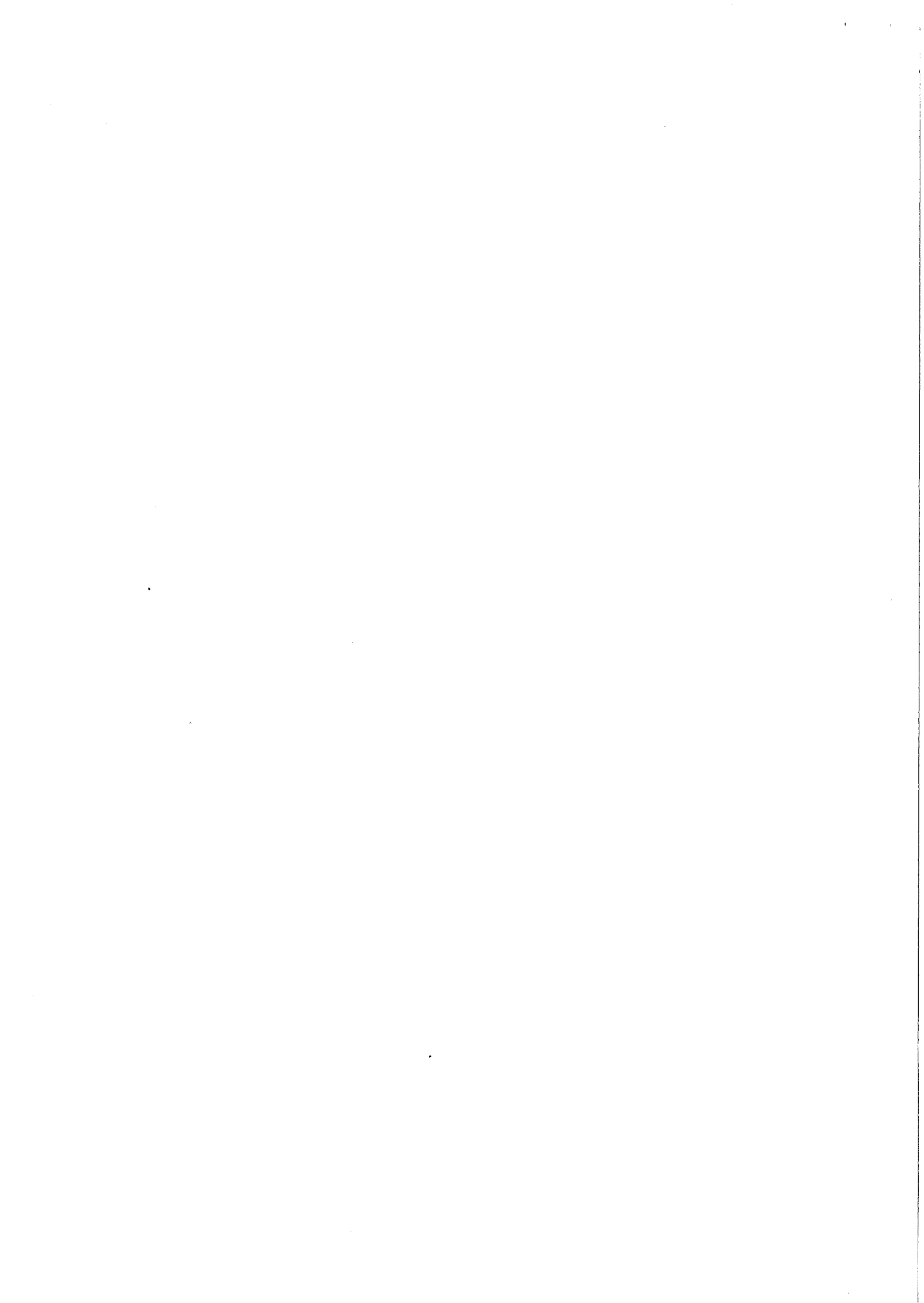


**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO. 7 OF 1995

29 June 1995





LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Standing Committee on Scrutiny of
Bills and Subordinate Legislation

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GPO Box 1020
CANBERRA A.C.T. 2601

Mr Greg Cornwell, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Cornwell,

Please find enclosed a copy of Report No. 7 of 1995 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its 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. I seek your approval to print and circulate Report No. 7 of 1995.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Paul Osborne'.

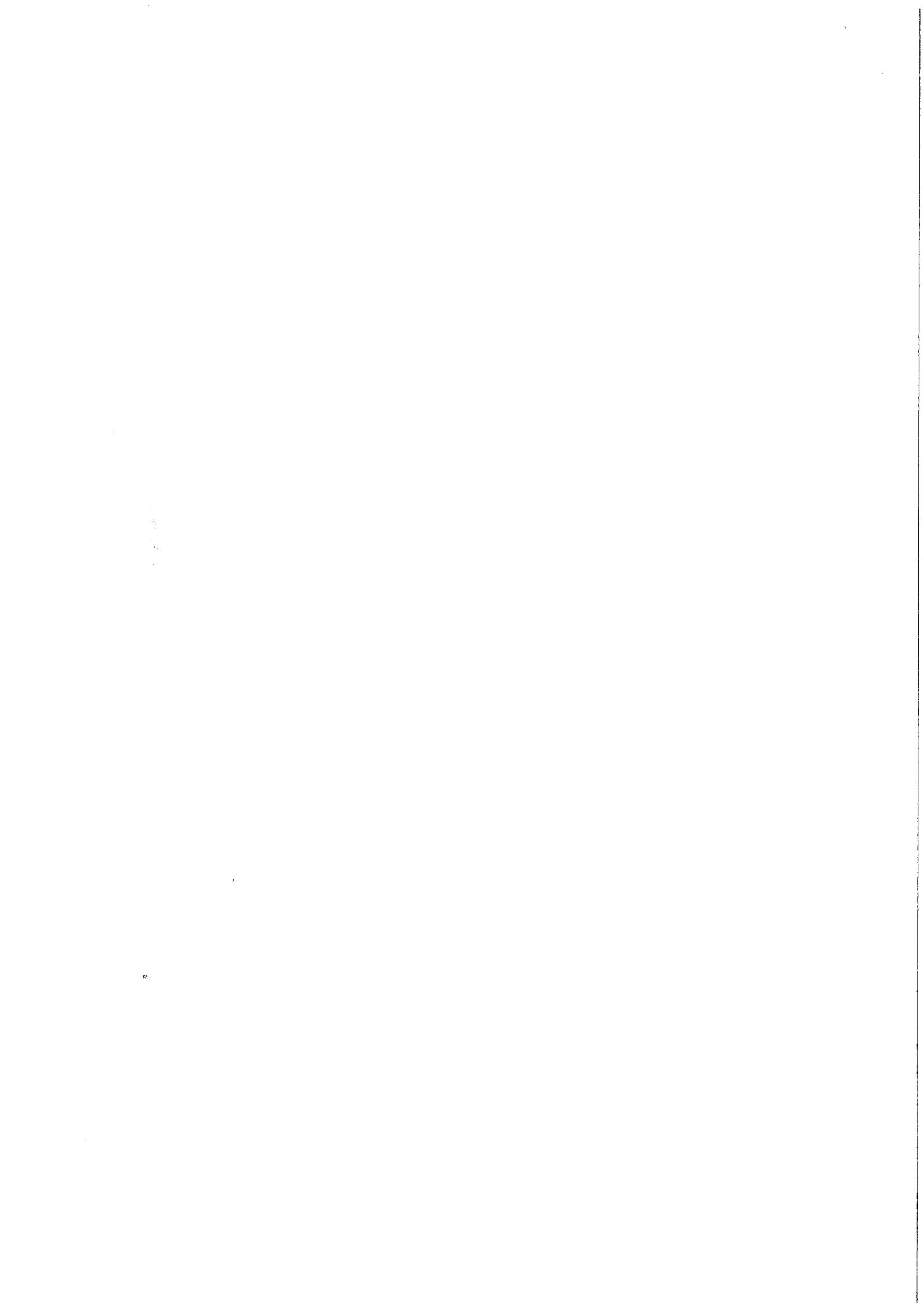
Paul Osborne, MLA
Chair

29 June 1995

A handwritten signature in black ink, appearing to read 'Greg Cornwell'.

Approved
Greg Cornwell, MLA
Speaker

29 June 1995



TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of three 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 Andrew Whitecross, MLA (Deputy Chair)
Mr Harold Hird, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM
Secretary: Mr Tom Duncan
Deputy Secretary: Ms Beth Irvin

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:

Annual Reports (Government Agencies) Bill 1995

This Bill establishes a new framework for the making of annual reports by ACT Government Service agencies.

Annual Reports (Government Agencies) (Consequential Provisions) Bill 1995

This Bill provides for consequential amendments to ensure that legislation relating to public authorities is made consistent with the changes to the law made by the Annual Reports (Government Agencies) Bill 1995.

Consumer Credit (Consequential Provisions) Bill 1995

This Bill provides for consequential and transitional amendments on the passing of the Consumer Credit Bill 1995.

Drugs of Dependence (Amendment) Bill 1995

This Bill provides a clear legal basis for the provision of takeaway doses of methadone at a treatment centre and ensures that such provision of methadone in the past was not illegal.

Land (Planning and Environment) (Amendment) Bill (No. 2) 1995

This Bill amends the Principal Act to replace the *Soil Conservation Act 1960* and also repeals the *Mining Act 1930* and the *Mining Act 1931*.

Oaths and Affirmations (Amendment) Bill 1995

This Bill provides for a new form of oath or affirmation to be made and subscribed by any future member of the Legislative Assembly before taking his or her seat.

Workers' Compensation (Amendment) Bill 1995

This Bill provides for a Workers' Compensation and Occupational Rehabilitation Council under the *Workers' Compensation Act 1951*.

Bills - Comment

The Committee has examined the following Bills and offers the following comments:

Consumer Credit Bill 1995

This Bill is the ACT part of a legislative scheme to put uniform consumer credit laws in place in all Australian jurisdictions.

Commencement Clause

Subclause 2(3) provides that if provisions of the Act have not commenced within 12 months of the notification of the Act in the *Gazette* then they automatically commence at that time. This varies from the usual provision for automatic commencement of 6 months.

Presumably this longer period was inserted because of the complexities of getting Australia-wide legislation in place.

Consent to Entry Provisions Weaker Than Usual ACT Provisions

The presentation speech for the present Bill states that:

“amending legislation may not be introduced into the Queensland Parliament unless there has been a resolution of the Ministerial Council, passed by a majority of at least two-thirds who are present and who vote, approving amending legislation. Once approved, the amending legislation is introduced into the Queensland Parliament and, if passed, is then applied by the other States and Territories.”.
(Emphasis added.)

Part 4 of the *Consumer Credit (Queensland) Act 1994* confers power to make regulations under the Consumer Credit Code which is an Appendix to the Act. Clause 5 of the present Bill provides that such regulations apply in the ACT.

Section 10 of the Queensland Act provides, in part, as follows:

- “(1) The Governor in Council may make regulations under the Code.
- (2) A regulation under this Part may be made only on the recommendation of the Ministerial Council.”.

The Committee notes in passing that the “Consumer Credit Legislation - Summary” supplied with the present Bill is slightly differently worded, as it states as follows:

- “(1) The Governor may make regulations for the purposes of the Code.” (Emphasis added.)

This minor change presumably occurred between the preparation of the Queensland Bill included in the Summary and the passing of the Act by the Queensland Parliament.

It is not clear from the presentation speech or the explanatory memorandum whether the "two-thirds rule" mentioned in the extract quoted above from the presentation speech also applies to a decision of the ministerial council to recommend a regulation under subsection 10 (2) as well as to the making of Parliamentary amendments.

Whether there needs to be a simple majority, a two thirds majority or unanimity in relation to recommendations of the Ministerial Council for the making of regulations under section 10 could have an impact on the making of changes in ACT law.

For example, such a change could possibly impact on provisions relating to entry into residential property in the ACT.

Section 91 of the Code provides as follows:

"(1) A credit provider, or an agent of a credit provider, must not enter any part of the premises used for residential purposes for the purpose of taking possession of mortgaged goods under a mortgage unless -

- (a) the Court [in the ACT it is the ACT Credit Tribunal - see paragraph 7 (1) (a) of the present Bill] has authorised the entry; or
- (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.

(2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given."

It is suggested that the provisions in relation to consent to enter in section 91 of the Code do not appear to be as protective as those that are now standard in the ACT. In the ACT consent to enter provisions now provide protection in a form such as the following:

- (1) An entry by virtue of the consent of a person is not lawful unless the person voluntarily consented to the entry.
- (2) Where such consent is obtained, the person consenting must be asked to sign a written acknowledgement -
 - (a) of the fact that the person has been informed that he or she may refuse to give consent;

- (b) of the fact that the person has voluntarily given consent; and
 - (c) of the day on which, and the time at which, consent was given.
- (3) Where it is material, in any proceedings, for a court to be satisfied of the voluntary consent of a person an acknowledgement, in accordance with subsection (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.

Furthermore, regulations can be made under subsection 91 (2) to "provide for procedures for the obtaining and giving of consent". If less than a unanimous vote is required at Ministerial Council under subsection 10 (2) of the *Consumer Credit (Queensland) Act 1994*, it could be that the protective provisions could be further eroded by the exercise of the regulation-making powers under subsection 91 (2) of the Code. This would be possible despite any opposition of the ACT Minister to such erosion.

ACT's Coastal Sea Covered

The Committee notes that there is a happy ending for all those who were holding their breath while reading the "Consumer Credit Legislation - Summary". They were, of course, looking for the most essential element in any Consumer Credit Code for the ACT. The Committee feels sure that they were very relieved to find it as the very last item on the very last page of the Summary.

Paragraph 37 of Schedule 2 of the Code on page 92 reads as follows:

"37 This Code has effect in and relation to the coastal sea of this jurisdiction as if that coastal sea were part of this jurisdiction."

Thus the code will apply to the ACT's coastal sea ie Jervis Bay.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 18 of 1995 being the *Land (Planning and Environment) Regulations (Amendment)* exempt a number of classes of lease variations and withdrawals by the Government of land from a lease (where the lease contains a withdrawal clause) from the operation of Part VI of the *Land (Planning and Environment) Act 1991*.

Subordinate Law No. 19 of 1995 being the *Supreme Court Rules (Amendment)* made under section 36 of the *Supreme Court Act 1933* makes amendments to the rules consequent upon the renumbering of the *Magistrates Court (Civil Jurisdiction) Act 1982* and the commencement of the *Mental Health (Treatment and Care) Act 1994*.

Public Management Standard - 2/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner with the approval of the Chief Minister amends *Public Sector Management Standard - 1/1994* in a number of technical ways, clarifies some conditions and implements annual financial reviews in areas of study leave.

Public Management Standard - 4/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner with the approval of the Chief Minister amends *Public Sector Management Standard - 1/1994* by clarifying rules or changes rates of allowances and making additions to the classification descriptions for General Service Officers.

Subordinate Legislation - Comment

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

Public Management Standard - 3/1995 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner with the approval of the Chief Minister amends *Public Sector Management Standard - 1/1994* in a number of technical ways to clarify the intent of some Standards, lists new rates for some allowances and amends the rules relating to leave.

On page 6 of Standard 3/1995 there is an amendment of page 916 of Standard 1/1994. The amendment deletes rule B:6 and replaces it with new rules B:6.1, B:6.2, B:7.1 and B:7.2. Rules B:6.1 and B:6.2 deal with "Sick leave without pay" and Rules B:7.1 and B:7.2 deal with "Leave without pay after 78 weeks".

However, unless they have been deleted somewhere else, there appear already to be Rules B:7.1, B:7.2, B:7.3 and B:7.4 on pages 916 and 917 of Standard 1/1994. These Standards deal with "Temporary Employees". Incidentally, the Committee notes that the existing B:7.2 was revoked and substituted by Standard 2/1995, which was approved and made on the same days of the present Standard 3/1995. This seems to suggest that the already existing provisions were intended to continue.

Perhaps a check should be made to see if there is duplication, because, if there is duplication, confusion could be caused in the future when any reference is made to Rules B:7. If there is, in fact, duplication then, unless the new Rules are renumbered B:7A or something similar to distinguish them from the existing Rules B:7, there would need to be renumbering right through to Rules B:15.

Determination No. 35 of 1995 being the Care and Protection of Intoxicated Persons Standard made under section 31 of the *Intoxicated Persons (Care and Protection) Act 1994* establishes minimum requirements for the manner in which a person licensed to provide a caring service under the Act is to provide that service.

The *Intoxicated Persons (Care and Protection) Act 1994* contains the now customary commencement section, which provides as follows:

“2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.

(2) The remaining provisions commence on a day fixed by the Minister by notice in the *Gazette*.

(3) If the provisions referred to in subsection (2) have not commenced before the end of the period of 6 months commencing on the day on which this Act is notified in the *Gazette*, those provisions, by force of this subsection, commence on the first day after the end of that period.”.

The *Intoxicated Persons (Care and Protection) Act 1994* was notified in the *Gazette* on 15 December 1994, so, if there has not been a Ministerial *Gazette* notice, the provisions of the Act other than sections 1 and 2 will have commenced on 15 June 1995 after the elapsing of the 6 months period.

Despite making a number of searches and enquiries, the Committee has been unable to find a Ministerial commencement notice.

If there is, in fact, such a notice and it provides for the remaining provisions of the Act to commence on or before 2 June 1995 (the date of the notification in the *Gazette* of the present Care and Protection of Intoxicated Persons Standard), then there is no problem with the making and commencement of the present Care and Protection of Intoxicated Persons Standard.

The comments that follow are made on the basis that there was no such Ministerial commencement notice.

The present Care and Protection of Intoxicated Persons Standard states that it is made under the power to make standards given by section 31 of the *Intoxicated Persons (Care and Protection) Act 1994*.

The present Care and Protection of Intoxicated Persons Standard was signed on 22 May 1995 and paragraph 2 provides as follows:

“2. The provisions of this standard, other than paragraph 6 2(a), take effect on notification of the Standard in the *Gazette*.

Paragraph 6.2(a) of the Standard takes effect on 1 January 1996.”.

The Notification of the Making of Determination was published in *Gazette* No. S110 on 2 June 1995.

On the face of it, the Standard appears to have been made under a provision, section 31 of the *Intoxicated Persons (Care and Protection) Act 1994*, that was not in force at the time of the making or purported commencement of most parts of the Standard.

Section 5 of the *Subordinate Laws Act 1989* permits the making of certain instruments between notification of an Act in the *Gazette* and the commencement of an Act or a provision or provisions of an Act. The rationale for section 5 is that appropriate delegated legislation to complement an Act can be made in anticipation with the intention that that delegated legislation can “lie in wait” for the commencement of the Act on which it is dependent.

The present Standard has not been made specifically in contemplation of the commencement of the relevant provisions of the Act. Indeed, it actually purports to set a commencement date for most of the Standard that is before the commencement date for the relevant provisions of the Act. Thus it may be difficult to rely on the provisions on section 5. This is especially so in relation to those matters that were to commence on gazettal on 2 June 1995.

The Committee suggests that a check should be made to see if there was, in fact, a Ministerial commencement notice on or before 2 June 1995. If there was not, the matter needs to be further considered.

GOVERNMENT RESPONSE

The Committee has received a response to comments made concerning:

- Determination No. 161 of 1994 and Determination No. 14 of 1995 made under the *Taxation (Administration) Act 1987* (Report No. 1 of 1995);
- Determination No. 27 of 1995 made under the *Magistrates Court (Civil Jurisdiction) Act 1982* (Report No. 2 of 1995);
- Auctioneers (Amendment) Bill 1995 (Report No. 5 of 1995);
- Pawnbrokers (Amendment) Bill 1995 (Report No. 5 of 1995); and
- Second-hand Dealers and Collectors (Amendment) Bill 1995 (Report No. 5 of 1995).

A copy of the response is attached.

The Committee thanks the Attorney-General for his helpful response.

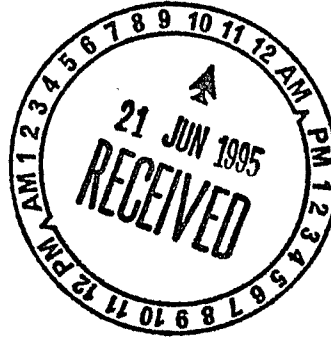
A handwritten signature in black ink, appearing to read 'Paul Osborne', written in a cursive style.

Paul Osborne, MLA
Chair

29 June 1995




Gary Humphries MLA



Attorney General
Minister for the Environment, Land
and Planning
Minister for Police
Minister for Emergency Services
Minister for Arts and Heritage
Minister for Consumer Affairs

Member for Molonglo
Australian Capital Territory

Mr Paul Osborne MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
Subordinate Legislation
ACT Legislative Assembly
South Building
London Circuit
CANBERRA ACT 2601


Dear Mr Osborne

In its Report No. 1 of 1995, the Committee commented on Determination No. 161 of 1994 and Determination No. 14 of 1995 made under the *Taxation (Administration) Act 1987*. The Committee noted that paragraph 4 of Determination No. 161 of 1994 wrongly referred to section 56A of the *Stamp Duties and Taxes Act 1987* when it should have referred to section 64A of the Act. The Committee also noted that this error was acknowledged and corrected by Determination No. 14 of 1995 which revoked and replaced Determination No. 161. This correction meant that Determination No. 161 of 1994 was in force for approximately one month.

The Committee asked whether any taxes were levied in reliance upon the incorrect paragraph 4 of Determination No. 161 of 1994 while the Determination was in force. I am advised by the Revenue Office that their records show that no taxes were levied during this period.

In its Report No. 2 of 1995, the Committee commented on Determination No. 27 of 1995 made under the *Magistrates Court (Civil Jurisdiction) Act 1982*. This Determination establishes new forms concerning enforcement of judgments under the Act. The Committee noted that the *Magistrates Court (Enforcement of Judgments) Act 1994* renumbers the Civil Jurisdiction Act and that the references to section numbers in the new forms are references to the renumbered sections of the Act.

The Committee commented that it was not able to check the references to the renumbered sections of the Civil Jurisdiction Act in the new forms as

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it would normally do because the reprint of the Act was not available. I am advised that the reprint of the Act was made available for publication by the Parliamentary Counsel's Office on 10 April 1995, was published by the Government Printer on 21 April 1995 and would therefore probably have been available while the report was being prepared. In any case, the Parliamentary Counsel's Office works closely with the Assembly Secretariat and is happy to assist informally in such cases.

In its report No. 5 of 1995, the Committee commented on the following Bills:

- Auctioneers (Amendment) Bill 1995;
- Pawnbrokers (Amendment) Bill 1995; and
- Second-hand Dealers and Collectors (Amendment) Bill 1995;

which were placed before the Assembly on 1 June 1995.

The Committee commented on an apparent difference in approach between the Auctioneers (Amendment) Bill and the two other Bills noted above in relation to application requirements for renewal of licences. The Committee suggested that the Pawnbrokers (Amendment) Bill and the Second-hand Dealers and Collectors (Amendment) Bill will require an applicant for renewal of a licence (as well as an applicant for initial licence) to produce character references whereas the Auctioneers (Amendment) Bill makes no such requirement for renewal of licences. The Committee asked why there is this apparent difference in approach.

I note that neither the Pawnbrokers (Amendment) Bill nor the Second-hand Dealers and Collectors (Amendment) Bill refers to the renewal of licences specifically. However, each of these bills provides for a process which is more stringent in relation to an application for a new licence than to the renewal of an existing licence. An application for an initial licence must be supported by three references and the furnishing of a certificate of the applicant's convictions (if any). An application for a licence by a person who is the holder of a licence (in effect, a renewal), must include a certificate of convictions (if any) but there is no requirement for the application to be supported by references. Please refer to proposed paragraph 2A(1)(c) of the *Second-hand Dealers and Collectors Act 1906* (NSW) and proposed paragraph 6(1)(c) of the *Pawnbrokers Act 1902* (NSW).

In this context it should be noted that the language of the proposed amendments of the *Second-hand Dealers and Collectors Act* and the *Pawnbrokers Act* is more concise than that of the *Auctioneers Act 1959* and as such reflects modern legislative drafting techniques.

I note that the probity checks on applications for renewal of licence are more thorough than is the case with some other occupational licences. However, as I mentioned to the Assembly when presenting these Bills it

should be noted that:

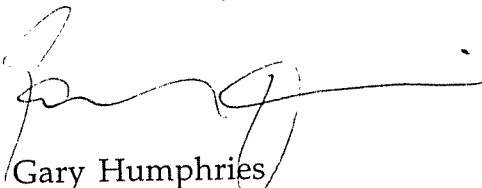
“... it is unfortunately the case that there is the possibility for links between the activities of criminals and the occupations under consideration”.

The Committee commented on a difference in approach to the forms required for application for licences under the three amending Bills. I agree with the Committee that there is an inconsistency of approach. Under the proposed amendments, the Pawnbrokers Act and the Auctioneers Act will continue to require an applicant for a licence to complete a form which is specified in the legislation whereas the proposed amendments to the Second-hand Dealers and Collectors Act will require completion of a form which is not specified in the legislation but is approved by the Registrar. The differing approaches in regard to forms stems from the fact that the First Schedule to the existing Pawnbrokers Act specifies a form of application whereas the existing Second-hand Dealers and Collectors Act has no specified form, but only requires an application for a licence to be made by a notice in writing, with no obligatory format, as specified by section 5 of the Act.

As indicated in my presentation speech, there will be further strategic consideration of this legislation in context of the Government's forthcoming review of business legislation. The Government will then examine the matter of forms and other differences between the three legislative schemes. I note also that, at a national level, the report to Heads of Government of the Vocational Education and Employment Advisory Committee will, if adopted, require some changes in the approach to the legislation.

I trust that this information will be of assistance to the Committee.

Yours sincerely



Gary Humphries
Attorney-General

20 JUN 1995

