

**Legislative Assembly for the Australian Capital Territory**



**The electronic version of this report does not contain attachments, these can be obtained from the committee office.**

**Standing Committee on Justice and  
Community Safety**

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

**SCRUTINY REPORT NO. 3 OF 1998**

**22 June 1998**

## **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 three 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 for Scrutiny of Bills and**  
**Subordinate Legislation: Mr Tom Duncan**

## **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 comment on them.

#### **Bail (Amendment) Bill 1998**

This Bill would amend the *Bail Act 1992* in ways which would achieve consistency with the *Domestic Violence Act 1986* were it to be amended as intended by the Domestic Violence (Amendment) Bill 1998.

#### **Births, Deaths and Marriages Registration (Amendment) Bill 1998**

This Bill would amend provisions of the *Births, Deaths and Marriages Registration Act 1997* to the effect that a fee will be payable in respect of an application to register a change in an adult's name, for a change in a child's name, for a change of name to be noted on a birth record, and for a change of sex to be noted on a birth record.

#### **Building (Amendment) Bill 1998**

This Bill would amend the *Building Act 1972* in ways which seek to ensure that a waste management plan was incorporated into the approval process for building work involving the demolition of a building.

#### **Magistrates Court (Amendment) Bill (No. 2) 1998**

This Bill would amend the *Magistrates Court Act 1930* in ways which would achieve consistency with the *Domestic Violence Act 1986* were it to be amended as intended by the Domestic Violence (Amendment) Bill 1998.

#### **Motor Traffic (Amendment) Bill (No. 2) 1998**

This Bill would amend section 172 of the *Motor Traffic Act 1936* to delete from subsection (1) all the words after "reasonable excuse".

#### **Protection Orders (Reciprocal Arrangements) (Amendment) Bill 1998**

This Bill would amend the *Protection Orders (Reciprocal Arrangements) Act 1992* to provide for the registration and enforcement of protection orders made in New Zealand. It will in this respect extend the scope of protection afforded to victims of domestic violence in the ACT.

#### **Rates and Land Tax (Amendment) Bill 1998**

This Bill would amend the *Rates and Land Tax Act 1926* to adjust the levels of the fixed charge and the rating factors for the 1998-1999 rating years.

#### **Tobacco Licensing (Amendment) Bill 1998**

This Bill would amend the *Business Franchise (Tobacco and Petroleum Products) Act 1984*. The amendments are necessary to be made if the Subsidies (Liquor and Diesel) Bill 1998 is enacted into law. The Bill would rename the *Business Franchise (Tobacco and Petroleum Products) Act 1984* as the *Tobacco Licensing Act 1984*, and make various amendments to that Act.

### **Trans-Tasman Mutual Recognition (Amendment) Bill 1998**

This Bill would amend the *Trans-Tasman Mutual Recognition Act 1997* so as to enable the enactment by an Act of the Commonwealth to provide the recognition throughout Australia of regulatory standards adopted in New Zealand regarding goods and occupations.

#### Bills - Comment

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

### **Community Referendum Bill 1998**

This Bill would make provision for electors in the ACT to initiate changes to the law through a referendum process.

The Committee notes that Government has taken up suggestions for improvement of this Bill which have been made by the predecessor to this Committee in relation to earlier versions of the Bill.

### **Crimes (Amendment) Bill (No. 4) 1998**

This Bill would amend the *Crimes Act 1900* by inserting provisions designed to prevent a person from relying upon evidence of intoxication, where that intoxication is self-induced, to establish that the person did not have the intent to commit an act or omission which constitutes an element of the criminal offence or that the person's act was not voluntary. These provisions are based on provisions of a Model Penal Code which has been developed by the Standing Committee of Attorneys-General.

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

The Committee draws attention to two aspects of the provisions of this Bill. The first is that they do qualify a fundamental principle of the common law. The basic notion was stated by Murphy J in *The Queen v O'Connor* (1980) 146 CLR 64 at 112:

"The expression "mens rea" refers to the central idea of the criminal common law that a mental element is present in all crime except in offences of criminal liability. Apart from crimes of specific intent, the theory requires the existence of a generalised element described as guilty mind, criminal intent, or something similar".

How this theory applied in cases where the defendant was intoxicated at the time he or she was alleged to have committed a crime was explained in the same case by Barwick CJ:

"... an accused in the state of intoxication which has rendered his acts involuntary or precluded the formation of a relevant intent and which has been brought about by the act of another could not be found guilty of any common law offence" (ibid at 73).

The Chief Justice went on to hold that the fact that a defendant's state of intoxication resulted from his or her own acts did not warrant exclusion of evidence as to their physical or mental condition.

The views of Barwick CJ and Murphy J were part of the 4:3 majority of the High Court in this case.

The Committee merely draws attention to the fact that this Bill will qualify a fundamental principle of the law.

In the second place, it draws attention to the limited nature of this qualification. The definition of "self-induced" intoxication will still enable a defendant to rely upon his or her being in a state of intoxication to argue that he or she did not have the requisite mens rea. One such case is where the intoxication was

“involuntary”, which would include the situation where some other person brought about that state; (for example, where the defendant’s drinks had been ‘spiked’ by someone else). A more problematic case is where the intoxication was the result of things such as “fraud” or “reasonable mistake”. Would this cover the case of “the person at who at dinner does not observe the frequency with which the waiter tops up his glass”; (a case posed by Barwick CJ, *ibid* at 74)? Also troublesome will be cases where the defendant claims not to have appreciated the potency of a drug or of some alcoholic drink.

Clearly then, there will be still much scope for a defendant to rely upon his or her being in a state of intoxication to argue that he or she did not have the requisite mens rea.

It should also be noted too that the provisions of the Bill do not attempt to preclude any other ways (apart, that is, from self-induced intoxication) in which a defendant may rely upon some self-induced state which may be said to have prevented her or him from having the requisite mens rea. Examples may be supposed, such as where a person has banged his or her head against a wall.

#### Comments on the Explanatory Memorandum

The Committee commends the Explanatory Memorandum for having taken up the suggestion in the Committee’s Report No. 17 of 1997 that there be given examples to support the comment in the Memorandum that these provisions will not prevent a defendant from relying upon his or her being in a state of intoxication to argue that he or she “lacked the specific intent to cause the specific result”, or to “deny that he or she had intent or knowledge with respect to a circumstance constituting an element of an offence”.

#### **Domestic Violence (Amendment) Bill 1998**

This Bill would amend the *Domestic Violence Act 1986*. In many respects, these amendments reflect or are based on the recommendations contained in Report No 11, “Domestic Violence - Civil Issues” (1995) of the Community Law Reform Committee of the Australian Capital Territory. More particularly, the amendments reflect the nature of the “ACT Government Response” to that report. (It should be noted however that some recommendations contained in Report No. 11 were enacted into law by the *Domestic Violence (Amendment) Act 1997* (No. 65 of 1997)).

From the perspective of the terms of reference of the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), the significant clauses are as follows:

Clause 4 of the Bill would amend section 3 of the Act in various ways. This provision is the interpretation section. Of note is the definition of ‘relevant person’ in relation to another person. A ‘relevant person’ is a spouse, child, or relative of the other person. The term spouse includes a former spouse, a de facto spouse, and a former de facto spouse. The term relative embraces a wide range of persons in the immediate and extended family of the person, and any person who would have been a family member if the first-mentioned person had been married to his or her de facto spouse. The term relative also includes a former relative (as that term is defined) of a person. A ‘relevant person’ also means a person who normally resides, or was normally resident in, the household of the other person (other than as a tenant or boarder).

Clause 5 of the Bill would repeal existing sections 4, 5 and 6 of the Act and insert new sections 4, 4A, 5 and 6 in their place. (The references now are to what would be the new provisions.)

Subsection 4(1) is the core provision in the Act. It enables the Magistrates Court to make a ‘protection order’ against a person where it “is satisfied, on the balance of probabilities, that [that] person has engaged in conduct which constitutes domestic violence”. This order will restrain that person from engaging in conduct which constitutes domestic violence, and may also include 1 or more of the conditions specified in section 9.

Section 9 enables the Magistrates Court to impose on the person a wide range of prohibitions which would restrict the freedom of movement of the person. In particular, the person may be prohibited from being on premises on which the aggrieved person resides (paragraph 9(1)(a)), which might also of course be the premises on which the person against whom the order is made resides. The Court might also give directions to the person to give personal property to the aggrieved person. (By section 3, an “aggrieved person” is a person “in respect of whom the alleged conduct has been, or is likely to be, engaged in”.) (Clause 10 of the Bill would amend section 9 - see below).

Subsection 4A(1) defines the nature of domestic violence. It covers certain kinds of conduct directed at a ‘relevant person’. Essentially, this is conduct which causes physical injury, damage to property, constitutes various kinds of offences, or is a threat to take any or all of these kinds of actions. It is also conduct which “is harassing or offensive towards a relevant person”.

Section 5 governs the making of an application for a protection order (and for the variation or revocation of a protection order). In essence, this provision applies the relevant provisions of Part II of the *Magistrates Court (Civil Jurisdiction) Act 1982* except in so far as the *Domestic Violence Act 1986* provides otherwise. Amendments which would be made by this Bill would enhance the role of the Community Advocate where the alleged behaviour involved a child.

Section 6 governs the date for the return before the Court of an application for a protection order or for its variation or revocation. Amendments which would be made by this Bill would allow for greater flexibility where the application is not for an *ex parte* order.

Clause 9 would insert a new section 8B, to the effect that in proceedings under this Act, the Court may permit evidence to be given “orally or in writing otherwise than on oath” and may “inform itself on any manner as it thinks fit”. (This does not however limit the application of Part XV of the *Magistrates Court (Civil Jurisdiction) Act 1982* to the proceedings.)

Clause 10 would extend the range of prohibitions and directions which a Court may impose on or give under section 9 to the respondent (that is, person to whom the protection order is directed). The Court would be empowered to “impose such restraints or conditions on the respondent as the Court is satisfied are necessary or desirable in the circumstances”. The particular kinds of orders now specified in subsection 9(1) become examples of the orders which might be made. In addition, the Court would also be empowered to make prohibitions of the kind referred to in the list of examples in relation to a child of the aggrieved person.

Clause 11 makes minor amendments to section 10 of the Act. This section is significant in the scheme of the Act inasmuch as it states the matters to which the Court shall have regard in making a decision on an application for a protection order. Amendments to the Act which were made by the *Domestic Violence (Amendment) Act 1997* (No. 65 of 1997) are not affected.

Clause 13 of the Bill would repeal section 11 and insert a new section 11. The amendment would expand on the power of the Court so that it may now, when it hears an application under the Act, recommend that the respondent, the aggrieved person “or any other person” participate in a program of counselling and the like. The current section 11 applies only where the Court makes a protection order. It should be noted that the “ACT Government Response” to Report No. 11 indicated that the relevant recommendation in that Report was acceptable provided that the failure of a party to a proceeding to comply with a recommendation did not prejudice that party in “further proceedings”.

Clause 16 would amend section 14, which deals with interim protection orders. The Magistrates Court may make such an order “whether or not a copy of the application [for a protection order] has been served on the respondent” (subsection 14(1)). It is thus said that an interim protection order may be sought *ex parte*. Other provisions of the Act bear on the duration of an interim protection order, but their application may be extended and in practice an interim protection order may be in effect for several months before the Court hears the substantive application for the protection order. An interim protection order may include the full

range of prohibitions and other kinds of orders which may be made under section 9 in respect of a protection order, although subsection 14(3) does indicate a preference for a more limited range of orders (which extends however to prohibiting the respondent from being on the premises on which the aggrieved person resides).

Clause 16 would amend section 14 in various ways and in particular insert a new subsection 14(2) which would permit the Court to make an interim protection order on the basis not only, as is now the case, of oral evidence of the applicant for the order (which includes a police officer: paragraph 5(c)), but also on affidavit evidence of the applicant.

Clause 20 of the Bill would insert a number of new provisions (sections 19A to 19E) after existing section 19. They would deal mainly with matters of procedure or the relocation of existing provisions. Section 19E is significant in that it would enable the Court to require an applicant to pay expenses to some other person where the application of the applicant was “frivolous, vexatious or ... not made in good faith” and the other person “reasonably incurred expenses in relation to the proceeding”. (The provisions of the *Magistrates Court (Civil Jurisdiction) Act 1982* in relation to costs would remain applicable.)

Clauses 22 and 23 deal with the publication of reports of proceedings. Clause 22 would insert a new subsection 30(2) in place of the existing provision, and clause 23 would insert a new section 30A in place of the existing provision.

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

A number of personal rights and liberties are implicated in an assessment of a domestic violence law. Its primary purpose is to provide an expeditious means for the protection of the physical safety and indeed the life of the aggrieved person; (cf Articles 6 and 9 of the International Covenant on Civil and Political Rights). On the other hand, the respondent to an application for a protection order might point to his or her right to liberty of movement (cf Article 12), and to be free from arbitrary interference with his or her family (cf Article 17, and see Article 23). This is far from a complete rights framework for an analysis of a domestic violence law, but it shows, as is commonly the case, that here rights are in conflict one with another.



The Committee leaves it to the Assembly to decide whether any aspect of the amendments proposed by the Domestic Violence (Amendment) Bill 1998 unduly trespass on rights and liberties. It sees its function as one of drawing attention to points where the issue seems to arise.

- The definition of “domestic violence” has been expanded to include conduct which is “harassing or offensive towards a relevant person” (clause 5, new section 4A). Read in the light of the history of the Act prior to the *Domestic Violence (Amendment) Act 1997* (No. 65 of 1997)), it is clear that the intention is to remove any need to consider whether the harassing or offensive conduct produces in the aggrieved person any fear for their safety. The policy issue was canvassed by the Community Law Reform Committee of the Australian Capital Territory in Report No. 11 (1995), page 27ff.

The Committee draws attention to the fact that the definition stated in new section 4A would expand considerably the potential scope for applications under the Act and correspondingly of the jurisdiction of the Magistrates Court to make an interim or final protection order. To the extent that one considers that such orders restrict rights and liberties, the effect of the definition is to expand considerably the potential for such restriction. The use of the word “offensive” might be seen to be problematic. A court might start from the appropriate ordinary definition of the word, which in the Macquarie Dictionary is stated in these terms: “causing offence or displeasure; irritating; highly annoying”. The word might be given a somewhat more limited meaning having regard to the fact that it occurs in conjunction with the word “harassing”, but on any basis, the use of the word “offensive” will expand considerably the potential scope for applications under the Act.

- Proposed new section 8B (see clause 9) would permit the court to “inform itself on any manner as it thinks fit”. This is a wide discretion and might be seen as derogating from the ability of a respondent to respond to and to test the evidence which might be adduced to support the allegations (which might of course be of a very serious kind) which will be the basis for the application for the protection order. Similarly, an applicant might be prejudiced by reason of information obtained by the court. It might perhaps be made clear that the court would be bound to observe natural justice and it might be provided specifically that a party must have an adequate opportunity to respond to and test any evidence adduced against that party.
- The amendment proposed by clause 10 to section 9 would extend the range of prohibitions and directions which a Court may impose on or give under section 9 to the respondent. Given the nature of the orders which may now be made under section 9, the additional power might be used to impose significant restrictions on at least the liberty of movement of a respondent. The Committee notes that the Explanatory Memorandum offers no justification for the proposed extension, and no illustrations of how it might be employed.
- The proposed new section 19E may operate only against an applicant. It might be argued that similar provision should be made in respect of similar conduct by a respondent.

### **Gas Pipelines Access Bill 1998**

This is a Bill to enact what would be a new *Gas Pipelines Access Act 1998*. Its purpose is to take legislative action as required by the Natural Gas Pipelines Access Agreement. Central to the scheme is clause 6, which provides that the Gas Pipelines Access Law applies as a law of the Territory.

#### *Paragraph 2 (c) (iv) - inappropriate delegation of legislative power*

Subclause 3(1) defines just what is the ‘the Gas Pipelines Access Law’. It is Schedule 1 of the *Gas Pipelines Access (South Australia) Act 1997*, as enacted and as amended from time to time by the Parliament of South Australia, and the ‘National Third Party Access Code for Natural Gas Pipelines Systems’ [the Code] as that has been agreed and amended from time to time.

The Explanatory Memorandum notes that the procedures for changing the Code require the agreement of the relevant Ministers of the participating jurisdictions. The effect of the definition is however that the law of the Territory may be altered by bodies which do not form part of the ACT legislative process, and are only indirectly linked even to the ACT Executive.

This is common feature of laws such as the proposed *Gas Pipelines Access Act 1998* which are designed to implement an agreement reached at inter-governmental level. But there is nevertheless an issue as to whether the definition contains an inappropriate delegation of legislative power. On the one hand, there is the extent of the delegation and the fact that the law-making bodies are remote from the ACT system of government. On the other is the consideration that the delegation is a necessary element of a national scheme of which the Territory is a part.

What has just been said applies also to clause 7, which adopts as law of the Territory regulations which are in force from time to time under the *Gas Pipelines Access (South Australia) Act 1997*.

### **Gas Supply Bill 1998**

This is a Bill to enact what would be a new *Gas Supply Act 1998*. Its purposes are to take legislative action as required by the Natural Gas Pipelines Access Agreement, and to refurbish the scheme for the regulation of the gas industry in the Territory.

#### *Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations*

The new Act would create a number of administrative decision-making powers. It appears however that the provisions for review of these decisions is adequate.

#### *Paragraph 2 (c) (iv) - inappropriate delegation of legislative power*

The Committee notes that the definitions of “Australian Standard” and “Code of Practice” in subclause 3(1) of the Bill incorporates as law of the Territory the provisions of (extrinsic) documents which are prepared by bodies which are not part of the Territory government. In the context of this scheme, this appears justified.

The Committee also notes that by reason of subclause 3(3), the only relevant version of either of these documents is that which is in force at the date any relevant provision of the Act comes into operation. (A relevant provision of the Act is one which operates by reference to these documents; see for example proposed section 23).

The problem that the relevant documents might become outdated is accommodated by the power vested by proposed subsection 61(4) in the Executive to make regulations which enable a reference in the Act to one of these extrinsic documents to be understood as a reference to the document as varied. Such regulations will be disallowable by the Assembly.

## **Interactive Gambling Bill 1998**

This is a Bill for an *Interactive Gambling Act 1998*. It would create a complex regime for both the control and the supervision of interactive gambling. (The major concern is with gambling via the internet.) The scheme is designed to link with similar laws in other jurisdictions in Australia. The Act would also include schemes to protect consumers (in some respects against themselves), and to raise taxes.

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

Division 3 of Part II of the Bill provides for the registration of persons as players in authorised games of gambling. Under clause 102, an application may be made to the Commissioner for an order to be made prohibiting a person (the “affected person”) from participating in authorised games. This application may be made by the “affected person” or by a person who satisfies the Commissioner “of a close personal interest in the welfare” of the “affected person”.

This provision might be argued to permit persons other than the “affected person” an undue degree of influence, but the Committee notes that the Commissioner would be obliged to invite the “affected person” to make representations.

### *Paragraph 2 (c) (ii) - insufficiently defined administrative powers*

Many of the administrative decision-making powers which would be created by the Act are defined in very general ways, such as by reference to the subjective state of mind of the decision-maker, or on the basis of “reasonable grounds”, or by similarly vague criteria. This approach might be justified on the basis that this is a new scheme and the particular bases upon which decisions might need to be made cannot at this stage be foreseen. The Committee suggests that in the light of experience consideration be given to refining the scope of the discretions which are inherent in the powers which confer these discretions.

The Committee does however query the need for subclause 28(2), given the range of factors which may bear upon an assessment of whether an applicant for an interactive gambling licence is a suitable person. This range of factors may be expanded upon by regulations made to give effect to paragraph 29(1)(g).

### *Paragraph 2 (c) (iii) - non-reviewable decisions affecting rights, liberties and obligations*

The Act would provide explicitly for the review (primarily by the Administrative Appeals Tribunal) of a large number of administrative decisions made under its provisions. There are however many decisions in respect of which there is no provision for review, and these are noted below. It is also noted that a person affected by a decision could seek judicial review and, where the decision is not made by a Minister, could complain to the Ombudsman. (Even where the decision is made by a Minister, a complaint could relate to advice given to the Minister.)

The decisions in respect of which there is no provision for review are those which would be made pursuant to these clauses of the Bill -

4(1)(a), 4(1)(b), 5(2), 5(3), 10(3), 11(1), 12(1), 13(1), 16(2), 22(1), 23(1), 27(2), 27(4), 38(2), 44(3)(b), 51(1), 51(4), 63(2) [and compare here to 40(2)], 64(1) [and compare here to 45], 67(1), 69(2), 70(1)(b)(iii), 76, 77(1), 78(1), 86, 90(1), 94(2)(b), 95(1), 95(2)(b), 95(4), 96(1), 102(2)(b), 104(1), 108(4), 111(1), 113(2), 114(2), 115(1), 116(1), 117, 118(2), 121(2), 123(3)(a) and (b), 124(3), 125(2), 125(3), 128(1), and 137.

The Committee also notes that under clause 46, the Minister may sign a certificate which has the effect of removing the ability of a person to seek review by the Administrative Appeals Tribunal of those decisions of the Minister which are so reviewable; (see the list in clause 140). The decision to sign a certificate is not reviewable under the Act. (The decision would be amenable to judicial review.)

In connection with the review provisions, the Committee notes that paragraph 142(1)(i) should probably refer to subclause 102(4).

*Paragraph 2 (c) (iv) - inappropriate delegation of legislative power*

Division 5 of Part II provides for exemption schemes. The central provision is clause 22, under which the Minister may approve an exemption scheme. Under such a scheme, a licensed provider (that is, a person licensed to conduct interactive games) could conduct games exempt from the application of provisions in the Act which would otherwise apply. The Minister may approve only in the circumstances defined in subclause 22(2), which include the satisfaction of the Minister that adequate safeguards will exist in relation to the particular interactive games affected.

The Committee notes however that a provision of this kind raises the issue of the extent to which a person who is part of the executive branch of government should be permitted to take action which is in effect a dispensation with the law. (This issue was discussed in Report No. 15 of 1997 of the Standing Committee on Bills and Subordinate Legislation, at pages 3-4).

In relation to Division 5 of Part II, it is noted that the power to dispense is limited by reference to defined criteria. By clause 25, the Minister is required to notify any exemptions in the *Gazette*, and a member of the public may inspect and obtain a copy of an exemption scheme.

The Legislative Assembly may wish to consider whether there should be inserted a provision which would require any application for an exemption to be notified to the public, and for the making of objections by a member of the public. Alternatively, or in addition, any exemption might be an instrument disallowable by the Assembly.

Clause 33 of the Bill raises a similar issue. By subclause 33(1), the Minister may change a condition to which an interactive gambling licence is subject. But by clause 32 - when read with subclause 33(2) - the Minister may in effect restrict her or his power to do so by reaching an agreement with the provider that a condition will be changed only by agreement between the provider and the Minister. In this way, the Minister can alter the scope of the discretion stated in subclause 33(1) to change a condition.

Such a provision may be viewed as a kind of “Henry the 8th” clause - that is, as a power to alter the effect of subclause 33(1).

The Committee notes that there is no provision to require notification or publication of an agreement, or for any review of an agreement by some person other than the beneficiary of the agreement. An agreement is not an instrument disallowable by the Assembly.

**Liquor (Amendment) Bill 1998**

This Bill would amend the *Liquor Act 1975* to repeal existing subsection 104B(3).

This provision is commonly found in legislation. Its purpose is to ensure that any conduct of a body corporate or natural person is caught by any other provision of the law, and in particular one which creates an offence in relation to certain conduct, where that conduct is engaged in by a director, servant or agent of the body corporate or natural person and that conduct is within the actual or apparent authority of the director, etc. In other words, and contrary to the principle that a person is criminally liable for only their own conduct, the conduct of the director, etc is imputed to the body corporate or natural person.

There are however circumstances where such conduct will not be so imputed. This qualification is expressed in the words in subsection 104B(3) “unless the body or person establishes that reasonable precautions were taken and due diligence was exercised to avoid the conduct”. (This may be referred to as the defence permitted by subsection 104B(3).)

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

Given that the purpose of the Bill is to remove the defence permitted by subsection 104B(3), the question is whether this is an undue trespass on personal rights and liberties.

It should also be noted however that the Bill would delete the whole of subsection 104B(3). This might well have the effect of making it more difficult to prosecute a body corporate or natural person for an offence under the Act, for there would then be no provision whereby the conduct of a director, etc could be imputed to the body corporate or natural person.

**Subsidies (Liquor and Diesel) Bill 1998**

This is a Bill for a *Subsidies (Liquor and Diesel) Act 1998*. It would create a regime for the payment of subsidies to ensure that consumers of low alcohol products, and pensioners and primary producers using diesel fuel, pay lower taxes for these products.

The Bill contains many provisions which confer administrative decision-making power, in particular by the Commissioner for Australian Capital Territory Revenue, but it notes that there is in Part VII a comprehensive scheme for the review of these decisions, primarily by the Administrative Appeals Tribunal of the ACT. There is also provision for 'internal review' by the Commissioner of decisions made by delegates of the Commissioner, and in practice this scheme for inexpensive review is likely to be of great value.

The Committee notes that clause 69 abrogates the privilege against self-incrimination in relation to notices issued under clause 66. In the context of the scheme this appears to be justified. It is also noted that clause 69 contains a prohibition on the derivative use in prosecutions of information obtained, and commends this restriction.

Several provisions authorise the making of subordinate legislation, (subclauses 3 (1) - definition of "low-alcohol liquor"; 5 (1); 26 (1); and clause 91). In each case, the subordinate legislation will be disallowable by the Assembly.

**SUBORDINATE LEGISLATION**

Subordinate Legislation - No Comment

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

**Subordinate Law No. 38 of 1997 being the Supreme Court Rules (Amendment) made under section 36 of the *Supreme Court Act 1933* inserts in the Supreme Court Rules new Order 34B (governing non-party production).**

**Subordinate Law No. 39 of 1997 being the Workers' Compensation Regulations (Amendment) made under the *Workers' Compensation Act 1951* amends the Workers' Compensation Regulations for the purposes of section 11 and Part VIB of the Act, and amends Schedules 2 and 3 of the Regulations.**

**Subordinate Law No. 40 of 1997 being the Workers' Compensation Regulations (Amendment) made under the *Magistrates Court (Civil Jurisdiction) Act 1992* amends the Workers' Compensation Regulations to insert a new regulation 31A to govern apportionment between insurers.**

**Subordinate Law No. 41 of 1997 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* amends regulation 3A of the Liquor Regulations to prescribe certain times for the sale or supply of liquor.**

Subordinate Law No. 42 of 1997 being the Motor Traffic Regulations (Amendment) made under the *Motor Traffic Act 1936* amends the Schedule to the Motor Traffic Regulations in relation to heavy vehicles.

Subordinate Law No. 1 of 1998 being the Electricity Regulations (Amendment) made under the *Electricity Act 1971* amends the Electricity Regulations, primarily to prescribe circumstances for the purposes of section 33 of the Act.

Subordinate Law No. 2 of 1998 being the Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations (Amendment) made under the *Magistrates Court (Civil Jurisdiction) Act 1982* amends the Magistrates Court (Civil Jurisdiction) (Solicitors' Costs) Regulations in relation to costs chargeable by the legal profession.

Subordinate Law No. 4 of 1998 being the Trans-Tasman Mutual Recognition (Temporary Exemptions) Regulations made under the *Trans-Tasman Mutual Recognition Act 1977* declares certain laws for the purposes of section 8 of the Act.

Subordinate Law No. 5 of 1998 being the Firearms Regulations (Amendment) made under the *Firearms Act 1996* inserts new regulation 10A in the Firearms Regulations for the purposes of subparagraph 43(a)(ii) of the Act.

Subordinate Law No. 6 of 1998 being the Public Health (Infectious and Notifiable Diseases) Regulations (Amendment) made under the *Public Health Act 1928* amends Schedule 3 of the Public Health (Infectious and Notifiable Diseases) Regulations by the addition of the word 'Cryptosporidiosis' after 'Cholera'.

Subordinate Law No. 7 of 1998 being the Liquor Regulations (Amendment) is made under the *Liquor Act 1975* amends regulation 11 of the Liquor Regulations to change a date.

Subordinate Law No. 8 of 1998 being the Bushfire Regulations (Amendment) made under the *Bushfire Act 1936* amends regulation 6 of the Bushfire Regulations in relation to prescribed fires.

Subordinate Law No. 9 of 1998 being the Motor Traffic Regulations (Amendment) made under the *Motor Traffic Act 1936* amends the Motor Traffic Regulations in various ways.

Subordinate Law No. 10 of 1998 being the Magistrates Court (Civil Jurisdiction) Regulations (Amendment) made under the *Magistrates Court (Civil Jurisdiction) Act 1982* amends the Schedule to the Magistrates Court (Civil Jurisdiction) Regulations.

Subordinate Law No. 11 of 1998 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* amends regulation 3A of the Liquor Regulations to prescribe certain times for the sale or supply of liquor.

Determination No. 251 of 1997 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 245 of 1997 and determines fees payable for the purposes of the Act in relation to the registration of motor vehicles.

Determination No. 252 of 1997 made under section 10 of the *Cultural Facilities Corporation Act 1997* appoints specified persons as members of the Cultural Facilities Corporation.

Determination No. 253 of 1997 made under section 13U of the *Motor Traffic Act 1936* approves a Code of Practice for Accredited Driving Instructors.

Determination No. 254 of 1997 made under paragraph 9(1)(a) of the *Bookmakers Act 1985* appoints a specified person as a member of the Bookmakers Licensing Committee.

Determination No. 255 of 1997 made under subsection 171(2) of the *Land (Planning and Environment) Act 1991* determines fees payable for the purposes of paragraph 171(1)(d) of the Act in respect of the further grant of a residential lease.

Determination No. 256 of 1997 made under subsection 101(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as Deputy Chair of the ACT Heritage Council.

Determination No. 257 of 1997 made under subsection 97(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 258 of 1997 made under subsection 97(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 259 of 1997 made under subsection 97(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 260 of 1997 made under subsection 97(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 261 of 1997 made under subsection 97(1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member of the ACT Heritage Council.

Determination No. 262 of 1997 made under section 23 of the *Nature Conservation Act 1980* comprises of a number of Action Plans prepared by the Conservator of Flora and Fauna. These Plans relate to three species which are regarded as endangered (the Eastern Lined Earless Dragon, a leek orchid, and a subalpine herb), two species which are regarded as vulnerable (the Striped Legless Lizard and the Corroboree Frog), and one endangered ecological community (Natural Temperate Grassland).

Determination No. 263 of 1997 made under section 15 of the *Nature Conservation Act 1980* establishes a strategic framework for conservation of the native plants and animals of the Territory in their natural habitats.

Determination No. 264 of 1997 made under subsection 33(4) of the *Motor Traffic Act 1936* declares a holiday period.

Determination No. 265 of 1997 made under section 70 of the *Energy and Water Act 1988* is a notice of adoption by the Minister of an emergency plan prepared by ACTEW Corporation Ltd.

Determination No. 266 of 1997 made under subsection 6E(3) of the *Motor Traffic Act 1936* is a Vehicle Inspection Manual prepared under subsection 6E(1) of the Act.

Determination No. 267 of 1997 is, in so far as it is made under subsection 15(1) of the *Independent Pricing and Regulatory Commission Act 1997*, a reference to the Commission of the matter of the determination of regulated charges for electricity, water and gas supplied by ACTEW Corporation Ltd, and, in so far as it is made under subsection 16(1) of the Act, is a specification of certain requirements in relation to the investigation by the Commission in relation to its determination of these regulated charges.

Determination No. 269 of 1997 made under subsection 87(1) of the *Occupational Health and Safety Act 1989* is an approval of the Safe Working on Roofs Code of Practice - Part 1.

Determination No. 270 of 1997 made under section 140 of the *Consumer Credit (Administration) Act 1996* revokes Determination No. 250 of 1996 and determines fees payable for the purposes of the Act.

**Determination No. 271 of 1997 made under subsection 12(1) of the *Trade Measurement (Administration) Act 1991* revokes Determination No. 204 of 1996 and determines fees payable for the purposes of the Act.**

**Determination No. 272 of 1997 made under subsection 90A of the *Sale of Motor Vehicles Act 1977* revokes Determination No. 205 of 1996 and determines fees payable for the purposes of the Act.**



### Subordinate Legislation - Comment

The Committee has examined the following subordinate legislation and offers these comments:

**Subordinate Law No. 37 of 1997 being the Fair Trading Regulations made under the *Fair Trading Act 1992* repeals regulation 4 and inserts a new regulation 4 in its place.**

The effect of this amendment is to prescribe two codes of practice for the purpose of section 34 of the Act. The text of these codes are not incorporated in new regulation 4, nor are they to be found in Gazette No. S400 of 9 December 1997. The text of one of these codes (the 'Crowd Marshals Industry Code of Practice') was circulated to the Assembly when Subordinate Law No. 37 of 1997 was tabled. The text of the other code (the 'Fitness Industry Code of Practice') had been prescribed under the repealed regulation 4 and was presumably circulated to the Assembly at an earlier date.

These comments point to the problem which arises when a law incorporates some extrinsic document (such as these codes) by reference to the document in the law. The extrinsic document is in effect part of the law, but it will not be easy for a member of the public to ascertain just what is the document incorporated by reference.

There is moreover nothing on the face (or on any of the pages) of the document entitled 'Crowd Marshals Industry Code of Practice' which was circulated with Subordinate Law No. 37 of 1997 to indicate that this document is in fact the code to which new regulation 4 refers.

These problems may not in practice be a problem, but given the status in law of these codes the Committee draws to the attention of the Assembly the difficulties which may arise in ascertaining just what they are.

**Subordinate Law No. 3 of 1998 being the Fair Trading Regulations (Amendment) made under the *Fair Trading Act 1992* amends regulation 4 of the Fair Trading Regulations to add to it a reference to three industry codes of practice.**

As outlined above, there will be problems in ascertaining just what are these codes.

**Subordinate Law No. 12 of 1998 being the Fair Trading Regulations (Amendment) made under the *Fair Trading Act 1992* amends regulation 4 of the Fair Trading Regulations to add to it a reference to an industry code of practice.**

As outlined above, there will be problems in ascertaining just what is this code.

**Subordinate Law No. 13 of 1998 being the Fair Trading Regulations (Amendment) made under the *Fair Trading Act 1992* amends the Fair Trading Regulations to add a definition of the word "approved" in regulation 3 and to add a new regulation 4A which is made for the purposes of section 35 of the Act.**

Section 35 of the Act permits a code prescribed for the purpose of section 34 of the Act to be amended by approval. The amendment to regulation 3 makes it clear that the Minister may make the approval. New regulation 4A provides that four industry codes of practice which have been prescribed under section 34 are amended by what are described as an 'Amendment' to each of the codes. These documents are given a title and a number (such as "Crowd Marshals Industry Code of Practice Amendment (No. 1 of 1998)").

The practice of approving amendments to the codes, while no doubt desirable, will add to the problems of ascertaining just what are these codes.

**Management Standard No. 2 of 1997 made by the Commissioner for Public Administration with the approval of the Chief Minister under section 251 of the *Public Sector Management Act 1994* is an amendment to Management Standard No. 1 of 1994.**

The Committee draws to the attention of the Assembly the problems which might arise from the use of different names for the subordinate laws of the Territory. Management Standard No. 2 of 1997 is stated in Special Gazette No. S387 of 2 December 1997 to be a Subordinate Law of the Australian Capital Territory, but then described as a Management Standard and given a number in a sequence of 'Management Standards'. From this Report, it will be apparent that there are at least two other numbered series of subordinate laws of the Territory - those called Subordinate Laws and those called Determinations.

There is potential here for confusion as to just what are the subordinate laws of the Territory.

The Explanatory Memorandum to Management Standard No. 2 of 1997 adds to the confusion by describing it as "Instrument 2/1997".

## **GOVERNMENT RESPONSES**

The Committee has received responses from the Attorney-General in relation to various Committee reports:

- on 10 December 1997 in relation to comments in Reports Nos 11 and 13 of 1997 concerning Determinations Nos 160, 161 and 162 of 1997, Determination No. 12 of 1997, and minor errors in the Annual Leave (Amendment) Bill 1997 and the Long Service Leave (Amendment) Bill 1997. In relation to the Bills, the Attorney-General advised that these errors had been corrected by way of Standing Order 191;
- on 12 December 1997 in relation to comments in Report No. 15 of 1997 on the Births, Deaths and Marriages Bill 1997. The Attorney-General advised that an error would be corrected by an amendment, and explained the absence of review in relation to clause 41 of the Bill;
- on 7 January 1998 in relation to comments in Report No. 18 of 1997 on the Classification (Publications, Films and Computer Games) (Enforcement) (Amendment) Bill 1997. A comment is addressed and the Attorney-General advised that the Explanatory Memorandum had been amended in the light of the Report;
- on 8 January 1998 in relation to comments in Report No. 17 of 1997 on the Crimes (Amendment) Bill (No. 6) 1997 (relating to self-induced intoxication). The Attorney-General's response addresses the issues raised and provides helpful comment on how the proposed change to the law might operate;
- on 8 January 1998 in relation to comments in Report No. 19 of 1997 on the Magistrates Court (Amendment) Bill (No. 2) 1997. The Attorney-General's response addressed the issues raised in the Report;
- on 15 January 1998 in relation to comments in various Reports - in Report No. 11 of 1997 concerning Determination No. 137 of 1997; in Report No. 15 of 1997 concerning the numbering of determinations made under the *Legislative Assembly (Member's Staff) Act 1989*; and Report No. 17 of 1997 concerning the wording of a provision in the Legislative Assembly (Privileges) Bill 1997. The Attorney-General's response addressed the issues raised in these Reports, and we note the action taken in response to some of these issues; and
- on 6 April 1998 in relation to comments in various Reports - in Report No. 11 of 1997 concerning Determination No. 113 of 1997; in Report No. 18 of 1997 concerning the Medical Practitioners (Amendment) Bill 1997; and in Report No. 19 of 1997 concerning Determination No. 194 of 1997. The Attorney-General's response addressed the issues raised in these Reports, and we note the action taken in response to some of these issues.

Copies of these responses are attached. The Committee thanks the Attorney-General for his helpful responses.

Paul Osborne, MLA  
Chair

June 1998