

**STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

REPORT NO. 7 OF 1994

17 May 1994

TERMS OF REFERENCE

- (1) a Standing Committee for scrutiny of bills and subordinate legislation shall be appointed;
- (2) the Committee shall with respect to any instrument of a legislative nature which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law) made under an Act consider whether the instrument -
 - (a) is in accord with the general objects of the Act under which it is made;
 - (b) unduly trespasses on rights previously established by law;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly; or
 - (e) or the explanatory statement accompanying it meets the technical or stylistic standards to which such an instrument or explanatory statement ought, in the opinion of the Committee, to conform;
- (3) the Committee shall with respect to the clauses of Bills introduced into the Legislative Assembly consider whether such Bills -
 - (a) unduly trespass on personal rights and liberties;
 - (b) makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers;
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny; or
 - (f) or the explanatory memorandum accompanying it meets the technical or stylistic standards to which such a Bill or explanatory memorandum ought, in the opinion of the Committee, to conform;
- (4) the Committee shall consist of three members;
- (5) 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;
- (6) the majority of members constitutes a quorum of the Committee;
- (7) the Committee be provided with the necessary additional staff, facilities and resources; and
- (8) 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

Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

Legal Advisor: Emeritus Professor D. Whalan, AM
Secretary: Mr T. Duncan
Deputy Secretary: Ms B. Irvin

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Legislative Assembly. The Committee does not make any comments on the policy aspects of the legislation. The terms of reference contain the customary principles of scrutiny that enable the Committee to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation that have been adopted, without exception, by all scrutiny committees in Australia. Such non-partisan, non-policy scrutiny allows the Committee to assist the Assembly passing into law Acts and subordinate legislation that comply with the high ideals set out in the terms of reference.

BILLS

Bill Upon Which No Comment is Offered

The Committee has examined the following Bill and offers no comment:

Poisons and Drugs (Amendment) Bill 1994

This Bill removes from the Principal Act the list of restricted substances and the list of specialist doctors eligible to be authorised by the Medical Officer of Health to supply or prescribe these substances and permits the prescribing of both lists by regulations.

Supply Bill 1994-95

This Bill makes broad appropriations from the Consolidated Revenue Fund on an interim basis until the *Appropriation Act 1994-95* is passed.

Bills Upon Which Comment is Offered

The Committee has examined the following Bills and offers the following comments:

Public Sector Management (Consequential and Transitional Amendments) Bill 1994

This Bill makes transitional arrangements for existing staff to be transferred to the new ACT Government Service.

Could There be Prejudicial Retrospectivity?

Subclause 18(1) gives the Commissioner for Public Administration power to make a declaration under subsection 18(2) relating to an existing staff member who was:

- "(a) a member of the transitional staff;
- (b) appointed or employed by a prescribed entity;
- (c) taken to have been appointed or employed by the Territory under section 21 of the *Health (Consequential Provisions) Act 1993* as in force immediately before [the commencement] day or
- (d) otherwise employed by the Territory, a Territory instrumentality or a statutory office holder."

Subclause 18(2) provides:

"(2) The Commissioner may, in writing, declare that a person shall, on or after the day specified in the declaration, be taken to be employed -

- (a) as an officer or employee in a specified government agency under the Public Sector Act; or
- (b) by the Territory on indefinite tenure in a specified government agency under this Act;

and such a declaration has effect according to its tenor."

Then subclause 18(3) goes on to provide as follows:

"(3) A declaration under subsection (2) may be expressed to have taken effect on a day that the Commissioner certifies was the day on which the person was appointed or employed by the person's employer for the purposes of paragraph (1)(a), (b), (c) or (d).".

It appears that a declaration may thus be retrospective in effect. There are protective provisions in later subclauses of clause 18 and subclause 18(10) provides that the powers under clause 18 may only be exercised for 12 months after the commencement day.

However, perhaps a check should be made to see whether the clause could perhaps operate prejudicially to an individual person.

A Henry VIII Clause and Retrospectivity

Clause 20 provides as follows:

"(1) The Executive may make regulations amending the provisions of this Act (other than this section), the Public Sector Act or any other Act in relation to any matter arising from, connected with or consequential upon the establishment of the Government Service.

(2) Regulations made under subsection (1) may be expressed to have taken effect on a day earlier than the day of the making of the regulations, not being a day earlier than the commencement day.

(3) The Executive may only make regulations under subsection (1) during the period of 12 months commencing on the commencement day.".

Subsection (1) is a classic Henry VIII clause, as it permits the Executive to alter Acts by subordinate legislation without those alterations being subject to Parliamentary debate.

Further, subsection (2) provides that the regulations may make amendments that are retrospective in effect.

However, three ameliorating points can be made about the provisions.

First, the power is not a continuing power, but is sunsetted after 12 months and this period cannot be extended by the use of the present power.

Secondly, although there is power to make retrospective amendments to Acts, the regulations cannot make amendments to Acts that take effect before the commencement day.

Thirdly, the power is to be exercised by the making of regulations, which would, of course, have to be tabled in the Legislative Assembly if they are to remain valid. The regulations would be subject to disallowance by the Assembly. Thus the Assembly would retain ultimate control over any amendments that are made.

SUBORDINATE LEGISLATION

Subordinate Legislation Upon Which No Comment is Offered

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

Subordinate Law No. 50 of 1993 being the *Proceeds of Crime Regulations* is a re-tabling of the Regulations following very helpful correspondence with the Minister, Mr Connolly.

Subordinate Law No. 9 of 1994 being the *Long Service Leave (Building and Construction Industry) Regulations (Amendment)* updates the list of prescribed awards to reflect the awards that are currently used in the building and construction industry.

Subordinate Law No. 10 of 1994 being the *Boxing Control Regulations (Amendment)* prescribed a particular boxing contest and thus allowed the contest to go ahead.

Subordinate Law No. 11 of 1994 being the *Public Health (Eating Houses) Regulations (Amendment)* repeals provisions relating to registration made redundant by the passing of the *Food Act 1992*.

Subordinate Law No. 12 of 1994 being the *Public Health (Meat) Regulations (Amendment)* repeals provisions made redundant by the passing of the *Food Act 1992*.

Subordinate Law No. 13 of 1994 being the *Public Health (Sale of Food and Drugs) Regulations (Amendment)* repeals provisions made redundant by the passing of the *Food Act 1992*.

Subordinate Law No. 14 of 1994 being the *Supreme Court (Admission of Practitioners) Rules (Amendment)* extends the list of prescribed tertiary institutions which are to be recognised as providing appropriate educational qualifications for admission as a barrister and solicitor of the Supreme Court and makes minor technical amendments.

Approval of Variation No. 9 to the Territory Plan made under section 26 of the *Land (Planning and Environment) Act 1991* approves a variation to Fyshwick, section 30, block 15.

Approval of Variation No. 15 to the Territory Plan made under section 26 of the *Land (Planning and Environment) Act 1991* approves a variation in the District of Gungahlin Mulligans Flat to define Mulligans Flat Reserve as Public Land.

Approval of Variation No. 16 to the Territory Plan made under section 26 of the *Land (Planning and Environment) Act 1991* approves a variation to Griffith, section 18, block 4.

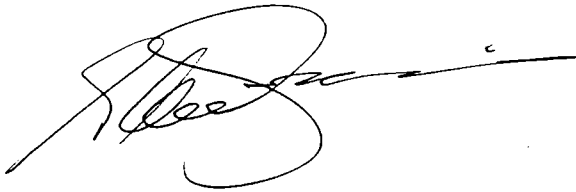
GOVERNMENT RESPONSES

The Committee has received responses to comments made concerning the following Bills and subordinate legislation:

- (a) Lotteries (Amendment) Bill 1994 (Report No. 5 of 1994);
- (b) Construction Industry Training Fund Bill 1994 (Report No. 5 of 1994);
and
- (c) Subordinate Law No. 50 of 1993, Proceeds of Crime Regulations.

Copies of the responses (including the Committee's letter to the Attorney-General concerning the Proceeds of Crime Regulations) are attached.

The Committee thanks the Attorney-General for his positive responses.

A handwritten signature in black ink, appearing to read 'Ellnor Grassby', with a long horizontal flourish extending to the right.

Ellnor Grassby, MLA
Chairperson

17 May 1994



Government of the
Australian Capital
Territory

Terry Connolly MLA

ATTORNEY GENERAL

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Mrs Ellnor Grassby ~~MLA~~
Presiding Member
Standing Committee on Scrutiny of Bills and
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1 Constitution Ave
CANBERRA ACT 2601


Dear Mrs Grassby

In its Report No. 5 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Lotteries (Amendment) Bill 1994 ("the Bill"). In particular the Committee drew attention to the retrospective effect of clause 5 of the Bill.

As the Committee noted, the purpose of the Bill is to clarify that in an instant lottery, a statement that a prize is won by matching 3 symbols (or matching 3 identical symbols) means, and is taken always to have meant, that a prize is won if the same symbol appears 3 times.

I am advised that the amendments effected to the *Lotteries Act 1964*, by the Bill, arise out of a request for assistance by the NSW Lotteries and Tattersalls Sweep Consultation, to confirm the common understanding of the rules of instant lottery games. The request came after the decision, early last year, of the NSW Court of Appeal in *NSW v. Burgin*, which confirmed deficiencies in the wording used on instant scratch lottery tickets and resulted in Mr Burgin's claim for a prize of \$20,000 being upheld.

A case before the ACT Supreme Court (*Steele v Hornsby*), instituted after the Burgin decision, involves a dispute on the wording of a scratch lottery ticket similar to that in the Burgin case. Should this case succeed, and others follow, it is estimated that the payout potential from just one print run of tickets could be as high as \$9 billion in respect of ACT lottery game sales. At a minimum Burgin style claims could reduce the Territory's share of net revenue from lottery games sales to nil.

In order to ensure that prizes in scratch lottery games are awarded in accordance with the commonly accepted understanding of the rules of such games and to safeguard revenues, the ACT, like other jurisdictions, proposes to legislate retrospectively to clarify the operation of the rules of instant scratch lottery games, notwithstanding that this may negate the possible rights of a claimant already before a court.

I trust this information is of assistance to the Committee.

Yours sincerely



Terry Connolly

12 MAY 1994

*I would add that, if
this legislation is not
retrospective, the big
loser would not be
ACT revenue, but NSW
Lotties or VIC Tatts.*





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Dear Mrs Grassby

In its Report No. 5 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on the Construction Industry Training Fund Bill 1994 ("the Bill").

Firstly, the Committee noted the absence of "entry by consent or warrant" provisions in relation to inspectors and drew attention to analogous legislation in which such provisions are found. In view of the Committee's comments Government amendments will be prepared to amend the Bill so that it includes "entry by consent or warrant" provisions.

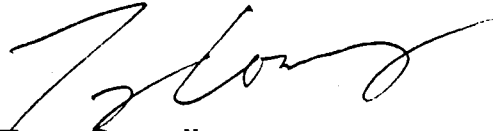
The second matter raised by the Committee was whether the Bill should provide for an independent outside review of decisions relating to the approval of training programs, courses or projects. In response to the concerns raised by the Committee the Bill will be further amended to provide for a right of appeal to the Administrative Appeals Tribunal from a decision of the Minister, pursuant to proposed section 50.

No right of appeal has been, or will be, provided in respect of a decision of the Board to approve expenditure of Fund moneys, pursuant to proposed section 51. The lack of a review in respect of such a decision is consistent with the view taken by the Administrative Review Council that AAT review of a decision with "polycentric elements", including decisions apportioning a finite resource, is inappropriate. The reason that AAT review of such decisions is considered inappropriate is that in such cases changing, on review, a decision affecting one person will necessarily affect decisions allocating to others a portion of the same limited resource.

The final matter on which the Committee commented was an apparent mistake in clause 52. As the Committee suggested, that provision should refer to "Division 3 of Part III" rather than "Division 2 of Part III". The Bill will be amended to correct this error.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Terry Connolly', with a stylized, flowing script.

Terry Connolly

- 9 MAY 1994



A.C.T. GOVERNMENT

TERRY CONNOLLY MLA

ATTORNEY GENERAL

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Mrs Ellnor Grassby MLA
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Dear Mrs  Grassby

In its Report No. 1 of 1994 the Standing Committee on Scrutiny of Bills and Subordinate Legislation commented on Subordinate Law No. 50 of 1993, being the Proceeds of Crime Regulations ("the Regulations").

The Committee drew attention to an incorrect cross reference in regulation 4 and suggested that a check should be made in relation to that cross reference.

The reference to "subregulations 12(2) or (3)" in paragraph 4(b) of the printed copy of the Regulations is inaccurate.

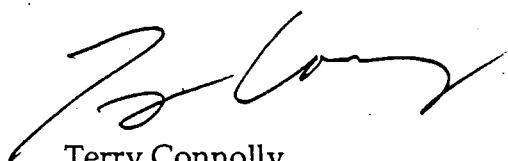
It has been confirmed, however, that the Regulations made by the Executive accurately refer to "subregulations 11(2) or (3)" and that a procedural irregularity resulted in copies of an earlier draft of the Regulations being tabled in the Assembly and sent to the Committee and the Government Printer.

I am advised that the validity of the Regulations is unaffected by the irregularity and no amendment of the Regulations is necessary. However, replacement copies of the Regulations have been issued to the Civic Shopfront, being the place from which a copy of the Regulations may be purchased by a member of the public.

For your information, a copy of the Regulations made by the Executive is attached (Attachment A), as are copies of the relevant pages of the Triplicate copy of the Regulations indicating the respective dates upon which the Regulations were signed and notified in the *Gazette* (Attachment B).

I trust this information is of assistance to the Committee.

Yours sincerely


Terry Connolly

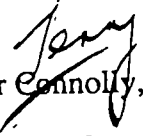
- 7 MAR 1994

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON
SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION

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Mr Terry Connolly, MLA
Attorney-General
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Dear Mr  Connolly,

I refer to your letter dated 7 March 1994 about the Government's response to our comments on Subordinate Law No. 50, Proceeds of Crime Regulations, ("the Regulations") (Report No. 1 of 1994).

Thank you for your response and for giving the Committee an information copy of the Regulations made by the Executive.

The Committee has not done a detailed comparison between the copy of the earlier draft that was tabled and the actual subordinate law in Attachment A to your letter that was signed by two Ministers. We discussed the response and agreed that I write to you to seek clarification on several matters:

- (1) We noted that the copy of the Regulations made by the Executive and given to the Committee was signed but not dated. Does the lack of a date affect the making of a regulation?
- (2) Was the incorrect cross reference that was picked up by the Committee the only difference between the two documents, or were there other changes? Does it matter whether there was only one change made between the "earlier draft" and the actual document or, say, 41 changes?
- (3) The Committee questioned the validity of the Proceeds of Crimes Regulations that were tabled in the Assembly. In your response you indicate that "a procedural irregularity resulted in copies of an earlier draft of the Regulations being tabled in the Assembly and sent to the Committee and the Government Printer". Was the Regulation made by the Executive tabled in the Assembly?

The provisions of section 6(1)(c) of the *Subordinate Laws Act 1989* require tabling of the subordinate law in the actual form made by the Executive. Your letter of 7 March admits that this has not happened in the present case, but states that an earlier draft was tabled.

Paragraph 6 (1) (c) states that:

"6. (1) A subordinate law -

(c) shall be laid before the Legislative Assembly within 15 sitting days after the day of notification."

Sub-section 6 (6) states that:

"6. (6) If a subordinate law is not laid before the Legislative Assembly in accordance with paragraph 1(c), it ceases to have effect."

If the Regulation that was tabled in the Assembly on 22 February 1994 was not the same as the one made by the Executive, it will cease to have effect after 15 sitting days (on 12 May 1994). The Committee has been advised that similar instances of this type have occurred in the Federal Parliament and that the solution has been for the Executive to table the subordinate law that was made by the Executive.

If you have any queries please contact the Secretary of the Committee, Mr Tom Duncan, on extension 50171.

Yours sincerely,



Ellnor Grassby
Chairperson

19 April 1994



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URGENT

Dear Mrs *Ellnor* Grassby

Thank you for your letter of 19 April 1994 raising a number of concerns about the Government's response to the Scrutiny of Bills Committee's comments on Subordinate Law No. 50 of 1993, Proceeds of Crimes Regulations ("the Regulations").

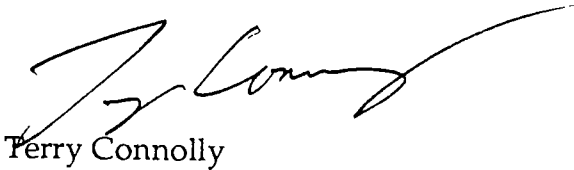
The Committee sought clarification of particular matters pertaining to the circumstances surrounding the tabling of the Regulations. I am advised that the answers to the Committee's questions are as follows:

- (1) The absence of a date on the copy of the Regulations sent to the Committee does not affect the making of the Regulations. The copy of the Regulations sent to the Committee was signed but not dated because that copy was not the 'original' (it was simply the copy held by my Department). The usual procedure is that the original copy of Regulations signed, and therefore made, by the Executive, is held by the Assembly Liaison Office which inserts the date on which the Regulations were signed in such Regulations.
- (2) Yes, the incorrect cross reference that was picked up by the Committee was the only difference between the two documents. I am advised that when the error was revealed by the Committee the documents were proof-read again and no other error was found. The question about the effect of one or many errors is addressed in the next paragraph.
- (3) My previous letter to the Committee advised that the validity of the Regulations is unaffected by the irregularity. That remains my advice, based on -
 - (a) the fact that there was no error in the Regulations as made by the Executive; and
 - (b) the insubstantial nature of the discrepancy in the Regulations as laid before the Assembly.

Notwithstanding the foregoing advice, as the Committee has expressed concern about the validity of the Regulations as they stand and since it is, until 12 May 1994, still possible to table the Regulations as made by the Executive, in the Assembly, I have arranged for that to be done on Tuesday 10 May 1994. I hope that by doing so the Committee's concerns will be met, and the question of validity will be put beyond doubt.

I trust this information is of assistance to the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Terry Connolly', with a long, sweeping horizontal stroke extending to the right.

Terry Connolly

9 MAY 1994