

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

**REPORT NO. 4 OF 1995**

**17 May 1995**



## 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**

**Mr Paul Osborne, MLA (Chair)**  
**Mr Andrew Whitecross, MLA (Deputy Chair)**  
**Mr Harold Hird, MLA**

**Legal Advisor: Emeritus Professor Douglas Whalan, AM**  
**Secretary: Mr Tom Duncan**  
**Deputy Secretary: Ms Beth Irvin**

## **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.



## LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Standing Committee on Scrutiny of  
Bills and Subordinate Legislation

Mr Greg Cornwell, MLA  
Speaker  
Legislative Assembly  
CANBERRA ACT 2601

Dear Mr Cornwell,

Please find enclosed a copy of Report No. 4 of 1995 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its 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. I seek your approval to print and circulate Report No. 4 of 1995.

Yours sincerely,

Paul Osborne, MLA  
Chair

17 May 1995

Approved  
Greg Cornwell, MLA  
Speaker

17 May 1995

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## BILLS

### Bills - No Comment

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

#### **Director of Public Prosecutions (Amendment) Bill 1995**

This Bill provides that the Director of Public Prosecutions may comment on matters concerned with the Office and that the Director, members of staff of the Office, persons acting under direction and persons who have been in those positions are given legal protection provided they act in good faith.

#### **Electoral (Amendment) Bill 1995**

This Bill prohibits canvassing for votes and dissemination of electoral matter within 100 metres of a polling place during polling.

#### **Trustee (Amendment) Bill 1995**

This Bill adds ACT credit unions to the list of investments in which a trustee may invest trust monies and updates the law relating to the deposit of monies with building societies.

### Bills - Comment

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

#### **Crimes (Amendment) Bill 1995**

This Bill provides that a person may be convicted if an element of an offence takes place within the ACT, abolishes the principle that, if an injury results in death later than a year and a day after the injury, there is no criminal responsibility, varies the age limits relating to sexual offences against young persons and makes some technical amendments that modernise references in the Act.

#### Territorial Application of the Criminal Law of the Territory - Balance of Proof and Retrospectivity

Clause 4 of the bill inserts new section 3A to provide that an offence against ACT law is committed if either an element of the offence occurs within the ACT or the alleged perpetrator of the offence is in the Territory at the time of the offence.

The explanatory memorandum gives this illustration of the present difficulties:

“At present ... Territory courts can convict a person of a murder only if the prosecution can prove that death or the act causing the death occurred within the Territory's borders. Even though there is clear evidence that the accused committed the murder it may be very difficult to obtain a conviction, for example, where the body is found on or near the Territory border but there is no evidence as to which jurisdiction the relevant act or death occurred in.”

The section is not limited to offences of murder. Indeed, in these days of enhanced communications and technology, the change could affect many offences.

The Committee makes two comments on the new section.

First, subsection 3A(4) provides that, if the accused disputes the existence of the connection with the Territory and if the court or the jury in a jury trial is:

“satisfied on the balance of probabilities that the necessary territorial nexus does not exist ... the charge is to be dismissed.” (Emphasis added.)

This is a departure from the normal criminal burden of proof that proof must be beyond reasonable doubt. However, in the present instance, the use of the balance of probabilities test will operate to the advantage of the accused.

Secondly, subsection 3A(8) has a substantial element of retrospectivity.

Section 3A is to apply to offences whether they are “committed before or after the commencement of this section”.

There are three exceptions. These are where:

- the law of the offence makes the place of the commission an element of the offence;
- the law of the offence is a law of extraterritorial operation and excludes the requirement for a territorial nexus; and
- proceedings are already pending at the commencement of the section.

In contrast to this substantial element of retrospectivity in section 3A, the new section 11 (inserted by clause 6), which abolishes the “death within a year and a day after an injury” rule, specifically provides that the section “does not apply in respect of an injury received before the commencement of this section”.

### **Education (Amendment) Bill 1995**

This Bill provides for the establishment of a Board of Review to review decisions regarding the suspension, compulsory transfer, exclusion or expulsion of students attending a school in the ACT.

### A Small Clarification may be Appropriate

Where a Board of Review sets aside a decision, subclause 30F(5) provides that the Board of Review:

“may remit the matter for reconsideration in accordance with any directions or recommendations of the Board.”.

There is also a mention of a matter being “remitted for reconsideration” in paragraph 30N(1)(c) which deals with publication of decisions.

In his presentation speech Mr Moore makes it clear that the intention is that the matter is to be remitted back for reconsideration by the school. Perhaps it may be appropriate to remove any possible ambiguity by stating this in the clauses.

### **Infants’ Custody and Settlements (Repeal) Bill 1995**

This Bill repeals the *Infants’ Custody and Settlements Act 1956*.

#### Are All Aspects Of The Repealed Act Redundant?

The *Infants’ Custody and Settlements Act 1956* dealt with custody and maintenance of infants, consents to marriage settlements of infants, the terms of, and trustees for, damages recovered on behalf of infants and the property of infants.

The presentation speech states that:

“the law relating to custody, guardianship and access to children can be said to be governed by the *Family Law Act 1975*. The *Infants’ Custody and Settlements Act 1956* is therefore redundant.”.

No mention is made in the speech or the explanatory memorandum of the other aspects of the Act. The Committee queries whether the other aspects are also redundant.

### **Periodic Detention Bill 1995**

This Bill provides for periodic detention as a sentencing option.

#### Are There Possibly Overlapping Amendments?

It may be appropriate for a check to be made to see if there is a possibility of an overlap occurring in the *Coroners Act 1956* because of amendments made to that Act by the *Intoxicated Persons (Consequential Amendments) Act 1994* and those proposed in the present Bill.

Section 2 of the *Coroners Act 1956* includes a definition of “custodial officer”. As it stood after the commencement of the *Coroners (Amendment) Act (No. 2) 1994* it read as follows:



“ ‘custodial officer’ means -

- (a) a member of the police force;
- (b) a person appointed under section 6 or 6A of the *Remand Centres Act 1976*;
- (c) an authorised officer or a supervisor within the meaning of the *Supervision of Offenders (Community Service Orders) Act 1985*;
- (d) the Director of Mental Health Services, or a Mental Health Officer appointed under section 12 of the *Mental Health Act 1983*;
- (e) the Director of Family Services, or an officer appointed by the Director to be an officer for the purposes of the *Children's Services Act 1986*; or
- (f) the Sheriff, a Deputy Sheriff, or a person appointed to assist the Sheriff, under the *Supreme Court Act 1933*”.

Paragraph 61(a), (b) and (c) of the present Bill would add a “manager of a detention centre” or a “custodial officer” under the Bill to this definition in the *Coroners Act 1956*. It does so by removing the “or” at the end of paragraph (e), by adding an “or” at the end of paragraph (f) and then adding the following paragraph:

- “(g) the manager of a detention centre or a custodial officer as provided for by section 36 of the *Periodic Detention Act 1995*”.

However, the Committee notes that the *Intoxicated Persons (Consequential Amendments) Act 1994* also added to the definition of “custodial officer” in the *Coroners Act 1956*. It also did so by removing the “or” at the end of paragraph (e), by adding an “or” at the end of paragraph (f) and then adding the following paragraph:

- “(g) a carer within the meaning of the definition of the *Intoxicated Persons (Care and Protection) Act 1994*”.

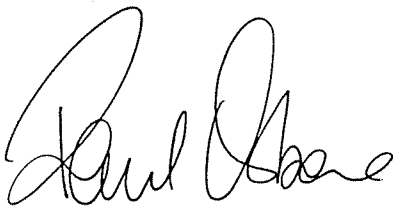
The Committee has not seen a reprint of the *Coroners Act 1956* as renumbered by the *Coroners (Amendment) Act (No. 2) 1994* or the most recent *Gazettes*, so has not covered all possibilities. But these amendments seem to raise the possibility of an overlap.

The main provisions of the *Intoxicated Persons (Consequential Amendments) Act 1994* were to commence when section 3 of the *Intoxicated Persons (Care and Protection) Act 1994* commenced. Section 3 was to commence on the earlier of “a day fixed by the Minister by notice in the *Gazette*” or on the first day after the expiry of 6 months from notification of the Act in the *Gazette*. The latter would give a commencement date of 16 June 1995.

If, in fact, there has been a ministerial *Gazette* notice, then the amendments made by the *Intoxicated Persons (Consequential Amendments) Act 1994* will have become effective and the amendments being made by the present Bill will need to be recast to avoid an overlap. This is also the case, if no ministerial *Gazette* notice is made before 16 June 1995 and the *Intoxicated Persons (Consequential Amendments) Act 1994* amendments commenced automatically on that date and the present Bill has not yet become an operative law.

On the other hand, if the present Bill were to be passed and commenced before the *Intoxicated Persons (Consequential Amendments) Act 1994* provisions have commenced, the amendments made to the *Coroners Act 1956* by the *Intoxicated Persons (Consequential Amendments) Act 1994* would need to be changed to remove the overlap.

In short, it appears that there may be an overlap between the amendments being made to the *Coroners Act 1956* by the present Bill and those that have already been made to that Act by the *Intoxicated Persons (Consequential Amendments) Act 1994*. It would be appropriate for a check to be made.

A handwritten signature in cursive script, appearing to read 'Paul Osborne'.

Paul Osborne, MLA  
Chair

17 May 1995