

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON  
LEGAL AFFAIRS  
(PERFORMING THE DUTIES OF A SCRUTINY  
OF BILLS AND SUBORDINATE  
LEGISLATION COMMITTEE)**

**SCRUTINY REPORT NO. 13**

**29 MAY 2002**

## **TERMS OF REFERENCE**

- (1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:
  - (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
    - (i) is in accord with the general objects of the Act under which it is made;
    - (ii) unduly trespasses on rights previously established by law;
    - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
    - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
  - (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee
  - (c) consider whether the clauses of bills introduced into the Assembly:
    - (i) unduly trespass on personal rights and liberties;
    - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
    - (iii) 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) report to the Assembly on these or any related matter and 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, publication and circulation.

## **MEMBERS OF THE COMMITTEE**

**MR BILL STEFANIAK, MLA (CHAIR)**  
**MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)**  
**MS KERRIE TUCKER, MLA**

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**LEGAL ADVISER: MR PETER BAYNE**  
**SECRETARY: MR TOM DUNCAN**  
**(SCRUTINY OF BILLS AND SUBORDINATE**  
**LEGISLATION COMMITTEE)**  
**ASSISTANT SECRETARY: MS CELESTE ITALIANO**  
**(SCRUTINY OF BILLS AND SUBORDINATE**  
**LEGISLATION COMMITTEE)**

## **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 - Comment

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

#### **Cemeteries and Crematoria Bill 2002**

This is a Bill for an Act to establish a framework for the regulation of cemeteries and crematoria in the ACT. It would repeal the *Cemeteries Act 1933* and *Cremation Act 1966*.

#### *Para 2(c)(i) – undue trespass on rights and liberties*

##### Access to law

Subclause 5(3) provides that a code of practice "may apply, adopt or incorporate a law or instrument, or a provision of a law or instrument, as in force from time to time". Note 1 notes that "The text of an applied, adopted or incorporated law or instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of the *Legislation Act 2001*, s 47 (5) or (6) is not disapplied (see s 47 (7))."

The Committee notes and commends that neither s 47 (5) or (6) have been disapplied; cf Report No 4 of 2002.

##### Privacy

Under subclause 8(4), "The Minister may, by written notice to the operator of a cemetery or crematorium, require the operator to give the Minister stated information or documents that the Minister reasonably needs to make a determination under this section".

First, the Committee notes that the Explanatory Memorandum (at p 4) appears to take the view that there would be no sanction for non-compliance other than that the Minister could proceed to make a determination of a perpetual care trust percentage under subclause 8(2). (This would not, as the Explanatory Memorandum says, be a figure that the Minister "believes is reasonable". The figure would be fixed under subclause 8(2), which does not employ that concept.) But would non-compliance be subject to sanction under clause 15? The terms of clause 15 appear to cover this situation.

Secondly, there is no provision in the Bill governing the disclosure of the information that may be provided under subclause 8(4). Of course, the *Freedom of Information Act 1989* and the *Privacy Act 1988* apply. This may nevertheless be regarded as adequate protection.

*(ii) insufficient definition of administrative powers*

## Guidelines

The Committee notes and commends the provision in clause 6 that empowers the Minister to make guidelines for the exercise of various powers on the Minister; the obligation on the Minister to comply with any such guidelines; and the provision that the guidelines are disallowable instruments.

### *(iii) review of administrative decisions*

The Bill would provide by clause 43 for review by the Administrative Appeals Tribunal (AAT) of significant decisions that might be made under the Bill. The Committee raises no comment except to commend the scheme.

In this respect, however, the Explanatory Memorandum is deficient.

- In relation to clause 8, it is explained that the an operator of a cemetery or crematorium may seek review by the AAT, but no mention is made of the Minister's obligation to issue a notice that complies with subsection 25B(1) of the *Administrative Appeals Tribunal 1989*.
- In relation to clause 15, there is mention of the obligation to issue a notice that complies with subsection 25B(1), but not of the fact that AAT review is possible;
- In relation to clause 17, there is no mention of either the fact that AAT review is possible, or to the obligation to issue a notice that complies with subsection 25B(1);
- In relation to clause 21, there is mention of the obligation to issue a notice that complies with subsection 25B(1), but not of the fact that AAT review is possible; and
- In relation to clause 22, there is no mention of either the fact that AAT review is possible, or to the obligation to issue a notice that complies with subsection 25B(1).

It may also be said that a reference to preparation of a notice in accord with a code made under subsection 25B(1) of the *Administrative Appeals Tribunal 1989* is incomplete. A more informative guide would also refer to section 25A, which provides that:

- (1) A person who makes a reviewable decision shall take such steps as are reasonable in the circumstances to give to any person whose interests are affected by the decision notice in writing—
  - (a) of the making of the decision; and
  - (b) of the right of the lastmentioned person to have the decision reviewed.

In the light of section 25A of the *Administrative Appeals Tribunal 1989*, clause 44 of the Bill appears to be unnecessary.

## **Duties (Insurance Exemptions) Amendment Bill 2002**

This Bill would amend the *Duties Act 1999* to permit the Minister to determine guidelines according to which a person might be relieved of the obligation to pay duty in respect of a premium paid for a contract for public liability insurance, or any other insurance prescribed by the guidelines. The determination will be a disallowable instrument.

### *(v) inappropriate delegation of legislative power*

This is an extensive delegation of legislative power to the Minister. It should be noted that the guidelines permit the Minister to not only prescribe by guidelines the circumstances under which an exemption might be granted in respect of a contract of insurance, but to determine what contracts of insurance might thus be affected.

It is noted that the determination will be a disallowable instrument. Nevertheless, the Committee is concerned that there is such an extensive delegation of legislative power to the Minister.

This concern has greater point when it is appreciated that while the Explanatory Memorandum states that the intention is to provide relief for "small amateur sporting and community bodies run on a not-for-profit basis", there is nothing in the Bill that would so limit the operation of proposed new section 201A of the Act.

## **Road Transport Legislation Amendment Bill 2002**

This Bill would amend the *Road Transport (Driver Licensing) Act 1999* to regulate the use and security of photographs and signatures taken by or given to the road transport authority in connection with the issue of a driver licence or proof of age card; the *Road Transport (General) Act 1999* in relation to identity cards issued to officers of the authority, and to establish a written-off vehicles register; and the *Road Transport (Vehicle Registration) Regulations 2000* to provide further matters in relation to the scheme for a written-off vehicles register.

### *Para 2(c)(i) – undue trespass on rights and liberties*

#### Privacy protection

The amendments to the *Road Transport (Driver Licensing) Act 1999*. The provisions of the Bill dealing with the use and security of photographs and signatures taken by or given to the road transport authority reveal a commendable concern for the privacy of the persons affected. The provisions are not, however, abundantly clear, and the lack of clarity might mislead a reader of the Act.

Proposed new subsection 33D(1) states that "The road transport authority must ensure that a photograph or signature is not disclosed by the authority to someone else except - [various named persons and purposes]". This would appear to be an exhaustive statement, but then subsection 33E(1) provides: "The road transport authority must ensure that photographs and signatures are disclosed by the authority to someone else only in accordance with this Act or another law in force in the ACT".

(The headings to these clauses are different, but both appear to deal with the same subject matter.)

The words "or another law in force in the ACT" are a more extensive qualification. The Explanatory Memorandum refers to the *Privacy Act 1988* (Commonwealth) as an example of another law that would fall under subsection 33E(1). This Act applies in the Territory, and of particular relevance is Information Privacy Principle (IPP) 11.

(There is no cross-reference to this Act, and in particular to IPP 11, as there is in subsection 33D(1).)

Under IPP 11.1,

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

- (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
- (b) the individual concerned has consented to the disclosure;
- (c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
- (d) the disclosure is required or authorised by or under law; or
- (e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

The point the Committee makes is that while the policy of protecting privacy is commendable, the two relevant provisions of the Bill present a somewhat confused and incomplete picture of just what is the extent of this protection.

It is also to be noted that the Explanatory Memorandum does not address the issue of how the *Freedom of Information Act 1989* might apply under proposed new subsection 33E(1). This is also another law in force in the ACT.

The amendments to the *Road Transport (General) Act 1999*. There is a similar concern with proposed new section 83E of this Act. It would provide:

The road transport authority must ensure that information in the written-off vehicles register that is of a personal nature or has commercial sensitivity for the person about whom it is kept is released only in accordance with this Act or another law in force in the ACT.

The Explanatory Memorandum notes that the *Privacy Act 1988* applies in the Territory.

It should be noted that the kind of information affected by the *Privacy Act 1988* is "personal information", a much more extensive category than "information ... of a personal nature". (Under the *Privacy Act 1988*, 'personal information' is any information about a person, and while there is some debate about how far it extends, it has been understood by bodies such as the Commonwealth AAT to encompass much more than 'information of a personal nature'.) This might raise some doubt as to whether the Explanatory Memorandum is correct in its reference to the *Privacy Act 1988* as "another law in force in the ACT" for the purposes of proposed new section 83E.

The category of "information in the written-off vehicles register that ... has commercial sensitivity" is not a category to which the *Privacy Act 1988* applies.

Again, it is to be noted that the Explanatory Memorandum does not address the issue of how the *Freedom of Information Act 1989* might apply under proposed new subsection 33E(1). This is also another law in force in the ACT. This issue is complicated by reason that the concept of 'information of a personal nature' is also not used in the *Freedom of Information Act 1989*.

The general comment to make is that while the provisions of the Bill do address the privacy and commercial-in-confidence concerns of persons who provide information to road transport authorities, they do so in a way that leaves it very unclear just what is the extent of that protection.

In contrast, as noted, the *Cemeteries and Crematoria Bill 2002*, in an analogous context, does not make explicit provision for these concerns. What might be addressed is whether this is the better model. A Note in the Act might, as appropriate, indicate that access to persons to information is *Freedom of Information Act 1989* and IPP 10 of the *Privacy Act 1988*, and disclosure by a record-keeper is governed by IPP 11 of the *Privacy Act 1988*.

## **SUBORDINATE LEGISLATION**

There is no matter for comment in this report.

## **GOVERNMENT RESPONSES**

There is no matter for comment in this report.

**REGULATORY IMPACT STATEMENTS**

There is no matter for comment in this report.

**INTERSTATE AGREEMENTS**

There is no matter for comment in this report.

Bill Stefaniak MLA  
Chair

29 May 2002