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. 4

5 March 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

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 - No Comment

The Committee has examined the following Bills and offers no comment on them.

Crimes (Bushfires) Amendment Bill 2002

This is a Bill to amend the *Crimes Act 1900* to create an offence constituted by causing a fire, where the person is either reckless with regard to, or has the intention of, causing the fire, and to the spread of the fire to vegetation on another person's property. There is a specific defence of consent available.

Road Transport (Driver Licensing) Amendment Bill 2002

This is a Bill to amend the *Road Transport (Driver Licensing) Act 1999* in order to clarify the operation of the Act in relation to the calculation of demerit points for the purpose of the suspension of a driver's licence.

Land (Planning and Environment) Amendment Bill 2002

This Bill would amend the *Land (Planning and Environment) Act 1991* to make amendments relating to development approvals.

Bills - Comment

The Committee has examined the following Bill and offers the following comments.

Inquiries Amendment Bill 2002

This is a bill to amend sub-section 14(3) of the *Inquiries Act 1991* by the deletion of the words "has been laid before the assembly" with the words "was a report the Assembly had ordered to be published".

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

A board of inquiry constituted under the *Inquiries Act 1991* must, after completing an inquiry, prepare a report of the inquiry and submit it to the Chief Minister; (section 14). Under sub-section 14A(1), the Chief Minister may lay a copy of a report or part of a report before the Legislative Assembly, or, by sub-section 14A(2), the Chief Minister "may make a report or part of a report public whether or not the Legislative Assembly is sitting and whether or not the report or part has been laid before the Assembly".

Sub-section 14A(3) then provides:

> (3) Where a report or part of a report is made public by the Chief Minister before it is laid before the Legislative Assembly, the report or part attracts the same privileges and immunities as if the report or part had been laid before the Assembly.

There is doubt as to whether the report attracts these privileges where the Assembly has not authorised the publication of the report. The amendment proposed by the Bill seeks to resolve this doubt by amending sub-section 14A(3) so that the making public of the report by the Chief Minister is deemed to be an authorisation by the Assembly.

From a rights perspective, the concern is with the position of those people whose conduct is the subject of the report, in particular where that conduct is criticised in a way that affects their reputation. Reputation is considered to be part of the personal affairs of a person, and protection of privacy embraces the notion that a person has the means to protect their privacy.

From this perspective, an issue for the Assembly is whether the Assembly itself should authorise the publication of a report of a board of inquiry where the effect of publication is that the report attracts the privileges and immunities of the Assembly.

Another issue is whether, if the Bill be passed, there should be some means for persons affected to place on the public record, contemporaneously with the release of the report, their response to parts of the report that reflect adversely on them. It is difficult to see how the Citizen's Right of Reply procedure (see the resolution passed by the Assembly on 4 May 1995) could always apply in these circumstances. This resolution suggests, however, that this issue needs attention.

Gene Technology Bill 2002

This is a Bill for an Act to regulate the use of gene technology in the ACT. Its enactment would carry into effect a commitment made under the *Inter-Governmental Agreement on Gene Technology* to introduce legislation based on a national model Bill to regulate gene technology. The Bill defines the notion of a dealing with a genetically modified organism (GMO), and then regulates such dealings by a licensing scheme. Inspectors with powers of enforcement and investigation support the scheme.

Paragraph 2(c)(iv) – inappropriate delegation of legislative power

By clause 72A of the Bill, the holder of a GMO licence is "liable to pay a charge" for the licence. The amount of the charge is that "amount prescribed under the regulations". Sub-clause 72A(3) then provides that "The amount prescribed may be in the nature of a tax and not be related to the cost of providing any service".

Thus, this provision will authorise the levying of a tax by means of a subordinate law.

A regulation is disallowable by the Assembly, but only after the tax has been levied. In these circumstances, there will be argument that disallowance of the tax will disturb business and other arrangements made by members of the community on the basis of the tax taking effect. Recovery of paid taxes will also be a very complicated matter.

In Scrutiny Report No 14 of 1999, the Committee noted that many scrutiny committees operate according to the principle that "[i]t is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so": Senate Standing Committee for Scrutiny of Bills, *The Work of the Committee during the 37th Parliament May 1993 – March 1996*, (June 1997), at 62. This Committee said: "[t]he vice to be avoided is taxation by non-primary legislation".

In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 579, Justice Brennan J referred to the long-standing constitutional position that "the raising* and expenditure** of public revenue have long been under the control of Parliament".

**Petition of Right* (1627), s 8; Bill of Rights (1688), s 1; Maitland, *The Constitutional History of England*, (1908), pp 307-309; *Attorney-General v Wilts United Dairies* (1922) 91 LJKB 897, at p 900.

***Auckland Harbour Board v The King* (1924) AC 318, at pp 326-327; Maitland, op cit, pp 309-310.

The causes and concerns of the constitutional conflicts and the civil war in England in the 17th century were far wider than the issue at hand. Nevertheless, a major objective of the parliamentarians of that period was to establish that the raising of public revenue must be under the control of Parliament.

The *Petition of Right* of 1628, after reference to a statute of the reign of Edward I, and other matters, recited in its preamble the freedom of all subjects "that they should not be compelled to contribute to any tax, tallage, aid or other like charge not set by the common consent in parliament". The same sentiment was stated in the body of the *Petition*; (C Stephenson and F Marcham, *Sources of English Constitutional History* (1972), 451). The *Bill of Rights* of 1689, the key document in the laws that make up the legislative outcome of the Revolution of 1688, declared that "levying of money for or to the use of the crown by pretence of prerogative without grant of parliament, or for longer time or in other manner then the same is or shall be granted, is illegal …" (ibid at 601).

Recognising the supremacy of Parliament, the courts have allowed that a statute may delegate to a Minister, or to some other person, the legislative power to levy a tax. In order, however, to give effect the principle that the raising of public revenue must be under the control of Parliament, the courts insist that such a delegation must be expressed in very clear terms.

This explains why the courts have held that a power to impose a fee or a charge by a subordinate law will be restricted to fixing an amount that is genuinely a recompense for the provision of a service rendered. If the amount fixed exceeds what is a fair recompense, the amount will be characterised as a tax. (The courts hold that the essential nature of a tax is that it is an exaction on money from the subject for a public purpose). Thus, if the power to make the subordinate law does not clearly authorise the imposition of a tax, it will be invalid to the extent that it purports to do so.

This Committee drew attention to the judicial attitude and its basis in Scrutiny Report No 14 of 1999. In that report, the Committee stated its concern that a provision of a Bill that empowered the determination of a fee also empowered the levying of a tax by means of that fee. The same concern has been expressed in later Scrutiny Reports; see, in particular, Report No 5 of 2000.

The Committee notes that the Explanatory Memorandum makes no reference to these issues in its explanation of clause 72A. It does, however, refer to section 4 of the *Gene Technology (Licence Charges) Act 2000* (Commonwealth), which provides:

> (1) A person who is the holder of a GMO licence at any time during a financial year is liable to pay a charge for the licence in respect of that year.
> (2) The amount of the charge for a financial year is such amount as is prescribed by the regulations.

It is to be noted that this comparable provision does not authorise the levying of a tax by regulation. It would be interpreted in a way that precluded a charge amounting to a tax.

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

Sub-clause 148(1) provides that where a court finds a person guilty of an offence under the proposed Act, it may order forfeiture to the Territory "of anything used or otherwise involved in the commission of the offence". The thing forfeited becomes the property of the Territory and may be sold or otherwise dealt with in accordance with the regulator's directions.

There is no provision for the person affected to seek relief against forfeiture, although it might be expected that a court would, in the exercise of its undefined discretion, take into account matters pertaining to the personal circumstances of the offender, and the circumstances of the offence.

This provision authorises a deprivation of property and thus brings into focus the right to property. This is recognised in our own constitutional system by a provision such as paragraph 23(1)(a) of the *Australian Capital Territory (Self-Government) Act 1988* (Commonwealth), which provides that " … the Assembly has no power to make laws with respect to: (a) the acquisition of property otherwise than on just terms; …". It is also recognised in the common law, and in international treaties such as the UN Universal Declaration of Rights, Article 17 (see below).

In the light of these considerations, a provision such as clause 148 should be justified.

(ii) rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers

While the Committee acknowledges that the power in clause 148 is vested in a court, it is nevertheless desirable that any power that affects a person in a significant way be described in terms which sufficiently define the factors that are relevant, and not relevant, to the exercise of the power.

Legislation Amendment Bill 2002

This is a Bill to amend the *Legislation Act 2002* (the Act) in a number of ways to complete the establishment of the legislative framework for the Pubic Access to Legislation project. In addition, the Bill makes provision for the interpretation of legislation. The Bill distinguishes between the classification of provisions of the Act as determinative, or, as non-determinative. Provisions of the former kind are less easily displaced by a later law. The Bill states principles for the interpretation of legislation. It states the need for a purposive approach, and permits resort to a wide range of extrinsic materials. The Bill confirms the application of the common law privileges relating to self-incrimination and client legal privilege, subject to express displacement by statute.

The Committee commends the explanation of the Explanatory Memorandum of the provisions of the Bill in terms of both the intended legal effect and the policy setting.

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

Access to the law; Henry 8th clauses

1. The Committee commends the proposal (clause 7) to insert proposed new sub-section 19(4A) to permit the inclusion in the ACT legislation register of material that has been incorporated in an ACT law by a statutory instrument. This will enhance access to the law.

2. The Committee also notes that by clause 10, section 47 would be repealed and replaced by a proposed new section 47. Sections 47(5) and (6) state requirements to be met to ensure that the policy of accessibility of the law is satisfied where the law of another jurisdiction (that is, other than the ACT), or an "instrument", is applied by an Act, as that other law or that instrument is in force at a particular time (sub-section 47(5)) or from time to time (sub-section 47(6)). In each case, the law, or the instrument, will be a notifiable instrument.

It should be noted that the concept of 'instrument' is very wide, embracing "any writing or other document" (section 14 of the Act). Thus, documents made by non-government bodies may be incorporated into ACT law.

It is also the case, however, by reason of proposed new sub-section 47(7), that sub-sections 47(5) and (6) may be displaced by the law that authorises the making of the relevant statutory instrument. Inasmuch as this law is an Act of the Legislative Assembly, the Assembly will retain the power to sanction or not the displacement of

these sub-sections. But the relevant statutory instrument may also displace these sub-sections where that instrument is in the nature of a subordinate law or a disallowable instrument. The Assembly defines a subordinate law in section 8 of the Act in such a way that it too is disallowable.

Thus, one effect of proposed new sub-section 47(7) is that a subordinate law may displace the operation of sub-sections 47(5) and (6), both of which are 'determinative' provisions of this Act, and therefore of fundamental significance. To this extent, sub-section 47(7) is a 'Henry 8th' clause, in that it permits a subordinate law to alter the effect of a statute (the latter being ss 47(5) and (6)). Such a provision should be justified. The Explanatory Memorandum mentions that displacement will be subject to Assembly scrutiny of the relevant subordinate law. It should be noted, however, that such scrutiny takes place after displacement occurs.

The Committee draws this matter to the attention of the Assembly.

3. There also appears to be a 'Henry 8th' element in proposed new sub-section 47(8) in so far as it applies to a case where the relevant instrument makes provision about a matter by applying an ACT statute. The effect of sub-section 47(8) is that the instrument may make changes to the statute for the purposes of the application of the statute. While this appears to be quite a minor matter, the Henry 8th element of a provision of a Bill should normally be justified.

The Committee draws this matter to the attention of the Assembly.

4. Proposed new Chapter 14 of the Bill states principles for the interpretation of legislation, including, in particular, permitting courts (and other interpreters) to resort to a wide range of materials that do not form part of the Act. Proposed new section 142 says: "In working out the meaning of an Act, any relevant material not forming part of the Act may be considered". Most of the examples given are of what are referred to as 'extrinsic' material, such as the debates of the Assembly, a presentation speech, an Explanatory Memorandum, or a law reform report.

It should first be noted that resort to this material does not permit a court to give a meaning to the words of an Act which those words cannot bear, (or which is "reasonably open" – see reference to case-law at Explanatory Memorandum at 27). Nevertheless, from a rights perspective, there are two sorts of concerns that need to be addressed.

The first, from an access to law perspective, is that the wider the range of materials that may be used to give meaning to the words of a law, the less the reader of a law is able to work out what those words mean simply by reading the text of the law. One rejoinder to this concern is the somewhat cynical point that citizens do not rely on the words of a law, but rather expect some lawyer to tell them what the law means. Even if there be something in this point, (cf the disagreement between High Court judges in *Watson v Lee* (1979) 144 CLR 374), there remain the points that (i) not all lawyers have equal access to the relevant extrinsic materials, and (ii) the need for lawyers to consult a wide range of materials will increase the cost of legal advice.

The second, from a separation of powers perspective, is that the greater the scope for the courts to mould the words of a law to achieve the 'purpose' of the law, the more the courts are made part of the legislative process.

These sorts of concerns are highlighted by an Example in the notes to proposed new section 142. In Example 7 it is said that the language of a (hypothetical) Act might be understood by reference to a provision of the UN Universal Declaration of Rights. The problem posed in this Example is one where it is not clear from the hypothetical Act whether a person might make application for relief from a forfeiture of property, (occasioned by the person having committed a serious offence), under only one of two, or under both provisions of the Act that permits such an application. It is suggested in the Example 7 that were reference made to the "property rights recognised by the [Universal Declaration]", the problem could be solved in favour of the person being able to make successive applications.

The text of Example 7 does not set out the relevant provision of the Universal Declaration. It is Article 17:

> (1) Everyone has the right to own property alone as well as in association with others.
> (2) No one shall be arbitrarily deprived of his property.

It is not proposed to query the suggestion given in the Example except to a limited extent. First, it not clear just how reference to Article 17 assists in resolution of the problem posed. The text of Article 17 does not itself point to an answer. Reliance would probably be placed on the general sentiment it expresses that persons should not be deprived of their property.

Secondly, is a reference to Article 17 sufficient? Should regard be had to any commentary on Article 17, and if so, which one(s)? Should resort be made to other rights stated in the Universal Declaration, such as the "the right to life, liberty and security of person" (Article 3)? Does the existence of this right suggest that regard be had to the victims of serious crimes, and, if so, does this support an argument that the forfeiture provisions of the hypothetical law be given a meaning that would discourage the commission of serious crimes?

It is, moreover, of interest that the International Covenant on Civil and Political Rights (ICCPR), another international rights treaty to which Australia is a party, does not provide for protection to property. Does this suggest that in international law, the right to property is seen to be of less significance than other rights?

These comments merely point to the fact that encouraging courts to resort documents in the nature of rights treaties such as the Universal Declaration will not often, indeed perhaps only rarely, point to a clear answer to the particular problem of interpretation. Reference to such materials will often point the interpreter in opposing directions, and, moreover, require a great deal of research in various directions.

Of course, the courts are to some extent doing all this. There is now a view, occasionally given concrete application, that statute law should be interpreted in a way that conforms to international law, and, in particular, to humanitarian law. A question here is, however, whether this is left for the present to the courts to work out.

Were it not for Example 7, the words "any relevant material" in proposed new section 142 might be understood to refer to material that points to what was intended by those who drafted the words of the law the meaning of which is in question. They suggest a reference to the debates of the Assembly debates, a presentation speech, an Explanatory Memorandum, or a law reform report. Examples 1 to 6, and Example 8, refer to such material, and, as the Explanatory Memorandum points out, the courts have sanctioned reference to such material.

The inclusion of Example 7 suggests to a reader that proposed new section 142 has a much broader application, although just how much broader is far from clear. Even if the courts were to act only in terms of what Example 7 suggests, the task of working out what a law means will become greatly more complex and costly. It will also confer on the courts, and others who interpret the words of a law, a great deal more room for choosing the interpretation that they think desirable.

The Committee draws this matter to the attention of the Assembly.

5. A final general point may be made. The Explanatory Memorandum (at p.10) correctly states that "No ACT Act or statutory instrument can properly be understood in isolation from the Legislation Act". Many of the amendments made to this Act by this Bill will make this more true that is currently the case. The Committee does not query this policy. Indeed, in some respects, such as in relation to the application of the common law privileges relating to self-incrimination and client legal privilege, the provisions of the Bill will give greater protection to rights.

On the other hand, the Committee can see that there will be a greater need for readers of ACT laws to be aware of the need to read any law together with the *Legislation Act 2001*. This raises the question, which the Committee does not propose to answer, as to how such awareness might be raised.

Drafting points

1. Proposed new sub-section 191(1) refers to a case where "an act or omission by a person is an offence against 2 or more Territory laws …". It then provides a rule to prevent multiple punishment.

There are cases where merely a person doing "an act" or making an "omission" establishes an offence. An example of such a strict liability offence is in clause 35 of the Gene Technology Bill 2002. But more commonly, an offence is not committed unless the defendant also had a certain state of mind. In such cases, the mere doing of, or the omission to do an act does not constitute the offence.

Thus, on its face, proposed new sub-section 191(1) would have a quite limited operation. Is this intended?

2. In proposed new sub-section 192(3), there is reference to an inquiry "into a matter that relates to an offence …". On its face, this suggests that the offence must have occurred. In many cases, however, the inquiry will be directed to establishing whether this is the case. Is this intended?

SUBORDINATE LEGISLATION

Subordinate Legislation – No comment

The Committee has examined the following items of subordinate legislation and offers no comment on them.

Subordinate Law No. 48 of 2001 being the Supreme Court Amendment Rules 2001 (No 3) made under section 36 of the *Supreme Court Act 1933* amends certain Supreme Court Rules.

Disallowable Instrument No. 335 of 2001 being made under subsections 10(2) and 13CE(3) of the *Legislative Assembly (Members' Staff) Act 1989* revokes Instrument Number 169 of 2001 and outlines the arrangements for the employment of staff and the engagement of consultants and contractors by members of the Legislative Assembly.

Disallowable Instrument No. 341 of 2001 made under subsection 23(1) of the *Race and Sports Bookmakers Act 2001* amends Instrument No. 262 of 2001 and determines that the requirement for sports bookmakers using the internet to provide manual reconciliations detailing all bets accepted, total gross movements in betting account balances of clients and total gross movements in the bank accounts of bookmakers, shall be provided on a monthly basis.

Disallowable Instrument No. 342 of 2001 made under section 22 of the *Rates and Land Tax Act 1926* revokes Instrument No. 152 of 2001 and sets the interest rate to be charged on unpaid rates and land tax to take effect from 16 January 2002.

Disallowable Instrument No. 343 of 2001 made under section 28B of the *Rates and Land Tax Act 1926* revokes Determination No. 153 of 2001 and sets the interest rate to be paid on overpaid rates and land tax to take effect from 16 January 2002.

Disallowable Instrument No. 344 of 2001 made under subregulation 21(1)(e) of the Road Transport (Offences) Regulations 2001 declares the period Wednesday 26 December 2001 to the last moment of Thursday 27 December 2001 (inclusive) as a holiday period.

Disallowable Instrument No. 345 of 2001 being the Financial Management Guidelines 2001 made under section 67 of the *Financial Management Act 1996* updates the Financial Management Guidelines made on 10 July 2000 and on 21 March 2001.

Disallowable Instrument No. 346 of 2001 made under sections 15 and 16 of the *Independent Competition and Regulatory Commission Act 1997* is a reference to the Independent Competition and Regulatory Commission to conduct an investigation into full retail contestability for electricity and for the requirements in relation to conduct of the investigation.

Disallowable Instrument No. 347 of 2001 made under section 4 of the *Public Place Names Act 1989* revokes Instrument No. 325 of 2001 and determines street nomenclature in the Division of Dunlop.

Disallowable Instrument No. 348 of 2001 being the Public Sector Management Amendment Standards 2001 made under section 251 of the *Public Sector Management Act 1994* amends Public Sector Management Standard No. 2 and ensures the retention of salary advancement provisions for Dental Assistants ½ as set out in Schedule A to the Instrument.

Disallowable Instrument No. 1 of 2002 made under subsection 13(1) of the *Road Transport (General) Act 1999* declares that a provision of the road transport legislation does not apply to certain persons and vehicles participating in the Summernats 15 – Car Festival from 3 January 2002 until 10 am on 7 January 2002, inclusive.

Determination No. 2 of 2002 made under subsection 13(1) of the *Road Transport (General) Act 1999* and subsection 18(1) of the *Road Transport (Vehicle Registration) Act 1999* declares that subsection 18(1) does not apply to unregistered vehicles while the vehicle is within the precincts of Exhibition Park in Canberra for Summernats 15 – Car Festival to enable drivers or registered operators of these vehicles to lawfully participate in the Summernats activities.

Disallowable Instrument No. 3 of 2002 made under subsection 36(1) of the *ACTION Authority Act 2001* provides for the transfer of existing ACTION staff to the ACTION Authority from the commencement date of the Act on 1 January 2002.

Disallowable Instrument No. 6 of 2002 made under subsection 21(1) of the *Race and Sports Bookmaking Act 2001* revokes Determination No. 266 of 2001 and determines that the ground floor of the Action Stand of the Canberra Racecourse be a sports bookmaking venue.

Disallowable Instrument No. 8 of 2002 made under subsection 12(1) of the *Animal Diseases Act 1993* revokes Instrument No. 248 of 1997 and declares certain diseases to be exotic diseases for the purposes of the Act.

Disallowable Instrument No. 9 of 2002 made under subsection 21(1)(b) of the *Animal Diseases Act 1993* revokes Instrument No. 247 of 1997 and declares that certain diseases to be endemic diseases for the purposes of the Act.

Disallowable Instrument No. 10 of 2002 made under section 139 of the *Taxation Administration Act 1999* revokes Instrument No. 5 of 2001 and determines for the purposes of section 64 of the *Emergency Management Act 1999* the calculation of the ambulance levy payable by health benefits organisation to be 95 cents per month on and from 1 February 2002.

Disallowable Instrument No. 13 of 2002 made under regulations 20 and 31 of the *Land (Planning and Environment) Regulations 1992* revokes Disallowable Instrument No 311 of 2001 and gives policy directions for determining remissions to be given of change of use charges.

Disallowable Instrument No. 14 of 2002 made under section 3 of the *Public Place Names Act 1989* determines street nomenclature in the Division of Nicholls.

Disallowable Instrument No. 16 of 2002 made under subsection 23(1) of the *Animal Diseases Act 1993* declares a specified area of land to be an endemic stock disease quarantine area.

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Subordinate Law No. 49 of 2001 amends the Road Transport (Offences) Regulations 2001 made under the *Road Transport (General) Act 1999* and provides the detail for the allocation of demerit points over a holiday period.

To which Subordinate Law does the explanatory statement refer?

The Committee notes that the explanatory statement for the above regulations identifies the Regulations by name only. The Committee feels there is a need for this statement to identify the number of the Subordinate Law to which it refers.

Disallowable Instrument No. 4 of 2002 made under subregulation 66(a) of the Road Transport (Safety and Traffic Management) Regulations 2000 revokes Instrument No. 89 of 2000 and approves protective helmets for bicycle riders.

Disallowable Instrument No. 7 of 2002 made under regulation 118 of the Road Transport (Driver Licensing) Regulations 2000 revokes Instrument No 129 of 2000 and approves the code of practice for accredited driving instructors specified in the Schedule.

Explanatory statements numbered incorrectly

The explanatory statements to the above Disallowable Instruments are entitled differently to the Disallowable Instruments themselves.

Disallowable Instrument No. 5 of 2002 made under section 32 of the *Health and Community Care Services Act 1996* revokes Determination No. 201 of 2001 and determines the fees and charges for or in connection with the provision of health and community care services to take effect from 31 January 2002.

Disallowable Instrument No. 15 of 2002 made under section 33 of the *Health and Community Care Services Act 1996* revokes Determination No 301 of 2000 and sets the interest rate to be charged on unpaid charges to take effect from 1 March 2002.

To which Instruments do the explanatory statements refer?

The explanatory statements to the above Disallowable Instruments do not include identifying Disallowable Instrument numbers. Should the documents become separated a missing Disallowable Instrument number could lead to identification problems.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received a response to its comments in its report No 2 on the Crimes Amendment Bill 2002 (No 2). The response was received at 9.00 am this morning and the committee has not had time to consider the response but attaches a copy of the response to the report for the information of Members of the Assembly. The Committee may make a response on the Government response at a later date.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

5 March 2002

Jon Stanhope MLA
CHIEF MINISTER
ATTORNEY GENERAL MINISTER FOR HEALTH MINISTER FOR COMMUNITY AFFAIRS MINISTER FOR WOMEN
MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2600

Bill

Dear Mr Stefaniak

I refer to Scrutiny Report No 2 of the Standing Committee on Legal Affairs and, in particular, the Committee's comments on Crimes Amendment Bill 2001 (No 2) (the Bill).

At the outset, I should say that the Government is surprised at some of the concerns and/or confusion which has arisen around Section 140A. This is particularly so given that the elements of the offences it creates are clearly stated and structured in accordance with the approach taken in the Model Criminal Code. As members of the Committee would be aware, in the future, all ACT criminal offence provisions will be drafted in accordance with the principles of Chapter 2 of the Model Criminal Code as applied by the ACT's *Criminal Code Act 2001*.

However, for the information of the Committee the Government provides the following comments and advice concerning the issues the Committee has raised.

Elements of the offences
The Government notes the Committee's comments about the essence of the offence and the Committee's conclusion that it appears not to be necessary for the prosecution to show that a defendant intended to cause public alarm or anxiety by acting in the ways described in sections 140A(a) or (b). The Government does not understand how the Committee reached that conclusion but, as the Committee does not raise issue with the approach, the Government will make no further comment.

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Public alarm or anxiety

The Committee asks whether "public" qualifies both "alarm" and "anxiety". The answer is that both terms are qualified. In written and oral communications adjectives are frequently not repeated to apply to more than one noun in a phrase. This is a standard syntactical approach which helps to simplify communications. Whether the word "public" is to apply to both "alarm" and "anxiety" must be taken from the context in which the expression is used. Pearce and Geddes discuss this in 'Statutory Interpretation in Australia' in chapter 4. They note that:

"The assumption that words will be read in context often leads to the omission of words, particularly adjectives, in an endeavour to make a document less verbose ... in Richardson v Austin (1911) 12 CLR 463, the High Court read the phrase "streets, lanes, entries or other public passages or places" as if the word "public" were also included before the word "places". From the context it was clear that the drafter had chosen not to repeat the word "public" but had expected that the reader would supply it."

The same applies in this instance.

It should also be noted that the concept of intending to cause "public alarm or anxiety" has been adopted from the existing product contamination offences in the *Crimes Act 1900*. These offences were developed for the Standing Committee of Attorneys General by the Model Criminal Code Officers Committee (MCCOC) and offences in the same terms are in place in most other jurisdictions. The commentary of the MCCOC's Report No 8 on Product Contamination Offences supports the view that "anxiety" is qualified by "public" as it refers to "public anxiety concerning the safety of goods" (see page 15 of the Report).

The Committee asks whether it is possible to provide a court with guidance about how to assess whether the public has suffered alarm or anxiety. My advice is that it is not necessary to include any further provisions to guide a court on this matter. The issue would be determined on the facts applying the natural meaning of the words in question. I note, in this regard, that no other jurisdictions have judged it necessary to provide guidance as to the meaning of "public alarm or anxiety" in the context of their product contamination offences. For the Committee's information the Macquarie dictionary defines "public" as relating to, or affecting the people as a whole or the community, state or nation. "Alarm" is defined as a sudden fear or painful suspense excited by an apprehension of danger; apprehension or fright. "Anxiety" is defined to mean distress or uneasiness of mind caused by apprehension of danger or misfortune.

The Committee has queried to what the alarm or anxiety must relate and has posited that the answer would appear to be "...something that could, or could reasonably be suspected to, endanger human life or health." The Committee is correct in drawing this conclusion and, in the Government's view, it is the only logical conclusion which can be drawn from the construction of the provisions, taking account of the natural meaning of the words used. For that reason, the Government does not consider it is necessary to make any change clarifying the provision.

Could the offence cover acts of self harm?
It is understood that a concern has been raised that a person engaged in a protest who, for that purpose, commits an act of self harm, might be caught by the offence on the basis that such a person would have:

(a) done something that could endanger human life or health; and
(b) done the act with the intent of causing public alarm or anxiety.

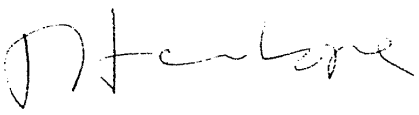
It is certainly possible, though rare, for protesters to make their point by committing serious acts of self harm. However, the Government is not convinced that such an act would, if done as part of a protest, ordinarily, satisfy the requirement that it be done with the intent to cause public alarm or anxiety, particularly in view of the ordinary meaning of those words as noted above. The Government is, therefore, of the view that the provisions, as cast, and taken in their context, would not result in the criminalisation of self-harming protesters.

However, the Government is prepared to amend the proposed provisions by specifying that where the act which could endanger human life or health would not be capable of endangering the human life of health of any person other than the person committing the act, no offence is committed under these provisions.

Does the provision cover acts which actually endanger life of health?
The Government's view is that section 140A does cover situations where an act does actually endanger human life or health, because in such a case it would, clearly, have to be capable of (ie it could) endangering human life or health.

I trust that these comments are of assistance to the Committee.

Yours sincerely



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