

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

REPORT NO. 6 OF 1994

28 April 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

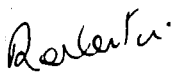
Mrs E. Grassby, MLA (Chairperson)
Mr G. Humphries, MLA (Deputy Chairperson)
Ms H. Szuty, MLA

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.

Ms Roberta McRae, OAM, MLA
Speaker
Legislative Assembly
CANBERRA ACT 2601


Dear Ms McRae,

Please find enclosed a copy of Report No. 6 of 1994 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. Accordingly, I seek your approval to print and circulate Report No. 6 of 1994.

Yours sincerely



Ellnor Grassby, MLA
Chairperson

28 April 1994



Approved
Roberta McRae, OAM, MLA
Speaker

28 April 1994

BILLS

Bills Upon Which No Comment is Offered

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

Air Pollution (Amendment) Bill 1994

This Bill amends the principal Act to take account of the fact that the testing of solid fuel-burning appliances is to be streamlined by the process passing through a clearing house for all certifications.

Evidence (Closed-Circuit Television) (Amendment) Bill 1994

This Bill provides that a child (other than a child who is accused of a criminal offence) shall, in the absence of an order made on specified grounds, give evidence using closed-circuit television where those facilities are available.

Financial Agreement Bill 1994

This Bill approves a new financial agreement between the Commonwealth and the States and Territories and provides for formal membership of the Loan Council for the Australian Capital Territory and the Northern Territory.

Government Contractual Debts (Interest) Bill 1994

This Bill provides for the payment of interest on certain contractual debts when they become overdue for payment.

Health (Amendment) Bill 1994

This bill amends the principal Act to include, as footnotes, the Explanatory Notes contained in the Commonwealth *Medicare Agreements Act 1992*, provides a basis for the release of specific confidential information in some circumstances with the consent of the Minister and inserts a regulation-making power.

Native Title Bill 1994

This Bill provides a basis for the Territory to participate in the scheme relating to native title that is set out in the Commonwealth *Native Title Act 1993*.

Payroll Tax (Amendment) Bill 1994

This Bill amends the principal Act to maintain the present position that payroll tax is calculated on the actual value of the fringe benefit to an employee, following amendments to the Commonwealth *Fringe Benefits Tax Assessment Act 1986*.

Bills Upon Which Comment is Offered

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

Domestic Relationships Bill 1994

This Bill provides that the Courts may adjust the property rights of parties living in a domestic relationship other than a legal marriage.

Prejudicial Retrospectivity

Clause 23 provides for the discharge, suspension, variation or revocation of a periodic maintenance order.

Subclause 23(5) provides as follows:

"An order decreasing the amount of a periodic sum payable under an order may be expressed to be retrospective to such date as the court thinks fit."

This provision could operate retrospectively to prejudice existing rights of a person.

Is there an incorrect cross reference?

Paragraph 15(1) (d) makes a reference to subsection 18(2) in relation to orders adjusting interests in property. Perhaps the reference should be to subsection 19(2).

Public Sector Management Bill 1994

This Bill establishes a separate ACT public service.

Preliminary Comments

The Committee makes two preliminary comments.

First, there were some matters in the Bill that could not be fully considered as there were cross references to the *Public Sector Management (Consequential and Transitional Provisions) Act 1994* and the Bill for that Act has not yet been introduced into the Assembly.

Secondly, perhaps the best way to comment on the Bill is to follow it through clause by clause and try to pick up cross references where appropriate.

Clause 22 Contrasted with Clause 249 and Schedule 4 - Modifications of the provisions of the *Occupational Health and Safety Act 1989* in its application to public employees - Self-incrimination

Clause 22 confers on the Commissioner for Public Administration wide-ranging investigative powers, with powers to enter government agency premises, summon people to give evidence and produce documents and also creates offences for failure to comply. However, clause 22(4) gives very strong protection against self-incrimination by providing that the provisions will not "be construed as compelling a person to answer any question which would tend to incriminate a person".

Clause 249 provides that the:

"provisions of the Occupational Health and Safety Act 1989 apply in relation to public employees -

(a) subject to the modifications and adaptations specified in Schedule 4 ... "

One major modification made to the *Occupational Health and Safety Act 1989* by Schedule 4 (on pages 206-212) in its operation relating to public employees is the insertion of "Part IVA - Inquiries and Reports in Relation to Matters affecting Public Employees".

As with the clause 22 provisions here, too, there are wide powers to obtain information and documents and powers to summon witnesses and to punish for failure of a witness to attend or to answer questions. Although Part IVA does provide for the usual protection that a witness is not to be prejudiced in employment where the witness gives evidence at an inquiry (clause 60P), in contrast to the protective provisions of clause 22 there do not appear to be any protection against self-incrimination provisions in Part IVA.

Clause 50 and Many Others - Consistency in Referring to Periods of Time

Many clauses in the Bill refer to periods of time. The following clauses are merely a sample, clauses:

- . 50 (14 days, 28 days, 12 months);
- . 70 (12 months, 6 months, 2 years);
- . 71 (6 months, 12 months, 24 months, 2 years, 2 years and 6 months, 3 years and 6 months);
- . 169 (6 weeks, 52 weeks);
- . 170 (12 weeks; 12 months);
- . 174 (7 days, 21 days);
- . 181 (7 days, 14 days);
- . 215 (2 years, 5 years);
- . 221 (4 weeks, 2 weeks);
- . 240 (1 year).

The Committee picked up two instances of possible lack of consistency merely as illustrations.

First, in clause 50 there is a reference to removal of the Clerk of the Assembly for absence from duty "for 14 consecutive days" without permission. In clause 221 there is a reference to forfeiture of office by an officer for absence without permission "for a continuous period of not less than 4 weeks". Would "2 weeks" in the first instance or, alternatively, "28 days" in the second instance have made the provisions more consistent?

Secondly, in the same clause 221 there are references to serving notices on the officer requiring a return to duty or an explanation for the absence "within a period of 2 weeks" and deeming the person to have retired "on the day following the expiration of that period of 2 weeks" if there is neither a return to duty or an explanation. In possible contrast, clauses 227 and 233 require certain things to be done "[w]ithin 14 days".

In all of the clauses mentioned (and the many other illustrations not given), the meaning appears to be clear. No comment is made on the appropriateness of the particular lengths of time as that is a policy issue, but perhaps a check could be made to see if there is consistent use of the description of periods of time throughout the Bill.

In passing, it is noted that the words "and 6 months after the date of the appointment; and" in subparagraph 71(2)(d)(ii) have been accidentally printed in italics.

Clause 63 - Is the Meaning Clear?

Subclause 63 (4) sets out circumstances in which an appeal "become[s] inoperative". Paragraph 63(4)(e) provides that:

"an appeal shall be taken to become inoperative if - ...

- (e) the promotion against which the appeal was made lapses under management standards made under section 91."

Management standards are not "made under section 91", but are made, numbered, notified in the Territory *Gazette* and published under clauses 251-253.

Subclause 91(1) provides as follows:

"A promotion or transfer of an officer to an office takes effect as provided by the management standards."

Is it intended that subclauses 64(3) and 91(1) are to interact to provide that an appointment is to lapse if the effect would be to breach the management standards? If so, perhaps a check needs to be made to see if the provisions effect their objective.

Clauses 83, 85, and 104 - Consistency of Tiny Matters

Clause 83 deals with transfers and promotions and subclause 83(4) provides that where two or more officers apply for promotion or transfer the Chief Executive is to:

"select from those officers the officer who is, in the opinion of the Chief Executive, the more or most efficient."

Clause 85 deals with the position where "an appeal is, or appeals are, made under section 84" and clause 104 deals with the position where "an appeal is, or appeals are, lodged under section 102".

In subclauses 85(1), (2) and (3) and in subclauses 104(1), (2) and (3) the Promotions Appeal Committees are to form "an opinion as to the most efficient of the officers concerned".

There are no problems with the meaning of the provisions. But there seem to be some very minor drafting inconsistencies in relation to the use of the phrases "the more or most efficient" and "the most efficient of the officers concerned" and the words "made" and "lodged".

Clauses 135, 143 and 144 - Mental Incapacity and Consent

Clause 135 provides for retirement of an officer on grounds of physical or mental incapacity "with the consent of the officer".

The phrase "catch 22" is much misused, but is there a true catch 22 problem here? (Or perhaps it is a true reverse catch 22 problem.) Could there possibly be a problem where an officer gives consent to retirement on the basis of mental incapacity and later challenges the decision on the basis that he or she did not have the mental capacity to give such a consent?

Similar difficulties could possibly arise with clauses 143 (dealing with action by a Chief Executive to reduce an officer's classification or retire an officer from the Service) and 144 (dealing with action by the Commissioner to reduce an officer's classification).

Clauses 136 and 146 - Declaration Effective on Day of Making Rather Than Day of Receipt by Officer

Clauses 136 and 146 provide that the Commissioner or a Chief Executive respectively, relying on the recommendation of an authorised medical officer, may declare an officer to be an unattached officer.

The officer's office becomes vacant on the day of the declaration and not on the day when a copy of the instrument of declaration is given to the officer. Certainly the provisions require a copy to be given to the officer "as soon as practicable", but perhaps the provisions could be unfair to an officer, if there was a delay in giving him or her a copy of the declaration?

Clauses 181, 208, 209 and 211 - "Convenor" and "Chairperson" - Should There be Consistency?

Clause 181 deals with disciplinary action in relation to Chief Executives and subclause 181(6) provides that:

"a Board of Inquiry shall consist of a Convenor and 2 other members ...".

Clause 211 deals with the protection of members of Boards of Inquiry and subclause 211(1) provides that:

"No action or proceeding, civil or criminal, lies against a person who is a Chairperson or member of a Board of Inquiry for or in respect of any act or thing done in good faith by him or her in his or her capacity as Chairperson or member."

There are also references to "Chairperson" of a Board of Inquiry in clauses 208 and 209.

Should the provisions perhaps be made consistent?

Clause 192 - Is there a Wrong Cross Reference?

Clause 192 deals with the consequences of the nullification of a conviction. Subclause 192(3) provides that where:

"after an officer has been transferred to another office under subsection 159(1) or 191(4) by reason of his or her having been found by a court to have committed a criminal offence, the finding of the court is nullified, the officer may apply to the Commissioner, in writing, for transfer to an appropriate office."

Clause 159 deals with the grant of extended leave or pay in lieu of leave for officers not entitled to long service leave and does not appear to be relevant to the position in subclause 192(3).

However, the Committee notes that clause 189 deals with the suspension of an officer or a direction to an officer to perform other duties where, among other possibilities, "an officer has been charged with having committed a criminal offence". Clause 189 does appear to be relevant to subclause 192(3).

Thus, perhaps it would be appropriate to substitute subclause 189(1) for subclause 159(1) in subclause 192(3).

Schedule 3 Modifications of the Commonwealth Merit Protection (Australian Government Employees) Act 1984 - A Possible tiny Error

Section 235 and Schedule 3 provide for modifications of the Commonwealth *Merit Protection (Australian Government Employees) Act 1984* in its application to employees under the present Bill.

Subsection 59(4) of the Act is modified by omitting paragraphs (a) to (d) and inserting new paragraphs (a) and (b).

Paragraph 59(4)(c) of the Commonwealth Act provides that where the Attorney-General gives a certificate that disclosure of specified documents or records:

"would be contrary to the public interest: ...

- (c) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; ... (Note the semi-colon here.)

the Director is not entitled to require a person to furnish any information concerning the matter, to answer questions concerning the matter or to produce those documents or records to the Director."

The modified equivalent is paragraph (b) and it is as follows (on page 199 of the Bill):

"by reason that it would involve the disclosure of deliberations or decisions of the Executive or a committee of the Executive." (Note the full stop here.)

Thus there is a tiny misprint in the Bill. As the modified paragraph (b) also leads directly on to the passage relating to the Director, there should not be a full stop at the end of the new paragraph (b) but probably a semi-colon, as appears in the unmodified paragraph 59(4)(c) of the Commonwealth Act.

Clause 249 and Schedule 4 Modifications of the Provisions of the Occupational Health and Safety Act 1989 in its Application to Public Employees - Are There Some Mistakes?

Clause 249 and Schedule 4 of the Bill modify the provisions of the *Occupational Health and Safety Act 1989* as it applies to public employees.

In Schedule 4 (on page 199 of the Bill) the following modification appears:

"Subsection 5(1) (definition of "designated work group") -

- (a) Omit from paragraph (a) "subsection 37(1) or (2)", substitute "subsection 37 (4A)".
- (b) Omit from paragraph (b) all the words after "subsection 37(4)", substitute "subsection 37(4B)".

The original definition of "designated work group" in subsection 5(1) that is being modified presently reads as follows:

"'designated work group' means -

- (a) a group of employees established as a designated work group by an employer under subsection 37(1) or (2) or by the Registrar under subsection 38(1) or (2); and
- (b) such a group as varied by an employer under subsection 37(4) or by the Registrar under subsection 38(3);

and, in relation to an employer, means such a group that consists entirely of employees of the employer;"

Later in Schedule 4 of the present Bill (on pages 200-201) subsections 37(1), (2), (3) and (4) of the Act are omitted and new subsections (1), (2), (3), (4), (4A) and (4B) are inserted.

Under the unmodified Act "designated work groups" are set up under subsections 37(1) and (2) and they are varied under subsection 37(4). However, under the modifications made by the present Schedule 4 "designated work groups" are set up under the new subsection 37(4A) and they are varied under the new subsection 37(4B).

Thus, incorporating the modifications as they are at present, the modified definition of "designated work group" would appear to read as follows:

"designated work group' means -

- (a) a group of employees established as a designated work group by an employer under subsection 37(4A) or by the Registrar under subsection 38(1) or (2); and
- (b) such a group as varied by an employer under subsection 37(4) subsection 37(4B)

and, in relation to an employer, means such a group that consists entirely of employees of the employer;"

The Committee makes the following comments on this modified definition.

The Committee deals first with paragraph (a) and makes two points.

First, paragraph (a) does correctly identify subsection 37(4A), as inserted by the present modifications (on page 201), as the subsection under which designated work groups will be established under the modified Act.

Secondly, it is a puzzle as to why the reference to action by the Registrar under subsections 38(1) and (2) are left in paragraph (a), as section 38 is omitted by the modifications (on page 202). The retention does no harm as the words appear to be surplusage now that section 38 will be omitted, but it may cause confusion.

The Committee now makes three points about paragraph (b).

First, in paragraph (b) the words referring to action by the Registrar have been omitted by the present Schedule amendment. It is suggested that this is correct given the disappearance of section 38.

Secondly, paragraph (b) does correctly identify subsection 37(4B), as inserted by the present modifications (on page 201), as the subsection under which designated work groups will be varied under the modified Act.

Finally, it is a puzzle as to why the reference to "subsection 37(4)" is left in paragraph (b), as the new subsection 37(4) refers to the procedures to be adopted where there is disagreement in the course of consultations about the setting up of, or making variations to, designated work groups. It seems to be of doubtful relevance in the present context. However, if it is decided that the new subsection 37(4) is relevant, the word "or" would need to be inserted after it. But it is suggested that it is more likely that "subsection 37(4)" should also be omitted as well as the words that have already been omitted from paragraph (b) of the unmodified Act.



Elinor Grassby, MLA
Chairperson

28 April 1994