

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

REPORT NO. 24 OF 1993

23 December 1993

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 which is subject to disallowance and/or disapproval by the Assembly (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-reviewable decisions;
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; or
 - (e) or the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (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) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers;
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny; or
 - (f) or the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) if the Assembly is not sitting when the Committee is ready to report on Bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing and circulation;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) the foregoing provisions of the resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

MEMBERS OF THE COMMITTEE

Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan
Secretary: Mr T. Duncan
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION

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Ms Roberta McRae, OAM, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601



Dear Ms McRae,

Please find enclosed a copy of Report No. 24 of 1993 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. Accordingly, I seek your approval to print and circulate Report No. 24 of 1993.

Yours sincerely



Elinor Grassby, MLA
Chairperson

23 December 1993



Approved
Roberta McRae, OAM, MLA
Speaker

23 December 1993

BILLS

Bills Upon Which No Comment is Offered

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

Associations Incorporation (Amendment) Bill 1993

This Bill provides that, in order to pass, special resolutions require a majority of three quarters of the votes cast rather than a majority of members voting in favour as has been the case up until now.

Coroners (Amendment) Bill (No. 2) 1993

This Bill makes some general amendments to the principal Act and also enacts special provisions relating to an inquest into a death in custody taking into account the Recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Electoral (Amendment) (Consequential Provisions) Bill 1993

This Bill provides for transitional matters relating to amendments made by the Electoral (Amendment) Bill 1993 and makes consequential amendments to the *Evidence Act 1971*, the *Freedom of Information Act 1989* and the *Juries Act 1967*.

Interpretation (Amendment) Bill (No. 3) 1993

This Bill introduces a system of penalty units for fines and fixes the amount of each unit at \$100.

Long Service Leave (Building and Construction Industry) (Amendment) Bill (No. 2) 1993

This Bill reduces the level of payment to the Board from 2.5% to 1.5% of "ordinary remuneration" in the absence of a determination of a different percentage by the Minister on the recommendation of the Board.

Judicial Commissions Bill 1993

This Bill provides the mechanism for the removal of a Judge of the Supreme Court, the Master of the Supreme Court, a Magistrate or a member of the Administrative Appeals Tribunal.

Smoke-free Areas (Enclosed Public Places) Bill 1993

This Bill provides the power for the Minister to prohibit tobacco smoking in enclosed public places.

Statute Law Revision (Penalties) Bill 1993

This Bill up-dates penalties in many Acts and introduces a system of penalty points.

Subordinate Laws (Amendment) Bill 1993

This Bill permits the Legislative Assembly to amend a subordinate law that has been laid before it.

Bills Upon Which Comment is Offered

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

Discrimination (Amendment) Bill (No. 4) 1993

This Bill adds discrimination on the grounds of profession, trade, occupation or calling to the list of grounds of discrimination to which the Act applies.

A Small Change That May Need to be Made

The amendment would insert this provision as paragraph 7(1)(ib) into the Act. The Discrimination (Amendment) Bill (No. 3) 1993 provides that discrimination on the ground of age is to be inserted as paragraph 7(1)(ib). Thus, if it were to be passed first, the present amendment would need to undergo a labelling change.

Electoral (Amendment) Bill 1993

This Bill amends the principal Act to provide for the conduct of elections in the ACT.

Privacy of Voting

Clause 130 provides as follows:

"Subject to section 152, a person shall, on receipt of a ballot paper under section 170, without delay -

- (a) go to an unoccupied voting compartment at the polling place;
- (b) there, in private, mark his or her vote on the ballot paper in accordance with section 128;
- (c) fold the ballot paper so as to conceal the vote and put it in a ballot box at the polling place; and
- (d) leave the polling place."

Section 170 applies only to claims to vote in Antarctica, so clause 130 does not appear to provide for privacy of voting in the ACT itself.

Do Suppressed Addresses Appear on a Certified List of Electors?

Clause 117 provides that, as soon as practicable after the roll closes for an election, a certified list of electors must be prepared.

Does this list include both the name and address of an elector, even if the elector has sought and obtained suppression of his or her address under clauses 71 to 73?

If a certified list does contain an otherwise suppressed address, does this put at risk the privacy of the person whose address has been suppressed?

On the other hand, if the person's address is not included in the certified list, is there a possible problem? Clause 129 provides that, where a person attends a polling place and claims to vote the officer can only issue a ballot paper if, among other things, the:

"certified list of electors for the electorate - (a) specifies the claimant's name and an address for the claimant". (Emphasis added.)

If a person's suppressed address is not on the certified list, what does the person do to get a vote? Is such a person required to make a declaration vote rather than an ordinary vote?

This seems to be a possibility, as paragraph 131(1)(a), which deals with declaration voting at polling places, seems to cover the position where the certified list of electors does not contain "an address for the person".

Subclause 132(1) also specifically covers the position of a person whose address is suppressed, but, except in the case of a declaration vote outside the Territory under paragraph 132(6)(b), it appears that an application for such a vote must be made before polling day. So, it does not seem to help a person with a suppressed address who turns up at a polling place on polling day.

Perhaps these matters could be confirmed or clarified.

Review of Discretions

There are many discretions conferred in the Bill. Many are subject to review by the Supreme Court exercising its jurisdiction under Part XVI - Disputed Elections, Eligibility and Vacancies and, to some extent, under Part XVIII - Enforcement Proceedings. Others are reviewable by the Electoral Commission and ultimately by the Administrative Appeals Tribunal under Part XV - Review of Decisions.

However, there is a number of discretions which may not be caught by those processes. Some of these may warrant consideration for possible review. Provisions that seem not to be subject to review include the following:

- (a) Subclause 74(3) (removal of a name from a closed roll by the Commissioner);
- (b) Subclause 75(4) (rejection by the Commissioner of an objection to enrolment on the grounds that the Commissioner believes the objection is frivolous or vexatious);
- (c) Clause 84 (Commissioner refusing an application for registration of a party because the applicant has not provided information requested by the Commissioner);
- (d) Clause 104 (rejection by the Commissioner of a nomination on the grounds that the nomination is not substantially in conformity with clause 99);
- (e) Clause 110 (rejection of a voting ticket by the Commissioner);
- (f) Subclause 189(4) (rejection of an application for a casual vacancy by the Commissioner on the grounds that the nomination is not substantially in conformity with subclause 189(2));
- (g) Paragraph 206(4)(b) (discretion on the part of the Commissioner to allow a longer period for the making of a claim for election funding); and
- (h) Clause 238 (rejection by the Commissioner of a request to correct an error or omission in a claim or return).

Retention of Property Seized

Clause 234 provides for the issue of a warrant by a magistrate to a person to enter, search and seize. Subclause 234(6) provides for the retention of this property in these terms:

- "(6) Where an article is seized by a person pursuant to a warrant -
- (a) the person may retain the article for as long as is necessary and reasonable for the purposes of the investigation to which it is relevant; and
 - (b) when the retention of the article ceases to be necessary and reasonable for those purposes, he or she shall cause it to be delivered to the person who appears to be entitled to possession of the article."

These provisions do not go on to give the access to seized materials that is usually given.

There are access provisions in several Acts, but the Committee chose two examples from Bills considered in this Report. In both the Coroners (Amendment) Bill (No. 2) 1993 (in clause 34C) and the Judicial Commissions Bill 1993 (in clause 34) there are such provisions. Subject to the substitution of the words "member" and "Commission" in the latter Bill for the word "Coroner" in the former, the provisions are identical and provide as follows:

- "(2) Where a document is retained under paragraph (1)(b) -
- (a) the person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by the Coroner [member] to be a true copy, and the certified copy shall be received in all courts as evidence as if it were the original; and
 - (b) until the certified copy is supplied, the Coroner [Commission] shall, at such times and places as it thinks appropriate, permit the person otherwise entitled to possession of the document, or a person authorised by that person, to inspect and make copies of, or take extracts from, the document."

Perhaps similar provisions could be considered for the present Bill.

Judicial Commissions (Consequential Amendments) Bill 1993

This Bill makes amendments to other legislation consequential upon the passing of the Judicial Commissions Bill 1993.

A Possible Inconsistency

In dealing with the matter of the tenure of office of a special magistrate, the presentation speech states as follows:

"The tenure of a special magistrate is linked to the period specified in the special magistrates instrument of appointment subject to retirement on attaining the age of 70 years."

If this was the intention, there may be a doubt as to whether the Bill achieves this. The substituted 10J (inserted by subclause 7(2)) provides thus:

- "10J. (1) A special magistrate holds office -
- (a) for the period specified in the instrument of appointment; or
 - (b) if a period is not so specified - until he or she attains the age of 70 years."

This seems to leave open the possibility that someone at, say, age 69 could have a "period specified in the instrument of appointment" (a specified period of 3 years, for example) that would take him or her to an age in excess of the age of 70 years.

Of course, the intention expressed in the presentation speech could be achieved administratively by ensuring either that no periods are specified or none is specified that would breach the age 70 barrier. But, if the intention is to achieve it in the legislation, perhaps an amendment is needed.

Voice of the Electorate Bill 1993 [No. 2]

This Bill enables electors to introduce, amend or repeal laws by referendum.

General Comment

Perhaps the best way to comment is to follow it through clause by clause and try to pick up cross references where appropriate.

Clause 2 - the Definition of "Law"

In the definition of "law" it is stated that " 'law' means a law of the ACT".

Perhaps consideration could be given to using the phrase "law of the Territory" in the definition, as that would pick up the very wide definition of "law of the Territory" given in subclause 14(1) of the *Interpretation Act 1967*.

Clause 3

Subclause 3(1) states that "This bill confirms the right of electors to put forward an Electors' Bill ... ". (Emphasis added.) Perhaps the intention can be gathered, but, as electors do not presently have a right to put forward an Electors Bill, it might be better to change the wording.

Subclause 3(2) contains items that normally appear in the explanatory memorandum for a Bill and are all covered in later provisions of the Bill. For instance, paragraph 3(2)(b) is covered in clause 18. In addition, its elements have already been covered in the definition of "qualified Electors' Bill" in clause 2.

Clause 4

Subclause 4(2) requires the plain English description to be not more than 150 words. This seems a modest word limit, for the description must not only describe the law that the Electors' Bill seeks to introduce, amend or repeal, but must also specify the provisions of the law it seeks to amend if the Electors' Bill is concerned with an amendment.

Clause 6

Subclause 6(6) provides a method of removal or replacement of a committee member by:

"not less than 75% of the signatories to the notice of appointment referred to in subsection (1).".

The Committee makes two comments on the provision.

First, there is a tiny literal mistake as the subclause commences "A members".

Secondly, it might be appropriate to clarify whether the provision should refer to subsection (1) or to subsection (2). On looking at Form 4 it seems that it is intended that a member is to be removed or replaced by 75% of the 100 signatories and not 75% of the 12 members of the committee. However, the appointment process by the 100 appears to be carried out under subclause 6(2) and not subclause 6(1).

Clauses 11 and 15

The Committee makes two comments on clause 11.

Subclause 11(1) authorises the Committee to "appoint any number of electors as Electors' Bills Representatives ...".

First, the Committee notes that there is no vetting of Electors' Bills Representatives, who have very significant powers and duties. They present the Electors' Bill to electors and collect and witness signatures. Of course, subclause 16(6) does permit, but does not require, the Electoral Commissioner or a Local Electoral Official to check the validity of signatures. Thus the integrity of people collecting signatures is significant.

Secondly, subclause 11(4) provides that:

"A person who has been appointed as an Electors' Bill Representative may sign as a witness to such signatures as have been, either before or after his or her appointment, made in his or her presence, and those signatures may thereupon be counted as signatories to the Electors' Bill.".

This is a powerful and unusual instance of retrospectivity.

Perhaps the significance of these points is emphasised when the important obligations set out in clause 15 are noted.

Two additional comments are made on clause 15.

First, it is noted that an Electors' Bill Representative must give a person an opportunity to read the description of the Electors' Bill or must read the description to the person. Should there be an obligation on the Electors' Bill Representative to give the person an opportunity to read the Electors' Bill itself and all of its associated material?

Secondly, subparagraph 15(3)(b)(iii) refers to the return of "signed Electors' Bills". Might it be better to refer to signed copies of Electors' Bills.

Clause 23

This clause deals with the drafting of ballot papers.

There may be a tiny literal mistake. There is a reference in subclause 23(1) to "the questions to be asked at referendum". Would it be better to say "the questions to be asked at a referendum". This would be consistent with the drafting in subclause 23(5), which refers to "materials used in connection with a referendum".

Clause 24

This clause deals with the date for a referendum and paragraph 24(2)(d) provides that one of the dates to be considered for the holding of the referendum is:

"the date determined by the Electoral Commissioner for the holding of a referendum where the Electors' Bill satisfies the requirements of section 18(2).".

Would it be appropriate to require that the Electors' Bill must also satisfy the requirements of clauses 19 (Electoral Commissioner to determine whether Electors' Bill qualifies) and 20 (Certificate of Qualification of Electors' Bill)?

Clause 26

This clause, among other things, deals with the approval of a proposed law at a referendum, including the means by which preferences are determined.

Subclause 26(4) provides that, after first preferences have been determined (by subclause 26(3)), further preferences are to follow the means provided by the *Commonwealth Electoral Act 1918*. Then subclause 26(5) provides that:

"A vote and a preference, including an equal preference, shall be counted where the intention is clear.".

It is not quite clear how this fits in with the adoption of the Commonwealth procedure. If the intention is to over-ride the Commonwealth procedure in this respect, perhaps this intention should be made clearer.

Clause 27

This clause excludes certain matters from referendums and paragraph 27(d) excludes a referendum that:

"proposes the disallowance of the Appropriation Bill for the ordinary purposes of government. However, a referendum may be held with respect to any item of expenditure or proposed item of expenditure of the Government of the ACT.".

In passing, the Committee notes that "disallowance" is perhaps an odd word to use, as it is usually reserved for subordinate legislation.

Perhaps this clause needs further development. Does it mean that a referendum could be held to decide whether a particular item should not be expended or a particular tax not collected for expenditure on a particular item? If so, and there was a large number of Electors' Bills, they could, in effect, add up to "disallowance". In addition, who would decide when this point had been reached?

As drafted the provision also refers to "any item of expenditure or proposed item of expenditure". This seems to suggest that not only is future funding covered, but perhaps also past funding. If so, this would introduce a major retrospective element.

Clause 35

This clause deals with proceedings for offences and provides that they be "dealt with by a Magistrates Court". Perhaps this should say "dealt with by the Magistrates Court". This then would make it absolutely clear that the definition of "Magistrates Court" in the *Interpretation Act 1967* applies.

References to Electoral Commissioner and Supreme Court

In dealing with specific clauses, a number of possible small mistakes has been referred to. However, in many clauses, there needs to be a tidying up of references to the Electoral Commissioner. Sometimes the full phrase is used and sometimes just the word "Commissioner". The same appears to be the case with references to the Supreme Court, although not to the same extent.

SUBORDINATE LEGISLATION

Subordinate Legislation Upon Which no Comment is Offered

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

Determination No. 163 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *Code of Practice for Animal Boarding Establishments*.

Determination No. 164 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *Code of Practice for Pet Grooming Establishments*.

Determination No. 165 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *Code of Practice - Animals at Saleyards in the ACT*.

Determination No. 166 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *Code of Practice for Livestock and Poultry at Slaughtering Establishments (Abattoirs, Slaughterhouses and Knackeries) in the ACT*.

Determination No. 167 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *ACT Code of Practice for the Welfare of Animals - Cattle*.

Determination No. 168 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *ACT Code of Practice for the Welfare of Animals - Sheep*.

Approval of Variation No. 7 to the Territory Plan made under paragraph 26(1)(a) of the *Land (Planning and Environment) Act 1991* dealing with Kambah, section 7, block 11 (part of Gleneagles Golf Course Estate).

Subordinate Legislation Upon Which Comment is Offered

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

Determination No. 162 of 1993 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the *Code of Practice for the Welfare of Horses in the ACT*.

A Possible Minor Error

The *Code of Practice* refers (at the bottom of page 1) to the bibliography as being contained in section 9. In fact the bibliography appears in section 8. This small error should perhaps be corrected when any amendment to the Code is made.

Determination No. 169 of 1993 made under section 217A of the *Motor Traffic Act 1936* revokes previous determinations relating to certain specified car parks and determines fees and periods of time covered by voucher parking in those specified locations and for specified new locations.

Reference to Revoked Determination as Well as to Relevant Gazette Would Have Been Helpful

There is no reference either in the determination itself or in the explanatory statement to the determination or determinations or, more probably, part of a determination that is being revoked or to the Gazette or Gazettes in which it, or they, appeared.

This may possibly be only a partial revocation and there are several determinations in existence that have been made under section 217A of the *Motor Traffic Act 1936*, which may have appeared in more than one Gazette. Thus it would have been very helpful to have given the references to the relevant determination or determinations affected and to the relevant Gazette or Gazettes.

This information would be helpful to any Member of the Assembly or member of the public who wished to check the relevant details.

Determination No. 174 of 1993 made under subsection 161(5) of the *Land (Planning and Environment) Act 1991* determines criteria for the direct grant of Crown leases limited by strata for the purposes of public pedestrian access over or under unleased Territory Land including a public road.

Determination No. 175 of 1993 made under paragraph 167(1)(a) of the *Land (Planning and Environment) Act 1991* declares the lease over a specified block to be a class of lease to which section 167 applies and specifies the criteria for determining whether a person is eligible to hold the specified lease.

Have the Explanatory Statements been Incorrectly Numbered?

Two helpful explanatory statements have been supplied for these two determinations, but their numbering does not match up with the determinations.

Fortunately, the determinations both appear in the same Gazette, so any mystification on reading the explanatory statement allegedly for Determination No. 174 of 1993 disappears when the explanatory statement allegedly for Determination No. 175 of 1993 is perused.

Any Member who checks these determinations "might learn something to his or her advantage" (as the advertisements for missing heirs to millions usually read) by swapping the explanatory statements.

GOVERNMENT RESPONSE

The Committee has received a response to comments made concerning the Legal Practitioners (Amendment) Bill 1993 (Report No. 22 of 1993). A copy of the response is attached.

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

A handwritten signature in black ink, appearing to read 'Ellnor Grassby', with a long horizontal flourish extending to the right.

Ellnor Grassby, MLA
Chairperson

23 December 1993



A.C.T. GOVERNMENT

TERRY CONNOLLY MLA

ATTORNEY GENERAL

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Mrs Ellnor Grassby MLA
Presiding Member
Standing Committee on Scrutiny of Bills and
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Dear Mrs Grassby

In its Report No. 22 of 1993 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Legal Practitioners (Amendment) Bill 1993 ("the Bill").

The Committee noted that, given the numerous amendments effected by the Bill, it would be helpful if a reprint of the principal Act could be produced promptly.

I am pleased to advise the Committee that it is intended that a reprint will be produced as soon as possible after the amendments contained in the Bill come into effect rather than awaiting the passage and commencement of the further amendments which were foreshadowed in my Presentation Speech to the Legislative Assembly.

I trust this information is of assistance to the Committee.

Yours sincerely

Terry Connolly

13 DEC 1993



