

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

REPORT NO 16 of 1991

1 October 1991

**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION**

MEMBERS OF THE COMMITTEE

Mrs E Grassby, MLA (Presiding Member)
Mr B. Collaery, MLA
Mr B Stefaniak, MLA

Secretary: Mr T Duncan
Legal Advisor: Emeritus Professor D Whalan

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 (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; and
 - (d) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (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) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (d) inappropriately delegate legislative powers; or
 - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (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.

ROLE OF THE COMMITTEE

The Committee examines all Bills and delegated 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 delegated legislation that comply with the high ideals set out in the Terms of Reference.

Mr B Stefaniak
Acting Speaker
Legislative Assembly
CANBERRA ACT 2601

Dear Mr Stefaniak

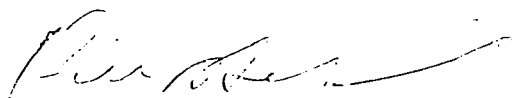
Please find enclosed a copy of Report No 16 of 1991 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under the resolution of appointment, the Committee is empowered to send a Report to you while the Assembly is not sitting so that it may be circulated to Members. Accordingly, I seek your approval to print and circulate Report No 16 of 1991.

Yours sincerely

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

Ellnor Grassby MLA
Presiding Member

October 1991

A handwritten signature in dark ink, appearing to read 'Bill Stefaniak', with a long horizontal flourish extending to the right.

Approved
Bill Stefaniak

October 1991

SUBORDINATE LEGISLATION

- (a) No comment offered.

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

1. Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Yarralumla Section 94, Block 3 (Part), Section 102, Blocks 1, 7, 8, 9 and 20 and Section 127, Block 1 (Part).
2. Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Macquarie Sections 48, 49 and 50.
3. Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Lyneham Section 50, Block 23.
4. Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Narrabundah Section 100, Blocks 1, 2, 4, 5, 11, 12, 13 (part), 16, 19, 20 and 21.
5. Approval of Variation to the Territory Plan made under section 19 of the Interim Planning Act 1990 dealing with Monash Sections 35-49.
6. ACT Determination No. 82 of 1991 made under section 27B of the Motor Traffic Act 1936 determines that the number of taxi licenses shall not exceed 188.

BILLS

- (a) No comment offered.

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

Administration and Probate (Amendment) Bill (No. 2) 1991

This Bill empowers the Minister to determine a rate of interest to be paid on legacies, but the determination is subject to disallowance by the Assembly.

Administrative Decisions (Judicial Review) (Amendment) Bill 1991

This Bill removes the requirement that a person must be aggrieved by an administrative decision under the Land (Planning and Environment) Act 1991 and the Heritage Objects Act 1991 before being able to challenge the decision as being contrary to law. In effect the Bill allows a person standing to challenge, although the person has no greater material or pecuniary interest than the general public.

Appropriation Bill 1991-92

This Bill provides for the issue and expenditure of public monies of the A.C.T. for services provided in the financial year.

Forfeiture Bill 1991

This Bill modifies the common law rule that prevents a person who unlawfully kills another from benefiting from the estate of that other person, by authorising the Supreme Court, except in the case of murder, to allow a person to inherit in the estate if circumstances suggest that it would be just for that to occur.

Government Solicitor (Amendment) Bill 1991

This Bill omits the references to the Government Law Office and substitutes references to the relevant administrative unit that administers the principal Act.

Heritage Objects Bill 1991

This Bill provides for the identification and protection of heritage objects that are publicly owned, both natural and manufactured (including those of Aboriginal origin), but does not apply to objects that are intrinsic to a heritage place or those that are privately owned.

Legal Practitioners (Amendment) Bill (No. 2) 1991

This Bill removes the phrase "Government Law Office" from the three places it appears in the principal Act and substitutes "relevant administrative unit" consequent upon the changes made to the Government Solicitor Act 1989.

(b) Comment offered

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

Land (Planning and Environment) Bill 1991

This Bill replaces existing planning and leasing legislation and introduces new law in the areas of heritage and the environment.

The Committee makes five sets of comments.

(i) The "Territory Plan"

In clause 4 "Plan" is defined to mean the "Territory Plan as in effect from time to time under this Act". This is a very helpful short-hand reference, but there appears to be a little inconsistency in the use of the words.

For example, without trying to give exhaustive lists, it is noted that "Plan" is used in clauses 7- 9 (in many places), 12, 14, 15(1), 206(1)(b) and (2), 207(2), 233(2)(a), 243(2)(a), 274(5)(b), whereas the full phrase "Territory Plan" is used in clauses 164(4)(a) and (c) and 196(1). The full phrase "Territory Plan" is also used in clause 13, but perhaps that may be intentional as a distinction is being drawn there between the new "Plan" and the plan under the Interim Planning Act 1990. But in clause 191 "Plan" appears at the beginning of the clause and the "Territory Plan" in paragraph (b). Here, too, emphasis may have been intended. However, it is more difficult to see why "Territory Plan" is used in Item 4 of Schedule 2 and "Plan" in Item 2 of Schedule 3, when both items are dealing with the use of "residential land for [the] carrying on [of] a profession, trade, occupation or calling".

This is a small point, but perhaps a check could be made.

(ii) Consent to Entry

Clause 151(1) confers on an "authorised person" a power to "enter any place-

- (a) with the consent of the occupier; or
- (b) pursuant to a warrant issued under section 152".

Then follow provisions about seeking consent and informing the occupier about his or her rights, including the right of the occupier to refuse to give consent.

It is noted that the now usual provisions about proving the voluntariness of the consent are not present here. It will be recalled that, in its recent Report No. 15 of 1991, the Committee expressed its appreciation of the inclusion of such a provision (among others) in the Trade Measurement (Administration) Bill 1991 following the Committee's comments in its Report No. 1 of 1991 on the principal Trade Measurement Bill.

Possibly the same formula is to be followed here in the Land (Planning and Environment) (Consequential Provisions) Bill which has not yet been introduced, but which is referred to in clause 158.

However, it is also noted that the usual consent formula is followed later in the present Bill in clauses 264 and 265.

(iii) Self-incrimination

Clause 267(1) confers detailed powers on an inspector including the powers to require a person to give information or to produce documents and to

"require any person in or on the place [enters] to answer questions".

A person who fails without reasonable cause to comply commits an offence (clause 267(2)). There does not seem to be any protection against self-incrimination, despite the lack of any caution.

(iv) Some Possible Small Mistakes

Clause 269 provides an impeccable procedure for dealing with samples that are taken and clause 270 deals with the disposal of seized items.

However, the reference in clause 269 to the taking of samples is to "paragraph 267(c)" and to the seizure in clause 270 (in two places) is to "paragraph 267(d)". Perhaps the references should be to "267(1)(c)" and "267(1)(d)" respectively.

Incidentally, the same mistakes also appear to have been made in the Explanatory Statement

(v) A Possible Small Inconsistency

Clause 271 deals with the issue of a search warrant to an inspector and clause 271(4)(e) follows the now usual and praiseworthy procedure of ensuring that a warrant has a finite life. Clause 271(4)(e) provides that the warrant "ceases to have effect" after 1 month, which would presumably mean a calendar month (Interpretation Act 1967 s.14(1)).

Clause 152 deals with the issue of a search warrant to a panel member engaged in an Inquiry. Clause 152(4)(e) also provides that the warrant is to have a finite life, but "ceases to have effect" "not later than 28 days after the the date of issue of the warrant". (Emphasis added.)

There does not seem to be any reason for the difference between the two provisions.

Having noted the difference, a further comment is made. The more usual formula is probably the "1 month" formula, but perhaps the "not later than 28 days" formula might have the advantage of being more easily calculated and consistent as well as there being no need to rely on an interpretation clause in the Interpretation Act 1967 as may be the case with the "1 month" formula.

Wills (Amendment) Bill 1991

This Bill reduces the formalities in the making of a will, allows the Supreme Court more flexibility in interpreting a will and allows the Court to look to see what the testator's or testatrix's intentions were and removes some uncertainties in the principal Act.

Clause 6 inserts inserts new section 11A(1), which provides as follows:

"11A(1)A document, or part of a document, purporting to embody testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the formal requirements of this Act, constitute a will of the deceased person, an amendment of the will of the deceased person or a revocation of the will of the deceased person, if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will respectively." (Emphasis added.)

It will be noted that the simple "balance of probability" burden of proof is embodied in the emphasised clause. The original provision of this kind was inserted in the South Australian Wills Act 1936 in 1975. However, s. 12(2) of the South Australian Act embodies the heavier burden of proof by providing that the document is to be a will

"if the Supreme Court ... is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will".

In his Presentation Speech the Attorney-General, Mr Connolly, paid a tribute to the work of Mr Charles Rowland of the A.N.U. Law Faculty in relation to the work on the present A.C.T. Bill. In a note in the Australian Encyclopaedia of Forms and Precedents Mr Rowland points out that "the [South Australian] provision has been construed in many cases" and he refers to a 1987 article on the provision. That article, published in 1987, describes the South Australian provision as "a triumph of law reform".

Certainly, the South Australian form was adopted by the Northern Territory in 1984 (Wills Act s. 12(2)) and by Western Australia in 1987 (Wills Act 1970 s. 34). The same form is in a Tasmanian Bill, but a different form is in force in Queensland (Succession Act 1981 s. 9(a)). Victoria appears to have made no move as yet, but New South Wales inserted a provision similar to that in the present A.C.T. Bill in 1989 (Wills, Probate and Administration Act 1898 s. 18A).

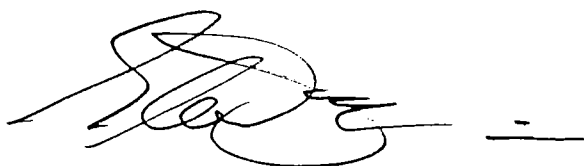
The Committee knows of no reported New South Wales decision as yet, but there is some evidence that the less strict burden of proof

is causing some concern. The Bill contains very important reforms, but perhaps an inquiry could be made about this particular clause.

Building (Amendment) Bill (No. 2) 1991 - Government Response

The Committee reported on the above-mentioned Bill in its Report No. 14 of 1991, dated 27 august 1991. The Committee has since received a response from the Attorney-General, dated 25 September 1991, which is attached.

The Committee thanks the Attorney for his response.

A handwritten signature in dark ink, appearing to be 'Ellnor Grassby', followed by a horizontal line.

Ellnor Grassby MLA
Presiding Member

/ October 1991



A.C.T. GOVERNMENT

TERRY CONNOLLY MLA

ATTORNEY GENERAL

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Mrs E Grassby MLA
Presiding Member
Standing Committee on Scrutiny
of Bills and Subordinate Legislation
ACT Legislative Assembly
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CANBERRA ACT 2601

Ellen
Dear Mrs Grassby

In its Report No 14 of 1991 the Committee queried the effect of two amendments to the Principal Act provided for in the Building (Amendment) Bill (No 2) 1991.

As stated when an amendment to the Bill was moved on 10 September 1991, a technical fault occurred at the drafting stage which, as the Committee pointed out, resulted in the removal of the requirement that an application for a building permit be in writing. This was not the intention and the Bill, during the detail stage, was amended to omit the scheduled amendments to paragraphs 35(2)(b) and (c) and to reinsert the requirement that such an application be in writing.

With regard to the Committee's suggestion that the sexist "him" in paragraph 35(2)(a) of the Bill be changed, it is considered inappropriate to change gender references in isolation. The Building Act as a whole requires numerous amendments of this nature which it would be preferable to make the next time the Act is amended.

I trust that the foregoing information satisfies the Committee's concerns.

Yours sincerely

Terry Connolly

