



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON
LEGAL AFFAIRS
(PERFORMING THE DUTIES OF A SCRUTINY
OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 37

2 SEPTEMBER 2003

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) 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) report to the Assembly on these or any related matter and 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, publication and circulation.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)
ASSISTANT SECRETARY: MS CELIA HARSDORF
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)

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 on them.

Appropriation Bill 2002-2004 (No 2)

This is a Bill to provide for an appropriation of moneys for the financial year 2002-2004.

Financial Management Amendment Bill 2003 (No 2)

This bill would amend the *Financial Management Act 1996* to the effect of requiring a budget for the Territory to be framed in accord with certain principles of financial management.

Fire, Emergency Services and Ambulance Authorities Bill 2003

This is a bill for an Act to establish independent authorities to supervise bushfire-fighting services (including the rural firefighting service), the ACT emergency service, the fire brigade and the ambulance service.

Government Procurement (Principles) Guideline Amendment Bill 2003

This bill would amend the *Government Procurement (Principles) Guideline 2002 (No 2)* DI2002-58 to establish a principle about procurement of computer software.

Health Amendment Bill 2002

This bill would amend the Health Act 1993 to insert a new Part 6A to regulate visiting medical officer service contracts.

Long Service Leave Legislation Amendment Bill 2003

This bill would amend the *Long Service Leave Act 1976*, the *Long Service Leave (Building and Construction Industry) Act 1981*, and the *Long Service Leave (Contract Cleaning Industry) Act 1999*, to make some amendments to the regime of entitlements to long service leave. A major change will be that a person's leave will be extended by the number of public holidays that occurred within the period covered by their leave.

Bills - Comment

The Committee has examined the following Bills and offers these comments on them.

Dangerous Goods Legislation Amendment Bill 2003

This bill would amend the *Dangerous Goods Act 1975* and the *Dangerous Goods Regulations 1978*. In general, these laws regulate the sale and use of fireworks.

Para 2(c)(i) – undue trespass on rights and liberties

Strict liability offences

A number of the offences that would be created by the Bill would be ones of strict liability. The Committee notes that there is no Explanatory Statement, and thus no explanation of why it is desirable that any particular offence be one of strict liability, nor of whether consideration was given to providing for a reasonable excuse defence.

The Committee has been concerned for some time about the number of proposals in bills that a proposed offence be one of strict liability. In Report No. 24 of 28 January 2003, the Committee offered some general comments in relation to this matter. In those comments, the Committee explained the operation of section 36 of the *Criminal Code 2002* in conjunction with a provision that an offence be one of strict liability. It pointed out that a defendant may argue that he or she was under a mistaken but reasonable belief as to whether certain facts existed. On the other hand, a defendant cannot argue that they took reasonable steps to obey the law.

It was also pointed out that a particular bill might in addition to creating an offence of strict liability make provision in relation to that offence for a defence of having taken reasonable steps to obey the law. Its comments in Report No. 24 were addressed to the Assembly, but of course, the Committee's hope is that the drafters of bills will address the issues of whether an offence should be one of strict liability, and if so, whether specific provision should be made for a defence of having taken reasonable steps to obey the law.

This general issue is highlighted by provisions of the bill under consideration.

Proposed new section 26E. Subsections 26E(1) and (3) provide:

- (1) A person commits an offence if the person uses a firework, or an exempt firework, in a way that is likely to—
 - (a) endanger the health or safety of, or cause distress or suffering to, a person or animal; or
 - (b) damage property.
 Maximum penalty: 100 penalty units, imprisonment for 1 year or both.
- ...
- (3) An offence against this section is a strict liability offence.

The effect of making this an offence of strictly liability might well be to ensure that where a person proposes to use a firework, he or she will be very careful to ensure that that use does not produce a result of a kind described in paragraphs (a) or (b) of sub-section 26E(1). It might be thought that this policy objective is best obtained by not permitting a defence that the person took reasonable steps to avoid producing one or other of these results. On the other hand, it may be that this issue was not addressed.

In contrast to proposed new section 26E, the Committee notes that proposed new regulation 41 of the *Dangerous Goods Regulations 1978* creates an offence of strict liability, but then goes on to provide for a defence based on the person's having taken reasonable care in relation to various matters. Sub-regulation 41(1) provides that a person must not manufacture, import into the ACT, or sell particular kinds of fireworks. By sub-regulation 41(4) the offence created is one of strict liability. It may be seen that the objective here is to impose on those who manufacture or import fireworks a heavy responsibility to ensure compliance with sub-regulation 41(1). However, sub-regulation 41(3) permits the offender to raise as a defence that they took reasonable care to avoid contravention (and that one or other of two other circumstances occurred).

It is not clear to the Committee why there should be a reasonable excuse defence available in relation to regulation 41, whereas it is not available in relation to section 26E.

The Committee draws these matters to the attention of the Assembly.

Inquiries Amendment Bill 2003

This is a Bill to amend the *Inquiries Act 1991*. A Board of Inquiry conducts an independent inquiry into an issue of significant public importance. These amendments follow a review of the Act subsequent to the Board of Inquiry into Disability Services conducted by The Honourable Mr John Gallop AM.

Para 2(c)(i) – undue trespass on rights and liberties

The Committee has a concern about the potential ramifications of proposed new subsection 38(4): “A person is not civilly liable for a comment made honestly in relation to a board’s report of an inquiry”. On its face, this would appear to afford a very wide immunity for defamatory statements, with consequent effects on the reputations of persons. The phrase “in relation to” is construed very widely by the courts. The Explanatory Statement does not explain why this provision is desirable, or what its effect might be.

The Committee draws this to the attention of the Assembly.

Royal Commissions Amendment Bill 2003

This is a Bill to amend the *Royal Commissions Act 1991*, and is the result of a review of the Act subsequent to the Board of Inquiry into Disability Services conducted by The Honourable Mr John Gallop AM.

Para 2(c)(i) – undue trespass on rights and liberties

Proposed new subsection 49(4) of the Act parallels proposed new subsection 38(4) of the *Inquiries Act 1991*. See the comment made in relation to this provision (above).

Victims of Crime (Financial Assistance) Amendment Bill 2003

This bill would amend the to *Victims of Crime (Financial Assistance) Act 1983* and the *Victims of Crime (Financial Assistance) Regulations 1998*. This Bill amends the Act by removing awards in respect of pain and suffering for police officers, ambulance officers and firefighters, and awards in respect of pain and suffering for victims of sexual offences are also removed to place all victims of crime on an equal footing. The Act will no longer make it mandatory for a victim to report the relevant crime to the police before being eligible to claim financial assistance and the *Victims of Crime (Financial Assistance) Regulations 1998* will be amended to increase the legal fee cap of \$650 to \$800. It will not be necessary that a victim report a violent crime to the police before financial assistance may be claimed.

Para 2(c)(i) – undue trespass on rights and liberties

The Committee notes and commends the provision made in the transitional provisions of the Bill to protect the substantive rights of persons whose injury occurred before the commencement of the Act.

INTERSTATE AGREEMENTS

The Committee has been made aware of some interstate agreements that have been forwarded to other committees, but not to this Committee. The Committee's reading of the relevant section of the *Administration (Interstate Agreements) Act 1997* is that all interstate agreements should be forwarded to this Committee.

The Committee will be writing to the Chief Minister to seek clarification on this matter.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments from:

- The Attorney-General, undated, in relation to comments in Scrutiny Report No. 31 regarding Disallowable Instrument DI2003-26 - being the Public Trustee – Appointments to the Public Trustee Investment Board 2003 (No 1) made under the *Public Trustee Act 1985*.
- The Minister for Planning, dated 20 August 2003, in relation to comments in Scrutiny Report No. 35 regarding Disallowable Instruments DI2003 – 135, 136, 137, 138, 139, 140 and 141 – Appointments of members to the Planning and Land Council and Disallowable Instruments DI2003 – 142, 143, 144, 145 and 146 – Appointments of members to the Land Agency Board, made under the *Planning and Land Act 2002*.

Copies of the responses are attached.

The Committee thanks the Attorney-General and the Minister for Planning for their helpful responses.

Bill Stefaniak MLA
Chair


September 2003

**Jon Stanhope** MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR COMMUNITY AFFAIRSMEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak 

I refer to your comments in Scrutiny Report No 31 regarding the Disallowable Instrument DI2003-26 being the Public Trustee – Appointment to the Public Trustee Investment Board 2003 (No1) made under section 48 of the *Public Trustee Act 1985* that appoints specific persons to be members of the Public Trustee Investment Board.

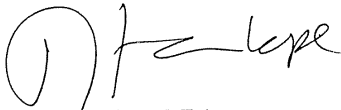
The instrument to which you refer is disallowable. It allows for members of the community to be appointed to the Public Trustee Investment Board. There are no appointments for public servants made under this instrument.

The appointment of members to the Public Trustee Investment Board commenced on 3 March 2003 and end on 2 March 2006.

The disallowable instruments to which you refer were clarified by Disallowable Instrument DI2003-189 on 7 July 2003.

Thank you for bringing this matter to my attention.

Yours sincerely



Jon Stanhope MLA
Attorney General

ACT LEGISLATIVE ASSEMBLY

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Simon Corbell MLA

MINISTER FOR PLANNING MINISTER FOR HEALTH

MEMBER FOR MOLONGLO

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Dear Mr Stefaniak

I refer to the Report No.35 of 2003 of the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee). The attached information is provided in response to the matters raised by the Committee in relation to appointments under the Planning and Land Act 2002.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Corbell'.

Simon Corbell MLA
Minister for Planning

10.1.03

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SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE

REPORT No.35 of 2003

**RESPONSES TO ISSUES re
APPOINTMENTS TO PLANNING AND LAND COUNCIL AND
LAND AGENCY BOARD**

Current status of instruments of appointment

The current instruments of appointment to the Planning and Land Council are DI2003 – 135, 136, 137, 138, 139, 140 and 141. All others are revoked.

The current instruments of appointment to the Land Agency Board are DI2003 – 142, 143, 144, 145 and 146. All others are revoked.

Appointments made prior to commencement of Planning and Land Act 2002

The current instruments all state that section 81(2) of the *Legislation Act 2001* applies. This enables the appointments to commence before the commencement of the *Planning and Land Act 2002*.

Appointments longer than 4 years stipulated by the Act

The purpose of commencing appointments of the Council and the Board was that those bodies would then be capable of dealing with appointments of the Chief Planning Executive and the chief executive officer of the Land Development Agency. In particular, it was necessary to have a Chief Planning Executive in place on 1 July 2003, as that person constitutes the Planning and Land Authority.

The appointment of Council and Board members was originally intended to run from 1 July 2003 for a period of either 2 or 4 years. The appointment of some members for more than the permitted 4 years, which was the result of an earlier commencement date, was an administrative oversight.

Section 43 of the *Legislation Act 2001* provides for the instruments to operate to the full extent of, but not to exceed, the power given by the Planning and Land Act. The appointments, as made, are therefore valid for four years only (for appointments that were made for four years).

Are persons appointed public servants? Are these disallowable instruments?

The persons appointed are not employed under the provisions of the *Public Sector Management Act 1994*. All appointments are disallowable.