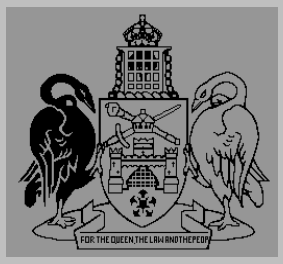
Legislative Assembly for the Australian Capital Territory



Standing Committee on Justice and Community Safety

(incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

SCRUTINY REPORT NO. 15 OF 2000

5 December 2000

Terms of reference

(1) A Standing Committee on Justice and Community Safety be appointed (incorporating the duties of a Scrutiny of Bills and Subordinate Legislation Committee).

(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) the 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) the explanatory memorandum meets the technical or stylistic standards expected by the Committee.

(3) The Committee shall consist of four 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 John Hargreaves, MLA (Deputy Chair)
Mr Trevor Kaine, MLA
Mr Harold Hird, MLA

Legal Adviser: Mr Peter Bayne
Acting Secretary: Mr Mark McRae
(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 - No Comment

The Committee has examined the following Bills and offers no comments on them.

Auditor-General Amendment Bill 2000

This Bill would amend the *Auditor-General Act 1996* to make new provision for the nature of and dealing with reports by the Auditor-General to the Legislative Assembly.

Health Legislation Amendment Bill 2000

This is a Bill for an Act to amend the *Dentists Act 1931*, and the *Health Professions Boards (Procedures) Act 1981* to enable the appointment of a legal practitioner to the Dental Board of the Territory.

Inquiries Amendment Bill 2000

This Bill would amend the *Inquiries Act 1991* to insert a new section 5A in the Act, the effect of which would be to require the Executive to appoint a board of inquiry to inquire into a stated matter upon the Legislative Assembly passing a resolution calling for such an inquiry. There is also provision for the tabling of reports by an inquiry instituted n this manner.

Land (Planning and Environment) Legislation Amendment Bill 2000

This Bill would amend regulation 24 of the *Land (Planning and Environment) Regulations 1992* to the effect of modifying the operation of section 276 of the *Land (Planning and Environment) Act 1991*.

Land (Planning and Environment) Amendment Bill 2000 (No 5)

This Bill would amend provisions of the *Land (Planning and Environment) Act 1991* governing the power of the Executive may waive a Change of Use Charge. The general discretions to remit might be made by a determination that is an instrument disallowable by the Legislative Assembly.

Legislation (Access and Operation) (Consequential Provisions) Bill 2000

This is a Bill for an Act to make provision for matters that would be consequential upon the enactment into law of the Legislation (Access and Operation) Bill 2000.

Public Sector Legislation Amendment Bill 2000

This is a Bill for an Act to remove sunset clauses in various Acts, to the effect that members of the public service of the Territory retain rights of review in relation to decisions affecting their employment until the scheme that would be effected by the Public Sector Management Amendment Bill 2000 comes into operation.

Public Sector Management Amendment Bill 2000

This Bill would amend the *Public Sector Management Act 1994* to make provision for a new framework for discipline, inefficiency and review of decisions affecting employment in the ACT Public Service.

Statute Law Amendment Bill 2000 (No 2)

This is a Bill for an Act to make technical and housekeeping amendments to a number of the laws of the Territory.

Unit Titles Bill 2000

This is a Bill for an Act to repeal the *Unit Titles Act 1970* and the *Unit Titles Regulations 1994*, and to make new provision for the subdivision of land by unit plans and the management of unit plans by owners corporations.

Unit Titles (Consequential Amendments) Bill 2000

This Bill would amend the *Land Titles (Unit Titles) Act 1970*, and so me other laws, to accommodate changes in the law that would be made by the Unit Titles Bill 2000 were it to be enacted into law.

Bills - Comment

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

Court Security Bill 2000

This is a Bill for an Act to deal with the security of court premises.

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

The Bill states in subclause 5(1) that "[a] person has a right to enter and remain in an area of court premises that is open to the public". Such a right would exist apart from its statement in a statute. Being a public place, a person would have right to enter and remain in it. In *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206, in an

analogous context, Higgins J referred to "the common law rights of the King's subjects to pass through the highways". He said further that "this is a common law right; and that any interference with a common law right cannot be justified except by statute - by express words or by necessary implication". This latter statement indicates how the court recognised such common law rights. Where a statute dealt with a right, the courts interpreted the law in a way that, so far as the language of the statute allowed, did not restrict that right.

The courts have attached great weight to the right of a person to enter and remain in a court. This right is the essential underpinning to the notion that the administration of justice by courts should be 'in the open'.

Against this background, it is critical that the Legislative Assembly scrutinise the ways in which this bill restricts the common law rights – and the right in clause 5. These comments are designed to assist in that scrutiny.

The right in clause 5 is subject to a number of controls. The Committee does not see any problem with paragraph 5(1)(a), which requires a person to comply with orders made by a judge or magistrate.

But paragraph 5(1)(b), which requires a person to comply with "all requirements made by a security officer under this Act", does raise a number of problems.

[Given that this is a provision that restricts an important right, the Committee suggests that the effect of paragraph 5(1)(b) would be clearer if it read "all requirements made under this Act by a security officer". In its present form, it may be read as covering any requirement made by a security officer, whether or not specifically stated in the Bill. The words "under this Act" might be read as attaching only to the mode of appointment of a security officer. It is unlikely that a court would so read this provision, but, given that this law will be administered by security officers (as to whom, see below), it is important that it be very clear on the question of their powers.]

The scope of the powers of a security officer to make a requirement

Clause 8

By clause 8, a security officer may require a person "entering or on court premises" to

- State their name and address;
- Their reason for being on the premises; and
- Provide evidence of their identity.

A failure to meet any such requirement would appear to have the effect that the person's clause 5 "right to enter and remain in an area of court premises that is open to the public" ceases. Failure to comply is moreover, an offence under subclause 8(3). Contravention would also justify a security officer making a requirement that the person not enter, or leave the premises, and a failure to comply is also an offence (clause 14). Force may be employed by a security officer to enforce compliance with such a requirement (subclause 14(6)).

There is a control on the exercise of the power in clause 8 in subclause 8(2). The security officer must believe "on reasonable grounds that it is necessary to make the requirement in the interests of court security".

It is to be noted that a person cannot avoid complying with a requirement of a security officer under this clause 8 by simply leaving the premises. This emerges if subclause 8(3) is compared to subclause 9(4).

Are these powers an undue trespass on rights and liberties?

The common law recognised "the right of the individual to refuse to answer questions put to him by persons in authority": *Rice v Connolly* [1966] 2 QB 414 at 419. This may be regarded as a dimension of the "right to silence", or, more particularly, of the privilege against self-incrimination; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at paras 8.1 and 8.8.

Today, this right might also be seen as a dimension of a right to privacy, in particular where the person questioned is not suspected of committing a crime.

It is not common to find statutory provision that require a person to give their name and address to an official of the state.

There are statutory provisions that impose on a person an obligation to provide their name and address if a state official believes that the person might be able to assist in inquiries in relation to the commission of an offence. There is a general provision to this effect in section 349V of the *Crimes Act 1900*.

In its report *Criminal Investigation (Report No 2, Interim)* (1975), the Australian Law Reform Commission (ALRC) noted that while "[s]tatutory power to require a person to furnish his name and address exists at present in most jurisdictions only in relation to traffic offences[, it] is nonetheless, a power which policemen need, and exercise in practice": ALRC at para 79. The Commission thus recommended:

> The power to require a person to furnish his name and address, now available only in traffic cases, should be extended to situations where the policeman has reasonable grounds for believing that the person can assist him in relation to an offence which has been, may have been, or may be committed. The police officer should be required to specify the reason for which the person's name and address is sought, and there should be a reciprocal right, in such a situation, for a citizen to demand and receive from the policeman particulars of his own identity: ALRC at para 322.

The Gibbs Committee approved of this general approach; see *Review of Commonwealth Criminal Law* (Fifth Interim Report, June 1991) at para 8.8.

It is also critical to note that the ALRC linked its recommendations to the means it recommended for enforcing safeguards against an excess of the powers of the police. In this respect, it instanced "disciplinary action, the exclusionary rule, and the civil action for false imprisonment": ALRC at para 81, footnote 107, and see too at para 204, and see paras 301-302.

In relation to the police, there is a distinct regime for making of complaints and discipline.

The issues for the Assembly are whether:

- It is necessary and/or desirable that a security officer be empowered to require a person to state their name and address, and provide proof of identity?
- Should any such powers be vested in persons who are not members of the police force (or of the sheriff's office)?
- Should there be restrictions and limitations imposed on the exercise of any such powers? In particular, what use might be made of any record made by a security officer of this information? In what form might it be kept? Who would have access to it?

These last matters are given additional point by reason of the fact, as noted above, that it appears that a person cannot avoid complying with a requirement of a security officer under this clause 8 by simply leaving the premises. This emerges if subclause 8(3) is compared to subclause 9(4).

On the other hand, the making of these judgments must take into account the justifications offered in the Explanatory Memorandum for the need for this Bill. Some of these justifications may be cast in the form of a need to protect the rights of persons other than the person who is made the subject of a requirement by a security officer, such as:

- The right to physical integrity of others who are present on court premises;
- The right of persons to have a fair trial; and
- The right of members of the public generally to have a person charge with an offence be dealt with by the courts (rather than escaping from the court premises).

Clause 9

By clause 9, a security officer may require a person "entering or on court premises" to

- Undergo a screening search or a frisk search, and
- In various ways, allow their personal possessions to be searched.

A security officer may use "necessary" force to conduct a search (subclause 9(5)).

A failure to meet any such requirement would appear to have the effect that the person's clause 5 "right to enter and remain in an area of court premises that is open to the public" ceases. This is backed up by subclause 9(4), which states that a person who does not comply with any such requirement must "immediately … leave the premises". Failure to comply is moreover, an offence under subclause 9(4) - unless the person chooses to leave the premises.

There is a control on the exercise of the power in clause 9 in subclause 9(3). The security officer must believe "on reasonable grounds that it is necessary to make the requirement in the interests of court security for the purpose of detecting firearms, explosives or offensive weapons". In this connection, it should be noted that the definition of offensive weapon is very broad; see in the Dictionary to the Bill. It

includes "anything … capable of being used[,] for causing injury to or incapacitating a person".

There is also a control in subclause 9(2) on the sex of the person making a search.

Are these powers an undue trespass on rights and liberties?

As stated in *Laws of Australia* vol 11 para 119:

> At common law power does not exist for the personal search by police of suspects prior to their being arrested. There is no general power at common law … enabling police to stop and search suspects, either by frisk or more intrusive search, or to seize their property.

This statement applies with more force to persons who are not suspects, such as those who might be able to assist the police in some way.

An unauthorised stopping, detention, or search of a person would constitute one or more forms of tortious or criminal behaviour. To stop a person and restrict their movement may amount to a false imprisonment. A search of a person involving any physical touching would involve a trespass to the person. A taking hold of their possessions, including a search of their baggage, would involve a trespass to property.

It is sensible to speak of a "common law principle of bodily inviolability", as did the majority of the High Court in *Marion's Case* (1992) 175 CLR 218 at 248. Their Honours approved of a view that this principle was allied with, or the basis for, a right to privacy. In relation to powers of search, detention and the like, the common law began from notions of right to property, and to bodily inviolability. There is a link between the latter and the notion of a right to privacy, and it is this right which is nowadays seen as the starting point for an assessment of the desirability of theses kinds of powers. For example, Feldman states that "[s]top and search powers have been described as "a major interference with people's right to privacy, and a relatively minor interference with the right to freedom from physical interference: Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) at 176-177.

The ALRC Report (see above) accepted that there was an informal use of such powers by the police, and it was better that they be regulated. The ALRC concluded that

> the power to search persons and vehicles without warrant should [be available in] the following situations, namely where there are reasonable grounds to suspect that that there may be found (i) an offensive weapon, or (ii) something which is the fruit of a serious crime, the means by which it was committed, or material evidence to prove its commission. By a 'serious' crime we mean, here as elsewhere, one punishable by a sentence of more than six month's imprisonment; ALRC Report at 204.

The ALRC linked its approval of conferring limited powers of stop and search on the police on the ground that an exercise of police power would be subject to police-specific complaint mechanisms, and to discipline within the police force; see ALRC Report at para 204, and see paras 301-302.

The Criminal Justice Commission of Queensland, (CJC), in its *Report On a Review of Police Powers in Queensland, Vol III,* also considered that the exercise of an

emergency power to stop, detain and search a person should be exercised only in relation to a serious crime; see CJC Report at 322-323. The qualification it added was that "[a]ny other specific power concerning offences of less seriousness would need to show (such) extraordinary circumstances as to justify a broader application of the power"; ibid at 319.

The issues for the Assembly are whether

- It is necessary and/or desirable that a security officer be empowered to require a person to undergo a search? If so, what kinds of searches?
- Should any such powers be vested in persons who are not members of the police force (or of the sheriff's office)?
- Should there be restrictions and limitations imposed on the exercise of any such powers? Should a security officer be required to record the fact of making a search? In particular, what use might be made of any record made by a security officer of this information? In what form might it be kept? Who would have access to it?

On the other hand, the making of these judgments needs to take into account the justifications offered in the Explanatory Memorandum for the need for this Bill. Some of these justifications may be cast in the form of a need to protect the rights of persons other than the person who is made the subject of a requirement by a security officer, such as:

- The right to physical integrity of others who are present on court premises;
- The right of persons to have a fair trial; and
- The right of members of the public generally to have a person charge with an offence be dealt with by the courts (rather than escaping from the court premises).

Clause 12

By clause 9, a security officer may require a person "entering or on court premises" with "anything" to leave that thing with the officer if he or she believes "on reasonable grounds that the thing may contain a firearm, explosive or offensive weapon or be use as an offensive weapon".

A failure to meet any such requirement would appear to have the effect that the person's clause 5 "right to enter and remain in an area of court premises that is open to the public" ceases. This is backed up by subclause 12(2), which states that a person who does not comply with any such requirement must "immediately … leave the premises". Failure to comply is moreover, an offence under subclause 12(2) - unless the person chooses to leave the premises.

Contravention would also justify a security officer making a requirement that the person not enter, or leave the premises, and a failure to comply is also an offence (clause 14). Force may be employed by a security officer to enforce compliance with such a requirement (subclause 14(6)).

<u>Are these powers an undue trespass on rights and liberties?</u>

There is much less room for concern about this provision. The Committee draws attention only to the width of the definition of "offensive weapon".

Clause 13

By clause 13, a security officer may require a person "entering or on court premises" to refrain from entering, or to leave, the premises if he or she believes "on reasonable grounds that the person "is behaving unlawfully or in a disorderly or menacing way". This power may not be excised where the person is required to attend the court.

Are these powers an undue trespass on rights and liberties?

There is much less room for concern about this provision, and, indeed, it appears to be a necessary one.

The appointment of a security officers

A members of the police force and a person who is a sheriff's officers will be a security officer. But so too will be any person appointed in writing by the chief executive. By subclause 17(2), the latter need consider only whether the person

- is a registered employee under the industry code (defined in subclause 17(4);
- has been convicted of certain offences; and
- "is capable of competently exercising the functions of a security officer under this Act".

In relation to the first dot point, which in practice may be the most significant limitation, it is to be noted that the power to determine whether it is satisfied is vested in the hands of whoever it is that registers employees under the industry code.

The power of the chief executive in subclause 17(3) to revoke the appointment of a security officer appears to be very limited. It covers the first 2 dot point matters but not the third. That is, an appointment could not be revoked on the ground that the security officer was not competent.

Are these powers an undue trespass on rights and liberties?

The Committee expresses a concern as it has before, that significant state powers are vested in persons who are not members of the police force. The police are members of a body that has its own system for holding its officers accountable. The police are, moreover, accountable through the quite distinct mechanisms under the *Complaints (Australian Federal Police) Act 1981* (Commonwealth). The Committee assumes that members of the sheriff's office are under the control of the courts, and will be accountable in that way.

In contrast, it is not at all clear how security officers who are simply persons registered under the industry code may be held accountable for the way in which they may exercise the powers for control that would be vested in them under the provisions of this proposed law.

The Committee has drawn attention to this general problem in other reports where it has noted that significant powers of law enforcement may be vested in persons who are not members of the police force.

Justice and Community Safety Legislation Amendment Bill 2000

This Bill would amend a number of Acts relating to justice and community safety, and for related purposes.

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

It appears that proposed new section 61A of the *Children and young People Act 1999* (see para [1.1] of Schedule 1 of the Bill) may have a retrospective effect. It would, however, have a beneficial effect, and is not open to objection on the basis that it may be retrospective.

The Explanatory Memorandum

The Committee commends the form of the Explanatory Memorandum. It provides an overview of the very many amendments proposed and highlights those that make changes to the law that are of some substance.

Legislation (Access and Operation) Bill 2000

This is a Bill for an Act to create a framework within which authorised versions of the legislation of the Territory may be made available in electronic form via the Internet. A central feature of the scheme would be a legislation register, which would include: authorised republications of Acts and statutory instruments; Acts and other laws, and various other instruments that are notified in the Gazette; notifications of the making of such laws and other instruments; and notifications of amendments made by the Legislative Assembly to delegated legislation. The Bill would also make provision for those laws that regulate the cycle of life of laws, and which state general rules to apply to the way laws are to be understood. Many provisions of the *Interpretation Act 1967* will be repealed and enacted in this Bill.

The provisions of the Bill that will enable members of the public to have access to laws of the Territory via the Internet will enhance access to the law and on this account will enable citizens to protect their interests. There are a number of aspects of the scheme that do warrant some comment. These provisions may simply restate provisions that may be found in current laws, such as in the *Subordinate Laws Act 1989*, and the *Interpretation Act 1967),* but as provisions of a Bill, they fall for comment by the Committee.

Before doing so, the Committee commends the Explanatory Memorandum for the clarity of its explanation of the law.

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

The object of clause 39 is to permit a statutory instrument to be make provision about a matter "by applying, adopting or incorporating (with or without change)" the provisions of another document. One such categoryof documents are the texts of laws of the Territory, of the Commonwealth, or of a State, as they are "in force at a particular time or from time to time". The second category is much broader, and

covers "any other instrument, or anything else in any other instrument, as "in force at a particular time". An "instrument" is defined in clause 14 as "any writing or other document".

The facility to make law by incorporation of the terms of another document, merely be reference to that document, brings with it the problem that a reader of the statutory instrument will not be able to find out, simply by reading it, what law is being made by the instrument. The Explanatory Memorandum notes at page 2 that

"It is a basic principle of our legal system that people are presumed to know the law. Ignorance of the law is no excuse. This important presumption depends on the law being readily available to people …".

Much of the Bill is of course designed to enhance access to the law. Use of the facility in clause 39, will, however, obstruct ready access to the law.

Clause 39 may be contrasted with clause 43. Where provision may be made by a statutory instrument "in relation to land or waters", such provision may be made by reference to a map, or plan, or to an entry in a register, but only if the map, plan, or register "is available for inspection by members of the public …".

The Committee draws clause 39 to the attention of the Legislative Assembly. It raises the question whether clause 39 should be accompanied by a scheme that would ensure that a reader of the relevant statutory instrument was provided with a means of access to the other law, or to the other document. This might be done in a number of ways, and, given the short time it has had for consideration of this bill, the Committee does not intend here to canvass all possible options. One possible means would be to require that the text of the other law, or of the other document, to be available on the ACT legislation register. Another would be to adopt the kind of scheme for dealing with this problem found in the law of other jurisdictions (such as in Victoria).

Para 2(c)(iv) – inappropriate delegation of legislative power

There are three aspects of the Bill to note here.

Clause 46 provides that a statutory instrument may provide for reconsideration or review of a decision made under the instrument, or under the Act under which the statutory instrument is in force. If the statutory instrument is a subordinate law, (that is, is a regulation, rule or by-law – see clause 8), it may "give jurisdiction to any court, tribunal or other entity".

The Committee appreciates that it is desirable to provide for the reconsideration or review of administrative decisions. There is, however, a question whether such provision is a matter of substance that should be provided for in an Act, rather than in a statutory instrument. It is noted that under clause 46, the statutory instrument may make provision with respect to decisions that may be made under the parent Act, as well as under the statutory instrument. The matter of substance is the precise content of the right to reconsideration or review of the particular administrative decision. In this respect, great variation is possible.

The powers of the parliamentary counsel on republication of a law. This topic is dealt with in Chapter 10 of the Bill. In part, clause 102 permits the parliamentary counsel to

make editorial amendments that he or she "considers desirable to bring the law into line, or more closely into line, with current drafting practice". In legal effect, it is clear from clause 105 that an editorial amendment will change the law. One effect of clause 103, however, is that any such amendment may not "change the effect of the law".

Clause 104 stipulates what may amount to an editorial amendment of the law. In some respects, it might be difficult to determine if a change is merely "to bring the law into line, or more closely into line, with current drafting practice", or whether the change would not "change the effect of the law". More particularly, it should be noted that by regulation, the Executive could add to the list of what kind of amendments will amount to an "editorial amendment".

The Committee appreciates, of course, that the parliamentary counsel is an independent authority and will act with integrity. It does, however, see here an issue of principle that that Legislative Assembly should take into account. In effect, these provisions of the Bill authorise the parliamentary counsel to change the laws of the Territory. Her or his power to do so may, moreover, be extended by a regulation made by the Executive.

There is in this scheme, a "Henry 8th" problem, in that some body other than the legislature may alter an Act passed by the Legislative Assembly. The power to do so in this Bill is closely circumscribed, although it is not limited in time (as are many "Henry 8th" clauses). There is also the distinct possibility that an editorial amendment of the law made by the parliamentary counsel would be seen by members of the public as changing the effect of the law, and thus embroiling that office in political controversy.

It should furthermore be noted that under clause 107, the parliamentary counsel "may delegate all or any of the parliamentary counsel's powers under this Act to a public servant". If this clause is retained, the Legislative Assembly might consider whether the powers of the parliamentary counsel in Part 10.3 should be excepted from the operation of clause 107.

"Henry 8th" clause

There is another "Henry 8th" clause in clause 114, but it is closely circumscribed, and is limited in time.

The Committee notes that by clauses 154 and 155, regulations made under the proposed Act may modify provisions of the Act. It is noted, however, that this is a limited power, and will expire 2 years after the Act commences.

Needle Exchange Bill 2000

This is a Bill for an Act to increase the number of needles used by intravenous drug users being handed in to official outlets and to provide for the making of reports on the number of needles distributed and returned.

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

The provisions of the Bill fix on the activity of one person giving to another (the receiver) a needle without charge. A needle is defined in the Dictionary to the Bill as "a needle used to inject something into an individual". The notion of "without charge" is defined in clause 5 and includes a case where the price charged is "significantly less than the ordinary market price for needles".

Restrictions on the liberty of the giver and receiver of a needle

As the law stands, any person has a right (or, perhaps more correctly, a liberty), to give to another person a needle without charge. The receiver has a liberty to receive the needle. The recept of the needle might be linked to the preservation or restoration of the health of the receiver. In such a case, one might also speak of the receiver having a right to access to the needle as an aspect of their right to good health; (although the latter is a very vague notion).

The provisions of the Bill would restrict these liberties in two major ways.

First, under subclause 6(1), a person may give the receiver a needle without charge only if the needle is given "at or from an approved needle exchange facility". Subclause 6(1) does not, however, by reason of subclause 6(2), apply where the person giving the needle is a doctor, certain similar persons, a member of the family of the receiver's family, or "someone prescribed under the regulations".

One issue for the Legislative Assembly to consider is whether the provisions of subclause 6(2) are broad enough. There may be other occasions, on which the receiver has a need for the needle, where the receiver will not have ready access to an approved needle exchange facility.

The second major restriction is found in clauses 9 and 10. They provide that an operator, or a worker at, an approved needle exchange facility, must ensure that a receiver a needle without charge obtains receipt only if the receiver gives to the operator, or worker, a needle in exchange. (There are some other similar restrictions.)

It is for the Legislative Assembly to consider whether these restrictions are justified.

The scheme for inspection

In clause 17 there is provision for the appointment of inspectors. The Committee notes three matters.

The first is that the chief executive may appoint "anyone" as an inspector. There is no guidance given as to their qualifications.

The second is that the power of an inspector to require an operator of an approved needle exchange facility to provide records or information is not limited by reference to the subject matter of the records or information. (The Committee also asks whether subclause 19(1) should refer to "a reasonable time", instead of "the reasonable time".)

The third is that while subclause 19(5) provides for a "reasonable excuse" defence to a failure to comply, there is no explicit provision concerning the privilege against self-

incrimination, and legal professional privilege. It is likely that both privileges could be claimed.

Para 2(c)(iii) – non-reviewable decisions affecting rights

Part 3 of the Bill contains a scheme for the approval, by the Minister, of a needle exchange facility. In respect of tis scheme, the Committee notes that there is no provision for the review of a decision by the Minister to refuse to approve a facility, or in respect of any action taken in relation to that approval as stated in clause 8.

The Committee notes that a person aggrieved by a decision by the Minister would have a limited capacity to complain to the Ombudsman, and might seek judicial review. A question for the Legislative Assembly is whether there should be provision for an appeal to the Administrative Appeals Tribunal.

Occupational Health and Safety Amendment Bill 2000 (No 4)

This Bill would amend the *Occupational Health and Safety Act 1989.* In the main, it would insert a new Part 5A in the Act, which would contain a scheme for the issuing of infringement notices in relation to certain offences under the Act. Some other provisions are designed to encourage employers to make codes of practice available to employees, and to comply with those codes.

Para 2(c)(ii) – insufficiently defined administrative powers

The Committee commends the inclusion of proposed new section 75K. Under this provision, the Minister may issue guidelines to the administering authority in relation to the exercise of the latter's significant discretionary powers under proposed new sections 75I and 75J. These guidelines would be disallowable by the Legislative Assembly.

The Committee notes that it would appear to be desirable that proposed new 75K should also refer to the discretion of the administering authority under proposed new section 75P.

Subordinate Legislation - No Comment

The Committee has examined the following items of subordinate legislation and offers no comment on them.

Subordinate Law 2000 No 36 being the Environment Protection (Legislation) Regulations 2000 made under the *Environment Protection Act 1997* amends Schedule 1 of the Environment Protection Act and the Environment Protection Regulations to ensure that the provision and movement of regulated waste within the Territory will demand the same stringency, as that required for the movement of interstate "controlled" waste.

Subordinate Law 2000 No 37 being the Children and Young People (Modification) Regulations 2000 made under the *Children and Young People Act 1999* modifies chapter 17 of the Act by inserting new section 439A which will protect the identify of members of the public who make reports under the Act.

Subordinate Law 2000 No 38 being the Liquor Regulations Amendment made under the *Liquor Act 1975* amends, for the purposes of Summernats 2001, the regulations by declaring areas prescribed public places in accordance with subsection 139 (5) of the *Liquor Act 1975*.

Subordinate Law 2000 No 39 being the Financial Institutions Duty Regulations Amendment made under *Financial Institutions Duty Act 1987* amends regulation 2A to allow the addition of new non-dutiable receipts and adds a new provision at paragraph 2A (1) (b) to prescribe, as a non-dutiable receipt, the receipt of money resulting from the direct credit of a payment under a family assistance law or *A New Tax System (Bonuses for Older Australians) Act 1999* (Cwlth) to an account kept by a financial institution.

Subordinate Law 2000 No 40 being the Corporations Law Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends Schedule 1 to delete an incorrect reference to adoption proceedings in the form and amends Schedule 2 to confer the power again upon the Master and Registrar to reinstate a deregistered company pursuant to section 601 AH (2).

Subordinate Law 2000 No 41 being the Children and Young People Regulations 2000 made under the *Children and Young People Act 1999* provides in regulation 4 for the purposes of section 133 a transitional regulation to recognise and continue previous agreements concerning children and young people held in custody interstate pursuant to ACT orders; prescribes in regulation 5 the information that must be contained within an application to register a family group conference agreement pursuant to section 175 (3) of the Act; prescribes in regulation 6 the information that must be contained within an application for a warrant under section 270 (2) and inserts in regulation 7 a new section 425A pursuant to section 445 of the Act. The provision continues existing agreements and arrangements concerning interstate transfer for children and young people.

Subordinate Law 2000 No 42 being the Mediation Regulations Repeal Regulations 2000 made under the *Mediation Act 1997* repeals *Mediation Regulations 1998* (1998 No 29) and *Mediation Regulations Amendment* (1999 No 24), as amended, to date.

Subordinate Law 2000 No 43 being the Electoral Regulations Amendment made under the *Electoral Act 1992* amends the regulations by inserting a new regulation 4 to make the chief health officer a prescribed authority authorised to be given confidential electoral roll data for the prescribed purpose of assisting the chief health officer to maintain the cancer register under the *Public Health Regulations 2000;* and provide that the chief health officer may give roll information to another person or entity only for use in maintaining the cancer register.

Subordinate Law 2000 No 44 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Rules Act 1933* inserts a new order 39A

which regulates the handling and return of documents and things which might be admitted as exhibits or produced to the Court in answer to a subpoena.

Subordinate Law 2000 No 45 being the Remand Centres Regulations Amendment made under the *Remand Centres Act 1976* amends the regulations to provide for quarterly notification to the Attorney-General of transfers of persons remanded into the custody of the administrator responsible for remand centres and replaces the current requirement to notify each transfer of remandee.

Subordinate Law 2000 No 46 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the Rules to remove or update outmoded, irrelevant or outdated provisions.

Determination No. 294 of 2000 made under section 5 of the *Administration Act 1989* delegates to the General Manager of the Health Protection Service, a branch of the Department of Health and Community Care, certain administrative powers as detailed in the Schedule to the instrument.

Determination No. 295 of 2000 made under section 137 of the *Public Health Act 1997* determines that the fees payable for the registration of the registrable public health risk activity of the operation of a cooling tower or warm water storage system are as set out in the Schedule.

Determination No. 296 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name of a certain street in the Division of Greenway.

Determination No. 297 of 2000 being Declaration No. 1 of 2000 made under section 4 of the *Olympic Events Security Act 2000* for Bruce Stadium and surrounds is a declaration of Olympic events as set out in Schedule A and a declaration of prohibited items as set out in Schedule B for the period 12 to 25 September 2000.

Determination No. 299 of 2000 made under subsection 39C (1) of the *Bookmakers Act 1985* varies Determination No. 69 of 1997 (Gazette S99, dated 18 April 1997) and determines the rules for sports betting as set out in the Schedule.

Determination No. 300 of 2000 made under subsection 39B (1) of the *Bookmakers Act 1985* determines the location of a sports betting venue as identified as the shaded area on the attached plan.

Determination No. 301 of 2000 made under section 33 of the *Health and Community Care Services Act 1996* revokes Determination No. 230 of 1999 (notified in Gazette No. 39, dated 29 September 1999) and determines that the interest charged on the aggregate amount of fees and charges unpaid after the due date shall be 13.95% per annum.

Determination No. 302 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to vehicles and persons competing in the special stages of the Canberra Rallysprint 2000 car rally on 16 September 2000.

Determination No. 303 of 2000 made under section 57 of the *Road Transport (Dimensions and Mass) Act 1990* revokes No. 202 of 1996 (notified in Gazette S229, dated 10 September 1996) and determines fees payable for the purposes of the Act.

Determination No. 304 of 2000 made under section 27 of the *Building Act 1972* exempts the Stadiums Authority from the application of Part C and Specification C1.1 of the Building Code of Australia to the part of the Bruce Stadium premises as identified as the Area of Works in the attached Plan.

Determination No. 307 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name of a certain street in the Division of Nicholls.

Determination No. 308 of 2000 made under section 4 of the *Public Place Names Act 1989* determines the name of certain streets in the Division of Russell.

Determination No. 310 of 2000 made under section 5 of the *Subordinate Laws Act 1989* and section 120A of the *Agents Act 1968* amends Determination No. 194 of 2000 (notified in Gazette No. 26, dated 29 June 2000) setting out fees and charges administered by the ACT Office of Fair Trading in relation to licence fees for employment agents.

Determination No. 311 of 2000 made under section 6 of the *Dentists Act 1931* and paragraph 5 (2) of the *Health Professions Boards (Procedures) Act 1981* appoints a specified person to be a member of the Dental Board of the ACT for a period of 12 months or until the completion of the hearing of Inquiry No. 1 of 2000 conducted by the Dental Board (previously gazetted as No. 275 of 2000).

Determination No. 312 of 2000 made under section 5 of the *Administration Act 1989* declares that the Minister for Health and Community Care delegates to the Chief Health Officer and General Manager of the Health Protection Service, a branch of the Department of Health and Community Care certain administrative powers under the *Smoke-free Areas (Enclosed Public Places) Act 1994*.

Determination No. 314 of 2000 made under paragraph 7C (a) of the *Dog Control Act 1975* declares dog exercise areas for Gungahlin for the purposes of the Act.

Determination No. 315 of 2000 made under paragraph 7C (a) of the *Dog Control Act 1975* declares dog exercise areas for Dunlop for the purposes of the Act.

Determination No. 316 of 2000 made under section 9A of the *Roads and Public Places Act 1937* revokes Determination No. 144 of 2000 (Gazette S20, dated 8 June 2000) and determines fees for the purposes of the Act in accordance with the Schedule.

Determination No. 317 of 2000 made under subsections 9 (2) and 10 (1) of the *Agents Act 1968* appoints a specified person to be a member and Chair of the Agents Board of the Australian Capital Territory until 31 December 2000.

Determination No. 318 of 2000 made under subsection 9 (2) of the *Agents Act 1968* appoints a specified persons to be members of the Agents Board of the Australian Capital Territory until 31 December 2000.

Determination No. 319 of 2000 made under sections 4 and 5 of the *Fire Brigade (Administration) Act 1974* appoints a specified person to the office of Fire Commissioner from 12 October 2000 for a period of five years and determines that the terms and conditions of the appointment are as set out in the attachment to the determination.

Determination No. 320 of 2000 made under subsection 13 (1) of the *Road Transport (General) Act 1999* includes 5 maps and declares that the road transport legislation does not apply to vehicles and persons competing in the special stages of the 2000 National Capital Rally on Saturday, 14 October 2000 and also has the effect of minimising the risk of claims against the Territory for injuries arising from the event.

Determination No. 321 of 2000 made under subsection 23 (6) of the *Domestic Violence Act 1986* appoints specified persons as members of the Domestic Violence Prevention Council of the Australian Capital Territory from 12 October 2000 until 31 August 2002.

Determination No. 322 of 2000 made under subsection 7 (1) of the *Health Professions Boards (Procedures) Act* and section 7 of the *Physiotherapists Act 1977* appoints a specified person as an acting member of the Physiotherapists Board for a period of twelve months commencing from 19 October 2000.

Determination No. 323 of 2000 made under subsection 12 (1) of the *Road Transport (General) Act 1999* declares that the road transport legislation does not apply to certain roads and road related areas, as specified in the instrument, on 17 and 18 October 2000 during the conduct of the Ralliart Australia rally car testing session and also has the effect of minimising the risk of claims against the Territory for injuries arising from this testing.

Determination No. 324 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for The Canberra Hospital.

Determination No. 325 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for The Canberra Hospital.

Determination No. 326 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for The Canberra Hospital.

Determination No. 327 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for The Canberra Hospital.

Determination No. 328 of 2000 made under subsection 7 (3) of the *Legal Aid Act 1977* appoints a specified person to be a part-time Commissioner of the Legal Aid Commission (ACT) for a period of three years commencing 18 October 2000.

Determination No. 330 of 2000 made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990* exempts a B-Double, a vehicle up to but not exceeding 4.6 metres in height and a bus with an overall length of greater than 12.5 metres but not exceeding 14.5 metres in length, that comply with and are operated in accordance with the conditions set out in the Schedule attached to this exemption notice, from the requirements of sections 9 and 24 of the Act and also exempts a person from compliance with subsection 37 (2) of the Act in relation to the operation of such a vehicle.

Determination No. 331 of 2000 made under section 31A of the *Road Transport (Dimensions and Mass) Act 1990* exempts semi-trailer combinations (six and seven axle) up to 42.5 tonnes GVM and 25 metres long carrying loads up to 3.5 metres wide; and other heavy vehicles including rigid trucks (not exceeding 12.5 metres in length) built up to 3.5 metres wide or carrying loads over 2.5 metres wide and up to 3.5 metres wide provided they comply with and are operated in accordance with the conditions set out in the schedule attached to the exemption notice.

Determination No. 332 of 2000 made under subsection 11 (2) of the *Legislative Assembly (Members' Staff) Act 1989* varies the terms and conditions of staff of Members as previously determined in Determination No. 81 of 2000, relating to contracts of employment entered into on or since 1 July 1997. The Determination provides for staff employed under the Act, upon termination of their employment under the Act, to be paid in lieu for long service leave accrued after 1 July 1997. The purpose of the amendment is to remove an anomaly regarding differing entitlements of staff to payment in lieu of long service leave. Schedule 2 is revoked and Schedule 2 to this determination is substituted.

Determination No. 333 of 2000 made under subsection 6 (2) of the *Legislative Assembly (Members' Staff) Act 1989* varies the terms and conditions of staff of office-holders as previously determined in Determination No. 82 of 2000, relating to contracts of employment entered into on or since 1 July 1997. The Determination provides for staff employed under the Act, upon termination of their employment under the Act, to be paid in lieu for long service leave accrued after 1 July 1997. The purpose of the amendment is to remove an anomaly regarding differing entitlements of staff to payment in lieu of long service leave. Schedule 2 is revoked and Schedule 2 to this determination is substituted.

Determination No. 334 of 2000 made under section 32 of the *Health and Community Care Services Act 1996* revokes Determination No. 213 of 2000 (notified in Gazette S 27 on 27 June 2000) and determines fees and charges for the purposes of the Act as specified in the Schedule to take effect from 1 December 2000.

Determination No. 335 of 2000 made under section 39B (1) of the *Bookmakers Act 1985* determines the ACTTAB Limited agencies identified in the Schedule to be sports betting venues.

Determination No. 336 of 2000 made under section 39B (1) of the *Bookmakers Act 1985* determines the area within a radius of 1 metre of any selling terminal, owned and operated by ACTTAB Limited and located within the places identified in the Schedule to be sports betting venues.

Determination No. 337 of 2000 made under section 39B (1) of the *Bookmakers Act 1985* determines the area within a radius of 1 metre of any selling terminal, owned and operated by ACTTAB Limited and located within the places identified in the Schedule to be sports betting venues.

Determination No. 338 of 2000 made under section 39B (1) of the *Bookmakers Act 1985* determines the area within a radius of 1 metre of the mobile sales caravan, owned and operated by ACTTAB Limited, registration number T73975, wherever it may be located from time to time, to be a sports betting venue.

Determination No. 339 of 2000 made under section 39B (1) of the *Bookmakers Act 1985* determines the ACTTAB Limited owned and operated Telebet Call Centre located at 28 Antill Street Dickson to be a sports betting venue.

Determination No. 340 of 2000 made under section 39B (2) of the *Bookmakers Act 1985* exempts ACTTAB Limited from the requirements under section 2.1 of Determination No. 68 of 1997 (notified in Gazette S99 of 18 April 1997) and varies the operational framework for the conduct of the sports betting service within the sports betting venues for ACTTAB Limited (A.C.N. 071 257 504) whilst its ACT sports betting licence remains in force and ACTTAB Limited remains an ACT Territory Owned Corporation.

Determination No. 341 of 2000 made under paragraph 12 (1) (a) of the *Road Transport (General) Act 1999* is a declaration to allow the road transport legislation to apply to car parks that may not fall under the general definition and declaration for road related areas; and to allow the parking patrol officers to issue infringements for parking offences in car parks, where the landlords have invited parking patrol officers to patrol, which are not generally open and used by the public.

Instrument No. 342 of 2000 made under subsection 5 (1) of the *Transplantation and Anatomy Act 1978* appoints a specified person to be a designated officer for Calvary Hospital.

Subordinate Legislation - Comment

The Committee has examined the following items of subordinate legislation and offers these comments on them.

Determination No. 287 of 2000 made under subsection 97 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person to be a member of the ACT Heritage Council for a period of three years from 7 September 2000.

Missing attachment

The Committee notes a brief resume of the specified person's background, referred to in the explanatory statement as an attachment, appears to be missing.

No confirmation by relevant Committee of agreement to appointment

The Committee notes no indication has been given in the explanatory statement as to whether the required consultation in relation to this appointment has taken place with the relevant Committee.

Is this instrument disallowable?

The Committee also notes that the explanatory statement to this appointment gives no indication as to whether or not the specified person is a public servant. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994.*

Determination No. 288 of 2000 made under section 133 of the *Public Health Act 1997* determines the Code of Practice at Schedule 1 to be a Code of Practice for the Operation of Cooling Towers and Warm Water Storage Systems which is taken to have commenced on 1 September 2000.

Retrospectivity and section 7 of the *Subordinate Laws Act 1989*

The Committee notes that this instrument is a determination of a code of practice, appeared in the Gazette on 7 September 2000 and was to take effect from 1 September 2000.

Determination No. 313 of 2000 made under sub-regulation 14 (3) of the *Road Transport (General) Regulations 2000* and the *Road Transport (General) Act 1999* determines that the fees, charges or other amounts paid to the Road Transport Authority and described in the attached schedule are non-refundable.

The Committee notes that this instrument is a determination of non-refundable fees, appeared in the Gazette on 5 October 2000 and was to take effect from 1 October 2000.

Comment

In the above cases, there is a gap in time between the date on which the instruments purport to come into effect and the date of gazettal of the instruments. To this extent, the instruments purport to be retrospective.

There is, however, no mention in the explanatory statements of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant periods of retrospectivity.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance to these appointments. It 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."

In the case of these instruments, the Committee considers that the Assembly should be advised that no person's rights have been prejudicially affected, nor any liabilities imposed on any person (other than the Territory or a Territory Authority), during the relevant periods of retrospectivity.

Determination No. 291 of 2000 made under subsection 121 (1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person to be the Principal Official Visitor.

Determination No. 292 of 2000 made under subsection 121 (1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person to be an Official Visitor.

Determination No. 293 of 2000 made under subsection 121 (1) of the *Mental Health (Treatment and Care) Act 1994* appoints a specified person to be an Official Visitor.

Determination No. 309 of 2000 made under subsection 9 (1) of the *Parole Act 1976* appoints a specified person as a member of the Parole Board of the Australian Capital Territory for three years.

No confirmation by relevant Committee of agreement to appointment

The Committee notes no indication has been given in the explanatory statements as to whether the required consultation in relation to these appointments has taken place with the relevant Committee.

Determination No. 298 of 2000 made under section 8 of the *National Exhibition Centre Trust Act 1976* appoints specified persons as members of the National Exhibition Centre Trust until 15 June 2002.

Determination No. 306 of 2000 made under paragraph 11 (1) (b) of the *University of Canberra Act 1989* appoints a specified person to be a member of the University of Canberra council for a period of four years commencing 21 September 2000.

Determination No. 329 of 2000 made under the *Cultural Facilities Corporation Act 1997* appoints a specified person as a member of the Cultural Facilities Corporation for three years from 26 October 2000.

Are these instruments disallowable?

The Committee notes that the explanatory statements to these appointments give no indication as to whether or not the specified persons are public servants. An instrument appointing a public servant is not a disallowable instrument under paragraph 6 (a) of the *Statutory Appointments Act 1994.*

Determination No. 305 of 2000 made under section 67 of the *Tobacco Act 1927* revokes the previous determination dated 11 August 2000 and determines fees payable for the purposes of the Act in relation to wholesale tobacco merchants' licences and retail tobacconists' licences.

No indication of which determination is being revoked.

The instrument revokes a previous determination dated 11 August 2000. The number of the determination being revoked has not been provided.

It is a tiny point, but could be inconvenient for anyone wishing to identify the determination which has been revoked.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

Paul Osborne, MLA
Chair

5 December 2000