

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

REPORT NO. 19 OF 1997

11 December 1997

TERMS OF REFERENCE

- (1) A Standing Committee for scrutiny of bills and subordinate legislation be appointed.
- (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) its 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) its explanatory memorandum meets the technical or stylistic standards expected by the Committee.
- (3) The Committee shall consist of three 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 Bill Wood, MLA (Chair)
Mr Paul Osborne, MLA (Deputy Chair)
Mr Harold Hird, MLA

Legal Advisor: Mr Peter Bayne
Secretary: Mr Tom Duncan

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

Bill - No Comment

The Committee has examined the following Bill and offers no comments:

Animal Welfare (Amendment) Bill (No. 2) 1997

This Bill would amend the *Animal Welfare Act 1992* and the *Animal Welfare Regulations* in various respects

Children's Services (Amendment) Bill (No. 2) 1997

This Bill would amend the *Children's Services Act 1986* so that fines imposed on children may be recovered under the new fine recovery scheme proposed by the *Magistrates Court (Amendment) Bill (No. 2) 1997*

Crimes (Amendment) Bill (No. 7) 1997

This Bill would amend the *Crimes Act 1900* to give effect to the new fine recovery scheme proposed by the *Magistrates Court (Amendment) Bill (No. 2) 1997*

Magistrates Court (Civil Jurisdiction) (Amendment) Bill (No. 2) 1997

This Bill would repeal section 349 of the *Magistrates Court (Civil Jurisdiction) Act 1982* and substitute in its place a new section 349 of the same Act. Under this new section, the Magistrates Court will have power to order a bailiff to make a forced entry of the premises of a judgment debtor to seize property to satisfy a judgment debt in circumstances where the debtor has refused entry or cannot be contacted.

Motor Traffic (Amendment) Bill (No. 7) 1997

This Bill would amend the *Motor Traffic Act 1936*. It needs to be understood in conjunction with the *Magistrates Court (Amendment) Bill (No. 2) 1997*, which would amend the *Magistrates Court Act 1930* to create a new fine recovery scheme. An element of this scheme is the provision for the suspension of the driving licence or the motor vehicle registration of a fine defaulter, and the amendments to the *Motor Traffic Act 1936* proposed by the *Motor Traffic (Amendment) Bill (No. 7) 1997* are designed to support this element of the new fine recovery scheme. When the Registrar of the Magistrates Court informs the Registrar of Motor Vehicles that a person has defaulted in payment of a fine, the latter shall suspend the person's driving licence or motor vehicle registration, or disqualify the person from holding a driving licence.

Remand Centres (Amendment) Bill (No. 2) 1997

This Bill would amend section 15 of the *Remand Centres Act 1976* to enable fine defaulters to serve out their period of imprisonment in respect of a fine default at a remand centre.

Supreme Court (Amendment) Bill 1997

This Bill would amend the *Supreme Court Act 1933* to the effect that the Supreme Court will have power to order the Sheriff to make a forced entry of the premises of a judgment debtor for any purpose connected with executing a judgment in circumstances where the debtor has refused entry or cannot be contacted.

Bill - Comment

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

Magistrates Court (Amendment) Bill (No. 2) 1997

This Bill would amend the *Magistrates Court Act 1930* (the Act) to create a new fine recovery scheme. This scheme provides a range of options to avoid, as far as possible, imprisonment and to encourage payment. The Registrar of the Magistrates Court will be the central authority in the scheme, which will apply to all courts in the Territory. One element of the scheme is the provision for the suspension of the driving licence or the motor vehicle registration of a fine defaulter.

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

The Committee notes that clause 9 of the Bill would insert a new section 147 in the Act, pursuant to which the Registrar may require the chief executive of a government agency, the Commissioner for Housing or the Chief Police Officer to give to the Registrar particulars concerning the address of a person who is liable to pay a fine. Similarly, clause 11 of the Bill would insert a new section 154 in the Act, pursuant to which the Registrar may require these same officials to give to the Registrar particulars of personal information concerning a fine defaulter. The concept of personal information refers to the financial circumstances or criminal record of the fine defaulter. These new sections thus contradict a central principle of privacy protection, in that they permit the disclosure of personal information for purposes other than those for which the information was collected. The Committee notes however that these provisions are of significance to the operation of the new scheme.

Paragraph c(iii) - non-reviewable decisions affecting rights, etc

Clause 11 of the Bill would insert a new section 152 in the Act, pursuant to which a person who is liable to pay a fine may apply to the Registrar for further time to pay a fine (or an administrative fee imposed under the scheme), or to pay a fine or such a fee by instalments. The Committee draws attention to the apparent absence of any

scheme for review of the discretion of the Registrar to approve or not any such arrangement.

Paragraph c(ii) - insufficiently defined administrative powers

The discretion which would be vested in the Registrar by the new section 152 of the Act (see above) is not confined by reference to relevant criteria. It is however likely that a court would find that such criteria could be spelt out of other provisions in this scheme, such as capacity to pay and the prior criminal history of the person concerned. The Committee considers however that attention might be given to specifying relevant criteria in a non-exhaustive way in the Act.

Clause 16 of the Bill would insert a new section 159 in the Act, pursuant to which "the Executive may, in writing, remit all or any part of a fine". This discretion is not confined by reference to relevant criteria. Given its significance in that it may be seen as a power to nullify the operation of the law, the Committee considers that relevant criteria be stated in the Act.

Roads and Public Places (Amendment) Bill (No. 2) 1997

This Bill would amend the *Roads and Public Places Act 1937* to vest in the Minister power to require a person to remove an object which that person, without a permit in that respect, placed in a public place.

The Committee notes that the discretion vested in the Minister is not confined by reference to relevant criteria, and that there is no provision for review of an exercise of the power. The Committee also notes however that a notice given by the Minister will cease to have effect if a permit is issued, and that the Explanatory Memorandum points out that if a permit is refused the applicant may seek review by the Administrative Appeals Tribunal.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

The Committee has examined the following subordinate legislation and offers no comment:

Subordinate Law No 24 of 1997 being the Liquor Regulations (Amendment) made for the purposes of provisions of sections 26, 27, 28 and 29 of the *Liquor Act 1975* amends the Liquor Regulations so as to restrict the trading hours during which liquor may be sold for consumption on or off premises

Subordinate Law No 25 of 1997 being the Liquor Regulations (Amendment) made under subsection 84(3) of the *Liquor Act 1975* amends the Liquor Regulations so as to declare certain areas to be public places

Subordinate Law No 26 of 1997 being the Motor Traffic Regulations (Amendment) made under section 218 of the *Motor Traffic Act 1936* amends the Motor Traffic Regulations by the insertion of a new regulation 33 which concerns demerit points during a holiday period

Subordinate Law No 27 of 1997 being the Motor Traffic Regulations (Amendment) made under section 218 of the *Motor Traffic Act 1936* amends the Motor Traffic Regulations by the insertion of a new Part III which concerns the format of learner driver log books

Subordinate Law No 28 of 1997 being the Electoral Regulations (Amendment) made under section 341 of the *Electoral Act 1992* amends the Electoral Regulations to prescribe classes of items for the purposes of section 295(d) of the Act

Subordinate Law No 29 of 1997 being the Building Regulations (Amendment) made under the *Building Act 1972* repeals regulation 12 of the Building Regulations

Subordinate Law No 30 of 1997 being the Supreme Court Rules (Amendment) made under section 36 of the *Supreme Court Act 1933* repeals rule 2 Order 22 and rule 15 Order 60 of the Supreme Court Rules

Subordinate Law No 31 of 1997 being the Supreme Court Rules (Amendment) made under section 36 of the *Supreme Court Act 1933* amends the Supreme Court Rules relating to cases stated for the consideration of the Court from a tribunal, court, body or person; appeals to the Court from a tribunal and other bodies; and the order nisi procedure to review decisions of the Magistrates Court

Subordinate Law No 32 of 1997 being the Occupational Health and Safety (Manual Handling) Regulations made under the *Occupational Health and Safety Act 1989* makes provision for the safety of work involving manual handling

Subordinate Law No 33 of 1997 being the Supreme Court Rules (Amendment) made under section 36 of the *Supreme Court Act 1933* inserts a new rule 8 Order 10 in, and amends rule 4 Order 13 of, the Supreme Court Rules

Subordinate Law No 34 of 1997 being the Electoral Regulations (Amendment) made under section 341 of the *Electoral Act 1992* amends the Electoral Regulations to prescribe classes of items for the purposes of section 295(d) of the Act

Subordinate Law No 35 of 1997 being the Motor Traffic Regulations (Amendment) made under the *Motor Traffic Act 1936* amends the Motor Traffic Regulations by the omission of Part II, the insertion of a new Part II, and the insertion of Schedule 2

Subordinate Law No 36 of 1997 being the Environment Protection Regulations made under the *Environment Protection Act 1997* make provision for a number of matters which must or may be prescribed under the Act

Determination No 208 of 1997 made under subsection 30(2)(b) of the *Canberra Institute of Technology Act 1987* appoints a specified person as a member of the Canberra Institute of Technology Advisory Council

Determination No 209 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as Chairperson of the Vocational Education and Training Authority

Determination No 210 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No 211 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No 212 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No 213 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No 214 of 1997 made under section 40 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the Vocational Education and Training Authority

Determination No 215 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as Chairperson of the ACT Accreditation and Registration Council

Determination No 216 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 217 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 218 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 219 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 220 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 221 of 1997 made under section 41 of the *Vocational Education and Training Act 1995* appoints a specified person as a member of the ACT Accreditation and Registration Council

Determination No 222 of 1997 made under subsection 13(3) of the *Children's Services Act 1986* appoints a specified person as Chairperson of the Children's Services Council

Determination No 223 of 1997 made under subsection 13(3) of the *Children's Services Act 1986* appoints a specified person as a member of the Children's Services Council

Determination No 224 of 1997 made under subsection 13(3) of the *Children's Services Act 1986* appoints a specified person as a member of the Children's Services Council

Determination No 229 of 1997 made under section 4 of the *Omnibus Services Act 1955* revokes Determination No 141 of 1996 and determines fees payable for the purposes of the Act

Determination No 230 of 1997 made under sections 28, 31, 48 and 50 of the *Radiation Act 1983* revokes Determination No 193 of 1996 and determines fees payable for the purposes of the Act

Determination No 231 of 1997 made under section 9A of the *Roads and Public Places Act 1937* determines fees payable for the purposes of the Act in relation to permits for outdoor cafes

Determination No 232 of 1997 made under subregulation 33(4) of the *Motor Traffic Regulations* declares that the period 3 October 1997 to 6 October 1997 (inclusive) to be a declared holiday period

Determination No 233 of 1997 made under section 4 of the *Public Place Names Act 1989* determines the names of certain public places in the Division of Dunlop

Determination No 234 of 1997 made under section 4 of the *Public Place Names Act 1989* determines the names of certain public places in the Division of Gungahlin

Determination No 235 of 1997 made under section 4 of the *Public Place Names Act 1989* determines the names of certain public places in the Division of Gungahlin

Determination No 236 of 1997 made under subsection 55(1)(a) of the *Bookmakers Act 1985* revokes Determination No 15 of 1996 and determines fees payable for the purposes of section 39K of the Act in relation to a sports betting licence

Determination No 237 of 1997 made pursuant to subsection 39C(1) of the *Bookmakers Act 1985* amends Determination No. 69 of 1997 which made rules for sports betting by prescribing rules for spread betting

Determination No 238 of 1997 made under subsection 9(1) of the *Parole Act 1976* appoints a specified person as a member of the Parole Board of the ACT

Determination No 239 of 1997 made under subsection 23(6) of the *Domestic Violence Act 1986* appoints specified persons as members of the Domestic Violence Prevention Council for a period of 2 years

Determination No 240 of 1997 made under subsection 23(2) of the *Domestic Violence Act 1986* appoints a specified person as Chairperson of the Domestic Violence Prevention Council for a period of 2 years

Determination No 241 of 1997 made under section 54 of the *Podiatrists Act 1994* revokes all previous determinations of fees payable under the Act and determines fees payable for the purposes of the Act

Determination No 242 of 1997 made under section 55 of the *Bookmakers Act 1985* revokes Determination No 23 of 1991 and determines the percentage for the purposes of calculating the fee payable under subsection 29(1) of the Act

Determination No 243 of 1997 made pursuant to subsection 39B(1) of the *Bookmakers Act 1985* determines the location of sports betting venues

Determination No 244 of 1997 made pursuant to subsection 39B(2) of the *Bookmakers Act 1985* determines directions for the operation of the sports betting venues at Manuka Oval

Determination No 245 of 1997 made under section 217A of the *Motor Traffic Act 1936* revokes Determinations Nos 53 of 1997 and 128 of 1997 and determines fees payable for the purposes of the Act in relation to the registration of motor vehicles

Determination No 246 of 1997 made under section 26AZE of the *Motor Traffic Act 1936* determines fees payable for the purposes of the Act in relation to inspections or tests of motor vehicles or trailers

Determination No 247 of 1997 made under subsection 21(1)(b) of the *Animal Diseases Act 1993* revokes Declarations Nos 5 and 6 of 1994 as published in Gazette No. S. 13, Monday 24 January 1994 and declares that certain diseases are endemic diseases

Determination No 248 of 1997 made under subsection 21(1)(b) of the *Animal Diseases Act 1993* revokes Declaration No. 8 of 1994 as published in Gazette No. S. 13, Monday 24 January 1994 and declares that certain diseases are exotic diseases

Determination No 249 of 1997 made under subsection 21(1)(a) of the *Animal Diseases Act 1993* revokes Declaration No. 7 of 1994 as published in Gazette No. S. 13, Monday 24 January 1994 and declares certain animals to be stock

Determination No 250 of 1997 made under subsection 39B(1) of the *Bookmakers Act 1985* determines the location of a sports betting venue

Determination No 268 of 1997 made under section 204(a) of the Land (Planning and Environment) Act 1991 is an approval of the Murrumbidgee River Corridor Plan of Management

Subordinate Legislation - Comment

The Committee has examined the following subordinate legislation and offers the comments:

Determination No. 194 of 1997 made under section 150M of the *Motor Traffic Act 1936* is an instrument of approval of a Code of Practice for Parking Heavy Vehicles in residential Areas. A Code of Practice is attached.

The relevant Determination is the instrument of approval, but as a practical matter it does not make sense without reference to the Code which is being approved. The Committee notes that the Code attached bears the Minister's initials and the date of approval, but is labelled as a DRAFT. This could cause confusion in the minds of those who refer to this Determination in order to ascertain what is provided for in the Code.

The Committee observes that it will be important to ensure that the Code is published and made available to the same extent as the Determination.

The Committee raises the question of whether it might be desirable to avoid this distinction between an instrument of approval and the document being approved. In the present case, it might have been better to simply empower the Minister to make a Code by instrument.

GOVERNMENT RESPONSE

The Committee has received a response in relation to comments made concerning:

- Health Records (Privacy and Access) Bill 1997 (Report No. 17 of 1997).

A copy of the response is attached. The Committee thanks the Minister for Health and Community Care for her helpful response.

A handwritten signature in cursive script that reads "Bill Wood".

Bill Wood, MLA
Chair

11 December 1997



Kate Carnell MLA

Chief Minister

Treasurer
Minister for Health and
Community Care

Member for Molonglo
Australian Capital Territory

Mr Bill Wood MLA
Chair
Standing Committee on Scrutiny of Bills
and Subordinate Legislation
Legislative Assembly for the ACT

Bill
Dear Mr Wood

I am writing to you in relation to Report Number 17 of the Standing Committee on the Scrutiny of Bills and Subordinate Legislation as it applies to the *Health Records (Privacy and Access) Bill 1997*.

The Committee commented on how the legislation in relation to privacy and access arrangements for health records would be enforced.

Claims of failure to protect privacy will be dealt with by the Commissioner for Community and Health Services Complaints in accordance with the current facility available to the Commissioner. The only privacy offence will be the obtaining of access to a health record by threat, intimidation or false representation.

In determining exemptions for access to health records, the record keeper (ie. the health service provider) will determine, in the first instance, if a record is to be exempted. This decision can be appealed by the patient/consumer to the Commissioner. In addition, the Commissioner's decision will be appealable to the Magistrate's Court.

The Committee raised concerns about the possible consequences of Clause 30, which requires record keepers to obtain expert advice in relation to the provision of access to records. Advice would only be required where a decision was required in relation to the exemption of a record. In most cases, the record keeper is also the service provider and would be considered to have the competence to determine whether a record should be exempted (subject to appeal rights).

Expert advice would only be required in situations where the service provider is not the record keeper, such as in a hospital where the record keeper may be the information manager in the medical records department. In such cases, the staff in the medical records office would seek advice from the relevant medical and/or clinical personnel as necessary. A similar situation may occur in a group medical practice.

I would expect that it would be a very rare case in which a service provider would be required to pay another professional to determine whether a record should be exempt from access.

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The Committee raises the possibility that the legislation might be the vehicle for actions in negligence of breach of statutory duty. I agree that such actions could occur. However I note that:

- it is currently possible for people to commence proceedings for breach of contract where there has been a breach of confidentiality;
- the Bill introduces more certainty for providers as it clearly states their obligations to maintain personal privacy; and
- the process of resolution of complaints allowed by the Bill is intended to provide an opportunity for people to resolve issues without recourse to legal processes.

The Committee suggests that the complexity of the scheme will impose significant costs on health providers. However, under the *Freedom of Information Act 1989*, public health services are required to comply with many provisions of the Bill with no demonstrated difficulty. In addition, many other services voluntarily comply with any request to review and discuss health care records. This has not led to either undue costs or increased litigation for those concerned.

The Committee also raised a concern over the proposed delegation of powers to the Minister to exempt certain health services from coverage of the Bill. The Committee correctly states that the definition of health service is broad. The Government specifically provided for the broad definition in order to ensure that Bill has as wide an application as possible. Given this, the Government does not envisage that there will be a large number of exemptions to the Bill. Most importantly, any exemption by way of Regulation would be a disallowable instrument which would provide the Assembly with the necessary opportunity to consider any proposed exemption.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Kate Carnell', written in dark ink.

Kate Carnell MLA
Minister for Health and Community Care

9 - DEC 1997