

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

REPORT NO 1 of 1990

22 February 1990

**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

MEMBERS OF THE COMMITTEE

Ms C Maher (Presiding Member)

Mr B Stefaniak

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) the majority of members constitutes a quorum of the committee;
- (6) the committee be provided with the necessary additional staff, facilities and resources; and
- (7) 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.



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21 February 1990

Mr Tom Duncan
Deputy Clerk
Legislative Assembly for
the Australian Capital Territory
1 Constitution Avenue
CANBERRA
ACT 2600.

Dear Mr Duncan,

Legal Adviser's Report No. 1 - Standing Committee on
Scrutiny of Bills and Subordinate Legislation

As Legal Adviser to the Standing Committee on the Scrutiny of Bills and Subordinate Legislation, I have considered the following Bills. Of course, in conformity with the Terms of Reference of the Committee, I make no comments on the policy aspects of the Bills, but consider the Bills against those Terms of Reference.

There are no matters in the following Bill to which the attention of the Committee is drawn:

Motor Traffic (Amendment) Bill (No. 2) 1990

This Bill makes it compulsory for a person applying for a permit licence to ride a motor cycle to complete successfully a motor cycle rider training course within 3 months prior to applying for the permit.

I draw the attention of the Committee to these matters in the following Bill:

Clinical Waste Bill

This Bill provides for the disposal of clinical waste and for its storage and transport under licence.

1. Declarations of "clinical waste" and "prescribed activity" by Minister

Clause 3 defines "clinical waste" and "prescribed activity" in some detail and then in paras. (1) and (e) of the respective definitions provides that the Minister may declare additional waste or activities to be within those definitions. However, clause 3(2) provides that such instruments are disallowable instruments. This means that the Assembly retains ultimate control over the exercise of the power because an instrument must be tabled within 15 sitting days and may be disallowed within a further 15 sitting days.

Thus the Committee may feel that the provisions are quite acceptable.

2. Crown not liable to Prosecution

Clause 4 provides that the Act binds the Crown, but then softens this by providing in clause 5 that the Crown is not liable to be prosecuted for an offence.

I accept that this formula does occasionally turn up in legislation. However, in the present context, it rather weakens the thrust of the legislation, given that probably the biggest producers of clinical waste are likely to be the local public hospitals. If they are protected by the shield of the Crown, they could, in theory, breach this Act with impunity.

Mind you, as the provisions are reasonably common, I would not suggest to the Committee that having them changed was as important as breaking down the Berlin wall - or even a quite small illegal front fence in Canberra!

3. Wide Power to Delegate

A Clinical Waste Controller may be appointed and clause 9 provides that the Controller "may delegate in writing to a public servant all or any of his or her powers under this Act."

There are no restrictions on the power to delegate and the Controller could therefore delegate the power to grant, refuse, vary, suspend or cancel licences. The Controller could even delegate the exercise of the emergency suspension powers in clause 25. These are all very important powers and it would seem inappropriate for them to be delegated too far down the line.

4. Clinical Waste Manual Disallowable

The Clinical Waste Manual and any amendments thereof are disallowable, so they remain subject to the Assembly's oversight.

Again, the Committee may feel that the provisions are quite acceptable.

5. Return of Licence

Clause 26(1) provides for a penalty of up to \$1,000.00 if a licensee does not return a licence within 7 days of notification of a variation, suspension or cancellation. In contrast, in clause 26(2), which imposes an obligation on the Controller to endorse a variation on a licence and return it to the licensee, there is no time limit nor penalty for failure to fulfil the obligation.

It may not be necessary for there to be a "what is sauce for the goose is sauce for the gander" approach. However, it may be reasonable to have a "without reasonable excuse" element inserted into clause 26(1) and, perhaps less importantly, a "within a reasonable time" provision inserted into clause 26(2). There is already a "without reasonable excuse" defence in clause 38, which deals with obstructing inspectors.

In the case of clause 26(1) an offence is committed once the 7 days are up. It would be quite possible, for instance, for the person responsible for keeping a company's documents to be on holiday or sick or for the licence to have been destroyed in a fire. Yet, once the 7 days are up, an offence has been committed.

There are plenty of precedents for ameliorating return of licence provisions similar to clause 26(1). Two that spring to my mind are s. 24 of the Medical Practitioners Registration Act 1930, and s. 34 of the Plumbers, Drainers and Gasfitters Board Act 1982. Incidentally, the doctors are discriminated against as they have to give up their certificates within 14 days whereas the plumbers, drainers and gasfitters have a month! Of course, both have an advantage over a licensee under the present Bill who has only 7 days.

6. Review of Decisions

The provisions of clause 27 faithfully follow the drafting formula that has been evolved between Federal Government Departments and the Senate Standing Committee on Regulations and Ordinances over the last few years.

It is very important that applicants be informed that they have a right to a review of a decision. However, for certainty and difficulty of proof purposes,

it has proved necessary to put in the provision in clause 27(3) that the validity of a decision is not affected if the notice on review right is defective. However, the way to overcome this aspect in practice has been for Departments to undertake to have a standard form of notification prepared in which the appropriate information about review rights appears.

Perhaps this practical solution would be appropriate in the present case also.

7. Enforcement Provisions and Entry to Premises

As with the rights of review, it is pleasing to see that the entry provisions in the present Bill have largely been drafted in conformity with the principles developed by the Departments and the Senate Standing Committee on Regulations and Ordinances in recent years. These changes have enhanced the protection of the rights and liberties of individuals by such changes as these:

- ensuring that any consent to entry (such as appears in clause 33 of the present Bill) is a genuine consent that is given in writing. If the written consent isn't produced, the person is presumed not to have consented and a prosecutor has to rebut that presumption;

- ensuring that inspectors produce proper identity cards (as in clauses 9, 10 and 32(2) of the present Bill);

- ensuring that entry is not to be judged on the subjective opinion of the entering inspector, but on objective "reasonable grounds" (as in clause 32(1) of the present Bill) or, in the case of a magistrate's search warrant, an inspector may only employ the objectively judged "such force as is necessary and reasonable" (clause 37(1));

- ensuring that search warrants, like symphonies, have a beginning, a middle and an end (as in clause 37(2) and (3) in particular) and not be like the Beatles' Hey Jude, which, delightful as it was, always seemed to go on for ever.

There are one or two small omissions that seem justifiable in the circumstances in the present Bill, so I make three comments only about the enforcement provisions.

First, it is noted that clauses 32-36 contain strong powers of entry without the authority of a search warrant. However, clause 32 provides that the powers can only be exercised in relation to regulated premises at any reasonable time (the phrase "regulated premises" is defined in clause 3 and includes the obvious places like hospitals and so on) or, in relation to any

premises at any time on the basis of consent. I suggest that the Committee may find that this formula, which is very similar to that adopted in other A.C.T. Acts in recent times, is acceptable in the present circumstances.

Secondly, clause 34(i) empowers an inspector

"to require any person on the premises to answer questions relating to the use of those premises in connection with the treatment, storage, transportation or disposal of clinical waste."

This provision is very much wider than the equivalent provision that appears, for instance, in the Pesticides Act 1989 that the Assembly passed. Section 71(1)(j) of that Act merely required

"the occupier to give the inspector such assistance as is reasonable to enable the inspector to exercise his or her powers under the section."

The principal problem with the provision in the present Bill is that a person appears to have none of the usual protection against self-incrimination. When we look at clause 38, we note that there is a defence of "reasonable excuse" which prevents a person from being convicted of "contraven[ing] a requirement of an inspector under clause 34". Whether failing to answer a question on the ground that to do so would incriminate a person, is a moot point.

I suggest that no-one should have to incur considerable legal costs in finding out the answer to that question. Perhaps the Committee should consider suggesting that the requirement in the Pesticides Act 1989 (or a requirement similar to it) would serve almost as well.

Thirdly, I note that under clause 35, which deals with the taking of samples, the sample is only split and labelled if the occupier requests part of the sample for analysis, which request must be made in writing within 14 days.

I suggest that it may be preferable to do the splitting and labelling as a routine matter. Unless there are very strong reasons for not following the precedent, I suggest that here, too, the Assembly enacted a preferable procedure when it passed s. 72 of the Pesticides Act 1989. In that case there is splitting, labelling and giving of one part of the sample to the occupier. There is a requirement in s. 72 for the sample to be split into 3 parts, but, unless it was felt that the Controller was equivalent to the Registrar in s. 72, it may well be sufficient in the present case for the sample to be split into only 2 parts.

Perhaps the Committee could consider my view that the Pesticides Act provisions probably protect both the integrity of the sample and the rights of all concerned better than the provisions of the present clause 35.

As you know, I have literally produced this Report since normal close of business today. Although it has been a great pleasure and, indeed, privilege for me to do so, I hope that there are not too many resultant errors or omissions. Of course, I stand ready to discuss any aspect of the Report.

Yours sincerely,

A handwritten signature in cursive script, reading "Douglas Whalan". The signature is written in dark ink and is positioned below the "Yours sincerely," text.

Professor D. J. Whalan