

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. 15 OF 1999

24 November 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.

Building Amendment Bill (No 2) 1999

This Bill would amend the *Building Act 1972* in ways designed, in conjunction with the amendments to the law proposed by the Building Construction Industry Training Levy Amendment Bill 1999, to make better provision for the payment and collection of the building training levies. This Bill would ensure that the calculation of the building levy is calculated by reference to the value of the building work.

Building and Construction Industry Training Levy Amendment Bill 1999

This Bill would amend the *Building Construction Industry Training Levy Act 1999* in order to improve the system for the collection and payment of the building training levies. This Bill is a companion to the Building Amendment Bill (No 2) 1999. This Bill would bring the method for calculating the training levy into line with the method for the calculation of the building levy.

Public Sector Legislation Amendment Bill 1999

This is a Bill for an Act to make amendments to the *Public Sector Management Act 1994* and to the *Fire Brigade (Administration) Act 1974*. These amendments would ensure that until 31 December 2000, employees of the ACT public service and the fire service will continue to be able to make use of the schemes for appeal and review that are provided for in the *Merit Protection (Australian Government Employees) Act 1984*.

Bills - Comment

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

Discrimination Amendment Bill (No 2) 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 of discrimination is irrelevant to the purpose of the special measure taken in favour of the group.

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

The *Discrimination Act 1991* applies to discrimination on a number of grounds, being - sex; sexuality; transsexuality; marital status; status as a parent or carer; pregnancy; race; religious or political conviction; impairment; membership or non-membership of an association or organisation of employers or employees; age; profession, trade, occupation or calling; and association (whether as a relative or otherwise) with a person identified by reference to one of these attributes.

Part III of the Act then provides that a person must not, when undertaking certain defined activities, discriminate against another person on one of these grounds.

Section 27 then provides:

Measures intended to achieve equality

Nothing in Part III renders it unlawful to do an act a purpose of which is -

- (a) to ensure that members of a relevant class of persons have equal opportunities with other persons; or
- (b) to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs.

Under this provision, a person or body may lawfully discriminate against persons who are not members of the relevant class. For example, the Explanatory Memorandum asserts that “men cannot complain if special measures, such as a women’s health clinic, are provided for women pursuant to section 27”.

The proposed amendment would make unlawful any act of discrimination prohibited by Part III against a member of the relevant class (the disadvantaged group), where that act of discrimination is irrelevant to the purpose of the special measure taken in favour of the group. It is designed to ensure that where special measures are taken, a member of the group is not barred from section 27 from claiming that he or she is the subject of unlawful discrimination in the provision of the special measure.

As such, the Committee sees no basis for a concern that this amendment is an undue trespass on personal rights or liberties of any person.

WorkCover Authority Bill 1999

The body to be called the WorkCover Authority to have various functions, including, in particular, to administer various laws referred to in the Bill as the workcover legislation. These laws deal primarily with occupational health and safety. The Authority would be a body corporate, comprised of seven directors, appointed by the Minister, and a general manager. The Minister may give general or particular directions to the Authority about the performance of its functions. Such directions must be laid before the Legislative Assembly. There is provision for the appointment, remuneration and termination of the

general manager, of staff, and of consultants. The Authority must, in consultation with the Minister, develop a business plan for each financial year. Such plans are to be laid before the Assembly. Quarterly reports by the Authority must also be laid before the Assembly.

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

There is a Henry VIIIth provision in subclause 4(2) 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 proposed Act to amend those parts of the workcover legislation which are such because they have been prescribed as workcover legislation. (Thus, the power in subclause 4(2) would not extend to the Acts that are specified in subclause 4(1)). The power is, moreover, limited to making those changes necessary because of the prescription of the law as workcover legislation. Finally, an exercise of the power expires one year after its exercise, unless confirmed by the relevant workcover law.

Subordinate Legislation - No Comment

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

Subordinate Law No. 25 of 1999 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* amends the Principal Regulations by repealing regulations 2 and 3 which contained reference to a no longer required transitional regulation and the interpretation of references to forms contained in the schedule; repeals regulations 4 to 10 (inclusive) and substitutes a new regulation 4 which relates to liquor permits by unincorporated associations and a new regulation 5 which relates to fittings that a licensee is required to notify the Registrar about if they are altered; and repeals Schedule 1.

Subordinate Law No. 26 of 1999 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the rules relating to the service of documents and makes miscellaneous amendments to the Schedule as part of a process of eliminating outmoded, outdated or irrelevant provisions within the Rules; makes consequential amendments to Subordinate Law No. 15 of 1995; and amends Subordinate Law No. 35 of 1998 to correct an incorrect reference to certain forms contained in the First Schedule.

Subordinate Law No. 27 of 1999 being the Fair Trading Regulations (Amendment) made under section 34 of the *Fair Trading Act 1992* amends regulation 4 of the Fair Trading Regulations by adding a reference to the Retirement Villages Industry Code of Practice so as to prescribe it as a code of practice under the section 34 of the Act.

Subordinate Law No. 28 of 1999 being the Epidemiological Studies (Confidentiality) Regulations Amendment made under the *Epidemiological Studies (Confidentiality) Act 1992* repeals regulation No. 1 of Subordinate Law No. 24 of 1992 for the purpose of renaming that regulation and inserts new regulations No. 5 and 6 which relate to prescribed studies for parenting practices of drug users and combating child abuse by drug users.

Determination No. 236 of 1999 made under subsection 8 (2) of the *Radiation Act 1983* appoints a specified person to be a member of the Radiation Council for a period of three years from 6 October 1999.

Determination No. 237 of 1999 made under paragraph 10 (1) (b) of the *Food Act 1992* revokes the appointment of a specified person as an Analyst.

Determination No. 238 of 1999 made under paragraph 10 (1) (b) of the *Food Act 1992* appoints a specified person as an Analyst for the purposes of the Act.

Determination No. 239 of 1999 made under paragraph 10 (1) (b) of the *Food Act 1992* appoints a specified person as an Analyst for the purposes of the Act.

Determination No. 240 of 1999 made under subsection 100 (1) of the *Public Health Act 1997* determines diseases or medical conditions to be notifiable conditions and diseases to be transmissible notifiable conditions.

Determination No. 241 of 1999 made under paragraph 5 (1) (a) of the *Blood Donation (Transmittable Diseases) Act 1985* approves a new Donor Declaration Form.

Determination No. 242 of 1999 made under section 105A of the *Liquor Act 1975* revokes Determination No. 101 of 1999 and determines new fees for the purposes of the Act.

Determination No. 243 of 1999 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 221 of 1999 and determines fees payable for the purposes of subsection 163C (2) for the issue of parking vouchers from machines at certain specified sites.

Determination No. 245 of 1999 made under subsection 8 (1) of the *Community and Health Services Complaints Act 1993* revokes Determination No. 229 of 1999 made under subsection 8 (1) of the *[Health Complaints Act 1993]* and appoints a specified person to be the Community and Health Services Complaints Commissioner.

Determination No. 246 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the name of a certain streets in the Division of Nicholls.

Determination No. 247 of 1999 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 147 of 1995 and determines the names of certain streets in the Division of Nicholls.

Determination No. 248 of 1999 made under section 24 of the *Building Act 1972* revokes Determination No. 88 of 1999 and adopts the provisions of the 1996 edition of the Building Code of Australia including amendments 1 to 5 prepared and published by the Australian Building Code and the Australian Capital Territory Index. A transitional period is allowed before clause 3.7.1.9 (b) of volume 2 of the Building Code comes into effect. This clause contains a requirement for ductwork for gas-fired central heating in residential buildings to meet a fire resistance test and came into effect on 17 August 1999.

Determination No. 252 of 1999 made under subsection 19 (1) of the *Liquor Act 1995* approves amendments to the Licensing Standards Manual.

Determination No. 253 of 1999 made under section 65 of the *Building Act 1972* determines various fees payable for the purposes of section 53AB of the Act in relation to certificates of regularisation.

Determination No. 254 of 1999 made under paragraph 30 (2) (b) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council until 20 April 2000.

Determination No. 260 of 1999 made under section 133 of the *Health Act 1997* determines a Code of Practice for public swimming and spa pools for the purposes of the Act.

Determination No. 261 of 1999 made under section 18 of the *Public Health Act 1997* is a declaration of a public health risk activity for the purposes of the Act.

Subordinate Legislation - Comment

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

Determination No. 249 of 1999 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and section 7 of the *Veterinary Surgeons Act 1965* appoints a specified person as Chairperson of the Veterinary Surgeons Board for the period commencing from 21 October 1999 to and including 26 September 2001.

The Committee notes that this appointment was signed on 21 October 1999, appeared in the *Gazette* on 3 November 1999 and states that it was to take effect from 21 October 1999.

Determination No. 250 of 1999 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and paragraph 7 (1) (a) and subsection 7 (2) of the *Nurses Act 1988* appoints a specified person as Chairperson of the Nurses Board of the ACT for the period commencing from 26 October 1999 to and including 27 June 2002.

Determination No. 251 of 1999 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* and paragraph 7 (1) (a) and subsection 7 (2) of the *Nurses Act 1988* appoints a specified person as a member of the Nurses Board of the ACT for the period commencing from 26 October 1999 to and including 27 June 2002.

The Committee notes that these appointments were signed on 26 October 1999, appeared in the *Gazette* on 3 November 1999 and state that they were to take effect from 26 October 1999.

Determination No. 255 of 1999 made under paragraph 7 (1) (a) of the *Building and Construction Industry Training Levy Act 1999* appoints a specified person as Chairperson of the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002.

Determination No. 256 of 1999 made under paragraph 7 (1) (b) of the *Building and Construction Industry Training Levy Act 1999* appoints a specified person as member of the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002.

Determination No. 257 of 1999 made under paragraph 7 (1) (b) of the *Building and Construction Industry Training Levy Act 1999* appoints a specified person as member of the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002.

Determination No. 258 of 1999 made under paragraph 7 (1) (b) of the *Building and Construction Industry Training Levy Act 1999* appoints a specified person as member of the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002.

Determination No. 259 of 1999 made under paragraph 7 (1) (b) of the *Building and Construction Industry Training Levy Act 1999* appoints a specified person as member of the Building and Construction Industry Training Fund Board from 1 November 1999 until 31 October 2002.

The Committee notes that these appointments were signed on 29 October 1999, appeared in the *Gazette* on 10 November 1999 and state that they were to take effect from 1 November 1999.

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

The effect of the period between these appointments taking effect and their notification in the *Gazette* needs to be considered.

There is no mention in the explanatory statements 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 Health and Community Care in relation to Scrutiny of Bills Report No 12 of 1999 and concerning comments on Determination No 230 of 1999.

The Committee thanks the Minister for his response.

Paul Osborne, MLA
Chair

1999