

**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. 4 OF 1999**

**20 April 1999**



## 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 Advisor: Mr Peter Bayne**  
**Secretary: Mr Tom Duncan**  
**Assistant Secretary (Scrutiny of Bills and**  
**Subordinate Legislation): Ms Celia Harsdorf**

## **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.

#### **Firearms (Amendment) Bill 1999**

This Bill would amend the *Firearms Act 1996* and the Firearms Regulations to enable recognition in the Australian Capital Territory of category C firearms licences, and of international temporary visitors permits, which have been issued by another State or Territory of Australia for the purpose of competitive target shooting by the holder of the permit. The temporary period of recognition would run three months from the day on which the relevant permit-holder arrives in the ACT.

#### **Nature Conservation (Amendment) Bill 1999**

This Bill would amend the *Nature Conservation Act 1980* to require the statutory position of Conservator of Flora and Fauna to be filled by a person with specific qualifications and experience in nature conservation.

#### **Payroll Tax (Amendment) Bill 1999**

This Bill would amend the *Payroll Tax Act 1987* to create a new scheme for the exemption of employment agents from payroll tax.

#### **Poisons and Drug (Amendment) Bill 1999**

This Bill would amend the *Poisons and Drugs Act 1978* to permit the advertising to the public of some kinds of "Pharmacist Only Medicines". It would do so by adopting by reference provisions of the "Drugs and Poisons Standard", which is published under the auspices of the Australian Health Ministers Advisory Council.

#### **Public Sector Management (Amendment) Bill 1999**

This Bill would amend the *Public Sector Management Act 1994* in various ways, being principally: to provide for the advertising of ACT Public Service jobs in the Territory (rather than in the Commonwealth) *Gazette*; to amend the definition of "criminal offence"; to permit the re-engagement of former Chief Executives and Executives during a benefit period where the Commissioner for Public Administration so consents in writing; and to permit this Commissioner to make routine changes to the Management Standards without the approval of the Chief Minister.

#### **Tobacco (Amendment) Bill 1999**

This Bill would amend both the *Tobacco Act 1927* and the *Tobacco Licensing Act 1984*. The purpose of this scheme is to link compliance with the *Tobacco Act 1927* to the licensing scheme under the *Tobacco Licensing Act 1984*.

The amendments which would be made to the *Tobacco Act 1927* would regulate in various ways the sale, advertisement and promotion of tobacco products. A new Part of the Act would be inserted to provide for alternatives to prosecutions for offences by persons who are licensed under the *Tobacco Licensing Act 1984*. Disciplinary powers would be vested in a Registrar of Tobacco, whose decisions would be reviewable by the Administrative Appeals Tribunal. There would also be provision for the appointment by the Chief Executive of authorised officers for the purposes of the Act, and in relation thereto for identity cards, powers of entry, search warrants and the powers of inspectors.

The amendments which would be made to the *Tobacco Licensing Act 1984* would enable the Commissioner under this Act to take into account information provided by the Registrar of Tobacco when considering an application for a tobacco licence, and would place restrictions on the grant of a licence.

### **Trustee (Amendment) Bill 1999**

This Bill would amend the *Trustee Act 1925* of New South Wales in its application to the Territory. The central provision of the proposed amendments is the repeal of the existing section 14, 15 and 16 of the Act and its replacement by new sections 14 to 14F inclusive. There is no longer to be a list of the investments which may be made by a trustee. Rather, the trustee may make any form of investment, subject to generally expressed obligations of prudence. There are particular provisions in relation to some forms of investment. The Bill would also make consequential amendments to some other legislation.

### **Bills - Comment**

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

### **Building Construction Industry Training Levy Bill 1999**

This is a Bill for an Act to create a Building Construction Industry Training Fund Board to administer a fund from which it may make payments in accordance with training plans. The Board would be comprised of a chairperson and a representative each of the employers and employees in the building and construction industry. The Minister would make these appointments to the Board. The fund would comprise amounts paid by project owners by way of a levy on the value of work undertaken on a particular project. After consultation with the ACT Regional Building & Construction Industry Training Council Incorporated, the Minister may by instrument approve a training plan for the building and construction industry. There would also be provision for the Board to appoint inspectors for the purposes of the Act, and in relation thereto for identity cards, powers of entry, search warrants and the powers of inspectors.

*Paragraph 2 (c) (v) – insufficient scrutiny of legislative power*

The Committee notes that the power of the Minister to approve by instrument a training plan for the building and construction industry is not made subject to disallowance by the Legislative Assembly.

**Motor Traffic (Amendment) Bill 1999**

This Bill would amend the Motor Traffic Act 1936 by (i) the insertion of a new section 164BA, to prescribe a motor vehicle should not be driven on a public street if the number of passengers in a vehicle exceeds the number of available seat belts in the vehicle, and (ii) the amendment of section 164C to make it an offence for a person to occupy, in a vehicle which is being driven, or has its engine running, on a public street, a position in that vehicle that is not equipped with a seat belt if there is another unoccupied position in the vehicle which is fitted with a seat belt.

Drafting

The Committee notes that clause 5 of the Bill refers to "Section 164C" of the Act. The reference should be to "Section 164C(1)".

**Native Title (Amendment) Bill 1999**

This Bill would amend the *Native Title Act 1994*. This Act took advantage of the permission accorded to the Territory by the *Native Title Act 1993* of the Commonwealth to validate past acts done by the Territory that may have been invalid because of their effect on native title to land. It was not until the decision of the High Court in the *Mabo* case in 1992 that the law of Australia recognised that there was a form of native title to land. Comments made by some judges in the *Mabo* case suggested that any form of pastoral lease that had been created over land would have extinguished any native title that existed over that land. The validation provisions of the *Native Title Act 1994* of the ACT, and of the *Native Title Act 1993* of the Commonwealth, were based on these comments. These provisions came into operation on 1 January 1994.

In the 1996 *Wik* decision however, the High Court held that native title could continue to co-exist with some forms of pastoral lease and other forms of tenure and interest in land. One of the purposes of the *Native Title Amendment Act 1998* of the Commonwealth is to enable the States and Territories to enact legislation which will validate or confirm acts which may be invalid because they would have the effect of extinguishing or diminishing native title in areas which, according to the decision in *Wik*, are areas in which native title can co-exist with some other form of interest in land (such as a pastoral lease). These acts are known as "intermediate period acts", because they are confined to acts done between 1 January 1994 and the date of the *Wik* decision in 1996.

This Bill would amend the *Native Title Act 1994* of the ACT to take advantage of these provisions of the *Native Title Amendment Act 1998* of the Commonwealth. The provisions of the Bill deal with the validation of intermediate period acts, confirm the effects of certain types of act, and confirm rights to use stock routes.

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

It is not clear whether there is any land in the Territory in respect of which native title may exist as a result of the *Wik* decision. On the assumption that there is, the effect of this Bill will be to diminish or extinguish that title. Whether that result is an "undue trespass" on the rights of the native title holders is a matter which was debated at length when the *Native Title Amendment Act 1998* of the Commonwealth was enacted. It is not of course the case that the Legislative Assembly should feel bound by the outcome in the Commonwealth Parliament.

The Committee notes that the *Native Title Amendment Act 1998* of the Commonwealth provides, in effect, that compensation is payable in respect of any diminution or extinguishment of native title as a result of the validation provisions in this Bill.

### **Olympic Events Security Bill 1999**

This is a Bill for an Act to make certain security arrangements for events of the Games of the XXVII Olympiad in 2000, or the Paralympic Games in 2000. The Minister may declare an event that is part of, or is associated with, these Games to be an Olympic event. A declaration cannot be made validly unless the Minister is satisfied it is reasonable and necessary for the safety of persons attending the event, and for the avoidance of disruptions to the event (clause 4(4)). A declaration is a disallowable instrument. One particular aspect of a declaration is that it must state any statutory conditions of entry which are applicable to venue of the event to which the declaration relates. Notice of the making of a declaration must be published in the *Gazette* and in a daily newspaper circulating in the Territory at least seven days before the event.

Clause 7 specifies what are the statutory conditions of entry which a declaration may state are applicable to venue of the event. They are:

- that a person seeking to enter the venue, or who is in the venue, must permit a search to be made of her or his personal property (clause 7(1)(a));
- that a person seeking to enter the venue, or who is in the venue, must permit a frisk search to be made of her or his person (clause 7(1)(b)); and
- that a person shall not take into or possess a prohibited item in the venue (clause 7(1)(c)).

The relevant declaration must state anything that is a prohibited item.

Clauses 9, 10 and 11 would create a number of offences in relation to the statutory conditions of entry. By clause 9, a person seeking to enter a venue to which clause



7(1)(a) has been applied commits an offence of he or she, without reasonable excuse, refuses permit a search to be made of her or his personal property. By clause 10, similar provision is made with respect to a person seeking to enter a venue to which clause 7(1)(b) has been applied. By clause 11, it would be an offence to take a prohibited item into a venue.

"Authorised persons" are given powers by virtue of clause 7. Such a person is a police officer, or a person authorised by the Minister under clause 16. Clauses 12 and 13 state other powers of authorised persons (see below). Clauses 14 and 15 create other offences (see below).

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

The Committee appreciates the need for security measures in relation to these Games. In certain respects, however, it may be asked whether the provisions of the Bill are too draconian in what they penalise and in the scope of the powers given to authorised persons and others.

- The definition of "prohibited item" in clause 3 provides no limit to what a declaration under clause 5(e) may state to be a "prohibited item". It would appear desirable to limit the definition, such as by reference to whether the item might be such as to affect the safety of persons attending the event, or might be used so as to disrupt the event (compare to clause 4(4)).
- It is not apparent why it is necessary to create offences in clauses 9, 10 and 11 in relation to a person who refuses on reasonable grounds to comply with the statutory conditions of entry stated in clauses 7(1)(a), 7(1)(b) and 7(1)(c). It would be less draconian to simply make such a refusal a ground for refusing to permit the person to enter the venue, or for removing the person from the venue.
- Similarly, it is not apparent why it is necessary to create the offence, specified in clause 8, of entering or remaining in a restricted area in a venue. Again, such action could be a ground for removing the person from the venue.
- By clause 12(1) and (2), it is an offence for a person seeking to enter a venue to refuse to provide her or his name and address to an authorised person, or to provide a false name or address, without reasonable excuse for so doing. It is most unusual for a law to require a person to provide their name and address, and this is usually regarded as a serious invasion of privacy. The police do not have any such general power in relation to the enforcement of the law. The Explanatory Memorandum argues that such a power in this Bill will enable the identification of potentially violent fans. It is a matter for debate whether this is a sufficient justification.
- By clause 12(3)(a), an authorised person may refuse entry to a venue to a person if the authorised person has reasonable grounds for believing that the person "has committed, or is likely to commit, an offence against this Act". When taken in conjunction with the range of offences, which would be created by the Act, this is a very broad and draconian power. It offends the general notion that a person may be penalised by reason of what they do, and not simply by reason that it is suspected that they might do something.

- By clause 12 (3) (b), an authorised person may refuse entry to a venue to a person if the authorised person has reasonable grounds for believing that the person "is likely to contravene a condition of entry to the venue imposed by an occupier of the venue". What has been said in relation to clause 12 (3) (a) applies here. In addition, this clause appears to give an unrestricted power to an occupier of a venue to impose conditions of entry. It is not clear how this power relates to the power of the Minister to make a declaration. The power of the Minister is limited in various ways. The power of the occupier appears to be unlimited. This needs clarification.
- Clause 13 vests in an authorised person a power to direct a person to leave a venue if the authorised person has reasonable grounds for believing that the person has committed an offence against a law in force in the Territory while seeking to enter or being in the venue. This provision would operate merely because an authorised person had reasonable grounds for believing that the person has committed an offence, and it offends the general notion that a penalty is appropriate where an offence has been committed, and not merely because someone in authority thinks it has been. The Explanatory Memorandum states that in practice a person would probably have been warned in advance. Would it not be possible to require that such a warning have been given?
- Clause 14 would make it an offence for a person to "enter or remain in an Olympic venue" unless they had paid the entrance fee (if any), or had the consent of the occupier, or was otherwise authorised to be in the venue. The concept of "Olympic venue" is very wide, embracing not just the place stated in the relevant declaration, but also "any other place reasonably incidental to the holding of the event" (clause 3). There is no allowance for a 'reasonable excuse' in this offence, and many persons could quite innocently offend. In any event, is it justifiable to criminalise conduct even by those who, as said in the Explanatory Memorandum "sneak in"? It would be less draconic to simply make the actions covered by clause 14 a ground for removing the person from the venue. The wide definition of the concept of "venue" would also have the affect of expanding the application of clauses 9 and 10. These problems could be addressed by deleting paragraph (b) of the definition of "venue" in clause 3.
- The offences that would be created by clause 15, relating to interfering with an event, or the enjoyment of spectators, are also very widely stated. Again, is it justifiable to criminalise such conduct? It would be less draconic to simply make the actions covered by clause 15 a ground for removing the person from the venue.
- The definition of "authorised person" in clause 3 includes a police officer, and, in addition, a person authorised as such by the Minister under clause 16. Clause 16 states no limits as to who may be so authorised. In this respect, this Bill compares unfavourably with analogous provisions of the Emergency Management Bill 1998. Under clause 29 of this Bill, it is only the Controller who may remove persons who obstruct a response or recovery operation. Under clause 30 the Controller may authorise only a "public employee" to require a person to provide their name and address. The Committee does not suggest that these clauses of the Emergency Management Bill 1998 be copied over to the Olympic Events Security Bill 1999. The comparison does point, however, to the looseness of this latter Bill (in its definition of "authorised person") in a critical respect. Given the extensive powers which such a person may exercise, it is suggested that closer attention be paid to who may be an "authorised person".

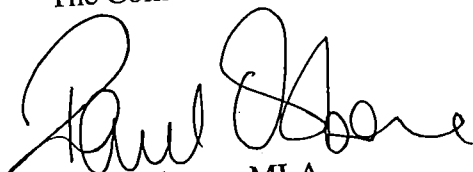
## INTERSTATE AGREEMENTS

It was noted in this Committee's Report No. 2 of 1999 that on 30 December 1998 the Chair of the Committee was informed by the Attorney-General that as a consequence of resolutions agreed to by the Australasian Police Ministers' Council, he would propose amendments to the *Firearms Act 1996*. The Committee notes that in the Presentation Speech, the Attorney-General has advised the Legislative Assembly of the result of further discussions he had with the Commonwealth government in relation to these resolutions.

## GOVERNMENT RESPONSE

The Committee has received a response from the Attorney-General, in response to its Report No. 2 of 1999 on the Dangerous Goods (Amendment) Bill 1999 and the Occupational Health and Safety (Amendment) Bill 1999.

The Committee thanks the Minister for his response.

A handwritten signature in black ink, appearing to read 'Paul Osborne', is written over the printed name and title.

Paul Osborne, MLA  
Chair

20 April 1999



**y Humphries MLA**

Deputy Chief Minister  
Attorney-General  
Minister for Justice and  
Community Safety  
Minister Assisting the Treasurer

Member for Molonglo  
Australian Capital Territory

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Mr Paul Osborne MLA  
Chair  
Standing Committee on  
Scrutiny of Bills and Subordinate Legislation  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2600

24 MAR 1999

Dear Paul

I am writing concerning the comments of the Standing Committee on Scrutiny of Bills and Subordinate Legislation, in Report Number 2 of 1999, on the Dangerous Goods (Amendment) Bill 1999 and the Occupational Health and Safety (Amendment) Bill 1999.

The Committee largely discusses whether the Bills would operate retrospectively and the principle against retrospectivity. As members of the Committee would be aware, I am strongly opposed to the retrospective application of legislation which alters a person's liability to be prosecuted in criminal proceedings.

However, my purpose in writing to the Committee is not to discuss the issue of principle involved in this legislation but to draw to the Committee's attention a High Court decision which, I am advised, supports the view that the Bills would not be given retrospective effect by a court.

I note that on page five of the report, the Committee has stated that while it cannot be certain as to how a court would interpret the provisions of the Bills, it should be assumed that the courts would hold these provisions to operate retrospectively, even if the limitation period had already expired before the Bills commence. The Committee's comments do not refer to the decision of the High Court in *Rodway v R* (1990) 169 CLR 515. In that case the Court considered the proposition that statutes dealing with procedure are an exception to the common law rule that a statute ought not be given retrospective operation which would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. The Court preferred the view that there is no presumption against retrospectivity in the case of statutes merely affecting procedure. However it noted the difference between substantive law and procedure is sometimes difficult to draw and that statutes which are commonly classed as procedural, such as statutes of limitation, when they operate so as to affect existing rights and obligations are not merely procedural and they fall within the presumption against retrospectivity.

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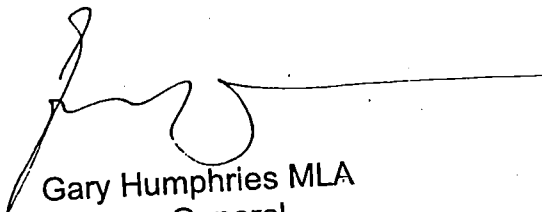
The Court went on to say:

"Where a period is limited by statute for the taking of proceedings and the period is subsequently abridged or extended by an amending statute, the amending statute should not, unless it is clearly intended, be given a retrospective operation to revive a cause of action which has become statute barred or to deprive a person of the opportunity of instituting an action which is within time. If it were given a retrospective operation, the amending legislation would operate to as to impair existing, substantive rights - either the right to be free of a claim or the right to bring a claim - and such an operation could not be said to be merely procedural."

My advice is that the Court's findings in *Rodway* mean that because the Bills in question could not be regarded as purely procedural and do not include express provisions giving them retrospective operation, the presumption against retrospectivity would operate in relation to the Bills, insofar as they purport to enlarge the period for prosecution of offences after the prosecution of offences has already become statute barred.

I trust that this information is of interest to the Committee.

Yours sincerely



Gary Humphries MLA  
Attorney General

