STANDING COMMITTEE ON SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

REPORT NO 11 of 1990

29 June 1990

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION

MEMBERS OF THE COMMITTEE

Ms C Maher MLA (Presiding Member)
Mr B Stefaniak MLA
Mr T Connolly MLA

Secretary: Mr T Duncan
Legal Advisor: Emeritus Professor D Whalan

TERMS OF REFERENCE

(1) a standing committee for scrutiny of bills and subordinate legislation shall be appointed:

(2) the committee shall with respect to any instrument of a legislative nature (including a regulation , rule or by-law) made under an Act consider whether the instrument -

(a) is in accord with the general objects of the Act under which it is made;
(b) unduly trespasses on rights previously established by law;
(c) makes rights, liberties and/or obligations unduly dependent upon non-viewable decisions; and
(d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(3) the committee shall with respect to the clauses of bills introduced into the Legislative Assembly consider whether such bills -
(a) unduly trespass on personal rights and liberties;
(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
(d) inappropriately delegate legislative powers; or
(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

(4) the committee shall consist of three members;
(5) if the Assesmbly 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.

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

1 Constitution Avenue
CANBERRA A.C.T. 2601
GPO Box 1020
Telephone: (062) 75 8570
Fax: (062) 75 8108

Mr D J Prowse MLA
Speaker
ACT Legislative Assembly
CANBERRA ACT 2601

Dear Mr Prowse

Please find enclosed a copy of Report No 11 of 1990 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under the 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 11 of 1990.

Yours sincerely

Carmel Maher MLA
Presiding Member

29 June 1990

Deputy Speaker

Approved
David Prowse
Speaker

29 June 1990

The Committee has examined the following delegated legislation tabled by the Attorney-General on Thursday, 7 June 1990:

Motor Omnibus Services Act 1955 -
Determination dated 19 February 1990
Determination dated 24 April 1990
Community and Health Service Act 1985 -
Amendment to Determination No 4 of 1990, dated 23 April 1990
Determination No 5 of 1990, dated 23 April 1990
Administrative Appeals Tribunal Regulations (Amendment) -
No 2 of 1990 - Notification of the making of a Regulation, dated 2 March 1990

In relation to the Motor Omnibus Services Act 1955 Determination dated 24 April 1990, the Committee offers no comment.

The Committee makes the following comments in relation to the following delegated legislation.

1. Amendment made under section 78 of the Community Health Service Act 1985 on 23 April 1990 and published in ACT Special Gazette No S15 of 24 April 1990 varies A.C.T. Determination No 4 of 1990 which was published in ACT Special Gazette No S1 of 31 January 1990.

   Possible Retrospectivity

   The original Determination determined hospital, nursing home, and various other health fees and the present Amendment varies the previous determination by deleting the word "not" from paragraph D1 of the Schedule to that Determination.

   The original paragraph D1 specified various fees

   "If the patient has not attained the age of 16 years ...".

   The paragraph will now read

   "If the patient has attained the age of 16 years ...".

   It is not quite clear to the Committee whether the deletion of the "not" is intended to take effect only from the notification of the present Amendment on 24 April 1990, or whether it is intended that the amendment is to be retrospective to 1 February 1990.

   The operative phrase used in the present Amendment is as follows:

   "... hereby amend the Determination of fees and Charges No 4 of 1990 as published in the Australian Capital Territory Gazette No S 1 on 31 January 1990 to take effect from 1 February 1990 ...". (Emphasis added.)

The Committee's uncertainty arises because it is not sure if the underlined phrase merely completes a perfectly accurate description of Determination No 4, or whether the phrase is actually determining that the deletion of the 'not' is to be retrospective to 1 February 1990.

If the phrase merely completes the description and the amendment is to be effective only from 24 April 1990, there is no retrospectivity. But then these questions arise. "What about the fees in the period up until 24 April 1990?". "Was the Determination administered as if the "not" were not there?". If so, the Determination would have been administered without legal authority. "What will be done if this is so?" If this is the case there appear to be individual rights involved, about which the Committee would be concerned.

If, on the other hand, the underlined phrase is intended actually to make the Amendment effective back to 1 February 1990, then there is retrospectivity. If this is the intention the Committee asks if there is any prejudice to the rights of, or liability imposed on, any person other than the Territory or a Territory authority that would be caught by s.7 of the Subordinate Laws Act 1989. In considering this matter, some of the same sorts of questions as under the first possible alternative would need to be considered.

2. A.C.T. Determination No 5 of 1990 made on 23 April 1990 under section 78 of the Community and Health Service Act 1985 cancels a previous Determination and determines hospital, nursing home, and various other health fees to take effect from 26 April 1990 (ACT Special Gazette No S16 of 26 April 1990).

Some Possible Errors

First, a form of shorthand seems to have crept into the provision that purports to cancel the previous Determination. The relevant part reads thus:

"... hereby cancel the Community and Health Service (A.C.T.) Determination of Fees and Charges No 4 of 1990 dated the 23rd day of April 1990 and published in the Australian Capital Territory Gazette No S1 on 31 January 1990...".

This seems to be misleading as it does not given the actual date of the Determination accurately, it does not mention that it had been amended and it does not give the date of the publication of that Amendment. Indeed, if one takes the cancellation at face value, unless someone was able to see

into the future, it might be thought to be difficult to see how a Determination made on 23 April 1990 was able to be published on 31 January 1990.

What the Committee thinks actually happened was that Determination No 4 was signed on 29 January 1990, published on 31 January 1990, amended on 23 April 1990 and the Amendment published on 24 April 1990. So perhaps an accurate cancellation might perhaps read something like this:

"... hereby cancel the Community and Health Service (A.C.T.) Determination of Fees and Charges No 4 of 1990 dated the 29th day of January 1990 and published in Australian Capital Territory Gazette No S1 on 31 January 1990 as amended by an Amendment dated the 23rd day of April 1990 and published in Australian Capital Territory Gazette No S15 on 24 April 1990...".

Secondly, the Committee noted the use of sexist language in the Determination. Examples exist on page 4 in the last line and on page 11 in paragraph (b).

Thirdly, a definition of "inpatient" is given at page 3, but wherever the Committee can find the word used it is given as "in-patient".

Finally, in the course of checking the other matters, could the Committee be given confirmation that s. 4 of the Self-Government (Transitional Provisions) Act 1989 is the source of power under which the General Manager of the Australian Capital Territory Community and Health Service acts as the delegate of the Minister for the purposes of s. 78 of the Community and Health Services Act 1985? If it is not, could the Committee be told what the source of power is?

3. Notification of the making of a Regulation being a Notice relating to the making of ACT Regulations 1990 No 2 being the Administrative Appeals Tribunal Regulations (Amendment) published in ACT Special Gazette No S10 of 2 March 1990.

ACT Regulations 1990 No 2 being Administrative Appeals Tribunal regulations (Amendment) repeal Regulation 15 of the principal Regulations which dealt with the remuneration and allowances of part-time members of the Administrative Appeals Tribunal.

Possible tabling out of time

The Committee examined whether the tabling of a notification of the making of a regulation rather than the actual regulation satisfies the provisions of the Subordinate Laws Act 1989.

The relevant parts of section 6 of that Act state:

"6(1) A subordinate law -

(a) shall be notified in the Gazette;

(b) takes effect on the day of notification or, if that law otherwise provides, as so provided; and

(c) shall be laid before the Legislative Assembly within 15 sitting days after the day of the notification. ...

(6) If a subordinate law is not laid before the Legislative Assembly in accordance with paragraph (1)(c), it shall be taken to be void and of no effect. ...

(12) In this section, 'subordinate law' means -
(a) regulations, rules or by-laws; ...".

The provisions of s.6(1) require certain things to be done with "a subordinate law" and, if they are done, certain consequences follow. However, if they are not done, certain other consequences follow.

One of the requirements is that s.6(1)(c) requires that "a subordinate law shall be laid before the Legislative Assembly within 15 sitting days after the day of the notification". Those provisions appear to the Committee to require that the relevant subordinate law itself and not merely the notification of the subordinate law "shall be laid before the Legislative Assembly within 15 sitting days after the day of the notification".

Furthermore, as the part of s.6(12) that is relevant here defines "subordinate law" to mean "regulations, rules or by-laws", that does not seem to permit the inclusion or substitution of a mere Gazette notification of that subordinate law in the meaning of subordinate law. Moreover, it is noted that the definition does not say (as definitions sometimes do) that a subordinate law "includes regulations, rules or by-laws" and thus possibly leave open the argument that a notification could be added to the list. Instead the definition actually says that a subordinate law "means... regulations, rules or by-laws" and thus excludes other things.

Thus, it is the Committee's view that tabling of a notification only would probably not be sufficient.

However, in the present case, the correctness of this view is probably not in issue. There must be tabling within 15 sitting days if regulations are to remain valid. It appears that the Regulations themselves have not been tabled and more than 15 sitting days have elapsed since they became effective. Although the notification was tabled on 7 June 1990, this tabling occurred more than 15 sitting days after the Regulations were notified.

Thus the tabling was out of time in any event.

As it appears that neither the Regulations nor the Notification were tabled within 15 sitting days, then the Regulations are void and of no effect.

If the Regulations are void and of no effect, then, as the Regulations repealed regulation 15 of the principal Regulations, the effect of s. 6(8) and (9) of the Subordinate Laws Act 1989 is that "the previous law is revived from and including ... the date on which the relevant law became void and of no effect, as if the relevant law had not been made" (s.6(9)).

4. Determination of 19 February 1990 made under section 4 of the Motor Omnibus Services Act 1955 provided that special bus fares would be payable on certain routes during the Royal Canberra Show on 23, 24 and 25 February 1990 (ACT Special Gazette No S7 of 22 February 1990).

Possible tabling out of time

This Determination was tabled on 7 June 1990. As it was notified on 22 February 1990, it does not appear to have been tabled within the required 15 sitting days. 15 sitting days from 22 February 1990 expired on Thursday 31 May 1990. Therefore the Determination will be void and of no effect. Of course, the effect of the Determination is spent in any event as it provided for special fares only during the Royal Canberra Show in February. Thus, if the Determination has, in fact, been tabled out of time, there is little or no practical remedial action that can be taken except to try to ensure that there is no recurrence of the failure to table such determinations in time in the future.

General Comment

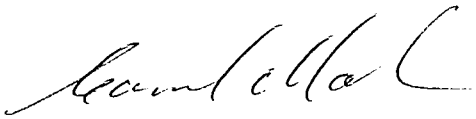
The Committee noted that the style and format of Determinations differs in each case. This perhaps reflects the fact that Determinations are prepared by the department administering the relevant Act. Whilst the Committee understands that administratively this is the best way of preparing Determinations, it can lead to inconsistencies in the style and format of the Determinations. Therefore, the Committee would see

benefit in having one body that would oversee the preparation and co-ordination of all Determinations.

Report No 6 - Government response

On 13 June 1990 the Attorney-General, Mr Collaery, forwarded to the Committee a response to its Report No 6, which was presented on 1 May 1990. A copy of the response is attached.

The Committee thanks the Attorney-General for his positive response to the Committee's report.



Carmel Maher
Presiding Member

29 June 1990

Australian Capital Territory
DEPUTY CHIEF MINISTER

1 Constitution Ave
Canberra ACT 2601

Ms C Maher
Presiding Member
Standing Committee on Scrutiny of Bills and Subordinate Legislation
ACT Legislative Assembly
1 Constitution Avenue
CANBERRA ACT 2600

Dear Ms Maher

The Standing Committee on Scrutiny of Bills and Subordinate Legislation (the Committee) in its Report No. 6 of 1990 (the Report) commented on the Housing Assistance (Amendment) Bill 1990 and on the Pawnbrokers Act 1902 as amended by the Pawnbrokers (Amendment) Bill 1990.

The Committee questioned why there was no commencement provision in the Housing Assistance (Amendment) Bill 1990 (the Housing Bill).

As you will be aware, by virtue of section 25 of the Australian Capital Territory (Self-Government) Act 1988 (Cth) if an Act does not contain a commencement provision, it will commence on the day of its notification in the *Gazette*. A commencement provision is therefore unnecessary.

If, however, the intention is that an Act is not to commence on its notification then a commencement provision specifying a commencement date or making provision for the relevant Minister to fix a commencement date is required.

100% recycled paper

Drafting practice is that in a Bill which contemplates a delayed commencement provision for its automatic commencement six months after passage through the Assembly if the Bill has not commenced by then shall be made. Because the intention was that the Housing Bill would commence on its notification in the *Gazette* a commencement clause as outlined by the Committee would have been inappropriate.

The Housing Bill was prepared to give statutory effect to the Territory becoming signatory to the Commonwealth State Housing Agreement (the CSHA). It was imperative that the Bill came into effect as soon as possible after the Territory entered into the CSHA. The Chief Minister signed the CSHA on 1 March 1990. The Housing Bill was agreed to by the Assembly on 3 May 1990 and notified by *Special Gazette* No. 25 of 17 May 1990 at which time it commenced.

The Committee also questioned why section 26 of the Pawnbrokers Act 1902 is not amended by the Pawnbrokers (Amendment) Bill 1990 to insert a defence of 'reasonable excuse' given that the section contained, in the view of the Committee, an offence of strict liability.

Section 26 prohibits a licensed pawnbroker from operating outside statutory business hours. The provision requires compliance with Part II of the Trading Hours Act 1962 which also prohibits trading outside set business hours and which makes no provision for a statutory defence of reasonable excuse. It is desirable that the two Acts, dealing with the same subject matter and creating the same offence, be consistent.

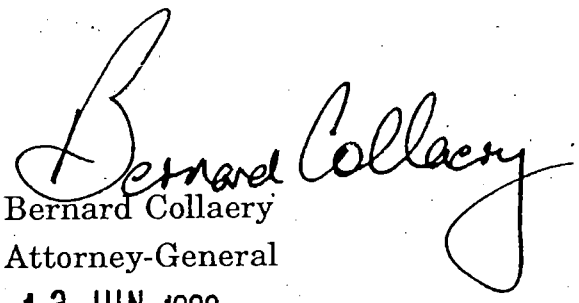
An offence is not necessarily one of strict liability merely because *mens rea* or a mental element is not expressly included as an element of the offence. To breach section 26 a pawnbroker would have to set his or her mind to the matter and consciously decide to operate out of hours and the prosecution would have to establish that state of mind in order to prove its case.

If section 26 were to be interpreted as an offence of strict liability, the defendant could always argue, in the circumstances of a stopped clock which the Committee gives as an example, the defence of honest and reasonable mistake. This would provide the defendant with the defence of reasonable mistake of fact or at least enable the defendant to avoid criminal liability by showing that no mental element was present. The concept of a strict liability offence is that there is no mens rea in the definition of the offence. Reasonable mistake mitigates the harshness but does not provide a mental element as such.

The reasonable excuse defence is usually attached to a provision which states that a person shall not fail to do a particular thing and which is likely to be interpreted as an offence of strict liability. Section 26 merely prohibits a licensed pawnbroker from operating outside business hours. The 'without reasonable excuse' formula is not appropriate to the circumstances it contemplates.

I hope this information is of assistance to the Committee.

Yours sincerely



Bernard Collaery
Attorney-General
13 JUN 1990