Legislative Assembly for the Australian Capital Territory

Standing Committee on Justice and Community Safety

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

SCRUTINY REPORT NO. 6 OF 1999

17 June 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.

Ambulance Service Levy (Amendment) Bill 1999

This Bill would amend the *Ambulance Service Levy Act 1990* to provide for an increase in the amount used in the calculation of the Ambulance Service levy payable by a health benefits organisation in the Territory.

Electoral (Amendment) Bill 1999

This Bill would amend provisions of the *Electoral Act 1992* which relate to the disclosure of political donations, and would make some minor textual amendments. The major effect of the Bill will be, first, to lower the threshold of the amount of the total value of transactions which will trigger a requirement that the donor, recipient of expenditure, or creditor must be reported, and, secondly, to lower the threshold of the value of individual transactions which must be counted in determining whether the first threshold has been reached.

Remuneration Tribunal (Amendment) Bill 1999

This Bill would amend the *Remuneration Tribunal Act 1995* to restrict the kinds of persons who may be appointed as members of the Remuneration Tribunal, and to make determinations of the Tribunal disallowable instruments.

Veterinary Surgeons (Amendment) Bill 1999

This Bill would amend the *Veterinary Surgeons Act 1965* to repeal a requirement that the Chairperson of the Veterinary Surgeons Board be a public servant.

Bills - Comment

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

Appropriation Bill 1999-2000

This Bill would appropriate money for the purpose of the Territory in respect of the financial year commencing in 1 July 1999 and for related purposes.

The Committee queried whether the clause amending the *Financial Management Act 1996* was appropriate for the Appropriation Bill 1999-2000 given that its main purpose was to appropriate moneys. However, as this matter falls outside the Committee's terms of reference, the Committee offers no comment.

Rates and Land Tax (Amendment) Bill 1999

This Bill would amend the *Rates and Land Tax Act 1926* to the primary purpose of adjusting the rating factors for the 1999-2000 rating year. The Bill would also create a mechanism for the determination of various kinds of fees payable upon the making of an objection, for an application for reconsideration, and for review by the Administrative Appeals Tribunal. Such fees would be refundable in the event of the objection, etc being successful in whole or in part.

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

It is noted that a determination of fees by the Minister under proposed new section 36 (see clause 13) would be a disallowable instrument by reason of the effect of subsections 6(1) and 6(19) of the *Subordinate Laws Act 1989*.

Revenue Legislation Amendment Bill 1999

This Bill would amend the *Gaming Machine Act 1987*, the *Lotteries Act 1964*, and the *Taxation Administration Act 1999* to implement a number of revenue raising initiatives in the 1999-2000 Budget. In the main, these amendments would have the effect of increasing various kinds of fees payable under those Acts.

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

It is noted that a determination of fees by the Minister under proposed new section 139A of the *Taxation Administration Act 1999* (see clause 16) would be a disallowable instrument by reason of the effect of subsections 6(1) and 6(19) of the *Subordinate Laws Act 1989*.

Further report on the Tobacco (Amendment) Bill 1999

This Bill would amend both the *Tobacco Act 1927* and the *Tobacco Licensing Act 1984*. The purpose of this scheme is to link compliance with the *Tobacco Act 1927* to the licensing scheme under the *Tobacco Licensing Act 1984*.

The Committee reported on this Bill in its Report No 4 of 1999. On further consideration, the Committee draws to the attention of the Legislative Assembly certain aspects of the enforcement provisions of the Bill that it considers amount to an undue trespass on personal rights and liberties.

OUTLINE OF THE BILL

For the most part, the Bill would, if enacted, make major changes to the *Tobacco Act 1927*. The major elements of the changes proposed are:

- A comprehensive set of definitions in section 3 of the Act, and in proposed new sections 3A to 3E inclusive. Sections 3A and 3B would amount to regulation of, respectively, point of sale displays and product information notices;
- In existing Part 2, section 4, which deals with the sale of tobacco products to under 18 year olds, would be repealed and replaced. The basic rule would be that sale to under 18 year olds is prohibited;
- Existing section 5 remains; its basic rule is that a person shall not purchase a tobacco product for use by an under 18 year old;
- Existing section 6, which governs sale through vending machines, would be substantially amended;
- Existing section 7, which deals with 'smokeless tobacco' remains, with a change to the penalty provision;
- Existing section 8, which deals with food and toys resembling tobacco products, would be repealed and replaced. The basic rule would be that the sale or importation of such food and toys is prohibited;
- Existing section 9, which prohibits the sale of cigarettes in quantities less than 20, remains, with a change to the penalty provision;
- Proposed new section 9A would limit the display of a tobacco product in a retail outlet to the point of sale, and proposed new section 9B would govern the number of points of sale in a retail outlet;
- The heading to Part 3 of the Act would be changed to "Advertising, Promotion and Sponsorship";
- Existing section 10, which governs tobacco advertising, would be substantially amended;
- Existing section 11, which governs the removal of tobacco advertisements, would be substantially amended;
- Proposed new section 11A would govern tobacco product promotions, and proposed new section 11B would govern competitions that promote tobacco products;

- A proposed new Part 3A would insert new sections to govern disciplinary action in relation to tobacco retailing. In this Part, there is provision for the creation of an office of Registrar of Tobacco (section 12A), for Deputy Registrars (section 12B); for notice of proposed disciplinary action to be given to a person who holds a tobacco licence or a liquor or gaming licence (section 12C), and for the kinds of disciplinary action that may be taken in relation to such persons (section 12D). (It should be noted that an exercise of the powers in section 12D is subject to review by the Administrative Appeals Tribunal; see section 12R). Section 12E governs the consequences of a disqualification.

A proposed new Part 3A would insert new sections to govern the enforcement of the provisions of the Act. Its major elements would be:

- In section 12G, provision for various classes of persons to be "authorised officers" for the purposes of the Act. They would be such persons appointed to an office which includes performing the functions of an authorised officer; the Registrar of Tobacco and any Deputy Registrar; a Public Health Officer under the *Public Health Act 1997*; and a police officer;
- In section 12H, provision for identity cards to be issued to authorised officers other than a Public Health Officer or a police officer;
- In section 12J, for powers of entry; in section 12K for consent to entry; in section 12L for powers of authorised officers; in section 12M for the power of an authorised officer to require a person to provide their name and address; in section 12N for search warrants to enter premises; in section 12P for an offence of obstructing an investigation; and in section 12Q, for the manner of dealing with seized items.

This last set of provisions are now the subject of detailed analysis.

OBSERVATIONS

For convenience, we state here the observations we make to the Assembly. They are the subject of detailed justification in what follows.

The Committee suggests that the Assembly review whether clause 18 of the Bill – in respect of proposed new section 12L - be amended to provide for the application of the privilege against self-incrimination and of legal professional privilege.

The Committee suggests that the Assembly review clause 18 of the Bill – in respect of proposed new subsection 12L(2).

The Committee suggests that the Assembly review clause 18 of the Bill – in respect of proposed new subsection 12M.

THE FRAMEWORK FOR A RIGHTS ANALYSIS

The Committee has evaluated the enforcement provisions proposed to be inserted in the Act against paragraph 2(c)(i) of its Terms of Reference. This paragraph requires the Committee to consider whether

> "clauses of bills introduced in the Assembly:
>
> (i) do not unduly trespass on personal rights and liberties; …".

The Committee considers that in several respects clause 18 may be considered to "unduly trespass on personal rights and liberties". It is under this clause that proposed new sections 12J to 12N would be inserted. The analysis and comment below indicates the ways in which these sections would unduly trespass on personal rights and liberties.

There is a substantial body of common law principle that addresses the personal rights and liberties issues that surround powers of the police and other government officers to enter premises, to conduct searches thereon, to stop, detain, question and search persons in public places, and to require persons to provide their names and address. These principles provide a yardstick against which to assess proposed new sections 12J to 12N. In addition, it is relevant to make an assessment against standards stated in various international rights instruments.

The common law background

The power of a police officer or other state official to enter premises and conduct a search

In *Coco v The Queen* (1994) 179 CLR 427 at 435, a majority of the High Court stated as a "fundamental common law right", "the right of a person in possession or entitled to possession of premises to exclude others from those premises".

The basis for this common law right lies deep in English legal history. In *Crowley v Murphy* (1981) 52 FLR 123 at 140, Lockhart J observed:

> In 1604 Sir Edward Coke reported *Semayne's Case* (1604) 5 Co Rep 919; 77 ER 194 as resolving:
>
> > The house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.
>
> This same conception was expressed, although in more colourful language, by William Pitt, First Earl of Chatham, in a celebrated address to Parliament in 1766 on general warrants, in these terms:
>
> > The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the winds may blow through it - the storm may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.

Another often quoted statement comes from *Entick v Carrington* (1765) 95 ER 807 at 817, where Lord Camden said:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

The common law has, however, always allowed that the principle of the inviolability of premises may be displaced. Thus, the majority of the High Court in *Coco* said:

> In accordance with [the fundamental common law right], a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law…: (1994) 179 CLR 427 at 435-436).

Thus, the common law right is subject to being displaced by statutory law. But the manner in which the courts have stated this qualification illustrates the capacity they have to protect the common law right from statutory curtailment. In *Coco*, the majority said (ibid at 436):

> Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct (citations omitted). But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon* (1991) 171 CLR at 654:
>
> > [I]nconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights.

In elaboration, the majority said:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them: (1994) 179 CLR 427 at 437.

This principle is referred to below as ‘the *Coco* principle’.

Their Honours allowed that abrogation or curtailment might arise from an implication “if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless”: ibid at 438. But they added:

> However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words

> will almost always be able to be given some operation, even if that operation is limited in scope: ibid.

Entry and search under a warrant

Despite the strength of the presumption as stated by the High Court, it is common to find that statute has clearly authorised abrogation or curtailment of the common law right of a person in possession or entitled to possession of premises to exclude others from those premises. As Lockhart J said in *Crowley v Murphy* (1981) 52 FLR 123 at 141: " … with the increasing complexity of modern civilization, the rise of technology and the development of sophisticated criminal techniques, Parliaments have found it necessary to encroach on such a fundamental principle of the common law".

A common form of curtailment is found in the many statutes that authorise entry and search of premises under the authority of a search warrant made by a judicial officer. The function of warrants was recognised by the High Court in *George v Rockett* (1990) 170 CLR 104 at 110:

> the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property. Search warrants facilitate the gathering of evidence against, and the apprehension and conviction of, those who have broken the criminal law.

The Court (at ibid) noted the historical and contemporary background to the law concerning search warrants:

> Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refused to countenance the issue of search warrants at all and refused to permit a constable or government official to enter private property without the permission of the occupier: *Leach v Money* (1765) 19 State Tr 1001; *Entick v Carrington* (1765) 19 State Tr 1029. Historically, the justification for these limitations on the power of entry and search was based on the rights of private property: *Entick*, at p 1066. In modern times, the justification has shifted increasingly to the protection of privacy: see Feldman, *The Law Relating to Entry, Search and Seizure*, (1986), pp 1-2.

In *Crowley v Murphy* (1981) 52 FLR 123 at 141-142, Lockhart J indicated the general framework in which the courts approach the construction of statutes that authorise search warrants. What he said is a useful general guide to a legislature contemplating whether to confer such a power and, if it is to be conferred, its scope. These remarks are also a useful guide to the conferment of a power to conduct warrantless searches (see below). His Honour said:

> Search warrants are necessary in modern society; but courts strive to balance the competing interests of the citizen to the inviolability of his home or premises and of the State to prevent the commission of crime or to obtain evidence in aid of the prosecution of offenders. It is as well to bear in mind the following passage from

the judgment of the Lord Justice General of Scotland, Lord Cooper, in *Lawrie v Muir* 1950 SLT 37 at pp. 39-40:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the utmost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

Justice Lockhart J drew a distinction between "warrants to search the premises of persons implicated in the alleged offences and those not implicated": (ibid at 152). He proposed, as a beneficial guiding principle, that

> the law … provides adequate means of obtaining the production of documents from third parties not implicated in an alleged offence (for example, subpoenas, and discovery against third parties) without the necessity of recourse to the drastic infringement of privacy necessarily involved in police officers searching the house or premises of an innocent third party who is unlikely to conceal, destroy or part with possession of incriminatory documents: ibid at 153.

It must be borne in mind that courts construe statutes authorising searches under warrant in accord with the general principle, stated in *Coco*, that statutes which authorise curtailment of rights be construed so as to preserve those rights. Thus, in *George v Rockett* (1990) 170 CLR 104 at 111, the Court said:

> the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

Warrantless searches

The common law does not confer on a police officer, or any other state official, a general power to enter premises without a warrant. (A police officer may have some particular common law powers to enter premises, such as a power to do so to effect an arrest; see Criminal Justice Commission, *Report On a Review of Police Powers in Queensland, Vol III: Arrest Without Warrant, Demand Name and Address and Move-On* Powers (1993) at 434 (henceforth 'CJC Report').

But there are several ACT statutes that confer on police officers, and/or on other kinds of government officials, authority to enter and search premises without warrant. These statutes authorise curtailment of the common law right which makes a person's premises immune from entry by officials of the state. There is greater concern with warrantless searches for the reason that an exercise of the power to make them is not – as is the case with searches by warrant – subject to control by a judicial officer.

The courts will then be particularly alert to construe such statutes in accord with the general principle, stated in *Coco*, that statutes which authorise curtailment of rights be construed so as to preserve those rights.

Powers to stop, detain and search persons and property

As stated in *Laws of Australia* vol 11 para 119:

> At common law power does not exist for the personal search by police of suspects prior to their being arrested. There is no general power at common law … enabling police to stop and search suspects, either by frisk or more intrusive search, or to seize their property.

This statement applies to persons who are not suspects, such as those who might be able to assist the police in some way.

An unauthorised stopping, detention, or search of a person would constitute one or more forms of tortious or criminal behaviour. To stop a person and restrict their movement may amount to a false imprisonment. A search of a person involving any physical touching would involve a trespass to the person. A taking hold of their possessions, including a search of their baggage, would involve a trespass to property.

It is sensible to speak of a "common law principle of bodily inviolability", as did the majority of the High Court in *Marion's Case* (1992) 175 CLR 218 at 248. Their Honours approved of a view that this principle was allied with, or the basis for, a right to privacy. In that case, Brennan J spoke of a "right to integrity of the person". He pointed to its basis in the common law and its reflection in international law:

> In *Collins v. Wilcock* (1984) 1 WLR 1172, at p 1177; (1984) 3 All ER374, at p 378, Robert Goff L.J. said:
>
> > The fundamental principle, plain and incontestable, is that every person's body is inviolate, it has long been established that any touching of another person, however slight, may amount to a battery. ... The breadth of the principle reflects the fundamental nature of the interest so protected. As Blackstone wrote in his *Commentaries* 17th ed. (1830), vol 3, p 120: 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.' The effect is that everybody is protected not only against physical injury but against any form of physical molestation.
>
> Blackstone declared the right to personal security to be an absolute, or individual, right vested in each person by "the immutable laws of nature" Blackstone, ibid., vol 1, pp 124, 129; vol 3, p 119. Blackstone's reason for the rule which forbids any form of molestation, namely, that "every man's person (is) sacred", points to the value which underlies and informs the law: each person has a unique dignity which

> the law respects and which it will protect. Human dignity is a value common to our municipal law and to international instruments relating to human rights.

In explanation of this last point, his Honour said:

> The inherent dignity of all members of the human family is commonly proclaimed in the preambles to international instruments relating to human rights: see the United Nations Charter, the International Covenant on Civil and Political Rights (which declares "the right to ... security of person": Art.9), the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

Australian judges have for some time referred to a right to privacy, and have applied this notion in the application of the *Coco* principle – that principle being of much older provenance than 1994, the year *Coco* was decided. Of interest is *Zanetti v Hill* (1962) 108 CLR 433. Chief Justice Dixon said of the (now repealed) "idle and disorderly" legislation that

> [it] was never meant to provide a weapon against the outwardly respectable householder who refuses to divulge his business and declines to discuss his sources of income or subsistence. It has never been regarded as overthrowing the rights to privacy or reticence of the ordinarily apparently or outwardly respectable householder: ibid at 439.

A notion of a right to privacy may be said to underpin the common law position that a person is not required to give their name and address to a police officer. It also underpins other kinds of rights that are relevant to consider in the context of this Bill, these rights being:

- The right of a client to claim legal professional privilege – see *Baker v Campbell* (1983) 52 at 95, per Wilson J, and *Carter v Northmore Hale Day & Leake* (1995) 183 CLR 121 at 161 per McHugh J
- The privilege against self-incrimination has been said to be treated by "modern and international [law]" as "a human right which protects personal freedom, privacy and human dignity" – Environment Protection Authority v *Caltex Refining Co Pry Ltd* (1993) 178 CLR 477 at 500 per Mason CJ and Toohey J

A right to privacy is also regarded as a factor to be taken into account by a judicial officer in deciding whether to issue a search warrant – *Grollo v Commissioner of Australian Federal Police* (1995) 131 ALR 225 at 231

In relation to actions which restrict the freedom of a person to move about in public places, it is relevant to note that in *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206, Higgins J referred to "the common law rights of the King's subjects to pass through the highways". He said further that "this is a common law right; and that any

interference with a common law right cannot be justified except by statute - by express words or by necessary implication".

The modern perspective

In relation to powers to search premises, or to stop and search a person in a public place, or to require them to provide their name and address, contemporary assessment or the desirability of these powers should take a wider standpoint than the common law.

First, the general issue has been considered in depth by a number of law reform bodies. The following reports are of particular assistance:

- Australian Law Reform Commission, *Criminal Investigation (Report No 2, Interim)* (1975)

- *Review of Commonwealth Criminal Law* - Fourth Interim Report, November 1990, and Fifth Interim Report, June 1991

- Criminal Justice Commission, *Report On a Review of Police Powers in Queensland, Vol III*

Secondly, a rights analysis must take account of provisions in various international rights documents, including, in particular, the *Universal Declaration of Human Rights*, and the *International Covenant on Civil and Political Rights* (ICCPR). Their relevance lies in the fact that Australian courts are now resorting to these documents for statements of rights which are taken into account in the application of the *Coco* principle. The High Court has recognized that international law, while having no force as such in Australian municipal law, nevertheless provides an important influence on the development of Australian common law, particularly in relation to human rights: *Mabo v Queensland (No.2)* (1992) 175 CLR 1 at 42.

The provisions of these international rights documents often simply restate the effect of what English and Australian judges found to be common law rights. This is hardly surprising, given the influence of Anglo-American lawyers – who in turn have been influenced by the Western European liberalism - on the drafting of documents such as the *Universal Declaration of Human Rights*. In relation to some kinds of rights, the common law provides a more sophisticated framework than is found in the international rights documents.

It must also be borne in mind that these documents do not operate as principles which limit legislative action. They have no higher status than common law principles. It is a matter for political judgment to assess the influence of both the common law and the international rights statements should have on the content of legislation.

In relation to powers of search, detention and the like, the common law began from notions of right to property, and to bodily inviolability. There is a link between the latter and the notion of a right to privacy, and it is this right which is nowadays seen as the starting point for an assessment of the desirability of theses kinds of powers. For example, Feldman states that “[s]top and search powers have been described as “a major interference with people’s right to privacy, and a relatively minor interference with the right to freedom from physical interference: Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) at 176-177.

On this basis, Articles 12 and 17 of the ICCPR are relevant:

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

It is also relevant to consider a right to property. This may now be regarded as a less significant basis for judicial attitudes to search and seizure powers, but it is nevertheless a right stated in the *Universal Declaration of Human Rights*:

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

If subsection 12L(2) were read to embrace a power to detain a person, or to use force, (as to which, see below), then Article 9 of the ICCPR becomes relevant.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

ANALYSIS AND COMMENT ON THE BILL

The powers to enter premises and makes searches thereon

The relevant powers are those in proposed new sections 12J, 12K and 12N.

Section 12J would confer on an authorised officer a power to enter premises (defined in section 4) in three circumstances. In the first two, the power might be exercised without the necessity for the authorised officer to obtain a warrant from a magistrate; in the third, this is necessary. The three circumstances are:

A warrantless power to "enter any premises (other than residential premises) at any reasonable time – paragraph 12J(1)(a);

A warrantless power to "enter any premises at any time with the consent of the occupier" – paragraph 12J(1)(b); and

A power "to enter any premises pursuant to a search warrant under section 12N" – paragraph 12J(1)(c).

It is apparent from a comparison of the provisions that it would be necessary to exercise the power under warrant only where it was proposed to enter residential premises, or, in relation to any premises, where it was contemplated that entry would be accompanied by "such force as is necessary and desirable".

What personal rights and freedoms are implicated?

The exercise of a power to enter and search premises may still be regarded, as it has been for centuries, as an interference with rights and interests of property. In more recent legal analysis, it is regarded as an interference with the right to privacy of those who are in possession of the premises. In *George v Rockett* (1990) 170 CLR 104 at 110, the High Court said:

> Historically, the justification for these [common law] limitations on the power of entry and search was based on the rights of private property: Entick v Carrington (1765) 19 State Tr.1029 at p 1066. In modern times, the justification has shifted increasingly to the protection of privacy: see Feldman, *The Law Relating to Entry, Search and Seizure*, (1986), pp 1-2.

These justifications were taken seriously by the Gibbs Committee, which, in its *Review of Commonwealth Criminal Law* (Fourth Interim Report, November 1990) at para 38.32, said:

> Entry into and search of premises under a search warrant represent one of the most serious forms of intrusions on personal privacy and dignity.

This comment applies with more force where the search is not made pursuant to a warrant, but merely by virtue of the police or other official making their own determination that it was appropriate to exercise the statutory power.

Non-consensual search without warrant

Are warrantless entry and search powers justifiable?

The ALRC view is that they are, in three kinds circumstance. The first was "in response to circumstances of such seriousness and urgency as to require and justify immediate action without the authority of (such) an order or warrant"; the second was "at the invitation, or with the consent of the person occupying the premises or in charge of the vehicle in question"; and the third was "pursuant to specifically designated authority": ALRC Report at para 197.

This third category is very broad, but the ALRC made it clear that it was designed to encompass what it described as "'routine', 'regulatory' or 'administrative' searches"; ibid at para 209, and see para 199.

In this light, a warrantless search authorised by paragraph 12J(1)(a) would not be an undue trespass on personal rights and liberties.

What limits should be placed on a warrantless search power?

Proposed new section 12J(1) states only that a search of any kind must be "for the purposes of the Act". The ALRC approved of this standard; see ibid at 209.

Who should exercise a warrantless search power?

There is much to be said for limiting the power to make a warrantless search to a police officer. The police are subject to police-specific complaint mechanisms, and to discipline within the police force.

Nevertheless, the ALRC did not suggest that powers of 'routine' or 'regulatory' warrantless search be limited to police officers, and the Committee does not suggest that proposed new section 12J is objectionable on the ground that the powers it confers should be limited to police officers.

The Committee is, however, concerned about the width of definitions of "authorised officers" for purposes of exercising powers which impinge on personal rights and liberties; (see, for example, clause 16 of the Olympic Events Security Bill 1999). This is an issue it flags for attention in future legislation.

Other issues

There are other means for the better protection of personal rights and liberties that might be explored. It is suggested that detailed records be made and kept of the exercise of a power of warrantless search; see CJC Report, chapter 11.

It is also suggested that some authority issue codes of practice to govern the circumstances in which they might be exercised in the particular statutory context concerned. The Committee flags these suggestions and indicates that they might be explored in the future.

Consensual search without warrant

It has been noted that the ALRC view was that a warrantless search was justifiable "at the invitation, or with the consent of the person occupying the premises or in charge of the vehicle in question. In this light, a warrantless search authorised by paragraph 12J(1)(b) would not be an undue trespass on personal rights and liberties.

The ALRC recommended that there be adopted safeguards to ensure the reality of a consent; see ALRC Report at para 205.

Proposed new section 12K appears to comply with the ALRC recommendations.

The Committee notes again, the suggestion that detailed records be made and kept of the exercise of a power of warrantless search; see CJC Report, chapter 11.

Non-consensual search under warrant

The ALRC stated a number of principles to govern search under warrant; see ALRC Report at pars 200 and 360.

Proposed new section 12N appears to comply with these principles.

The scope of the powers of an authorised officer upon entry to premises

Proposed new section 12L states the power on an authorised officer upon entering premises. It is noted that there is power in paragraph 12L(1)(e) "to seize anything on the premises connected with an offence". Proposed new section 12Q governs the disposal of seized items.

The Committee notes the extensive scope of these powers, and the capacity an authorised officer will have to curtail or infringe upon personal rights and liberties. The powers conferred appear to be in a common form, and the Committee makes no adverse comment on them. It will, however, keep this issue under review.

One particular matter warrants comment. On its face, an exercise the power in paragraph 12L(1)(f) could require a person to incriminate him or herself, and to provide information which he or she could not be compelled to disclose according to the doctrine of legal professional privilege.

But it is very likely, if not certain, that a court would, in the application of the *Coco* principle, read the power in paragraph 12L(1)(f) as subject to the right of the relevant person the benefit of the privilege against self-incrimination and of legal professional privilege.

The Committee considers that the Bill should recognise these privileges. It should not be left to the reader to be aware of these privileges and the *Coco* principle.

The Committee suggests that the Assembly review whether clause 18 of the Bill – in respect of proposed new section 12L - be amended to provide for the application of the privilege against self-incrimination and of legal professional privilege.

The scope of the stop and search power in proposed new sub-section 12L(2)

Proposed new subsection 12L(2) provides:

> If an authorised officer has reasonable grounds for believing that a person in a public place can provide evidence about the commission of an offence against the following sections, the officer may exercise any power under subsection (1) in relation to the person or anything in the person's possession: … .

Subsection then lists a number of sections that prescribe offences, (such section 4, governing the supply of tobacco to under 18 years olds).

<u>What does subsection 12L(2) permit?</u>

There are a number of problems here. The major difficulty lies in the fact that the powers in sub-section 12L(1) may be exercised in relation to things on or actions that take place on premises. For example, under section 12L(1)(a), an authorised officer may "inspect anything on the premises" (being premises the

officer has entered under section 12J). How can such powers be exercised in relation to a person who is in a public place, and not on premises?

The way around this dilemma is to read sub-section 12L(2) as if the "powers under sub-section 12L(1)" refers only to the powers to take various kinds of actions specified in sub-section 12L(1).

It is not beyond doubt that a court would read subsection 12L(2) in this way. Applying the *Coco* principle, a court will read this provision restrictively. It might be read so as to apply only to a person who was simultaneously in a public place and on premises. In any event, there is a lack of clarity about this provision which should, if the provision is to be retained, be clarified. The need for clarification is strengthened by reason that this provision is invasive of a range of personal rights and freedoms.

For the sake of further comment, it will be assumed that sub-section 12L(2) should be understood as if the "powers under sub-section 12L(1)" refer only to the powers to take various kinds of actions specified in sub-section 12L(1). On this basis, it has a very wide application and amounts, in effect, to a very broadly stated 'stop and search' power.

(It is understood that these powers may be exercised only where the authorised officer has reasonable grounds for believing that a person in a public place can provide evidence about the commission of an offence against the following sections.)

For example, taking the power in subsection 12L(1)(a), under subsection 12L(2), an authorised officer may "inspect anything" "in relation to the person or anything in the person's possession". It is difficult to read this anything other a power to make a search of the person. An authorised officer might also make a search of "anything in the person's possession".

Other examples may be given:

- taking the power in subsection 12L(1)(e), under subsection 12L(2), an authorised officer may "seize anything" "in relation to the person" "connected with an offence"; and
- taking the power in subsection 12L(1)(f), under subsection 12L(2), an authorised officer may require a person in a public place "to make available anything", or to "provide information", or to "answer questions".

Some more particular problems of interpretation arise. Proposed new subsection 12L(2) does not in express terms authorise an authorised officer to detain a person for the purposes of an exercise of power in this provision. There is an argument that such a power is implied, but, again, a court applying the *Coco* principle might well find that it is not, so that an authorised officer could not detain a person in a public place who chose to simply walk away.

It is much less clear that an authorised officer could use any degree of force to exercise a power in subsection 12L(2). Again, the *Coco* principle would indicate that a court would not find such a draconic invasion of rights to be authorised by implication. Such a reading is strengthened by reason that proposed new subsection 12J(2) does expressly authorise the use of force in relation to an entry to premises. The omission to provide for such a power in subsection 12L(2) thus appears to be deliberate.

What personal rights and freedoms are implicated?

Stop and search powers have been described as "a major interference with people's right to privacy, and a relatively minor interference with the right to freedom from physical interference:" Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) at 176-177.

Relevant articles of the ICCPR have been set out above.

Is the stop and search power in subsection 12L(1) justifiable?

There are views that stop and search powers are never justifiable; see Feldman, ibid at 180ff, and CJC Report at 299. This view has not, however, been taken by any Australian law reform body. The CJC noted the view that if the police did not, in some circumstances, have such a power, they might resort to unnecessary use of the power to arrest as a device to make a search; CJC Report at 307.

But a 1975 ALRC Report accepted that there was an informal use of such powers by the police, and it was better that they be regulated. The ALRC concluded that

> the power to search persons and vehicles without warrant should [be available in] the following situations, namely where there are reasonable grounds to suspect that there may be found (i) something which is the fruit of a serious crime, the means by which it was committed, or material evidence to prove its commission. By a 'serious' crime we mean, here as elsewhere, one punishable by a sentence of more than six month's imprisonment; ALRC Report at 204.

The CJC also considered that the exercise of an emergency power to stop, detain and search a person should be exercised only in relation to a serious crime; see CJC Report at 322-323. The qualification it added was that "[a]ny other specific power concerning offences of less seriousness would need to show (such) extraordinary circumstances as to justify a broader application of the power"; ibid at 319.

Judged by these standards, sub-section 12L(2) is not warranted. It is not limited to action taken in relation to a serious crime, but to obtaining evidence about the commission of various minor offences (judged by penalty). There has not been here a showing of "extraordinary circumstances as to justify a broader application of the power".

There is a further point to note about the scope of sub-section 12L(2). The ALRC linked its approval of conferring limited powers of stop and search on the police on the ground that an exercise of police power would be subject to police-specific complaint mechanisms, and to discipline within the police force; see ALRC Report at para 204, and see paras 301-302.

A further objection to proposed new sub-section 12L(2) is that this power may be exercised by persons other than the police.

What limits should be placed on a stop and search power?

If a power such as sub-section 12L(2) were to be retained in some form, it would be necessary to address a wide range of particular issues. The CJC Report is a valuable guide to this general issue.

A central issue concerns the circumstances in which such a power may be invoked. Under sub-section 12L(2), an authorised officer may exercise the powers it confers if he or she "has reasonable grounds for believing that a person in a public place can provide evidence about the commission of an offence against [various] sections".

The Committee notes that the reasonable grounds standard in sub-section 12L(2) is narrower than is often stated. What is required here are reasonable grounds for a belief as to a certain state of affairs. This is narrower than a standard that requires only reasonable grounds for a suspicion as to a certain state of affairs; see *George v Rockett* (1990) 170 CLR 104. In this particular respect, the Committee commends the drafting of sub-section 12L(2).

Beyond this central issue, there is a range of more particular matters which should be addressed in a provision such as sub-section 12L(2):

- who should exercise such powers? We have noted the argument that only police officers should do so;

- what of the gender of the authorised officer? Where at least a search is involved, it is now widely accepted that the person should be searched only by an authorised officer of the same gender;
- where should the power be exercised? The occasion for exercise of these powers is that the person is in a public place, but in the interests of the privacy of the person, or for other reasons, there might need to be provision for the authorised officer to take the person to some other place;
- what kind of search is permitted? As the CJC noted, a search can range across a spectrum from "a 'frisk' search, where no clothing is removed, to a 'strip' search and examination of body cavities": CJC Report at 297, and see their recommendations at 324-325;
- what degree of force, if any, may be employed by an authorised officer?;
- for what period, if any, may the person be detained?;
- what information should be given to the person by the authorised officer? Subsection 12L(3) does permit the person to require proof of identity, but this falls far short of the range of information which some law reform bodies have suggested should be given;
- what is to occur if a person commits an offence under this provison? what, in particular, are the powers of an authorised officer?; and
- what records of an exercise of the power should be kept, and to whom should they be made available?

In relation to the last dot point, it should be noted that a search for a knife by a police officer under section 349DB of the *Crimes Act 1900* must be recorded.

It is these issues which law reform bodies have suggested should be addressed when a power of the kind in sub-section 12L(2) is conferred on the police.

The Committee flags two more general questions. The first is whether these issues might be the subject of guidance by way of a Code of Practice. The second, and larger question, is whether it is desirable to codify existing powers of this nature and adopt a template approach to the conferral of these powers.

As it stands, there are too many problems and deficiencies surrounding proposed new subsection 12L(2). The efficacy of the scheme for enforcement would not be greatly affected by its deletion, and the Assembly may wish to consider this option.

The Committee suggests that the Assembly review clause 18 of the Bill – in respect of proposed new subsection 12L(2).

The power to require a person to provide their name and address

Proposed new subsection 12M(1) provides:

> (1) An authorised officer may require a person to state the person's name and address if the officer believes on reasonable grounds that –
>
> (a) the person is committing, or has committed, an offence; or
> (b) the person can provide evidence of the commission of an offence.

Failure to comply with such a requirement is an offence: subsection 12M(4). By subsection 12M(2), the authorised officer must tell the person of the reasons for the requirement, and record those reasons. He or she must also produce an identity card if so asked by the person: subsection 12M(3).

What personal rights and freedoms are implicated?

The common law recognised "the right of the individual to refuse to answer questions put to him by persons in authority": *Rice v Connolly* [1966] 2 QB 414 at 419. This may be regarded as a dimension of

the "right to silence", or, more particularly, of the privilege against self-incrimination; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at paras 8.1 and 8.8.

Today, this right might also be seen as a dimension of a right to privacy, in particular where the person questioned is not suspected of committing a crime.

When is it justifiable to impose on a person an obligation to provide their name and address?

There are statutory provisions that impose on a person an obligation to provide their name and address if a state official believes that the person might be able to assist in inquiries in relation to the commission of an offence. There is a general provision to this effect in section 349V of the *Crimes Act 1900*.

The ALRC noted that while "[s]tatutory power to require a person to furnish his name and address exists at present in most jurisdictions only in relation to traffic offences[, it] is nonetheless, a power which policemen need, and exercise in practice": ALRC at para 79. The Commission thus recommended:

> The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person's name and address is sought, and there should be a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity: ALRC at para 322.

The Gibbs Committee approved of this general approach; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at para 8.8.

It is, however, critical to note that the ALRC linked its recommendations to the means it recommended for enforcing safeguards against an excess of the powers of the police. In this respect, it instanced "disciplinary action, the exclusionary rule, and the civil action for false imprisonment": ALRC at para 81, footnote 107, and see too at para 204, and see paras 301-302.

The first of these reasons has much less force where the person exercising the power is not a police officer. In relation to the police, there is a distinct regime for making of complaints and discipline.

Section 12M conforms largely to the recommendations of the ALRC except that it would permit persons other than police officers to exercise the power. The Committee considers it inappropriate to extend the power in this way. It is not clear why this provision is necessary, given the power of police conferred by section 349V of the *Crimes Act 1900*.

Section 12M does not conform to the recommendations of the ALRC (and see section 349V of the *Crimes Act 1900*, which does conform) in relation to the information that the authorised officer must give to the person.

The Committee suggests that the Assembly review clause 18 of the Bill – in respect of proposed new subsection 12M.

The Committee has other concerns with section 12M. There is now much greater concern with personal information that is stored in electronic data bases. This raises question of what is to happen to lists of names and addresses collected under section 12M. The collection, storage and use of this information will be subject to the *Privacy Act 1988* (C'wealth), but there is a question whether names and addresses collected under section 12M should be stored in any permanent form.

Subordinate Legislation - No Comments

The Committee has examined the following subordinate legislation and offers no comment:

Subordinate Law No. 3 of 1999 being the Canberra Sewerage and Water Supply Regulations (Amendment) made under the *Energy and Water Act 1988* makes several amendments in relation to plumbing and drainage work.

Subordinate Law No. 4 of 1999 being the Electricity Regulations (Amendment) made under the *Electricity Act 1971* inserts new regulations 7B and 7C in the Principal Regulations to provide exemptions to the requirements of section 33A and 33B.

Subordinate Law No. 5 of 1999 being the Dangerous Goods (Exemption) Regulations (Amendment) made under the *Dangerous Goods Act 1984* amends the regulations to suspend the operation of subclause 46 (2) of the Dangerous Goods Regulation (NSW) 1975 (which prohibits the sale of shopgoods fireworks) in their application in the Territory in the period leading up to the Queens Birthday long weekend.

Determination No. 64 of 1999 made under paragraph 9 (1) (d) of the *Public Health Act 1997* provides the Chief Health Officer with express powers to issue an alert in response to a public health hazard.

Determination No. 65 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 66 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 67 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 68 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 69 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 70 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 71 of 1999 made under section 14 of the *Health Regulation (Maternal Health Information) Act 1998* appoints a specified person to be a member of the Advisory Panel on Abortion Information.

Determination No. 72 of 1999 made under section 4 of the *Fire Brigade (Administration) Act 1974* appoints a specified person to the office of Fire Commissioner from and including the 18th day of April 1999 for a further term of 1 year on the terms and conditions specified in an Attachment to the Determination.

Determination No. 73 of 1999 made under subsection 8 (2) of the *Radiation Act 1983* appoints a specified person to be a member of the Radiation Council.

Determination No. 74 of 1999 made under subregulation 33 (4) of the Motor Traffic Regulations declared the period 23 April to 26 April 1999 (inclusive) as a holiday period.

Determination No. 75 of 1999 made under section 20 of the *Remuneration Tribunal Act 1995* determines fees and allowances for members of the Remuneration Tribunal.

Determination No. 76 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the names of public places in the Division of Dunlop.

Determination No. 77 of 1999 made under subsection 11 (2) of the *Legislative Assembly (Member's Staff) Act 1989* revokes "Schedule 2 of Determination No. 198 of 1997" and inserts in its stead a new Schedule 2 which determines the terms and conditions of staff employed under the Act.

Determination No. 79 of 1999 made under section 78 of the *Water Resources Act 1998* determines fees payable for the purposes of section 78 of the Act.

Determination No. 82 of 1999 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 7 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. 83 of 1999 made under section 139 of the *Taxation Administration Act 1999* determines the scale of expenses payable for the purposes of subsection 82 (5) to persons required to attend before an authorised officer to give oral evidence.

Determination No. 84 of 1999 made under section 4 of the *Public Place Names Act 1989* determines the names of public places in the Division of Nicholls.

Determination No. 85 of 1999 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons to be Justices of the Peace.

Determination No. 86 of 1999 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 until 21 July 2000.

Determination No. 87 of 1999 made under section 13U of the *Motor Traffic Act 1936* is an approval of a Code of Practice for Accredited Driving Instructors specified in the Schedule to the Determination, together with an attachment being the *Motor Traffic (Amendment) Act 1997*.

Determination No. 88 of 1999 made under section 24 of the *Building Act 1972* revokes Determination No. 176 of 1998 and adopts all of the provisions of the Building Code of Australia prepared and published by the Australian Building Codes Board in December 1998 and the Australian Capital Territory Appendix to the Building Code of Australia.

Determination No. 89 of 1999 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 2000.

Determination No. 90 of 1999 made under subsections 232 (1) and (2) of the *Duties Act 1999* determines exemption guidelines for corporate reconstructions.

Determination No. 91 of 1999 made under section 230 of the *Duties Act 1999* determines exemption guidelines for intergenerational rural transfers.

Determination No. 92 of 1999 made under paragraph 75 (1) (b) of the *Duties Act 1999* is a notice of declaration to ensure duty on the transfer of marketable securities is not levied in more than one jurisdiction for the one transaction.

Determination No. 93 of 1999 made under paragraph 7 (a) of the *Health Act 1993* appoints an ACT Mental Health Services Clinical Incident Review Committee.

Determination No. 94 of 1999 made under section 11A of the *Public Health Act 1928* revokes Determination No. 120 of 1998 and determines fees and charges payable for the purposes of the Act.

Determination No. 95 of 1999 made under section 19B of the *Meat Act 1931* revokes Determination No. 121 of 1998 and determines fees payable for the purposes of regulation 5(4) of the *Meat Regulations.*

Determination No. 96 of 1999 made under section 58 of the *Veterinary Surgeons Act 1965* revokes all previous determinations of fees and determines fees payable under the Act and determines fees payable for various purposes of the Act.

Subordinate Legislation - Comments

The Committee has examined the following subordinate legislation and offers the following comment:

Determination No. 78 of 1999 made under subsection 6 (2) of the *Legislative Assembly (Member's Staff) Act 1989* revokes "Schedule 2 of Determination No. 196 of 1997" and inserts in its stead a new Schedule 2 which determines the terms and conditions of staff employed under the Act.

The Committee draws attention to the incorrect description of the instrument in the *Gazette*. The description should read "Terms and conditions of employment of Staff of office-holders and the Speaker pursuant to subsection 6 (2)".

Determination No. 80 of 1999 made under subsection 97 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person to be Deputy Chairperson of the ACT Heritage Council for a period of two years.

Determination No. 81 of 1999 made under subsection 97 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person to be a member of the ACT Heritage Council for a period of three years.

Unfortunately, neither of the Explanatory Statements for these two Determinations indicates that there has been consultation about the appointments with the relevant standing committee of the Legislative Assembly as required by the *Statutory Appointments Act 1994*.

GOVERNMENT RESPONSES

The Committee has received responses from:

- the Chief Minister, in response to its Report No. 5 of 1999 on the Gaming Machine (Amendment) Bill 1999;
- the Minister of Health and Community Care, in response to its Report No 3 on Determination Nos 15, and 40 of 1999 made under the *Health and Community Care Services Act 1996* and Determination No. 37 of 1999 made under the *Psychologists Act 1994*;

- the Chief Minister, in response to its Report No. 3 on Determination No. 34 of 1999 made under the *Subsidies (Liquor and Diesel) Act 1998*.
- the Chief Minister, in response to its Report No. 5 on Determination No. 44 of 1999 made under the *Taxation Administration Act 1999*.

The Committee thanks the Chief Minister and the Minister for their responses.

Paul Osborne, MLA
Chair

June 1999