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)

The electronic version of this report does not contain attachments, these can be obtained from the committee office

SCRUTINY REPORT NO. 6 OF 2000

1 May 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

Bills - No Comment

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

Discrimination Amendment Bill 2000

This Bill would amend the *Discrimination Act 1991* to the effect that a credit provider may take a person's age into account in an assessment of that person's credit worthiness. The criteria according to which, in a particular case, either (i) credit is refused, or (ii) terms are imposed, must be based on data on which it is reasonable to rely, and must be reasonable. The Discrimination Commissioner, or the Administrative Appeals Tribunal, may require the relevant credit provider to inform the Commissioner or the Tribunal, as the case may be, of the sources of the data relied on by the credit provider in a particular case.

Financial Relations Agreement Bill 2000

This is a Bill for an Act to implement certain measures in the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations. This Agreement is a schedule to the Bill.

Milk Authority (Repeal) Bill 2000

This is a Bill for an Act to repeal the *Milk Authority Act 1971* and to make transitional provisions in consequence of the repeal.

Occupational Health and Safety (Amendment) Bill 2000

This Bill would amend subsection 251(3) of the *Occupational Health and Safety Act 1989* by omitting the current provision and inserting a new provision to provide that the commissioner has all the powers of the chief executive in relation to the staff assisting her or him as if the staff were employed in a department under the control of the commissioner.

Statute Law Amendment Bill 2000

This is a Bill for an Act to make a wide range of technical law reform amendments to various laws of the Territory.

Territory Owned Corporations Amendment Bill 2000

This Bill would amend the Territory Owned Corporations Act 1990 to remove CanDeliver from the framework established by the Act.

Territory Superannuation Provision Protection Bill 2000

This is a Bill for an Act to ensure that the appropriations and moneys held for the management of the Territory's superannuation liabilities may only be expended in connection with the management of the superannuation liabilities of the Territory, Territory authorities and Territory owned corporations.

Water and Sewerage Bill 2000

This is a Bill for an Act to regulate the supply of plumbing and sanitary drainage services in the Territory. The relevant owner of premises must appoint a certifier in relation to proposed plumbing and sanitary drainage work, and may apply to the certifier for approval of the work. In this respect, the discretion of the certifier is specified. The Bill specifies offences for unlicensed persons performing certain plumbing and sanitary drainage work. It also provides for enforcement and inspectorate powers.

Bills - Comment

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

Adult Entertainment and Restricted Material Bill 2000

This is a Bill for an Act to confine the adult entertainment and restricted material industry to the industrial suburbs of Fyshwick, Mitchell and Hume.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The core provisions of the Bill are clauses 6, 7 and 8. Clauses 6 and 7 provide:

> 6 **Adult entertainment prohibited**
>
> A proprietor of premises that are a public place must not provide adult entertainment at the premises.
>
> Maximum penalty: 100 penalty units, imprisonment for 12 months or both.
>
> 7 **Selling restricted material prohibited**
>
> (1) This section applies to premises a major use of which is the sale of restricted material if the premises are a public place.
> (2) The proprietor of premises must not sell restricted material at or from the premises.
>
> Maximum penalty: 100 penalty units, imprisonment for 12 months or both.

The term "public place" is defined in the Dictionary to the Bill in a conventional way. It includes a place that it open to use by a member of the public, or a section of it, whether on payment of money or otherwise. The terms "adult entertainment" and "restricted material" are also defined.

Subclause 4 (1) defines "adult entertainment" to mean "entertainment that a reasonable adult would consider inappropriate to be seen by a child because it involves nudity or a state of dress that offends against the standards of propriety generally accepted by reasonable adults". It does include "a play, show or film at a theatre or cinema" (subclause 4(2)).

Subclause 5(1) defines “restricted material” to mean films classified X or R, and having other classifications, under the *Classification (Publications, Films and Computer Games) Act 1995* (Commonwealth). It also means, in paragraphs 5(1)(c) and (d):

> (c) Equipment for use in –
>
> (i) acts of a sexual nature; or
>
> (ii) torture or extreme violence or cruelty; or
>
> (iii) revolting or abhorrent phenomena;
>
> (d) any other material prescribed under the regulations for this section.

Clause 8 provides that sections 6 and 7 do not apply to premises in the industrial suburbs of Fyshwick, Mitchell and Hume.

These provisions raise a number of ‘rights’ issues.

Are the definitions too vague to be acceptable as a standard for the application of the criminal law?

The difficulty of determining whether particular behaviour falls within the definitions of adult entertainment or restricted material is apparent from reading the definition clauses.

- In relation to definition of adult entertainment, the first issue will be whether a person’s nudity, or state of dress is such that it offends against the “standards of propriety generally accepted by reasonable adults”. It is thus a question of what a reasonable adult would find offensive. If that were the case in respect of a particular entertainment, the next issue is whether a reasonable person would find it inappropriate for it to be seen by a child. There is no guidance given as to the age of the child.

- In relation to the definition of restricted material, the notion of “equipment for use in … acts of a sexual nature” is obviously very wide, and might include a bed. The notion of “equipment for use in … revolting or abhorrent phenomena” is also very broad, and might well include items that have socially valuable uses quite separate from their possible use in entertainment.

It is a fundamental of our legal system that there should be no punishment without a statute. This is often expressed in the maxim *nulla poena (*or *nulla crimen*) *sine lege* (no punishment except by law).

The principle is often invoked as an objection to laws that have a retrospective effect. For example, in *Polyukovitch v Commonwealth* (1991) 172 CLR 501 at 610, Deane J said:

> the whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention of the requirements of a valid law which was applicable to the act at the time the act was done. It is the determination of that question which lies at the heart of the exclusively judicial function of the adjudgment of criminal guilt.

The principle has a wider effect. The notion that there should be no punishment without a statute is taken to mean that any statute that purports to impose a sanction must be capable of being understood by those to whom it is directed. If the definition of the offence is too vague, the law has not in effect specified what is punishable. In European legal history, the maxim was invoked to oppose laws that permitted punishment on the basis of 'reason of state', or on the ground of danger to 'public safety' or some such vague term; (see Max Radin, *Law Dictionary* (2nd ed, 1970) 226. Radin notes that such laws came to be regarded as objectionable by the nineteenth century, (although at later times authoritarian regimes have adopted 'reason of state' punishments). In *Polyukovitch*, above at 609, Deane J quoted English writers who emphasised the need for offences to be prescribed by law:

> The basic tenet of our penal jurisprudence is that every citizen is "ruled by the law, and by the law alone". The citizen "may with us be punished for a breach of law, but he can be punished for nothing else" (Dicey, *Introduction to the Study of the Law of the Consitution*,10th ed. (1959), p 202). Thus, more than two hundred years ago, Blackstone taught (see *Commentaries*, (1830), vol. I, pp 45-46) that it is of the nature of law that it be "a rule prescribed" …

The United States courts will find laws 'void for vagueness'. Such findings are often based on the due process clauses of the constitutions of the federal and state governments. For example, the Supreme Court of the USA has struck down a law that prohibited the ordinary activity of walking at night (*Papachristou v Jacksonville* (1972) 405 US 156). As an academic has explained:

> Once the police decided to charge a person with the crime of nightwalking, the police were assured of a conviction. Since the law was not designed to allow the courts to decide who would be convicted, but was designed to "increase the arsenal of the police", it violated the doctrine against arbitrary vagueness: J Daniels, "Valid Despite Vagueness: The Relationship between Vagueness and Shifting Objective" (1994) 58 Saskatchewan Law Review 101 at 104).

The primary rationale now offered by the American courts is that a vague law is invalid if it confers too much discretion on the police. To the same extent, such a law deprives the courts of their function in adjudging criminal guilt. While he was not concerned with a vague law, Deane J's statement that it is the role of the courts to adjudge criminal guilt reflects the concern of the American courts.

The secondary rationale offered by the American courts is that a vague law is objectionable because it does give fair notice of just what kinds of conduct is prohibited by the law. This older approach reflects the concerns of older writers such as Dicey and Blackstone. Modern writers do not find it convincing. A person is punished whether or not they are aware of the law. That is, a person cannot argue that they had no notice of a clear law. Nevertheless, this rationale still has some force. In many situations, people will attempt in advance to ascertain the limits of the criminal law before embarking on some business or social activity.

The application of a 'void for vagueness' principle is of course an uncertain matter. Two American writers distinguished between a law that forbade reckless walking – which would be invalid – from one which forbade reckless driving – which would not be invalid. They argue "[i]f a threat is greater and its regulation or prohibition cannot be expressed more concretely, the [courts] will tolerate comparatively more vagueness" (J E Nowak and R D Rotunda, *Constitutional Law* (5th ed, 1995) at 1001.

It is for the Legislative Assembly to determine whether it considers that definitions of adult entertainment and restricted material are too vague to be acceptable as standards for the application of the criminal law.

In this respect, the Assembly may contrast these definitions with the more limited definition of "sexually explicit entertainment" in subsection 131(3) of the *Liquor Act 1975*. This provides that for the purposes of section 131, "sexually explicit entertainment" means any performance or other entertainment (a) in the course of which a person displays genitalia; or (b) that includes sexual intercourse within the meaning of section 92 of the *Crimes Act 1900*; and includes a performance or entertainment of a prescribed kind".

Is clause 6 objectionable as a restriction on free speech?

The first issue is whether "adult entertainment" could be characterised as free speech.

The High Court of Australia has made it clear that communication includes expressive conduct, (although only in relation to the freedom of political communication inherent in the *Constitution of the Commonwealth*; see *Levy v Victoria* (1997) 146 ALR 248. The courts of the USA have taken speech to include expressive conduct such as dancing. Dancing includes striptease; see *Miller v City of South Bend* (1990) 904 F 2d 1081. In issue in that case was the validity of a local government law which banned nudity in public places. Judge Cudahy thought that the need to invoke the freedom of speech clause (the First Amendment) of the US Constitution in that context struck him "as bit trivializing and, perhaps, unworthy". But he recognised that "a bar-room striptease is "expressive". … [I]t sends an unadorned message to [an] audience. It is a message of temptation and allurement coupled with coy hints of satisfaction" (ibid at 1089). He thought that "striptease is not a subject that the Founding Fathers had in mind", and that suggested "a need for caution in making the [First] Amendment do service in situations as improbable as this one seems to me" (ibid).

The US law makes it clear that freedom of speech in all its modes – including dancing – may be regulated as to its subject matter, and to the location in which it takes place.

As to substance, the US courts allow that there are circumstances in which the harmful consequences of speech may outweigh its expressive value. The free speech clause does not forbid the prohibition of obscenity, or of various forms of hate speech. There is no limit to the kinds of harms that may justify restriction of speech. In the *Miller* case, which concerned nude dancing in a place of public entertainment, Judge Posner allowed that a plausible concern "is fear that striptease dancing in bars stimulates or facilitates prostitution" (ibid 1100). He said that "the association between erotic dancing and prostitution goes back to Roman times; bump and grind dancing is said to have originated in the bordellos of the Wild West [of the USA]" (ibid 1101). He recognised other kinds of interests that a legislature may take into account in regulating erotic dancing and nudity: "Hostility to public nudity may even be connected with concepts of dignity and equality that are central to our political and social institutions" (ibid 1104).

As to the location in which the speech takes place, the US courts have allowed that "the geographical scope of a restriction on expressive activity bears on the reasonableness of the restriction" (ibid 1102). Thus, the courts have upheld laws that restrict erotic dancing and the like to particular areas of a city or other locality.

It is a matter for debate just how one should weigh competing values, or assess the permissible geographical restraints. In the analogous context of the scope of the freedom of political communication inherent in the *Constitution of the Commonwealth*, the High Court asks whether the law restricting such communication "is reasonably appropriate and adapted to serve a legitimate end"; (see A Stone, "*Lange, Levy* and the Direction of the Freedom of Political Communication under the Australian Constitution" (1998) 21 UNSW Law Journal 117 for a discussion).

Thus, the Legislative Assembly might ask questions such as these:

- Does it consider that dancing and other forms of adult entertainment are to be considered as speech?
- If so, does the restriction in clause 6 on this speech serve some other value deserving of protection through law?
- If so, is this restriction appropriate and adapted to serve the protection of that (or those) other value(s)?
- In particular, is this restriction justified by reason that under clause 8, it does not apply in certain geographical areas of the Territory?

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

Regulations may prescribe "material" to be restricted material (paragraph 5(1)(d)). Given the penal nature of clause 7, is it appropriate to delegate legislative power in this respect? Given the breadth of the concept as stated in subsection 5(1), it will be difficult to challenge an exercise of this regulation making power.

Electricity Amendment Bill 2000

This Bill would amend the *Electricity Bill 1971*. One purpose of the Bill is to amend the Act to accommodate the fact that ACTEW is no longer, as such, the regulator under the Act. (It will, however, continue in this role as an electricity distributor.) Another is to make provision for the reporting of serious electrical accidents. The Bill would also alter the system under which consumers' electrical equipment is regulated.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Offences where a person will be liable in absence of intention to offend

Under clauses 79 and 81, a person will be liable where he or she "might reasonably be expected to know" that an article of electrical equipment did not comply with relevant safety standards (clause 79), or was an article the sale or installation of which was prohibited (clause 81). As such, these provisions dilute the principle that to be liable for a criminal offence, a person should intend to perform the actions that constitute the offence.

The Committee notes that the Explanatory Memorandum does not justify the imposition of criminal liability in this way.

The enforcement provisions

Clause 7 would insert a proposed new Part 7D of the Act, to deal with the enforcement of the Act through inspectors. The Committee wishes to comment, largely favourably, on a number of aspects of this scheme.

Proposed new section 89D makes provision for the appointment of inspectors. It is commended as a model for such provisions. It stipulates in some detail the qualifications for appointment, including, in particular, the competency of the person for the exercise of the powers of an inspector.

Proposed new section 89B is a common form provision that enables the chief executive to require a person to provide information and documents reasonably required for the purposes of the Act.

Proposed new section 89C provides that a person must not, "without reasonable excuse", contravene a requirement made under section 89B. The Committee does note that it is not clear on whom would lie the burden of proof in relation to the issue of whether the relevant person had (or did not have) a "reasonable excuse". The Committee considers that such matters should be made clear. If the burden is to lie on the person charged (the defendant), the section should state this clearly. In such a case, the Explanatory Memorandum should justify the placing of the burden on the defendant.

The Committee commends the form of proposed new section 89W. On the one hand, it excludes reliance on the privilege against self-incrimination as a reasonable excuse for a refusal to provide information or to produce a document. On the other, it prohibits the use, and the derivative use, of the information obtained as evidence in criminal proceedings against the person (except for offences under this Act, and in relation to the falsity of the information). This is commended. The Committee does note, however, that the Explanatory Memorandum should justify the displacement of the privilege against self-incrimination.

The Committee commends the inclusion of proposed new section 89X. This provision makes it plain that a person may claim legal professional privilege as a reasonable excuse for a refusal to provide information or to produce a document.

Power to require name and address

Clause 7 of the Bill makes provision for a proposed new section 89Q, under which an inspector may require a person to state their name and address if the inspector finds the person committing an offence against the Act, or has reasonable grounds for a belief in that respect.

This is a limited power and falls within the principles the Committee has accepted as justification for a power to require a person to state their name and address.

Compensation provision

The Committee notes and commends the inclusion of a new section 89ZC of the Act (see page 24 of the Bill). Under this section, a person may claim from the Territory reasonable compensation where he or she suffers loss or expense because of the performance of a function under proposed new Part 7D of the Act.

The Committee commends the inclusion in subsection 89ZC(4) of a power, exercisable by regulations under the Act, to structure the discretion of a court to order the payment of reasonable compensation.

The Committee questions whether section 89ZC should also apply to an exercise of a function under proposed new Part 7B of the Act. The exercise of these functions might also cause loss or expense to a person.

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

Adoption by reference of other laws

Under clauses 79 a person will be liable where he or she "knows, or might reasonably be expected to know", that an article of electrical equipment did not comply with relevant safety standards. These standards are those specified in "Australian Standard 3820, as in force from time to time".

The Committee accepts that it likely that those who might breach section 79 will be aware of Australian Standard 3820, as in force from time to time. This, however, an instance where the relevant law is contained in a document that does not form part of the law of the Territory as is may be found in Acts, regulations, and other subordinate laws. Moreover, the Bill allows that the law contained in Australian Standard 3820, may change from time to time without the approval of the Legislative Assembly or of any other Territory law-making body.

It may be impracticable to address the matter in any other way. The Committee observes that the Explanatory Memorandum should offer a justification for the adoption of documents of this kind, in particular where these documents may be amended from time to time.

Comments on the Explanatory Memorandum

The Committee notes that the Explanatory Memorandum is generally of a high standard in the manner it explains each clause in terms of what it provides and of how it changes the current position. For this, it is to be commended. We note only that the reference in the Explanatory Memorandum to paragraph 4(b) should be to paragraph 4(c), and vice versa.

First Home Owners Grant Bill 2000

This is a Bill for an Act to establish a First Home Owners' Scheme in the Territory. It seeks to implement an undertaking made by the Territory in the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations. The Bill makes provision for eligibility for grants under the scheme, and the administration of the scheme.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Provisions relating to investigations

Clause 39 is a common form provision that enables the commissioner to require a person to provide information, to attend to give evidence, and to produce documents for the purposes of an authorised investigation by the commissioner. Under subclause 39(3), a person must not, "without reasonable excuse", fail to comply with such a requirement.

The Committee notes that it is not clear on whom would lie the burden of proof in relation to the issue of whether the relevant person had (or did not have) a "reasonable excuse". In view of the explicit provision in subclause 45(3) locating the burden of proof on a defendant, it may be that under subclause 39(3), the prosecution must establish that the defendant did not have a "reasonable excuse". The Committee considers that such matters should be made clear.

Clause 43 excludes reliance on the privilege against self-incrimination as a reasonable excuse for a refusal to provide information, etc. In contrast to most other such provisions found in Territory law, (see, for example, the discussion above of new section 89W of the *Electricity Act 1971*, proposed in clause 7 of the Electricity Amendment Bill 2000), clause 43 does not protect the relevant person from the **derivative** use of the information obtained as evidence in criminal proceedings against the person. The Explanatory Memorandum does not offer any justification for this more limited form of protection.

Clause 43 prohibits the use of the information obtained as evidence in criminal proceedings against the person, except for offences in relation to the falsity of the information. This is standard and the Committee sees no issue. Oddly, there is no exception made in relation to offences under the Act proposed by this Bill. This may be a drafting oversight.

The Committee notes that there is no provision concerning whether a person may claim legal professional privilege as a reasonable excuse for a refusal to provide information, etc. (Again, this Bill compares unfavourably with the Electricity Amendment Bill 2000, which does make explicit provision protecting this privilege.) This issue should be addressed in the Bill.

Reversal of burden of proof

Subclause 45(2) makes it an offence for a person to make a statement that is misleading in a material particular in, or in relation to, an application for a first home owner grant. By subclause 45(3), it is a defence "for the defendant to establish that the defendant's contravention [of subclause 45(2)] was neither intentional or negligent".

The general principle and starting point for evaluation is that the prosecution carries the burden of proof in relation to the facts in issue in a criminal matter; see *Woolmington v*

DPP [1935] AC 462 at 481, a principle endorsed by a majority of the High Court in *Chugg v Pacific Dunlop* (1990) 170 CLR 249 at 257. The Committee considered this general issue in its Report No 8 of 1999.

Subclause 45(3) places on the defendant an onus of proof in relation to the fact of whether the defendant's contravention of subclause 45(2) was not intentional, or was merely negligent. The effect will be to dilute the principle that the prosecution carries the burden of proof to prove that the defendant intended to perform the actions that constitute the offence – in this case, to make a statement that is misleading in a material particular in or in relation to an application for a first home owner grant.

The Explanatory Memorandum does not offer any justification for this combined effect of subclauses 45(2) and (3). They compare unfavourably with clause 42 of the Fisheries Bill 2000. The latter provides simply that a person must not make a record that the person knows to be false or misleading in a material particular. There would be no legal burden on the person to show that what he or she did was not intentional. The Committee cannot appreciate why the policy in relation to the First Home Owner Grant Bill 2000 should be different to that in the Fisheries Bill 2000. The latter Bill is more consistent with general principle concerning the basis of criminal liability and, we think, with the policy followed in Territory laws.

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

The Bill provides for a great number of very widely expressed discretions to be vested in those who will administer the scheme; in particular, in the commissioner for revenue. The mode of expression varies. There are examples of a discretion to be exercised "in the commissioner's opinion" (see paragraph 4(b)); or if "in the commissioner's opinion [there are] good reasons" to do something (see paragraph 12(2)(b)); or upon the commissioner being "satisfied" of a state of affairs (see paragraph 5(2)(d)); or simply in terms that the commissioner "may" do something (see subclause 12(2)); or if the commissioner considers a course of action "appropriate" (see subparagraph 13(4)(b)(ii)). In one instance, it is simply said that the commissioner "has a discretion" to do something (see subclause 14(6)). Other provisions state simply that the commissioner may "require" something to be done, or "consent" to its being done (see clause 14 for examples).

The Committee considers that there is a strong argument for the inclusion in the Act of a provision that would empower the commissioner and/or the Minister to issue guidelines as to how these many discretions might (or should) be exercised.

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

A person may apply to the commissioner for a first homeowners grant (clauses 14 and 17). The commissioner may authorise payment of the grant "on conditions the commissioner considers appropriate" (clause 21). The commissioner may "vary or reverse" a decision on an application (clause 23). It appears that it is only these kinds of decisions that would be "a decision on the application" made by a person, and thus amenable to internal review, by the commissioner, on an objection by the applicant (see subclause 23(3)). An applicant dissatisfied with the commissioner's decision on the objection may then apply for a review by the Administrative Appeals Tribunal (clause 31). (In addition, the applicant may seek review of a decision under subclause 48(6) in relation to the remission or refund of all or part of an amount of interest).

The Committee makes the following observations.

The result of the above is that very many of the discretions vested in the commissioner are not reviewable, either internally, or by the AAT. The Ombudsman would, however, be able to consider complaints in relation to these discretions. Given the cost of AAT review, this may be seen as an acceptable result.

Clause 26 contains some unusual provisions. Under subclause 26(1), the applicant must state the grounds for objection to the commissioner "fully and in detail", and under subclause 26(2): "The burden of showing that the objection should be upheld lies with the applicant".

- The result may be that the commissioner may only review a decision on the application in terms of the statement of the grounds for objection provided by the applicant. If this is so, this is inconsistent with a principle generally applied on a 'merits' review. This principle is that such a review may take into account any matters of fact or law bearing on whether the decision under review is the correct or preferable decision. In other words, the grounds of objection do not limit the scope of the merits review. If it is intended that this general principle should apply, it would be better to state it in the Bill.
- The burden of proof provision in subclause 26(2) is inconsistent with another principle generally applied on a 'merits' review. This principle is that the person seeking review does not bear a burden of proof. Rather, if faced with a situation in which it cannot come to its own decision on what is the correct or preferable decision, the review body must, in effect, abstain from making the decision; (see *McDonald v Secretary, Department of Social Security* (1984) 1 FCR 354, and *Re ACT Department of Health and Nikolovski* (1996, AAT No 10826)). The imposition of a burden of proof on the applicant may not make much of a practical difference, and this is a reason for an argument that it is desirable to maintain the general principle that the person seeking review does not bear a burden of proof.

If the commissioner may only review a decision on the application in terms of the statement of the grounds for objection provided by the applicant, it may follow that the AAT could review only the decision of the commissioner on that objection. This may be argued to be unnecessarily restrictive.

Interstate agreement

The Committee considers that it is appropriate to raise the question whether any of the steps taken by Ministers or others to reach an agreement concerning the First Home Owners' Scheme were subject to the requirements of the *Administration (Interstate Agreements) Act 1997*.

Fisheries Bill 2000

This is a Bill for an Act to repeal the *Fishing Act 1967* and to provide a scheme for the licensing of fishing for commercial, scientific, and import and export purposes. The Act would contain provisions creating offences in relation to fishing, and for infringement notices to be issued in relation to various offences.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

Provisions relating to the powers of conservation officers

Subclause 53(2) provides that a person must not, "without reasonable excuse", fail to comply with a requirement of a conservation officer who has entered a place under a warrant. Clause 62 provides that a person must not, "without reasonable excuse", obstruct or hinder a conservation officer in the exercise of a power under the Act.

The Committee notes that it is not clear on whom would lie the burden of proof in relation to the issue of whether the relevant person had (or did not have) a "reasonable excuse". The Committee considers that such matters should be made clear.

The Committee also notes that the Bill does not state whether the privilege against self-incrimination, or legal professional privilege, is a reasonable excuse under these provisions. On general principle, it might be expected that a court would find that reliance on either privilege is a reasonable excuse. This is not perfectly clear, and for the sake of giving better guidance, these questions should be addressed in the Bill.

Power to require name and address

Clause 56 of the Bill makes provision for a conservation officer to require a person to state their name and address if the officer has reasonable grounds for a belief that the person has committed an offence against the Act. This is a limited power and falls within the principles the Committee has accepted as justification for a power to require a person to state their name and address.

Onus of proof issues

Many of the offence provisions in part 7 of the Bill state that a person must not do something "without reasonable excuse". The Committee notes that it is not clear on whom would lie the burden of proof in relation to the issue of whether the relevant person had (or did not have) a "reasonable excuse". The Committee considers that such matters should be made clear.

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

Part 3 of the Bill contains a number of provisions relating to the licensing of fishing for commercial, scientific, and import and export purposes. These provisions confer discretions in these respects on the "conservator" (who is the conservator of flora and fauna under the *Nature Conservation Act 1980*). In deciding whether to grant a licence, the conservator must have regard to certain considerations (see subclauses 18(1), 19(1) and 20(1)). These provisions also state that these statements of what are relevant considerations do not limit the maters the conservator may take into account (see subclauses 18(2), 19(2) and 20(2)). Thus, in deciding whether to grant a licence, the conservator has an open-ended discretion.

The conservator also appears to have an open-ended discretion in relation to (i) attaching conditions to a licence, (see subclause 22(1)); (ii) exempting the licensee from the application of a declaration made by the Minister under Part 2 of the Bill (see subclause 22(3)); and (iii) changing a licence (see clause 23).

The Committee considers that there is a strong argument for the inclusion in the Act of a provision that would empower the conservator and/or the Minister to issue guidelines as to how these many discretions might (or should) be exercised. The exercise of these powers will have a significant impact on the business of fishing, and those affected need some guidance in order to plan for their business and take risks accordingly.

The points just made apply also in relation to the discretion in clause 31.

Drafting point

The Committee notes that subclause 26(1) states a number of grounds on which the conservator may cancel a licence. One is that "a ground for refusing to issue the licence exists" (paragraph 26(1)(a)). The Committee queries whether the Bill states any such grounds. It may be argued that those provisions that state what are relevant considerations in relation to the grant of a licence are not statements of the grounds for refusing to issue a licence.

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

The exercise of powers in relation to licensing are subject to review by the Administrative Appeals Tribunal (see clause 98).

Surveillance Cameras (Privacy) Bill 2000

This is a Bill for an Act to regulate the collection of information by surveillance cameras. It contains provisions to ensure the protection of the privacy of persons whose lawful activity is recorded in the course of surveillance, and to limit the purposes for use may be made of information collected by surveillance. The Bill requires that all persons comply with Surveillance Camera Principles (SCPs), and that surveillance managers, and persons associated with the managers, must comply with a Surveillance Camera Code (SCC). The Minister may vary a Model Surveillance Camera Code (MSCC) set out in the Bill. A person may seek internal and/or Administrative Appeals Tribunal review of variation decisions.

Paragraph 2 (c) (i) - undue trespass on personal rights and liberties

The effect of the Bill on surveillance for litigation

The law would have a significant impact on the extent to which a person may collect information by surveillance camera for the purposes of proceedings in court or before tribunals.

Films and videos of camera surveillance are commonly made and used in personal injury litigation. They are often the most useful evidence of the effects of an accident on a person's capacity for physical activity. If it be accepted that a litigant has a 'right' to adduce evidence that supports their case, and to test the value of the evidence presented by the other party, a number of points may be made about the effect of the Bill on this right.

- It should be noted that the definition of surveillance is limited to the observation of a *public place* by means of a camera (see definition in the Dictionary of the Bill). Surveillance for litigation is sometimes undertaken in a public place, but often it is of a person in some other place, (such as their backyard). The SCPs apply to surveillance in a public place, and it would appear that the Minister cannot vary the SCPs in relation to a particular surveillance manager. The MSCC provides that a surveillance manager, and a surveillance operator must not authorise, or undertake (as the case may be) surveillance in a private area. The Minister may vary the MSCC in its application to a surveillance manager, operator and record keeper. There thus appears to be a different treatment of surveillance of persons in a private as opposed to a public place.
- The statement of permissible surveillance purposes in SCP 1 may not permit many kinds of surveillance for civil litigation. Paragraphs (c) and (d) refer only to certain kinds of civil ligation. Surveillance in relation to a negligence claim, or a workers' compensation matter, may not be covered by paragraphs (c) and (d).
- To the extent that surveillance for civil litigation is permissible, the effect of several of the SCPs may be to inhibit greatly the utility of undertaking such surveillance, and, if undertaken, of the information thus collected. See in particular SCPs 4 (notice of surveillance), 6 (information relating to surveillance records), 7 (access to surveillance records), 8 (change of surveillance records), 9 (use of personal information in surveillance records), and 10 (disclosure of personal information in surveillance

records). It is noted that a surveillance record includes a film recorded, or any documents that contain information obtained from a film.

Privileges concerning answering questions about a surveillance operation

By subsection 8(4), an inspector may require a person who authorised a surveillance operation, or a surveillance manager, operator and record keeper, to provide assistance, including answering questions about a surveillance operation. Subsection (5) provides that "A person must not, without reasonable excuse, fail to comply with a requirement under this section".

The issue is whether the Bill should –

- clarify the issue of where lies the burden of proof in relation to the issue of "reasonable excuse"; and
- specify whether a person may raise a claim of the privilege against self-incrimination, or of legal professional privilege, as a reasonable excuse.

General Comment

This Report has addressed a number of recurring issues, and it the Assembly may consider it desirable to take them up in a general debate.

- ***Onus of proof*.** This issue often arises where a provision makes criminal a refusal or failure of a person to do something "without reasonable excuse". In some cases, the defendant may have a burden of proof to establish that he or she had such an excuse; in others, the prosecution may have a burden of proof to negate the existence of such an excuse. We recommend that relevant provisions in Bills make it clear how this question should be answered in relation to a particular offence. Provisions that make criminal a refusal or failure of a person to do something "without reasonable excuse" are so common that it might be appropriate to deal with the general question in this particular context in the *Interpretation Act 1967*.

- ***Privileges.*** An allied issue is whether a person may invoke the privilege against self-incrimination, or legal professional privilege, as a reason to refuse to comply with a direction to answer a question or to produce some other information. In this Report, we have commended the approach taken in the Electricity Amendment Bill 2000. We also consider that where the privilege against self-incrimination is to be abrogated, even with such protection as is given by this Bill, that the Explanatory Memorandum justify the abrogation.

- ***Structuring discretions*.** It is common and desirable that Minsters and other officials be given discretions to exercise administrative power. Where this occurs, it is also desirable that the repository of the power, or perhaps any relevant Minister, be given a power to issue non-exhaustive guidelines as to how the discretionary power may be exercised. We have commended such power in the Electricity Amendment Bill 2000. We consider that, in general, such provisions be included in all Bills that vest in Minsters and other officials discretions to exercise administrative power.

Subordinate Legislation – No comment

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

Subordinate Law No 3 of 2000 being the Animal Diseases (Bees) Regulations 2000 made under the *Animal Diseases Act 1993* creates the offences of keeping bees other than in a frame hive and

exposing honey or honeycomb to bees outside a frame hive. These actions are prohibited to minimise the risk of bee diseases being introduced or spread.

Subordinate Law No 16 of 2000 being the Corporation Rules made under section 36 of the *Supreme Court Act 1933* sets out the practice and procedure to be applied to a proceeding in the court under the Corporations Law. The Rules follow a national model set of rules drafted by a committee of Judges of the Federal Court and the State and Territory Supreme Courts.

Subordinate Law No 17 of 2000 being the Supreme Court Rules Amendment made under section 36 of the *Supreme Court Act 1933* amends the Principal Rules in various respects.

Determination No. 77 of 2000 made under subsection 6 (2) of the *Legislative Assembly (Members') Staff Act 1989* varies the terms and conditions of employment of staff of office-holders as previously determined in Determination No. 196 of 1997 dated 16 August 1997 in relation to 'old' contract staff. The Determination provides for changes to the severance benefits of employees which are designed to better reflect length of service, and to more closely align the benefits with comparable arrangements in other parliaments and permanent officers of the ACTPS under the *Redeployment and Retirement (Redundancy) Award 1987.* Schedule 1 is revoked and Schedule 1 to this Determination is substituted.

Determination No. 80 of 2000 made under subsection 11 (2) of the *Legislative Assembly (Members') Staff Act 1989* varies the terms and conditions of employment of staff of Members as previously determined in Determination No. 198 of 1997 dated 16 August 1997 in relation to 'old' contract staff. The Determination provides for changes to the severance benefits of employees which are designed to better reflect length of service, and to more closely align the benefits with comparable arrangements in other parliaments and permanent officers of the ACTPS under the *Redeployment and Retirement (Redundancy) Award 1987.* Schedule 1 is revoked and Schedule 1 to this Determination is substituted.

Determination No. 81 of 2000 made under subsection 11 (2) of the *Legislative Assembly (Members') Staff Act 1989* varies the terms and conditions of employment of staff of Members as previously determined in Determination No. 77 of 1999 dated 2 May 1999 in relation to 'new' contract staff. The Determination provides for staff employed under the *Legislative Assembly (Members' Staff) Act 1989* to request a lump sum payment in lieu of accrued annual leave credits, to be met from within the Member's existing budget allocation and subject to the written agreement of the employing Members. The Determination also provides for changes to the severance benefits of employees which are designed to better reflect length of service, and to more closely align the benefits with comparable arrangements in other parliaments and permanent officers of the ACTPS under the *Redeployment and Retirement (Redundancy) Award 1987.* Schedule 2 is revoked and Schedule 2 to this Determination is substituted.

Determination No. 82 of 2000 made under subsection 6 (2) of the *Legislative Assembly (Members') Staff Act 1989* varies the terms and conditions of employment of staff of office-holders as previously determined in Determination No. 78 of 1999 dated 2 May 1999 in relation to 'new' contract staff. The Determination provides for staff employed under the *Legislative Assembly (Members' Staff) Act 1989* to request a lump sum payment in lieu of accrued annual leave credits, to be met from within the Office-Holder's existing budget allocation and subject to the written agreement of the employing Office-Holder. The Determination also provides for changes to the severance benefits of employees which are designed to better reflect length of service, and to more closely align the benefits with comparable arrangements in other parliaments and permanent officers of the ACTPS under the *Redeployment and Retirement (Redundancy) Award 1987.* Schedule 2 is revoked and Schedule 2 to this Determination is substituted.

Determination No. 83 of 2000 made under section 224 of the *Duties Act 1999* lists applications made under section 213A which are exempt from duty: namely, where an application is made to reduce the number of operators when requested by the Road Transport Authority, or where government vehicles are sold and then leased back to the government and an operator's name is required to be recorded.

Determination No. 84 of 2000 made under section 224 of the *Duties Act 1999* exempts from duty applications to rectify errors which were made under section 213A if the application is lodged within 30 days of the original application.

Determination No. 85 of 2000 made under section 18 of the *Public Health Act 1997* declares Operation of a Drinking Water Utility to be a public health risk activity and further declares Operation of a Drinking Water Utility to be a non-licensable public risk activity for the purposes of the Act.

Determination No. 86 of 2000 made under section 133 of the *Public Health Act 1997* determines the Code of Practice at Schedule 1 to be a Drinking Water Quality Code of Practice for the Public Health Risk activity for the purposes of the Act.

Determination No. 87 of 2000 made under subsection 3 (1) of the *Justices of the Peace Act 1989* appoints specified persons as Justices of the Peace.

Determination No. 88 of 2000 made under subsection 171A (2) of the *Land (Planning and Environment) Act 1991* revokes Determination No. 270 of 1999 and determines the maximum term of a rural lease, and the conditions subject to which the Executive shall grant a further rural lease.

Determination No. 89 of 2000 made under subsection 17 (1) of the *Road Transport (General) Act 1999* approves protective helmets for bicycle riders under subregulation 66 of the Road Transport (Safety and Traffic Management) Regulations 2000.

Determination No. 90 of 2000 made under subsection 17 (1) of the *Road Transport (General) Act 1999* approves child restraints under subregulation 66 of the Road Transport (Safety and Traffic Management) Regulations 2000.

Determination No. 91 of 2000 made under subsection 17 (1) of the *Road Transport (General) Act 1999* approves protective helmets for motorbike riders under subregulation 66 of the Road Transport (Safety and Traffic Management) Regulations 2000.

Determination No. 92 of 2000 made under subsection 5 (1) of the *Health Professions Board (Procedures) Act 1981* and paragraph 6 (2) (a) of the *Chiropractors and Osteopaths Act 1983* appoints a specified person as the Chairperson of the Chiropractors and Osteopaths Board of the ACT for a period of three years commencing the date of gazettal (16 March 2000).

Determination No. 93 of 2000 made under subsection 5 (1) of the *Health Professions Board (Procedures) Act 1981* and paragraph 6 (2) (a) of the *Chiropractors and Osteopaths Act 1983* appoints a specified person as a member of the Chiropractors and Osteopaths Board of the ACT for a period of three years commencing the date of gazettal (16 March 2000).

Determination No. 94 of 2000 made under subsection 5 (1) of the *Health Professions Board (Procedures) Act 1981* and paragraph 6 (2) (a) of the *Chiropractors and*

Osteopaths Act 1983 **appoints a specified person as a member of the Chiropractors and Osteopaths Board of the ACT for a period of three years commencing the date of gazettal (16 March 2000).**

Determination No. 95 of 2000 made under paragraph 7 (1) (a) of the *Health Professions Board (Procedures) Act 1981* and paragraph 6 (2) (a) of the *Chiropractors and Osteopaths Act 1983* appoints a specified person as a member of the Chiropractors and Osteopaths Board of the ACT for a period of twelve months commencing the date of gazettal (16 March 2000.

Determination No. 96 of 2000 made under section 179 of the *Liquor Act 1975* revoke Determination No. 242 of 1999 and determines the fees payable for the purposes of the Act.

Determination No. 98 of 2000 made under subsection 19A (1) of the *Children's Services Act 1986* appoints a specified person as an Official Visitor for the purposes of the Act, for a period of 3 years from 1 April 2000.

Determination No. 102 of 2000 made under subsection 7 (3) of the *Legal Aid Act 1977* appoints a specified person as a Commissioner of the Legal Aid Commission (ACT) for the period commencing on 15 March 2000 and ending at the expiration of 13 January 2003.

Public Sector Management Standard No. 2 of 2000 made under subsection 251 (7) of the *Public Sector Management Act 1994* amends, as set out in Schedules A and B, the Public Sector Management Standards that were prescribed by Public Sector Management Standard No. 1 of 1994. The amendments reflect the decision made by the Full Bench of the Australian Industrial Relations Commission in the Family Leave Test Case.

Subordinate Legislation - Comment

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

Incorrect reference in explanatory statement?

Determination No. 67 of 2000 made under subsection 16 (1) and paragraph 16 (2) (a) of the *Independent Pricing and Regulatory Commission Act 1997* varies the requirements specified in Instrument No. 265 of 1998 in relation to the conduct of the investigation into taxi fares referred to the Independent Pricing and Regulatory Commission by that instrument so as to extend the date for the final report to 28 April 2000.

The Committee notes that the explanatory statement cites Instrument No. 265 of 1998 as the Instrument which referred taxi fares to the Independent Pricing and Regulatory Commission. Instrument No. 265 of 1998 relates to the public transport bus services provided by ACTION. Perhaps the reference should be to Instrument No. 119 of 1998? It is noted that while Determination No 67 refers to the Final report, the Explanatory Statement refers to a draft report.

Is this a disallowable instrument?

Determination of fees made under section 137 of the *Public Health Act 1997* determines fees for the purposes of the Act.

The Committee draws attention to the manner of gazettal of this instrument and its explanatory statement. The instrument appears to be a disallowable instrument under section 10 of the *Subordinate Laws Act 1989*, however the Committee notes it was gazetted in Gazette No. 11 dated 16 March 2000 as a Government notice.

Is this instrument disallowable?
Retrospectivity and section 7 of the *Subordinate Laws Act 1989*

Determination No. 97 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 a period of three years commencing from 9 March 2000.

The Committee notes that the explanatory statement gives no indication as to whether or not the person appointed as a member 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.*

The Committee also notes that this instrument appointing a specified person to be a member of the Parole Board of the ACT appeared in the Gazette on 16 March 2000 and was to take effect from 9 March 2000.
Comment
In the above case, there is a gap in time between the date on which the instrument purports to come into effect and the date of gazettal of the instrument. To this extent, the instrument purports to be retrospective. There is, however, no mention in the explanatory statement of the possible effect of section 7 of the *Subordinate Laws Act 1989* on any occurrences decided during the relevant period 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 this instrument, 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 period of retrospectivity.

No confirmation by relevant Committee of agreement to appointments

Determination No. 99 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 with effect from date of gazettal (15 March 2000).

Determination No. 100 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 with effect from date of gazettal (15 March 2000).

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

Are these instruments disallowable?

Determination No. 101 of 2000 made under subsection 7 (3) of the *Legal Aid Act 1977* appoints a specified person as a Commissioner of the Legal Aid Commission (ACT) for the period commencing on 15 March 2000 and ending at the expiration of 13 January 2003.

Determination No. 103 of 2000 made under paragraph 12 (1) (a) of the *Liquor Act 1975* appoints a specified person to be the Chairperson of the Liquor Licensing Board until 31 December 2004.

Determination No. 104 of 2000 made under paragraph 12 (1) (c) of the *Liquor Act 1975* appoints a specified person to be a member of the Liquor Licensing Board until 31 December 2004.

Determination No. 105 of 2000 made under paragraph 12 (1) (c) of the *Liquor Act 1975* appoints a specified person to be a member of the Liquor Licensing Board until 31 December 2004.

Determination No. 106 of 2000 made under paragraph 12 (1) (c) of the *Liquor Act 1975* appoints a specified person to be a member of the Liquor Licensing Board until 31 December 2004.

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

FURTHER MATTER

Guidelines concerning the Technical Amendments Program

We have appended to this report a copy of the Guidelines concerning the Technical Amendments Program that are current as at 1 May 2000. These Guidelines are employed in the preparation of laws such as the Statute Law Amendment Bill 2000.

GOVERNMENT RESPONSES

The Committee has received responses in relation to comments made concerning:

- Nature Conservation Act – Determination No. 66 of 2000 (Report No. 3 of 2000), dated 24 March 2000.
- Health Professions Boards (Procedures) Act and the Medical Practitioners Act - Determination No. 267 of 1999 (Report No. 2 of 2000), dated 28 March 2000.
- Administration Act – Determination No. 9 of 2000 (Report No. 2 of 2000), dated 28 March 2000.
- Public Sector Management Act – Public Sector Management Standards 4, 5 and 6 of 1999 (Report No. 3 of 2000), dated 31 March 2000, together with attachments.
- Supervised Injecting Place Trial Act – Determinations Nos 15-28 and 52-54 of 2000 (Report No. 3 of 2000), dated 23 March 2000.
- Mental Health (Treatment and Care) Act – Determination No. 31 of 2000 (Report No. 3 of 2000), dated 23 March 2000.

- Health Promotion Act – Determinations Nos 32-39 of 2000 (Report No. 3 of 2000), dated 23 March 2000.
- Health Act – Determinations Nos 40-50 (Report No. 3 of 2000), dated 23 March 2000.
- Dental Technicians and Dental Prosthetists Registration Act – Determinations Nos 56-61 (Report No. 3 of 2000), dated 23 March 2000.
- Interpretation Amendment Bill 2000 (Report No. 5 of 2000), dated 14 April 2000.
- Milk Authority Act – Determination No. 273 of 1999 (Report No. 2 of 2000), dated 26 April 2000.
- Hotel School Act – Determination No. 5 of 2000 (Report No. 2 of 2000), dated 26 April 2000.

Copies of the responses are attached.

The Committee thanks the Chief Minister, the Attorney-General, the Minister for Urban Services and the Minister for Health and Community Care for their helpful responses. We make further comment on two matters.

Appointments to Boards and Committees

We note the response of the Minister for Health and Community Care of 23 March 2000 concerning the Committee's comments in Report No 3 of 2000 relating to Determinations Nos 15-28 and 52-54 of 2000. We noted that an instrument appointing a public servant to a public office and the like is not a disallowable instrument under paragraph 6(a) of the *Statutory Appointments Act 1994*. The Minister acknowledges that some of the appointments should not have been gazetted as disallowable instruments. He states he has as a matter of practice gazetted the appointments of both public servants and others as a package, and has not sought to deal with the two categories separately.

The Committee appreciates that the reason for this practice is to provide better information to the public concerning just who has been appointed to boards and committees. We accept that this is desirable. There are, however, countervailing considerations.

The Committee is conscious of the limitations of its powers, and does not wish to purport to exercise a function it does not have. We do not, moreover, wish to inadvertently give the Assembly to understand that it may disallow a particular appointment. This is what would happen were we to deal with a particular appointment on the basis that the relevant Determination was a disallowable instrument.

We suggest that the Minister's policy could be achieved in one or other of two ways. The first would be for the Minister to deal separately with the appointments of public servants and non-public servants. In respect of the former, the appointment could be notified simply by a notice in the Gazette. In respect of the latter, the appointment could be gazetted as a disallowable instrument. If the Minister wishes to gazette the appointments of both public servants and others as a package, the Minister might ensure that the Explanatory Statement to the relevant determination makes it clear whether or not the appointee is a public servant. If this is done, the Committee, and public servants, will be saved the trouble and time taken up in the Committee's ascertaining whether or not the appointee is a public servant.

Further comment on the Interpretation Amendment Bill 2000

By letter of 14 April 2000, the Attorney-General has responded to comments made by the Committee in Report No 5 of 2000 concerning the Interpretation Amendment Bill 2000.

The Committee makes these comments on the Attorney's response for the benefit of the Legislative Assembly.

The Committee did not intend to suggest that the proposed amendments are designed to give government officials the ability to levy taxes without the involvement of the Assembly. We appreciate that for the most

part, the power to determine fees and the like is vested in a Minister, and that the relevant Determination is disallowable by the Assembly. Nevertheless, the amendment proposed by the Bill would extend to any case where a person or body other than a Minister may determine fees and, in addition, where the relevant Determination was not disallowable. The Minister's response cited one such power vested in ACTEW. The Committee accepts that this is rare. There is, however, probably no constitutional inhibition on vesting powers to determine fees in persons or bodies other than Ministers.

The Committee's concerns are not much less where the power to determine fees is vested in a Minister, and where the instrument is disallowable. Disallowance is not a simple matter. Once a fee that is in substance a tax is imposed, members of the community will make plans to do or not to do something on the basis that the impost is valid and will take effect. The disallowance of a fee/tax will also raise the issue of whether fees/taxes that have been paid must be refunded. The exercise of the disallowance power must take these matters into account, and in some cases there will be a strong argument that it should not be exercised. Depending on sitting times of the Assembly, there could be a substantial period between the time when the fee/tax takes effect and the opportunity for disallowance.

We note that the Attorney-General accepts that GST problems may be separately addressed.

It is true that the Bill would remove the possibility of judicial challenge to Determinations of fees on the ground that they are, in substance, taxes. This is not necessarily to be seen as a virtue. The principle that taxes must be imposed by the legislature is, as we have said, of long-standing. It is regarded as a fundamental principle of the operation of Australian parliaments. The question is whether the Assembly should consent to the abandonment of this fundamental principle.

The matter could be addressed by directly restricting the power of the courts to consider the validity of a determination of a fee on the ground that it was a tax. This would probably be seen by some as infringing upon the proper role of the courts, and contrary to fundamental principle concerning the role of the courts in reviewing subordinate legislation. This Bill achieves this result in an indirect way.

We have not sought to explore whether there might be constitutional objections to the Bill. It could be argued that the legislative power granted to the Legislative Assembly is subject to the preservation of the principle that taxes must be imposed by the Assembly.

Paul Osborne, MLA
Chair

May 2000