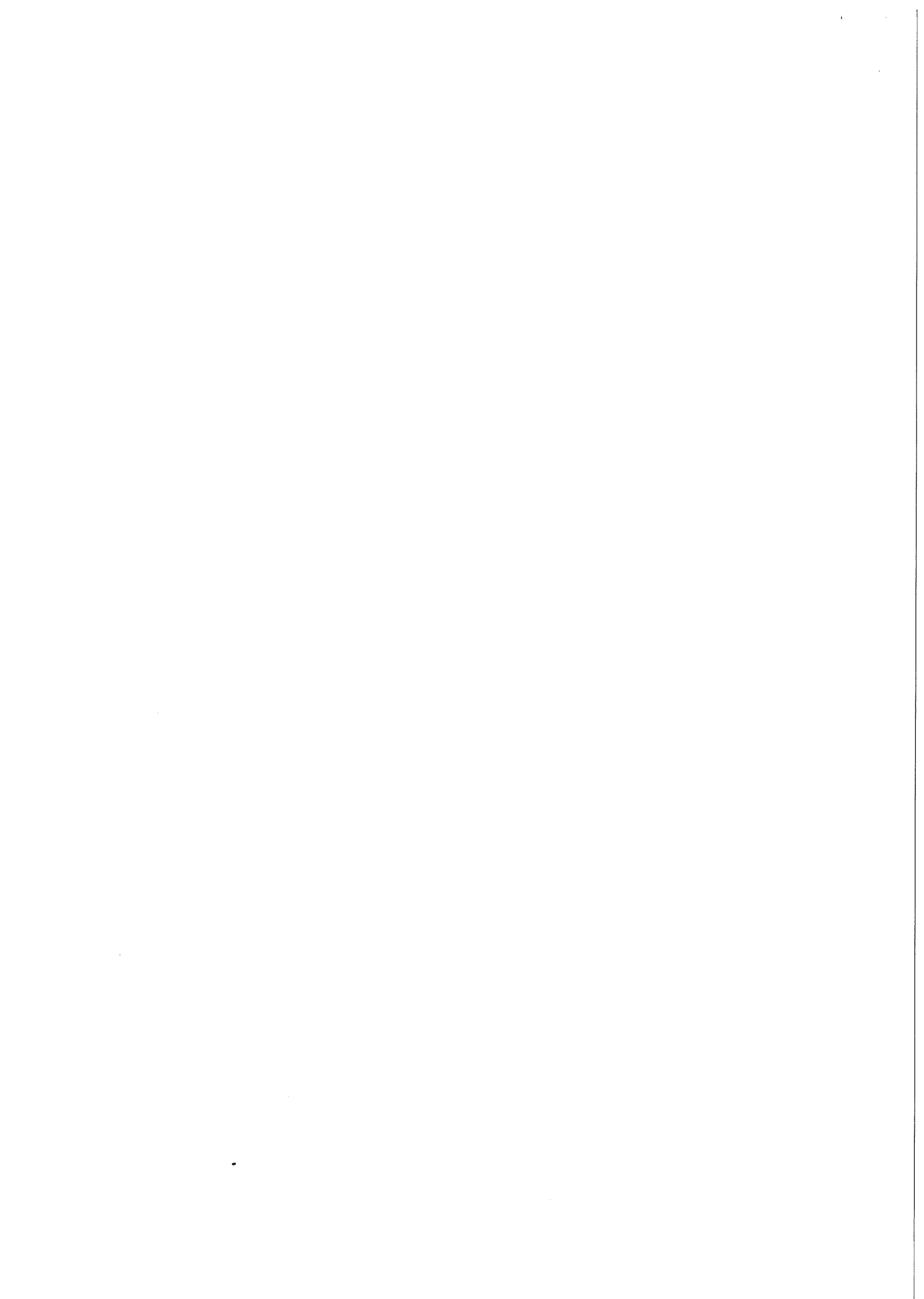


**STANDING COMMITTEE ON  
SCRUTINY OF BILLS AND  
SUBORDINATE LEGISLATION**

**REPORT NO. 12 OF 1995**

**4 October 1995**





# LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Standing Committee on Scrutiny of  
Bills and Subordinate Legislation

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Mr Greg Cornwell, MLA  
Speaker  
Legislative Assembly  
CANBERRA ACT 2601

Dear Mr Cornwell,

Please find enclosed a copy of Report No. 12 of 1995 of the Standing Committee on Scrutiny of Bills and Subordinate Legislation. Under its resolution of appointment, the Committee is empowered to send a report to you while the Assembly is not sitting so that it may be circulated to Members. I seek your approval to print and circulate Report No. 12 of 1995.

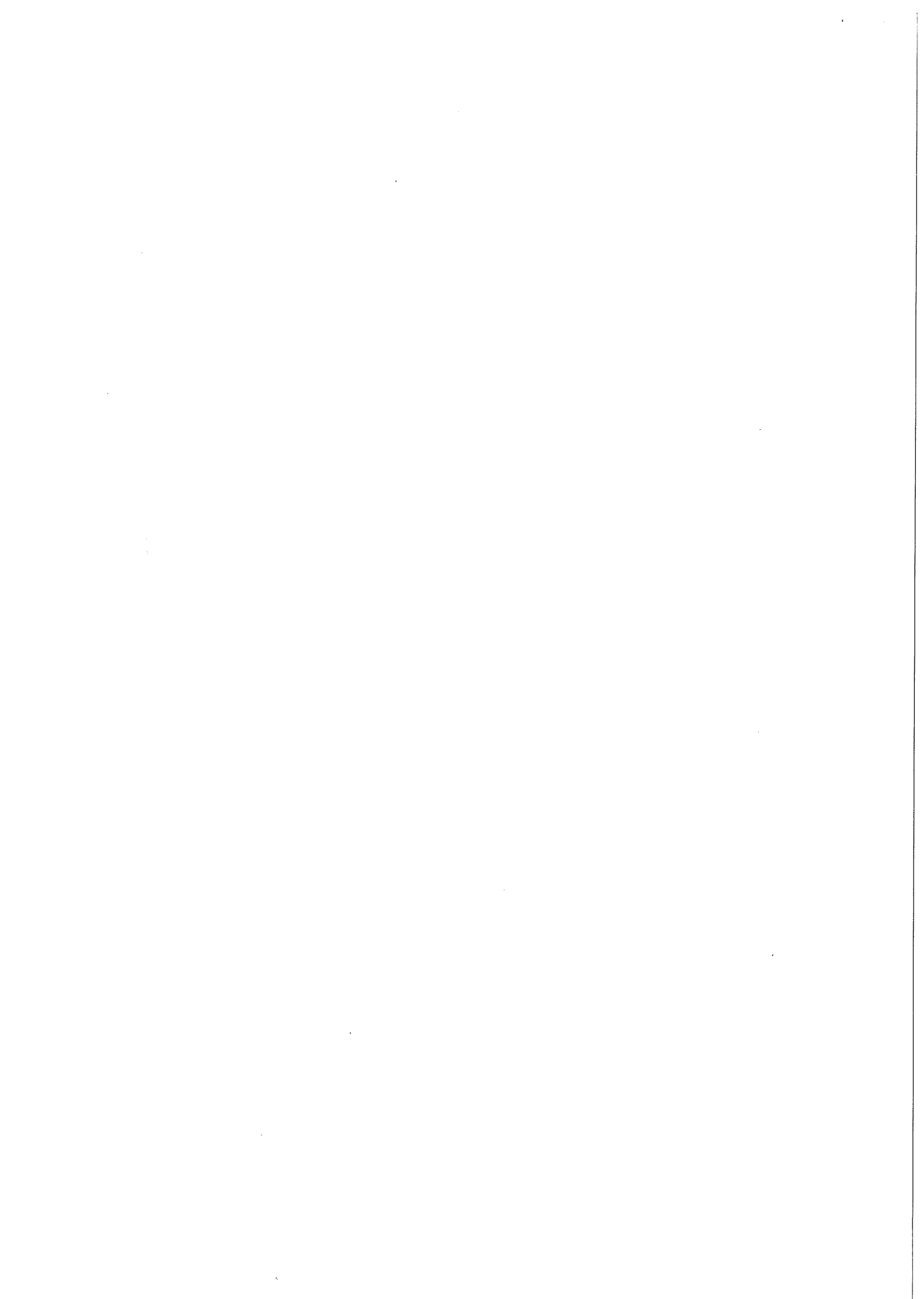
Yours sincerely,

Andrew Whitecross, MLA  
Deputy Chair

4 October 1995

Approved  
Greg Cornwell, MLA  
Speaker

4 October 1995



## 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 Paul Osborne, MLA (Chair)  
Mr Andrew Whitecross, MLA (Deputy Chair)  
Mr Harold Hird, MLA

Legal Advisor: Emeritus Professor Douglas Whalan, AM  
Secretary: Mr Tom Duncan  
Deputy Secretary: Ms Beth Irvin

## 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 comment:

#### **Guardianship and Management of Property (Amendment) Bill 1995**

This Bill allows the Public Trustee the same rights to invest monies under management as other managers of funds under the Act.

#### **Health Promotion Bill 1995**

This Bill establishes the Health Promotion Board and charges it with promoting health in the ACT.

#### **Legal Practitioners (Amendment) Bill 1995**

This Bill ends the appointment of Queen's Counsel in the ACT.

#### **Magistrates Court (Amendment) Bill 1995**

This Bill permits the sending of a person who has appealed against a conviction to a remand centre pending the hearing of the appeal and for a person who refuses to enter into a recognizance for good behaviour under subsection 547 (2) of the *Crimes Act 1900* to be sent to a remand centre.

#### **Remand Centres (Amendment) Bill 1995**

This Bill extends the categories of people who may be detained in a remand centre rather than in police custody or in a prison in New South Wales, makes consequential amendments to the *Removal of Prisoners Act 1968* and removes sexist language from the Principal Act.

#### **Vocational Education and Training (Consequential Provisions) Bill 1995**

This Bill repeals the *Vocational Training Act 1989* and the *Australian National Training Authority (Territory Functions) Act 1993*, provides for the Chairperson of the Vocational Education and Training Authority to be a member of the Canberra Institute of Technology Advisory Council and enacts a number of transitional provisions relating to arrangements made under the 1989 Act.

### Bills - Comment

The Committee has examined the following Bills and offers the following comment:

## **Appropriation Bill 1995-96**

This Bill provides for the issue and expenditure of public monies of the ACT for services provided in the financial year 1995-96.

### A Possibly Inaccurate Reference in the Explanatory Memorandum

The explanatory memorandum has a three page attachment giving a detailed explanation of each of the clauses of the Bill and its Schedule.

In the first paragraph of the part of the attachment that explains the details of the Schedule the following sentence appears:

“In the absence of such a schedule there would be no limit on the individual Appropriation Units as to the amounts which could be expended except for the total authorised in clause 3.”.

In fact, clause 3 is merely the interpretation clause in which “financial year”, “salary” and “Supply Act” are defined.

However, clause 4 provides that the Treasurer:

“may issue the sum of \$1,343,690,900 out of the Consolidated Revenue Fund and apply it in respect of services provided in the financial year by the appropriation units specified in the Schedule.”.

And clause 6 provides that the:

“sums authorised to be issued out of the Consolidated Revenue Fund ... and amounting in the aggregate to \$1,343,690,900, as specified in the third column in Part I of the Schedule, are to be taken to have been appropriated on 1 July 1995 for services provided in the financial year by the relevant appropriation unit specified in the Schedule.”.

It seems that the reference to clause 3 in the explanatory memorandum may be incorrect, but the other clauses could be relevant.

## **Law Reform (Miscellaneous Provisions) (Amendment) Bill 1995**

This Bill partially abrogates the common law rule that a court may not exercise jurisdiction over land or other immovable property outside the ACT.

### Retrospective Conferral of Jurisdiction

The common law prevents a court from exercising jurisdiction over land or other immovable property outside the jurisdiction.

The present amendment maintains the rule that an ACT court may not decide the title to, or right to possession of, land or other immovable property outside the ACT. However, a discretion is conferred on ACT courts to entertain actions concerning foreign land or other immovable property provided that the title to, or possession of, the land or property is not affected.



Section 5 of the Bill provides as follows:

“Part XI of the Principal Act as amended by this Act applies in relation to proceedings pending at the commencement of this Act or instituted after that commencement, irrespective of when the cause of action arose.”.

Thus the amendment applies both to proceedings pending before the court and to those started after the amendment is passed. Therefore, the Bill has the potential to confer jurisdiction retrospectively on the ACT courts.

The Committee would be interested to know whether any cases are currently before the ACT courts.

### **Medical Treatment (Amendment) Bill 1995**

This Bill amends the *Medical Treatment Act 1994* in relation to directions or requests for the medical termination of life in specified circumstances.

#### Definition of “Power of Attorney”

There may be a problem with the definition of “power of attorney” which appears in both paragraph 5 (a) and 5 (b) of the Bill. Could the Committee be advised whether it would be appropriate for paragraph 5 (a) to be omitted and paragraphs 5 (b) and 5 (c) become paragraph 5 (a) and 5 (b)?

### **Vocational Education and Training Bill 1995**

This Bill provides for arrangements for the management of vocational education and training, establishes a Vocational Education and Training Authority and an Accreditation and Registration Council responsible for accreditation of courses and the registration of providers of vocational education and training.

#### The Ambit of the Meaning of “Federal Award”

Clause 4 of the Bill gives the following definition of “federal award”:

“ ‘ federal award’ means -

- (a) an award or order that has been reduced to writing under subsection 143 (1) of the *Industrial Relations Act 1988* of the Commonwealth;
- (b) an enterprise flexibility agreement within the meaning of that Act;  
or
- (c) a certified agreement within the meaning of that Act.”.

Subsection 143 (1) of the *Industrial Relations Act 1988* of the Commonwealth provides for the formalities of the making of an award or order. Then subsection 143 (1A) provides as follows:

“(1A) For the purposes of subsection (1), none of the following is an award or an order affecting an award:

- (a) a decision to certify, or to approve implementation of, an agreement under Part VIB [which is headed “Promoting Bargaining and Facilitating Agreements” and includes provisions for “certified agreements” and “enterprise flexibility agreements”];
- (b) a certified agreement;
- (c) an enterprise flexibility agreement.”.

The Committee notes that, in the definition of “federal award” in clause 4 of the Bill, the exclusions of certified agreements and enterprise flexibility agreements in the Commonwealth Act are negated, but that the exclusion of “a decision to certify, or to approve implementation of, an agreement under Part VIB” is not negated.

This may be deliberate (perhaps on the basis that the decisions or approvals have not yet been formally and fully completed) but perhaps a check should be made.

#### Annual Reports, Ministerial Directions and “Periodic Reports”

In clauses 8 and 15 of the present Bill there are provisions for the Vocational Education and Training Authority and the Accreditation and Registration Council respectively to furnish an annual report to the Minister for presentation to the Legislative Assembly.

Under clause 50 of the Bill the Minister:

“may, in writing, give a relevant body [that is either the Authority or the Council] directions in relation to the performance or exercise of its functions or powers.”.

The Health Promotion Bill 1995, which is considered in this report, also contains a provision for the furnishing of annual reports (in clause 30) and for the giving of Ministerial directions (in clause 7).

There appear to be two ways in which the provisions in the Vocational Educational and Training Bill 1995 differ from those in the Health Promotion Bill 1995.

First, although all three bodies are required to give the particulars of any such Ministerial directions in their annual reports, directions to the two bodies in the present Bill do not have to be laid before the Legislative Assembly within 15 sitting days as is required by the Health Promotion Bill (subclause 7(3)). On the other hand, the present Bill requires the Authority and the Council to give statements in their annual reports "indicating how effect has been given to those directions" (paragraphs 8(2)(c) and 15 (2)(b)), but there does not seem to be a similar requirement in clause 30 of the Health Promotion Bill.

Secondly, subclause 30(4) of the Health Promotion Bill provides that an annual report of the Health Promotion Board is a periodic report for the purposes of section 30A of the *Interpretation Act 1967*. Section 30A imposes certain restrictions, including times for furnishing the report to the Minister and tabling by the Minister in the Assembly. There is no such provision in relation to the annual reports of the Authority and the Council in clauses 8 and 15 of the present Bill.

There may be reasons for the differences between the two Bills, but there is no explanation given in the respective Explanatory Statements.

The Committee also queries why the reports under these provisions have not been put within the scope of the recently passed *Annual Reports (Government Agencies) Act 1995*.

### Rights to Review

The Bill contains a substantial number of provisions under which decisions are made either by the Authority or the Council, such as approving or varying training agreements and accreditation of courses and registration of trainers.

There are also very detailed and appropriate powers conferred on the Administrative Appeals Tribunal by clauses 62 and 63 to review the exercise of these powers.

However, there is one area where power is conferred on the Authority that is not subject to independent merits review.

Clauses 25 and 26 provide as follows:

"25. The Authority may determine in writing that a sequence of vocational education and training is approved training for the purposes of this Act.

26. The Authority may determine in writing that a trade or other vocation is, or is no longer, a prescribed vocation for the purposes of this Act."

A determination to approve a sequence of vocational education and training or a determination to approve or discontinue a trade or vocation as a prescribed vocation could be of major commercial importance to those concerned in the area.

Perhaps it may be appropriate to consider whether there should be independent merits review of the decisions made under these powers.

## SUBORDINATE LEGISLATION

### Subordinate Legislation - No Comment

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

**Subordinate Law No. 32 of 1995 being the *Boxing Control Regulations (Amendment)* exempts two specified events from the application of the *Boxing Control Act 1993*.**

**Subordinate Law No. 33 of 1995 being the *Public Health (Cervical Cytology) Regulations (Amendment)* amends the principal regulations to make definitions in the regulations consistent and to renumber part of a regulation following on the resolution passed by the Assembly on 7 December 1994 amending the regulations.**

**Subordinate Law No. 34 of 1995 being the *Periodic Detention Regulations* provides for a number of managerial and formal matters necessary for the bringing into operation of the *Periodic Detention Act 1995*.**

**Subordinate Law No. 35 of 1995 being the *Business Franchise (Tobacco and Petroleum Products) Regulations (Amendment)* amends the principal regulations to provide that a determination of the value to be attributed to tobacco sold or purchased is to be made by notice in the *Gazette*.**

**Determination No. 122 of 1995 made under section 119 of the *Children's Services Act 1986* revokes the existing exemption and exempts specified classes of child care from the operation of Part VII of the Act.**

**Determination No. 123 of 1995 made under section 19 of the *Credit Act 1985* exempts agents for bodies corporate, that are themselves exempt from the provisions of subsections 154(4) and (5) under the provisions of paragraphs 156(1)(c) and (d), from the requirements to hold a finance broker's licence.**

Determination No. 124 of 1995 made under section 287 of the *Land (Planning and Environment) Act 1991* revokes Determination No. 49 of 1995 and determines new fees payable under the Act.

Determination No. 125 of 1995 made under section 30 of the *Business Franchise (Tobacco and Petroleum Products) Act 1984* sets the value to be attributed to tobacco sold or purchased for the purpose of calculating the franchise fee to be the wholesale list price for tobacco as published from time to time by tobacco manufacturers and importers, disregarding any amount in consideration of a licence fee or any tobacco sold under a *Customs Act 1901* (Commonwealth) Part V licence.

Determination No. 126 of 1995 made under subsection 24(1A) of the *Business Franchise (Tobacco and Petroleum Products) Act 1984* determines the quantity of tobacco, in excess of which a person (other than the holder of a wholesale tobacco licence), who has possession of such a quantity is presumed to be carrying on tobacco wholesaling unless the contrary is proved.

Determination No. 128 of 1995 made under subsection 36(1) of the *Motor Traffic Act 1936* revokes Determination No. 101 of 1994 and determines new maximum taxi fares payable under the Act.

Determination No. 129 of 1995 made under section 22 of the *Animal Welfare Act 1992* approves the Code of Practice for the Welfare of Captive Birds as a code of practice under the Act.

#### Subordinate Legislation - Comment

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

Determination No. 127 of 1995 made under section 54 of the *Physiotherapists Act 1977* revokes the existing determination and determines fees payable under the Act.

#### One Aspect of the Guidelines for Preparation of Disallowable Instruments not Followed

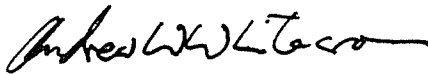
There is a very helpful explanatory statement for this instrument. It sets out the background to the determination, signifies that there are different section numbers for the determinations of fees following a re-numbering of the Act, gives a full description of the determined fees, indicates the reasons for increases where these have occurred and gives a comparative table of past and present fees.

However, the Committee raises one small matter. The actual determination itself should follow the *Guidelines for the Preparation of Disallowable Instruments* of the ACT Attorney-General's Department of May 1993, which states as follows (at page 11):

"It is important that you clearly identify the previous instrument (if there is one) which the new instrument replaces. Use the number inserted by the Gazette Officer and identify the *Gazette* in which the previous instrument was notified.

This will enable a Member of the Assembly or a member of the community who wishes to check back on the previous situation to do so easily."

This guideline was not followed in the present instrument. It would be appropriate for it to be followed when fees are next determined under the Act.



Andrew Whitecross, MLA  
Deputy Chair

4 October 1995