Legislative Assembly for the Australian Capital Territory

Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 11 OF 2001

9 August 2001

Terms of reference

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(2) The Committee will consider whether:

(a) any instruments of a legislative nature which are subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act:

(i) meet the objectives of the Act under which it is made;

(ii) unduly trespass on rights previously established by law;

(iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contain matter which should properly be dealt with in an Act of the Legislative Assembly.

(b) the explanatory statement meets the technical or stylistic standards expected by the Committee.

(c) clauses of bills introduced in the Assembly:

(i) do not unduly trespass on personal rights and liberties;

(ii) do not make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) do not 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) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four members.

(4) 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.

(5) The Committee be provided with the necessary additional staff, facilities and resources.

(6) 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

Mr Paul Osborne, MLA (Chair)
Mr John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Adviser: Mr Peter Bayne
Secretary: Mr Tom Duncan
(Scrutiny of Bills and Subordinate Legislation Committee)
Assistant Secretary: Ms Celia Harsdorf
(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.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments made concerning:

- Bail Amendment Bill 2001 (Report No. 10 of 2001) (Attorney-General, dated 7 August 2001).
- Crimes Legislation Amendment Bill 2001 (Report No. 10 of 2001) (Attorney-General, dated 7 August 2001).
- Workers Compensation Amendment Bill 2001 Bill 2001 (Report No. 10 of 2001) (Minister for Urban Services, dated 7 August 2001).

Copies of the responses are attached.

The Committee thanks the Attorney-General and the Minister for Urban Services for their helpful responses, and notes the action that the latter proposes to take in response to Report No 10.

It desires to make further comment on the Crimes Legislation Amendment Bill 2001 in response to comments made by the Attorney-General.

In relation to the comments about our comments on the scheme for post-conviction review:

- The point that the Committee made is not that a law of the Territory should follow that of any other jurisdiction, but rather that there are several alternatives to be explored. The fact that only one formal application to use section 475 of the *Crimes Act 1900* has been made, (being the very recent Eastman matter), would suggest that there is time to seek views from the general community, to address options, and perhaps to clarify points of some obscurity.
- The comment of the Attorney in relation to the circumstances in which an inquiry may be ordered is accepted.
- The omission of a provision such as the current subsection 475(3) remains a matter of concern. It is not apparent why the resolution of the rights of a person (other than the applicant) who will be subject to investigation should be left to the uncertain application of section 18 of the *Inquiries Act*. It is police officers who are most likely to make use of a provision such as subsection 475(3).
- The issue of disclosure of material generated by an application for an inquiry, or by the inquiry in its investigation, is an important one. The point made by the Attorney that the Full Court should not be pressured has substance, although it might be asked whether judges will really be influenced. It is perhaps more a matter of there not being a perception that they might have been influenced. There is an analogy here with the law of contempt of court. But what of dissemination of information after the Full Court decision? This underlines the general point made by the Committee about the need for reflection on what is proposed.
- It is not clear to the Committee that the range of options that would be available to the Full Court under the Bill is wider than those available under the section 475 procedure.

- As to the retrospectivity point, the comments are perhaps given greater point by the news that the Chief Justice of the Supreme Court has taken action under section 475 in relation to Mr David Eastman. In any event, any kind of law that has the potential to affect adversely and retrospectively a person's rights needs justification. Those rights include a right to have a discretion exercised to one's benefit. In addition, the fact that existing section 475 is inadequate does not mean that any change must be for the better from the point of view of a person who might, after these amendments come into operation, seek post-conviction review.

In relation to taking fingerprints, the comment to make is that the circumstances in which prints may be taken under the *Crimes (Forensic) Procedures Act 2000* are more limited than those circumstances in which these amendments will operate. The latter are not limited to establishing that a suspect may have committed an offence.

In relation to the destruction of identifying material, the Attorney's comments are well made, and it is noted that as a result of the Committee's report No 10, an amendment to the law will be made.

In relation to stop and search powers, there is nothing to add.

In relation to the new offence of passing a valueless cheque, the Attorney's comments do not address the issue of why the burden of proof should be reversed. Given that a reversal always impinges on the presumption of innocence, it is in accord with the approach of the Committee to point to a lack of justification whenever this is the case.

In relation to the limitation period for commencing a prosecution, the Attorney's comments are accepted.

In relation to orders to review acquittals, the Committee sought to expose the competing arguments, and considers that it did so in a fair and balanced way by lengthy quotation from the judgments of the High Court of Australia in *Davern v Messel*. Justices Mason and Brennan made the point that the Attorney makes by his citation of Canadian cases. Their Honours said (as the Committee quoted):

> "[55] It is perhaps somewhat surprising that the courts concluded so readily, without discussion of the countervailing factors, that the rule against double jeopardy extended so as to bar an appeal against an acquittal. The thrust of the double jeopardy rule is that no man shall be tried twice for the same offence (*Kepner v. United States* (1904) 195 US 100, at p 130). In his dissenting opinion in that case Holmes J. (with whom White and McKenna JJ. concurred) said (at p.134):
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> > "... logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."
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> The powerful considerations which made it unfair and unjust that a man should be prosecuted twice for the same offence seem to lose some of their force when an

> appeal is sought to be equated with a second prosecution. A second prosecution for the same offence immediately raises the spectre of persecution. Although the pursuit of a Crown appeal might be carried to the point of persecution, the risk of that occurrence is more remote, if only because the accused would be protected by the courts against an appeal which was instituted mala fides or amounted to an abuse of process and, as already noted, the courts would not go behind a jury's verdict. Moreover, the Crown has a legitimate interest in securing a review of a trial, more particularly if it appears that the trial judge has made an erroneous ruling on a question of law or departed from correct procedures."

Given that the Committee made this reference, and also drew attention to the judgments in *Davern v Messel* as sources for competing viewpoints, is not surprising that it did not explore the Canadian cases. The point made there was well exposed by Justices Mason and Brennan.

The Committee did not seek to determine whether other common law jurisdictions permit the Crown to seek review of an acquittal. It was known that some do, but also that it is very likely that the great majority of them do not.

Paul Osborne, MLA
Chair

9 August 2001