

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. 16 OF 1999

7 December 1999

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 Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan
Assistant Secretary (Scrutiny of Bills and
Subordinate Legislation): Ms Celia Harsdorf

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 comments on them.

ACTION Corporation Bill 1999

This is a Bill to establish ACTION Corporation as a statutory authority to provide public passenger transport services. A board of management would have general responsibility for the policies and management of the corporation, and this board would appoint a chief executive for the corporation. The Minister would appoint the directors of the board, and the Minister may, by instrument, give directions to the corporation in relation to the performance of any of its functions. Such directions must be laid before the Legislative Assembly. The corporation must provide a business plan to the Minister upon the request of the latter, and any plan must be laid before the Legislative Assembly. The Treasurer must consent to certain contracts to be entered into by the corporation.

Crimes Amendment Bill (No 3) 1999

This Bill would amend the *Crimes Act 1900* to insert provisions creating three offences concerning food contamination.

Justice and Community Safety Legislation Amendment Bill (No 2) 1999

This Bill would amend several pieces of legislation relating to Territory Tribunals. The object is to provide, so far as is desirable, a set of standardised provisions dealing with the administration and membership of these Tribunals. The relevant Tribunals are: the Credit Tribunal; the Discrimination Tribunal; the Guardianship and Management of Property Tribunal; the Mental Health Tribunal; and the Tenancy Tribunal. Of note is: that all Tribunal members will now be appointed by the Territory Executive; that the president of a Tribunal must be a Magistrate; that all members may be appointed for a maximum of 5 years; and that the president of a Tribunal is responsible for ensuring the orderly and prompt discharge of the Tribunal's business.

The Bill also proposes some amendments to the *Interpretation Act 1967*, the *Juries Act 1967*, and the *Parole Orders (Transfer) Act 1983*.

Kingston Foreshore Development Authority Bill 1999

This is a Bill to establish the Kingston Foreshore Development Authority as a statutory authority to develop the Kingston foreshore, (an area defined in the proposed Act). A body of members of the Authority would have general responsibility for the policies and management of the Authority, and this body would, in consultation with the Minister, appoint a chief executive for the Authority. The Minister would appoint the members of the governing body, and the Minister may give written directions to the corporation in relation to the performance of any of its functions. Such directions must be laid before the

Legislative Assembly. The Authority must develop a business plan in consultation with the Minister, and the plan must be laid before the Legislative Assembly. There are provisions concerning the extent to and the manner in which the Authority may subscribe to existing companies, or form new companies, or enter into joint ventures. In these respects, there are certain obligations to inform the Legislative Assembly.

Periodic Detention Amendment Bill 1999

This Bill would amend the *Periodic Detention Act 1995* by inserting a new section 28A, and the repeal and replacement of section 29 of the Act. The effect of these amendments would be that to make it clear that when a person subject to a periodic detention order is sentenced to more than one month in prison, the order is cancelled, and, that where a periodic detainee is in custody, and cannot serve a detention period, the person will be credited with having served the period.

Bills - Comment

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

Discrimination Amendment Bill (No 3) 1999

This Bill would amend the *Discrimination Act 1991* by the addition of a qualification to section 27 of the Act. Section 27 states that it is not unlawful under the Act to do certain acts for the purpose of ensuring that members of an identified disadvantaged group have equal opportunities with other persons in the community. This amendment is designed to make unlawful any prohibited discrimination against a member of the disadvantaged group where that act discriminates against a member of the relevant disadvantaged group.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The Committee has commented on a similar Bill in its Report No 15 of 1999. The Committee sees no basis for a concern that this amendment is an undue trespass on personal rights or liberties of any person.

Casino Control Amendment Bill (No 2) 1999

This Bill would amend the *Casino Control Act 1988* in order to enable games to be played on gaming machines in a casino approved under the Act. There would also be provision for a gaming machine tax. The Bill provides for a scheme to control gaming machines in a casino. There is also provision to prohibit a casino licensee from permitting a cash facility to be placed in the casino.

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

Taxation by subordinate laws

Under clause 6 of the Bill, proposed new subsection 16(1) provides that the gaming machine tax is imposed on the gross gaming machine revenue. Subsection 16(2) provides

that “the Minister may determine, by notice in writing, the method for assessing the amount of gaming machine tax that is payable”.

Such determinations may, pursuant to subsection 6(19) of the *Subordinate Laws Act 1989*, be disallowable by the Assembly.

The Legislative Assembly may wish to consider whether it is desirable to vest such a power to tax in a Minister. In this respect, see the comments below concerning the Water Resources Amendment Bill 1999.

Justice and Community Safety Legislation Amendment Bill (No 3) 1999

This Bill would amend several pieces of legislation relating to the law concerning fair trading in the Territory. The amendments are necessary in order to facilitate a re-ordering of fair trading functions within the Department of Justice and Community Safety to bring these functions under executive level supervision. A central feature of the amendments is the proposal to create an office of Commissioner for Fair Trading of the Australian Capital Territory.

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

There is a Henry VIIIth provision in clause 24 of the Bill. (The nature of such clauses is explained in Report No 14 of 1999.) It is, however, a very limited power.

The power would enable regulations made under the *Fair Trading (Consumer Affairs) Act 1973* to modify Part 5 of that Act to make provision for any matter that is not, or not adequately, dealt with in Part 5. This provision expires one year after the commencement of Part 5.

Part 5 would be inserted by this Bill, and deals with transitional matters. Given the very limited scope of this power, the Committee does not suggest that clause 24 gives rise to any matter for concern.

Supervised Injecting Place Trial Bill 1999

This is a Bill for an Act “to allow the temporary operation of a supervised injecting place ...” (proposed section 4). The main features of the proposed scheme are:

- the Minister may declare a place to be a facility if it is suitable for use as a supervised injecting place, and if appropriate directions have been made by the Attorney-General under proposed section 8;
- a definition of what may constitute a supervised injecting place;
- the Minister may declare a person to be the operator of a facility;
- provision that staff of a facility, and some other kinds of persons, are immune from criminal liability in relation to acts done by them in connection with the operation of a supervised injecting place;
- the immunity from civil liability of the Territory or anyone else, at the suit of a person who has self-administered drugs (the affected person), in relation to the death, or any loss or injury, suffered by the affected person;
- the giving of directions by the Attorney-General to the Director of Public Prosecutions (DPP), under subsection 20(1) of the *Director of Public Prosecutions Act 1990*, so as “to ensure that drug dependent persons are not deterred by fear of prosecution for an offence from making use of [a supervised injecting place]”; and
- the exclusion of persons from a facility.

Any directions given by the Attorney-General to the DPP must be laid before the Assembly, but they are not disallowable.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Dispensing with the law

There is a long-standing principle of constitutional law and practice that an executive body should not dispense with the operation of the law. It is expressed in the clause of the *Bill of Rights 1688* (1 William & Mary (sess. 2) Ch. 2) that states “that the pretended power of dispensing with laws or the execution of laws as it hath been assumed and exercised of late is illegal”. (There is a judicial comment on the principle in *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 272, per Windeyer J).

The principle may, of course, be displaced by statute. The issue for the Assembly is whether displacement is justified in any particular case. In relation to clause 20 of the Bill, a number of matters might be noted.

First, it is not very clear just what kinds of directions to the DPP would be justified in order “to ensure that drug dependent persons are not deterred by fear of prosecution for an offence from making use of [a supervised injecting place]”. Might this extend to the protection from prosecution of the drug dependent person in relation to her or his purchase of the drug?, or of the seller of such a drug? The point of these questions is that the drug user must obtain their supply of drugs from somewhere, and that is likely to involve an illegal transaction.

Secondly, the definition of “drug dependent person” in subsection 3(1) of the *Drugs of Dependence Act 1989* is a limited one. It provides that “drug dependent person” means, in relation to a drug of dependence or a prohibited substance,

“a person with a condition such that –

- (a) as a result of the administration to him or her of the drug or substance, the person demonstrates -
 - (i) impaired control; or
 - (ii) drug-seeking behaviour that suggests impaired control;in relation to the person's use of the drug or substance; or
- (b) the cessation of the administration of the drug or substance is likely to cause the person to experience symptoms of mental or physical distress or disorder; ...”.

Thus, this definition will not pick up many persons (such as the relatively new user) who may use, or who may wish to use, a facility. This may be the object of proposed section 8, but, if so, it points to the difficulties the DPP, (and possibly the police), will face in giving effect to any direction. How, and when, is it to be ascertained whether a particular person is a “drug dependent person”?

Thirdly, the Bill does not address the scope of the common law and statutory powers of a police-officer to arrest and charge a person for an offence. There may be particular problems in respect of the police. Section 9 of the *Australian Federal Police Act 1979* of the Commonwealth provides that the functions of a member of the Australian Federal Police (AFP) include those which are imposed upon her or him by legislation and indeed by common law. The Committee is aware that there is legal debate as to the extent of the obligation of a police officer to enforce the law. There is no doubt that he or she has a discretion in this respect, but there may be a point where there is a duty to enforce the law in some particular situations. A critical issue is how the provisions of this Bill can be adjusted to the duties and functions of a member of the AFP.

Fourthly, it is not entirely clear how the power in proposed section 8 relates to the power of the Attorney-General to give directions to the DPP under subsection 20(1) of the *Director of Public Prosecutions Act*

1990. It appears to be intended that the qualifications in section 20 apply to any exercise of the power in section 8. But it is to be noted that subsection 8(2) is an explicit power to direct the DPP that certain persons not be prosecuted for a criminal offence. On the other hand, subsection 20(3) states that “[a] direction ... shall be of a general nature and shall not refer to a particular case”. Subsection 8(2) might be read as a power to direct that persons of a certain kind or class not be prosecuted, and thus be seen to be consistent with subsection 20(3). This is, however, a point of some significance, and the matter might be clarified lest misunderstandings arise.

Finally, there are questions about the interrelationship between the proposed sections 5 and 8. The Minister may declare a place to be a facility only if appropriate directions have been made by the Attorney-General under proposed section 8. This suggests that the approval is valid only so long as the directions in place at the time of approval remain in place. If so, this will limit the ability of the Attorney-General to amend or revoke directions given under section 8.

Civil liberties and treaty obligations

The regulation of drugs does raise issues of civil liberties. It is, like so many areas of human activity, one in which rights are in conflict; (see J A Inciardi and D C McBride, “Legalization: A High Risk Alternative in the War on Drugs” (1989) 32 *American Behavioral Scientist* 259 at 281ff).

It is also an area where it may be argued that international law has a bearing. In this connection, the Assembly may wish to take into account Australia’s obligations under international treaties that deal with the control of drugs of dependence. Article 36(1) of the *Single Convention on Narcotic Drugs 1961*, which was ratified by Australia in 1967, provides that:

“1(a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that ... possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever ... of drugs contrary to the provisions of this Convention ... shall be punishable offences when committed intentionally ...”.

In addition, Article 3 of the *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* provides in part that:

“1. Each party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

(a) (i) The ... distribution, sale, delivery on any terms whatsoever ... of any narcotic drugs or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention; ...”.

Water Resources Amendment Bill 1999

This Bill would amend the *Water Resources Act 1998* to provide for the payment of periodic fees by the holder, under the Act, of a water allocation, or of certain kinds of licences. Proposed new section 78 of the Act would enable the Minister, by notice in the *Gazette*, to determine the fees payable under the Act. Such a determination would be disallowable by the Assembly.

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

Taxation by subordinate laws

The Committee draws attention to proposed new subsection 78(5), which provides:

“A reference in this section to a fee includes a reference to a fee that is a tax”.

The Committee commented on this kind of provision in its *Report No 14 of 1999*, in relation to a provision of the Road Transport (General) Bill 1999. The issue is whether the Assembly wishes to confer a power to levy a tax on a Minister.

Subordinate Legislation - No Comment

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

Subordinate Law 1999 No 29 made under the *Liquor Act 1975* amends regulations 3A of the Liquor Regulations to the effect of removing the trading hour restrictions under the Act to the sale of liquor for consumption on and off licensed premises on New Year’s eve and New Year’s morning, 2000 and removing the trading hour restriction that applies under the Act to the sale of liquor for on premises consumption on ANZAC day morning; and amends regulation 11 to the effect of declaring an area as a prescribed public place in accordance with subsection 84 (3) of the Act for the purposes of the Food and Wine Frolic conducted by ACT Festivals.

Determination No. 264 of 1999 made under subsection 30 (1) of the *Electoral Act 1992* appoints a specified person to be the Acting Electoral Commissioner until 31 January 2000.

Subordinate Legislation - Comment

The Committee has examined the following subordinate legislation and offers this comment on it.

Determination No. 262 of 1999 made under section 217A of the *Motor Traffic Act 1936* determines fees payable for the issue of a restricted taxi licence to be six thousand dollars for a six year licence term for the purposes of subsection 27D (1) of the Act.

The Committee notes that instrument was signed on 4 November 1999, appeared in the *Gazette* on 17 November 1999 was to take effect from 4 November 1999.

What is the effect of the period from the instruments taking effect until gazettal?

The effect of the period between this instrument taking effect and its notification in the *Gazette* needs to be considered.

There is 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.”

Confirmation is sought 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.

INTERSTATE AGREEMENTS

The Committee has not received any relevant notification.

GOVERNMENT RESPONSES

The Committee has received a response from the Minister for Urban Services in connection with the comments in its *Report No. 14 of 1999* on the Road Transport Bills. It is noted that:

- the Henry VIIIth clause in clause 9 (2) of the Bill will now be subject to a sunset clause;
- the provision in clause 96 (6) to permit the Minister to levy a tax through the determination of fees will be retained. The Minister states that “[i]n reality the Government sets a budget and fee amounts are determined in order to meet the Government’s requirements”. It is pointed out that the Assembly may disallow any determination of fees;
- the Committee’s concerns about non-disallowable instruments made by the Minister will be addressed in a review of public transport legislation;
- regulations will provide that authorised persons (see clause 19) must be of good character and be suitably trained;
- clause 156 will be re-drafted to insert a “reasonable grounds” limitation to the scope of this discretion;
- clause 209 (2) will be retained, but the Minister will be empowered to make disallowable guidelines for the exercise of powers in relation to authorised insurers;
- clause 172 – relating to provision of name and address to a police officer – will be retained;
- clauses 62 and 63 – relating to mandatory sentences – will be retained;
- clause 77 – relating to liability for unsuccessful prosecutions – will be retained;
- a “reasonable excuse” limitation will be added to clause 82;
- clause 189 will be omitted; and
- clause 16 – the “good Samaritan” provision – will be retained.

A copy of the response is attached.

The Committee thanks the Minister for Urban Services for his helpful response. The Committee does however make the following comments:

First, in relation to the Road Transport (General) Bill 1999:

- Clause 209 (2) should not be retained in its present form. A discretion phrased in terms that it may be exercised “for any reason the Minister considers appropriate” negates the concept of the exercise of administrative power being subject to the law. If it is desired that the Minister have a wide discretion, the use of the words “may cancel” will be sufficient.
- The Committee adheres to its earlier view that the Minister be empowered to make disallowable guidelines for the exercise of *all discretionary powers* under the road transport legislation. This kind

of provision is now commonly found in legislation which confers discretionary powers, and we consider it appropriate to this legislation.

- That the Committee retains its concerns about clause 16 – the “good Samaritan” provision. It is not that such a provision is undesirable. But that its ramifications need to be explored and dealt with. There is, for example, no denial in the Minister’s response that civil liability may result from a failure of a person to obey clause 16. Would third party insurance cover such liability? There remain concerns about the scope of this provision and in particular with the absence of any defences.

Secondly, the Committee states again its concern that the authority and power of the Legislative Assembly is significantly undermined by the practice of the executive in agreeing to adopt a national approach to legislation. In this fashion the Assembly is presented with a *fait accompli*. This appears to be the case in relation to several aspects of the road transport laws and, in particular, in relation to the “good Samaritan” provision in clause 16.

Where a Bill is said to rest on some national approach, the Committee considers that the Assembly be informed as to whether the provisions of the *Administration (Interstate Agreements) Act 1997* have any application, and, if so, whether those provisions were obeyed. Where this Act does not apply, the Committee nevertheless considers that the Assembly be informed as to the justification for the national approach.

Finally, in relation to the subordinate legislation, the Committee states a general concern that the scrutiny function of this Committee is undermined by the neglect of Ministers to address concerns raised by the Committee. A particular instance concerns our comments on the practice of commencing subordinate laws prior to the date of their notification in the *Gazette*. We have noticed a number of cases recently whether this occurs, and we have yet to have had a response which addresses our concern that section 7 of the *Subordinate Law Act 1989* may render these subordinate laws of no effect.

Paul Osborne, MLA
Chair

December 1999