

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. 7 OF 1999

2 July 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 Adviser: 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.

Financial Sector Reform (ACT) Bill 1999

This is a Bill for an Act to implement an agreement between the Commonwealth, the States and the Territories to transfer regulatory responsibility for building societies, credit unions and friendly societies to the Commonwealth. The Act would wind up the office of the ACT Registrar of Financial Institutions, the Supervision Fund and the Credit Unions Contingency Fund.

Gambling and Racing Control (Consequential Provisions) Bill 1999

This is a Bill for an Act to amend a number of existing Acts in ways which will make effective the regime for the control of gambling and racing which was introduced by the *Gambling and Racing Control Act 1999*. Various powers which are exercised by other authorities under other Acts will be transferred to the Gambling and Racing Commission established under the *Gambling and Racing Control Act 1999*. There would also be a number of other consequential amendments to various laws.

Gaming Machine (Amendment) Bill (No 2) 1999

This Bill would amend the *Gaming Machine Act 1987* to the effect of retaining the cap of 5,200 on the number of gaming machines in the Territory until 10 July 2000.

Bills - Comment

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

Appropriation (Bruce Stadium and CanDeliver Limited) Bill 1999

This is a Bill for an Act to retrospectively appropriate money for the purposes of the redevelopment of Bruce Stadium and for the purposes of CanDeliver Limited.

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

The provisions of this Bill would have retrospective effect. They do not, however, impose any form of criminal or civil liability on a person and thus do not offend the common law concept of objectionable retrospective law, nor of any such concept in international rights instruments.

Motor Traffic (Amendment) Bill (No 2) 1999

This Bill would amend the *Motor Traffic Act 1936* to facilitate the introduction of speed and red light cameras in the Territory. It also makes provision for a new scheme for infringement notices to be used where the driver of a vehicle is unknown.

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

There are a number of aspects here.

Optical surveillance and privacy

The use of cameras at intersections and speed spots will no doubt prove to be of value in the detection of red-light running and speeding. Thus, significant social value will accrue. On the other hand, the use of any form of optical surveillance of what people do, even in public, raises a privacy issue. In the circumstances here, the Committee does not consider that the limited intrusion of privacy is such that it amounts to an undue trespass on personal rights and liberties.

Onus of proof

Under proposed new section 180J(3), in a prosecution against an owner of a vehicle for an infringement notice offence involving a vehicle, the Magistrate must not find the owner liable if “the court is satisfied” of certain matters.

The use of the phrase “the court is satisfied” leaves very unclear the issues of where the burden of proof lies in relation to the various matters stated. Is any kind of burden placed on the owner? If so, is it merely a burden to adduce evidence of the facts to be established, leaving it to the prosecution to carry the burden to persuade the court that the facts are as advanced by the prosecution? Or must the defendant/owner carry the burden to persuade the court that the facts are as advanced by the defendant/owner?

It is generally undesirable to leave these questions unresolved, and this is particularly so where the law will impinge on the daily activities of a large number of people.

(There may even be a question whether there is any burden of proof on any party if it is the court which must be satisfied. This kind of language is more appropriate where the fact-finder is an administrative body and not a court).

Paragraph 2 (c) (ii) – insufficiently defined administrative powers

The effect of proposed new sections 180ME and MF is that an administering authority has an uncontrolled discretion to withdraw an infringement notice. This is a significant power, not least because it is in effect a power to dispense with the application of the law in favour of particular individuals. Its exercise will impinge on the daily activities of a large number of people.

Given the nature of this power, there is a strong case to say that the legislation should state the kinds of considerations that must or may be taken into account by an administering authority when it exercises this discretion. It might be considered desirable to empower the Minister to issue guidelines to control the exercise of this discretion.

Comments on the Explanatory Memorandum

The Committee has concerns about a number of aspects of the Explanatory Memorandum. Its is not, on the whole, a satisfactory explanation of the Bill.

It states at the outset that the Bill will facilitate the introduction of speed and red light cameras in the Territory. This is so, but it appears that for the most part the Bill makes provision for a new scheme for infringement notices to be used where the driver of a vehicle is unknown. This should have been made clear.

In general terms, the Explanatory Memorandum provides only a very brief explanation of quite complex provisions.

The Explanatory Memorandum omitted to comment on clause 5 of the Bill. That clause is of little significance, but the omission has the result that what purports to be an explanation of clause 5 (and of clause 6, etc) is in fact an explanation of clause 6 (and clause 7, etc).

The explanation of some of the sections proposed to be inserted by clause 13 (clause 12 according to the Explanatory Memorandum) is also deficient. What purports to be an explanation of proposed new section 180MB is not an explanation of this provision, but is rather an explanation of section 180MD. There is no explanation of proposed new section 180MB. Nor is there an explanation of proposed new section 180MC (although this section not difficult to understand). The result of these omissions is that the explanations of proposed new sections 180MD to 180MI are described as explanations to sections 180MB to 180MG.

This problem flows through the remainder of the explanation of clause 13, with the additional complication that there is no explanation for proposed new section 180ML, or for the proposed new section 180MU.

The omission of an explanation of proposed new section 180MB cannot be overlooked. This provision is very difficult to understand. Its effect may be that in relation to a “camera-detected offence”, the owner of a vehicle commits an offence (under subsection 180MB(2)) where he or she fails to give an unknown user declaration in circumstances where the owner knew of the identity of the driver of the vehicle.

This provision may well affect many vehicle owners who lend their vehicle to others (such as spouses or children). The Explanatory Memorandum should explain the provision with care, providing examples. There is reason to say the Act itself should contain an explanatory note.

What the Explanatory Memorandum describes as clause 15 of the Bill does not appear to have a counterpart in the Bill. Is this significant?

Land (Planning and Environment) (Amendment) Bill 1999

This Bill would amend the *Land (Planning and Environment) Act 1991* to make changes to the regime under the Act for the ‘change of use charge’ payable on the variation of a Crown lease. The major amendments would have the effect of (i) changing the general rate of change of use charge from 75% of assessed added value to 50%; (ii) removal of a ‘sunset provision’ that required the rate of the charge to become 100% of assessed added value on 31 August 1999; and (iii) enabling regulations which may be made by the Minister to remit or to increase a change of use charge to come into effect on the day of their notification in the *Gazette*, or as otherwise prescribed (usually by the law which confers the power to make the regulations).

Paragraph 2 (c) (v) – insufficient scrutiny of legislative power

Sections 184C and 187C of the *Land (Planning and Environment) Act 1991* empower the Minister to make regulations for the purpose of prescribing the circumstances in which the Minister may remit or increase a change of use charge. Subsection (5) of each of these sections is unusual in that they stipulate that any such regulations do not come into effect, at the earliest, until the day following the date on which they could have been disallowed under section 6 of the *Subordinate Laws Act 1989*.

These provisions enhance the power of the Assembly to scrutinise the regulations. The effect of clauses 6(b) and 9(b) of the Bill would be to remove this enhanced power.

The Explanatory Memorandum provides as justification the need to ensure that the reduction in the general rate from 50% to 75% does not result in windfall gains to particular groups.

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

Magistrates Court (Amendment Bill) 1999

This is a Bill to amend the *Magistrates Court Act 1930* to the effect that the *Magistrates Court (Civil Jurisdiction) Act 1982* would apply to proceedings under Part 10 of the *Magistrates Court Act 1930* and to ensure that any orders may be made by consent without admissions by the respondent to the application for the order.

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

Clause 6 of this Bill may have retrospective effect. It does not, however, impose any form of criminal or civil liability on a person and thus does not offend the common law concept of objectionable retrospective law, nor of any such concept in international rights instruments.

Psychologists (Amendment) Bill 1999

This is a Bill to repeal sections 57, 58 and 59 of the *Psychologists Act 1994* and to insert new sections 57, 58 and 59 to the effect of removing certain transitional provisions in the Act. These provisions enabled persons who did not hold qualifications to become registered as psychologists under the Act to make application to become registered by reason of their having practised as a psychologist prior to the introduction of the Act in 1994. It is considered no longer necessary to make such transitional provision.

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

The effect of the proposed new section 58 of the Act would be to terminate applications to the Psychologists Board by persons seeking registration, and also to terminate applications for review by the Administrative Appeals Tribunal of decisions of the Board.

These provisions have the potential to retrospectively deprive a person of an accrued right to make these kinds of application. They do thus involve a retrospective deprivation of a legal right, and there may well be persons who will be affected adversely by these provisions.

The Committee draws this matter to the attention of the Assembly. It is suggested that in any case where a provision of a Bill does have retrospective effect in the manner of this Bill, that the matter is drawn to the attention of the Assembly in the Explanatory Memorandum

GOVERNMENT RESPONSES

The attached Government responses were referred to in Report No. 6.

Paul Osborne, MLA
Chair

July 1999