SCRUTINY OF LEGISLATION
COMMITTEE

ALERT DIGEST

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SECTION A - BILLS REPORTED UPON

1. CHOICE OF LAW (LIMITATION PERIODS) BILL 1996

Background

1.1 This Bill was first introduced on 7 September 1995 by the Honourable M J Foley MLA, the former Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts. The Bill was not, however, passed by the House prior to the prorogation of Parliament on 11 March 1996 and, as a consequence, it lapsed.

1.2 The Bill was reintroduced on 17 April 1996 by the Honourable D E Beanland, the Attorney-General and Minister for Justice.

1.3 This Bill provides that limitation laws (as defined in the Bill) are to be treated as part of the substantive law for the purposes of choice of law. The effect is that the law of the cause determines the limitation periods, rather than the law of the forum. The limitation laws applicable are therefore to be set rather than allowing litigants to "forum shop" in search of the longest limitation periods.

1.4 This Bill is part of a national legislative scheme aimed at achieving uniformity on this point throughout the States and Territories of Australia, and ultimately extending to New Zealand.

Previous comments by the Committee on this Bill

1.5 When this Bill was first introduced in September 1995 the Committee commented on it at pages 1 - 2 of its Alert Digest No.1 of 1995. At that time the Committee made the following observations on clause 3 and its potentially retrospective application:

> *The effect of clause 3 is that the "limitation law" applicable to the law of the cause will apply to proceedings initiated after the commencement of this Act. Causes of action arising before the commencement of this Act will therefore be retrospectively affected. Proceedings started before the commencement of this Act will not, however be affected by it.*

1.6 The Committee expressed concern that intending plaintiffs may be detrimentally affected by the application of the Bill and sought advice from the Minister as to whether persons would be detrimentally affected. The former Minister did not reply to the Committee formally.

Committee comments on the version of the Bill currently before the House

1.7 The Bill currently before the House is substantially the same as when it was previously introduced. The current Minister has, however, addressed the issue previously raised by the Committee in his second reading speech, the relevant sections of which are extracted below:

> *Clause 3 of the Bill is not directed at retrospectively affecting the rights of potential litigants. Retrospective laws are generally passed to validate past actions, correct defects in legislation or confer benefits retrospectively. The purpose of this Bill is to obviate the contentious decisions of the High Court in cases such as McKain v. Miller which evidence some disagreement between the members of the Court concerning procedural and substantive aspects of the law. Therefore, this Bill is neither validating past actions nor correcting defects in legislation, but removing the uncertainty in this choice of law area.*
>
> *All the other states and territories have now passed this model Bill into law with the consequence that their respective jurisdictions have already adjusted to this change in the choice of law rules with respect to present and future litigation.*
>
> *It may affect a small and unquantifiable number of potential litigants, who for whatever reason have not initiated civil action despite having a right to do so.*
>
> *To minimise the impact on potential litigants, it is proposed to delay the commencement of the Bill for a period of possibly six months. Moreover, given that this Bill has been mooted for some time, its terms cannot come as a surprise to the legal profession, which should, of course, be advising its clients accordingly.*

1.8 The Committee thanks the Minister for his attention to its concern as previously raised. Misgivings about the potentially detrimental impact on intending litigants are allayed by the Minister's advice that the commencement of the Bill will be delayed.

2. CONSTITUTION (PARLIAMENTARY SECRETARIES) AMENDMENT BILL 1996

Background

2.1 This Bill was introduced on 17 April 1996 by the Honourable R E Borbidge MLA, Premier.

2.2 The Bill allows for Parliamentary Secretaries to be appointed. The Bill deals with their functions, the duration of their appointment, their remuneration and the reimbursement of their expenses.

2.3 The Explanatory Note states that the purpose of the Bill is to clarify the situation of Parliamentary Secretaries in Queensland and, because the current wording of legislation is regarded as ambiguous and restrictive, to remove any areas of uncertainty.

General Comment by the Committee

2.4 The Committee takes no objection to the intended effects and likely operation of the Bill.

2.5 This proposal is in line with developments in other Parliaments, including, most notably, the British Parliament where the practice of appointing whips, parliamentary secretaries and other functionaries (collectively referred to as "junior ministers") arose.

2.6 The size of that Parliament and the complexities of government meant that such measures are eminently sensible. The practice has proven highly valuable, perhaps even necessary to the better functioning of the Parliament and Executive.

2.7 The practice has been followed in other jurisdictions and this Bill follows the pattern of other similar bills (although it does not appear that those bills were subjected to the kind of scrutiny process required under this Committee's terms of reference).

2.8 The Bill is entirely constitutional and its provisions produce effects which reflect constitutional practice for other political offices.

2.9 The only questions arise over the means of legislative implementation - essentially over the wording of one or two sections.

Sufficient regard to the rights and liberties of individuals? - Clause 59(3) of the *Constitution Act 1867*

2.10 If this was not a Bill creating a political office the Committee may have been concerned about whether there were sufficient safeguards to protect an individual appointed to a position from the arbitrary exercise of administrative power and to ensure that the principles of natural justice are complied with.

2.11 The Bill, however, deals with appointments to a political office and the appointees are, like other Members of Parliament, liable to lose office for political reasons under the conventions of responsible government.

2.12 Accordingly, the Committee considers that the Bill pays sufficient regard to the rights and liberties of individuals and is no breach of legislative standards on this ground.

2.13 It is presumed that the appointment and termination of a Parliamentary Secretary be the subject of a statement to the Parliament by the Premier as is the practice for the appointment and termination of Ministers.

2.14 The Committee seeks clarification from the Premier on this point.

Sufficient regard to the institution of Parliament? - Clause 58 of the *Constitution Act 1867*

2.15 The broad discretion conferred on the Premier in cl.58 may be regarded as having insufficient regard to the institution of Parliament. Clause 58 provides:

A Parliamentary Secretary has the functions decided by the Premier.

2.16 This provision reflects the effective practice with the allocation of ministerial functions. These are effectively determined by the Premier and affected by the Governor on the Premier's advice. This practice is at the cornerstone of responsible government.

2.17 However, the terms of the section are extremely wide. If taken literally, the section might mean that legislative or judicial functions might be delegated to Parliamentary secretaries. Even within executive powers, wide powers could be allocated to parliamentary secretaries.

2.18 As is clear from the second reading speech, nothing of the sort is intended. However, the Committee is of the view that the relatively limited intentions of the Act be more clearly stated by limiting the functions that can be allocated.

2.19 The significance of this point as regards the institution of Parliament is that executive power is being granted to individuals who are not responsible to Parliament and whose powers and functions are not defined by statute.

2.20 It is presumed that that allocation of functions would be in writing. However, the Committee's view is that it is better for this to be stipulated in the Bill.

2.21 The Committee refers these issues to Parliament to consider prior to its passage of this Bill.

3. COURTS (VIDEO LINK) AMENDMENT BILL 1996

Background

3.1 This Bill was first introduced into Parliament on 2 November 1995 by the Honourable M J Foley MLA, the former Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts. The Bill was not, however, passed by the House prior to the prorogation of Parliament on 11 March 1996 and, as a consequence it lapsed.

3.2 The Bill was reintroduced (with a few minor amendments) on 17 April 1996 by the Honourable D E Beanland, the Attorney-General and Minister for Justice.

3.3 The Bill amends the *Supreme Court of Queensland Act 1991*, the *District Courts Act 1967* and the *Justices Act 1886*. The purpose of the Bill is:

- to make the use of video link facilities mandatory in bail and remand proceedings, (unless the court, in the interests of justice otherwise orders) where:
  - ◊ the defendant is entitled or required to appear in court in person, and
  - ◊ video link facilities link the correctional centre where the defendant is held, and the court; and
- to permit the use of video link facilities in other criminal proceedings, at the court's discretion, if all the parties consent.

Previous comments by the Committee on this Bill

3.4 When this Bill was first introduced in November 1995 the Committee commented upon it at pages 7 - 9 of its Alert Digest No.3 of 1995. As there have been no substantive changes to this Bill those comments are reproduced below for the convenience of Members and readers. One additional comment on an alteration to the Bill is made in the next segment.

Sufficient regard to rights and liberties

Section 4(2)(a) of the Legislative Standards Act provides that the fundamental legislative principles contained in the Act include requiring:

that legislation has sufficient regard to—

rights and liberties of individuals

The Committee noted the following safeguards incorporated into the Bill:

- *Video link facilities can only be used where two-way audio and visual communication between the defendant and the court is available.*

- *Only the court, the defendant and the defendant's representative may use video link facilities. According to the Explanatory Notes, video link facilities are "not intended to be used for other purposes, such as the taking of evidence from a person who is not a party to the proceedings."*

- *Facilities for private communication between the defendant and his or her legal representative in court must be made available. These private communications are confidential and inadmissible as evidence in court proceedings.*

Incarceration is one of the most severe and total deprivations of a citizen's liberty. The common law has long required that it is only done with the authority of the court. The court authorises incarceration of someone who is found guilty through court procedures and sentenced by a judge. That is the point of the criminal law. However, other cases of incarceration are permitted with great reluctance. The law has traditionally required that the executive produce the defendant in court for committal. Irrespective of particular provisions which require the state to produce detainees, the court has an overriding power under the most justly famous writ known to English law - habeas corpus.

There are a number of reasons for this:

- *the court can see who the detainee is*

- *the court can determine his/her condition*

- *the citizen can be released immediately on being granted bail*

- *the court is entirely in control of the detainee*

- *addition communication between detainee and solicitor are much easier*

The right of the police to arrest and bring an accused to court is an exception to the general rights of freedom of movement. Bail is a beneficial exception to this rule. However, the right to arrest and detain someone who has not yet been proven guilty would be intolerable without provision for bail.

The Act seeks to substitute a video appearance by the detainee for a corporeal one, and to substitute confidential communication between lawyer and client for face to face personal contact during a bail hearing.

There are some safeguards built in and the Act attempts to respect the reasons for a corporeal appearance. The place where the detainee is held is deemed to be a part of the court to allow the court to exercise formal control over the detainees and officials who are holding them. However, this is more theoretical than real. Confidential communication cannot substitute for face to face contact.

The right to a video hearing seems to be clearly a lesser right than that for which it is substituted.

Hence the rights and liberties of detainees are clearly affected. In considering whether sufficient regard has been given to the rights of detainees, the Committee considered what other values are being furthered, whether those values could be realised in other ways and in whether those values justify the restriction of this liberty.

The values that are being furthered by this legislation are:

- *the security risks of transferring detainees to court. This amounts to an argument about the protection of the public from detainees escaping from the court or from transfers between court and detention centre. (The Committee may wish to be satisfied of the number of escapes from detainees in court or in the process of transfer. It is a calculation that the Committee refuses to make as the detainee is entitled to a presumption of innocence.)*

- *The cost of such transfers;*

- *to the extent that police resources cannot be simply expanded by further expenditure, the transporting of detainees uses relatively inflexible police resources with the consequent limitation of protection available to others.*

The Committee notes that, although provision is made for confidential communication with a detainee's legal representative, the detainee can be forced to use video links even where he or she is unrepresented. The Committee is not satisfied that all detainees could adequately represent himself or herself through a video link.

Committee's comments on the version of the Bill currently before the House

3.5 As previously outlined, the Bill remains substantively the same as when the Committee made the above quoted comments. The Committee does, however, add the following comments which relate to changes in the Bill.

3.6 Proposed cl.116C on *Use of video link facilities in proceedings* allows video link facilities to be used only if all parties consent. The requirement for consent has been emphasised by the addition of the word ONLY in cl.116C(3).

3.7 In his second reading speech the Honourable D E Beanland also highlighted the cost savings which would result from the use of video link facilities as proposed by this Bill.

3.8 The Committee reiterates the conclusions it reached when the Bill was first considered:

3.9 The Committee notes that this Bill seeks to substitute communication via a two way video link for the right to appear in court in bail proceedings. It also seeks to substitute the right to a confidential link (presumably by telephone) between detainee and legal representative for the right of face to face discussion in, or just outside, the court. This new right may be considered a lesser right and hence limits the rights of detainees.

3.10 However, the Committee is of the view that the provision of video link facilities where all parties consent is reasonable and pays sufficient regard to the rights and liberties of individuals.

3.11 In other instances, the question of whether this new right is justified by security and cost considerations is referred to Parliament for debate.

4. EDUCATION (WORK EXPERIENCE) BILL 1996

Background

4.1 A Bill on this subject was introduced on 2 November 1995 by the Honourable D J Hamill MLA, the former Minister for Education. That Bill was not, however, passed by the House prior to the prorogation of Parliament on 11 March 1996 and it therefore lapsed.

4.2 The Bill underwent some redrafting before being reintroduced by the Honourable R J Quinn MLA, Minister for Education, on 17 April 1996.

4.3 The purpose of this Bill, as stated in the Explanatory Notes, is to regulate work experience which students receive as part of their education. This Bill replaces the *Education (Student Work Experience) Act 1978.*

Previous comments by the Committee on this Bill

4.4 After the Bill was first introduced in November 1995, the Committee reported on it in its Alert Digest No.3 of 1995, at p13. The response of the then Minister of Education, the Hon. D J Hamill MLA is published in full in Appendix A of this Alert Digest.

4.5 In its previous report on the Bill when first introduced, the Committee was concerned that the drafting was not sufficiently clear and precise to enable a lay person to understand its contents without having to refer to a number of other statutes. In particular, the Committee referred to several sections and to the dictionary to the Bill which substantially complicated the text by referring to several other Acts for the necessary definitions.

4.6 In Alert Digest No.3 of 1995 the Committee came to the following conclusion:

> *In instances where phrases with specified definitions are used in a Bill the Committee is of the view that, within reason, the Bill should contain that definition. If the definition is commonly used, the Committee is of the view that it should be included in the Acts Interpretation Act 1954.*

Committee comments on the version of the Bill currently before the House

4.7 The Committee has been very pleased to note that some changes have been made to the Bill which take its previously expressed views into account.

4.8 It is the Committee's view that this Bill is made considerably easier for the lay person (without access to a library of current legislation) to use and understand.

Many cross references to other Acts have been removed[1] and in one case where that was not possible, the relevant section of the external legislation has been incorporated in a footnote[2].

4.9 The Committee has taken note of the advice received by the former Minister for Education from the Office of the Parliamentary Counsel, which is referred to in the Honourable. D J Hamill's letter and appreciates that the issue is not a simple one. The changes brought about in this current version of the Bill, however, illustrate that it is possible to achieve a workable compromise between that style of drafting which merely refers to external sources for definitions and the approach originally suggested by the Committee in paragraph 4.8 above.

4.10 In the OPC's advice to the Honourable Hamill reference is made to the fact that:

> *this complex issue is currently the subject of a review by that office in a general review of the Acts Interpretation Act 1954.*

4.11 The Committee commends the Honourable R J Quinn MLA on the changes brought about in the Bill. The Committee also makes a request to the Attorney General (as the Minister responsible for the administration of the *Acts Interpretation Act*) to include the Committee in the consultation process on this issue in the general review of the *Acts Interpretation Act.*

Appropriate delegation of administrative power? - Clause 7(3)

4.12 This clause allows the principal to delegate power to approve a work experience arrangement (only if the work experience provider is suitable) to:

> *an officer or employee of the educational establishment*

4.13 The Committee has some concerns about whether the delegation clause is sufficiently defined and about the effect of s. 27A of the *Acts Interpretation Act 1954* which deals with the delegation of powers. The Committee will examine the issue of delegation and make its recommendations to Parliament in the near future.

[1] For example, the definition of "parent" in the dictionary and "educational establishment" in cl.5.
[2] Refer to the definition of "person with a disability" in the dictionary to the Bill (in the schedule).

5. LAND AMENDMENT BILL 1996

Background

5.1 This Bill was introduced on 17 April 1996 by the Honourable H W T Hobbs MLA, Minister for Natural Resources.

5.2 The Bill seeks to achieve three changes to the *Land Act 1994*:

- to introduce a discretion allowing the Minister to set rentals to alleviate hardship which would be caused by rent increases;
- to allow the content of an approved broadscale tree clearing policy to be considered by the chief executive in deciding whether to issue a tree clearing permit (and any conditions thereto) where no relevant local guidelines for broadscale tree clearing exist; and
- to ensure the continued existence of the Land Court and Land Appeal Court.

Unambiguous and drafted in a sufficiently clear and precise way? - Clause 183A

5.3 Clause 183A(1) gives the Minister a discretion to set the rent at an amount equal to the rent for the previous rental period if the Minister considers that the rent *calculated using the most recently made valuation for rental purposes would result in an undue increase in the rent for a rental period* (emphasis added).

5.4 On addressing this point in his second reading speech, the Minister stated:

> *I have allowed for the flexibility to extend this provision in future to those categories of people or industry which could be deemed unviable or incapable of paying increased rentals without dire hardship* (emphasis added).

5.5 The test of hardship outlined in the Minister's second reading speech does not appear to be reflected in the wording of the Bill. In this instance the speech is more limited than the relevant clause in the Bill and this may cause some ambiguity.

5.6 The Committee is aware that the second reading speech may be used as extrinsic material capable of assisting a court in the interpretation of this clause, however, the Committee is of the view that it is preferable for the Parliament to make its intent clear in the wording of the clause.

5.7 The Committee is therefore of the view that, to ensure that the intent of the clause is clearly understood, it may be desirable for the clause to be

redrafted to incorporate the criteria referred to in the second reading speech.

5.8 The Committee recommends that the phrase "undue increase" be defined or the criteria referred to in the second reading speech be incorporated as part of the Bill

NOTE:

5.9 Prior to publication of this Alert Digest the Minister was made aware of the Committee's concerns. At that stage the Minister took cognisance of the Committee's views - and indicated that the concerns would be addressed in the House.

6. LOCAL GOVERNMENT AMENDMENT BILL 1996

Background

6.1 This Bill was introduced on 18 April 1996 by the Honourable D E McCauley MLA, Minister for Local Government and Planning.

6.2 The Bill amends the *Local Government Act 1993* to provide for:

- possible de-amalgamation of Local Government Areas; and
- possible elections in 1997 for reinstated and nominated Councils

Sufficient regard to rights and liberties of individuals? - Clause 137ZD

6.3 This clause allows the Minister to appoint a person to prepare an "explanatory statement" containing crucial information on the issues the subject of the referenda, which will be sent to each affected elector.

6.4 In her second reading speech the Minister explained the need for these explanatory statements, their significance to the electors voting on each referendum and the desired attributes of the persons responsible for these statements:

> *To have a meaningful referendum, it is essential electors entitled to vote are able to make an informed decision.*
>
> *For each referendum, the Bill therefore requires an explanatory statement to be sent to each affected elector. This statement is to be prepared by an independent person appointed by the Minister and will set out that person's assessment of the advantages and disadvantages of de-amalgamation and the estimated financial cost.*
>
> ...
>
> *The people preparing these statements should be beyond reproach. It is therefore intended to appoint persons with the necessary skills and experience to do the job and for those persons to be impartial and objective in the preparation of the statements.*

6.5 Clause 137ZD directs the Minister to appoint a person to prepare an explanatory statement and requires the statement to include:

- the appointed person's estimate of the financial cost to local government of abolishing the area's amalgamated area and taking associated action;

- the appointed person's estimate of the financial cost to local government of holding triennial elections in 1997; and

- ... a statement ... of the advantages and disadvantages that, in the appointed person's opinion, should be taken into account by an affected elector voting in the referendum.[3]

6.6 Clause 137ZD(5) then allows the Minister to *give directions to the appointed person about the format in which the explanatory statement is to be presented* and cl.137ZE(2) allows the Minister to enter into an agreement with the appointed person about the preparation of the explanatory statement.

6.7 These clauses do not, however, contain any of the standards for the appointment of the "appointed person", which were mentioned in the Minister's speech. There are no criteria to ensure that the person is "independent" or "beyond reproach", has "the necessary skills and experience to do the job" and will be "impartial and objective in the preparation of the statements".

6.8 The only mention of the appointment process for these persons appears in the Minister's speech:

> *If referendums are to be held, I will discuss with the Local Government Association of Queensland the names of the people I consider are capable of preparing these statements. This would happen before any appointments occur.*[4]

6.9 The Explanatory Note states that the Minister's power under cl.137ZD(5) will enable a consistent approach to be adopted State-wide in respect of the format of explanatory statements. Clause 137ZE provides for agreements between the Minister and the appointed person which may deal with, but are not limited to, issues such as remuneration and expenses, departmental support and time constraints. The Minister stated in her speech that ...*the Minister would not have any power over the content of the explanatory statement* but there is nothing in the Bill to expressly ensure this result.

6.10 The references in the second reading speech to the appointed person consulting ... *consultation with the affected Councils and interested people and groups in the community and others who hold information of relevance* is also not given legislative force. Consultation that might otherwise have been part of the process of preparing Regulatory Impact Statements (RIS's) for regulations under this amendment legislation has also been avoided by the express statement in cl.137ZZH that an RIS need not be prepared.

6.11 These issues raise the question of whether this legislation has sufficient regard to the democratic rights of individuals affected by this legislation.

[3] Clause 137ZD(2)(c)
[4] Second reading speech on the Local Government Amendment Bill 1996 at p14.

6.12 As the second reading speech clearly indicates, these provisions are intended to enhance the citizens' right to vote at the referendum. The right to vote is not one of the specific examples of rights and liberties listed in sections 4.3 or 4.4 of the *Legislative Standards Act*. However, those lists are not intended to be exhaustive and there can be little doubt that the right to vote is one of the most fundamental of rights in a parliamentary democracy as it forms part of the definition of the term and was the means by which the Australian constitution came into being.

6.13 This right is reflected in the Queensland Constitution (ss. 22 and 28), the Australian Constitution (s. 24) and many judicial pronouncements.

6.14 The means by which these provisions seek to enhance the right to vote is by the provision of an unbiased explanatory statement of the issues.

6.15 Some may doubt whether it is possible to ensure any unbiased objective expertise. They would argue that such matters are inherently political and are best settled by competitive political argument (constrained by various bans on deliberate attempts to mislead voters for which there is bi-partisan support for strengthening).

6.16 However, if Parliament does seek to go down this route, then it is essential that it ensures, as far as possible, that the prerequisites of objectivity are met. Electors have a right to expect that such information will be both accurate and expressed by persons who do not have an interest in the outcome of the referendum.

6.17 In a case such as this where material (purporting to be unbiased on the issues in question) will be provided to all affected electors by the Government, the Committee is of the view that, in the interests of protecting the democratic rights of individuals to be accurately and independently informed, safeguards should be introduced into the legislation to ensure this end.

6.18 The Committee recommends that the words "an independent" be inserted into cl.137ZD(1) as indicated below:

> ***137ZD.(1)*** *The Minister must appoint an independent person (the* ***"appointed person"*** *to prepare a statement (the* ***"explanatory statement"****) about the advantages and disadvantages of the referendum action for a referendum.*

Sufficient regard to rights and liberties of individuals? - Clause 137ZG

6.19 The questions that have been dealt with above arise out of concerns that the accuracy of the explanatory statements and the independence of the persons responsible for their development are not ensured by the Bill. These concerns are exacerbated by the fact that cl.137ZG makes both explanatory statements or

a document appearing to be an explanatory statement, not justiciable. The clause goes to considerable lengths to ensure that ... *a decision of an appointed person made, or appearing to be made, in preparing an explanatory statement, including a decision about the content of the explanatory statement* cannot be challenged in any way by any court, tribunal or another entity, on any ground.

6.20 Whenever ordinary rights of review are removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the Committee takes particular care in assessing whether sufficient regard has been had to individual rights.

6.21 Such a removal of rights may be justified by the overriding significance of the objectives of the legislation. In seeking an indication of the purpose of this ouster clause the Committee referred to the Explanatory Notes which were of no assistance in this regard. The only information provided is that these ouster provisions ... *are similar to those relating to the preparation of Regulatory Impact Statements* under the *Statutory Instruments Act 1992*. The Committee notes however, that although the courts are excluded from considering RIS's, s. 40(3) of the *Statutory Instruments Act* expressly states that it is the intention of Parliament that the RIS guidelines be complied with and this Committee has the function of monitoring compliance with those guidelines[5].

6.22 By contrast, and in the absence of any access to review, there are no means of ensuring that explanatory statements comply with any minimum standard, are truthful, or represent unbiased views. In fact, the wording of cl.137ZG(1), (which states that an *explanatory statement or a document appearing to be an explanatory statement* are not justiciable) makes it appear as if an explanatory statement could be fraudulently produced with impunity.

6.23 While it is clearly not the intention of the legislature to produce those effects, no appointment process is perfect. The purpose of judicial review is to deal with those actions of public officials who act beyond the powers that are intended for them. It acts to protect the legislative intention approved by Parliament and proposed by the Executive. As such, ouster clauses should rarely be contemplated and even more rarely implemented.

6.24 If there is a concern that frivolous complaints might hold up the referendum process it should be noted that judicial review is discretionary and Judges have been reluctant to unnecessarily hold up the electoral process.

6.25 The Committee seeks information from the Minister which justifies such a curtailment of the rights of individuals to have access to the judicial system or to having a relevant question reviewed.

6.26 In the absence of a compelling justification for this ouster clause the Committee recommends the removal of cl.137ZG from the Bill.

[5] This responsibility is imposed upon the Committee by s. 22(2)(b) of the *Parliamentary Committees Act 1995*.

Sufficient regard to the institution of Parliament? - Clause 137ZZG

6.27 This clause allows an Act of Parliament to be amended and supplemented by the Executive, by way of regulations which may be given retrospective effect. Three serious issues therefore arise: the question of Henry VIII clauses; the question of whether there has been an inappropriate delegation of legislative power and the issue of retrospectivity.

- A Henry VIII Clause?

6.28 Sub-clause 137ZZG(2)(a) allows the way that parts of primary legislation are applied to be changed by subordinate legislation.

> *A "Henry VIII clause" is a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.*[6]

6.29 Such clauses are specifically referred to in s. 4(c) of the *Legislative Standards Act 1992*. While this clause would not literally permit the amendment of the Act, there are some who argue that a clause changing the effect of an Act, rather than amending it, does not qualify as a Henry VIII clause. In particular some argue that clauses allowing regulations to facilitate the operation of innovative legislation is acceptable. Others regard such clauses as the result of inadequate drafting and hastily prepared legislation.

6.30 The Committee is currently preparing a report to Parliament on Henry VIII clauses which it hopes to table in the near future. One of the matters being considered within that report is whether subordinate legislation changing the effect of principal legislation should be regarded as Henry VIII clauses.

6.31 Although the Committee has not yet finalised its approach it regards these clauses as questionable at best and as Henry VIII clauses at worst. Until its view on this point is settled, the Committee strongly discourages the use of such clauses in legislation.

- Appropriate delegation of legislative power?

6.32 Whether subject to Henry VIII objections or not, there is real doubt about how appropriate such broad delegations of power are. Sub-clause 137ZZG(2)(c) clearly anticipates that the Bill may be inadequate because it foresees a need to correct shortcomings. It provides that a regulation may:

> *(c) make provision about a matter for which this Act does not make provision or enough provision.*

[6] Queensland Law Reform Commission (1990), Report No. 39 *Henry VIII Clauses*, Brisbane, p. 1.

6.33 In the Committee's view, this is not an appropriate delegation of legislative power. Since the predecessor to this Committee (the Subordinate Legislation Committee) was established in 1975 it has consistently maintained that if a matter is of sufficient importance to be included in an Act of Parliament, that is the only appropriate place for it to be dealt with. Such a significant matter can not appropriately be dealt with by subordinate legislation.

6.34 The Committee therefore recommends the removal of cl.137ZZG(2)(c).

- Rights and liberties retrospectively affected or obligations retrospectively imposed?

6.35 Clause 137ZZG(3) provides:

> *A regulation made under this section may be given retrospective effect to a day not earlier than 20 March 1996.*

6.36 The Explanatory Note provides the relevance of the date of 20 March 1996 as being the day the form of petition was approved and gazetted.

6.37 The Committee notes that the Bill also retrospectively validates the petition forms published in the Government Gazette on that day as being the approved form of petition for seeking a referendum on de-amalgamation (see cls.137F - L in Division 2 of Part 2A of the Bill).

6.38 The Committee does not object to curative retrospective legislation without significant effects on the rights and liberties of citizens. However, when the delegation of legislative power is as broad as it is under sub-clause (c), subordinate legislation should not be allowed to have retrospective operation.

6.39 This Committee has a responsibility to Parliament to assess whether legislation, both primary and delegated, retrospectively affects rights and liberties or imposes obligations retrospectively. Neither Parliament or the Committee can perform such an assessment if clearance for such retrospective regulations is granted in this Bill.

6.40 The Committee recommends the removal of clause 137ZZG(3) from this Bill particularly because its inclusion in the Bill will limit the Committee in any challenge to subordinate legislation with a detrimental retrospective effect.

Regulatory Impact Statements - Clause 137ZZH

6.41 Clause 137ZZH provides that an RIS need not be prepared for a regulation made as a consequence of this amendment Bill. The relevant section of the Explanatory Note indicates the reason for this express exemption:

> *Compliance with these (RIS) provisions would unnecessarily disrupt the strict timetable for implementing the de-amalgamation process described in this Bill.*

6.42 The Committee has consistently taken objection to Bills providing express exemptions to the requirements of the RIS guidelines. One of the reasons for this objection is that the RIS guidelines were introduced in the *Statutory Instruments Act 1992* specifically to ensure that the Executive will consult and conducts cost benefit analyses, prior to making regulations. The guidelines do not anticipate that their effect will be overridden by subsequent legislation, and, in fact, Parliament expressly stated its intention at the time that the RIS guidelines be complied with[7].

6.43 A second reason for the Committee's objection to such express exemptions is that the RIS guidelines already envisage numerous and comprehensive circumstances under which the preparation of an RIS would not be necessary. One of those circumstances is if it would be against the public interest to prepare an RIS because of the circumstances in which the proposed subordinate legislation is made[8].

6.44 A third reason is the breadth of the regulation making power that is being exempted from RIS provisions.

6.45 As already referred to, the Explanatory Note gives the desire to keep within the strict timetable as a reason for this exemption. The Committee notes that the timetable is dictated by the date for triennual elections previous applicable to Local Councils. It also notes that the de-amalgamation of any council would be likely to impose an appreciable cost on those parts of the community affected by the amalgamation. There is therefore an argument that the question of whether or not it is in the public interest for an RIS to be prepared should be determined according to the RIS guidelines.

6.46 The importance of keeping to the abovementioned timetable does not seem sufficient to justify a departure from the RIS guidelines.

6.47 The Committee recommends that cl.137ZZH be removed from the Bill and that Parliament discourage such clauses providing express exemptions to the RIS guidelines.

[7] *Statutory Instruments Act 1992* s.40(3)
[8] *Statutory Instruments Act s.46(2)*

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7. PETROLEUM AMENDMENT BILL 1996

Background

7.1 This Bill was introduced on 17 April 1996 by the Honourable T J G Gilmore MLA, Minister for Mines and Energy.

7.2 The objectives of the Bill are described as follows in the Explanatory Notes:

- *to remove doubts about the application of the Petroleum Act 1923 to authorities to prospect, leases, and licences, granted or to granted for coal seam gas under the Act; and*

- *to make it clear that someone granted the right to mine coal does not automatically have to right to mine coal seam gas.*

Obligations imposed retrospectively? - Clause 150(4)

7.3 The Committee notes that the effect of this Bill is to clarify the extent of an authority to mine coal. The Committee does, however, seek information from the Minister on what action, if any, could be taken by the State with respect to persons who have extracted coal seam gas (under their authority to mine coal) up to the date of commencement of this Act.

7.4 The Committee would be concerned if any obligations, charges or fines were imposed, or revenue sought, for activities undertaken with respect to coal seam gas prior to the commencement of this Act.

7.5 The Committee seeks advice from the Minister in relation to this point.

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SECTION B - COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

8. PARLIAMENTARY COMMITTEES LEGISLATION AMENDMENT BILL 1996

Background

8.1 This Bill was introduced on 4 April 1996 by the Honourable R E Borbidge MLA, Premier and passed by the House on 18 April 1996.

8.2 The Bill was commented upon by the Committee at pages 1 and 2 of its Alert Digest No. 1 of 1996.

Drafted in a clear and precise way? - Explanatory Notes - Clauses 3, 10, 12 and 13

8.3 The Committee raised several queries with respect to the sufficiency of the Explanatory Notes and sought clarification from the Premier in relation thereto.

8.4 The Premier subsequently "reintroduced" an amended copy of the Explanatory Notes which overcame all the Committee's concerns.

8.5 The Committee thanks the Premier for taking cognisance of its recommendations.

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