Legislative Assembly for the Australian Capital Territory

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Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 1 OF 2000

8 February 2000

TERMS OF REFERENCE

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(2) The Committee will consider whether:

(a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:

(i) meet the objectives of the Act under which it is made;

(ii) unduly trespass on rights previously established by law;

(iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.

(b) the explanatory statement meets the technical or stylistic standards expected by the Committee.

(c) clauses of bills introduced in the Assembly:

(i) do not unduly trespass on personal rights and liberties;

(ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(d) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four members.

(4) If the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation.

(5) The Committee be provided with the necessary additional staff, facilities and resources.

(6) The foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and Subordinate Legislation): Ms Celia Harsdorf

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - No Comment

The Committee has examined the following Bills and offers no comments on them.

Commission for Integrity in Government Bill 1999

This is a Bill to establish a Commission for Integrity in Government. The primary functions of the Commission would be to investigate conduct lacking integrity or possible such conduct, and to educate public authorities and the community generally on the detrimental effect of such conduct. The concept of "conduct lacking integrity" is defined. A Commissioner would be appointed by the Attorney-General, and be removable only by an address to the Legislative Assembly. The Commissioner would be responsible for the Commission. An Operations Review Committee would advise the Commissioner concerning the investigation function of the Commission, and an Ethical Standards Council would carry out work in relation to educative functions of the Commission.

Environment Protection Amendment Bill (No 2) 1999

This Bill would amend the *Environment Protection Act 1997* by the insertion of a provision that would require the chief executive of an administrative unit, or a public authority, to include certain information in reports under the *Annual Reports (Government Agencies) Act 1995*. This information relates to the actions of the unit or of the agency as it impinges on the environment and in particular in relation to the principles of ecologically sustainable development.

Independent Competition and Regulatory Commission Amendment Bill 1999

This Bill would amend the *Independent Competition and Regulatory Commission Act 1997*. Primarily, it would rename the existing Independent Pricing and Regulatory Commission as the Independent Competition and Regulatory Commission (ICRC). Commissioners would be appointed on the basis of their skills and knowledge. Associate Commissioners may be appointed for particular purposes. The Bill would also expand the regulatory oversight function beyond that of the existing Commission. The ICRC would investigate competitive neutrality complaints. The Bill would make consequential amendments to a number of Acts.

Liquor Amendment Bill (No 2) 1999

This Bill would amend the *Liquor Act 1975* to insert a new section 177A to govern the admissibility in evidence in judicial proceedings of breath analysis tests conducted in licensed premises.

Stadiums Corporation Bill 1999

This is a Bill for an Act to establish a Stadiums Corporation as a body corporate. It would have various functions, including, in particular, to own, operate or manage sporting or entertainment facilities. The Corporation would be comprised of 4 to 6 directors, appointed by the Minister, and the chief executive, who would be appointed by the appointed directors. There is provision for the termination of the appointment of the appointed directors, and for the appointment of staff, and of consultants. The Minister may give directions to the Corporation about the performance of its functions. Such directions must be laid before the Legislative Assembly. The Authority must, at the request of the Minister, develop a business plan. Such plans are to be laid before the Assembly. The Treasurer has certain powers and functions in relation to the Corporation.

Tobacco Amendment Bill (No 2) 1999

This Bill would amend the *Tobacco Act 1927,* and to repeal the *Tobacco Licensing Act 1984* and certain other Acts. There is provision for the application for, and the grant or refusal of, and other matters relating to a retail tobacconist's licence, and a wholesale tobacco merchant's licence. There is provision for disciplinary action in relation to licensees, and for offences by licensees and others. In particular, a person must not, without a licence, sell or carry on tobacco retailing, or tobacco wholesaling. There is provision for review by the Administrative Appeals Tribunal of significant decisions affecting licensees and those who make application to become licensees. The Minister must make determinations in relation to fees payable by licensees.

Workers Compensation Amendment Bill 1999

This Bill would amend the *Workers Compensation Act 1951* to create criminal offences in relation to and provide penalties for evasion of payment of premiums and the understatement of wages in order to lessen the payment of premiums in relation to insurance policies concerning workers compensation.

Bills - Comment

The Committee has examined the following Bills and offers these comments.

Defamation Bill 1999

This is a Bill for an Act to regulate certain aspects of the law concerning defamation. It is not a code concerning that law. The Bill would make a number of substantial changes to the law as it stands. In particular, it would (i) introduce a new defence based on the concept of negligence; (ii) restore the common law position in that it would permit a defendant to plead, as a defence, that the published matter was true; (iii) introduce an "offer of amends" scheme; and (iv) establish some principles to govern the award of damages.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The rights dimension of defamation law

A law concerning defamation bears on the two different personal rights. In *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 113 the High Court said that "[t]he purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech". In its report *Unfair Publication: Defamation and Privacy* (ALRC 11), the Australian Law Reform Commission (ALRC) said that the report "dealt with two important but competing interests: on the one hand the protection of individual honour, reputation and dignity and on the other the protection of freedom of expression and access to public affairs": (see at http://www.austlii.edu.au/au/other/alrc/publications/reports/20years/vol2/Unfairpublicationdefamatio.html).

There is, thus, on the one hand, "freedom of expression". A modern expression of the content of this notion may be found in Article 19 of the ICCPR:

> ***Article 19***
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive and impart information and ideas of all kinds**, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be **subject to certain restrictions**, but these shall only be such as are provided by law and are **necessary**:
>
> (a) **For respect of the rights or reputations of others**;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Committee has pointed out at various times that the ICCPR is the rights instrument of most direct relevance to an assessment of the extent to which an ACT law may be thought to have unduly trespassed on personal rights and liberties. At the same time, common law concepts of rights and liberties are also a yardstick against which to make such a judgment.

In the context of defamation law, it is those who publish allegedly defamatory matter who invoke "freedom of expression" as a source of limitation on the scope of this law. The point was made by Powell J in *Gertz v Robert Welch Inc* (1974) 418 US 323 (passage cited in the Presentation Speech):

> "… punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and the press".

Justice Powell was speaking of the First Amendment to the Constitution of the United States. This, as relevant here, provides simply that: "Congress shall make no law … abridging the freedom of speech, or of the press; …".

It is well to remember, however, that it is only comparatively very recently that the First Amendment has been understood in the USA to have consequences for the scope of

defamation law. As one commentator has noted:

> For nearly two centuries, there could be no doubt that only socially acceptable speech was entitled to constitutional protection. The most obvious example is provided by defamation. It was not until the 1960s that the Supreme Court, in the landmark decision *New York Times Co v Sullivan* [376 US 254 (1964)] began to rewrite the law of slander and libel along lines derived from a new interpretation of the First Amendment" (F Kubler, "How Much freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights" (1998) 27 *Hofstra Law Review* 335 at 338).

Such legal development in other jurisdictions is even more recent. The same commentator noted that

> [In *Lingens v Austria* (1986) 103 Eur Ct HR (ser A)] the European Court of Human Rights followed suit a few years later, rejecting the traditional application of Austrian defamation law as a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (ibid).

Article 10 of the Convention which was in issue in *Lingens* (the European Convention) provides:

> 1. Everyone has the **right to freedom of expression**. This right shall include freedom to hold opinions and **to receive and impart information and ideas** without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it **carries with it duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, **for the protection of the reputation or rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The *Lingens* case is of interest to a consideration of an ACT law for the reason that Article 10 is closely similar to Art 19 of the ICCPR. The methodology applied by the European Court illustrates how these kinds of provisions might be applied to a particular law. Speaking of Art 10, the Court indicated (at para 35) that these questions need to be addressed:

- Was the law in its application in the particular case an "interference by public authority" with a person's "right to freedom of expression"? If so, there is a contravention of Art 10 unless it can be shown that requirements of Art 10(2) are met.
- Under Art 10(2), the first question is whether the interference was "prescribed by law".
- The next is whether the law, or its manner of application, had an aim or aims that is or are legitimate under Art 10(2).
- The final question is whether the law, or its manner of application, was "necessary in a democratic society" for the aforesaid aim or aims.

In relation to this last step, the Court said that “[t]he adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need"”, and added that the law-maker has “a certain margin of appreciation in assessing whether such a need exists” (para 39). It said too that a court reviewing the law “must determine whether the interference at issue was "proportionate to the legitimate aim pursued" (para 40). It then added:

> 41. In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" … .
>
> These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them … . In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader … .
>
> 42. Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The analysis in *Lingens v Austria* is but one of many variations on a basic theme. It illustrates in general terms the kind of analysis that Art 19 of the ICCPR requires, and the policy standpoint taken by the Court is also representative of the thrust of judicial approaches. It provides a yardstick that the Legislative Assembly may wish to adopt to evaluate a law concerning defamation.

But from a rights analysis of a law concerning defamation, this is not the end of the matter. The competing right – and one invoked by those reputations are the subject of the exercise of speech – is that of privacy. This was acknowledged by the Court in *Lingens v Austria* (see above, at paras 37-38); (although on the facts of that case, the Court held that Art 8 of the European Convention – which states a right to privacy - was not relevant).

The right to privacy is stated in the ICCPR in these terms:

> ***Article 17***

1. **No one shall be subjected to** arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to **unlawful attacks on his honour and reputation**.

2. Everyone has the **right to the protection of the law against such interference or attacks**.

It is to be noted that this right is not stated to be "subject to" the right to freedom of expression in Art 19. Furthermore, Art 19(3) permits laws to qualify freedom of expression to the extent that they are "necessary" to "respect (of) the rights or reputations of others".

There is no way to break out of this circle of argument except by making a judgment in a particular case as to whether the right to freedom of expression should prevail over the right to protection from attacks on honour and reputation. One freedom does not have priority over another.

From this perspective, it might be asked whether the Court in *Lingens* accorded too much weight to freedom of expression when they tied it to a notion of the freedom of the press. Of course, "freedom of political debate is at the very core of the concept of a democratic society", and, of course, the press, and the media generally, are very important vehicles for the conduct of political debate. But those who own the media – whether Australians or foreign – have their own interests to pursue in many political debates. When this occurs, the presentation of the debate through the particular media outlet is often distorted. To accept that "freedom of expression" demands "freedom of the press" creates a danger to democratic debate because it accords a preference to certain major players in that debate.

It must also be borne in mind that those who own the press are very powerful in terms of the financial resources they can bring to bear in any dispute with a person who wishes to bring legal suit against the media owner in respect of allegedly defamatory matter published by the media outlet concerned.

Moreover, if one is to recognise the role of the press in promoting freedom of expression – which is legitimate – one must also recognise the role of the press in promoting and facilitating invasions of the right to privacy in the form of attacks on the honour and reputation of individuals. It must be recognised that "[f]reedom of the Press has another side, in that it may be abused by intrusive investigations, sensational or inaccurate reporting, refusal or failure to publish explanations, and publication of material better ignored" (*Oxford Companion to Law* (1980) 495).

The Committee appreciates that the standpoint that informs the comments that follow may be somewhat different to that stated in the Presentation Speech. The Committee's comments are placed before the Legislative Assembly in the spirit of fostering a debate on this Bill that takes account of the competing rights involved.

The Bill as a whole

Taking the framework for analysis stated in the *Lingens* case, the Committee considers that a law which permits an action in defamation is one that, in a general sense, accords with both the freedom of speech and the right to privacy. Such a law is an interference with freedom of speech stated in Art 19 of the ICCPR. But, in general, it has the legitimate aim of protecting the reputations of those who are the subject of the speech. This latter interest is at the heart of the right to privacy stated in Art 13 of the ICCPR.

The defence of truth

Clause 16 of the Bill would restore the common law defence of truth in a civil proceeding. The point here is that it would no longer be necessary for a defendant to an action in defamation to establish both that the publication was true and that it served a public interest. The Committee has no 'in principle' objection to this reform. It accords with common sense, and the common law is a legitimate standard for assessment of rights.

Clause 16 does, however, bring the right to privacy into focus. The problem was identified by the ALRC over 20 years ago. As stated in an ALRC comment in its report *Unfair Publication: Defamation and Privacy* (ALRC 11):

> In (those) jurisdictions where truth alone was a defence, the law of defamation imposed no inhibition upon the publication of personal information. Intimate facts, of no relevance to public affairs or to the public activities of a person could be published without restriction provided that they were accurate; see at http://www.austlii.edu.au/au/other/alrc/publications/reports/20years/vol2/Unfairpublicationdefamatio.html).

Thus, the ALRC sought to recommend "a law suitable for all Australia that while stimulating the discussion of public affairs, would improve the position of a person falsely defamed and would provide some protection of personal privacy" (ibid). To this end, it recommended that the law be contained in "a single statute without the necessity to resort to earlier decided case". A critical aspect of the particular reforms proposed was that there be

> … a limited law of privacy protection. It would allow a person to sue for damages or injunction if sensitive private facts were published about that person. These included facts relating to the health, private behaviour, home life, personal or family relationships of the individual which, in all the circumstances, would be likely to cause distress, annoyance or embarrassment to a person in the position of the individual (ibid).

It is apparent that this recommendation is linked to the ALRC's comment that a defence of truth has the consequence that "intimate facts, of no relevance to public affairs or to the public activities of a person could be published without restriction provided that they were accurate".

The Committee notes that the Presentation Speech may take a different standpoint on the desirability of linking recognition of a defence of truth to protection of privacy. It rejects the notion that the protection of reputation is an aspect of a notion of privacy. This view is at odds with the approach taken by international treaties such as the ICCPR. Of course, the Legislative Assembly is not bound to take this latter approach and may in any instance choose not to follow or to have regard to a document such as the ICCPR. In this instance, however, it is to be noted that the ALRC has felt it desirable to link reform of defamation law to protection of privacy, and, moreover, to view them as two sides of the same coin.

It is a question for the Legislative Assembly whether it considers that the approach of the ALRC should be adopted. In particular, the question is whether these reforms should be accompanied by a "a limited law of privacy protection" as recommended by the ALRC.

The Presentation Speech argues that reform of defamation law – and in particular of the removal of the "public interest" element of the truth defence – would mitigate the effect of the current law as "the preserve of the rich and famous".

The legitimate point here is that the sheer complexity of the current law makes it difficult for a person whose reputation has been traduced to sue for defamation. The ALRC noted that "the existing law offered a plaintiff complex and expensive litigation leading to a trial years later in which the only available remedy was an award of money damages" (ibid).

The Committee accepts that reduction of the defences will, to some extent, reduce the complexity of the law. This is very important given the enormous financial resources of many media outlets. But there are other aspects of the Bill that will make it easier for a publisher of defamatory matter to defend an action in defamation.

The new defence based on negligence

The Presentation Speech sees this reform as the most significant change proposed by the Bill. Clause 23(1) provides that:

> (1) It is a defence if the defendant establishes that the published matter (other than any published matter imputing criminal behaviour) was not published negligently.

But the scope of this provision appears to be more broadly based, for by clause 23(2):

> (2) For subsection (1), it is sufficient if the defendant establishes –
>
> (a) that if the plaintiff had proceeded against the defendant in an action for negligence –
>
> (i) the defendant would not have owed a duty of care to the plaintiff; or
> (ii) the defendant would not have breached a duty of care to the plaintiff; or
>
> (b) that, because of the publication, the plaintiff did not suffer, or is not likely to suffer harm; or
> (c) the defendant took reasonable steps to ensure the accuracy of the publication.

The notion that a defendant might prove that he or she or it was not negligent will strike many as fair. Nevertheless, it must be recognised that this defence will provide another means by which rich and powerful defendants may resist an action in defamation. The Presentation Speech argues that this defence "will provide a new and powerful reason for journalists and publishers to get their stories right". But it may be asked whether this incentive is even greater if there is no defence of absence of negligence; that is, where, as at present, a no-

fault scheme operates.

Moreover, the Committee notes that it will be sufficient under clause 23 for a defendant to merely establish "that, because of the publication, the plaintiff did not suffer, or is not likely to suffer harm". This appears to have nothing to do with a 'no-negligence' defence. It would enable a defendant to place in evidence a great range of matters relating to the reputation of a plaintiff, and might be thought to be another discouragement to mounting an action at all. (It is also not clear how this aspect of clause 23 relates to clause 15 of the Bill.)

The offer of amends procedure

Part 2 of the Bill is headed "Resolution of disputes without litigation". The essence of the scheme is summarised in the Presentation Speech:

> Under the proposed scheme, litigants are encouraged to consider timely and reasonable corrections. A publisher may make a formal offer of amends that may consist of an apology, correction, offer of settlement or a combination of these. A person defamed must seriously consider an offer.
>
> Under the proposed model, the making of an amends at the earliest sign of a problem is now very attractive. A reasonable offer of amends is a complete defence to a later action for defamation.

This reform is welcome if it operates to provide an efficacious, speedy and inexpensive means for redress. If so, will do a great deal to further the interest a person has in her or his reputation.

The Committee notes, however, that the consequences for a plaintiff who does not accept an offer are such that he or she will be under great pressure to accept an offer of amends, notwithstanding that they may feel that the offer is not adequate. Thus, while this reform will place some pressure on a potential defendant to make an offer, it also will place pressure on a potential plaintiff to accept the offer. This may seem to be an appropriate means to achieve the resolution of disputes without litigation. But, in situations where there is great inequality of bargaining power, this procedure will favour the stronger party. In many cases, this will be the press and the media.

The Committee notes that by clause 11 of the Bill, a potential plaintiff to whom an offer of amends is not made "may apply to the Supreme Court for an order to vindicate his or her reputation". The Bill makes no further provision concerning this procedure, and, in particular, as to just what the Supreme Court may do.

Damages

Out of concern to ensure that in this field of the law "damages serve principally to vindicate a plaintiff's reputation" (see the Presentation Speech), clause 25 of the Bill provides:

> 25 Damages
>
> In deciding the amount of damages to be awarded, a court must –
>
> (a) ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded; and
> (b) take into account the ordinary level of general damages component in personal injury awards in the Territory.

The Committee accepts that there is a perception that some awards of damages in defamation cases have been too high. It is not clear that this provision will be of much assistance in this regard. It may be presumed that courts (including juries) endeavour now to achieve what is stated in clause 25(a). With respect to clause 25(b), it is not said how "the ordinary level of

general damages component in personal injury awards" should be taken into account. Nor is it easy to see how the assessment of damage to reputation is to be measured by reference to damages assessed in respect of a very different form of injury.

The High Court's freedom of political communication

In *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 106-107 the High Court, confirming earlier case-law, held that arising from ss 7 and 24 of the Australian Constitution there was a "freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors". The Court also held that the common law concerning libel and slander must conform to this freedom. It stated the scope of a defence that must be available to a defendant in a defamation matter and held that an Australian legislature could not abridge the scope of this defence.

This Bill does not attempt to state this defence, and it will be a matter for litigation whether the provisions of the Bill amount to an unconstitutional limitation of the defence stated by the Court in *Lange*.

Conclusion

The Committee does not cavil with attempts to reform defamation law. It has been recognised for many years that the current law is highly technical and due for reform. The Bill does not purport to be a code on the subject, and the government has signalled the need for further change.

From the perspective of the role of this Committee, the issue that the Committee considers needs to be addressed by the Legislative Assembly is whether the Bill makes an adequate adjustment between the right to freedom of expression and the right to privacy.

Interpretation Amendment Bill 1999

This Bill would amend the *Interpretation Act 1967* by the insertion of a new section 27A to deal with the publication of short-form notices of the making of an instrument under a law.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

To remove any doubt concerning the operation of the law as it stands, it would be declared that certain things done prior to the commencement of this Bill are to be taken to have been validly done. The Committee notes this retrospective aspect of the Bill. It finds that this is not an objectionable feature. The policy of the Bill is that which was intended by the Legislative Assembly in 1994 amendments to the *Subordinate Laws Act 1989*. Moreover, it is far from clear that the rights of any person would be affected adversely by this aspect of the Bill.

Road Transport Legislation Amendment Bill (No 2) 1999

This Bill would amend a number of Acts dealing with road transport. It would amend the *Road Transport (General) Act 1999* to provide for automatic disqualification for certain driving offences. It would amend the *Road Transport (Safety and Traffic Management) Act 1999* by the insertion of (i) a new section 5A to prohibit racing and other kinds of activities involving speeding on roads or road related areas without the approval of the road transport authority; and (ii) a new section 5B to prohibit burnouts on roads or road related areas. A new division 2.3 of this Act deals with the seizure, impounding and forfeiture of vehicles for offences against proposed new sections 5A and 5B.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Mandatory sentences – clause 4

Under these clauses, a person would, upon conviction for certain offences in relation to driving, be automatically disqualified from holding a driver's licence.

Any form of mandatory sentence is a matter of concern.

Forfeiture and seizure of vehicles

The Committee notes that these provisions do contain provisions to ameliorate the hardship that their enforcement might entail.

SUBORDINATE LEGISLATION

There is no subordinate legislation for comment in this report.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Government, in response to its Report No. 16 of 1999 concerning the Supervised Injecting Place Trial Bill 1999;
- the Minister for Education, in response to its Report No. 15 of 1999 concerning Determinations Nos 255-259; and
- the Minister for Urban Affairs, in response to its Report No. 16 of 1999 concerning subclause 78(5) of the Water Resources Amendment Bill 1999.

The Committee thanks the Ministers for their responses, and proposes to comment further in respect of subclause 78(5) of the Water Resources Amendment Bill 1999. Clause 78 would enable the Minister, by notice in the *Gazette*, to determine the fees payable under the Act. By subclause 78(5): "A reference in this section to a fee includes a reference to a fee that is a tax".

The Committee commented on this kind of provision in its *Report No 14 of 1999*, in relation to a provision of the Road Transport (General) Bill 1999. It pointed out that this kind of provision reverses the general constitutional position that taxes should be levied only by the legislature. The issue is whether the Assembly wishes to confer a power to levy a tax on a Minister.

In relation to clause 78 of the Water Resources Amendment Bill 1999, the Minister has stated in his response that the government does not intend that the power to determine fees should be employed so as to fix a tax. It is said that: "The subclause [78(5)] in question has been included for completeness and clarity and to prevent any vexatious claims against the validity of determined fees and charges".

The issue is whether these kinds of considerations should prevail over the desirability if maintaining the general constitutional position that taxes should be levied only by the legislature. In this respect, it is to be noted that the omission of subclause 78(5) would not compromise or effect government policy in relation to the use of the power in clause 78. Furthermore, if careful attention is paid when making a determination of fees under clause 78, there should be very little possibility of "vexatious claims against the validity of determined fees and charges".

Paul Osborne, MLA
Chair

February 2000