

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

REPORT NO. 11 OF 1996

27 August 1996

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

Ms Rosemary Follett, MLA (Chair)
Mr Harold Hird, MLA (Deputy Chair)
Mr Paul Osborne, 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.

SUBORDINATE LEGISLATION

Subordinate Legislation - No Comment

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

Subordinate Law No. 12 of 1996 being the Weapons Regulations (Amendment) made under section 102 of the *Weapons Act 1991* provides that a number of specified sporting organisations may use starting pistols.

Subordinate Law No. 13 of 1996 being the Motor Traffic Regulations (Amendment) made under section 218 of the *Motor Traffic Act 1936* repeals and substitutes the Schedule to increase penalties and fix the level of demerit points.

Subordinate Law No. 14 of 1996 being the Supreme Court Rules (Amendment) amend the regulations in relation to the remuneration and allowances of an acting judge of the Court.

Subordinate Law No. 15 of 1996 being the Weapons Regulations (Amendment) made under section 102 of the *Weapons Act 1991* declares a device known as a Darchery Dartslinger or similar device to be a prohibited weapon.

Subordinate Law No. 16 of 1996 being the Competition Policy Reform (Savings and Transitional) Regulations made under the *Competition Policy Reform Act 1996* provides that authorisations and notifications granted under the previous legislation will be effective for the purposes of the Competition Code.

Determination No. 98 of 1996 made under section 46 of the *Public Trustee Act 1985* appoints two specified persons as members of the Public Trustee Investment Board for a period of three years.

Determination No. 150 of 1996 made under section 39B of the *Bookmakers Act 1985* varies the directions for the operation of the sports betting venue at the Bruce Outdoor stadium by deleting the present provision relating to the times of betting and inserting times of betting for 13 July 1996.

Determination No. 152 of 1996 made under section 139 of the *Land Titles Act 1925* revokes Determination No. 66 of 1995 and determines fees payable under the Act.

Determination No. 162 of 1996 made under subsection 13 (1) 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. 164 of 1996 made under section 39B of the *Bookmakers Act 1985* varies the directions for the operation of the sports betting venue at the Bruce Outdoor stadium by deleting the present provision relating to the times of betting and inserting times of betting for 28 July 1996.

Determination No. 165 of 1996 made under section 37 of the *Supreme Court Act 1993* revokes Determination No. 70 of 1995 and determines fees payable under section 37A of the Act.

Determination No. 166 of 1996 made under section 248A of the *Magistrates Court Act 1930* and section 74 of the *Coroners Act 1956* revokes Determination No. 65 of 1995 and Determination No. 61 of 1995 and determines fees payable under the Acts.

Determination No. 167 of 1996 made under section 59A of the *Administrative Appeals Tribunal Act 1989* and section 78 of the *Tenancy Tribunal Act 1994* revokes Determination No. 57 of 1995 and Determination No. 6 of 1995 and determines fees payable under the Acts.

Determination No. 168 of 1996 made under sections 4 and 80 of the *Freedom of Information Act 1989* varies Determination No. 132 of 1995 by providing that fees and charges are not payable by an Aboriginal person or a Torres Strait Islander for the purpose of assisting that person to re-establish community or family links as a result of past policies of an Australian government.

Determination No. 169 of 1996 made under section 54 of the *Chiropractors and Osteopaths Act 1983* revokes Determination No. 104 of 1994 and determines fees payable under the Act.

Determination No. 170 of 1996 made under section 4 of the *Public Place Names Act 1989* determines the name, origin and significance of a street in the Division of Ngunnawal.

Public Sector Management Standards 12/1996 made under section 251 of the *Public Sector Management Act 1994* by the Commissioner for Public Administration with the Approval of the Chief Minister revokes, amends and makes a number of provisions dealing with ACTTAB and ACTEW staff.

Subordinate Legislation - Comments

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

Determination No. 151 of 1996 made under subsections 97 (1) and 101 (1) of the *Land (Planning and Environment) Act 1991* appoints a specified person as a member and as Chairperson of the ACT Heritage Council for a period of three years.

Determinations Nos. 153 and 154 of 1996 made under sections 5 and 9 of the *Plumbers, Drainers and Gasfitters Board Act 1982* appoint four specified persons as members of the Board and two specified persons as deputy members of the Board for a period of three years.

No Mention in the Explanatory Statement of Consultation under the *Statutory Appointments Act 1994*

There is no mention in the Explanatory Statement whether there was a need to consult the relevant Committee of the Legislative Assembly nominated by the Speaker as is required under the *Statutory Appointments Act 1994*.

If there was such a requirement, was it complied with?

Determination No. 155 of 1996 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and the provisions of paragraph 8 (1) (a) of the *Medical Practitioners Act 1930* appoints a specified person as a member of the Medical Board of the ACT for a period of one year commencing on 5 June 1996 to and including 4 June 1997.

Determination No. 156 of 1996 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and the provisions of paragraph 8 (1) (a) of the *Medical Practitioners Act 1930* appoints a specified person as a member of the Medical Board of the ACT for a period of one year commencing on 5 June 1996 to and including 4 June 1997.

Determination No. 157 of 1996 made under section 5 of the *Health Professions Boards (Procedures) Act 1981* and the provisions of paragraph 8 (1) (a) of the *Medical Practitioners Act 1930* appoints a specified person as a member of the Medical Board of the ACT for a period of one year commencing on 5 June 1996 to and including 4 June 1997.

No Mention in the Explanatory Statement of Consultation under the *Statutory Appointments Act 1994* and Retrospectivity

The Committee makes two comments.

First, the comments that the Committee made under the previous heading appear to be relevant here, too. That is, there is no mention in the Explanatory Statement 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*.

Secondly, it is noted that these appointments were signed on 9 July 1996 and notified in the *Gazette* on 18 July 1996. The appointments are back-dated to 5 June 1996.

There is thus a period of retrospectivity of operation involved and section 7 of the *Subordinate Laws Act 1989* may be relevant. 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."

The Medical Board has very significant powers and functions. They include imposing conditions on registration, granting or refusing registration, cancelling or suspending registration, cautioning or reprimanding, imposing fines and reviewing accounts for fees.

The effect of section 7 and the back-dating of the three present appointments in relation to any meetings, decisions or actions that may have been taken during the period of back-dating, needs to be considered.

This may have particular practical effect in the present cases. The Explanatory Statement advises that all three persons are re-appointments. If there has been continuing "business as usual" during the period when they were not entitled to act, then the validity of any matters occurring to any person's detriment during that time would need to be considered.

Determination No. 158 of 1996 made under paragraph 111 (1) (a) of the *Gas Act 1992* revokes Determination No. 85 of 1995 and determines fees payable under the Act.

Determination No. 159 of 1996 made under section 12 of the *Clinical Waste Act 1990* revokes Determination No. 82 of 1995 and determines fees for the issue or renewal of a licence to transport clinical waste.

Mistakes Repeated from Last Year

Both Determination No. 158 and Determination No. 159 of 1996 refer to the determinations being revoked, Determinations Nos. 82 and 85 of 1995, being published in the *Gazette*.

Last year the Committee drew attention in its Report No. 8 of 1995 to the fact that there were references in many determinations to determinations being published in the *Gazette*.

As pointed out last year, and again in the Committee's recent Report No 10 of 1996, this practice of publication no longer occurs and there is merely notification in the *Gazette* of the making of a determination and a statement as to where a copy can be bought. Most of the relevant determinations for this year have been corrected, but the mistake is repeated in Determination No. 158 of 1996 and Determination No. 159 of 1996.

There is no problem of invalidity involved as the statements occur in a revocation provision, but it can be misleading to members of the Assembly or members of the public wishing to check on fees.

The Committee repeats its suggestion that when the next determinations are made under these Acts, a correction should be made.

Determination No. 160 of 1996 made under subsection 13 (1) of the *Occupational Health and Safety Act 1989* appoints six specified persons as members of the Occupational Health and Safety Council for a period of three years.

Determination No. 161 of 1996 made under subsection 22 (1) of the *Occupational Health and Safety Act 1989* appoints five specified persons as acting members of the Occupational Health and Safety Council for a period of three years.

Determination No. 163 of 1996 made under subsection 22 (1) of the *Occupational Health and Safety Act 1989* appoints a specified person as an acting member of the Occupational Health and Safety Council for a period of three years.

No Answer yet to Questions Raised Earlier and a Possible Recurrence Here

In its Report No. 6 of 1996 of 21 May 1996 the Committee raised a number of possible problems with Determinations Nos. 43, 44, 45 and 46 of 1996 which were also determinations made under the *Occupational Health and Safety Act 1989*.

The Committee has not yet received a reply to the concerns raised in that Report, but looks forward to receiving one.

Unfortunately, two of the questions raised in Report No. 6 of 1996 do appear to arise again with the present determinations. They concern the effect of retrospectivity (which arises with Determinations 160 and 161) and that of possible invalidity (which arises with Determinations Nos. 161 and 163). Although there is considerable repetition, for the sake of convenience the points made in Report No. 6 of 1996 are applied to the present determinations.

First, retrospectivity is considered.

Determinations Nos. 160 and 161 were signed on 10 July 1996, but were not notified in the *Gazette* until 25 July 1996. They both state that the appointments were "from the date of this instrument".

Subsection 6(1) of the *Subordinate Laws Act 1989* states as follows:

"6 (1) A subordinate law -

- (a) shall be notified in the *Gazette*;
- (b) takes effect on the day of notification or, if the law otherwise provides, as so provided; and
- (c) shall be laid before the Legislative Assembly within 15 sitting days after the date of notification."

Section 7 of the *Subordinate Laws Act 1989* 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."

The fact that the notification in the *Gazette* was later than the date when the instruments stated they were to take effect (that is, they were not notified until 25 July 1996 and were to come into effect from 10 July 1996) is relevant.

The question of the effect of these periods of retrospectivity needs to be considered in both cases.

The Committee now turns to the question of possible invalidity.

Determination No. 161 of 1996 provides that, under subsection 22 (1) of the *Occupational Health and Safety Act 1989*, 5 named persons are appointed

"to be acting members of the Occupational Health and Safety Council for a period of three years from the date of this instrument."

Determination No. 163 of 1996 provides that, under subsection 22 (1), a named person is appointed

"to be an acting member of the Occupational Health and Safety Council for a further period of three years from the 29 August 1996 when his current term of appointment expires."

Subsection 22 (1) of the *Occupational Health and Safety Act 1989* provides as follows:

"21(1) The Minister may appoint a person to act as a member of the Council, other than the Chairperson or Deputy Chairperson -

- (a) during a vacancy in the office of the member, whether or not an appointment has previously been made to the office; or
- (b) during any period or all periods when the member is absent from duty or from the Territory or is, for any reason, unable to perform the duties of the office;

but a person appointed to act during a vacancy shall not continue so to act for more than 12 months."

The present acting appointments have been made for a period of three years. Do these appointments breach the "12 months" rule in subsection 21 (1)?

Unfortunately, the Explanatory Statement does not indicate whether the appointees are appointed in relation to paragraph 21 (1) (a) or paragraph 21 (1) (b).

If they are, in fact, appointed to fulfil obligations under paragraph 21 (1) (b), there appears to be no problem of invalidity.

However, if they are to cover vacancies under paragraph 21 (1) (a), the appointments appear to breach the "12 months" rule in subsection 21 (1). If this is so, the consequences of this breach need to be considered.

There are two aspects to this - the positions of the "members" and the effect of any action in which they may have been involved.

First, so far as the "members" themselves are concerned, they may have received remuneration or other compensation for acting and the position relating to that will need to be considered.

Secondly, however, as far as any matters that the "members" have been involved in are concerned, subsection 22 (4) of the *Occupational Health and Safety Act 1989* may be of assistance. It provides as follows:

"22 (4) Anything done by or in relation to a person purporting to act under subsection (1) is not invalid on the ground that -

- (a) the occasion for the person's appointment had not arisen;

- (b) there is a defect or irregularity in connection with the person's appointment;
- (c) the person's appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased."

The matter of the validity and effect of the appointments needs to be considered.

A handwritten signature in cursive script, reading "Rosemary Follett". The signature is written in black ink and is positioned above the printed name and title.

Rosemary Follett, MLA
Chair

27 August 1996