

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

**(INCORPORATING THE DUTIES OF A
SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 2 OF 2001

27 FEBRUARY 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
ACTING SECRETARY: MR MARK MCRAE
(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.

BILLS

Bills - No Comment

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

Building Amendment Bill 2001

This Bill would amend the *Building Act 1972* to the effect of requiring the Territory to apply for building approval for works on unleased land, and to permit the Commonwealth to do so.

Public Sector Management Amendment Bill 2001

This Bill would amend the *Public Sector Management Act 1994*, and, in one respect, the *Remuneration Tribunal Act 1995*. In the main, the amendments would regulate the employment of senior officers of the Australian Capital Territory Public Service. There is provision for an office of Senior Appointments Commissioner, to be appointed by the same process as is the Auditor-General. Other provisions govern the appointment and duties of a chief executive.

Bill - Comment

The Committee has examined the following Bill and offers this comment.

Proportional Representation (Hare-Clark) Entrenchment Amendment Bill 2001

This Bill would amend the *Proportional Representation (Hare-Clark) Entrenchment Act 1994*. The Bill would re-title that Act as the Electoral (Entrenched Provisions) Act 1994. The Act as amended would apply to a law of the Legislative Assembly “that relates to the day when an ordinary election of members of the Legislative Assembly is held”. The effect would be that any such law could not be amended unless the Bill for the amendment is passed *either* by the Assembly and a majority of electors at a referendum, *or* by at least a two-thirds majority of the members of the Legislative Assembly.

Comment on the Explanatory Memorandum

It is apparent that the concept of a law “that relates to the day when an ordinary election of members of the Legislative Assembly is held” is intended to include section 100 of the Electoral Act 1992, which governs the dates on which elections may be held. The concept is, however, potentially very broad, and some further illustration of its effect would assist in understanding its scope. Would, for example, a law regulating the sale of liquor on the day when an ordinary election be a law that “relates to” such a day? If it is the intention of this Bill to entrench only section 100, the Memorandum needs to explain why a potentially broader category of laws is included.

The Memorandum might also usefully address the question of whether this Bill cannot become law unless it is passed – in terms of subsection 5(1) of the Act - by both a two-thirds majority of the members of the Legislative Assembly, and by a majority of electors at a referendum.

Subordinate Legislation - No Comment

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

Subordinate Law 2000 No 49 being the Children and Young People (Modification) Regulations Amendment made under the *Children and Young People Act 1999* amends the Principal Regulations to extend the expiry of the regulation to 10 May 2001.

Subordinate Law 2000 No 50 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the Rules to expand the jurisdiction of the Master in respect of personal injuries actions and applications to extend time for commencement of civil actions.

Subordinate Law 2000 No 52 being the Road Transport Legislation Regulations Amendment made under the *Road Transport (Safety and Traffic Management) Act 1999* amends the Principal Regulations to allow for the introduction of red light – speed cameras (to be known as traffic lights detection devices), including their approval and testing requirements, and explain to meanings of codes used on images produced by camera detection devices including traffic lights detection devices.

Subordinate Law 2000 No 53 being the Corporations Law Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the *Corporations Law Rules 2000* which form part of a national model set of rules regulating the practice and procedure to be applied to a proceeding in the Court under the Corporations Law and have been agreed to by a representative Monitoring Committee.

Subordinate Law 2000 No 54 being the Building Regulations Amendment made under the *Building Act 1972* amends the Principal Regulations by exempting externally mounted photovoltaic panels, solar water heaters and airconditioning units from formal approval processes and requirements contained in Part 3 and Part 5A of the Act.

Subordinate Law 2000 No 55 being the Land (Planning and Environment) Regulations) Amendment made under the *Land (Planning and Environment) Act 1991* amends the Principal Regulations by adding items to Schedules 2, 5 and 7. The items exempt photovoltaic panels, solar water heaters and airconditioning units from Part 6 of the Act, subject to an Authority Guideline.

Subordinate Law 2000 No 56 being the Crimes (Forensic Procedures) Regulations 2000 made under the *Crimes (Forensic Procedures) Act 2000* provides under section 13 of the Act for appropriately qualified persons to conduct forensic procedures.

Subordinate Law 2000 No 57 being the Road Transport (Offences) Regulations Amendment made under the *Road Transport (General) Act 1999* amends the Principal Regulations to streamline the application of double demerit points during holiday weekends by removing the need for the declaration of a holiday period for each applicable weekend; and generally align the ACT with the NSW process for the application of double demerit points.

Subordinate Law 2000 No 58 being the Liquor Regulations Amendment made under the *Liquor Act 1975* amends the Principal Regulations by restricting the sale of beer in glass bottles between 12 noon and 11 p.m. on 31 December 2000, with the intention of reducing the potential for injury resulting from broken glass during the New Year celebration.

Subordinate Law 2001 No 1 being the Land (Planning and Environment) Regulations Amendment made under the *Land (Planning and Environment) Act 1991* expands the exemption from development approval currently contained in item 3 of the Schedule to the Principal Regulations by providing an exemption for landscaping work on rural land, subject to conditions being met.

Subordinate Law 2001 No 2 being the Water and Sewerage Regulations 2001 made under the *Water and Sewerage Act 2000* regulates the supply of plumbing and sanitary drainage services in the ACT.

Subordinate Law 2001 No 3 being the Road Transport (Driver Licensing) Regulations Amendment made under the *Road Transport (Driver Licensing) Act 1999* extends the “Road Ready Plus” program for provisional licence holders to allow provisional licence holders who are 26 years or older and have held their provisional licence for at least six months to (i) remove their “P” plates; and (ii) increase their demerit point limit from 4 to 8 points without the need to actually complete the Road Ready Plus course.

Determination No. 348 of 2000 made under sections 40 and 42 of the *University of Canberra Act 1989* is an approval of Statute No. 39, Courses and Awards Amendment Statute 2000, which amends the Courses and Awards Statute 1995 by adding new awards arising from the accreditation of new courses and the re-accreditation of existing courses in 2000.

Determination No. 349 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for The Canberra Hospital.

Determination No. 350 of 2000 made under section 96 of the *Road Transport (General) Act 1999* revokes Instrument No. 151 of 2000 (notified in Gazette S20, dated 8 June 2000) and determines the fee payable, as specified in the Schedule, in respect of the provisions of the *Road Transport (Vehicle Registration) Regulations 2000* in relation to transactions relating to number plates.

Determination No. 351 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* declares that the road transport legislation does not

apply to vehicles and persons competing in the special stages of the final round of the Rally Des Femmes on 2 December 2000.

Determination No. 358 of 2000 made under section 96A of the *Occupational Health and Safety Act 1989* determines fees payable, in accordance with the Schedule, for the purposes of the Act.

Determination No. 359 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* declares that Australian Road Rule No. 185 (Stopping in a permit zone) does not apply to a driver of a declared vehicle stopped in a declared permit zone.

Determination No. 361 of 2000 made under section 107 of the *Road Transport (General) Act 1999* revokes all previous instruments under this section and those instruments under subsection 27E (1) of the Motor Traffic Act that were deemed to be an instrument under this Act pursuant to section 254 and determines that the number of restricted taxi operator's licences that may be issued is twenty six as from this instrument.

Determination No. 362 of 2000 made under paragraph 5 (1) (a) of the *Blood Donation (Transmittable Diseases) Act 1985* approves a new Donor Declaration Form.

Determination No. 363 of 2000 made under section 4 of the *Public Place Names Act 1989* amends Instrument No. 7 of 1995 (notified in Gazette S13, dated 11 January 1995) by extending a street name in the Division of Nicholls.

Determination No. 364 of 2000 revokes all previous delegations of powers made under section 119 of the *Mental Health (Treatment and Care) Act 1994* and delegates powers and functions under subsection 5 (1) of the *Administration Act 1989* to the Executive Director of Mental Health Services at The Canberra Hospital.

Determination No. 365 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names of two streets in the Division of Nicholls.

Determination No. 366 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the names of a street in the Division of Gungahlin.

Determination No. 367 of 2000 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons to be Justices of the Peace.

Determination No. 368 of 2000 made under subsection 235 (1) of the *Utilities Act 2000* determines industry codes of practice.

Determination No. 369 of 2000 made under subsection 236 (1) of the *Utilities Act 2000* determines technical codes of practice.

Determination No. 370 of 2000 made under section 22 of the *Utilities Act 2000* exempts various bodies from the requirement for a relevant licence in relation to electricity, gas, water and sewerage processes and will expire on 1 June 2001.

Determination No. 371 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* declares that certain provisions of the road transport legislation do not apply to traffic marshals for a specified designated activity.

Determination No. 373 of 2000 made under the *Victims of Crime Act 1994* and subsection 8 (1) of the *Victims of Crime Regulations 2000* appoints specified persons as members of the Victims Assistance Board for a period commencing on 1 January 2001 and ending on 31 December 2002.

Determination No. 376 of 2000 made under section 12 of the *Housing Assistance Act 1987* is a variation to the Public Rental Housing Assistance Program.

Determination No. 377 of 2000 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 the Summernats event to enable the owner or user of the vehicle to lawfully participate in the Summernats activities.

Determination No. 380 of 2000 made under subsection 22 (3) of the *Rates and Land Tax Act 1926* revokes Determination No. 244 of 2000 (notified in Gazette S37, dated 13 July 2000) and determines that the rate of interest to be charged on unpaid rates and land tax for the purposes of subsection 22 (3) shall be 13.86 percent per annum as from 16 January 2001.

Determination No. 382 of 2000 made under section 28B of the *Rates and Land Tax Act 1926* revokes Determination No. 246 of 2000 (notified in Gazette S37, dated 13 July 2000) and determines that the rate of interest payable on overpaid rates and land tax for the purposes of paragraph 28B (1) (a) shall be 5.86 percent per annum as from 16 January 2001.

Determination No. 3 of 2001 made under section 23 of the *Rates and Land Rent (Relief) Act 1970* revokes Determination No. 245 of 2000 (notified in Gazette S37, dated 13 July 2000) and determines the rate of interest for the purposes of subsection 23 (1) in relation to amounts deferred as the result of a deferment under section 3, at 5.86 percent per annum; and in relation to amounts unpaid after the date of revocation of a deferment, at 13.86 percent per annum as from 16 January 2001.

Determination No. 4 of 2001 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 365 of 2000 (notified in Gazette No. 51, dated 21 December 2000).

Determination No. 5 of 2001 made under section 139 of the *Taxation Administration Act 1999* revokes Instrument No. 63 of 2000 (notified in Gazette No. 8, dated 24 February 2000) and determines for the purposes of section 64 of the *Emergency Management Act 1999* the calculation of the ambulance levy payable by health benefits organisations to be 91 cents per month on and from 1 February 2001.

Determination No. 6 of 2001 made under subsection 10 (2) of the *Legislative Assembly (Members' Staff) Act 1989* provides for an amendment to provide a staff salary allocation to a new Member.

Determination No. 7 of 2001 made under paragraph 167 (1) (a) of the *Land (Planning and Environment) Act 1991* declares the lease over block 1 section 1 division of Bruce (Calvary Hospital) to be a lease to which section 167 shall apply and specifies the criteria for determining whether a person is eligible to hold the land comprised in the lease.

Determination No. 8 of 2001 made under subsection 55 (1) of the *Betting (ACTTAB Limited) Act 1964* amends the rules of betting in relation to totalisator bets as from 5 February 2001.

Public Sector Management Standards 7/2000 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the approval of the Chief Minister makes an amendment to clarify the status of New Zealand citizens in relation to their eligibility for appointment to the ACT Public Service.

Subordinate Legislation - Comments

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

Subordinate Law 2000 No 51 being the Victims of Crime Regulations 2000 made under the *Victims of Crime Act 1994* provides a framework of core requirements, standards and elements under which the Victims Services Scheme will operate.

Unfinished sentence in Explanatory Statement

The Committee notes the following unfinished sentence in the Explanatory Statement to Subordinate Law 2000 No 51:

“Financial Impact

The costs of the VSS and the Board are covered by an appropriation for the”.

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

The Committee has a concern with regulation 24.

Subsection 3(1) of the Act defines the concept of a “victim” in a way that does not limit the kinds of circumstances in which a person may suffer harm in the course of or a result of the commission of an offence. Subsection 19(2) enables regulations to be made to provide for “(c) conditions for eligibility for the scheme”.

Subregulation 24(2) defines “eligible victim” in a way that excludes a victim who suffers harm in either of two stated ways – relating to the use of motor vehicles, and directly or indirectly as a result of that person’s “committing an offence”.

The Committee does not ordinarily concern itself with questions of the legal validity of subordinate law, but where, as in this case, rights conferred by the Act have been cut down in scope by a regulation, the validity of the regulation falls for comment. It is arguable that the power in subregulation 19(2) to make regulations to provide for “(c) conditions for eligibility for the scheme” do not extend to making provision for who may be considered to be a victim. This has been provided for in subsection 3(1) of the Act. The concept of “conditions for eligibility” can be given a narrower, but still very wide, sphere of operation. It could cover matters such as the provision by an applicant of evidence of the circumstances of the crime, of the extent of harm, and so forth. In other words, section 19 may be read down so as not to permit the regulations to contradict the statement in subsection 3(1) of who may be a victim.

The Committee has a more limited concern with regulation 24. Those who decide whether a person is an “eligible victim” must determine whether that person was harmed, directly or indirectly, as a result of that person’s “committing an offence”. For this purpose, it appears that the decision-maker may have regard to information that the person “is a suspect” (presumably in relation to the allegedly criminal activity that caused the harm).

The Committee draws attention to the facts that (i) a non-judicial body or person will make a finding that a person has committed an offence; and (ii) on the basis of information that includes whether that person was a suspect. The findings will not be binding as a matter of law, but may operate to the detriment – say through affecting reputation, or employment prospects - of the person concerned.

The Committee draws these matters to the attention of the Assembly.

Determination No. 372 of 2000 made under the *Victims of Crime Act 1994* and subsection 8 (1) of the *Victims of Crime Regulations 2000* appoints specified persons as members of the Victims Assistance Board for a period commencing on 1 January 2001 and ending on 31 December 2002.

Separation of appointments into notices and instruments

The Committee notes that in Instrument No. 372 of 2000 the appointments to the Victims Assistance Board are of public servants and a non public servant. As the appointment of a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994* it would be preferable for appointments to be separated into notices for public servants and disallowable instruments for non public servants.

Determination No. 360 of 2000 made under section 14 of the *Gungahlin Development Authority Act 1996* appoints and reappoints specified persons as members of the Gungahlin Development Authority for terms as specified in the schedule, with effect from 1 July 2000 for a period of 2 years.

Retrospectivity and section 7 of the *Subordinate Laws Act 1989*

The Committee notes that this instrument, appoints specified persons to be members of the Gungahlin Development Authority, appeared in the Gazette on 21 December

2000 and was to take effect from 1 July 2000.

Comment

In the above case there is a large gap in time between the date on which the instrument purports to come into effect and the date of gazettal of the instrument. To this extent, the instrument purports to be retrospective.

There is, however, no mention in the explanatory statement of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant period of retrospectivity.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance to these appointments. It provides as follows:

“7. A subordinate law shall not be expressed to take effect from a date before the date of its notification in the *Gazette* where, if the law so took effect –

- (a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or
- (b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;

and where any subordinate law contains a provision in contravention of this subsection, that provision is void and of no effect.”

In the case of this instrument, the Committee considers that the Assembly should be advised that no person’s rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant period of retrospectivity.

Is this instrument disallowable?

The Committee also notes that the explanatory statement gives no indication as to whether or not the persons appointed as members are public servants. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

Determination No. 378 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* and the *Road Transport (Third-Party Insurance) Regulations 2000* declares that the compulsory third party provisions of the road transport legislation do not apply to certain persons and vehicles whilst at Exhibition Park In Canberra participating in Summernats activities.

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

This instrument was made by the Minister under section 13 of the *Road Transport (General) Act 1999*, which provides:

13 Power to exclude vehicles, persons or animals from road transport legislation (NSW s 10)

- (1) The Minister may, in writing, declare that the road transport legislation, or a provision of the road transport legislation, does not apply to a vehicle, person or animal in a place or circumstance stated in the declaration.
- (2) The declaration has effect until it is revoked or, if a period is stated in the declaration, for that period.
- (3) A declaration under subsection (1) is a disallowable instrument for the Subordinate Laws Act 1989.

The Committee has on several occasions expressed concern over the inclusion in laws of general dispensing powers such as are found in section 13. They vest in a member of the executive branch of government a power to alter the law by simply providing that it not apply in the stated circumstances.

An exercise of the power in section 13 is subject to disallowance. It may, however, be the case that the exercise of this power will not have any practical effect. There is another point here. By the time the Assembly had its first opportunity to consider disallowance, this Instrument had achieved the legal effect intended. In these circumstances, issues of policy, and of fairness to the promoter and the public, cannot be adequately addressed.

The Committee makes these points to draw attention to the consequences of vesting dispensing powers in Ministers and other executive persons and bodies. Furthermore, the particular use of this dispensing power underlines the need for an Explanatory Memorandum relating to such a power to indicate as far as practicable the kinds of situation in which the power may be used.

The Committee has some particular concerns with the exercise of the power under section 13 by means of Instrument No 378 of 2000. It is made clear in the Explanatory Statement that the Instrument had the effect of excluding potential claims against the Nominal Defendant that could have arisen out of injuries arising out of the use of unregistered vehicles, and of limiting other kinds of claims against the compulsory third party scheme. These effects were limited to events that took place within the fenced area of Exhibition Park used during the Summernats 14 – Car Festival.

Both the compulsory third party scheme, and the scheme for a Nominal Defendant, provide a very important measure of protection in favour of persons who are injured in motor vehicles accidents. These schemes are provided for in legislation, which of course may be amended, or in this case, simply set aside under section 13. Nevertheless, members of the public, including the promoter of the Summernats 14 event, may be said to have reasonable expectation that the schemes would operate to their potential benefit. A member of the public might choose not to attend in the absence of the operation of these schemes, and the promoter might have made calculations as to the costs of the event based on the continued operation of the schemes.

So far as members of the public are concerned, their interests appear to have been accommodated by the Minister ensuring that the promoter took out public liability insurance. This was not a legal requirement attaching to the exercise of the power in section 13, but appears to have been accepted by the Minister as a condition of the exercise of this power in section 13. The Committee commends this stance, although it notes that the matter was in effect placed in the hands of the promoter. There may have been more secure means to protect the interests of the public.

So far as promoter is concerned, it appears that this person was left to carry the cost of taking out public liability insurance. There may too have been some loss of custom at the event arising out of the publicity given to the making of s Instrument 378. It may well have been the case – although the Committee refrains of course from expressing a legal viewpoint on the matter – that the promoter was entitled to a measure of procedural fairness before the Minister made Instrument 378. That is, the promoter may have been entitled to notice of the Minister's intention to make the instrument, and an opportunity to state a view as to whether the instrument should be made.

Determination No. 1 of 2001 made under section 96 of the *Road Transport (General) Act 1999* revokes Determination No. 351 of 2000 (notified in Gazette S67, dated 30 November 2000) and determines that the fee payable in respect of the provisions of the *Road Transport (Vehicle Registration) Regulations 2000* is as specified in the Schedule.

Has an incorrect Instrument been revoked?

It appears that an incorrect instrument may have been revoked. The above instrument revokes Instrument No. 351 of 2000 which declares that the road transport legislation does not apply to vehicles and persons competing in the special stages of the final round of the Rally Des Femmes. Perhaps it is Instrument No. 350 of 2000 which relates to fees payable in respect of number plates which should have been revoked.

Determination No. 352 of 2000 made under paragraph 30 (1) (a) of the *Canberra Institute of Technology Act 1987* appoints a specified person as Chairperson of the Canberra Institute of Technology Advisory Council until 31 December 2002.

Determination No. 353 of 2000 made under paragraph 30 (2) (c) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 31 December 2002.

Determination No. 354 of 2000 made under paragraph 30 (2) (e) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 31 December 2002.

Determination No. 355 of 2000 made under paragraph 30 (2) (e) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 31 December 2003.

Determination No. 356 of 2000 made under paragraph 30 (2) (e) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 30 June 2003.

Determination No. 357 of 2000 made under paragraph 30 (2) (e) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 30 June 2003.

Determination No. 374 of 2000 made under subsection 9 (2) of the *Agents Act 1968* appoints specified persons to be members of the Agents Board of the Australian Capital Territory from 21 December 2000 to 30 June 2001.

Determination No. 375 of 2000 made under subsections 9 (2) and 10 (1) of the *Agents Act 1968* appoints a specified person to be a member and Chair of the Agents Board of the Australian Capital Territory from 21 December 2000 to 30 June 2001.

Determination No. 383 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as Chairperson of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 384 of 2000 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 385 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 386 of 2000 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 387 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 388 of 2000 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 389 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 390 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 391 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 392 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 393 of 2000 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 394 of 2000 made under subsection 8 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as a member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 395 of 2000 made under subsection 11 (1) of the *Board of Senior Secondary Studies Act 1997* appoints a specified person as an alternate member of the Board of Senior Secondary Studies until 31 December 2003.

Determination No. 2 of 2001 made under subsection 10 (1) of the *Cultural Facilities Act 1997* appoints and reappoints specified persons as members of the Cultural Facilities Corporation for a period of three years from 1 February 2001.

Are these instruments disallowable?

The Committee is concerned that the explanatory statements for the above instruments of appointment give no indication as to whether or not the persons appointed as members are public servants. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994*.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

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

- Determination 287 of 2000 made under the *Land (Planning and Environment) Act 1999* (Report No. 15 of 2000 (Minister for Urban Services – 5 February 2001).
- Determination No. 313 of 2000 made under the Road Transport (General) Regulations 2000 (Minister for Urban Services – 5 February 2001).
- Court Security Bill 2000 (Report No. 15 of 2000) (Attorney-General – 9 February 2001).
- Legislation (Access and Operation) Bill 2000 (Report No. 15 of 2000 (Attorney-General – 20 February 2001).
- Leases (Commercial and Retail) Bill 2000 [No 2] (Report No. 14 of 2000) (Attorney-General – 12 December 2000).

Copies of the responses are attached.

Leases (Commercial and Retail) Bill 2000 [No 2]

The Committee makes these comments in response to the Attorney's letter.

The power of the Magistrates Court to assess whether there has been unconscionable or harsh and oppressive conduct

In its report No 14, the Committee addressed clause 22 of the Bill, which provides that a party to a lease or to negotiations therefor, must not in dealings with another party to the lease 'engage in conduct that is unconscionable or harsh or oppressive'. The Committee commented that:

"The result is that the court has a very wide degree of choice in making the assessment. The questions for the Legislative Assembly are whether it is appropriate that a commercial dealing might be upset on such broad grounds, and also whether it is appropriate that a court should be the body to make such a decision".

The Attorney has pointed out that provisions such as that in clause 22 of the Bill are found commonly in analogous statutory regimes, citing section 13 of the *Fair Trading Act 1992*.

The Committee's report was in the form of a suggestion that the Assembly might address the issues involved in conferring such powers at all, and in particular in a court. It appreciates that in other contexts, the Assembly has enacted similar provisions. It acknowledges that these provisions are not cast in the form of a power of a body to upset a valid contractual arrangement, but rather are in the form of a proscription on what a contract may provide. But, in effect, given the difficulty of predicting just what conduct is proscribed, the body (here, a court), is given a power to undo a contractual arrangement that was not, at common law, invalid.

The exercise of such a power may be seen as involving an interference with the common law freedom of an individual to enter into contracts. Many laws of course restrict the exercise of this freedom. It is nevertheless always a question whether a particular restriction is not an undue trespass on the exercise of that right. The Committee only seeks to draw this issue to the Assembly.

What may be appropriate in one situation may not be appropriate in another; (unless it be said that the freedom to contract in every situation should be constrained by a proscription such as is found in clause 22). The context in which section 13 of the *Fair Trading Act 1992* occurs is analogous to that of this Bill. But one must ask whether the exercise of the power in clause 22 of the Bill would, in practice, have more or less effect on commercial dealings than the exercise of the power in section 13 of the *Fair Trading Act 1992*. Moreover, it should be noted that the range of matters that a court may take into account under clause 22 is wider than the range under section 13.

Dispute resolution by the Magistrates Court

In relation to clause 136, the Committee said that such provisions are at times not very helpful in providing guidance. Clause 136 provides that the court “must, when hearing a proceeding, (a) act as quickly as possible; and (b) ensure, as far as practicable, that all relevant material is disclosed to the court to allow it to decide the matters in dispute”. It said:

“Paragraph (b) is a direction to the court that it intervene and make decisions concerning the evidence that is placed before it, notwithstanding the decisions in this regard that may have been taken by the parties and their legal advisers. If taken seriously, such a direction will add to the cost – to both the parties and the public – of these hearings. In this way, the aim in paragraph (a) will be defeated”.

The Attorney’s response is that clause 136(a) was included to overcome a decision of the High Court to the effect that there was no right to speed in decisions. The Committee appreciates that bodies such as courts should proceed with expedition, but only so far as consistent with the interests of the parties in achieving an adequate measure of procedural fairness. That measure must be adjusted to the circumstances of each case and the particular body, which latter arguably includes having regard to the resources available to the body concerned. It cannot be expected that tribunals and courts of limited jurisdiction can proceed in the same way as a superior court. However, to elevate speed in decision-making, as such, as a factor warranting particular emphasis in the legislation creates some risk that it will assume too great a significance. There will be many cases where one party’s case will be enhanced by some delay – such as for example, to seek evidence to rebut evidence or argument made by the other party, in particular in circumstances where the former party did not have adequate notice of that additional matter. In such cases, the dictates of procedural fairness might be sacrificed in the interests of speed.

The Committee’s view is that this is a matter that warrants the Assembly’s attention from the perspective of the terms of reference of this Committee.

Concerning clause 137, the Attorney points out, and the Committee accepts, that there is in the Committee’s comments an unexplained criticism of the clause. Subclause 137(1) provides that “The Magistrates Court may decide its own procedures”. By subclause 137(2)(f), for example, it may modify provisions of the *Magistrates Court (Civil Jurisdiction) Act 1982* concerning the law of evidence; (in any event, s 201 of that Act empowers the Magistrates Court to dispense with the rules of evidence “where such compliance might occasion or involve unnecessary or unreasonable expense or delay”.) The general point that the Committee makes is that the rules of evidence are in many respects designed to strike a balance between, on the one hand, matters such as the needs of expedition in the conduct of litigation, and, on the other, the rights of the parties to the litigation. The rules of evidence are the distillation of centuries of experience of the courts in striking this balance. The rules against the reception of hearsay evidence, even as much modified by the *Evidence Act*, may be seen as ensuring that a party has a fair opportunity to deal with evidence adduced by the opponent party. (In relation to the dangers of admitting hearsay evidence, see the judgment of Higgins J in *A and B v. Director of Family Services* [1996] ACTSC 48.)

On the view once expressed, that “our liberties are secreted in the interstices of the rule of procedure”, the committee considers it desirable to draw to the attention of the Assembly provisions of bills that enable adjudicative bodies that have a wide power

to fashion their own procedures, in particular where the rule of evidence may be modified.

The Committee thanks the Attorney-General for his considered response, and hopes that this exchange of views will assist the Assembly.

Paul Osborne, MLA
Chair

February 2001