

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. 5 OF 1998

16 July 1998

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 comment on them.

Acts Revision (Taxation of Territory Authorities) Bill 1998

This Bill would amend various Acts which are specified in the Schedule to the Bill to the effect of making various Territory bodies liable to pay taxes and fees imposed under laws of the Territory. These bodies are in the nature of business enterprises. The object of the Bill is to meet some of the Territory's responsibilities under the National Competition Arrangements. The Bill would also amend other Acts to afford to some other Territory bodies an immunity from taxation.

Appropriation Bill 1998-99

This is a Bill for an Appropriation Act 1998-99, to appropriate money for the purposes of the Territory in respect of the financial year commencing on 1 July 1998, and for related purposes.

Birth (Equality of Status) (Amendment) Bill 1998

This Bill would amend the *Birth (Equality of Status) Act 1988* to provide for a restatement in the Act of certain presumptions regarding the parentage of children. Rebuttable presumptions are based on evidence of marriage and on cohabitation between a man and a woman, and an irrebuttable presumption is based on certain findings by a court.

Dangerous Goods (Amendment) Bill 1998

This Bill would amend the *Dangerous Goods Act 1984* and two other laws of NSW which apply to the Territory so as to preserve the operation of aspects of all of these laws notwithstanding the enactment or the making of laws by the Commonwealth which latter laws will apply uniformly throughout Australia. If passed, this Bill would not however be inconsistent with the objective of the uniform laws.

Bills - Comment

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

Financial Institutions Duty (Amendment) Bill 1998

This Bill would amend the *Financial Institutions Duty Act 1987*. Its primary objective is to remove means by which businesses may avoid the payment of financial institutions duty. It would also expand the definition of 'financial institution' to encompass credit providers; regulate those who act as agents for interstate financial institutions; and make changes in respect of short term dealing.

The Committee has noted that various discretions may be exercised by the Commissioner or her or his delegate, and also that the proposed amendments would make adequate provision for review of an exercise of these discretions.

The Committee has also noted that a determination which might be made by a Minister under proposed subsection 24(1) (see clause 24), and an instrument which might be made by a Minister under proposed subsection 38(1) (see clause 26), are disallowable instruments.

Agents (Amendment) Bill 1998

This Bill would amend the *Agents Act 1968* to make provision for the registration of employment agents. There would be provision made for the licensing of persons and companies as employment agents, and for the suspension and revocation of such licences. The provisions of the Act concerning review by the Administrative Appeals Tribunal of such decisions would apply.

Drafting comment

Under proposed section 47CA (see clause 12), a person is eligible for the grant of an employment agent's licence only if that person's "experience as an employment agent has been such that he or she is competent" to carry on the business of an employment agent on their own account. (A similar provision is made with respect to the director of a company which seeks registration; see proposed section 47CB (see clause 12)).

Given that there is no existing Territory scheme for registration of a person as an employment agent, many persons would have difficulty meeting this requirement. There might be a need to allow applicants for licences to acquire experience as an employee of an employment agent (as is the case in connection with the licensing of travel agents - see paragraph 47C(b) of the Act). This may not however be sufficient, and the Committee merely draws this issue to the attention of the Assembly.

Health (Amendment) Bill 1998

This Bill would amend the *Health Act 1993* to make provision for the establishment and the conduct of quality assurance committees in private health facilities (being private hospitals and private day hospital facilities).

Under the Act, such committees may now be established in respect of public health facilities, and, in general terms, the proposed amendments would establish quality assurance committees in private health facilities on the same basis as those in public health facilities. To this end, the Bill would make some amendments to those provisions of the Act which deal with such committees in public health facilities.

There are a number of major elements of the scheme proposed.

The Minister may, on application by a private health facility, declare that a specified committee established by that facility is an approved private sector quality assurance committee. The Minister's discretion must be exercised having regard to matters stated in proposed subsection 13AC(2). In part, the Minister must have regard to whether the functions of the committee are of one or other (or both) of the two kinds mentioned, whether the members of the committee should be afforded the protections and immunities of the Act in order to facilitate the exercise of their functions, and whether it would be "in the public interest to restrict the disclosure of information compiled by the committee in the performance of its functions".

A decision of the Minister to refuse to make a declaration under proposed subsection 13AC(1), or to revoke such a declaration, is reviewable by the Administrative Appeals Tribunal (see clause 17).

Various protections and immunities are afforded by the Act to members of and to persons acting at the direction of an approved committee. In particular, such a person has qualified privilege in proceedings for defamation in relation to statements made or statements published by the person. The person is not compellable to give evidence or to produce documents to a "court, tribunal, board or person". Certain statements made or produced to a committee, or committee findings or recommendations, are not

“admissible as evidence in civil or criminal proceedings”. There is a prohibition on the disclosure of the identity of a person who was provided with a health service by a private health facility.

An approved committee has a wide discretion to regulate its procedure but must have regard to the principles of natural justice in so far as they are relevant.

Comment

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

The functions of an approved committee are described in proposed subsection 13AC(2) in such a way as to suggest that these committees are concerned primarily with matters of general significance. They are to either (or both) “assess and evaluate the health services provided” by the private health facility, or “conduct research or investigations into morbidity and mortality” in the facility”; see proposed paragraph 13AC(2)(b).

But it is also appears that the scheme envisages that the committees will make investigations into particular incidents in a facility, and it is in relation to such investigations that the protections and immunities are afforded by the Act are likely to be of significance. It is in relation to such investigations that others - such as medical staff and patients - may have an interest in defending or pursuing some legal action (including a prosecution). In this light, the Committee draws to the attention of the Assembly some ways in which the scheme proposed has ramifications for the rights of persons.

A person’s right to the protection of their reputation is affected by a law which confers on others a qualified privilege in respect of the law of defamation.

A person’s right to the privacy interest they have in information which is confidential to them (in the sense that they could invoke legal remedies in respect of a breach of confidence) is affected by the wide grant of legal immunity to members of the committees.

Other legal rights of persons - such as the property interest they have by virtue of the law of copyright - might be affected adversely by the wide grant of legal immunity.

A person also has a right to a fair adjudication or a fair trial before a court or a tribunal (or similar body). This right is diminished to the extent that the person cannot compel others to give relevant evidence or to produce relevant documents according to normal legal processes.

The proposed section 13AG (clause 15), (and see proposed section 11 (clause 11)), raises particular problems. The provision that “a statement or disclosure (whether oral or written) made or produced before [a committee]” is “not admissible as evidence in a civil or criminal proceeding” may, by reason of the use of the word “produced” have the effect of immunising from production in court of evidence which came into existence for a reason completely independent of the work of the committee. (On the other hand, the limitation of this provision to a “a civil or criminal proceeding” might mean that this prohibition would not apply in other forums, such as a disciplinary proceeding.)

The Committee leaves it to the Assembly to decide whether any aspect of the amendments proposed by the Health (Amendment) Bill 1998 unduly trespass on rights and liberties. It sees its function as one of drawing attention to points where the issue seems to arise.

Insurance Levy Bill 1998

This is a Bill for an Insurance Levy Act. Its object is to provide for the imposition of a levy on insurance companies writing general insurance in the Territory (and in particular in respect of property situated in the Territory). The moneys raised by the levy would be used to offset the cost of operational agencies within the Emergency Services Bureau (such as fire-fighting).

Comment

Paragraph 2 (c) (iv) - inappropriate delegation of legislative power

A key element of the proposed scheme is the “assessable portion” of a “prescribed premium”. The latter is a premium payable in respect of general insurance. The “assessable portion” is that proportion of the premium as is determined in accordance with regulations made by the Executive (see clauses 5(1) and 17). Subclause 5(2) provides that after the first regulations are made, further regulations “may only be made ... if the Executive is satisfied that at least two-thirds of the general insurers liable to pay levies under the Act desire that such regulations be made”.

The Committee draws attention to two matters. In the first place, this language is very vague. The use of the word “desire” might suggest that there needs to be some examination of the motives of an insurer in consenting to a further regulation. Given that the validity of regulations might be challenged for failure of the Executive to comply with subclause 5(2)), more precision in language is desirable.

Secondly, the Committee is concerned that a body of persons who do not form part of the government of the Territory is in effect given a veto over the making of the law for the Territory. On the face of it, this is undesirable.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations

The Committee draws attention to the fact that a number of discretionary administrative powers which would be vested in the Commissioner (see clause 8, subclauses 9(1), 9(2), and 14(1)) are not expressly subject to external review.

Workers’ Compensation (Amendment) Bill 1998

This Bill would amend the *Workers’ Compensation Act 1951* to insert a new section 27D which would enable the Minister responsible to notify an approved insurer or an exempt employer of their obligation (which would be imposed by this section) to pay a levy. The amount of the levy is based on the premiums received by the insurer or which would have been paid by the employer.

The levy is that portion of “the costs of administration of this Act in respect of a financial year” which is ascertained by having regard to the premium incomes received by an insurer or the premium which would have been payable by an employer if the employer had not been exempt from the obligation to be insured; (see proposed subsection 27D(3)).

The amount of this liability for the costs of administration is determined by the Minister (see proposed subsection 27D(2)).

By subclause 4(2) of this Bill, the amendment to be effected by new section 27D applies in relation to costs of administration incurred after 1 July 1997, but by subclause 4(3), the Minister may not effect an apportionment of liability until after 1 January 1999.

Comment

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

The Committee notes the retrospective nature of the operation of the amendments proposed to be made by subclauses 4(2) and 4(3) the Bill. It has noted that the Explanatory Memorandum states that subclause 4(2) “is to enable the costs to be recovered in the 1998/99 financial year”. It appears that the effect of subclause 4(3) is only to postpone the time for payment of the levy.

The Committee considers that further justification be given for imposing the obligation to pay the levy retrospectively.

Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations

The Committee notes that an exercise of power by the Minister under proposed subsection 27D(2)) is not expressly subject to external review.

Comments on the Explanatory Memorandum

The Explanatory Memorandum states that “at present it is intended the costs to be recovered by the levy will be limited to those incurred in having the [Magistrates] Court provide arbitration services”. The proposed section 27D employs the wider term “costs of administration of this Act”. It is not clear how the Minister could lawfully achieve what is said by the Explanatory Memorandum to be the object of this provision.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments made concerning:

- Motor Traffic (Amendment) Bill 1998 (Report No. 1 of 1998).
- Water Resources Bill 1998 (Report No. 2 of 1998).

Copies of the responses are attached.

The Committee thanks the Attorney-General and the Minister for Urban Services for their helpful responses.

Paul Osborne, MLA
Chair

July 1998