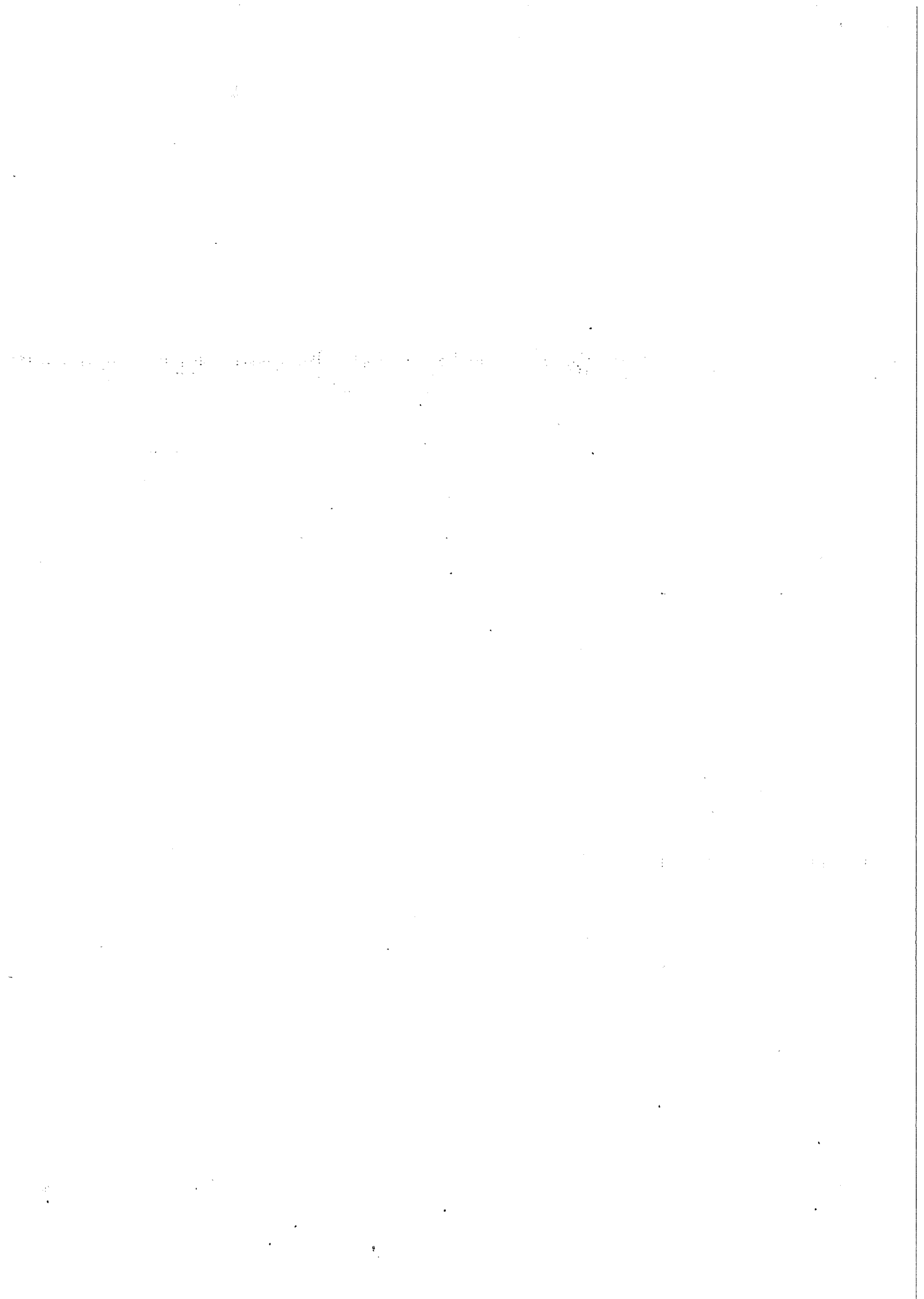


**STANDING COMMITTEE ON  
SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION**

**REPORT NO. 1 OF 1997**

**25 February 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: Emeritus Professor Douglas Whalan, AM**  
**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

### Bills - No Comment

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

#### **Crimes (Amendment) Bill 1997**

This Bill amends the provisions relating to police search powers and expands the sentencing principle relating to guilty pleas.

#### **Gaming Machine (Amendment) Bill 1997**

This Bill permits hotel licensees to instal the gaming machines currently available to club licensees.

#### **Health Promotion (Amendment) Bill 1997**

This Bill allocates 5% of the actual tobacco franchise fees to the Board instead of 5% of projected fees and repeals a redundant provision relating to audit as the matter is now covered in the *Financial Management Act 1996*.

#### **Liquor (Amendment) Bill 1997**

This Bill prohibits sexually explicit entertainment on premises other than those in prescribed locations and permits the extension of the restricted licensing hours trial until 30 September 1997.

#### **Trading Hours (Repeal) Bill 1997**

This Bill repeals the *Trading Hours Act 1996* and the *Trading Hours (Amendment) Act 1996*.

### Bill - Comment

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

#### **Medical Treatment (Amendment) Bill 1997**

This Bill amends the principal Act to add provisions authorising the administration or provision of a substance to terminate the life of a person on request.

#### Provisions for Witnesses

Section 7 of the Principal Act sets out the requirements for written directions under the Act. Clause 11 amends section 7 to add requirements in the case of a written request.

Paragraph 11 (d) amends paragraph 7 (c) to provide that, in the case of a written request, one of the two witnesses must be the medical practitioner named in the request.

New section 7A, inserted by clause 12 of the Bill, makes provision for an oral direction or request made by a person physically unable to sign the direction or request to be signed on behalf of that person in the presence of that person and two witnesses.

New subsection 8 (1), also inserted by clause 12, sets out the requirements for the witnesses to a direction or request. Then new subsection 8 (2) adds to these requirements in relation to a direction only in the following terms:

"(2) In the case of a direction that is not in writing, in addition to the requirements specified in subsection (1), the witnesses shall also be 2 health professionals (1 of whom shall be a medical practitioner) present at the same time."

Thus it appears that, although the medical practitioner named in a written request is required by the amended paragraph 7 (c) to be one of the witnesses to a written request, there is no requirement for any medical practitioner (or, indeed, any health professional) to be a witness in the case of a request that is not in writing. Should the new subsection 8 (2) perhaps be extended to cover an unwritten request as well as an unwritten direction?

## SUBORDINATE LEGISLATION

### Subordinate Legislation - No Comment

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

**Determination No. 289 of 1996 made under section 4 of the *Public Place Names Act 1989* revokes Determination No. 257 of 1996 and determines the names, origins and significance of streets in the Division of Ngunnawal.**

**Determination No. 291 of 1996 made under section 59A of the *Administrative Appeals Tribunal Act 1989* varies Determination No. 167 of 1996 by inserting a fee for lodging an application for review of a decision under the *Land (Planning and Environment) Act 1991*.**

**Determination No. 292 of 1996 made under section 63 of the *Tenancy Tribunal Act 1994* appoints a specified person as Acting President of the Tenancy Tribunal.**

**Determination No. 293 of 1996 made under section 189 of the *Credit Act 1985* appoints a specified person as an acting member and acting Chairperson of the Credit Tribunal.**

**Determination No. 294 of 1996 made under section 67 of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* determines fees for the grant or renewal of licences to sell X films, copy X films or copy and sell X films.**

**Determination No. 1 of 1997 made under section 21 of the *Nature Conservation Act 1980* revokes Determination No. 29 of 1996 and declares specified species to be vulnerable species or endangered species and a specified community, Natural Temperate Grassland, to be an endangered community.**

**Determination No. 2 of 1997 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* appoints a named person to be Chairperson of the Chiropractors and Osteopaths Board for a period of three years.**

Determination No. 3 of 1997 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* appoints a named person to be a member of the Chiropractors and Osteopaths Board for a period of three years.

Determination No. 4 of 1997 made under subsection 5 (1) of the *Health Professions Boards (Procedures) Act 1981* appoints a named person to be a member of the Chiropractors and Osteopaths Board for a period of three years.

Determination No. 5 of 1997 made under paragraph 75 (1) (b) of the *Tenancy Tribunal Act 1994* exempts specified leases from the operation of the Commercial and Retail Leases Code of Practice.

Determination No. 6 of 1997 made under paragraph 14 (1) (c) of the *Health and Community Care Services Act 1996* appoints a named person to be a member of the Health and Community Care Services Board for a period of four years.

Determination No. 7 of 1997 made under paragraph 14 (1) (c) of the *Health and Community Care Services Act 1996* appoints a named person to be a member of the Health and Community Care Services Board for a period of four years.

Determination No. 8 of 1997 made under paragraph 14 (1) (c) of the *Health and Community Care Services Act 1996* appoints a named person to be a member of the Health and Community Care Services Board for a period of two years.

Determination No. 9 of 1997 made under paragraph 14 (1) (c) of the *Health and Community Care Services Act 1996* appoints a named person to be a member of the Health and Community Care Services Board for a period of two years.

Determination No. 10 of 1997 made under paragraph 26 (1) (a) of the *Health and Community Care Services Act 1996* appoints a named person to be Chairperson of the Health and Community Care Services Board.

Determination No. 11 of 1997 made under paragraph 26 (1) (b) of the *Health and Community Care Services Act 1996* appoints a named person to be Deputy Chairperson of the Health and Community Care Services Board.

Determination No. 12 of 1997 made under subsection 428A (2) of the *Crimes Act 1900* extends the operation of Part XI of the *Crimes Act 1900* for the purposes of section 428A(1).

Determination No. 13 of 1997 made under section 9 of the *Health Act 1993* declares specified committees appointed by the Board of Management of Calvary Hospital to be approved Quality Assurance Committees.

Determination No. 14 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as Chairperson of the Ethics Committee of the ACT for a period of three years.

Determination No. 15 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 16 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 17 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 18 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 19 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 20 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 21 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 22 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 23 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 24 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 25 of 1997 made under section 7 of the *Health Act 1993* appoints a specified person as a member of the Ethics Committee of the ACT for a period of three years.

Determination No. 26 of 1997 made under section 13 of the *Occupational Health and Safety Act 1989* appoints a specified person as a member of the Occupational Health and Safety Council for a period of three years.

Determination No. 27 of 1997 made under section 13 of the *Occupational Health and Safety Act 1989* appoints a specified person as a member of the Occupational Health and Safety Council for a period of three years.

Determination No. 28 of 1997 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the document entitled *We Fish for the Future - The National Code of Practice for Recreational and Sport Fishing*.



Determination No. 29 of 1997 made under section 217A of the *Motor Traffic Act 1936* revokes Determination No. 118 of 1996 and determines fees for a commercial parking label, a medical parking label or a parking label for residents in specified locations.

Determination No. 30 of 1997 made under section 22 of the *Animal Welfare Act 1992* approves as a Code of Practice the Code of Practice for the Welfare of Dogs in the ACT.

Determination No. 31 of 1997 made under section 16 of the *Nature Conservation Act 1980* revokes Determination No. 77 of 1996 and declares that specified species have special protection status.

Determination No. 32 of 1997 made under subsection 61 (9) of the *Public Trustee Act 1985* sets the rate of management fee for the administration of moneys held in the Common Fund Guarantee and Reserve Account at 1% per annum.

Determination No. 33 of 1997 made under section 12 of the *Housing Assistance Act 1987* varies Determination No. 211 of 1996 being the house assistance program called the Kickstart Assistance Program to extend the Program to include non-public tenants.

Determination No. 34 of 1997 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 13 of 1995 and Determination No. 226 of 1996 and determines the concessional rates of stamp duty payable under the *Stamp Duties and Taxes Act 1987* by eligible homebuyers and the criteria for eligibility.

Determination No. 35 of 1997 made under section 4 of the *Public Place Names Act 1989* determines the names, origins and significance of streets in the Division of Conder.

Determination No. 36 of 1997 made under section 8 of the *Ambulance Service Levy Act 1990* fixes the prescribed amount of levy.

Determination No. 37 of 1997 made under subsection 39B (2) of the *Bookmakers Act 1985* determines the directions for the operation of the sports betting venue at Bruce Outdoor Stadium at Canberra Cosmos matches on specified dates.

Determination No. 38 of 1997 made under section 99 of the *Taxation (Administration) Act 1987* revokes Determination No. 152 of 1993 and determines unchanged rates of stamp duty payable under the *Stamp Duties and Taxes Act 1987* on the transfer of land, but replaces references to the term of 25 years or a term for 25 years as an aggregate of the term of a lease and options to renew with a reference to 30 years.

Subordinate Law No. 29 of 1996 being the Liquor Regulations (Amendment) made under the *Liquor Act 1975* declared a "dry area" in the vicinity of Stage 88 from 3 p. m. on Friday 13 December 1996 until 9 a. m. on Saturday 14 December 1996 to ensure that the prescribed area was liquor free during a specified event.

Subordinate Law No. 30 of 1996 being the Casino Control Regulations (Amendment) prescribes a lower limit of \$1,000 that the casino licensee can offer in relation to commission-based gaming.

Subordinate Law No. 31 of 1996 being the Supreme Court Rules (Amendment) makes changes to the form of affidavits relating to the winding up of an insolvent company.

Subordinate Law No. 32 of 1996 being the Discrimination (Remuneration and Allowances) Regulations (Amendment) fixes the level of remuneration and allowances for the Discrimination Commissioner.

Subordinate Law No. 33 of 1996 being the Liquor Regulations (Amendment) extended the trading hours for the sale of liquor for consumption on licensed premises on 1 January 1997.

Subordinate Law No. 34 of 1996 being the Remand Centres Regulations (Amendment) provides that the Attorney-General shall provide the Standing Committee on Legal Affairs of the Legislative Assembly with a copy of the notice whenever a person remanded into custody in the ACT is transferred to an institution outside the ACT.

#### Subordinate Legislation - Comments

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

**Determination No. 290 of 1996 made under section 217A of the *Motor Traffic Act 1936* determines road rescue fees under section 14AA of the Act.**

#### Have Road Rescue fees been Validly Collected?

Determination No. 290 of 1996 determines the levels of the road rescue fee section. The Determination stated as follows:

"This instrument commences operation on 1 January 1997."

The imposition of road rescue fees was authorised by amendments made to the *Motor Traffic Act 1936* by the *Motor Traffic (Amendment) Act (No. 2) 1996*.

The Committee found a Notice of Commencement in ACT *Gazette* No. S353 dated 23 December 1996, which provided for the commencement of the remaining provisions of *Motor Traffic (Amendment) Act (No. 3) 1996* on 1 January 1997. This Act is irrelevant to the present matter as it is the amending Act dealing with parking of heavy vehicles.

However, the Committee has been unable to find a commencement announcement for the *Motor Traffic (Amendment) Act (No. 2) 1996* before 1 January 1997.

If there was, in fact, a Notice of Commencement published in the *Gazette* before 1 January 1997 there is no problem. However, if there was no such commencement, then any road rescue fees collected under Determination No. 290 of 1996 prior to the commencement of the statutory provisions, which authorised the collection of such fees, appear to have been collected without legal authority. If so, a retrospective amending Act correcting the matter would appear to be appropriate.

The matter should be checked.

**Determination No. 296 of 1996 made under section 3F of the *Building and Services Act 1924* revokes Determination No. 121 of 1996 and determines fees for the disposal of garbage at ACT Government landfills.**

Guidelines not Followed Yet Again

In its Report No. 10 of 1996 the Committee commented in detail on the fact that the Explanatory Statement for Determination No. 121 of 1996, which is revoked by the present determination, did not follow the Guidelines for the Preparation of Disallowable Instruments.

The Explanatory Statement for the present determination also fails to observe these Guidelines, which were updated and reissued by the Attorney-General's Department in September 1996.

The relevant parts of the Guidelines provide as follows (at page 16):

*"Fees and Charges*

**First**, if you are preparing a determination of fees or charges then the explanatory statement **must** include a comparative list of old fees or charges (if any) and the new fees or charges.

Also the explanatory statement **must** explain the reason for the variation in the fees or charges. There could be a variety of reasons such as an increase in the Consumer Price index; the Government's budget strategy for the year in question; the need to recover the full cost of providing the services or items; bringing the fees or charges in line with those applying elsewhere."

As the Guidelines state (at page 14):

"The purpose of an explanatory statement is to explain your disallowable instrument in simple terms. This means the reader should have complete information relating to the instrument being explained, including what existed previously, why any change was made and what effect the instrument will have.

The explanatory statement is used by members of the Legislative Assembly and members of the public to understand the background to the instrument and its effect.

Also, the explanatory statement may be used (by a court, for example) as an aid to establish the meaning of a provision of the instrument."

The four explanatory paragraphs of the Explanatory Statement for the present determination are exactly word for word with those in the Explanatory Statement for Determination No. 121 and, as the Committee said in its Report No. 10 of 1996,

"there is no comparative table of old and new fees for the disposal of garbage and very little explanation for any changes."

When one looks at the present determination, there appear to be very modest changes made in the present determination itself for existing items (and there do not seem to be any fee changes to these items), but at least one item appears to have been added.

In his very helpful response of 23 September 1996 to the Committee's comments on Determination No. 121, the Attorney-General, Mr Humphries, mentioned the Committee's concerns and stated that:

"This matter has been brought to the attention of those responsible."

It would have been helpful for everyone if the Attorney-General's and the Committee's suggestions that the Guidelines be complied with had been adopted.

**Determination No. 297 of 1996 made under section 7 of the *Dental Technicians and Dental Prosthetists Registration Act 1988* appoints 5 specified persons as members of the Dental Technicians and Dental Prosthetists Board and a specified person as Chairperson of that Board.**

An Apparent Hiatus in Membership, the Effect of the Period from Making until Gazettal and an Inaccurate Explanatory Statement

This determination takes an unusual form. Instead of making a separate determination for each appointment as usually happens, this determination consists of 6 separate instruments all separately signed and dated.

Fortunately, 5 are identical in form except for the substitution of a different person's name as a member of the Board for a period of three years from the date of the notice. The sixth instrument is also the same except that it appoints a specified person as Chairperson of the Board.

The unusual form of the determination appears to create no legal problems. However, there do seem to be other problems with the instruments.

The first problem is that, unfortunately, there is a discrepancy between what the Explanatory Statement says the instruments do and what they actually do. Other difficulties flow on from this discrepancy.

The Explanatory Statement states:

"All six positions on the Board will become vacant on 5 December 1996."

The Explanatory Statement then notes that "six persons nominated for the Board" three of whom were existing members and three of whom were new people.

The Explanatory Statement then states:

"All nominees are eligible for appointment. Appointments to the Board are for a period of three years commencing 5 December 1996 to and including 4 December 1999." (Emphasis added.)

In fact, this last statement does not coincide with what the 6 instruments do. All 6 instruments were not signed until 20 December 1996 and state that the appointments are "for the period of three years commencing from the date of this notice". (Emphasis added.)

Furthermore, the making of the determination was not notified in the *Gazette* until 31 December 1996.

Two discrete problems arise from these facts.

First, if the vacancies occurred on 5 December 1996 as the Explanatory Statement advises, there would have been no Board members from that date until 20 December 1996.

Thus, if it was "business as usual" at the Board during this period, there appears to be a problem. If any decisions were made or expenses paid to members (section 13 of the *Dental Technicians and Dental Prosthetists Registration Act 1988* provides that members are not remunerated but receive reasonable expenses) or any other action taken involving the people who became former members of the Board on 5 December 1996, all such actions would appear to be invalid. Even the three members who are reappointed to the Board by the present determination were not members from 5 to 20 December 1996.

This matter needs to be considered.

Secondly, there may be a problem in relation to the period from the commencement of the appointments on 20 December 1996 until notification in the *Gazette* on 31 December 1996.

This is a matter that the Committee has raised in detail in recent Reports, so the Committee will briefly set out the issues.

Because of the provisions of section 5 of the *Statutory Appointments Act 1994* the present determination is a disallowable instrument, and thus relevant provisions of the *Subordinate Laws Act 1989* apply to it.

The possible effect of section 7 of the *Subordinate Laws Act 1989* appears to be of particular relevance. 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 fact, section 7 may not cause any problem in the present instance, as there may not have been much happening with the Board during the period 20 December 1996 to 31 December 1996. Nevertheless, perhaps a check should be made.

**Determination No. 39 of 1997 made under the *Health and Community Care Services Act 1996* revokes Determination of Fees and Charges No. 240 of 1996, repeats the fees that were fixed by that determination and adds a fee relating to audiometry.**

#### An Important Variation in this Determination

This determination fixes the same fees and charges as were in the revoked determination, Determination No. 240 of 1996.

However, the Explanatory statement states as follows:

"The Determination reproduces Determination No. 240 of 1996 except for the introduction of the new fee [for audiometry]."

In fact, the determination does not reproduce Determination No. 240 of 1996, as another very important change is made to the present Determination. As the Committee pointed out in its Report No. 17 of 1996 Determination No. 240 stated that it was "to take effect from 17 October 1996". Unfortunately, it did not appear in the *Gazette* until 23 October 1996. The Committee suggested that the period from 17 October 1996 until 23 October 1996 needed to be considered.

In the present case, this flaw pointed out by the Committee has been fixed up. The equivalent provision in Determination No. 39 of 1997 provides appropriately that the determination is "to take effect from the date of Gazettal" and thus avoids the possibility of a problem arising.

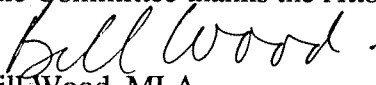
## GOVERNMENT RESPONSE

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

- Determinations Nos 155, 156 and 157 of 1996 made under the *Health Professionals Board (Procedures) Act 1981* and the *Medical Practitioners Act 1930* (Report No. 11 of 1996).
- Determination No. 187 of 1996 made under the *Taxation (Administration) Act 1987* (Report No. 12 of 1996).
- Determination No. 211 of 1996 made under the *Housing Assistance Act 1987* (Report No. 16 of 1996).
- Motor Traffic (Amendment) Bill (No. 4) 1996 (Report No. 17 of 1996).
- Determination No. 231 of 1996 made under the *Radiation Act 1983* (Report No. 17 of 1996).

A copy of the response is attached.

The Committee thanks the Attorney-General for his helpful response.

  
Bill Wood, MLA  
Chair

25 February 1997



Gary Humphries MLA

Attorney General  
Minister for the Environment, Land  
and Planning  
Minister for Police  
Minister for Emergency Services  
Minister for Arts and Heritage  
Minister for Consumer Affairs

Member for Molonglo  
Australian Capital Territory

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Mr Harold Hird MLA  
Acting Chair  
Standing Committee on Scrutiny of Bills  
and Subordinate Legislation  
ACT Legislative Assembly  
South Building  
London Circuit  
CANBERRA ACT 2601

Dear Mr <sup>Harold</sup>Hird

I refer to the Standing Committee's Reports Nos. 11 (27 August 1996), 12 (12 September 1996), 16 (2 October 1996) and 17 (28 November 1996).

I am now in a position to respond to a number of the matters raised in these Reports.

In Report No. 11, you made two comments concerning Determinations No. 155, 156 and 157, which appointed specified persons to the Medical Board.

Firstly, you queried whether there was consultation with the relevant Committee of the Legislative Assembly nominated by the Speaker as is required under the *Statutory Appointments Act 1994*. I am advised that consultation with the relevant committee of the Legislative Assembly took place, although this was not noted in the Explanatory Statement accompanying the determinations.

Secondly, you queried the period of retrospectivity between 5 June 1995, when the appointments were specified by the determination to commence, and 18 July 1996, when the determinations were notified in the Gazette.

As set out in the attached advice from the Government Solicitor's Office, the Board met once during the relevant period and it accepted the recommendations of its Registration Committee. The Government Solicitor's Office is of the view it is likely these registrations would be upheld.

ACT Legislative Assembly,  
London Circuit, Canberra ACT 2601  
GPO Box 1020, Canberra ACT 2601  
Phone (06) 205 0133 Fax (06) 205 0427

I am also advised section 14 of the *Health Professionals Board (Procedures) Act 1981* provides that the validity of the decisions of the board is not affected by there being vacancies on the Board, so long as there was a quorum at each meeting. A quorum of the Medical Board is four members, including the presiding member (*Health Professions Board (Procedures) Act, s. 18; Medical Practitioners Act 1930, s. 8(1)*). I am advised that there was a quorum of members, whose positions on the Board were not in doubt, during the relevant meeting.

In Report No. 12 you commented on Determination No. 187 of 1996. As you have pointed out, Determination No. 187 revoked Determination No. 74 of 1995. The Determinations were made under section 99 of the *Taxation (Administration) Act 1987*. Determination No. 187 does not alter the rates of stamp duty that are payable, the Determination was intended to correct a number of incorrect cross-references in Determination No. 74.

You have referred to cross-references in paragraphs 12, 13 and 14 of Determination No. 187. As you have pointed out, these paragraphs correspond to paragraphs 13, 14 and 15 in Determination No. 74.

I will deal with the paragraphs in turn. For the sake of convenience the paragraph numbers that are in brackets are those that appeared in Determination No. 74.

I am advised that the cross-references in paragraphs 14 and (15) are correct.

Paragraph 12 should refer to paragraphs 8, 9 and 11 instead of paragraphs 9, 10 and 12. Paragraph (13) should have referred to paragraphs (9), (10) and (12) rather than paragraphs (9), (10), and (11).

Paragraph 13 correctly refers to paragraphs 8, 9 and 11. Paragraph (14) should have referred to paragraphs (9), (10) and (12) rather than to paragraphs (9), (10) and (11).

Determination No. 247 of 1996, which was notified in the Special Gazette on Tuesday 29 October 1996, revokes Determination No. 187 and corrects the cross-references in paragraph 12.

In your report you also referred to the inadequacy of the explanatory statement for Determination No. 187, which did not refer to the fact that it the determination had been made to correct cross-references. The explanatory statement for Determination No. 247 refers to this matter. As set out in your Report No. 17, it does not, unfortunately, refer to the role of your committee in the matter, as is customary. This matter has been brought to the attention of those responsible.



In Report No. 16, you commented on the failure to provide for merit review under the Kick Start Housing Program specified in Determination No. 211 of 1996.

I am advised that consideration has been given to the inclusion of merit review provisions in the Program. The objective of the Program is to provide access to an affordable total finance package. The decision on individual cases is primarily a commercial decision by two approved lenders. Such decisions are based on the affordability of the total deal and are best left with the financial institutions that are exposed to the risk.

Although ACT Housing is required by the Program to make an assessment of a number of factors (see clauses 3.2, 3.3, 3.4 and 3.5), the practicality is that the major decision under the program is made by the approved lenders, who also accept a major commercial risk.

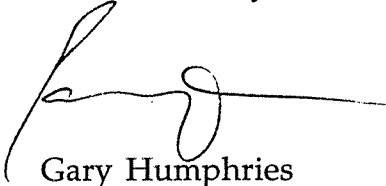
It should be noted that as only a limited number of grants may be made, there would be little, if any, scope for merits review. The reviewer would not be in a position to transfer an approval to another applicant if all grants had already been made. ACT Housing could not be expected to hold back approvals so that any decision favourable to the appellant could be satisfied. Similar considerations apply to the approval of lenders.

In Report No. 17, you suggested that the inter-relationship between the amendments being made to section 256 of the Land (Planning and Environment) Act 1991 by the Motor Traffic (Amendment) Bill (No. 4) 1996 and the Land (Planning and Environment) Bill (No. 3) 1996 needed to be considered. The Land (Planning and Environment) Bill (No. 3) was passed on 4 December 1996, prior to the Motor Traffic (Amendment) Bill (No. 4) being debated. I am advised that, in anticipation of this occurrence, Government amendments to the Motor Traffic (Amendment) Bill (No. 4) were prepared by the Parliamentary Counsel's Office. These amendments will be debated with the Bill.

In Report No. 17, you queried the validity of any actions or decisions of the Radiation Council during the period of retrospectivity of the appointment to the Council by Determination No. 231 of 1996. Determination No. 231 provided that the appointment commenced on 6 October 1996. The Determination was not notified in the Gazette until 11 October 1996. Legal advice provided in relation to other appointments to the Radiation Council (at Attachment A to my response of 18 November 1996) suggests that even if the period of retrospectivity is struck down by s. 7 of the *Subordinate Laws Act 1989*, s. 8(4) of the *Radiation Act 1983* provides that the performance of the powers or duties of the Radiation Council are not affected because of a vacancy or vacancies on the Council. I am advised that this legal advice is

equally applicable to the validity of any actions or decisions of the Radiation Council between 6 October and 11 October 1996.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Gary Humphries', written in a cursive style with a long horizontal stroke extending to the right.

Gary Humphries  
Attorney General

- 8 JAN 1997

Documents  
Enclosed



**AUSTRALIAN CAPITAL TERRITORY  
GOVERNMENT SOLICITOR**

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Your Reference:

Our Reference: 96-2-287556

Josephine Aylward  
Ph: 207 0404

1st Floor  
GIO House  
City Walk  
CANBERRA CITY 2601

29 October 1996

Mr Bob Bradford  
Registrar  
ACT Medical Board  
PO Box 1309  
TUGGERANONG ACT 2900

**APPOINTMENTS TO THE MEDICAL BOARD**

I refer to your letter to Mr Killalea of this office dated 11 September 1996 and your fax of 23 October 1996 and 24 October 1996.

Your specific question was: What effect do the 3 backdated appointments to the Medical Board by the Minister have on any decisions the Board made during the period of intended retrospectivity?

**Background**

Three positions on the Board became vacant on 4 June 1996. The Board recommended that the current 3 appointed members be reappointed for a period of 12 months from and including 5 June 1996 up to and including 4 June 1997. I heard from the Acting Registrar in your absence on 29 October 1996 that consultation with the relevant committee of the Legislative Assembly took place even though this was not noted in the Explanatory Statement accompanying the determinations.

Determination Nos. 155, 156 and 157 were made under s5 of the *Health Professions Boards (Procedures) Act 1981* ("the HPBP Act") and para. 8(1)(a) of the *Medical Practitioners Act 1930* ("the MP Act") to this effect. These Determinations were all signed on 9 July 1996 and gazetted on 18 July 1996. The Board conducted one meeting during the retrospective period in which it ratified registrations approved by the Registration Committee of the Board.

## Short Answer

It is likely that the ratification of registrations that occurred during the retrospective period would be upheld.

## Reasons

Section 5 of the SA Act provides:

### "Disallowable instrument

5. An instrument by which an appointment referred to in section 4 [see above] is made is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*."

Section 10 of the *Subordinate Laws Act 1989* basically provides for our purposes amongst other matters that s6 and s7 of the *Subordinate Laws Act 1989* shall apply to the appointments.

Paragraph 6(1)(b) of the *Subordinate Laws Act 1989* provides that a subordinate law takes effect on the day of notification or, if that law otherwise provides, as so provided. In this case, the subordinate laws (appointments) have been stated to have had effect from 5 June 1996.

Section 7 of the *Subordinate Laws Act 1989* provides:

### "Retrospectivity

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 this case, I have had no instructions that retrospective operation of the appointments would affect the 3 appointed members' rights in a prejudicial manner. I have also had no instructions that retrospective operation of the appointments would cause liabilities to be imposed on these members in respect of any act or omission before the date of notification in the *Gazette*.

However, I understand that the Board conducted one meeting during that period which ratified registrations approved by the Registration Committee of the Board.

Section 7 of the *Subordinate Laws Act 1989* (see above) can meet this situation. By implication, s7 can be taken to be saying that a subordinate law takes effect from a date before the date of its notification in the *Gazette* unless 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 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. The act of ratification of the registration of applicants under the *Medical Practitioners Act 1930* is more likely to have a beneficial effect rather than a prejudicial one. Therefore, it does not offend the restrictions in paragraph (a) of s7. It also does not offend the restrictions in paragraph (b) of s7 as no liabilities are imposed. Hence, the retrospective operation of the ratification of the registrations is more likely than not to be upheld.

ACT Government Solicitor

per:

