returned to the Registrar or licences or weapons to be returned by the Registrar, there are several provisions governing such returns. The following provisions apply:

- . clause 32 (return within 7 days if a licensee ceases to possess a restricted weapon or the licence expires and is not renewed - penalty \$1,000.00);
- . clause 40(5) (return of dealer's book within 7 days if licence cancelled or surrendered or expires and is not renewed - penalty \$2,000.00);
- . clause 48(4) (return of licence to licensee after variation by Registrar - no time limit or penalty for failure on Registrar's part);
- . clause 53 (return within 7 days if dealer ceases to carry on business at an address - penalty \$2,000.00 or imprisonment for 12 months or both);
- . clause 54(1) (Surrender of weapon within 7 days in certain circumstances - penalty \$2,000.00 or imprisonment for 12 months or both);
- . clause 54(2) (return of weapon by Registrar within 7 days of successful appeal to AAT - no penalty for failure on Registrar's part);
- . clause 54(3) (return of weapon by Registrar on completion of endorsement - no time limit or penalty for failure on Registrar's part);
- . clause 55(3) and (4) (return or give notice within 7 days where licensee or dealer respectively ceases to possess or disposes of weapon - penalty \$2,000.00);
- . clause 56 (return by dealer within 7 days for change of address and return after amendment by Registrar - penalty for dealer \$1,000.00, but no time limit or penalty for failure on Registrar's part);
- . clause 64 (surrender of weapon within 7 days where licence refused - penalty \$2,000.00 or imprisonment for 12 months or both; and on successful appeal against refusal return of weapon by Registrar to owner within 7 days - no penalty for failure on Registrar's part);
- . clause 73 (notification within 7 days of changes in a business for variation - penalty \$1,000.00);
- . clause 79 (return of weapon by Registrar where charge dismissed by court - no time limit or penalty for failure on Registrar's part).

Clause 40(5) concerning return of a dealer's book very properly contains a "without reasonable excuse" defence, if there is a failure to comply with the clause's provisions.

The Committee questions why "without reasonable excuse" defences have not been inserted in the other provisions.

The Committee considers that there is a case for such a change, and offers the following example in order to demonstrate its need.

Clause 53 provides that, if a licensed dealer ceases to carry on business at an address to which the licence relates, the licensee shall within 7 days of so moving or ceasing to carry on business at that address, surrender the licence to the Registrar. (In passing the phrase "so moving" is slightly puzzling as the clause does not otherwise mention moving.) The Committee postulates these facts. There is a totally successful robbery at a dealer's premises in which everything is stolen. In addition, the robbers set fire to the premises and all is destroyed, including the dealer's licence. Not only has the dealer lost his or her stock and premises, but, because the licence was burnt, he or she can't comply with clause 53 and has committed an offence to which there is no defence.

Illustrations could be given for other clauses.

On a related matter, the Committee notes that clause 51, which provides for the issue of a copy of a lost, stolen or destroyed licence, requires notification within 2 days under pain of a penalty of \$1,000.00. It is a short period and there may be reasons for this. However, the Committee queries why the short period is thought to be necessary and why there is no "without reasonable excuse" defence in this section either.

To illustrate the point; if a licensee's house burnt down destroying everything including the licence, the licensee might be thinking of getting a roof over his or her head and might quite innocently forget for 48 hours the obligations under clause 51. Too bad - an offence has been committed to which there is no defence.

(c) Directory or Mandatory Provisions

There are many provisions in the Bill that confer powers on the Registrar to grant, refuse, cancel, vary or suspend licences and to do many other things. The Committee noted that some clauses provide for the mandatory "the Registrar shall" do certain things and others provide for the directory "the Registrar may" do certain things.

The following clauses contain "shall" provisions:

24, 25, 26, 30, 35, 36, 39(4), 48(4), 50, 52(2), 54(2) and (3), 56, 63, 64, 66(2), and (4), 70, 71, 72(1), 79(4) and (5), 95, 101, 104 and 109. The following clauses contain "may" provisions: 39(2), 48(1), and (3), 51, 52, 59 and 66(1).

Most of the distinctions appear to be perfectly reasonable. However, on some the Committee couldn't follow the reason for the decision.

For instance, clause 48(1) quite properly provides that the Registrar may specify licence conditions. Clause 48(3) provides that

"where the Registrar is satisfied that in the interests of the safety of members of the public"

there should be conditions or variation or revocation of conditions in the licence, the Registrar may require the holder of the licence to forward the licence for variation.

If the Registrar is satisfied that the safety of the public is at risk perhaps he or she should be required to call in the licence for variation. This directory provision seems to contrast with the mandatory provisions of clause 72(1) under which the Registrar "shall require" a person to produce the licence for the cancellation of an endorsement of the registration of a dangerous weapon.

Again, almost all the clauses about the issuing of licences require the Registrar to do so once he or she is satisfied as to the facts. However, clause 51, which provides for the issue of a copy of a licence on the payment of the determined fee, merely provides that the Registrar may issue the copy. As a licensee is required to have a licence and to produce it for inspection when required, perhaps the Registrar should be required to issue a copy on payment of the fee.

Therefore the Committee considers that the "shall" and "may" provisions should be checked.

(d) Evidentiary Provisions

Clause 102 provides for evidentiary provisions relating to official certificates. In the Committee's opinion, these provisions comply with the conventions relating to such certificates and notices.

(e) Right to Review

Clause 103 deals with the right to review of decisions by the ACT Administrative Appeals Tribunal. There are very comprehensive rights to the review of decisions and it appears that all significant decisions are made subject to review.

Once again, the Committee repeats a point made in Report No.1 and in comments made above about the Motor Vehicles (Dimensions and Mass) Bill about the notification of decisions. Clause 104(3) provides that the validity of the decision is not affected if the notice on review rights is defective. This formula has proved necessary in many pieces of legislation.

However, just as the Committee has asked about the provision in the other Bills, here, too, it seems appropriate for a query about the preparation of standard forms that automatically include the information about review rights.

(f) Devices for Protection against Assault

Clauses 4(1) and 16 and Schedule 3 provide that certain specified things are totally prohibited. However, items 11 and 12 of Schedule 3 are of interest. They prohibit

"A weapon capable of discharging by any means any irritant liquid, powder, gas or chemical or any pyrotechnic flare or dye" and

"Any irritant or poison gas".

In recent years, some protective devices or warnings have been developed for women to protect themselves against possible illegal attack.

The Committee would welcome comments on whether any of the prohibitions in Schedule 3 would outlaw any of the devices that have been developed to permit women to thwart interference with their rights and freedoms.

(g) Powers of Entry, Search and Seizure

Clauses 74 to 79 deal with the powers of entry, search and seizure.

In Report No 1 the Committee raised a question about a provision which did not build in the usual prohibition against self-incrimination.

The context is slightly different in the present Bill, and the question is dealt with quite openly here. Clause 75(5) provides that a person is obliged to furnish books, documents, records and information and to answer questions and a person cannot refuse to do these things on the grounds that to do so would incriminate him or her. However, clause 75(6) goes on to provide that any evidence so gained can only be used in proceedings for an offence against the Weapons Act. This form of drafting, too, has come into more general use in recent times. It means that the provisions cannot be used successfully for a general "fishing expedition".

The Committee finds that the present provisions do comply with its Terms of Reference.

PUBLICATIONS CONTROL (AMENDMENT) BILL 1990

This Bill was introduced into the Assembly on 14 February 1990 by Mr Stevenson as a private Members Bill. The Bill seeks to amend the Publications Control Act 1989 so as to remove from "X" films the current entitlement to distribution and to apply to those films the provisions of the Publications Control Act 1989 relating to objectionable publications. The Committee suggests later that the Bill may also affect other publications.

(a) Preliminary Point on Assembly's Powers

The Committee is aware of a newspaper report which suggests that the Bill "is beyond the powers of the ACT Assembly" (Canberra Times, 17 February 1990, page 3).

In setting up the Standing Committee for the Scrutiny of Bills and Subordinate Legislation, the Legislative Assembly followed quite closely the precedent set by the Senate in the scrutiny of Bills portion of the Committee's Terms of Reference. The Terms of Reference authorise the Committee to consider whether

"the clauses of bills introduced into the Legislative Assembly"

breach certain principles that are set out in detail in the Terms of Reference.

The Senate Committee for the Scrutiny of Bills is not authorised to consider whether Bills or clauses of Bills are within power under the Australian Constitution. Similarly, the Committee's Terms of Reference do not authorise the Committee to consider whether Bills or clauses of Bills are within the powers of the Legislative Assembly.

As such consideration is not within the Committee's jurisdiction, the Committee has therefore not examined this issue.

(b) Reversal of Burden of Proof and Entry into Premises

Clause 3 of the Bill redefines "objectionable publication" by adding "an 'X' film" and restructuring the form, but not changing the meaning, of the remainder of the definition. The remainder of the definition refers to unclassified publications or unapproved advertising matter in relation to a film, which have either been refused classification or approval or which describe, depict or promote various kinds of sexual, cruel, drug-related, violent or other matters specified in the definition.

There are also several amendments to other sections of the principal Act that are largely consequential changes flowing from the addition of "an 'X' film" to the definition.

The amendments alter the way in which "an 'X' film" is dealt with, although the meaning of film is not changed by the amendments. Film is defined in s. 3 of the Act as follows:

"'film' includes a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image can be produced".

Section 5 of the Act, which would remain unamended, provides that a

"person shall not advertise, sell, let on hire or distribute an objectionable publication".

Thus the amendments affect the way in which a substantial range of products are dealt with.

Then clauses 4, 5, and 6 of the Bill amend ss.6, 7 and 11 of the Act. The amendments are similar in effect. Before setting out the three provisions and the proposed amendments the Committee first notes that "publishing", which appears in all three sections,

"includes sell, let on hire, exhibit, display and distribute".

Section 6 states that a

"person shall not possess an objectionable publication for the purpose of publishing it".

The penalty for breach is \$2,000.00 or imprisonment for 12 months or both for an objectionable child publication or \$1,000.00 or imprisonment for 6 months or both in any other case. These penalties are the same for s.7 and, as s. 11 only deals with objectionable child publications, only the first set of penalties applies.

Under the Bills s.6 would have the following added to it:

"(2) For the purposes of subsection (1), where a person possesses 5 or more objectionable publications, it is to be presumed that the possession is for the purpose of publication, but that presumption is rebuttable".
(Emphasis added.)

Section 7 provides that

"the occupier of any premises shall not keep or permit to be kept at those premises an objectionable publication for the purpose of publishing it".

Section 7 would have the following added to it:

"(2) For the purposes of subsection (1), where the occupier of any premises keeps, or permits to be kept, at those premises 5 or more objectionable publications, it is to be presumed that the publications are kept there for the purpose of publication, but that presumption is rebuttable". (Emphasis added.)

Section 11 provides that a

"person shall not print or otherwise make or produce an objectionable child publication for the purpose of publishing it".

Section 11 would have the following added to it:

"(2) For the purposes of subsection (1), where a person prints or otherwise makes or produces 5 or more copies of an objectionable child publications, it is presumed that those copies are printed, made or produced for the purpose of publication, but that presumption is rebuttable".
(Emphasis added.)

Each of the emphasised provisions places the burden of rebuttal on the person who possesses, keeps or produces the objectionable publications. All that a prosecutor would need to show would be that a person had 5 or more objectionable publications in his or

her possession or was keeping 5 or more objectionable publications at premises or had printed, made or otherwise produced 5 or more objectionable child publications. It would then be for the defendant to prove that he or she did not possess, keep or produce them for the purpose of publishing them. As we have seen publishing includes "sell, let on hire, exhibit, display and distribute".

If ss. 7, 8 and 11 were amended as suggested, these reversals would not apply only to X films (in the wide meaning of "film"), but to all "objectionable publications" as defined in clause 3.

The amendments effect very important reversals of the onus of proof.

It is perhaps relevant to consider the enforcement provisions in the Act along with the proposed amendments to help to gauge their possible effect.

Sections 31 to 37 of the Act, to which no amendments are proposed, provide for the enforcement of the Act. Section 32 provides that a

"police officer may enter any place, and may search for and seize any thing that he or she believes on reasonable grounds to be connected with an offence that is found on or in the place if, and only if, the search and seizure is made [with consent or under a warrant under s 34].
(Emphasis added.)

It is noted that the section does not draw a distinction between business premises and premises in general, including, of course, private premises. There are plenty of instances where this distinction is drawn, but one is the Clinical Waste Bill presently before the Assembly which carefully does so in clause 32 by referring to "regulated premises" and "any premises". Nor is there any restriction on the times at which entry can be effected (although, of course, a magistrate does have to specify the time in a warrant if entry is by warrant - s 34(3)(b)).

The Committee does not consider this to be a significant point, but nevertheless draws it to the attention of the Assembly.

In addition, as mentioned earlier, the Committee also draws the attention of the Assembly to two other aspects of the Publications Control (Amendment) Bill 1990. These are:

- (i) the proposed amendments do not affect only X films, but affect all "objectionable publications"; and
- (ii) that, under the proposed amendments, if 5 or more "objectionable publications" (which includes "objectionable child publications") are possessed, kept or, in the case of "objectionable child publications", are produced, the onus of proving that they are not for selling, letting on hire, exhibiting, displaying or distribution is on the person who possesses, keeps or produces the publications.