

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

REPORT NO. 12 OF 1996

3 September 1996

TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its 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

Ms Rosemary Follett, MLA (Chair)
Mr Harold Hird, MLA (Deputy Chair)
Mr Paul Osborne, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM
Secretary: 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:

Artificial Conception (Amendment) Bill 1996

This Bill makes provisions to enable the genetic parents of a child born as a result of a surrogacy agreement to become the legal parents of that child.

Dentists (Amendment) Bill 1996

This Bill provides for nationally uniform standards and arrangements for regulating dentists, specialist dentists and dental hygienists.

Lotteries (Amendment) Bill 1996

This Bill provides that in the future the minimum total prize value for exempt lotteries will be set by the Minister and increases penalties for breaches of the Act.

Medical Treatment (Amendment) Bill 1996

This Bill amends the provisions relating to the operation of directions given under that Act and relating to the relief of pain.

Noise Control (Amendment) Bill 1996

This Bill amends the provisions relating to noise emissions from premises to include motor vehicle noise.

Prohibited Weapons Bill 1996

This Bill prohibits the possession and use of designated weapons and articles unless a permit is held.

Public Interest Disclosure (Amendment) Bill 1996

This Bill includes references to the Auditor-General, amends the provisions relating to discretions to decline to investigate disclosures and makes consequential amendments.

Public Trustee (Amendment) Bill 1996

This Bill makes amendments relating to the charging of fees and management of the financial accounts of the Public Trustee.

Uncollected Goods (Consequential Provisions) Bill 1996

This Bill amends or repeals provisions in a number of Acts and makes transitional provisions consequent upon the passing of the Uncollected Goods Bill 1996.

Bills - Comments

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

Stamp Duties and Taxes (Amendment) Bill 1996

This Bill extends the meaning of "marketable security" to ensure the payment of stamp duty on transfer of the Commonwealth Instalment Receipt issued on the sale of the Commonwealth Governments final tranche of shares or any similar sale by the Commonwealth.

Retrospectivity

The substantive provisions of the Bill are made retrospective to 15 July 1996 and duty will be payable on all transactions since that date.

Uncollected Goods Bill 1996

This Bill sets up a statutory regime for dealing with uncollected goods.

The Committee makes three comments on the Bill.

Are there some Uncollected Goods Somewhere Belonging to this Bill?

The Committee notes that the Bill jumps from PART II - UNCOLLECTED GOODS to PART IV - DISPOSAL OF UNCOLLECTED GOODS. PART III appears to be missing. The Bill's clauses run on without any gap in numbers, the Table of Provisions to the Bill lists no PART III, and neither the Explanatory Statement nor the Presentation Speech appears to mention a PART III, nor why it is apparently AWOL.

Are there some uncollected goods somewhere belonging to this Bill? As the law has been largely common law up until now (apart from some "goods" picked up from the *Protection of Lands Act 1937* and the *Public Baths and Public Bathing Act 1936*) there is no "old Bill" to check to see what might be missing. Should the Committee ask the other "Old Bill" to conduct an inquiry?

Interrelationship with Weapons Legislation

There is a definition of weapon in clause 4 that depends upon the definition given in the *Weapons Act 1991*. There is also a reference to the *Weapons Act 1991* in clause 34 and to weapons and ammunition in clause 21.

Care will need to be taken to ensure that the cross-references in the present Bill fit in with the new legislation in the Firearms Bill 1996 and perhaps also the Prohibited Weapons Bill 1996.

Identification for the "authorised officer"

Clause 16 provides for the Minister to appoint an "authorised officer". The authorised officer has very substantial powers to deal with goods lost or abandoned on public or unleased land, including, for example, dealing with vehicles.

As the officer will be dealing on public property and quite possibly with the public, perhaps it would be appropriate for the officer to have proper identification, so that all will know that goods are being dealt with legally and that some unauthorised person is not simply making off with them.

Firearms Bill 1996

This Bill sets in place a regime for the control, possession and use of firearms.

The Committee makes three comments.

Is this Cross-reference Accurate?

Clause 77 deals with the seizure and forfeiture of firearms. Subclause 77 (5) deals with retention of seized firearms or ammunition pending the hearing of a charge and paragraph 77 (5) (d) provides that the Registrar may retain ammunition if

"the Registrar is otherwise entitled to revoke an approval order under subsection 98(4)."

Subclause 98 (4) refers to an application to possess ammunition being "in a form approved by the Registrar". It is subsection 98 (5) that provides that

"the Registrar may approve or refuse to approve an application."

Perhaps a check should be made to see whether an alteration should be made to the cross-reference. Such a change would seem to be consistent with the correction of the cross-reference to the similar provision in section 90 of the *Weapons Act 1991* made by section 33 of the *Weapons (Amendment) Act 1996*.

Medical Practitioners may Disclose Information

Clause 114 provides as follows:

"114(1) If a registered practitioner is of the opinion that a patient is an unsuitable person to be in possession of a firearm -

- (a) because of the patient's mental condition; or
- (b) because the medical practitioner thinks that the patient might attempt suicide, or would be a threat to public safety, if in possession of a firearm;

the medical practitioner may inform the Registrar of that opinion.

(2) This section has effect despite any duty of confidentiality, and any action by a medical practitioner in accordance with this section does not give rise to any criminal or civil remedy."

The Committee draws attention to this provision because it is a most unusual provision.

The Presentation Speech explains its rationale in the following terms:

"[T]his is not mandatory reporting. The wording of the legislation is carefully chosen to include 'may' - not 'will'. The Government recognises that a requirement to report would place considerable pressure on doctors, both ethically and literally. The clause is framed so as to absolve the medical practitioner of any criminal or civil remedy or proceeding arising from expressing that view to the Registrar. I would hope that the medical community would see this provision in the community's best interest."

Provisions for Compensation

The Presentation Speech makes substantial references to the payment of compensation for surrendered weapons, and states that compensation payments are presently being made. The Bill does not appear to contain a provision equivalent to that in section 92 of the *Weapons Act 1991*, which presently provides for the payment of compensation.

The regulation-making power contained in paragraph 125 (2) (u) does provide that regulations may be made in relation to

"the maximum amounts payable by way of compensation for the surrender of prohibited firearms."

Is this the means by which compensation is to be given in the future?

Animal Welfare (Amendment) Bill 1996

This Bill phases out the keeping of battery hens, removes compliance with a code of practice as a defence, provides for public access to inspection reports, amends the provisions relating to inspections and removes the requirements for notice to be given prior to inspections.

No comments were offered on this Bill in Report No. 120 and the Committee made no comment on the Bill in its Report No. 10 of 1996. However, having considered the provisions relating to access to premises in the Firearms Bill and having looked again at the other provisions in the *Animal Welfare Act 1992* as well as the patterns of powers of entry and search provisions in several other ACT Acts, the Committee makes the following comments on the present Bill.

Walk-through Powers and Powers of Entry and Search

The Committee makes two comments.

First, the usual protective provisions appear to be missing from the new section 79 inserted by clause 7 of the present Bill.

Clause 7 inserts the following provision into Division 2 of Part VII of the principal Act:

"79(1) Notwithstanding anything else in this Part, an inspector or authorised officer may inspect defined premises at any reasonable time.

(2) Subsection (1) authorises an inspector or authorised officer to inspect premises and any thing in or on the premises for the purpose of determining compliance with this Act.

(3) Subsection (1) does not authorise an inspector or authorised officer to enter an abattoir unless he or she is, or is with, a veterinary surgeon.

(4) In this section -

'defined premises' -

- (a) means premises used for the sale or transport of animals, or for other commercial purposes in relation to animals; and
- (b) in relation to an inspector or authorised officer - means any premises he or she believes on reasonable grounds is being used for -
 - (i) the purpose of research, or teaching, using animals; or
 - (ii) the acquisition, breeding or keeping of animals for such a purpose."

In ACT legislation entry to premises is usually permitted on three grounds: first, with the consent of the occupier of the premises (with special protective provisions relating to that consent); secondly, under a warrant issued by a judicial officer; and, thirdly, in what can be described as an emergency situation.

In Divisions 3 and 4 of Part VII of the Animal Welfare Act 1992, when dealing with the powers of entry and search of inspectors and authorised officers, these principles appear in the following commonly used form in subsections 81 (3) and 83 (3) respectively:

"(3) Subsection (1) only authorises an inspector [authorised officer] to enter premises -

- (a) with the consent of the occupier of the premises (subject to section 88);
- (b) pursuant to a warrant issued under section 90; or

- (c) with such assistance and by such force as is reasonable, where the inspector [authorised officer] believes on reasonable grounds that the circumstances are of such seriousness and urgency as to require the immediate exercise of those powers without the authority of such a warrant."

The new section 79 does not contain any of these protective provisions and any possibility of the other provisions being applied are ruled out by the insertion of the phrase at the beginning of section 79, "Notwithstanding anything else in this Part".

Secondly, the Committee comments on the amendments made by clauses 8 and 9 of the present Bill. These clauses remove the following provision from sections 81 and 83, the powers of entry and search provisions relating to inspectors and authorised officers respectively:

"(2) An inspector [authorised officer] shall give the occupier of premises 7 days' prior notice of an inspection, unless the inspector [authorised officer] believes on reasonable grounds that there is, on the premises, an animal or thing connected with an offence."

In contrast to the "consent, warrant or emergency" provisions considered above, these provisions for giving 7 days notice are not ones that are commonly inserted in ACT legislation. However, their removal will diminish the rights of the occupier of premises.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 17 of 1996 being the Weapons Regulations (Amendment) made under section 102 of the *Weapons Act 1991* provides for the exemption of specified types of batons from the provisions of the Act and for the storage of batons.

Subordinate Law No. 18 of 1996 being the Energy and Water (Regulation of Charges) Regulations made under section 49A of the *Energy and Water Act 1988* sets up a scheme for the regulation of charges of ACTEW Corporation.

Subordinate Law No. 19 of 1996 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* restricts the trading hours during which liquor can be sold for consumption on or away from licensed premises for the period commencing on 1 September 1996 and ending on 31 March 1997.

Determination No. 180 of 1996 made under section 39 of the *Water Pollution Act 1984* revokes Determination No. 55 of 1995 and determines fees payable under the Act.

Determination No. 181 of 1996 made under section 47 of the *Ozone Protection Act 1991* revokes Determination No. 59 of 1993 and determines fees payable under the Act.

Determination No. 182 of 1996 made under section 39B of the *Bookmakers Act 1985* varies the directions for the operation of the sports betting venue at the Bruce Outdoor stadium by deleting the present provision relating to the times of betting and inserting times of betting for 11 August 1996 and 23 August 1996.

Determination No. 183 of 1996 made under section 57 of the *Pharmacy Act 1931* revokes Determination No. 133 of 1995 and determines fees payable under the Act.

Determination No. 184 of 1996 made under section 44A of the *Business Franchise (Tobacco and Petroleum Products) Act 1984* revokes Determination No. 146 of 1995 and determines fees payable under the Act.

Determination No. 185 of 1996 made under section 12A of the *Dangerous Goods Act 1984* revokes Determination No. 83 of 1995 and determines fees payable under the Act.

Determination No. 188 of 1996 made under subsection 5KA (7) of the *Bushfire Act 1936* approves the variation of the Rural Fire Control Manual.

Determination No. 190 of 1996 made under section 6 of the *Cemeteries Act 1933* appoints a specified person to be the Chairperson of the ACT Cemeteries Trust.

Determination No. 191 of 1996 made under section 8 of the *Electoral Act 1992* determines an hourly fee of \$50.00 for assisting in the conduct of an election.

Determination No. 192 of 1996 made under section 36 of the *Motor Traffic Act 1936* revokes Determination No. 128 of 1995 and determines new maximum taxi fares payable under the Act.

Subordinate Legislation - Comments

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

Determination No. 171 of 1996 made under section 63 of the *Tenancy Tribunal Act 1996* appoints a specified person to be the Acting President of the Tenancy Tribunal.

Determination No. 172 of 1996 made under section 63 of the *Tenancy Tribunal Act 1996* appoints a specified person to be the Acting President of the Tenancy Tribunal.

Determination No. 173 of 1996 made under section 63 of the *Tenancy Tribunal Act 1996* appoints a specified person to be the Acting President of the Tenancy Tribunal.

Can three People be "the Acting President" and no term of Appointment Specified

Section 63 of the *Tenancy Tribunal Act 1994* provides as follows:

"63(1) The Minister may appoint a Magistrate to be the Acting President.

(2) The Acting President shall act as President -

(a) during a vacancy in the office of President, whether or not an appointment has previously been made to the office; or

(b) during any period or during periods when the President is, for any reason, unable to perform the functions of the office.

(3) An Acting President shall not act continuously as President for more than 12 months.

(4) Anything done in good faith by or in relation to a person purporting to act under subsection (2) is not invalid on the ground that -

(a) the person's appointment was ineffective or had ceased to have effect; or

(b) the occasion for the person to act had not arisen or had ceased."
(Emphasis added.)

The Committee makes two comments.

First, the Committee notes that three different persons have been appointed "to be the Acting President". It may be very convenient in practice for three appointments to be made, but perhaps confirmation could be given that three persons are entitled to be appointed to the one post at the same time. Does the use of the phrase "An acting President" in subsection 63 (3) overcome this possible problem, despite the clear wording in the earlier provisions?

Secondly, the Committee notes that no period of time is set for any of the appointments. Is it permissible for an indefinite appointment to be made when subsection 63 (3) provides that no person "shall act continuously as President for more than 12 months"?

Determination No. 174 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as member and as Chairperson of the Credit Tribunal.

Determination No. 175 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as a member and as Chairperson of the Credit Tribunal.

Determination No. 176 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as a member and as Chairperson of the Credit Tribunal.

Determination No. 177 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as a member and as Chairperson of the Credit Tribunal.

Determination No. 178 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as a member and as Chairperson of the Credit Tribunal.

Determination No. 179 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person to act as a member and as Chairperson of the Credit Tribunal.

No term of Appointment Specified

Subsection 189 (1) provides as follows:

"189(1) The Minister may, in writing, appoint a person who is eligible for appointment as the member referred to in paragraph 185 (1) (a) to act as that member and as Chairperson -

- (a) during a vacancy in the office of Chairperson; or
- (b) during any period, or during all periods, when the Chairperson is absent from duty or from the Territory or is, for any other reason, unable to perform the functions of his or her office,

but a person appointed to act during a vacancy shall not continue to act for more than 12 months."

Although the provisions of the relevant provisions of the *Credit Act 1985* do not appear to present the same problems relating to multiple appointments that may apply to the appointments dealt with under the previous head dealing with the Tenancy Tribunal, there may be a concern in certain circumstances with these appointments about the term of the appointments.

None of the present appointments fixes a term for the appointments.

If the present multiple appointments are intended to apply to acting as a member or as Chairperson under paragraph 189 (1) (b), when the Chairperson is unavailable, there seems to be no difficulty.

But, if the present multiple appointments are intended to apply to filling a vacancy under paragraph 189 (1) (a), are these appointments for indefinite periods permissible, when subsection 189 (1) provides that "a person

appointed to act during a vacancy shall not continue to act for more than 12 months"?

Instrument No. 186 of 1996 made under subsections 8 (2) and 10 (1) of the *Health Promotion Act 1995* appoints a specified person as a member of the ACT Health Promotion Board for a period of three years and as Deputy Chairperson of the ACT Health Promotion Board.

Appointment re-made in Response to the Committee's Comments.

In its Report No. 7 of 1996 of 4 June 1996 the Committee raised a number of possible problems with Instrument No. 61 of 1996, which dealt with the appointment of the same person as the present determination appoints as member and as Deputy Chairperson of the ACT Health Promotion Board.

The Explanatory Statement appropriately states that the present determination was made because the Committee drew attention to the fact that errors had been made in the appointments, which may have affected the validity of the person's appointments. The Committee looks forward to receiving a reply to the concerns raised in that Report. This is particularly relevant if the person concerned took part in any activities of the Board from the commencement of Determination No. 61 until the commencement of the present determination.

In addition, the Committee raises questions relating to the present instrument.

Subsection 6 (1) and section 7 of the *Subordinate Laws Act 1989* appear to be relevant.

Subsection 6 (1) of the *Subordinate Laws Act 1989* provides as follows:

"6 (1) A subordinate law -

- (a) shall be notified in the *Gazette* ;
- (b) takes effect on the day of notification or, if the law otherwise provides, as so provided; and
- (c) shall be laid before the Legislative Assembly within 15 sitting days after the date of notification."

Section 7 of the *Subordinate Laws Act 1989* provides as follows:

"7. A subordinate law shall not be expressed to take effect from a date before the date of its notification in the *Gazette* where, if the law so took effect -

- (a) the rights of a person (other than the Territory or a Territory authority) existing at the date of notification would be affected in a manner prejudicial to that person; or

- (b) liabilities would be imposed on a person (other than the Territory or a Territory authority) in respect of any act or omission before the date of notification;

and where any subordinate law contains a provision in contravention of this subsection, that provision is void and of no effect."

The Committee makes three comments.

First, the Committee notes that the part of the present instrument which appoints the person as a member of the Board provides that the appointment is "for a period of three years commencing on the date of this instrument", which was 21 July 1996. The Committee notes that the appointment was not notified in the *Gazette* until 15 August 1996.

The fact that the notification in the *Gazette* was later than the date when this part of the instrument stated it was to take effect is relevant and the effect of subsection 6 (1) and section 7 of the *Subordinate Laws Act 1989* needs to be considered.

Secondly, the Committee notes that the part of the instrument that appoints the person as Deputy Chairperson was also signed on 21 July 1996 and not notified in the *Gazette* until 15 August 1996.

Here, the provisions of paragraph 6 (1) (b) appear to apply and the appointment would appear to have been effective from 15 August 1996, the date of notification in the *Gazette*.

Both parts of the instrument raise questions about the period from 21 July 1996 to 15 August 1996 and, if the person concerned was involved in any activities of the Board during that period, the effects of that involvement need to be considered.

Thirdly, the Committee notes that the part of the instrument that appoints the person as Deputy Chairperson does not indicate the period of that appointment. The effect of the appointment for an indefinite period needs to be considered.

Determination No. 187 of 1996 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 74 of 1995 and determines the rates of stamp duties payable on securities that are liable for duty in the ACT.

Are the Cross-references Correct?

The Explanatory Statement confirms that the "determination makes no changes to the rate of duty applicable to the sale, purchase or transfer of marketable securities".

The Explanatory Statement states that the purposes of the new determination are to correct a reference to the *Corporations Law* of the Commonwealth and to amend some headings in the determination. There is no mention in the Explanatory Statement concerning any changing of

inaccurate cross-references in making the new determination, so the Committee assumes that those in the revoked determination, Determination No. 74 of 1995, were correct.

The numbering of the clauses in the determination has been changed, because the commencement clause that was in Determination No. 74 of 1995 has been dropped in the present determination. As a result of the changes in numbering, there may be some difficulties with the cross-references in the present determination.

For instance, clause 12, which deals with deemed transfers of land on dealings with unlisted shares, starts off thus:

"For the purposes of paragraphs 9, 10 and 12, ...".

It seems most unlikely that clause 12 would be cross-referring to itself.

There are also cross-references in paragraphs 13 and 14. Those in clause 14 appear to correspond with the relevant cross-references in Determination No. 74 of 1995, but those in clause 13 do not seem to correspond with the relevant cross-references in that revoked determination.

This determination has significant financial consequences for the ACT and the effects of the cross-references are a significant part of the determination. Perhaps a check should be made of the accuracy of the cross-references in clauses 12, 13 and 14.

Determination No. 189 of 1996 made under section 73 of the *Dental Technicians and Dental Prosthetists Registration Act 1988* revokes the existing determinations and determines fees payable under the Act.

A Small Inaccuracy

The Explanatory Statement states that the present determination revokes Determination No. 14 of 1993. In fact, Determination No. 14 of 1993 is a determination made under the *Public Place Names Act 1989*. The determination that should have been referred to is Determination No. 114 of 1993.

There is no problem created by this error, as the present determination does not mention Determination No. 14 of 1993, but has a general revocation clause.



Rosemary Follett, MLA
Chair

September 1996