SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

Tabled and ordered to be printed
18 November 1997

Issue No. 12 of 1997

Scrutiny of Legislation Committee
– Membership –

48th Parliament
2nd Session

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SECTION A

BILLS REPORTED ON

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

> *... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted*[2]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[3] of a provision may therefore be considered as extrinsic material in its interpretation.

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2 s. 14B(3)(c) Acts Interpretation Act 1954.

3 The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s. 15 *Acts Interpretation Act 1954.*

SECTION A – BILLS REPORTED ON

1. ARTS LEGISLATION AMENDMENT BILL 1997

Background

1.1. The Honourable J M Sheldon MLA, Deputy Premier and Minister for the Arts, introduced this bill into the Legislative Assembly on 29 October 1997.

1.2. According to the explanatory notes, this bill:

- substantially redrafts the legislative basis for the operations of the Library Board of Queensland; Queensland Art Gallery Board of Trustees; Queensland Museum Board of Trustees (to be now known as the Board of the Queensland Museum); Queensland Performing Arts Trust; and Royal Queensland Theatre Company;
- modernises various other provisions of the following Acts associated with those bodies:
  - *Libraries and Archives Act 1988;*
  - *Queensland Art Gallery Act 1987;*
  - *Queensland Museum Act 1970;*
  - *Queensland Performing Arts Trust Act 1977;* and
  - *Royal Queensland Theatre Company Act 1970;* and
- abolishes the Queensland Cultural Centre Trust and repeals the *Queensland Cultural Centre Trust Act 1976*.

1.3. Many of the replacement provisions inserted into the existing Acts, particularly those dealing with the composition and procedures of the boards and trusts constituted under the Acts, are identical for the five amended Acts.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[4]

– **clause 7, new s.11 *Libraries and Archives Act***[5]

[4] Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

1.4. The committee notes the statutory obligation on the Governor in Council to consider a potential appointee's abilities when appointing members of the public bodies referred to in the bill. For example, clause 7, proposed s.11 of the *Libraries and Archives Act* provides:

> ***(2)*** *In appointing a member, regard must be had to the person's ability to contribute to the board's performance and the implementation of its strategic and operational plans.*

1.5. In addition, the committee notes the introduction of the requirements that ministerial directions to the board be in writing[6] and that the board's annual report include particulars of any directions given to the board by the minister.[7]

1.6. The committee commends the minister on these changes which further define the exercise of administrative power and make the minister's dealings with the boards more transparent.

Does the legislation have sufficient regard to the rights and liberties of individuals?[8](privacy)

– **clause 21, proposed s. 68G *Libraries and Archives Act***

1.7. Proposed s. 68G of the *Libraries and Archives Act*[9] provides that library officers may inspect material or "receptacles" brought into the State library or any of its branches. The first three subsections of proposed s.68G provide:

> ***68G.(1)*** *The purpose of this section is to stop the unauthorised removal of library material from the board's premises.*
>
> ***(2)*** *This section applies if–*
>
> *(a) a person brings onto the board's premises any material in the nature of library material or a receptacle that may contain library material; and*
>
> *(b) an officer or employee of the board asks the person to allow the officer or employee to inspect the material o receptacle.*
>
> ***(3)*** *The person must allow the officer or employee to inspect the material or receptacle unless the person has a reasonable excuse.*

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5 For convenience, the committee has addressed this recurring provision in relation to the *Libraries and Archives Act*. The corresponding provisions that amend the other four Acts are cl.28, proposed s.9 *Queensland Art Gallery Act*; cl.43, new s.7 *Queensland Museum Act*; cl.53, new s.7 *Queensland Performing Arts Trust Act*; cl.66, new s.4B *Royal Queensland Theatre Company Act*.

6 Under cl.13, proposed s.24 *Libraries and Archives Act* and cl.18, proposed ss. 41(3) & 44(2) *Libraries and Archives Act*. Similar provisions have been inserted in the other Acts.

7 Clause.18, proposed s.47C(c) *Libraries and Archives Act*. Similar provisions have been inserted in the other four Acts.

8 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

9 This provision redrafts and relocates regulation 9 of the *Libraries and Archives Regulation 1990*.

1.8. On the face of it, this provision affects an individual's right to privacy[10] in that a person who brings a bag into the State Library must allow an officer to inspect that bag unless the person has a reasonable excuse (a maximum penalty of 5 penalty units or $375 applies).

1.9. In this instance, however, the committee considers that the provision pays sufficient regard to the right to privacy because:

- the circumstances of any inspection are clearly spelt out in subss.68G(1) & (2);
- while a person must allow an officer to inspect if asked, the person need not comply if he or she has a 'reasonable excuse' not to; and
- officers may only ask a person to allow an inspection if the officer displays or produces an identity card containing a recent photograph.[11]

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[12]

– **part 7, division 2, subdivisions 2 and 3 (cls.75-80)**

1.10. Part 7, division 2, subdivision 4 dissolves the Queensland Cultural Centre Trust and deems the State to be the successor of the trust. A consequence is that the State will replace the trust in all leases and agreements to which the trust is a party.

1.11. Part 7, division 2, subdivision 2 retrospectively validates leases granted by the trust to each of the other public bodies referred to in the current bill (the Library Board of Queensland, Queensland Art Gallery Board of Trustees, etc.). Part 7, division 2, subdivision 3 retrospectively validates some licence agreements entered into by private companies and various public bodies referred to in the bill.

1.12. The department has informed the committee that, in routinely preparing for the dissolution of the trust and other matters, it discovered that certain technical requirements had not been observed when the leases were created – the leases are therefore invalid. Because the validity of the licence agreements is

10 While there is no common law right to privacy and there is no general statutory right to privacy, notions of privacy appear in areas of law such as trespass to land, trespass to the person, nuisance and defamation and are inherent in the fundamental legislative principle restricting powers of search and seizure [s.4(3)(e) *Legislative Standards Act 1992*]. In addition, international agreements to which Australia is a party recognise a right to privacy (Art.12 *Universal Declaration of Human Rights*; Art.17 *International Covenant on Civil and Political Rights*).

11 New subss.68G(4) & (5). It would of course be prudent in practice, since it is not legislatively prescribed here, for the library to display a prominent sign containing the library's s.68G 'condition' of entry.

12 Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

contingent upon the validity of the leases, the licence agreements are also invalid.

1.13. The commencement provision of the bill, cl. 2, provides that subdivisions 2 and 3 have earlier operation than subdivision 4. Therefore, when the State becomes the successor to the trust, the leases that are transferred to the State and the associated licence agreements will have already been made valid.

1.14. It appears to the committee that these provisions may affect legal rights, especially those of the private companies involved in the licence agreements. However, the committee is of the view that the provisions cannot be seen to defeat the companies' expectations because it seems that the companies were unaware of the technical irregularity of the documents.

1.15. The committee therefore considers that the retrospective provisions contained in subdivisions 2 and 3 of part 7, division 2 - at least in the circumstances described by the department - are curative and do not unnecessarily breach fundamental legislative principles.

2. CENTRAL QUEENSLAND COAL ASSOCIATES AGREEMENT AMENDMENT BILL 1997

Background

2.1. The Honourable D J Slack MLA, Minister for Economic Development and Trade and Minister Assisting the Premier, introduced this bill into the Legislative Assembly on 28 October 1997.

2.2. This bill amends the *Central Queensland Coal Associates Agreement Act 1968*. The primary aim of the bill is to update the Act and the agreement to bring them into line with other mining legislation and with the National Competition Policy guidelines.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[13]

– **clause 5 (amendment of s. 4)**

2.3. Clause 5 removes the capacity for the *Central Queensland Coal Associates Agreement* ("the Agreement"), contained in the schedule to the *Central Queensland Coal Associates Agreement Act 1968*, to be amended by any means other than another Act of Parliament.

2.4. The following reason for this amendment was contained in the explanatory notes.

> *Section 5 removes the "Henry VIII" option provision from Section 4 of the CQCA Agreement Act 1968 which previously allowed amendment of the Agreement by regulation. The removal of these provisions will place the Act and Agreement more in keeping with the fundamental legislative principles.*[14]

2.5. The committee notes that previous changes to the agreement have been made by regulation, under s. 4 of the Act. Section 4 is a "Henry VIII clause" as it allows an Act of Parliament to be amended by subordinate legislation.

2.6. However, clearly having regard to the fundamental legislative principles and the committee's view on this issue,[15] these amendments to the agreement have

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13 Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

14 Explanatory notes at p. 4.

15 As expressed in the Scrutiny of Legislation Committee's *Report on the use of Henry VIII clauses in Queensland legislation*, tabled January 1997.

been carried out by principal legislation, and the ability to amend the agreement by regulation in future has been removed altogether.

2.7. The committee commends the minister on the removal of a "Henry VIII clause" from the *Central Queensland Coal Associates Agreement Act 1968*. It expresses its appreciation to the minister for his recognition of the importance of removing this type of clause from Queensland legislation.

2.8. The committee re-affirms its opposition to the use of "Henry VIII clauses" in Queensland legislation and urges other ministers to remove offensive "Henry VIII clauses" from the statute book.

Is the content of the explanatory note sufficient?[16]

2.9. The committee values the simple explanation of the purpose and intended operation of each clause of the bill in the explanatory notes, as required by s. 23(h) of the *Legislative Standards Act 1992*.

2.10. In particular, the committee notes that the explanatory notes contain a brief explanation for the omission of each individual clause that is omitted by the bill. For example, one section of the bill omits the entirety of part II of the agreement, but the explanatory notes set out the justification for the omission of each of the sections in that part separately.

2.11. In the committee's view, this approach fulfils the aim of s. 23(1)(h) of the *Legislative Standards Act* and makes the explanatory notes a valuable aid in the interpretation of the Act.

2.12. The committee commends the minister and the drafters of this explanatory note for setting out a brief explanation of the reasons for the omission of each clause omitted by this bill.

2.13. The committee draws the attention of drafters of explanatory notes to this style of drafting, and encourages other drafters to adopt similar practices when drafting explanatory notes for bills that omit large sections of Acts.

[16] Section 23 of the *Legislative Standards Act 1992* sets out the information required to be included in an explanatory note for a bill. If the explanatory note does not include any of this information, it must state the reason for non-inclusion.

3. CRIME COMMISSION BILL 1997

Background

3.1. The Honourable T R Cooper MLA, Minister for Police and Corrective Services and Minister for Racing, introduced this bill into the Legislative Assembly on 30 October 1997.

3.2. The bill proposes the establishment of a permanent crime commission entitled the Queensland Crime Commission (QCC) to:

- investigate criminal paedophilia, organised crime and major crime; and
- maintain an effective intelligence service in respect of those areas; and
- liaise with other law enforcement agencies.[17]

3.3. However, the QCC's power to investigate is only activated on a reference from the Queensland Crime Commission Management Committee ("the management committee"). In acting on a reference, the QCC is vested with significant coercive powers of investigation subject to quite detailed review and accountability mechanisms.

3.4. The bill establishes the QCC's area of operation (investigations into criminal paedophilia, organised crime and major crime) as distinct from that of the Criminal Justice Commission (CJC) which will be to investigate official misconduct.[18]

♦ Positive aspects of the bill

3.5. The committee notes that the bill seeks to promote fundamental legislative principle . This is illustrated in the following examples:

- All warrants provided for in the bill, namely, a search warrant, a surveillance warrant, a covert search warrant and an arrest warrant, are issued either by a magistrate or a judge of the Supreme Court. In special circumstances when action may be taken without a search or surveillance warrant. However, officers are still required to get a judge's approval of the exercise of the powers afterwards.
- Most discretionary powers are required to be exercised after consideration of prescribed factors.

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17 Clauses 28(1)(c), 33 and 60.

18 The CJC will investigate official misconduct amongst other things, but will no longer investigate organised crime and major crime.

- Witnesses giving evidence at a QCC hearing can be legally represented at the hearing.[19]
- Witnesses at QCC hearings have a right to an interpreter.[20]
- The bill contains a number of provisions which are designed to prevent the identity of persons being investigated from being revealed or information obtained in the course of QCC investigations and hearings from being disclosed.[21]
- Persons attending before a QCC hearing or appealing to the Supreme Court can apply to the Attorney-General for financial assistance.[22]
- There is a 5 year sunset clause on the bill.[23]

Does the legislation have sufficient regard to the institution of Parliament?[24]

3.6. The committee notes that there appears to be no process of accountability of a management committee to the minister or to the Legislative Assembly in this bill. The QCC and the public interest monitor must each submit annual reports to the minister who is required to table the report in the Legislative Assembly.[25] It could therefore be argued that some basis of accountability is required in view of the fact that the crime commission is empowered to investigate organised crime and major crime only on a reference from the management committee.[26]

3.7. The committee seeks information from the minister addressing the suggestion that, like the QCC and the public interest monitor, the management committee be required to submit an annual report to the minister and to Parliament on the exercise of its functions.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[27]

– **clause 4(1) (object)**

19 Clause 103.

20 Clause 104.

21 For example, cls 49(3), 72, 85, 111, 119 and 126.

22 Clause 118.

23 Clause 131.

24 Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

25 Clauses 37 and 71.

26 Clauses 28(1)(a) and 46).

27 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

3.8. One of the objects of the bill in cl. 4(1)(a) might be interpreted to contemplate the crime commission investigating "criminal activity" other than criminal paedophilia and major and organised crime. Yet it is only those specific areas of crime that the commission is empowered by cl. 28(1) to investigate and only on reference from the management committee pursuant to cl. 45(1)(a).

3.9. In the committee's view, it is essential that the crime commission's power of investigation is clearly defined. This would ensure that those powers which simply refer to a QCC investigation cannot be used in respect of the investigation of criminal activity other than criminal paedophilia and major and organised crime. Those powers are:

- the power to hold a hearing under Part 7 [cl. 100(1)]; and
- the related powers to issue a notice to produce under Div 5, an attendance notice under Div 6 and an arrest warrant under Div 7.

– **clauses 6, 7 & 8 (meaning of "criminal paedophilia", "major crime" and "organised crime")**

3.10. The definitions of "criminal paedophilia" in cl. 6, "major crime" in cl. 7 and "organised crime" in cl. 8 are widely drafted.

3.11. This may be due in part to the fact that they are not technical legal terms and definitions given in the bill do not necessarily accord with the common understanding of their scope. "Criminal paedophilia" is not confined in the bill to habitual offenders nor to organised networks of paedophiles. The definition of major crime covers offences such as manslaughter which would not normally be considered as "major crime". "Organised crime" may only involve two persons and is not confined to any particular offences. The problems associated with attempting to define "organised crime" were identified by (then) commissioner, Tony Fitzgerald in the "Fitzgerald Report".[28]

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[28] *"Organised crime", is a term frequently used but rarely defined. It embraces serious crime committed in a systematic way involving a number of people and substantial planning and organisation, sophisticated methods and techniques.*

Offences commonly associated with organised crime include theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, getting money from vice activities engaged in by others, extortion, violence, corruption of or by officials, bankruptcy and company violations, harbouring of criminals, forging of passports, armament dealings or illegal trafficking of fauna into or out of Australia.

In modern organised crime, theft and fraud have included systematic robbery, organised shoplifting, wharf and cargo theft, motor car theft and credit card theft, arson/insurance fraud, bankruptcy/insolvency fraud and public fiscal fraud, for example, fraud of health insurance and social security and tax evasion.

An exhaustive definition of organised crime is both impossible and unnecessary. A working definition might focus on the destination of the proceeds of crime. If they stay with and are used on "legitimate" expenses by the people directly engaged in misconduct, then the crime is usually local . If a "cut" goes to others, remote from the misconduct, then the crime is clearly "organised".

Report of a Commission of Inquiry Pursuant to Orders in Council,

3.12. One of the problems created by these broad definitions is that a wide range of activity is drawn into the jurisdiction of the QCC which can then be subject to the substantial powers of the commission.

– **clause 22(1)(d) (termination of appointment of a commission member)**

3.13. Clause 22(1)(d) provides for the Governor in Council to terminate the appointment of a commission member if the member –

> *(d) is absent, without the minister's leave and without reasonable excuse, for 7 consecutive days or 14 days in a year.*

3.14. This subclause, however, fails to specify what the member is absent from. In contrast, cl. 23(1)(b) refers to the appointment of an acting crime commissioner when the crime commissioner is *absent from duty or from the state*.

– **clause 24(2) (disclosure of pecuniary interest by commission members)**

3.15. Clause 24(2) requires each commission member to give a written summary of the member's pecuniary interests.

3.16. No guidance is, however, given on the detail required in the *written summary of the* (commissioner's) *pecuniary interests*.

3.17. To avoid issues arising with respect to the content of these summaries of pecuniary interests, it may be necessary for Parliament to further define "pecuniary interest" in the bill.

– **clauses 73(5), 93(6), 105(2), 107(3) and the dictionary ("privilege")**

3.18. Clauses 73(5), 93(6), 105(2), 107(3) all refer to claims of "privilege", which is defined in the dictionary to the bill:

> ***"privilege"**, in relation to an answer, information, communication or document, or thing means privilege recognised at law on the ground of–*
>
> *(a) self-incrimination; or*
>
> *(b) legal professional privilege;*
>
> *and includes a claim, recognised at law, that giving the answer, or disclosing the communication or document, would be a breach of a statutory or commercial obligation or restriction to maintain secrecy.*

3.19. This definition does not appear to cover public interest immunity or Parliamentary privilege. For the sake of certainty, it seems to the committee that Parliament should expressly state its intention on these other forms of privilege.

– **clause 74(6)(b) (search warrant)**

3.20. The distinction drawn in cl. 74(6)(b) between (i) a warrant issued in relation to a relevant criminal activity or a major crime and (ii) a "forfeiture proceeding"[29] is confusing when a warrant can only be applied for and issued in respect of the former [cl. 74(1) and (5)].

3.21. It seems to the committee that the drafting in s. 74(6)(b) is inconsistent with the other subsections of that provision and may need to be clarified.

– **clause 76 (search to prevent loss of evidence)**

3.22. Clause 76(4) prescribes those factors of which the magistrate must be satisfied before making an order approving a search undertaken without a warrant. It is currently drafted with paras (a) and (b) as alternative grounds. However, the explanatory notes to cl. 76 refer to these as cumulative grounds. This appears to be the more desirable position otherwise approval may be given even if the officer held no reasonable suspicion of evidence being there or that it would be lost.

3.23. The committee has identified several provisions of the bill where the drafting may be ambiguous or insufficiently clear and precise. The committee therefore requests that the minister consider:

- confining the object in cl. 4(1)(a) to the investigation of criminal paedophilia and major and organised crime; and
- further defining the absence that may lead to the termination of the appointment of a commission member in cl. 22(1)(d); and
- defining the types of "pecuniary interests" that should be disclosed by commission members in cl. 24(2); and
- amending the definition of "privilege" in the dictionary to the bill to include references to public interest immunity and Parliamentary privilege; and
- clarifying whether or not search warrants may be issued in relation to forfeiture proceedings under cl. 74; and
- amending cl. 76(4) to make paragraphs (a) and (b) cumulative grounds (in line with the explanatory note) so that a magistrate could not approve a search in the public interest unless the officer also held a reasonable suspicion of evidence being in the place or being lost.

3.24. The committee also brings to the attention of Parliament the fact that the broad definitions of "criminal paedophilia", "major crime" and "organised crime" will make a broad range of activity subject to the substantial powers of the QCC.

[29] Clause 78(4)(c).

Does the legislation have sufficient regard to the rights and liberties of individuals?[30] (issues generally arising)

– **clause 14 (appointment of crime commissioner and assistant crime commissioner)**

3.25. The committee notes that under cl. 14(4), a person is disqualified from being appointed if found guilty of an indictable offence. Moreover, the benefits of ss 6, 8 and 9 of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, to not disclose or to disregard certain convictions, are denied.

– **clause 78 (requirement after property is seized)**

3.26. Where a thing is seized pursuant to a search warrant, the matter must be brought to a magistrate within 28 days unless the owner has consented to the officer retaining possession [cl. 78(1)(b)]. In the committee's view it would be more appropriate for this consent [and likewise the withdrawal of consent under cl. 78(2)] to be in writing.

3.27. The committee does not raise any concerns with respect to the exemption of appointees as commission members from certain provisions of the *Criminal Law Rehabilitation of Offenders Act 1986*.

3.28. The committee requests that the minister consider making amendments to require the owner of seized property to provide written consent to the officer retaining possession of such property (and written withdrawal of such consent).

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined?[31]

3.29. The following provisions appear to the committee to contain administrative powers which may not be sufficiently defined.

– **clause 16 (nomination for appointment as commission member)**

3.30. Under cl. 13(1) while there must be a crime commissioner (and only one), the appointment of assistant crime commissioners in cl. 116 appears to be optional. Clause 16 states:

> *The Minister may nominate a person for the appointment as a commission member ...*

30 Section 4(2)(a) of the *Legislative Standards Act* requires legislation to have sufficient regard to rights and liberties of individuals.

31 Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

3.31. There are no guidelines for deciding on whether any assistant crime commissioner's need to be appointed.

– **clause 46 (referrals to QCC)**

3.32. Clause 46 prescribes the factors the management committee must be satisfied of before referring relevant criminal activity or major crime to the QCC for investigation on its own initiative or at the request of the police commissioner. The committee notes, however, that the clause does not appear to prescribe any factors to be considered in the case of a request from the crime commissioner.

– **clause 69(1) (public interest monitor)**

3.33. Clause 69(1) provides that the governor in council may appoint a public interest monitor. This appears to be a discretionary power.

3.34. It appears to the committee that both cls 16 and 69 may be interpreted as granting a discretion as to whether or not an assistant crime commissioner/s and public interest monitor may be appointed.[32]

3.35. It also seems to the committee that before referring a relevant criminal activity or major crime to the QCC for investigation it may be desirable for the management committee to be required to consider certain factors when the crime commissioner makes a request for a case to be referred to the QCC.

3.36. The committee seeks information from the minister in relation to these observations.

Does the legislation have sufficient regard to the rights and liberties of individuals?[33] (privacy)

– **clause 37 (Annual Report)**

3.37. Clause 37(4) states that the QCC Annual Report must not "identify persons" as being suspected or as having committed offences unless they have been actually convicted. It seems to the committee that it may be desirable to amend this clause to prevent persons being identified "directly or indirectly" given that identity can be deduced from material which does not actually name a person. The same addition might be made in sub cl. (5).

3.38. The committee requests that the minister consider amending cls. 34(4) and (5) to prevent the identity of persons being revealed either directly or indirectly. This is

[32] *Acts Interpretation Act* , s. 32CA states that the word "may," used in relation to a power, indicates that *the power may be exercised or not exercised at discretion*.

[33] Section 4(2)(a) of the *Legislative Standards Act* requires legislation to have sufficient regard to rights and liberties of individuals.

to address the possibility of a report providing sufficient information to reveal the identity of persons indirectly.

– **clause 82(10) (surveillance warrants) and clause 88(8) (covert search warrants)**

3.39. Amongst other things, cl. 82 makes provision for a judge or magistrate ("the issuer") to consider applications for surveillance warrants. Subsection (10) states a number of matters which the issuer must consider before issuing a surveillance warrant. According to the explanatory notes for proposed s. 82(10):

> *These matters generally revolve around the question of whether the seriousness or nature of the offence under investigation justifies the invasion of privacy that the use of a surveillance device entails.*

3.40. Interference with privacy is, however, only listed as the second of seven factors and then only in respect of a class A device (a surveillance listening or tracking device installed in a private or public place or on the suspect's clothing), not for a class B device (a tracking device in a car or moveable object). The same issue arises under cl. 83(6) which refers to and applies cl. 82(10).

3.41. Since the assessment to be made by the magistrate or judge in issuing a surveillance warrant is whether the benefits for the investigation outweigh the invasion of privacy, it seems to the committee to be desirable for the bill to make this clear. Indeed s. 82(10)(b), by only referring to privacy as a factor for a class A device, will be interpreted as denying this as a factor for a class B device.

3.42. This issue again arises in cl. 88(8) which repeats all but one of the factors in cl. 82(10) in relation to surveillance warrants to be considered before issuing a covert search warrant. The omission which is of concern is that which requires the likely extent of the interference with privacy to be considered. Indeed the explanatory notes to cl. 88(8) refer to this as the factor against which the other factors must be weighed. As with cl. 82(10), the committee is again of the view that the importance of the interference with privacy ought to be expressly spelt out.

3.43. The committee also notes that cl. 83(10)(b) does not consider the privacy of <u>others</u> affected. For example, the owner or occupier of a place where a device is installed in the belief that the suspect will be at that place and the owner or occupier of premises through which officers pass to install a device pursuant to cl. 84(f).

3.44. The impact of the use of surveillance devices on the privacy of individuals is substantial. It seems to the committee that the balancing of the need for a surveillance device against the erosion of individual rights in terms of invasion of privacy, is a vital safeguard which should be clearly reflected in the bill. The committee therefore requests that the minister consider clearly incorporating a counterbalancing test for the impact on privacy (as outlined in the explanatory notes) into cls. 82(10) and 88(8) of the bill.

– **clause 82(12) (surveillance warrants – parts of a dwelling under surveillance)**

3.45. Clause 82(12) states that a warrant for a class A device in respect of a "dwelling" must specify the parts of the dwelling in which the device may be installed. "Dwelling" is essentially defined in the dictionary to mean a residence. No guidance is given as to the criteria to be considered by the issuer in deciding which parts of the residence may be under surveillance.

3.46. In the committee's view, it may be desirable for certain factors, similar to those listed in cl. 82(10) (including the factor of privacy), to be incorporated into subsection (12) for this purpose. As the explanatory notes state, this provision enables areas like bedrooms to be excluded from surveillance.

3.47. The use of a surveillance device in a residence in cl. 82(12) will, again, have a significant impact on the privacy of individuals. The committee therefore, considers it desirable for subsection (12) to stipulate the impact on privacy as a factor to be considered by the issuer when specifying the parts of the residence in which the device may be installed.

3.48. Clause 82(12) is currently also limited to visual surveillance devices. The installation of other surveillance devices (for example audio surveillance) in a residence will also significantly impact on the privacy of individuals (for example, in a bedroom). It may, therefore, also be desirable to allow the issuer to restrict the parts of the dwelling in which an audio device may be installed.

3.49. The committee therefore requests that the minister consider amending cl. 82(12) to require the impact of a surveillance device (both audio and visual) on the privacy of individuals to be weighed up by a judge or magistrate when considering whether to restrict the places within a residence where such devices may be located.

– **clause 82(16) (surveillance warrants – destruction of recordings)**

3.50. The only section on surveillance warrants that provides for the destruction of any recordings not related to the relevant criminal activity or major crime to which the warrant relates (or another such investigation of the QCC) is cl. 82(16), which allows the issuer to make a destruction order. The issuer may, however, only require the destruction of irrelevant records if one of the conditions imposed on the warrant at the time of issue was a requirement to regularly report to the issuer on activities under the warrant.[34]

3.51. Obtaining information by using a listening device or a visual surveillance device under a surveillance warrant is a significant invasion of the privacy of individuals. It therefore seems reasonable that the issuer of a surveillance

[34] Clause 82(15)

warrant should have the power to require the destruction of any recordings made that are not related to the relevant criminal activity or major crime mentioned in the warrant. Clause 82(16) makes provision for such destruction but only if the warrant was subject to a regular reporting condition.

3.52. The committee requests that the minister consider amending cl. 82(16) to make it generally applicable to all surveillance warrants rather than being limited to those issued subject to conditions under subclause (15)(a).

– **clause 68 (protection of parliamentary commissioner)**

3.53. Clause 68 provides a range of protections for the parliamentary commissioner. The Office of Parliamentary Criminal Justice Commissioner was created in Part 4A of the *Criminal Justice Legislation Amendment Act 1997*. Clause 41 of the bill to that Act proposed the insertion of s. 118ZA into the *Criminal Justice Act 1989*. Section 118ZA, as proposed in the bill, contained all the elements of cl. 68 of this bill and a few more. The committee commented at length on the then proposed s. 118ZA (at pages 20 – 24 of Alert Digest No. 11 of 1997) and reported to Parliament on:

- the limitations on the review role of the courts;
- the limited accessibility to the criminal law;
- the erosion of the administrative law principles of procedural fairness and ultra vires; and
- the limited accountability of the parliamentary commissioner to Parliament.

3.54. The committee then made the observation that it could be argued that the parliamentary commissioner would not be accountable to rule of law.

3.55. Proposed s. 118ZA of the *Criminal Justice Act* was subsequently amended in Parliament to remove the words which, in the committee's view, eroded the administrative law principles of procedural fairness and ultra vires.

3.56. As stated above, cl. 68 of this bill is almost identical to proposed s. 118ZA of the *Criminal Justice Legislation Amendment Bill* in that:

- the parliamentary commissioner is not liable to proceedings *on the ground of want of jurisdiction or on another ground*;[35]
- the parliamentary commissioner is not liable *to any civil or criminal proceedings … for any act done … in good faith and without negligence*;[36]
- *no civil or criminal proceedings may be brought against the parliamentary commissioner … without the leave of the Supreme Court* (which must be

35 Clause 68(1).

36 Ibid.

satisfied that there is a substantial ground for claiming lack of good faith or negligence);[37] and

- a parliamentary commissioner can not be called to give evidence or produce documents in any proceedings.[38]

3.57. The functions of the parliamentary commissioner under this bill are, however, substantially different from those set out in division 2, part 4A of the *Criminal Justice Legislation Amendment Bill*. In this bill, the parliamentary commissioner's functions involve:

- reviewing intelligence data and access to information by various agencies;[39]
- monitoring (and making decisions on) the supply of evidence on official misconduct to the CJC by the QCC;[40] and
- inspecting the warrants register.[41]

3.58. In the committee's view, these functions are much less likely to affect individual rights and liberties as compared to those functions of the parliamentary commissioner in the *Criminal Justice Legislation Amendment Bill*.

3.59. Although the committee is concerned about the fact that no civil or criminal proceedings may be brought without the leave of the Supreme Court, its major concern arises from the statement in cl. 68(1) that the *parliamentary commissioner is not liable, whether on the ground of want of jurisdiction or another ground*. As the committee reported on page 22 on Alert Digest No. 11 of 1997, this statement appears to erode the administrative law principle of procedural fairness and to overturn the principle of ultra vires. It seems, for example, that the parliamentary commissioner can not be held liable for acting beyond his or her powers if he or she acted in good faith and without negligence.

3.60. The committee is concerned about the exclusion of the administrative law principle of ultra vires which would seem to permit an abuse of power conferred by the bill because the parliamentary commissioner is not held liable for acting "beyond the power". The committee therefore requests that the minister consider removing the words *whether on the ground on want of jurisdiction or on another ground* from cl. 68(1) of the bill.

3.61. The committee also seeks information from the minister justifying the need to make civil or criminal proceedings against the parliamentary commissioner in the Supreme Court subject to obtaining leave of that court in cl. 68(2) and (3).

37 Clauses 68(2) and (3).

38 Clause 68(4).

39 Clause 60.

40 Clauses 33(3) and (4).

41 Clause 92.

Does the legislation have sufficient regard to the rights and liberties of individuals?[42] (exercise of coercive powers)

3.62. The bill contains a number of coercive powers by which the commission can require persons to:

- provide information;
- attend and produce documents or things; or
- attend a hearing to give evidence or produce documents or things.

3.63. A person failing to comply with notices requiring persons to do these things are subject to a maximum penalty of 85 penalty units ($6375) or 1 year's imprisonment unless they have a reasonable excuse. The various powers available to the QCC are outlined below.

– **clause 73 (commission members may require information etc., from units of public administration)**

3.64. Clause 73 empowers a commission member to require an officer of the CJC or of any government body which is a unit of public administration under the *Criminal Justice Act 1989*[43] by written notice:

(1) to give "information" stated in the notice which is in the unit's possession and is relevant to an investigation being conducted by the QCC; and

(2) to attend and produce a "document or thing" which relates to the exercise by the unit of its functions and is relevant to an investigation being conducted by the QCC. The investigation referred to must be one with respect to relevant criminal activity or major crime.

3.65. The requisite notice under cl. 73 does not have to state the nature of the investigation or the purpose for which the information is sought. The committee notes, however, that this is not always practicable. Failure to comply with a notice under cl. 73, without reasonable excuse, carries a maximum penalty of 85 penalty units or 1 years imprisonment.

– **clause 93 (notice to produce)**

3.66. A notice to produce a specified document or thing to a QCC officer may be given only by the crime commissioner if he or she believes on reasonable grounds that it is relevant to an investigation being conducted by the QCC. Again the investigation must be one into relevant criminal activity or major crime. The

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42 Section 4(2)(a) of the *Legislative Standards Act* requires legislation to have sufficient regard to rights and liberties of individuals.

43 Section 3 defines a unit of public administration to mean the Legislative Assembly, the Executive Council, a department, the police service, Queensland Rail, statutory corporations, other Crown entities and the courts.

committee notes that there is no requirement to obtain judicial approval, nor is there any need for a hearing.

3.67. There is, however, provision for refusing to comply with the notice by claiming a "reasonable excuse" which includes the grounds of privilege as defined in the dictionary to mean privilege against self-incrimination, legal professional privilege and statutory and commercial obligations of confidentiality. Where this excuse is not accepted by QCC's representative, it is determined by a QCC hearing conducted under part 7.

3.68. There is again no requirement to state in the notice the purpose of the notice or the nature of the investigation for which the notice to produce has issued. Again, failure to comply with the notice carries a maximum penalty of 85 penalty units or 1 year's imprisonment.

– **clause 95 (attendance notice) and clause 100 (QCC hearings)**

3.69. An attendance notice to appear at a QCC hearing may be issued by the crime commissioner but judicial approval is needed to require immediate attendance.[44]

3.70. Clause 100(1) grants the QCC the power to "hold a hearing for an investigation" and must be read with the functions of the QCC in cl. 28. The only function which contemplates an investigation is that in cl. 28(1)(a):

> *"to investigate relevant criminal activity or major crime referred to it by the management committee".*

3.71. These hearings are facilitated by the power in cl. 95 to require the attendance of persons to give evidence or to produce a stated document or thing. Clause 96 allows for the enforcement of this power by imposing a maximum penalty of 85 penalty units or 1 year's imprisonment for failure to attend. Where a person refuses to attend a hearing, an arrest warrant may issue under division 7 which brings them to the hearing. Failure to answer questions put at the hearing constitutes an offence under cl. 107 and a failure to produce a specified document or thing constitutes an offence under cl. 105.

3.72. Provided it is not prejudicial to an investigation, the notice must state:

> *so far as reasonably practicable, the general nature of the matters about which the person may be questioned at the QCC hearing.*[45]

3.73. But it does not have to state the nature of the investigation. Yet, failure to comply with subclause (3) appears to have no effect due to subclause (5).

3.74. Where a person fails to produce in accordance with an attendance notice a stated document or thing at a QCC hearing, the only privilege able to be claimed as a reasonable excuse is legal professional privilege. That privilege provides

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44 Clause 95(2).

45 Clause 95(3).

no reasonable excuse where it is waived by the client whose name and address must be given by the person claiming the privilege. Determination of a reasonable excuse occurs pursuant to cl. 108.

– **clause 97 (arrest warrant)**

3.75. To fail to comply with an attendance notice without reasonable excuse constitutes an offence under cl. 96 but also renders the person liable to an arrest warrant which can only be sought with the approval of the crime commissioner from a Supreme Court Judge.[46] The judge must be satisfied that it is in the public interest to compel the person's attendance to avoid prejudice to the conduct of an investigation.

3.76. When arrested, the person must be brought immediately to a QCC, hearing and accommodated to a comparable standard as a juror unless the warrant otherwise provides.[47]

3.77. Express provision is made for the arrest of a person even when the time stated in the attendance notice has not passed provided that the person has acted in a manner to indicate that the attendance notice will not be complied with.

♦ **justification for the need to use coercive powers**

3.78. The explanatory notes address the need for coercive powers as follows:

> *It is proposed that the QCC will have the power to direct an individual to produce a thing or to appear as a witness. In some cases a person may be directed to produce the thing or appear immediately. While this power clearly impacts on the rights and liberties of individuals, it is submitted that the power is sufficiently defined and subject to appropriate review.*
>
> *A decision of the QCC to direct a person to produce or attend is open to judicial review. In addition, the legislation incorporates a scheme by which a subject person may appeal a QCC decision in the Supreme Court.*

♦ **committee's observations on coercive powers**

3.79. The bill vests wide-ranging investigative and powers in the QCC many of which require compliance on pain of penalty (hence the term "coercive powers"). Certain powers are confined to the conduct of a hearing (notice to attend to give evidence or to produce a document or thing) but the majority of powers are simply investigative, available irrespective of any hearing.

3.80. The most significant impact on individual rights of the coercive powers relating to hearings is the abrogation of the privilege against self-incrimination. Although the non-admissibility of that evidence in criminal and civil proceedings goes some way to ameliorating that impact, the requirement to claim privilege before

46 Clause 97(1).

47 Clause 97(5).

incriminating oneself significantly dilutes that protection. Furthermore, it seems that all other forms of privilege are also abrogated except for legal professional privilege.

3.81. The general investigative powers clearly impact on the right to privacy. In particular, covert search warrants and surveillance warrants invade the privacy of individuals without their knowledge. For instance, since a surveillance warrant may issue in respect of a dwelling, a device may be placed in a bedroom. Consequently the bill endeavours to prescribe safeguards by requiring judicial approval for these warrants and providing for the representation of the public interest at those in camera proceedings by a public interest monitor.

3.82. The coercive powers contained in the bill facilitate the conduct of investigations and hearings by the QCC. This is, however, achieved at a cost to the rights of individuals the subject of QCC hearings or investigations.

3.83. The impost on privacy and the abrogation of various privileges (including the privilege against self-incrimination) is dealt with at paragraphs XX and XX of this chapter.

3.84. The committee refers to Parliament the question of whether, in facilitating the operations of the QCC through granting various coercive powers, this bill has sufficient regard to the rights and liberties of individuals.

Does the legislation have sufficient regard to the rights and liberties of individuals?[48] (availability of appeal)

– **clause 76**

3.85. Clause 76 provides for an authorised QCC officer to take possession of property without first obtaining a warrant under urgent circumstances.

3.86. Where the magistrate refuses to retrospectively approve the search, cl. 76(5) allows the magistrate to order that the officer "retain, dispose of, return or destroy" what was seized. The committee notes, however, that no provision is made for an appeal by the owner of the thing seized, although the officer may appeal to the Supreme Court.[49]

3.87. The owner of a thing that has been seized by an authorised QCC officer in circumstances where the magistrate refuses to retrospectively approve the search is not specifically given the option to appeal the decision of the magistrate to, amongst other things, dispose of or destroy the thing. The

[48] Section 4(2)(a) of the *Legislative Standards Act* requires legislation to have sufficient regard to rights and liberties of individuals.

[49] Clause 76(6).

committee requests that the minister consider amending cl. 76 to allow the owner of the thing, as well as the officer, to appeal such a decision by the magistrate.

Does the legislation provide appropriate protection against self-incrimination?[50] **(also, breach of privilege generally)**

– **clauses 107 and 110**

3.88. Clause 107 requires all witnesses attending a QCC hearing to answer "a question put to the person at the hearing". Subsection (3) provides:

> ***(3)*** *The person is not entitled–*
>
> *(a) to remain silent; or*
>
> *(b) to refuse to answer the question on a ground of privilege, other than legal professional privilege.*

3.89. It appears, therefore, that the only ground available for refusing to answer a question is that of legal professional privilege.

3.90. Although no privilege against self-incrimination is available, cl. 110 does provide some "use immunity" with respect to evidence given and documents or things produced under compulsion. That protection is that, under certain circumstances, evidence given and documents or things produced at the hearing are not admissible against that person in any civil, criminal or administrative proceedings.[51] The acknowledged deficiency in this protection is, however, that it does not preclude the "derivative use" of the evidence gained, that is, using the information gained to discover other evidence which is admissible.

3.91. The explanatory note provide the following justification for breaching this fundamental right:

> *Protection against self incrimination*
>
> *The legislation will also allow the QCC to compel a witness to answer a question even if the answer might tend to incriminate the witness. While this is in itself a breach of fundamental legislative principles, it is also a cornerstone of investigative hearings. The use of the power is balanced by the inclusion in the legislation of certain safeguards. These are that when a witness claims privilege against self incrimination, any answer given under compulsion may not be used against that witness in any subsequent criminal or civil hearing.*

3.92. A further limitation to the protection against use of information gained under compulsion is, however, that it is conditional on the person *claiming prior to* answering the question or producing the document or thing that he or she would

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[50] Section 4(3)(f) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

[51] Other than proceedings which concern the falsity or misleading nature of their evidence, or concern an offence against the Act or a contempt of a commission member.

"otherwise be excused on a stated ground of privilege" and that the privilege of self-incrimination would otherwise apply. A failure to make a claim of privilege before acting under compulsion enables any incriminating evidence or material to be used in other proceedings. But since the claim of privilege need not be one of self-incrimination, it would seem that the clause allows more leeway for the witness by permitting an objection based on any ground of privilege provided that the privilege of self-incrimination could have been made.

3.93. Clause 107(3) removes the right of a person appearing at a QCC hearing to claim the right to silence or the privilege against self-incrimination. Clause 110, however, restricts the use of the information gained and provides that it is not admissible in evidence against the person in any civil, criminal or administrative proceedings.

3.94. In view of the limited use of information gained, Parliament may consider that the abrogation of the rights to silence and the privilege against self-incrimination are justified by the need for coercive powers to investigate criminal conduct which is notoriously difficult to successfully prosecute.

3.95. The committee is, however, concerned at the precondition to immunity from use of the information which is set out in cl. 110(1). That clause requires a person to claim privilege *before* giving incriminating evidence or producing incriminating documents or things in order to render that evidence inadmissible in all other proceedings.

3.96. The committee therefore requests that the minister consider strengthening the protections offered in respect of the abrogation of the right to silence and privilege against self-incrimination by removing the precondition to claim privilege set out in cl. 110(1).

Is the content of the explanatory note sufficient?[52]

– **clauses 75 and 99**

3.97. The explanatory notes to cl. 75 refer to allowing the seizure of evidence not stated in the warrant but which relates to an investigation of a relevant criminal activity or a major crime and which would be lost if not seized at that time without a warrant. There appears to be no reference in cl. 75 to this power which is in fact conferred by cl. 99.

3.98. The committee requests that the minister clarify this explanatory note.

[52] Section 23 of the *Legislative Standards Act* sets out the information required to be included in an explanatory note for a bill. If the explanatory note does not include any of this information, it must state the reason for non-inclusion.

4. EDUCATION AND OTHER LEGISLATION AMENDMENT BILL 1997

Background

4.1. The Honourable R J Quinn MLA, Minister for Education, introduced this bill into the Legislative Assembly on 29 October 1997.

4.2. According to the explanatory notes, the objectives of this bill are to:

- provide for the establishment and operation of school councils for certain State schools;
- devolve more responsibility to principals and local school communities for the management of State educational institutions;
- regulate the allocation of semesters of State education;
- extend the powers and information available to the Board of Teacher Registration; and
- improve the management and operation of parents and citizens associations.

Does the legislation have sufficient regard to the rights and liberties of individuals?[53]

– **clauses 6 and 21 (new s.30ZO) (proposed amendments to s. 9A(1) of the *Criminal Law (Rehabilitation of Offenders) Act 1986*)**

4.3. The *Criminal Law (Rehabilitation of Offenders) Act 1996* provides that a person is not to be required or asked to disclose (and if so required or asked, shall not be obliged to disclose) for any purpose:

- a conviction that is not part of the person's criminal history;
- a conviction that is the criminal history of another person;
- a charge made against the person;
- a charge against another person; or
- a conviction of the person in respect of which a "rehabilitation period"[54] has expired and has not been revived.[55]

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53 Section 4(2)(a) of the *Legislative Standard Act*.

54 The 'rehabilitation period' is in respect of indictable offence 10 years and in respect of other offences 5 years. The convictions are 'revived' if the person is again convicted of an offence, in which case the rehabilitation period commences again from the date of the later conviction.

55 Sections 5 and 6 – *Criminal Law (Rehabilitation of Offenders) Act 1986.*

4.4. However, there are a range of exclusions from the general provisions of that Act. In particular, s. 9A of the Act provides that, despite the general provisions of the Act, applicants for some positions or offices are required to disclose specified offences or specified classes of offences. For example, a person who applies to be a police officer is required to disclose all contraventions of or failures to comply with any provisions of the law.

4.5. The proposed amendments to s.9A contained in the bill aim to ensure that a person seeking to be elected or appointed as a member of a school council has to provide the same details of their past criminal history as do registered teachers, teachers' aides and administration or ground staff at State Schools.

4.6. Therefore, the amendment would mean that a person applying to be elected or appointed to a school council may be required to disclose any conviction committed in Queensland or elsewhere which would constitute an offence defined in Chapters 22, 32, 33, 34 of the Criminal Code[56] or in part 2 of the *Drugs Misuse Act 1992* or an offence which involves an assault of a sexual nature.

4.7. The *Criminal Law (Rehabilitation of Offenders) Act* provides statutory protection to those who have been convicted of offences. The Act is instrumental in affecting the rehabilitation of offenders and improving their opportunities in the wider community.

4.8. In the committee's view, exemptions from the *Criminal Law (Rehabilitation of Offenders)* Act should be carefully considered. In the case of this exemption the committee recognises the competing community need to ensure a safe school environment.

4.9. The committee does not have any concerns to report in relation to this particular amendment, but brings the matter to the attention of the Parliament.

Does the legislation have sufficient regard to the rights and liberties of individuals?[57]

– **clause 8 (proposed amendment to s.8 of the Criminal Law (Sexual Offences) Act 1978)**

4.10. The *Criminal Law (Sexual Offences) Act 1978*, amongst other things, prohibits the publication of any matters which are likely to lead to the identification of a complainant or a defendant in a prescribed sexual offence.

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[56] Chapter 22 (offences against morality); chapter 32 (assaults on females – abduction); chapter 33 (offences against liberty); and chapter 34 (offences relating to marriage and parental rights and duties).

[57] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

4.11. Section 8 of the Act exempts some reports from these general provisions. Included in these general exemptions is a report made to or on behalf of the Department of Justice, the Police Department and the department administering the *Children's Services Act 1965*.

4.12. The proposed amendment in the bill seeks, amongst other things, to add the Board of Teacher Registration to the list of agencies exempted by s. 8.

4.13. The purpose of the *Criminal Law (Sexual Offences) Act* is to safeguard, as much as possible, the privacy of those who have made a complaint of a sexual offence, therefore amendments which exempt an agency from the general privacy measures contained in the Act should be carefully considered.

4.14. The committee does not have any concerns to report in relation to this particular amendment, but brings the matter to the attention of the Parliament.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[58]

– **clause 21 [proposed ss. 30ZB and 30ZB(6)(a)]**

4.15. Clause 21 makes provision for the constitution of school councils. Proposed 30ZB(2) deals with the membership of a school council; it contains the following requirements.

> *All of the following provisions apply to the membership of a school council—*
>
> *(a) the number of members of a council must be at least 6 and not more than 15;*
>
> *(b) the number of elected parent members and elected staff members must be equal;*
>
> *(c) there must not be more than 2 elected student members and 2 appointed members;*
>
> *(d) there must be a least 1 elected parent member, 1 elected staff member and 1 elected student member.*

4.16. According to proposed s. 30ZB(2)(c)(d), the maximum number of elected student members is 2.

4.17. Proposed s. 30ZB(6) provides that the elected student members—

> *(a) may only be students in years 10, 11 and 12 at the school for which the council is established; and*
>
> *(b) must be elected by a poll in which only students at the school in years 10, 11 and 12 may vote.*

[58] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

4.18. The explanatory notes state that *the provisions about elected student members only applies to years 10, 11 and 12.*[59]

4.19. The committee observes that the requirement under proposed s. 30ZB(2)(d) to have at least 1 elected student member is mandatory for all school councils. This being the case, it would appear to the committee that this mandatory requirement effectively prevents school councils from being established in schools that do not have students in years 10, 11 and 12.

4.20. The committee seeks clarification from the minister as to whether it is the intention of this bill to only permit the establishment of school councils in schools that have students in years 10, 11 and 12. If the bill intends all schools to have school councils, the committee is of the view that the requirement in proposed s. 30ZB(2)(d) should be more precisely drafted to provide for schools that do not have years 10, 11 and 12.

Does the legislation have sufficient regard to the rights and liberties of individuals?[60]

– **clauses 53 to 55 (amendments to s.37 of and inserting proposed ss. 44A and 44B into the *Education (Teacher Registration) Act 1988*)**

4.21. The bill seeks to amend the *Education (Teacher Registration) Act* by increasing the power and responsibility of the Board of Teacher Education and, in the words of the minister to:

> *introduce more rigorous procedures for ensuring that those registered as teachers are people who present no danger to their students.* [61]

4.22. The amendment to the Act will require the board to take into account the criminal history of each applicant for teacher registration when assessing the applicant's character.

4.23. To achieve this end, the amended Act will:

- place an obligation on the Commissioner of Police Service, when requested by the board, to supply a written report on the criminal history of a person applying for registration;
- place an obligation on an employing authority for a school to notify the board of the resignation or dismissal of a teacher following written notice to that teacher that the authority had investigated a sexual allegation involving that teacher and was dissatisfied with that teacher; and

59 At page 9.

60 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

61 *Education and Other Legislation Amendment Bill 1997*, Second Reading Speech, p.5.

- place an obligation on a prosecuting authority to notify the board about a registered teacher who is committed for trial or convicted in respect of an indictable offence and any acquittal, mistrial or presentation of a *nolle prosequi* in relation to an indictable offence against a registered teacher.

4.24. The committee notes that the criminal history of a person required to be provided by the Commissioner of Police extends to include, despite the provision of s. 5 of the *Criminal Law (Rehabilitation of Offenders) Act,* a charge made against a person for an offence. Therefore, the Commissioner of Police would be required to disclose to the board a charge, even if the person was acquitted or that charge or any conviction had been set aside or quashed.

4.25. The committee notes that the presumption of innocence is a fundamental principle of our law. This means that a person's innocence in respect of an allegation or a charge is to be assumed unless guilt is proved or admitted. These amendments appear to run contrary to this presumption.

4.26. The committee refers this issue to Parliament for consideration.

5. ELECTRICITY AMENDMENT BILL (NO.3) 1997

Background

5.1. The Honourable T J G Gilmore MLA, Minister for Mines and Energy, introduced this bill into the Legislative Assembly on 30 October 1997.

5.2. This bill amends the *Electricity Act 1994* and the *Queensland Competition Authority Act 1997* to facilitate electricity market reform in the light of the National Competition Policy.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[62]

– **clause 33 (inserting proposed s. 64J) and clause 39 (inserting proposed ss.120ZQ(2)(3) and 120ZR(4)(5) into the *Electricity Act 1994*)**

5.3. Clause 33 of this bill makes provision for the creation of an independent Electricity Industry Ombudsman (the ombudsman) to investigate customers' complaints and resolve disputes between customers and electricity entities about the performance of obligations under contracts.[63]

5.4. Proposed ss. 64J and 120ZM to 120ZQ specify the powers of the ombudsman. The ombudsman may require the complainant and the electricity entity in dispute to provide information (except self-incriminating information) and may make orders against an electricity entity[64] that are enforceable in the Magistrates Court.[65]

5.5. It appears to the committee that ss. 64J(1), 120ZQ(2)(3) and 120ZR(4)(5) are not sufficiently clear and precise.

5.6. Proposed s. 64J provides:

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62 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

63 Clause 39 [proposed s. 120ZG(2)] declares that an electricity entity may not refer a dispute for hearing by the electricity industry ombudsman.

64 Proposed ss. 120ZM and 120ZN. The ombudsman may, having considered the objects of the *Electricity Act*, order the electricity entity that is a party to a dispute to remedy any issue in dispute or pay an amount of no more than $10,000 (proposed s. 120ZN(1)). However, the ombudsman can not cancel, suspend or amend the authority of an electricity entity (proposed s. 120ZN(4)). An electricity entity must comply with an order of the ombudsman (proposed s. 120ZT). If an electricity entity contravenes an order of the ombudsman, the ombudsman must refer the matter to the regulator (proposed s. 120ZU). The regulator may then take any of the following disciplinary actions under proposed s. 133(1) – cancellation, suspension or amendment of the entity's authority (proposed s. 120ZV).

65 Proposed s. 120ZW.

Powers

64J.(1) *Without limiting the powers the ombudsman has as an individual, the ombudsman may do anything else necessary or convenient to be done, or in connection with, the performance of the ombudsman's functions.*

5.7. Proposed ss. 120ZQ and 120ZR provide:

Order final

120ZQ.(1) *Subject to section 120ZR, an order made by the electricity industry ombudsman binds an electricity entity that is a party to the dispute.*

(2) *The entity may not apply for review of, or appeal against, the order.*

(3) *However, the entity may apply for a review of the order under the Judicial Review Act 1991.*

Customer or prescribed person to advise whether order accepted

120ZR.(1) *A customer or prescribed person that is a party to a dispute must give written notice to the electricity industry ombudsman if the customer or person decides not to accept the ombudsman's order against the electricity entity.*

(2) *The notice must be given within 21 days.*

(3) *If the notice is not given within 21 days the customer or prescribed person is taken to have accepted the order and the order binds the customer or person.*

(4) *A customer or prescribed person may not apply for a review of or appeal against the order if it is binding on the customer or person.*

(5) *However, the customer or prescribed person may apply for a review of the order under the Judicial Review Act 1991.*

5.8. The committee is concerned that:

- proposed s. 64J(1) does not clearly specify whether the ombudsman has a power to enter places, search and seize evidence without warrant; and
- while proposed ss. 120ZQ(3) and 120ZR(5) permit judicial review of an order of the ombudsman, proposed ss. 120ZQ(2) and 120ZR(4) appear to restrict the review right. These sub-sections seem to be contradictory.

5.9. The committee brings these matters to the attention of Parliament and requests clarification from the minister. The committee takes the view that legislation should be precisely drafted and therefore requests the minister to consider revising:

- proposed s. 64J(1) to clearly define the scope of the ombudsman's investigation powers, particularly in relation to the power to enter places, to search and seize evidence, if any; and
- proposed ss. 120ZQ(3)(4) and 120(4)(5) to clarify what review rights may be exercised.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[66]

– **clause 39 (inserting proposed s. 120C into the *Electricity Act 1994*)**

5.10. Proposed s. 120C(1) permits the Queensland Competition Authority[67] to prepare conduct rules. The conduct rules may state the electricity entities or the types or classes of entity to which the rules are to apply. The rules may also state the way market conduct is to be regulated to promote the efficient and equitable operation of the electricity market.[68] Proposed s. 120C(3) sets out the matters that the conduct rules may deal with.

5.11. The Queensland Competition Authority may apply to the Supreme Court concerning breaches of these rules and the court may, after considering certain specified matters,[69] impose substantial penalty for non-compliance.[70]

5.12. The explanatory notes provide the following information to justify the conduct rules making power.

> *There may be objection to the QCA's* [Queensland Competition Authority's] *proposed capacity to make and amend conduct rules for the regulation of market behaviour. However, it is considered that it would be inappropriate for Government to set the conduct rules for the industry's market behaviour because of the conflict that would arise through the Government's ownership of most of the industry. The Bill provides a clear statement of the types of matters that the conduct rules are to cover: these are essentially customer protection matters. Further, the rules will be detailed, apply to either specified bodies or behaviours, or both, and will require swift implementation and, where necessary, amendment to prevent the abuse of market power by market participants at the expense of consumers and the delivery of significant benefits to the State's economy.*
>
> *Importantly, it should be noted that the QCA itself cannot impose penalties for the contravention of a conduct rule—the QCA will have to pursue enforcement of the conduct rules through action in the Supreme Court.*[71]

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66 Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

67 Created under the *Queensland Competition Authority Act 1997*.

68 Proposed s. 120C(2).

69 Clause 39 (proposed s. 120T(3)).

70 Clause 39 (proposed s. 120T(2)): the Supreme Court may impose penalty of not more than, for an individual—$100 000, or for a corporation—$500 000. The court may also grant injunctions to prohibit unlawful conduct and order compensation to be payable. If the court decides that an electricity entity has contravened the conduct rules, the Queensland Competition Authority must refer the contravention to the regulator (proposed s. 120ZA). The regulator may then take any of the following disciplinary action under proposed s. 133(1)— cancellation, suspension or amendment of the entity's authority.

71 At pages 8 and 9.

5.13. The committee considers this power to prepare conduct rules to be a broad delegation of legislative power. In the committee's view, it is important that the exercise of this power is sufficiently subject to the scrutiny of the Legislative Assembly.

5.14. The committee is concerned that there does not appear to be any requirement for the conduct rules to be contained in subordinate legislation. Neither is there a requirement for these rules to be tabled in the Legislative Assembly.[72]

5.15. The explanatory notes indicate that the bill *provides a clear statement of the types of matters that the conduct rules are to cover*.[73] In the committee's view, the phrase "*The matters the rules may deal with include the following—*" contained in proposed s. 120C(3) appears to suggest that the conduct rules may deal with other matters not listed in the proposed section. The committee seeks clarification from the minister as to whether the matters specified in proposed s. 120C(3) are intended to be the only matters that the conduct rules may deal with. If they are, the committee requests the minister to consider introducing appropriate amendments to proposed s. 120C to restrict the scope of the conduct rules making power.

5.16. The committee refers to Parliament for consideration the question of whether this power to make conduct rules is sufficiently subject to Parliamentary scrutiny.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[74]

– **clause 39 (inserting proposed s. 120Z into the *Electricity Act*)**

5.17. Proposed s. 120Z deems the conduct of directors, servants or agents (representatives) to be the conduct of the corporation or principal for whom they act if it is proved that they were acting within the scope of their actual or apparent authority.

5.18. The committee observes that a corporation or principal is only taken to have engaged in the conduct of another person if that person has engaged in the relevant conduct at the direction of the corporation's representative, or at the direction of the principal's servant or agent, acting within the scope of actual or apparent authority.[75]

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72 The conduct rules take effect on the day stated in a gazette notice or on the day the notice is gazetted (proposed s. 120G).

73 Explanatory notes at page 9.

74 Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

75 Proposed ss. 120Z(3)(b) and 120Z(4)(b).

5.19. The deeming provisions under proposed s. 120Z only apply to a proceeding under proposed division 3.[76] It would therefore appear that that the deeming provisions will facilitate the proof of alleged conduct in any of the following proceedings:

- an application by the Queensland Competition Authority under proposed s. 120T to the Supreme Court to enforce the conduct rules;
- an application by the Queensland Competition Authority or any other person under proposed s. 120V to the Supreme Court for an injunction, for example, to prevent a person from further engaging in conduct that constitutes or would constitute a breach of the conduct rules;
- an application to the Supreme Court made by a person under proposed s. 120W to recover the amount of loss or damage suffered as a result of another person's conduct that contravened the conduct rules; and
- an application to the Supreme Court made by an injured party under proposed s. 120X for such orders as the court thinks appropriate, such as an order directing the contravener or another person involved to refund an amount or return property to the injured party.

– **clause 64 (inserting proposed s. 240A into the *Electricity Act 1994*)**

5.20. The deeming provisions under proposed s. 120Z do not make the director, servant or agent of a corporation liable for any infringement of the conduct rules. However, under proposed s. 240A(3), the evidence that a corporation has been convicted of an offence against a provision of the *Electricity Act* is evidence that each of the corporation's executive officers[77] committed the offence[78] of failing to ensure the corporation complies with the infringed provision of that Act.

5.21. However, under proposed s. 240A(4), it is a defence for an executive officer to prove that:

(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—that the officer took reasonable steps to ensure the corporation complied with the provision;[79] or

(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.[80]

5.22. The committee has previously commented on provisions that reverse the onus of proof.[81] As a general rule, the committee does not approve of these provisions,

76 Proposed s. 120Z(1) provides that this *section applies to a proceeding under this division.* "This division" means *Division 3—Enforcing conduct rules* (proposed ss. 120O to 120ZB).

77 As defined in clause 64 of this bill (proposed s. 240A(5)).

78 Under proposed s. 240A(2).

79 Proposed s. 240A(4)(a).

80 Proposed s. 240A(4)(b).

although it appreciates the difficulties of determining liability in certain circumstances, for example, in corporations.

5.23. In considering whether there is justification for a reversal of onus of proof in a provision of a bill, the committee takes into account whether the subject matter of proof by the defendant is a matter peculiarly in the knowledge of the defendant, or whether it would require considerable expenditure on the part of the crown and would be extremely difficult to establish.

5.24. The committee requests the minister to provide information as to the rationale or justification for proposed ss. 120Z and 240A and refers to Parliament for consideration the question of whether proposed ss. 120Z and 240A contain justifiable reversals of onus of proof.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[82]

– **clause 43 (inserting proposed s. 133 into the *Electricity Act 1994*)**

5.25. Under proposed s. 133(5)–(10), the regulator may give notice to require an electricity entity that has a prohibited interest to dispose within a certain period of time of the interest that gave rise to the contravention.[83] A person whose interest is affected by the regulator's decision under proposed s. 133(5) may appeal to the Supreme Court against that decision.[84]

5.26. Failure to comply with the regulator's notice results in the interest being forfeited to the State.[85] The regulator must then sell the forfeited interest and, after deducting reasonable costs of forfeiture and sale, pay the proceeds of sale to

81 *Consumer Credit Legislation Amendment Bill 1996*, cl. 18 – Alert Digest No. 7 of 1996 at pages 9-11; *Keno Bill 1996*, cl. 226 – Alert Digest No. 10 of 1996 at pages 9-10; *Workplace Relations Bill 1996*, cls. 246, 447 & 452 – Alert Digest No. 13 of 1996 at pages 13-15; *Land Sales and Land Title Amendment Bill 1997*, cl. 27 – Alert Digest No. 5 of 1997 at pages 47-48; *Queensland Competition Authority Bill 1997*, cl. 236 – Alert Digest No. 5 of 1997 at pages 75-76; *Friendly Societies (Queensland) Bill 1997*, cl. 132– Alert Digest No. 6 of 1997 at pages 15-16; *Lotteries Bill 1997*, cls. 211 & 212– Alert Digest No. 7 of 1997 at pages 11-12; *Transport Legislation Amendment Bill 1997*, cls. 124 & 129– Alert Digest No. 11of 1997 at pages 42-44.

82 Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

83 See also explanatory notes to this section at page 24. "Prohibited interest" is defined in clause 83 of this bill (amending schedule 5 (Dictionary) to the *Electricity Act 1994*). According to proposed s. 133(21), an interest includes a legal or equitable right to acquire shares, a right under an agreement or arrangement, etc.

84 Clause 81(1) (amending schedule 1 of the *Electricity Act 1994*).

85 Proposed s. 133(11).

the person from whom the interest was forfeited.[86] Clause 83 of this bill defines "sell" to include *give away or swap*.

5.27. The committee notes that under proposed s. 133(6), the regulator may decide to require the disposal of the interest *based on the information that the regulator considers sufficient in the circumstances*.

5.28. There does not appear to be any specific criteria, such as the objects of the *Electricity Act* or the conduct rules, prescribed for the regulator to consider before the regulator makes a decision under proposed s. 133(5) to require the disposal of a prohibited interest. The committee is concerned that this power of the regulator does not appear to be sufficiently defined. It therefore requests the minister to provide information on the criteria that the regulator must consider, and must not consider, before making a decision under proposed s. 133(5). The committee also requests the minister to considering introducing appropriate amendments to specify these criteria for the purpose of proposed s. 133(5).

5.29. The committee understands that a person may appeal against the regulator's decision made under proposed s. 133(5) to require disposal of an interest. However, under proposed s. 133(11), if the offending electricity entity or person who is given a notice to dispose an interest fails to comply with that notice, the subject interest is forfeited to the State.

5.30. The committee notes the definition of "sell" under clause 83 and is concerned that the regulator may technically "give away" the interest forfeited under proposed s. 133(11). If so, there may not be any sale proceeds left to be repaid under proposed s. 133(13) to the person from whom the interest was forfeited. The committee seeks clarification from the minister on this point and requests the minister to introduce appropriate amendments to clarify how proposed s. 133(13) and clause 83 are intended to operate.

5.31. The committee refers to Parliament for consideration the question of whether proposed s. 133(11) (the forfeiture provision) is justified.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[87]

– **clause 66(2) (amending s. 254(1) of the *Electricity Act 1994*) and clause 96 (amending s. 237(1) of the *Queensland Competition Act 1997*)**

5.32. Both clauses 66(2) and 96 of this bill respectively amend existing provisions of the *Electricity Act* and the *Queensland Competition Authority Act* that protect

[86] Proposed s. 133(12) and (13).

[87] Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

certain specified persons from civil liability for their acts done or omissions made under these Acts.

♦ **Section 254(1) of the *Electricity Act***

5.33. This section currently protects specified persons from civil actions for an act done, or an omission made, *honestly and without negligence* under the *Electricity Act*. Clause 66(2) extends this limited protection from civil liability to the following persons:

- the Electricity Industry Ombudsman and employees in the Office of the Electricity Industry Ombudsman;
- members and employees of the Queensland Competition Authority; and
- an operator appointed by the regulator to operate the defaulting entity's operations and the operator's employees.

♦ **Section 237(1) of the *Queensland Competition Authority Act 1997***

5.34. This section currently protects a member or employee of the Queensland Competition Authority from civil actions for an act done, or an omission made, *honestly and without negligence* under the *Queensland Competition Authority Act*. Clause 96 amends s. 237(1) so that the protection will apply to an act done, or an omission made *in good faith* under that Act.

5.35. The committee observes that both clauses 66(2) and 96 address the civil liability of a member or employee of the Queensland Competition Authority. The extent of the protection from civil liability given to this class of persons varies according to the basis on which an act is done, or an omission is made.

5.36. It would appear that if a member or employee of the Queensland Competition Authority has done an act or omitted to do something under the *Electricity Act*, any aggrieved person may bring a civil action against that member or employee (even if the act was done or omission was made in good faith) based on negligence. However, if the same member or employee of the Authority has done an act or omitted to do something in good faith under the *Queensland Competition Act*, the member or employee is protected from a civil action based on negligence.

5.37. The committee has previously commented on provisions that exclude civil liability for anything done or omitted to be done in good faith, in the exercise of their powers and performance of their functions.[88] It has expressed the view that one of the fundamental tenets of the law is that every is equal before the law, and should therefore be fully liable for tortious acts.[89]

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88 See Alert Digest No. 9 of 1997 at pages 14 to 15 on the *Electricity Amendment Bill (No.2) 1997*.

89 ibid., at page 15.

5.38. The explanatory notes provide the following information.

> *Questions may arise about amendments to the QCA Act* [Queensland Competition Authority Act] *to address an issue about the liability of members and staff of the QCA for negligence. Essentially, the amendment will remove liability for negligent acts performed in good faith. This reverses the current position where members and staff are liable for negligent acts. The Committee may argue that this change breaches fundamental legislative principles by conferring immunity from proceeding or prosecution without adequate justification. However, this amendment will bring the liability arrangements into line with the Corporations Law and the position of members of many other statutory authorities. It will also accord with the position for similar regulators in NSW and Victoria.*[90]

5.39. The explanatory notes have provided the reasoning behind the amendment (under cl. 96) to s. 237(1) of the *Queensland Competition Act*, but not the amendment [under cl. 66(2)] to s. 254(1) of the *Electricity Act*.

5.40. The committee seeks clarification from the minister on the extent of protection from civil liability given to members and employees of the Queensland Competition Authority under clause 66(2) for negligent acts performed in good faith under the *Electricity Act*. It also requests information justifying the amendment under clause 66(2) to s. 254(1) of the *Electricity Act*.

5.41. The committee refers to Parliament for consideration the question of whether the curtailment by clauses 66(2) and 96 of the right to bring civil actions based on torts is justified and whether the proposed amendments in question have sufficient regard to the rights of individuals.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[91]

– **clause 80 (amending s. 303(1) and (3) of the *Electricity Act 1994*)**

5.42. Section 303 currently contains extensive transitional regulation making powers. These powers will expire on 1 July 1998. Existing s. 303 provides that:

> ***Transitional regulations***
>
> ***303. (1)*** *A regulation may make provisions for any matter for which this Act does not make provision or sufficient provision and for which—*
>
> *(a) it is necessary or convenient to assist or give effect to the restructuring of the Queensland electricity supply industry or reforms proposed for the Queensland electricity supply industry; or*

90 At page 9.

91 Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

(b) it is necessary to provide for the preservation, continuation, termination of any authority or special approval issued under this Act including without limitation any licence or approval that has been preserved or continued by this Act; or

(c) it is necessary or convenient to assist in giving effect to sections 289 to 302; or

(d) it is necessary to provide for the preservation of any accrued rights existing before the commencement in relation to the supply of electricity.

(2) *A regulation under subsection (1) may be given retrospective operation to a date not earlier than the commencement of this section.*

(3) *This section and any regulations made under it expires 1 year after this section commences.*

5.43. The committee has previously expressed the following views in relation to s. 303 in its Alert Digest No. 5 of 1997.[92]

- In relation to s. 303(1), the committee noted that there may be circumstances under which regulations may need to be made that were not anticipated under an Act. The committee indicated that it would have no objection so long as these regulations did not run contrary to the intent of s. 4(5)(c) of the *Legislative Standards Act* which provides:

  (5) *Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation¾*

  (c) contains only matter appropriate to subordinate legislation.

  The committee welcomed the subjection of s. 303(1) to a one year sunset clause.

- In relation to s.303(2), the committee expressed concern that transitional regulations made under s. 303(1) may be given retrospective operation to a date not earlier than the commencement of s. 303. Although it recommended the removal of s. 303(2), Parliament decided to retain the subsection (2).

5.44. Clause 80 of this bill amends ss. 303(1)(a) and 303(3). It extends the expiry date of the transitional making power to 2 years from the date of commencement. Accordingly, the transitional making power will expire on 1 July 1999.

5.45. It also expands the scope of s. 303(1)(a). The effect of this proposed amendment is that a transitional regulation, made before 1 July 1999, may make provision for:

- any matter listed in existing s. 303(1); and
- any matter for which the *Electricity Act* does not make provision or sufficient provision and for which it is necessary or convenient to help or give effect to:

[92] At pages 33 and 34.

- the objects of the *Electricity Act*; or
- a financially viable Queensland electricity supply industry.

5.46. The committee observes that s. 303(2) is not amended, this means that a transitional regulation made under s. 303 may be given retrospective application to a date not earlier than 1 July 1997.

5.47. The committee seeks information from the minister on the rationale behind the proposed increase of the transitional regulation power under s. 303(1)(a) and the extension of the expiry of this power to 1 July 1999.

5.48. It also refers to Parliament the question of whether the proposed amendments to s. 303(1)(3) are justified and therefore have sufficient regard to the institution of Parliament.

6. ENVIRONMENTAL AND OTHER LEGISLATION AMENDMENT BILL 1997

Background

6.1. The Honourable B G Littleproud MLA, Minister for Environment, introduced this bill into the Legislative Assembly on 29 October 1997.

6.2. This bill repeals the *Contaminated Land Act 1991.* However, much of that Act is amended and redrafted for relocation as a new part 9B of the *Environment Protection Act 1994*. One important change made by the bill is that it distinguishes sites which would currently be entered on the existing Contaminated Sites Register. Sites likely to be contaminated but with a low probability of risk to human health or the environment *under current land use* will be placed on an Environmental Management Register. These low-risk sites will not require remediation (clean-up) but may be subject to site management plans. Contaminated sites which do constitute risks to the environment and require remediation will be placed on a Contaminated Land Register.

6.3. The bill makes amendments to the *Environmental Protection Act* apart from the contaminated land provisions. Operators who undertake 'level 1 environmentally relevant activities' (activities which *inherently* pose greater risks of environmental harm) can now seek 'level 1 approvals' instead of licenses. To do so, operators must have a superior environmental track record and environmental management procedures that reduce the *actual* risk of environmental harm to one of insignificance. Other amendments to the *Environmental Protection Act* include changes to local government approvals of waste management works and an amendment to enable regulations to be made in regard to litter on all land, not just public places.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[93]

– **clause 21 (new ss.118J & K, 118Y, and 118ZM & ZN of the *Environmental Protection Act*)**

6.4. Some provisions of the existing *Contaminated Land Act*, introduced in 1991, imposed obligations retrospectively. The current bill re-enacts the effect of those

[93] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

provisions (although reformulated), raising issues about the retrospective effect of the bill.[94]

6.5. The provisions which potentially impose obligations retrospectively are contained in cl.21, – proposed ss.118 J & K, 118 Y and 118ZM & ZN. Proposed ss.118 J & K enable the administering authority under the Act to require that site investigations be conducted for land registered on the Environmental Management Register that is believed to be contaminated and posing a serious risk to persons or the environment.[95] Section 118Y enables the administering authority to require remediation of contaminated land recorded on the *Contaminated Land Act*. Sections 118ZM & ZN enable the administering authority to require that a 'site management plan' be created for land which is contaminated but the contamination may be managed.

6.6. If the person required to conduct a site investigation or remediation fails to do so, the person becomes liable under cl.27, proposed s.179A, to pay for reasonable expenses incurred by the administering authority in performing the work itself.

6.7. Proposed ss.118J & K, 118Y and 118ZM & ZN apply the 'polluter pays' principle. The person who is required to investigate, remediate or prepare a site management plan (the 'recipient' of a notice issued under the respective clauses) is:

- the person who released the contaminant; or
- if the polluter is not known, the local government but only if the local government was erroneously instrumental in the contaminating activity having occurred; or
- if the first two cases are not applicable, the owner of the land.

6.8. New ss.118J & K, 118Y and 118ZM & ZN would operate to impose obligations retrospectively on a person who released the contaminant where that polluter is known and the contamination occurred before the commencement of the bill (indeed, before the commencement of the 1991 *Contaminated Land Act*

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94 This is regardless of the fact that s.8.3A of the *Local Government (Planning and Environment) Act 1990*, which preceded the 1991 *Contaminated Land Act*, creates obligations with regard to contaminated land in certain circumstances.

95 The prerequisites for requiring a site investigation are outlined in new s.118J(1), namely, that the administering authority is satisfied that:

(a) after a preliminary investigation, particulars of land are recorded in the environmental management register because the land is contaminated land; and

(b) the hazardous contaminant contaminating the land is in a concentration that has the potential to cause serious or material environmental harm; and

(c) a person, animal or another part of the environment may be exposed to the hazardous contaminant.

provisions re-enacted here).[96] In this way it appears to the committee that the bill alters the direct legal consequences of past events. A corporation or person who, say, thirty years ago undertook activities which involved the release of substances now considered to be hazardous is – through the bill – financially liable for the activity. The corporation or person, however, may not have been liable for the consequences of the activity at the time.[97]

6.9. The committee notes that recipients of notices requiring the recipient to investigate, remediate or produce management plans may apply to the administering authority for it to waive the particular requirement.[98] Each of the three requirements may be waived if performing the work would cause the recipient financial hardship or, when the recipient is a land owner, the owner's rights do not extend to exercising control over environmental management.[99]

6.10. In the case of potentially the most expensive requirement, that is, remediation, the recipient has two additional grounds for waiver set out in cls.118Z(4)(b) & (c):

> *(b) the contamination happened while the recipient was carrying out an activity that is lawful apart from this Act and the recipient complied with the general environmental duty[100]; or*
>
> *(c) the contamination happened before the commencement of the repealed Act* [*Contaminated Land Act*] *and it would not be reasonable in the circumstances for the recipient to conduct or commission the work to remediate the land.*

6.11. It therefore appears to the committee that these two additional grounds could be applied to ameliorate any particularly harsh retrospective effect on polluters, especially in circumstances where the activity which caused the contamination was not known to be hazardous at the time when the activities were undertaken.

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96 Clause 118Z(4)(c) of the Bill and existing ss.19(1) and 20(1) of the *Contaminated Land Act* expressly provide for activities which may have contaminated sites before the commencement of the *Contaminated Land Act*.

97 The issue of 'retrospectivity' arises particularly with regard to (known) polluters rather than land owners. The provisions impose financial liabilities on the *activities* of polluters whose activities may not have attracted liabilities at the time. The effect of the same provisions on the position of landowners is arguably different. The current owner of a piece of land may have an obligation to rectify their land notwithstanding that they did not own the land at the time and were therefore directly or indirectly involved in the contamination of the land. In this context, the provisions would not necessarily be characterised as imposing the obligation *retrospectively*.

Note also that persons who purchased land after the commencement of the *Contaminated Land Act* are somewhat protected. As land becomes identified as likely to be or actually contaminated, recordings are made on the Environmental Management Register or *Contaminated Land Act*. Particulars of land recorded on the Environmental Management Register or *Contaminated Land Act* are provided to the registrar of titles (new s.118ZZD) and must be divulged by any vendor of land entered on the registers (new s.118ZZC).

98 Clause 21, new ss.118L, 118Z and 118ZO respectively.

99 Clause 21, new ss.118L(4), 118Z(4)(a) & (d) and 118ZO(4).

100 Equivalent existing s.20(3)(a) *Contaminated Land Act* does not express the ground with reference to the 'general environmental duty'. That concept was introduced by the EPA in 1994.

6.12. The committee notes that although some requirements in proposed ss. 118J and K; 118Y; 118ZM and ZN and may arguably have retrospective effect, the bill contains provisions to counterbalance the adverse effects. The committee brings the potential concerns about retrospectivity to the attention of Parliament.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[101]

– **clause 21, proposed ss.118N, 118ZB, 136A & 138A *Environmental Protection Act* and amendment to s.135**

6.13. Site investigations are assessments of land recorded on the Environmental Management Register to determine whether the land is contaminated in a way that is a risk to health or the environment. Remediation are clean-ups of land recorded on the Contaminated Land Register.

6.14. The administering authority, in certain circumstances, is empowered to require a site investigation of land (proposed s.118J) or remediation of land (proposed s.118Y) to be conducted or commissioned by:

- the person who released the contaminant; or
- if the polluter is not known, the local government but only if the local government was erroneously instrumental in the contaminating activity having occurred; or
- if the first two cases are not applicable, the owner of the land.

6.15. When the recipients of notices containing these requirements are not the land owners, the recipients (or people undertaking the site investigation or remediation on the recipients' behalf) are authorised to enter the land to conduct the investigation (s.118N) or to conduct the work (s.118ZB) if the owner and occupier give their consent or the recipient or contractor has given seven days written notice to the owner and occupier.

6.16. Should landowners not wish the entry or prefer the entry at another time, it would appear the appeal provisions in the Act do not cover any objection of the land owner to entry of their land by recipients.

6.17. The committee seeks information from the minister on the recourse available in these circumstances.

[101] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

Does the subordinate legislation contain only matter appropriate to subordinate legislation?[102]

– **clause 35, new s.220(k) *Environmental Protection Act***

6.18. Clause 35 amends s.220 of the *Environmental Protection Act 1994* which provides for matters about which the Governor in Council may make regulations. This bill amends subsection 220(k) by replacing "littering on public places" with "litter".

6.19. There may be some argument as to whether it is appropriate for legislation dealing with litter to be contained in regulations and not principal legislation, (the *Environmental Protection Act* itself). It appears that legislation concerning litter could restrict individuals' rights, for example, the right to use and enjoyment of *your own land* (the fact that litter regulations may now extend from litter in public places to merely 'litter' points to this) and, more importantly, freedom of expression/communication (for example, through distribution of leaflets for public rallies, fund-raisers, political forums).

6.20. The fact that regulations regarding litter per se could be substantial and appropriate for inclusion to the principal Act is supported by the fact that any such regulations could potentially be open to constitutional challenge for hampering the distribution of political material and thereby infringing the implied constitutional right to freedom of communication about political matters.

6.21. The committee brings these comments to the attention of Parliament.

[102] Section 4(5)(c) of the *Legislative Standards Act 1992* provides that whether subordinate legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation contains only matter appropriate to subordinate legislation.

7. INTEGRATED PLANNING BILL 1997

Background

7.1. The Honourable D E McCauley MLA, Minister for Local Government and Planning, introduced this bill into the Legislative Assembly on 30 October 1997.

7.2. According to the explanatory note the bill has three main objectives:

- to coordinate and integrate planning at the local, regional and State levels;
- to manage the process by which development occurs; and
- to manage the effects of development on the environment.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[103]

– **clause 2.2.16 (conduct of hearings)**

7.3. This clause defines the way in which an independent review should be conducted. Clause 2.2.16(e) allows the reviewer "to prohibit or regulate questioning in the hearing". The committee is concerned that the bill provides no criteria according to which questioning may be prohibited or regulated. Is it, for example, intended to be the criterion of "relevance" used by courts? A similar question arises regarding the tribunal see clause 4.2.31(f).

– **clause 2.2.22 (reviewers not liable for performing functions under review)**

7.4. This clause provides that the reviewer is not liable to pay an amount for an action brought against him or her arising from a hearing, publication, or *anything done or in good faith purportedly done* in the performance of the reviewers functions.

7.5. It would appear to the committee that this clause could be interpreted as protecting the reviewer from liability for acts done in the absence of <u>good faith</u>.

– **Clause 2.5.2 (establishment of committees)**

7.6. Clause 2.5.2(3) provides that the minister may establish a regional planning advisory committee and before establishing such a committee the minister must consult with local governments and interest groups. The term "interest group" is not, however, defined in the bill.

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[103] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

7.7. The committee seeks information from the minister on the following points:

- the criteria according to which the reviewer may prohibit or regulate questioning in a hearing;[104]
- whether the exclusion from liability of the reviewer[105] is limited to acts done in good faith; and
- the intended meaning of the term "interest group".[106]

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[107]

– **clause 2.6.22 (if designator refuses request to acquire interest in designated land)**

7.8. This clause provides that a designator can refuse a request by the owner of an interest in land to buy the interest. The committee notes that this clause is not, however, overridden by cl 2.6.23 which mandates compulsory acquisition.

7.9. The committee seeks information from the minister on how an interest in designated land will be handled if the designator decides to refuse the request (by an owner of an interest in designated land to buy the interest) and decides not to take action under cl. 2.6.21 (for example, offers to exchange the interest for property held by the designator etc.).

7.10. The committee particularly seeks information on whether the interest will be acquired and whether fair compensation will be provided.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[108]

– **clause 3.2.1 (applying for development approval)**

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104 Clause 2.2.16(1)(e) and, regarding the tribunal in cl. 4.2.31(f)

105 Clause 2.2.22.

106 Clauses 2.5.2(3).

107 Section 4(3)(i) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.

108 Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

7.11. Clause 3.2.1 (7) provides that the assessment manager may refuse to receive an application that is "not a properly made application" [defined by subclauses (1), (2), (3)(a), (4), (5)]. It appears to the committee that the bill does not provide any remedial consequence for the applicant in these circumstances. The committee is concerned that this may not provide appropriate review for the exercise of administrative power as required by s. 4(3)(a) of the *Legislative Standards Act.*

7.12. The committee seeks information from the minister as to the ways in which a person would be disadvantaged if a development application were refused and how the bill remedies the situation where there is administrative error and a "properly made" development application is erroneously rejected. Will the applicant, for example, have a right of appeal under clause 4.2.9(1)(a)?

– **clause 3.5.6 (assessment manager may give weight to later codes, planning instruments, laws and policies)**

7.13. This clause provides that the assessment manager may give weight to codes, planning instruments, laws and policies that come into effect after the application was made. A similar provision in cl 4.1.52(2), allows the Court to give weight to new laws and policies commenced after the application was made.

7.14. The committee seeks information from the minister as to what extent this will give retrospective effect to those codes, planning instruments, laws and policies and whether this is justified in light of s. 4(3)(g) *Legislative Standards Act.* A similar question arises regarding the tribunal,[109] which may consider any appropriate new laws and policies that come into force after the application was made.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[110]

– **clause 4.4.3 (executive officers must ensure corporation complies with Act)**

7.15. Clause 4.4.3(3) provides that evidence that the corporation has been convicted of an offence under the Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the Act.

– **clause 4.4.14 (responsibility for acts or omissions of representatives)**

109 Clause 4.2.33 (b).

110 Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

7.16. Clause 4.4.14(2) and (3) essentially make a person vicariously liable for the actions of their representatives.

7.17. The committee is of the view that these clauses effectively reverse the onus of proof with respect of the offences deemed to be committed. Although both clauses provide defences for the persons concerned, those persons will be presumed guilty unless they can raise an effective defence under the relevant sections.

7.18. The committee has considered these types of reversal of onus of proof before.[111] It appreciates the difficulties of determining liability in certain circumstances, for example, in corporations.

7.19. As a general principle, however, the committee does not approve of provisions in legislation which effectively reverse the onus of proof.

7.20. The committee refers to Parliament the question of whether cls. 4.4.3(3) and 4.4.14(2) and (3) contain justifiable reversals of onus of proof – and therefore have sufficient regard to the rights and liberties of the individuals affected.

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?[112]

– **chapter 5, part 3 (clause 5.3.1 onwards)**

7.21. Part 3 of chapter 5 of the bill allows for a system of private certification under a development application requiring code assessment only. The private certification model appears to the committee to be a form of contracting out designed to ensure competition and efficiency. The committee has previously noted concerns with contracting out and accountability.[113]

7.22. The committee seeks information from the minister as to whether the private certification model will in any way reduce traditional forms of accountability (for example, through the *Freedom of Information Act 1992*, the *Judicial Review Act 1991* or the *Parliamentary Commissioner Act 1974*).

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111 *Consumer Credit Legislation Amendment Bill 1996*, cl. 18 – Alert Digest No. 7 of 1996 at pp 9-11; *Keno Bill 1996*, cl. 226 – Alert Digest No. 10 of 1996 at pp. 9-10; *Workplace Relations Bill 1996*, cls. 246, 447 & 452 – Alert Digest No. 13 of 1996 at pp 13-15; *Land Sales and Land Title Amendment Bill 1997*, cl. 27 – Alert Digest No. 5 of 1997 at pp. 47-48; *Queensland Competition Authority Bill 1997*, cl. 236 – Alert Digest No. 5 of 1997 at pp. 75-76; *Friendly Societies (Queensland) Bill 1997*, cl. 132– Alert Digest No. 6 of 1997 at pp. 15-16; *Lotteries Bill 1997,* cls. 211 and 212 – Alert Digest No. 7 of 1997 at pp. 11–12.

112 Section 4(3)(c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

113 *Corrective Service Legislation Amendment Bill 1997* – Alert Digest No. 9 of 1997 at pp. 6–10.

Does the legislation have sufficient regard to the rights and liberties of individuals?[114]

– **clause 5.8.4**

7.23. Clause 5.8.4 denies operation of the *Judicial Review Act* in relation to decisions made under the bill. While the Committee notes the introduction of the new provisions for declarations and orders in clauses 4.1.21 -22 it is concerned that the safeguards and accountability mechanisms of the *Judicial Review Act,* designed to ensure the rights and liberties of individuals, are not adequately replaced.

7.24. The operation of the *Judicial Review Act* is excluded in certain respects by cl. 5.8.4. The committee seeks information from the minister justifying this removal and referring to any other safeguards and accountability mechanisms which may be regarded as adequately replacing the protection provided by judicial review.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[115]

– **native title considerations**

7.25. As the bill is fundamentally concerned with the use of land the committee is concerned that it may adversely impact on native title claimants in the areas of designation or development.

7.26. The Department of Local Government and Planning has provided the committee with the following view on this point:

> *It is the department's view that there is no inconsistency between the Integrated Planning Bill and native title. It is considered that section 13A*[116] *of the Acts Interpretation Act was placed in that Act to cover all legislation. It is our view that under section 13A legislation cannot affect native title unless the specific legislation makes express provision for that to occur. The Integrated Planning Bill does not make express provision to affect native title.*
>
> *In addition it is the department's understanding that legislation potentially affecting native title cannot be inconsistent with the Native Title Queensland Act and that*

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114 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

115 Section 4(3)(j) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

116 ***13A.(1)*** *An Act enacted after the commencement of this section affects native title only so far as the Act expressly provides.*

(2) *For the purposes of subsection (1), an Act affects native title if it extinguishes the native title rights and interests or it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.*

any State legislation affecting native title that is inconsistent with the Commonwealth Native Title Act would be invalid to the extent of the inconsistency. As it was not intended that the Integrated Planning Bill would have any impact on native title or that the holders of any native title rights would be treated any differently from the holders of other rights (e.g. grazing rights), it was considered there was no need for specific legislative provisions in the Bill about native title. It is our view that the aforementioned legislation sufficiently provides for native title and ensures that there is no inconsistency between the Bill and native title or the rights of native title holders.

7.27. The committee thanks the department for providing it with this information which makes it clear that it was not intended for the bill to have any impact on native title. The committee requests that the minister confirm this information and refers it to Parliament for its consideration.

8. JUSTICE AND OTHER LEGISLATION (MISCELLANEOUS PROVISIONS) BILL (NO.2) 1997

Background

8.1. The Honourable D E Beanland MLA, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 30 October 1997.

8.2. The bill provides for a number of technical and other amendments to approximately 47 statutes administered by the Department of Justice including the *Classification of Publications Act 1991*, *Justices Act 1886*, and *Juvenile Justice Act 1992*.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[117]

– **clause 58 (Amendment of *Justices Act 1886*)**

8.3. Clause 58 proposes that s.98BA be inserted into the *Justices Act 1886* and that this provision is to be taken to have commenced on 1 July 1992. Therefore, the section is to have retrospective operation.

8.4. The explanatory notes to the bill state that this retrospectively is essential to validate the service of notices under part 4A of the *Justices Act* from 1 July 1992.

8.5. According to information provided to the committee office, this proposed amendment is necessary due to the following.

- Part 4A of the *Justices Act* was inserted by *the Offence Notices Legislation Amendment Act 1992* which commenced on 1 July 1992. This part implemented the self enforcing ticketable offence notice system (SETONS). Various notices are required to be served on alleged offenders under this part.

- As part 4A of the *Justices Act* does not deal with the service of notices, the relevant provisions in the *Acts Interpretation Act 1954* apply.

- Section 39A(1) of the *Acts Interpretation Act 1954* was considered by the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87. From this decision it is apparent that service would not be effected if Australia Post returned notices served by post.

- Notices are posted to the address given by the alleged offender at the time the infringement notice is issued or alternatively to the address of the registered

[117] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

owner of a vehicle. [Under s.27 of *the Transport Infrastructure (Roads) Regulation 1991*, a person whose name appears in the register of vehicles must notify the chief executive of any change of name or address.] Therefore, it is possible that a person could avoid an offence by returning or ignoring notices sent by post.

- The SETONS registry has been relying on the decision of *Gem Po-Chioh Cheong v Webster Ex Parte Gem Po-Chioh Cheong* [1986] 2 Qd R 374 in which the Supreme Court held that non-delivery of a summons served by registered post under s.56(1) of the *Justices Act* did not invalidate service. However, that decision was based on a finding that s.56(1)(a) which deals specifically with summons was inconsistent with those provisions of the *Acts Interpretation Act 1954* governing service by post.

8.6. On the basis of the above it is arguable that some warrants which have issued to date are open to challenge. Therefore, the clause seeks to mandate retrospective operation of the provision from 1 July 1992.

8.7. The committee does not object to curative retrospective legislation per se. However, it gives particular attention to clauses which adversely affect rights and liberties retrospectively.

8.8. In this case the committee recognises that the proposed amendment is curative in nature. In view of the information referred to in paragraph XX above, the committee is not unduly concerned by this amendment. The committee does, however, request that the minister confirm the information provided.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[118]

– **clause 90 (Amendment of *Travel Agents Act 1988*)**

8.9. Clause 90 of this bill inserts new provisions into this Act dealing with powers of entry by an authorised officer.

8.10. The committee has, on several occasions,[119] reported adversely on these types of powers that allow inspectors to enter premises with or without a warrant. Once inspectors gain entry they have substantial powers of search and seizure.

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118 Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

119 *Financial Intermediaries Bill 1995* cl. 31 - Alert Digest No. 2 of 1995 pp. 11-12; *Financial Intermediaries Bill 1996* cl. 31 - Alert Digest No. 5 of 1996 pp. 11-13; *Consumer Credit Legislation Amendment Bill 1996* cl. 18 - Alert Digest No. 7 of 1996 pp. 5-7; *Keno Bill 1996* Part 9 - Alert Digest No. 10 pp. 6-8; *Consumer Law and Other Justice Legislation (Miscellaneous Provisions) Bill 1996* cls. 126 and 133 - Alert Digest No. 11 of 1996 pp. 3-6; *Workplace Relations Bill 1996* cl. 381 - Alert Digest No. 13 of 1996 pp 16-17.

8.11. The bills that the committee has reported on in the past have typically allowed entry either by consent of the occupier, by warrant, or when the subject public place is open for entry. This bill introduces similar provisions into the *Travel Agents Act*. Of particular concern to the committee is the fact that inspectors can gain entry to the places, and carry out substantial powers of search and seizure without the necessity to obtain a warrant.

8.12. The committee has contrasted these circumstances with the safeguards and requirements imposed for entry by warrant. It has concluded on each occasion that:

- the substantial powers to search, inspect, seize etc, without a warrant indicated a need for some further safeguards; and
- departures from the safeguards provided by search warrants should only be considered in exceptional circumstances.

8.13. The committee is also concerned to note that some standard clauses imposing requirements for gaining an occupier's consent to enter a place, which have been used in other legislation, have not been incorporated into this bill. The sections that the committee refers to are well drafted and provide safeguards to ensure that the consent to entry is both informed, and evidenced in writing, amongst other things. An example of these sections (drawn from the *Keno Bill 1996*) is set out below.

> ***Consent to Entry***
>
> ***174.(1)*** *This section applies if an inspector intends to ask an occupier of a place to consent to the inspector or another inspector entering the place.*[120]
>
> ***(2)*** *Before asking for the consent, the inspector must tell the occupier¾*
>
> *(a) the purpose of the entry; and*
>
> *(b) that the occupier is not required to consent.*
>
> ***(3)*** *If the consent is given, the inspector may ask the occupier to sign an acknowledgment of the consent (a* ***"consent acknowledgment"****).*
>
> ***(4)*** *The acknowledgment must state¾*
>
> *(a) the occupier was told¾*
>
> *(i) the purpose of the entry; and*
>
> *(ii) that the occupier is not required to consent; and*
>
> *(b) the purpose of the entry; and*
>
> *(c) the occupier gives the inspector consent to enter the place and exercise powers under this part; and*
>
> *(d) the time and date the consent was given.*

[120] This section does not apply if entry is authorised by section 172 or 173(b).

(5) *If the occupier signs a consent acknowledgment, the inspector must promptly give a copy to the occupier.*

Evidence of consent

175.(1) *Subsection (2) applies if¾*

(a) an issue arises in a court proceeding whether the occupier of a place consented to an inspector entering the place under this part; and

(b) a consent acknowledgment is not produced in evidence for the entry; and

(c) it is not proved the occupier consented to the entry.

(2) *The court may presume the occupier did not consent.*

8.14. The insertion of the above quoted sections would ensure informed consent which is evidenced in writing. In the committee's view, this would more closely conform with the requirements of the fundamental legislative principles as referred to in s. 4(3)(e) of the *Legislative Standards Act*.

8.15. The committee notes the fact that inspectors have substantial powers once inside a place, even where inspectors gain access without consent or a warrant.

8.16. It would appear reasonable that departures from the safeguards provided by search warrants should be carefully considered and adequately justified.

8.17. The committee requests that the Attorney-General consider inserting further safeguards into the provisions dealing with entry by consent. These safeguards should ensure that inspectors obtain consent after providing full information, that they seize only matters raised in obtaining the consent of the occupier, and that they obtain consent evidenced in writing.

8.18. The committee brings these concerns to the attention of Parliament.

9. NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 1997

Background

9.1. The Honourable H Hobbs MLA, Minister for Natural Resources introduced this bill on 30 October 1997.

9.2. This bill amends a number of existing pieces of legislation. For example, some of the proposed amendments seek to:

- clarify several provisions of the *Body Corporate and Community Management Act 1997*;
- extend the time for filing notices of appeal under the *Land Act 1994*;
- validate certain fees that have been collected from local governments since 1985;
- empower a police officer to arrest a person without a warrant for failure to comply with certain requirements under the *Water Resources Act 1989*.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[121]

9.3. The bill inserts a number of retrospective amendments into the following Acts of Parliament:

- the *Body Corporate and Community Management Act 1997*;
- the *Land Act 1994*; and
- the *Valuation of Land Act 1944*.

9.4. The committee always takes care when examining provisions of legislation that have retrospective effect, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue.

¤ **Proposed retrospective amendments to the *Body Corporate and Community Management Act 1997***

– **clause 7 (proposed s. 22(3A)), clause 11 (amending s. 55(4)(d)), clause 25(2) (amending s. 268(5)) and clause 28 (inserting proposed s. 290(5))**

[121] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

9.5. The subject retrospective amendments deal with the following matters:

- the application of a regulation module;
- the process of giving consent to the recording of a community management statement;
- the extension of a provision that exempts a regulation module from the regulatory impact statement process; and
- the term of body corporate contracts entered into after 24 October 1994.

The application of a regulation module (clause 7)

9.6. Clause 7 inserts proposed s. 22(3A) into the *Body Corporate and Community Management Act 1997* (BCCM Act) to clarify that a regulation module[122] made under the BCCM Act always applies to a former building or group title plan that became a community titles scheme by virtue of that Act. The explanatory notes provide that:

> *A retrospective amendment ensures that sub-section 22(3)(2) places beyond doubt that the standard module applies to every building unit plan and group title plan under the Building Units and Group Titles Act 1980. These are now community title schemes under the Body Corporate and Community Management Act 1997.*[123]
>
> *…*
>
> *The retrospectivity does not adversely affect rights or impose obligations.*[124]

9.7. The committee does not object to clauses that are curative in nature so long as they do not impose liabilities on any persons retrospectively. The committee notes that clause 7 clarifies the position that a regulation module always applies to a building or group title plan that has become a community titles scheme under the BCCM Act. The committee has no further comment to make in relation to these proposed amendment.

The process of giving consent to the recording of a community management statement (clause 11)

9.8. Under existing s. 55(4)(d) of the BCCM Act, a body corporate need not pass a resolution without dissent or special resolution to consent to the recording by the registrar of titles of a new community management statement[125] to note the details of allocations of common property made under an exclusive use by-

122 A regulation module is a regulation applicable to a community titles scheme.

123 At page 4.

124 At page 10.

125 Containing particulars such as the name of the scheme, the name and address of the body corporate, by laws, and whether the scheme is part of a progressive development.

law.[126] Clause 11 amends s.55(4)(d) to clarify that the procedure under s. 55(4)(d) also applies to the recording of allocations of body corporate assets made under an exclusive use by-law. The explanatory notes provide the following information.

> *A retrospective amendment to section 55 includes body corporate assets when referring to common property. The section provides for instances where body corporate consent to a new CMS* [community management statement] *is required and provides for the type of resolution in each instance. It was not intended to have different resolution levels for common property and assets. There is at least one instance where a 'new' CMS that included a by-law that changed the allocation of an asset was prevented because the resolution without dissent was lost. Accordingly, the amendment clarifies that an ordinary resolution is also required for asset allocations rather than one without dissent and allows these types of property allocation to be dealt with consistently.*[127]
>
> *….*
>
> *The allocation of rights over body corporate assets (eg. a marina berth) is an administrative and commercial matter best dealt with by the committee of a body corporate. As allocations of such rights may have been made since the commencement of the Act, the retrospectivity is necessary to ensure that allocations have been made correctly.*[128]
>
> *The retrospectivity does not adversely affect rights or impose obligations.*[129]

9.9. The committee values this information that explains the rationale behind this retrospective amendment. The committee observes that the allocation of rights over body corporate assets are administrative matters that the body corporate may deal with. This proposed amendment appears to clarify as well as simplify the body corporate's voting process in relation to the recording of allocation of rights over its assets or common property, without imposing obligations retrospectively.

9.10. The committee does not have any adverse comment on this proposed amendment.

<u>The extension of a provision that exempts a regulation module from the regulatory impact statement process [clause 25(2)]</u>

9.11. Clause 25(2) amends s. 268(5) of the BCCM Act to retrospectively extend the validity of a regulatory impact statement exemption provision under s. 268(4) of

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126 An exclusive use by law may entitle an owner of a lot to use certain common property or assets exclusively.

127 At page 5.

128 At page 10.

129 At page 10.

that Act from 13 July 1997. The committee has previously opposed the exemption s. 268(4).[130] Section 268(4)(5) provides:

> ***(4)*** *A regulatory impact statement under the Statutory Instruments Act 1992 need not be prepared for a regulation under this Act—*
>
> *(a) if the regulation is a regulation module; or*
>
> *(b) to the extent the regulation amends a regulation module.*
>
> ***(5)*** *Subsection (4) and this subsection expire 3 months after the commencement of this section.*

9.12. According to s.268(5), the exemption under s. 268(4) expired 3 months after its commencement—13 October 1997. Section 268(5) also expired on the same day.[131]

9.13. The committee notes that s. 268(4)(5) expired before the introduction of this bill. This being the case, it expresses doubt as to whether clause 25(2) may effectively reinstate expired s. 268(4) without setting out the expired provision in full in the bill and retrospectively amend the validity of expired s. 268(4) to 13 January 1998.

9.14. The committee is also concerned about the extension of the exemption provision under s. 268(4). The committee has previously expressed concern in its Alert Digest Nos. 5 and 6 of 1997[132] about expired s.268(4) that exempted a regulation module from the regulatory impact statement process.

9.15. In the committee's view, if the *Statutory Instruments Act* would require the preparation of a regulatory impact statement, one should be required. The committee takes the view that the proposed extension of the exemption provision under s. 268(4) undermines the express intention of Parliament that the regulatory impact statement guidelines be complied with.[133]

9.16. The committee opposes the proposed amendment contained in clause 25(2) that effectively seeks to reinstate expired s. 268(4) and to extend its validity retrospectively from 13 July 1997 to 13 January 1998.

<u>The term of body corporate contracts entered into after 24 October 1994 (clause 28)</u>

130 Clause 267(4) of the *Body Corporate and Community Management Bill 1997* - Alert Digest No. 5 of 1997 at pages 4 to 5 and Alert Digest No. 6 of 1997 at pages 21 to 23.

131 As confirmed by the Queensland Legislation Annotation Update Release No. 22 (2 November 1997) at page 26.

132 Alert Digest No. 5 of 1997 at pages 4 to 5 and Alert Digest No. 6 of 1997 at pages 21 to 23.

133 As stated in s. 40(3) of the *Statutory Instruments Act 1992*,

9.17. The BCCM Act defines a body corporate contract as a contract or arrangement entered into by a body corporate to engage a person as its manager, service contractor or letting agent for a community titles scheme.[134]

9.18. Section 290 of the BCCM Act provides that under certain specified circumstances, particular provisions of that Act and of the relevant regulation module (the exempted provisions) do not apply to a body corporate contract entered into before or after 24 October 1994. These provisions include those regulating the term of a body corporate contract.

9.19. Clause 28 inserts proposed s. 290(5) into the BCCM Act to clarify the extent to which the exempted provisions do not apply to the types of new body corporate contracts (the new contracts).[135]

9.20. The committee notes that proposed s. 290(5) takes effect retrospectively from 13 July 1997. The committee requests the minister to provide examples of how proposed s. 290(5) operates and to confirm that proposed s. 290(5) does not operate to adversely affect the rights of, or impose obligations on, body corporate managers, service contractors or letting agents under the new contracts.

♦ **Proposed retrospective amendments to the *Land Act 1994***

– **clauses 61(2) and 70 (proposed ss. 428(5) and 506(2)**

9.21. The subject retrospective amendments deal with the following matters:

- the time allowed for filing a notice of appeal; and
- the continuation of the rules and regulations of the *Cemetery Act 1865*.

The time allowed for filing a notice of appeal [clause 61(2)]

9.22. Under s. 428(3) of the *Land Act*, a notice of appeal must be filed within 28 days after the day the applicant receives notice of the review decision. Section 428(5) empowers the Land Court to extend the period for filing a notice of appeal by a further 28 days.

9.23. Clause 61(1) amends s. 428(3) to extend the initial filing period from 28 days to 42 days. Clause 62(2) amends s. 428(5) so that the Land Court *may, whether before or after the time for filing the notice of appeal ends, extend the period for filing the notice of appeal*.

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134 Section 288 of the *Body Corporate and Community Management Act 1997*.

135 That bodies corporate entered into pursuant to amendments to original contracts made after 24 October 1994.

9.24. Clause 61(3) removes a requirement under s. 428(6) of that Act for a notice of appeal to state the facts relied on. The effect of this proposed amendment is that only the grounds of the appeal are required to be stated in a notice of appeal.

9.25. The committee notes that proposed amendments to s. 428(5)(6) operate retrospectively from 1 July 1995. The explanatory notes provide the following information.

> *The removal of the time restriction on the Land Court's power to extend the period for filing a notice of appeal and the removal of the requirement for an appeal to state the facts relied on, are of benefit to appellants.*[136]
>
> *…*
>
> *The retrospectivity expands the rights of appellants.*[137]

9.26. The committee values the information contained in the explanatory notes. It has no adverse comment to make in relation to these proposed amendments which appear to expand the rights of appellants under the *Land Act*.

The continuation of the rules and regulations of the *Cemetery Act 1865* (clause 70)

9.27. Section 506 of the *Land Act* declares that all reserves and deeds of grant in trust for cemetery purposes under the *Cemetery Act 1865* are reserves and deeds of grant in trust for cemetery purposes under the *Land Act*. The explanatory notes summarise the effect of proposed s. 506(2) as follows.

> *The amendment to ensure that rules and regulations under the Cemetery Act 1865 continue as by-laws under the Land Act 1994 for three years from the commencement of the Land Act 1994 (1 July 1995) is necessary to correct an oversight in the drafting of the Land Act 1994.*[138]

9.28. The committee notes that proposed s. 506(2) takes effect retrospectively from 1 July 1995. This means that the rules and regulations made under the *Cemetery Act* continue to be by-laws of the *Land Act* until 1 July 1998. The committee seeks further information as to the rationale behind this extension for three years.

- **Proposed amendments to the *Valuation of Land Act 1944***

  - **clauses 130 and 132 (proposed ss. 75(2) and 102) - power to levy fees from a local government**

9.29. Section 75 of the *Valuation of Land Act 1944* provides that the chief executive may at the request of a local government identify land in categories for the local

136 At page 10.

137 At page 10.

138 At page 10.

government. The explanatory notes indicate that the chief executive has been charging local governments for this service since 1985.[139]

9.30. Proposed s. 75(2) retrospectively permits a regulation to *prescribe a fee payable by a local government for identifying land in a category* and proposed s. 102 retrospectively validates the fees charged since 1985.[140] The explanatory notes provide the following background information.

> *Fees have been charged since 1985 without realising there was no specific regulation making power in the section.*[141]
>
> *Clause 132…validates fees paid by a local government for the identification of land by the chief executive for the purposes of categories.*[142]

9.31. The committee notes that the chief executive has been providing the land identifying service for local governments and that the chief executive has been charging them for the service provided. The committee understands that proposed ss. 75(2) and 102 seek to legitimise put beyond doubt the validity of the fees charged since 1985 and the fees to be charged.

9.32. The committee understands that the chief executive has been collecting the fees from local governments.

9.33. The committee recognises the importance of including specific fee levying power in principal legislation and refers to Parliament the question of whether proposed ss. 75(2) and 102 are justified.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[143]

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139 At page 10.

140 Proposed s. 102 will expire one year after it commences (on a day to be fixed by proclamation). Proposed s. 102(4) provides that if the chief executive has not charged a local government a fee for identifying for it the land in a category, the chief executive may charge the local government the fee prescribed under section 75 [apparently proposed s. 75(2)].

141 At page 24. Section 99 of the *Valuation of Land Act* contains the following regulation making power:

> ***99.(1)*** *The Governor in Council may make regulations for the purposes of this Act.*
>
> *(2) A regulation may be made with respect to—*
>
> *(a) the powers and duties of valuers; and*
>
> *(b) the form of valuation roll; and*
>
> *(c) the fees payable under this Act; and*
>
> *(d) the offences for contravention of a regulation and the maximum penalties, of not more than 1 penalty unit, for the offences.*

142 At page 24.

– **clauses 46 and 48 (amending ss. 219(1) and 225(1) of the *Land Act 1994*)**

9.34. Clauses 46 and 48 amend ss. 219(1) and 225(1) of the *Land Act* to clarify the effect of resuming a lease in terms of the *Land Act* or pursuant to a condition of a lease.

9.35. Existing ss. 219(1) and 225(1) provide that:

> ***219.(1)*** *If a lease or part of a lease is resumed, the lease or part resumed becomes unallocated State land free of any interest or obligation, other than a native title interest.*
>
> *….*
>
> ***225.(1)*** *If a lease or part of a lease is resumed under this division, the lease or part of the lease becomes unallocated State land free of any interest or obligation.*

9.36. Proposed ss. 219(1) and 225(1) read as follows:

> *If a lease or part of a lease is resumed under this division, the land the subject of the interest comprising the lease or the part of the lease is free of any interest or obligation arising under the lease.*

9.37. According to the explanatory notes, the proposed amendments are intended to clarify the effect of resuming a lease. The explanatory notes provides the following background information.

> *Previously it could be construed that if a lease over a reserve was resumed, the land became unallocated State land. This was not the intention.* [144]

9.38. The committee observes that existing s. 219(1) does not exclude a native title interest; it would appear to the committee that existing s. 225(1) operates in the same way.

9.39. The committee notes that the proposed amendments to ss. 219(1) and 225(1) specifically provide that the land, being the subject of a resumed lease, is *free of any interest or obligation arising under the lease*. This seems to suggest that other interests in the land, such as reserve interests, remain unaffected.[145]

9.40. The committee seeks clarification from the minister as to whether the land in question remains subject to any native title rights or interests that may exist.

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143 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

144 At pages 16 and 17.

145 As indicated in the portion of the explanatory notes quoted.

Does the legislation have sufficient regard to the rights and liberties of individuals?[146]

– **clause 175 (proposed s. 224A(4) of the *Water Resources Act 1989*) - power for a police officer to arrest without warrant**

9.41. Proposed s.224A(4) empowers a police officer to arrest without a warrant a person on reasonable belief that:

- the person has not, without reasonable cause, complied with an authorised officer's requirement to state or give evidence of the correctness of the person's name and address; and
- proceedings by way of complaint and summons against that person (for an offence[147] for failure to state the person's name and address or give evidence of the correctness of a name or address) would be ineffective.

9.42. Under proposed s. 224A(1), an authorised officer may require a person to state the person's name and address if the officer:

- finds the person committing an offence against the *Water Resources Act*; or
- finds the person in circumstances that lead, or has information that leads, the authorised officer to suspect on reasonable grounds that the person has committed an offence against that Act.

9.43. The committee notes that the person must comply with the authorised officer's requirement unless the person has a reasonable excuse.[148] However, the person does not commit an offence if:

- the authorised officer required the person to state the person's name and address on suspicion of the person having committed an offence against the *Water Resources Act*; and
- the person is not proved to have committed the offence.

9.44. Despite these safeguards, it would appear to the committee that a police officer may arrest without a warrant a person who has a reasonable excuse for not providing the person's name or address, or giving evidence of the correctness of a name or address. This is because proposed s. 224D(4) authorises a police officer to make the arrest if the police officer <u>believes on reasonable grounds</u> that the person has not complied with the authorised officer's requirement, and

146 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

147 Under proposed s. 224D.

148 Proposed s. 224D(1)(2).

proceedings against the person before the court for failure to comply with the authorised officer's requirement[149] would be ineffective.

9.45. The committee is concerned that proposed s. 224A(4) may not have sufficient regard to the rights and liberties of individuals. It seeks information from the minister justifying this proposed power of arrest without a warrant.

9.46. The committee also refers to Parliament for consideration the question of whether the power of arrest contained in proposed s. 224A(4) is justified and has sufficient regard to the rights and liberties of individuals.

[149] For an offence under proposed s. 224D.

10. PETROLEUM AND GAS LEGISLATION AMENDMENT BILL 1997

Background

10.1. The Honourable T J G Gilmore MLA, Minister for Mines and Energy, introduced this bill into the Legislative Assembly on 30 October 1997.

10.2. This bill amends existing legislation relating to petroleum and gas to:

- facilitate gas pipeline developments in Queensland;
- enhance administration of access arrangements to pipeline facilities by third party users; and
- clarify the validity of fees and charges levied by gas franchisees.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[150]

– **clause 25 (inserting proposed ss.29A and 29AA into the *Gas Act 1965*)**

10.3. Under s.11 of existing schedule 2 of the *Gas Act,*[151] a gas franchisee that supplies fuel gas (fuel gas supplier)[152] may contract with any person for the supply of gas to any premises, private way or place within the area of a gas franchise. The *Gas Act* requires a fuel gas supplier to supply fuel gas upon application by a consumer. It has been the practice of fuel gas suppliers to levy from consumers other incidental supply charges[153] in addition to the normal tariff, such as disconnection and reconnection charges and security deposits.

10.4. Clause 25 of this bill clarifies the liability of a fuel gas consumer to pay supply charges to a (fuel gas supplier).

10.5. Proposed s. 29A(3) provides as follows.

> ***(3)*** *…for supply given before the commencement—*
>
> *(a) the consumer is only liable for supply charges for the supply if the supply was given within 6 years before the commencement; and*

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150 Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

151 The schedule to this bill renumbers schedule 2 of the *Gas Act* as schedule 1 of that Act.

152 Being the holder of a franchise to establish and maintain a reticulation system for the supply of fuel gas.

153 Proposed s. 29A(6) clarifies what incidental supply charges are by defining them.

(b) the consumer is only liable for an incidental supply charge if the supplier demanded payment before the commencement.

10.6. The explanatory note to proposed s. 29A provides the following information.

> *Section 29A (Consumer's liability for supply charges) makes it clear that a consumer who accepts a supply of gas from a supplier must pay the supplier for all supply charges associated with the supply. The section also provides that if a regulation requires the amount of a supply charge to be approved, the supply charge imposed on the consumer must not be more than the approved amount. The section has retrospective application to put beyond doubt the validity of the various fees and charges incidental to the supply of gas that have been imposed on consumers over many years in accordance with the long-standing accepted practices of gas suppliers. The retrospective obligation is confined to six years past, in line with the period of statutory limitation.*[154]

10.7. Proposed 29AA replaces existing s. 29A of the *Gas Act*[155] that dealt with security for gas supply. Proposed s. 29AA recasts existing s. 29A and clarifies that a fuel gas supplier may, in all cases and not just for special applications, require a consumer to give the supplier a security deposit for the charges associated with the supply of gas. The explanatory note to proposed s. 29AA provides as follows.

> *The section has retrospective application to put beyond doubt the validity of "ordinary" security deposits that have been required of consumers over many years in accordance with the long-standing accepted practices of gas suppliers. As existing section 29A provides, the section also allows a gas supplier to require the consumer to commit to taking supply for at least 1 year in a case where a gas main must be extended to provide supply.* [156]

10.8. The committee always takes care when examining provisions of legislation that have retrospective effect, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue.

10.9. In his second reading speech, the minister explained the rationale behind these proposed amendments.

> *Legal advice to my department has raised doubts about the validity of certain fees, charges and, in some instances, security deposits imposed on customers by gas franchisees. In contrast, at least one franchisee has legal advice that such fees, etc., are legally valid.*
>
> *The fees, charges and security deposits have been levied by the franchisees, in some cases for many years, in good faith and on the understanding that there was authority to levy them. In view of the conflicting legal advice, the Bill puts beyond doubt the validity of those fees, charges and deposits. This will operate both retrospectively and for the future.*

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154 At page 8.

155 Omitted by clause 25(1) of this bill.

156 At page 8.

The Government is mindful of the concerns of the Parliamentary Scrutiny of Legislation Committee regarding the retrospective application of legislation. However, in this case the retrospective application only applies to preserve the accepted practices over many years, to remove doubts about their possible invalidity, and will not impose new obligations on gas customers or franchisees. [157]

10.10. The committee thanks the minister for providing background information on the reasons for these retrospective provisions.

10.11. The committee observes that under proposed s. 29A(3)(b), a consumer is liable to pay incidental supply charges such as disconnection and reconnection charges only if the fuel gas supplier had demanded payment before the commencement of proposed s. 29A. It also notes that proposed s. 29AA clarifies the requirement for security deposits under existing s. 29A of the *Gas Act*.

10.12. The committee does not generally object to provisions of a curative nature that do not impose obligations retrospectively. The committee does not have any adverse comments to make in relation to these retrospective provisions..

[157] An abridged version of this explanation is given at page 3 of the explanatory notes to this bill under the heading “Consistency with Fundamental Legislative Principles”.

11. POLICE POWERS AND RESPONSIBILITIES BILL 1997

Background

11.1. The Honourable T R Cooper MLA, Minister for Police and Corrective Services and Minister for Racing, introduced this bill into the Legislative Assembly on 30 October 1997.

11.2. According to the explanatory notes, the main objectives of the bill are to:

- provide powers necessary for modern effective policing; and
- consolidate police powers into one statute to promote consistency and accessibility of the law.

♦ Positive aspects of the bill

11.3. The bill in many respects introduces new safeguards for the individual including the incorporation into the bill of requirements that are presently only in Operational Guidelines and do not have the force of law.

11.4. For example :

(a) Clause 5 spells out the intention of Parliament that the police shall comply with the Act when exercising powers and performing responsibilities.

(b) Clause 104 makes a confession *prima facie* inadmissible unless the making of it *or at least* the reading of and adoption of it are electronically recorded.

(c) Clause 99 requires the cautioning of a suspect before questioning commences in accordance with the responsibilities code [It is assumed that this will include the Right to Silence retained under Clause 92].

(d) Clauses 95 to 97 requires a suspect to be informed of the right to speak to a friend and a lawyer and have them present during subsequent questioning.

(e) Clause 101 requires, in appropriate cases, the provision of an interpreter before the suspect is questioned or examined.

(f) Clause 58 requires the destruction of identifying particulars such as fingerprints etc if found not guilty or not proceeded against.

(g) Clause 111 provides for the protection of the dignity of persons during search.

(h) Clause 112 requires that a police officer inform a person the subject of arrest, search, seizure, detention, entry of a place etc of the officer's details. This is, however, not required to be in writing. Also the police officer is only required to record these details in a register in the case of arrest, search or seizure.

(i) The police are to consider less intrusive alternatives to arrest and division 2 of part 7 provides for proceedings to be started by a notice to appear which is equivalent to a complaint and summons under the *Justices Act 1886*.

(j) The introduction of a Public Interest Monitor to monitor compliance with the Act in respect of the obtaining and execution of surveillance warrants and covert search warrants.

Does the legislation have sufficient regard to the institution of Parliament?[158]

– **clause 9**

11.5. Clause 9 deals with other Acts inconsistent with the bill. Subclause (2) provides:

> *(2) To the extent of any inconsistency, this Act prevails over the other Act, whether enacted before or after this Act.*

11.6. This clause addresses both Acts passed before the bill and passed after the bill.

11.7. Firstly, with respect to Acts passed before the bill, the clause provides that the bill prevails to the extent of any inconsistency between the two.

11.8. In this sense, the clause reaffirms the current position at law which was clearly in *Goodwin v Phillips*[159] per Griffith CJ:

> *… where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.*[160]

11.9. With respect to Acts passed after the bill, the clause could have one of two intended operations:

- to prevent any legislation with contrary effect being made on the subject matters of this bill in future; or
- to prevent the provisions of the bill being amended by implication in the future and require that any amendment be by express provisions.

11.10. With respect to the first point, there is a generally accepted principle (reflected by the Latin maxim: *leges posteriores priores contraries abrogant* which translates as “later Acts repeal earlier inconsistent Acts”) that Parliament cannot bind its successor. It:

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158 Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

159 (1908) 7 CLR 1 @ p. 7

160 D C Pearce and R S Geddes, 1996, *Statutory Interpretation in Australia*, 4th Edition, Butterworths, p.198

> *… cannot by Act of Parliament effectively fetter itself as to the substance or content of its own future legislative action.*[161]

11.11. With respect to the second point, if the intention is to require the bill to be expressly repealed, rather than allowing a court to interpret that the provision has been impliedly repealed by subsequently inconsistent legislation, there are very real doubts that this intention will be effective. The following passage provides the rationale for those doubts:

> *From time to time provisions are included in Acts that indicate that the particular provision is to apply to stated circumstances 'unless otherwise expressly provided' or 'except where otherwise expressly enacted' or 'unless the contrary intention appears'. The Real Property Act 1886 (SA) went further and provided that any later Act inconsistent with it was to be regarded as inoperative unless it included a provision stating that it was enacted 'notwithstanding the provisions of the Real Property Act 1886'. None of these provisions has been held sufficient to protect the Act in which they appear from an implied repeal by later inconsistent legislation: Rose v Hvric (1963) 108 CLR 353; South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603. To have held otherwise would have been to countenance a derogation of the competency of parliament to pass legislation after the date of the Act inconsistent with it.*[162]

11.12. Doubts are occasionally expressed about the basis for *South Eastern Drainage Board*.[163] The proposed Commonwealth Statutory Bill of Rights in 1984 had a section which attempted to perform a function similar to that envisaged by the second interpretation of this proposed clause. The rationale for such provisions are that there is no attempt to bind successors but to provide an aid to interpretation of subsequent legislation. However, such provisions would need to be carefully drafted and still might be ineffective for the reasons given in Pearce, quoted above.

11.13. Whilst Parliaments cannot fetter their own legislative action as to the substance of the laws, Parliament can clearly bind itself as to the procedure, or "manner and form", by which future legislation can amend existing legislation.[164] The means by which this can be done is known as "double entrenchment" by which the section states that any attempt to amend either the substantive sections OR the section which provides the altered procedure, can only be amended by the stated procedure.

11.14. While the committee understands the intention of the bill, it is of the view that the section as currently drafted, on either interpretation, may be interpreted by the

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161 *South Eastern Drainage Board* (S.A.) *v. Savings Bank* of *South Australia* (1939) 62 C.L.R. 603; *Magrath v. commonwealth* (1944) 69 C.L.R. 156

162 D C Pearce and R S Geddes, 1996, *Statutory Interpretation in Australia*, 4th Edition, Butterworths, p.201

163 Eg in Blackshield, Williams and Fitzgerald, *Australian Constitutional Law and Theory*, Federation Press, Sydney, 1995, p.309

164 Principles of Australian Administrative Law, Hotop S D, 6th edition, 1985, the Law Book Company @ p. 81.

Courts as being of no effect because of the inability of Parliament to bind its successors. In this sense the section is imprecisely drafted.

11.15. The Committee refers these matters to Parliament for its consideration.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[165] (the responsibilities code)

♦ **What is the responsibilities code?**

– **clause 135**

11.16. The dictionary of the bill defines the responsibilities code as *the code of responsibilities of police officers prescribed under a regulation*. Clause 135 (2) and (3) provide that a regulation may make provision with respect to the responsibilities of police officers under the bill and may include operational guidelines. However, the operational guidelines are not to be part of the regulation.

11.17. Under cl. 132 the commissioner of police is required to ensure that a copy of the code is available at any police station for inspection by anyone who asks for it.

♦ **What is required under the responsibilities code?**

11.18. The bill states various circumstances in which the responsibilities code is to be complied with. The rights and liberties of individuals can be adversely affected in some of these circumstances. Following are four examples of this point.

- Procedures for identifying suspects: cl. 59 allows police to use identification parades, photo boards, videotape and computer generated images to gather evidence of a suspect. Subsection (2) provides that a police officer must comply with *the procedures in the responsibilities code* for *identifying suspects*.

- Covert search warrants in respect of organised crime: cl. 74 (2) provides that an application to a Supreme Court Judge by an inspector of police for a covert search warrant must include the information specified in the responsibilities code about any warrants issued in the previous year. A police officer must also, within 7 days after the execution of the covert warrant, give to the Supreme Court Judge a report complying with the responsibilities code on the exercise of the powers under the warrant. The extensive powers exercisable under a covert search warrant are detailed under cl. 75.

  In the committee's view, it is, therefore, important to know how the code will require these powers to be exercised – particularly in view of the requirement in the bill for the public interest monitor to monitor compliance with the

[165] Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

responsibilities code. It seems that the contents of the code will be relevant to the way the monitor questions witnesses at an application before a Supreme Court Judge and to the contents of the monitor's reports to the commissioner of police and the parliament.

- Cautioning persons in custody: cl. 99 (1) requires a police officer to caution a person in custody *in the way required by the responsibilities code*. Clause 92 provides that nothing in the Act affects the right to refuse to answer questions. It seems to the committee that it is therefore important to know how the caution is to be administered and what it is to contain.

- Reading over of written confessions: cls. 104(5) to (9) allows for a written confession, as distinct from an electronically recorded one, but provides for certain procedures – including the recording of the reading over of and adoption of the confession. Subclause (7) requires that before the written confession is read over to the person in custody:

  an explanation, complying with the responsibilities code, must be given to the person of the procedure to be followed to comply with this section.

  As the admissibility of a written confession represents a substantial lessening of the safeguards against impropriety the procedures to be adopted in respect of the adoption become crucial. It is therefore important to know how the procedures will be explained to the person in custody to be confident that their rights are safeguarded.

11.19. It is, therefore, apparent to the committee that the responsibilities code will incorporate some important substantive as well as procedural matters. Its contents will affect to some extent the way that some of the provisions of the bill will operate.

11.20. More significantly, the responsibilities code will deal with matters which affect the rights of individuals. For example, it will affect the way that the right to silence is explained to a suspect, the way that a person understands the procedure that must be adopted in relation to the recording of the adoption of written confessions and the way that persons may be identified by a witness.

11.21. The committee notes the following information provided to Parliament on the responsibilities code by the minister during his second reading speech.

However, for the purposes of accountable government, I give an undertaking to the House, that at the commencement of the committees of the whole, I will table, with the consent of the Chairman of the Committees, a ministerial statement of intent which will outline the substance of the proposed responsibilities code.

I stress though, that for obvious reasons, the document cannot be a finished product. It will merely be a statement of intent which will be subject to further consultation.

11.22. At the outset, the committee makes the observation that it considers the making of subordinate legislation containing the responsibilities code to be a significant positive step.

11.23. The committee does, however, have two concerns with cl. 135 which allows a responsibilities code to be made. Firstly, as referred to above, the responsibilities code will deal with matters which affect the rights and liberties of individuals. It is arguable, therefore, that these matters should be set out in the bill rather than in subordinate legislation so that the impact on the rights and liberties of individuals can be debated in Parliament.

11.24. The committee is pleased to note the minister's undertaking to table a statement of intent outlining the substance of the proposed responsibilities code. The committee requests that details of those sections of the code which may affect the rights and liberties of individuals be provided to the Parliament to enable it to more completely consider the effect of those provisions of the bill relating to the responsibilities code.

11.25. The committee's second concern is that cl. 135 anticipates that the regulation containing the responsibilities code may include operational guidelines but that these operations guidelines are not part of the regulation.

11.26. The committee seeks information from the minister on how it is intended that this will be achieved while sufficiently subjecting delegated legislative power to the scrutiny of the Legislative Assembly.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[166]

– **the current law**

11.27. There are presently no statutory powers for police to enter private property to preserve a crime scene or to direct individuals off private property. If the lawful occupier refuses entry to the property the police officer would normally be required to obtain a search warrant.

11.28. Having said this, however, the committee notes that police currently secure crime scenes and therefore, the committee considers cl. 17 to be a positive step.

– **clause 17 (initial establishment of a crime scene)**

11.29. Clause 17 gives a power to any police officer to enter a place that may be a crime scene and decide whether the place is a crime scene. Having so decided, the police officer may exercise the wide powers in cl. 20 which include:

166 Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

- excluding anyone (including the occupier of private property) from the scene, seizing things that **may** provide evidence; and

- digging up anything, removing walls and ceiling linings or floors of a building, or panels of a motor vehicle.

11.30. A crime scene is by definition in the bill either a *primary scene* or a *secondary scene*. A *primary scene* is one:

- where a 7 year imprisonment or deprivation of liberty offence has happened; and

- where it is necessary to protect the place to search for and gather evidence of the offence.

11.31. A *secondary scene* is a place:

- away from where an offence happened but where there may be significant probative evidence of the commission of a serious violent offence; and

- where it is necessary to protect the place to search for and gather evidence.

11.32. Clause 17(c) requires the police officer to apply to a magistrate for a crime scene warrant as soon as is reasonably practicable after the crime scene is established. The application must be sworn by the police officer and state the grounds on which it is sought. [167]If the application for a crime scene warrant is refused the powers under cl. 20 cease. However, the committee notes that they will often have already been exercised unless they involve a case of structural damage to a building when a warrant must first be obtained from a Supreme Court Judge.[168]

11.33. The committee is concerned about four aspects of cl. 17. Firstly, in the case of a primary crime scene – the threshold decision by the police officer (whether or not the place is one where a relevant crime happened) carries no requirement of either belief or suspicion based on reasonable grounds.

11.34. Secondly, it appears that there are no criteria governing a decision as to whether it is necessary to protect the place to search and gather evidence.[169] This applies to both primary and secondary crime scenes.

11.35. Thirdly, a secondary crime scene is by definition one where there may be evidence of significant probative value of a serious violent offence. This may be on private property and will always be away from the scene of the actual crime.

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167 Clause 18(4).

168 There is no definition of structural damage and it appears arguable whether it includes removing walls and ceiling partitions or even floors.

169 The CJC and the PCJC recommended that it only apply where it is necessary for immediate entry to prevent material evidence from being lost, concealed, damaged or destroyed or new material from being introduced to the crime scene.

Again there is no requirement that the police officer entertain any belief or suspicion based on reasonable grounds that the evidence is in the place.

11.36. It seems to the committee that this is in contrast to the requirements in the case of an ordinary warrant to search under cl. 28 where the issuing justice must be satisfied beforehand that there are reasonable grounds for suspecting that the evidence is likely to be at the place. Even in the case of a search to prevent the loss of evidence under cl. 31, reasonable suspicion on the part of the police officer is required. In addition, the magistrate who subsequently approves the search must be satisfied both that the police officer had the reasonable suspicion before exercising the power to search, and that there was a reasonable likelihood that the evidence would be concealed or destroyed.

11.37. The committee's fourth concern is that the powers in cl. 20 may be exercised on private property and could lead to the occupier being excluded from their own property without a proper basis for either the entry or the exclusion being first required. The subject of police entry on private property was dealt with by the High Court in *Coco v R* (1993–4) 179 CLR 427 at 435–6 per Mason CJ, Brennan, Gaudron and McHugh who said:

> *Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right (25). In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law (26).*

11.38. Having expressed these concerns, the committee does, however, note that when a police officer applies for a crime scene warrant a magistrate (stating the grounds on which it is sought) the magistrate must consider certain matters [in cl. 18(7)] and be reasonably satisfied that the place is a crime scene.

11.39. After examining the power for police officers to secure crime scenes (in cl. 17 of the bill) the committee has concluded that, although it involves an encroachment on existing rights, there is a significant public interest in allowing police to preserve crime scenes.

11.40. The committee therefore has significant concerns about the impact of cl. 17 on the rights that individuals presently have over their private property. It appears to the committee that would be better protected by a threshold requirement that the police officer suspect, on reasonable grounds, that:

- the place is a crime scene; and
- there is a necessity to protect it because the evidence will be lost, concealed, damaged or destroyed or new material introduced to the crime scene.

11.41. The committee also requests that the minister consider inserting a definition of "structural damage" into the dictionary as, in the committee's view, it is unclear whether police officers must obtain a warrant from a Supreme Court Judge

before removing walls, ceiling partitions or floors (referred to in cl. 20(1)(m) and in paragraph XX above.

11.42. The committee refers these concerns to the minister and requests that he consider protecting individual rights as suggested.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[170]

– **clause 17 (secondary crime scenes)**

11.43. As described above, cl. 17, together with the dictionary definition of a "secondary crime scene", (referred to in paragraph XX above) grants powers which significantly impinge on current rights of individuals over private property.

11.44. At present, police have to obtain a search warrant by satisfying a justice that there are reasonable grounds for suspecting that there is evidence at the place relating to an offence.

11.45. Clause 17 allows police to not only excise powers over the scene of the crime but over other places, away from the scene without first obtaining a warrant.

11.46. The committee is concerned about the extension of police powers in cl. 17 which allows them to secure places away from the actual crime scene (for example by directing persons off the property and preventing others from entering the scene) without a warrant.

11.47. The committee seeks information from the minister justifying the need for this power. The committee particularly requests that the minister provide reasons for these powers in addition to the general search warrant provisions in part 5 which are subject to the safeguard of being approved by a warrant issued by a judicial officer.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[171]

– **clause 27 (searching of vehicles without warrant)**

[170] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

[171] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

11.48. Several statutes presently give police officers significant powers to search vehicles. For example:

- a police officer suspecting that a dangerous drug is in the vehicle has the power to search it;[172]
- a person reasonably suspected of having stolen property or unlawfully obtained property may be searched under s. 24 of the *Vagrants, Gaming and Other Offences Act 1931*;
- persons suspected of being in possession of a weapon can have their vehicles searched under the *Weapons Act 1990*.

11.49. The committee observes that the power proposed to be granted under cl. 27 [which contain the above items in cls. 27(a) to (d)] is a broader power.[173]

11.50. The committee brings this observation to the attention of Parliament.

Does the legislation have sufficient regard to the rights and liberties of individuals?[174] (reasonable grounds for suspicion regarding evidence)

– **clause 28 (search warrant)**

11.51. The dictionary to the bill defines "evidence of the commission of an offence" to include:

(a) a thing that is or may provide evidence of the offence; and

(b) a thing that will provide evidence of the offence; and

(c) a thing that is intended to be used for committing the offence; and

(d) a thing that may be liable to forfeiture.

11.52. Clause 28(1) provides that a justice may issue a warrant to enter any place and search it to obtain evidence of the commission of an offence. The justice may only issue the warrant if satisfied there are reasonable grounds for suspecting that there is at the place (or is likely to be at the place within 72 hours) evidence of the commission of an offence.[175]

11.53. Clause 29(1) then empowers the police officer conducting the subsequent search under the warrant to seize a thing if they reasonably suspect that it may be evidence of the commission of the offence to which the warrant relates. In

172 *Drugs Misuse Act 1986*.

173 Note, however, that a similar provision is contained in s. 3T of the *Commonwealth Crimes Act 1914*.

174 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

175 Clause 28(6)

other words, it appears to the committee that the assessment of the quality of the thing as evidence of the commission of the offence is left to the search stage.

11.54. It appears to the committee that, as the law presently stands under s 679 of the Criminal Code, it has to appear to the issuing justice that there are reasonable grounds for suspecting that the thing is at the place. In addition, in the case at least of (b) and (c) in paragraph XX above, there is the further requirement of reasonable grounds for believing that it is of that quality.

11.55. The committee notes on this point that both the CJC and the PCJC recommended that the issuing authority must have reasonable grounds to suspect that the objects of the search are to be found on the premises and have reasonable grounds to suspect that the objects of the search are connected with an offence.

11.56. The committee has examined the grounds on which a justice may issue a search warrant in cl. 28. By comparison to the current law it seems that cl. 28 introduces a lesser threshold test for the issue of a search warrant than presently applies by removing the second requirement of suspicion (or belief) on reasonable grounds that the thing will afford evidence of the commission of an offence.

11.57. The committee recommends that Parliament consider maintaining the dual test currently applicable to search warrant provisions.

11.58. The law currently requires an issuing justice to be satisfied both:

- that there are reasonable grounds for suspecting that the thing is in place; and
- that there are reasonable grounds for suspecting (or believing) that the thing, if found there, is evidence of the commission of the offence.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[176] (police powers of arrest without a warrant)

- **reasonable suspicion as distinct from reasonable belief**
  - **the current law**

11.59. Under the Criminal Code the general distinction between offences arrestable without warrant and those generally requiring arrest with a warrant is made by s 5. Crimes are generally arrestable without warrant whereas misdemeanours

[176] Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

generally require a warrant. There are exceptions to this which can be found within the individual offence–creating provisions of the Criminal Code.

11.60. The current requirement is that a police officer exercising a power of arrest without warrant can only do so if they believe on reasonable grounds that the offence has been committed, and committed by the person arrested.[177]

– **clause 35 (arrest without a warrant)**

11.61. Clause 35(1) makes it lawful for a police officer to arrest a person without warrant if the police officer reasonably suspects he or she has or is committing an offence if it is reasonably necessary for 1 or more of the reasons listed in cl. 35(1)(a) to (k).[178] Under clause 35(2) it is also lawful to arrest a person without warrant if the police officer reasonably suspects that the person has committed or is committing an indictable offence. This is to allow the person to be questioned about the offence under Part 8 or to allow the offence to be investigated.

♦ **"suspicion" as distinct from "belief"**

11.62. The authorities make it clear that a "suspicion" involves a lesser test than "belief" and this is accepted in the bill itself. The New Zealand Supreme Court has observed that:

> *... to suspect is to imagine something evil or undesirable, or on slight or no evidence to imagine or fancy something wrong, to imagine or fancy something to be possible or likely. To imagine something, especially something evil, is possible.*[179]
>
> *On the other hand, 'to believe' is to have evidence or faith, and consequently to rely upon, to give credence to, to believe in its existence or occurrence*[180] [181]*.*

11.63. The committee has reviewed the present powers of arrest without a warrant and has compared them to those powers proposed under cl. 35 of the bill. The law currently requires a police officer to believe on reasonable grounds that an offence, generally a crime, has been committed before a person can be arrested without warrant. Proposed cl. 35 allows this power if the police officer reasonably suspects that the person has committed or is committing an offence. It is clear from decisions of the High Court[182] and other authorities that "suspicion" is a lesser test than "belief". Police powers to arrest a person without a warrant

177 Criminal Code s. 546.

178 Some of the reasons listed in subsections (a) to (k) are: to prevent the continuation, repetition or commission of an offence; to establish the person's identity; to prevent the fabrication of evidence and to prevent the person fleeing.

179 Shorter Oxford Dictionary 2093.

180 Shorter Oxford Dictionary 165.

181 *Seven Seas Publishing v Sullivan* [1968] NZLR 65 at 76

182 *George v Rockett* [1990] 170 CLR 104 at 115

therefore appear to have been broadened in two significant respects. Firstly, the power in cl. 35 relates to any offence. Secondly, it only requires a "suspicion" on reasonable grounds.

11.64. In addition, it appears to the committee to be unclear whether the general arrest provision in cl. 35 can be construed as being inconsistent with the existing arrest provisions in the criminal code and other Acts. In certain circumstances it may be unclear whether the bill or the criminal code is intended to apply and therefore which test is intended to apply.

11.65. Also, it is unclear whether or when the powers of arrest presently given to citizens apply given that cl. 123 prevents a police officer from authorising an assistant to arrest a person when helping to exercise a power given to the police under the bill.

♦ **arrest for any offence**

11.66. Clause 35(1) allows arrest for <u>any</u> offence (even minor offences) if it is reasonably necessary for the various reasons listed in (a) to (k). This includes reasons like:

- making inquiries to establish identity;
- where the person was originally proceeded against otherwise than by arrest and has failed to present themselves as required by a notice to provide their fingerprints etc;
- to ensure appearance before court;
- to obtain or preserve evidence relating to the offence; and
- to prevent the fabrication of evidence.

11.67. The committee notes that cl. 35(1) allows arrest for <u>any</u> offence and that some of the criteria listed in cl. 35(1)(a) to (k) enable a person to be arrested without a warrant in circumstances not previously contemplated by Queensland law.

11.68. This broadening of the power to arrest without warrant clearly affects the rights and liberties of individuals. The committee refers to Parliament the question of whether this provision has had sufficient regard to the rights and liberties of individuals.

♦ **sufficiently clear and precise drafting of arrest powers?**

11.69. It appears to the committee that if none of the matters in s. 35(1) (a) to (k) are present then, despite the presence of a reasonable suspicion, there is no power to arrest the person. However, because the bill does not state that an arrest cannot otherwise be made, it seems that if the criteria for a lawful arrest in the

criminal code or any other Act is satisfied, an arrest can still be made under those other powers.

11.70. In addition, clause 35(1)(k) allows an arrest on reasonable suspicion if it is reasonably necessary because of the nature and seriousness of the offence. It seems to the committee that, unlike the criminal code (which provides that crimes are generally arrestable without warrant, whereas misdemeanours generally require a warrant) the bill provides no specific guidance as to when the nature and seriousness of the offence makes it reasonably necessary to arrest without warrant.

11.71. The explanatory notes relating to cl. 35(1)(k) do not clarify the issue as there are numerous other offences in the Criminal Code which are crimes and thus arrestable without warrant that do not meet this criteria such as stealing[183] or operating a motor vehicle dangerously while under the influence.[184]

11.72. The uncertainty of this highlights that the drafting is not sufficiently clear and precise to have sufficient regard to the rights and liberties of individuals.

11.73. It seems to the committee that, as this bill does not consolidate all powers of arrest applicable under Queensland law, it potentially creates uncertainty in several respects. For example:

- it may be difficult to determine precisely what the powers of arrest without warrant are;
- the position of arrest without warrant by citizens (presently found in various provisions of the criminal code) may be uncertain; and
- there may be some uncertainty as to whether offences not otherwise caught by cl. 31(1)(a) to (k) are still arrestable if there is a belief based on reasonable grounds.

11.74. The committee is, therefore, of the view that it is arguable that the drafting of the bill is not sufficiently clear and precise with respect to powers of arrest. The committee seeks information from the minister addressing and, if possible, clarifying this point.

♦ **arrest for questioning or investigating**

11.75. The committee understands that there is currently no power at common law to arrest a person for questioning. In *Williams v. R* [1986] 161 CLR 278 Mason and Brennan JJ [as they then were] said this at p. 305:

> *It is beyond question that at common law no person has power to arrest a person merely for the purposes of questioning him.*[185]

183 Section 398.

184 Section 328A(2).

185 *Beckwith v. Philby* [1827].

11.76. Any such detention is unlawful and actionable under the civil law and any evidence obtained while unlawfully detained is likely to be kept from the jury in the exercise of a trial judge's discretion.[186]

11.77. Claue 35(2) of the bill, however, empowers a police officer who simply suspects on reasonable grounds that a person has committed an indictable offence to arrest them for either questioning or investigation.

11.78. The police power to arrest a person (whom they suspect on reasonable grounds has committed an offence) for questioning or investigation is one which the police do not currently have in Queensland. In the committee's view, this provision erodes the rights and liberties of individuals that are enjoyed under the current law.

11.79. The committee refers to Parliament the question of whether the granting of police powers of arrest for the purpose of questioning and investigation in cl. 35 of the bill have sufficient regard to the rights and liberties of individuals.

Does the legislation have sufficient regard to the rights and liberties of individuals?[187] (police powers of detention for questioning and investigation)

– **the current law**

The right to personal liberty is, as Fullagher J. described it, "the most elementary and important of all common law rights": Trobridge v Hardy (1955) 94 CLR 147 at p. 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the law of England "without sufficient cause": Commentaries on Laws of England (Oxford, 1765), Bk. 1, pp 120-121.[188]

11.80. At common law it is unlawful to detain an arrested person beyond the period that is reasonably required to take them "forthwith" before a justice to be dealt with according to law or admitted to bail.[189] Since 1886 in the *Justices Act* (s. 69), and 1901 in the Criminal Code (s. 552) a person has to be taken forthwith, or as soon as reasonably practicable, before a justice to be dealt with according to law (that is, to consider bail). In short, under the current law, a person cannot be detained simply for questioning.[190] Clause 39 of the bill continues this position but makes it subject to part 8 (which allows a person being detained in custody to be questioned).

186 *Forster v R* [1993]67 ALJR 550.

187 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

188 *Williams v R* [1986] 161 CLR 278.

189 See Kennedy Allen, *The Justices Act Qld* 1956 Law Book Qld at 185

190 *Williams v R* [1986]161 CLR 278.

– **clauses 48 & 50 (application of part 8 and periods of detention or questioning)**

11.81. The new power in cl. 35(2) for police to arrest for questioning and investigating an offence has already been identified. Clause 50 gives any police officer the power to detain any person (who is arrested for an indictable offence; or is refused bail; or has had his or her bail revoked; or is serving a sentence[191]) for a reasonable time to investigate or question the person about an indictable offence.

11.82. The power may be exercised for an initial period of 8 hours[192] without the need to refer the matter to any other officer of any particular rank and without the need for the authorisation of any judicial officer. There is also no provision for any superior officer to overview the period of detention. A magistrate or justice only become involved if an extension beyond that initial period of detention is required. A police officer may apply for an extension or extensions of the detention period under cl. 51.

♦ **Application of part 8 – investigations and questioning**

11.83. Clause 48 purports to clarify the persons who can be subject to the police powers of investigation and questioning in part 8. The scope of the clause is, however, in the committee's view, not clear.

11.84. Clause 48(1) states that part 8 applies only to a person:

- questioned in relation to an indictable offence; or
- detained for investigating, an indictable offence.

11.85. Clause 48(2) states that part 8 also applies only to a person:

- arrested for an indictable offence; or
- refused bail; or
- in custody after having bail revoked; or
- under sentence of imprisonment or detention.

11.86. In the committee's view, cl. 48 can be interpreted to mean that part 8 applies either to persons in subclause (1) or (2). It appears from cl. 50(1), however, that the intention is for part 8 only to apply to persons meeting the criteria in (1) and (2).

11.87. The committee, therefore, deduces [from cl. 50(1)] that persons described in cl. 48(1) can not be detained for 8 hours for investigation or questioning in cl. 50.

191 clause 48(2).

192 clause 50(2)

The description of persons caught by cl. 48(1) would include "volunteers" – persons who, of their own volition, attend (either by themselves or with a police officer) at a police station to assist with an investigation.

11.88. As this new power of detention for investigation or questioning appears to be a substantial abrogation of the rights and liberties of individuals the committee considers it important for Parliament to consider the sufficiency of safeguards contained in the bill.

♦ **safeguard: position of volunteers**

11.89. As it appears that volunteers can not be detained for investigation or questioning under part 8, it would seem to the committee that they should be made clearly aware of their rights. The bill does not, however, require police officers to instruct volunteers that they are not under arrest and are free to leave at any time. Such an instruction would ensure that persons continue to assist police as volunteers and not as persons under the impression that they are effectively arrested and compelled to assist.

11.90. It is also not clear in part 8 that the safeguards in part 12 apply to volunteers, although this appears to be the case based on the definition of person "in custody". In the committee's view it should be expressly stated that volunteers (persons assisting police with investigations who are not arrested) also have the rights granted in part 12, for example, to talk to a friend, relative or lawyer.

♦ **safeguard: right to silence**

11.91. The bill expressly recognises the right to silence in cl. 92 which states that:

... nothing in this Act affects the right of a person to refuse to answer questions ...

11.92. It appears to the committee, however, that there is no mechanism in the bill for a detained person to bring a period of detention to an end by relying on their right to silence and refusing to answer any further questions. The only relief from detention appears to be the "un-arrest" procedures set out in cl. 38.

11.93. Clause 38(1) and (2) impose a duty on the police officer to release an arrested person at the earliest opportunity:

- if they are no longer a suspect; or
- where the reason for arresting no longer exists and a notice to appear or a summons to appear has been served on the person.

11.94. While in custody, however, the person can be searched and re-searched. Further, things that the police officer reasonably suspects may provide evidence, may be seized.

♦ **safeguard: access to legal and other advice**

11.95. Clauses 95 to 97 require that a person in custody be informed of the right to contact a friend or relative and a lawyer and have them present at the questioning. The committee notes, however, that cls. 95(6), and 97(4) allow the police officer to exclude "another person present", or an interview friend including a lawyer, if the police officer considers that the person is *unreasonably interfering with the questioning*. A similar power exists in relation to an interview friend in the case of Aboriginal or Torres Strait Island persons under cl. 96(7), and children under cl. 97(4).

11.96. This provision may be in conflict with (and thus would appear to override) s. 9E of the *Juvenile Justice Act 1992* which renders a confession inadmissible unless a third person was present at the time it was made (subject to exceptions).

♦ **Safeguards ensuring rights of and fairness to persons limited to indictable offences.**

11.97. Clause 93 states that part 12, division 3 “safeguards ensuring rights of and fairness to persons questioned for indictable offences” is applicable only to indictable offences. These safeguards therefore do not apply to summary offences which carry a penalty of imprisonment.

11.98. The committee also notes that the safeguards in cl. 96 (including a requirement for police to inform the legal aid organisation) and cl. 97 only apply to Aboriginal people and Torres Strait Islanders and children. There is no similar general provision of safeguards for disadvantaged persons, (like the mentally ill, intellectually disabled or even persons from other cultural backgrounds).

♦ **safeguards excluded**

11.99. Clause 106 provides that some of the safeguards in part 12, division 3[193] do not apply if the police officer reasonably suspects that compliance with the safeguard is likely to result in:

- an accomplice being tipped off; or
- an accomplice being present at the questioning; or
- evidence being concealed, fabricated or destroyed; or
- a witness intimated.

11.100. Many of the safeguards provided in division 3 of part 12 relating to rights to be advised by a lawyer or another person can therefore be removed by a police officer on the basis of a reasonable suspicion.

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193 Sections 95 to 97 and 102. *Sections 95 (Right to communicate with friend, relative or lawyer), 96 (Questioning of Aboriginal people and Torres Strait Islanders), 97 (Questioning of children), 100 (Provision of information relating to a person in custody) and 102 (Right of foreign national to communicate with embassy etc.)*

♦ **committee's assessment of the police powers of detention for questioning and investigation, and the counterbalancing safeguards**

11.101. The committee has formed the view that the power to arrest for questioning or investigation and subsequent power to detain for questioning or investigation is a encroaches the rights and liberties currently enjoyed by the people of Queensland. In particular, the committee is concerned about the following points:

- This power may be exercised by police officers irrespective of rank and without a further requirement for the exercise of the power to be sanctioned by the judicial officer or even a senior police officer.

- Clause 51(8) refers to applications for extension. It seems therefore that extensions can run for a number of days, although the person in custody has a right of appearance and legal representation at the application and has a right to be heard. There is, however, no provision in the bill for appeal against detention for questioning or investigation. Magistrates may extend detention periods and persons have no right to challenge such decisions on appeal except under the general law [eg *Judicial Review Act 1991 (Qld).* This may be illusory because by the time review by a court is available the period of detention may well be over.

- Under the example in cl. 51(8) a person who has already been held for 8 hours may get an extension of 8 hours for questioning and a further 12 hours for reasonable time-out, which is a total of 28 hours of detention without appeal.

11.102. Given these infringements of rights, the committee is concerned by the fact that safeguards provided in the bill are also undermined by the provisions of the bill. This is demonstrated by the following points:

- The exercise of the right to silence, while recognised in the bill, is not specifically facilitated, for example, by a mechanism for a person to bring a period of detention to an end by refusing to answer questions. The effectiveness of the protection of the right to silence in the bill also depends on the form and content of the caution in the responsibilities code. This could lead to the repeated breach of this fundamental right.

- The bill allows persons to have access to legal and other advice while being questioned during detention, however, this safeguard may be removed by a police officer on a reasonable suspicion.

- The provisions for terminating a detention period are exercisable at the discretion of the police officer only.

11.103. The committee has examined the police powers of detention for questioning and investigation and the effectiveness of counterbalancing safeguards in the bill. (In the section at paragraphs XX to XX above.)

11.104. The committee has serious concerns about the multiple abrogations of the rights and liberties of individuals contained in cls. 48 and 50 and about the fact that the safeguards provided by the bill are also undermined by its provisions.

11.105. In the committee's view, it is not clear from the drafting of cl. 48 whether the powers of investigation and questioning are meant to apply to persons described in subclause (1) or (2), or (1) and (2). In particular, it appears to the committee that persons described in cl. 48(1) can not be detained for investigation or questioning. The committee considers it essential for the drafting of cl. 48 to be clarified and requests that the minister consider amending cl. 48 accordingly.

11.106. The committee also requests that the minister consider amending part 8 (and/or part 12) in light of the comments below to ensure the safeguarding of individual rights affected by police powers.

- The position of volunteers [included in cl. 48(1)] could be protected by a requirement for police officers to instruct them that they are not under arrest and are free to leave at anytime.
- The application of safeguards in part 12 to volunteers [in cl. 48(1)] could be expressly stated to ensure their application.
- The exercise of the right to silence could be facilitated by an additional clause which provides that a person who clearly states that they do not want to answer any questions must either be proceeded against by notice to appear or arrested and taken before a justice.
- The power of a police officer to exclude persons *unreasonably interfering with the questioning* could be further defined by providing criteria to guide the exercise of power.
- The safeguards in part 12, division 3 could be made applicable to all offences carrying the penalty of imprisonment.
- The bill could make specific provision (similar to those in cls. 96 and 97 relating to Aboriginal people and Torres Strait Islanders) for further protection of disadvantaged persons.
- The potential conflict between cl. 97(4) and s. 9E of the *Juvenile Justice Act 1992* may also need to be resolved.

11.107. The committee refers to Parliament the question of whether cls. 48 and 50 have sufficient regard to the rights and liberties of individuals and whether the safeguards should be strengthened (or additional safeguards inserted) to ensure that the infringement of rights is justified.

Does the legislation have sufficient regard to the rights and liberties of individuals?[194] (power to take "identifying particulars")

– **the current law**

[194] Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

11.108. The taking of fingerprints, palm prints and photographs of an arrested person is presently routinely done. Although the taking of "identifying particulars" such as voice prints or handwriting is probably not currently permitted by the common law, it is arguably permitted by s. 43 of the *Vagrants Gaming and Other Offences Act 1931* which provides:

> *...may take or cause to be taken all such particulars as may be deemed **necessary for the identification** of such person, including the person's photograph and fingerprints and palm prints.*

– **clause 57**

11.109. Clause 57 provides for the power to take identifying particulars such as fingerprints, handwriting, voice prints, and photographs whether the person is proceeded against by arrest, notice to appear or complaint and summons. It therefore extends the power to proceedings otherwise than by arrest.[195]

11.110. Although strictly speaking the taking of handwriting and voice prints is still identification evidence, in some cases it will be akin to providing direct evidence against the person as for example in the case of forgery.

11.111. It appears to the committee that cl. 57 technically enlarges police power to obtain things that may be admissible in evidence against suspects. The committee refers to Parliament the question of whether this provisions has sufficient regard to the rights and liberties of individuals.

Does the legislation have sufficient regard to the rights and liberties of individuals?[196] (power to perform medical and dental procedures)

– **the current law**

11.112. Under the present Criminal Code provision s 259, where there is no consent to a medical or dental procedure, a magistrate can only order that it be carried out if the person *is in lawful custody upon a charge of committing an offence* and there are reasonable grounds for believing that the procedure may afford evidence of an offence.

– **clauses 63 and 64**

11.113. Clause 63 of the bill allows a police officer to apply to a magistrate for an order approving the performance of a medical or dental procedure on a person *in custody for an indictable offence*. Clause 64 provides for such procedures when the detainee does not consent.

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195 See the *Commonwealth Crimes Act*, s. 32J.

196 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

11.114. The term "in custody" appears in several places throughout the bill and appears to cover not only persons arrested on a charge for an indictable offence, but also persons arrested for questioning and or investigation under cl. 35(2) (that is when there is a reasonable suspicion that they have committed an indictable offence). Because of this broad meaning of the words “in custody” it seems to allow use of these powers against a broader range of persons than under the existing law. However, the committee notes that before the magistrate can make the order he or she must be satisfied that there are *reasonable grounds for believing*[197] that the procedure may provide evidence of the commission of the offence.

11.115. In the final analysis, the police power to have medical or dental procedures performed on persons does not appear to the committee to significantly alter the existing rights and liberties of individuals.

11.116. The committee does, however, request that the minister consider amending cl. 63 to allow the person who is to be the subject of a non-consensual medical or dental procedure a right to be heard by the magistrate hearing the police officer’s application.

Does the legislation have sufficient regard to the rights and liberties of individuals?[198] (use of surveillance powers – privacy)

11.117. There is no common law right to privacy, however, it has been reasoned that privacy is incidentally protected by the laws of defamation under trespass.

11.118. The concept of privacy has not been defined in Australia but has been described as follows:

> *In essence, privacy involves keeping oneself and one’s affairs removed from public views or knowledge, even if the information so protected is itself not intrinsically sensitive. It has been argued that the interest in freedom from surveillance is a privacy interest.*[199]

11.119. In addition to raising concerns about privacy, surveillance can involve trespass (when persons enter private property to install surveillance devices) and can lead to damage to property (with the installation or retrieval of devices from equipment, for example computers).

11.120. In this section the committee reviews the changes to Queensland law and its impact on individual rights, particularly privacy.[200]

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197 Section 63(4).

198 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

199 *Surveillance – Issues Paper 12*, New South Wales Law Reform Commission at page 13.

200 *Surveillance – Issues Paper 12*, New South Wales Law Reform Commission.

♦ Powers of surveillance with a warrant

– The current law

11.121. The use of listening devices by police is presently authorised by s 43 of the *Invasion of Privacy Act 1971* and, in the case of detecting serious drug offences carrying 20 years imprisonment, the *Drugs Misuse Act 1986.* Until 1994 it was believed that the *Invasion of Privacy Act* permitted the use of listening devices to be installed by subterfuge and/or trespass. However the High Court of Australia in *Coco v R* has held that no power to order such installation is to be implied into the Act.[201] Clause 68 appears to rectify the technical point that arose in Coco's case.

11.122. The committee notes that judicial concern has been expressed about the lack of representation by the surveillance target at an application for surveillance with a warrant under s 43 of the *Invasion of Privacy Act* and the usual lack of full disclosure of all materials to the issuing justice.[202] It is also for obvious reasons inconsistent with the principles of natural justice.

11.123. In respect of persons trespassing on private property to install surveillance devices – the right of a person in possession of premises to exclude others from those premises is a fundamental common law right. There is no power for police to enter or remain on private property without the consent of the person in possession.[203]

– clause 68 of the bill (surveillance warrants)

11.124. Surveillance devices are defined in the bill to include "listening devices", "visual surveillance devices" and "tracking devices".

11.125. Clause 68 constitutes an enlargement of the statutory powers of police (other than in the case of serious drug offences) to enter private property, albeit subject to judicial control.

11.126. Clause 68 allows a police officer, of at least the rank of inspector, to apply for a surveillance warrant authorising the use of a surveillance device if the officer reasonably believes that a "suspect" has committed, is committing, or is about to commit an indictable offence. Clause 68 imposes various controls on the issuing of warrants for a class A device (a surveillance listening or tracking device installed in a private or public place or on the suspect's clothing). For example, the application must be made to a Supreme Court Judge and can only be issued if the judge is satisfied that there are reasonable grounds for believing that the person to be under surveillance is likely to be involved in the commission of an indictable offence. Additionally, it can only be applied for in the case of a serious

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201 [1994] 179 CLR 427.

202 Dowsett J in *R (A Solicitor) v Lewis* [1987] 2 Qd R 710.

203 *Plenty v Dillon* [1991] 171 CLR 635.

indictable offence and the judge must consider extensive criteria in deciding the application, including such things as whether the use of conventional ways of investigation would be likely to help in the investigation of the offence, and the effect of previous warrants.

11.127. As a protective measure, a public interest monitor is to be appointed under cl. 79 of the bill. The monitor must be advised of all applications for surveillance warrants, will appear at any hearing of an application, can cross examine any witness to test the validity of the application and make submissions to the judge. The monitor is required to report annually to the minister who must table the report in Parliament.

11.128. A register of applications must be kept by the Commissioner of Police and be available for inspection by the monitor. The judge issuing the warrant may require the destruction of any recordings made that are not related to the offence mentioned in the warrant, unless they relate to another indictable offence.[204] A device cannot be installed in a lawyer's office unless the application relates to the lawyer's involvement in the offence.[205]

11.129. Clause 68(3)(b) requires applications for a class B device (that is, a tracking device in a car or moveable object) to be made to a magistrate. The same conditions and safeguards applying to listening and surveillance devices apply to tracking devices.

♦ **Powers of surveillance without a warrant**

– **the current law**

11.130. The *Drugs Misuse Act* provides for emergency permits for listening and visual surveillance devices to be issued by a Supreme Court Judge orally or in writing, and to last for 48 hours or such lesser period as ordered.

– **clause 69**

11.131. Clause 69 permits an inspector of police or police officer of higher rank who reasonably believes that there is a risk of serious injury to a person and a surveillance device may help reduce the risk to authorise the use of a surveillance device. The police officer is to apply to a Supreme Court Judge within 7 days for approval of the exercise of the power.[206]

11.132. Under cl. 129 of the bill, provision is made for emergency applications to an inspector or other authorised officer for any warrant, approval, notice to produce or another authority under the bill. This may be done by phone, fax, radio or another similar facility if it is impracticable to apply in person. The authority may

204 Clause 68(16).

205 Clause 68(13).

206 Clause 69(4).

be sent to the police officer by fax or by telling the officer the terms of the authority.

♦ **justification for the use of surveillance**

11.133. The explanatory notes to the bill provide the following information on the need for surveillance powers and the counterbalancing safeguards in the bill.

> *The authority to install a listening or visual surveillance device for the investigation of serious indictable offences, or the conduct a covert search of a place for evidence relating to organised crime, are extraordinary but necessary powers. As the level of intrusiveness may be extensive, the community expects respective safeguards also to be extensive to ensure the proper use of such powers. The Bill introduces the new concept of a public interest monitor. The monitor will perform an independent role, and will be able overview applications to a Supreme Court Judge for a surveillance warrant or covert search warrant. This overviewing function will include the authority to ask the applicant police officer questions and make submissions to the judge with respect to the application. Due to the clandestine use of surveillance devices and covert search warrants applying the principles of natural justice is not appropriate.*
>
> *The Bill recognises the importance of privacy and protection of law abiding citizens, by ensuring that investigative powers into prescribed offences are properly balanced with an individuals rights to privacy. A judge before issuing the warrant must consider a number of matters, including the privacy of the person.*[207]

♦ **committee's observations on surveillance powers in the bill**

11.134. In the committee's view, the use of surveillance devices (including listening devices, visual surveillance and tracking devices) are highly intrusive powers which constitute an invasion of privacy of the individual concerned and may involve trespass to private property to install the devices. The use of surveillance powers already exists in the case of serious drug offences and was thought to exist in respect of other offences. [208]

11.135. The bill also introduces some safeguards, for example, the role granted to the public interest monitor in applications for surveillance warrants requirements for judicial sanction, and the list of issues which a judge must consider in approving an application for a surveillance warrant.[209] The committee notes, however, that interference with privacy is only listed as the second of eight factors to be considered and, only in respect of a class A device (a surveillance, listening or tracking device, installed in a private or public place or on the suspect's clothing) not for a class B device (a tracking device in a car or moveable object).

11.136. Clause 68(12) states that a warrant for a class A device in respect of a "dwelling" must specify the parts of the dwelling in which the device may be installed.

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207 Explanatory notes at p. 2.

208 See point raised at the end of paragraph XX.

209 Clause 68(10).

"Dwelling" is essentially defined in the dictionary to mean a residence. No guidance is given as to the criteria to be considered by the issuer in deciding which parts of the residence may be under surveillance.

11.137. In the committee's view, it may be desirable for certain factors, similar to those listed in cl. 68(10) (including the factor of privacy), to be incorporated into subsection (12) for this purpose. This would enable areas like bedrooms to be excluded from surveillance.

11.138. In respect of the emergency use of surveillance devices in cl. 69, the committee notes that evidence obtained under an exercise of this emergency power to use surveillance is admissible in a prosecution if the judge approves the exercise of the powers. It appears, therefore that if the judge does not so approve, the evidence can not be so used. It does seem, however, that the evidence may be used for other investigating purposes but the committee notes that the judge can also require the destruction of any records not related to the purpose for which the surveillance device was used. [210]

11.139. The only section on surveillance warrants which provides for the destruction of any recordings not related to the offence mentioned in the warrant or another indictable offence is cl. 68(16) which allows the issuer to make a destruction order. The issuer may, however, only require the destruction of irrelevant records if one of the conditions imposed on the warrant at the time of issue was a requirement to regularly report to the issuer on activities under the warrant.[211]

11.140. The surveillance powers granted in cl. 69 appear to the committee to be a significant extension of the powers currently available. The potential impost on the privacy of persons the subject of the surveillance is equally significant. The committee has noted the various safeguards on the exercise of these surveillance powers with and without a warrant but remains concerned about the impost on rights and liberties to privacy of persons the subject of these powers.

11.141. The committee therefore requests that the minister consider providing further safeguards to the privacy of individuals in the bill by:

- requiring the issuer of a surveillance warrant under cl. 68 to balance the need for a surveillance device against the erosion of individual rights in terms of invasion of privacy;
- amending cl. 68(12) to stipulate the impact on privacy as a factor to be considered by the issuer when specifying the parts of the residence in which a device may be installed;
- allowing the issuer to require the destruction of any recordings made that are not related to the relevant criminal activity or major crime mentioned in the warrant [this

210 Clause 69(6).

211 Clause 68(15).

power should not be condition on the warrant being subject to a regular reporting condition as is currently the case in cl. 68(16)].

Does the legislation have sufficient regard to the rights and liberties of individuals?[212] (covert search warrants)

– **the current law**

11.142. Although there may be power to order a covert search warrant under s. 18 of the *Drugs Misuse Act 1986* it arises only by implication.[213] There does not appear to be any such power in any of the other Acts including s. 679 of the *Criminal Code.*[214]

– **clause 74**

11.143. Clause 74 permits an application for a warrant involving entry covertly or by subterfuge to investigate "organised crime".[215] The warrant must be issued by a Supreme Court Judge who is satisfied there are reasonable grounds for believing that there is evidence of organised crime at the place.

11.144. The bill contains a range of applicable safeguards. Generally the judge must consider the same criteria as for a surveillance warrant, the public interest monitor is involved both in the application to the judge and the overseeing of the use of covert warrants. The same register of warrants must be kept.[216] In addition, within 7 days after executing the warrant, the police officer must give to the issuing judge a report complying with the responsibilities code[217] on the exercise of the power.[218] The police officer must also, if practicable, take anything seized or photographed before the judge for the making of appropriate orders in respect of them.[219]

11.145. There is no power for the police to authorise emergency covert searches as in the case of surveillance devices.

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212 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

213 Reg 7(3) of the *Drugs Misuse Regulation* requires an Occupiers Notice to be given or left at the premises unless *the police officer has reasonable grounds to believe that service of* [the notice] *would frustrate or otherwise hinder the investigation of the offence in respect of which the search warrant was issued*.

214 See *Report on a Review of Police Powers in Queensland Volume II: Entry Search and Seizure* CJC May 1993 at p. 379 and *Review of the CJC's Report on Police Powers in Queensland Vol I-III. Part B-Comment, Analysis and Recommendations PCJC* Report No. 23B August 1994 at page 91-92.

215 "Organised crime" is defined as ongoing criminal enterprise to commit serious offences in a systematic way involving a number of people and substantial planning and organisation.

216 Clause 78.

217 See the committee's comments on the responsibilities code at paragraphs XX to XX.

218 Clause 76.

219 Clause 76(2).

11.146. The committee notes, however, that the subject of the search is denied the natural justice of appearing at the application and may never know that it has occurred or that the search has taken place. The powers under cl. 75 are extensive involving entry and re-entry as often as is reasonably necessary.

♦ **committee observations on covert search warrants**

11.147. In the committee's view, the notion of covert search warrants is a significant enlargement of police powers in Queensland. It represents an intrusion beyond that even in the case of the surveillance powers in that what may be taken away without the knowledge of the subject of the search is property and other real evidence. The committee refers to the fact that there are already extensive powers of search and seizure where there are, as is required here, reasonable grounds to believe that there is evidence of the indictable offence at the place.

11.148. The concerns identified in respect of the powers under a surveillance warrant above and the way of dealing with them are also present in the case of covert search warrants.

11.149. The committee also notes that further concerns about the possibility of planting evidence have been raised. [220] These concerns could be addressed by an order that the search be videotaped [cl.74 (8) (e)] and by a requirement to report back to the issuing judge with the things seized and photographed [cl. 76 (2)].

11.150. The committee has concluded that covert search warrants are a matter of grave concern in their impact on the rights of individuals. For example, they involve trespass to property, invasion of privacy, and a breach of the principles of natural justice. It is therefore vital to have safeguards to counterbalance these powers and several are provided in the bill. The rights of affected individuals would, in the committee's view, be better protected by a mandatory requirement to video tape the search and for the tape to be shown to the issuing judge. The committee requests that the minister consider inserting this additional safeguard.

11.151. The committee also requests that the minister provide details of the requirements for a report to the judge that are to be included in the responsibilities code.

Does the legislation have sufficient regard to the rights and liberties of individuals?[221]

– **clause 79(5)**

220 Submissions by the Legal Aid Commission to the PCJC in Review of the CJC's Report on Police Powers in Queensland Volumes I-III. Part B-Comment, Analysis and Recommendations, Report No 23B, August 1994 at pp 93-94.

221 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

11.152. Clause 79 provides for a Governor-in-Council to appoint the public interest monitor. Subclause (5) sets out the persons who are not to be a monitor.

11.153. The committee has some concern that if the public interest monitor is a practicing lawyer, he/she could be involved in applications concerning current or former clients. In the committee's view, the potential for such conflict of interest is concerning.

11.154. The committee brings this observation to the attention of the minister and seeks his comments in relation to it.

Does the legislation have sufficient regard to the rights and liberties of individuals?[222] ("move–on" powers)

- **the current law**

11.155. Various Queensland statutes currently empower police to direct persons to "move–on" from places, for example:

- *Public Safety Preservation Act 1986;*[223]
- *Racing and Betting Act 1980;*[224]
- *State Counter Disaster Organsiation Act 1975,*[225] *and*
- *Local Government (Queen Street Mall) Act 1981.*[226]

- **part 11 of the bill ("move–on" powers)**

11.156. Clause 83 in part 11 provides for new powers to direct persons to "move–on" from prescribed places when either the behaviour or the presence of the person causes a police officer to reasonably suspect that it would:

- cause reasonable persons anxiety; or
- is disorderly or offensive; or
- disrupts the orderly conduct of an event; or
- when a complaint is made by the proprietor that the behaviour or presence of the person interferes with business.

222 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

223 Section 8.

224 Section 160

225 Section 14B.

226 Section 36.

11.157. A police officer can give a reasonable direction to such persons, which includes asking them to leave and not return within 24 hours.[227] Failure to comply without a reasonable excuse is an offence.[228]

11.158. Clause 85 states that part 11, division 1 (directions to move-on) does not apply to an authorised public assembly under the *Peaceful Assemblies Act 1992*. The committee notes that unauthorised public assembly is also lawful and it is therefore arguable that it should similarly be excluded from the operation of division 1.

11.159. The committee notes that the power to declare a place a "notified area" under cl. 86 contains no criteria by which such a decision is to be made by the minister, although the minister must ensure that any requirements prescribed under a regulation have been complied with. There also appears to be no mechanism for removing a place from the list of "notified areas" when it no longer needs to be so classified. This may lead to a steady increase in the number of notified areas over time.

11.160. The committee requests that the minister consider exempting authorised and unauthorised assemblies, which are both lawful, from the operation of part 11, division 1.

11.161. The committee notes that there are already a large number of statutes containing these powers.[229] It appears to the committee that this bill may enlarge police powers to direct persons to "move–on". As the power to move persons on in notified areas affects the rights of the persons concerned, the committee is of the view that places should be made "notified areas" by an Act of Parliament rather than by subordinate legislation.

11.162. The committee requests that the minister provide information in elation to these issues.

Does the legislation have sufficient regard to the rights and liberties of individuals?[230] (requiring name and address details)

- **the current law**

11.163. There is no power to demand the name and address of a suspect at common law,[231] however, a large number of statutes in Queensland allow such powers.[232]

227 Clause 88.

228 20 penalty units or 6 months imprisonment – cl. 120.

229 PCJC Report No 23B supra at pp 270 to 275.

230 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

♦ **clause 23**

11.164. Clause 23 of the bill empowers a police officer to require the name and address of a person found committing an offence or who is reasonably suspected of committing an offence. It also empowers them to demand it of any person who is a potential witness to an indictable offence because they were near the place at the time.[233]

11.165. The police can also demand evidence of the name and address provided.[234] It is an offence to fail either to provide the name and address or to provide evidence of the name and address, without a reasonable excuse.[235]

11.166. The law currently allows police to demand the name and address of suspects in circumstances specified by a number of Queensland statutes. The bill, however, introduces a power which is generally applicable to suspects. It also extends these powers to generally cover potential witnesses for the first time.

11.167. In the committee's view the bill, therefore, trespasses on the common law right to silence currently enjoyed by potential witnesses and suspects (in circumstances not presently governed by statute).

11.168. The committee refers to Parliament the question of whether cl. 23 has sufficient regard to the rights and liberties of individuals.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[236]

♦ **prevention of offences**

– **the current law**

11.169. There are presently some powers to arrest someone found lying or loitering at night under circumstances that afford reasonable grounds for believing that they are about to commit an offence.[237] In addition a power of arrest is arguably exercisable for an anticipated breach of the peace at common law which would include assault or malicious damage.

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231 *Trobridge v Hardy* [1955] 94 CLR 147.

232 See CJC Report on Police Powers Vol III *Arrest Without Warrant, Demand Name and Address and Move-On Powers,* November 1993 Appendix 7 Table 11.

233 Clause 23(1)(c). See also *Commonwealth Crimes Act* s. 3B.

234 Clause 23(3).

235 Clause 23(5) – maximum penalty, 10 penalty units.

236 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

237 Section 546 (f) Criminal Code.

– **clause 121 of the bill**

11.170. This clause purports to make it lawful for a police officer to take the steps the police officer considers reasonably necessary to prevent the commission of an offence. The explanatory memorandum offers no guidance as to what is intended by this clause.

– **the committee's observations on the power to prevent offences**

11.171. It appears to the committee that this clause is on its face so wide that it would make lawful almost anything no matter how unreasonable or unlawful provided that it was in the view of the police officer reasonably necessary to prevent the commission of an offence. This point was also raised with regard to cl. 89 above.

11.172. In addition, it appears that the clause also requires no nexus with the offence in terms of time or space. The committee refers to the general duty imposed on all police officers to prevent the commission of offences.[238] It appears that this clause could be interpreted to make anything done to fulfil that general duty lawful provided it is considered by the individual police officer to be reasonably necessary.

11.173. As with the point made at paragraph XX above, it appears to the committee that cl. 121 imposes a subjective test (judged against the views of the individual police officer) rather than an objective test (measured against the views of the "reasonable man"). It seems that this objective test could be argued to make even unlawful actions by police officers to be lawful. Again, it appears to the committee that an objective test would protect individuals from the actions of potentially unreasonably police officers. The committee refers these comments to the minister and seeks clarification from him on the purpose and intended operation of cl. 121 and particularly the phrase "take the steps the police officer considers reasonably necessary".

11.174. The committee also requests that the minister considers amending cl. 121 to incorporate a reasonable nexus with a particular offence.

Does the legislation have sufficient regard to the rights and liberties of individuals?[239]

– **clause 104 (recording of confessions and admissions)**

11.175. Clause 104(2) states that a confession or admission is admissible as evidence only if it is written or electronically recorded as required in cl. 104.

238 *Duncan v Jones* [1936] 1 KB 218 at 277 per Viscount Kave L.C.

239 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

11.176. There does not, however, appear to be anything in cl. 104 requiring confessions and admissions to be recorded unless not reasonably practicable.[240] The committee has been informed that this is currently the case pursuant to internal police administrative guidelines.

11.177. The committee seeks information from the minister as to whether confessions or admissions are currently electronically recorded wherever reasonably practicable. If that is the case the committee requests that the minister consider amending cl. 104 to ensure that this safeguard of the rights of suspects is continued.

Does the legislation have sufficient regard to the rights and liberties of individuals?[241] (use of force against individuals in critical situations)

– **the current law**

11.178. Under the Criminal Code s 256 force that is intended to cause death or grievous bodily harm can only lawfully be used against a person when it is reasonably suspected the person has committed an offence carrying the penalty of life imprisonment and the person takes flight while being lawfully arrested. The deadly force can only be used to prevent the escape of the person if it is reasonably necessary and the person has been called on to stop.

– **clause 127 of the bill**

11.179. Clause 127 extends the lawful use of reasonably necessary deadly force to the case where the person is reasonably suspected to be committing or about to commit an offence punishable by life imprisonment. If the police officer reasonably believes that deadly force is necessary, cl. 127(5) requires the officer, if practicable, to call on the person to stop doing the unlawful act.

– **the committee's observations on the use of force against individuals in critical situations**

11.180. It appears to the committee that cl. 127 considerably enlarges the power presently available to police. Not only does it extend the power to use force likely to cause grievous bodily harm or the person's death in the case of someone who is about to commit the offence, it also only requires that they be called on to stop if "it is practicable". It seems that the clause is capable of the construction that provided the potentially deadly force is objectively necessary, the police officers do not themselves have to believe or suspect that it is necessary. This would suggest that it may not, to the knowledge of the police officer, actually be necessary to use potentially deadly force, yet the resultant

240 See, for example, s. 23V of the *Commonwealth Crimes Act* which requires the written record of interview to be confirmed by a tape recording.

241 Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

grievous bodily harm or death will still be lawful. Although this may not be the intention of the clause, it may be the effect of it.

11.181. Clause 127 also extends the power to the case where a person is reasonably suspected of doing or being about to do something to a person which is likely to cause either death or grievous bodily harm to them, and they reasonably suspect that they can not prevent the death or grievous bodily harm other than by using potentially deadly force. It is lawful to use potentially deadly force provided it is reasonably necessary (that is, objectively necessary) to do so. In this case the police officer certainly does not have to believe that it is necessary to cause grievous bodily harm or death. They need only to suspect that it is necessary.

11.182. The committee requests that the minister consider amending this clause to require a police officer to believe that it is necessary to use the objectively reasonable force.

12. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 1997

Background

12.1. The Honourable R E Borbidge MLA, Premier, introduced this bill into the Legislative Assembly on 29 October 1997.

12.2. This bill amends a number of Acts of Parliament. The objective of this bill to improve the quality of the statute law of Queensland by repealing redundant provisions and rectifying drafting errors.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[242]

– **Schedule (amending s. 172(7) of the Transport Operations (Passenger Transport) Act 1994)**

12.3. The schedule to this bill amends s. 172(7) of the *Transport Operations (Passenger Transport) Act 1994* (the Act) to correct the date on which s. 172 of the Act expires.

12.4. Section 172 of the Act preserves a public passenger transport service operator's entitlement to receive from the State an interest rate subsidy under s. 17(1)(a) of the repealed *Urban Passenger Service Proprietors Assistance Act 1975*.[243] The subsidy helps a service operator meet interest payment on moneys borrowed to purchase omnibuses.

12.5. Section 172(5) of the Act provides that an agreement to pay an interest rate subsidy must not be entered into under the Act after 7 November 1999.[244] However, s. 172(7) of the Act provides that s. 172 expires on 30 November 1996. Section 172(7) therefore casts doubt on the validity of s. 172(5) that envisages the possibility of further agreements to pay interest rate subsidies being entered into before 7 November 1999.

12.6. The proposed amendment extends the expiry date of s. 172 to 7 November 1999 and this amendment is taken to have commenced on 30 November 1996.

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242 Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

243 Repealed by s. 144 and schedule 4 of the *Transport Operations (Passenger Transport) Act 1997.* Section 172(6) of the Act provides that s. 17 of the repealed *Urban Passenger Service Proprietors Assistance Act 1975* continues to have effect for the purposes of the interest subsidies.

244 Under s. 52 of the *Transport Operations (Passenger Transport) Act 1997,* the chief executive may enter into a service contract with an public passenger service operator for the provision of financial assistance in situations where the minister has approved the basis of the financial assistance.

12.7. The committee always takes care when examining provisions of legislation that have retrospective effect, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue.

12.8. The explanatory note to this proposed amendment provides the following reasoning.

> *The section [172] preserves certain financial arrangements that were available before the commencement of the section. It was intended that the section would continue until 7 November 1999. However, an incorrect date of 30 November 1996 was inserted instead. The amendment corrects the error and permits the financial arrangements to continue.*

12.9. The committee notes that the proposed amendment is intended to rectify drafting error so as to preserve arrangements made after 30 November 1996 and before 7 November 1999 to pay interest rate subsidies.

12.10. It appears to the committee that this proposed amendment has a beneficial effect on public passenger service operators. The committee therefore does not object to this proposed amendment.

12.11. Although the committee does not object to the rectification of the drafting error, it expresses doubt as to whether the proposed amendment may effectively amend expired s. 172 without setting out the expired provision in full in the bill and retrospectively extending the validity of expired s. 172 to 7 November 1999. The committee brings this observation to the attention of Parliament.

13. TWEED RIVER ENTRANCE SAND BYPASSING PROJECT AGREEMENT BILL 1997

13.1. The Honourable B G Littleproud MLA, Minister for Environment, introduced this bill into the Legislative Assembly on 29 October 1997.

13.2. The object of this bill is to ratify agreements made between the Queensland government and the New South Wales government to implement the Tweed River Entrance Sand Bypassing Project. This project is aimed at implementing a co-operative approach between the two States in the tasks of maintaining the southern Gold Coast beaches and improving and maintaining the navigability of the Tweed River entrance.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[245]

– **General comment**

13.3. This bill incorporates commercial agreements with other jurisdictions, therefore, once it is passed it will be what the committee has termed an "agreement Act". Many agreement Acts contain a "Henry VIII clause" that provides for the agreement contained in the schedule to be flexibly amended by subordinate legislation, whilst still continuing to have the force of principal legislation.

13.4. This bill incorporates an agreement but does not contain such a clause. The explanatory notes confirm that *any amendment to the terms of the Deed of Agreement will require an Amendment Act*.[246]

13.5. The committee commends the minister on the introduction of an agreement Act that does not contain a "Henry VIII clause".

13.6. The committee re-affirms its opposition to the use of "Henry VIII clauses" in Queensland legislation and urges ministers to remove offensive "Henry VIII clauses" from the statute book.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[247]

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245 Section 4(4)(c) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

246 Explanatory notes at p. 3.

– **clause 7**

13.7. Clause 7 of the bill provides that proceedings for injunctive relief may not be brought by any person in relation to a matter arising in connection with the Tweed River Entrance Sand Bypassing Project.

13.8. The explanatory notes provide the following justification for this exclusion of interim relief.

> *Clause 7 provides that a proceeding for an injunction may not impede the project, thus ensuring that the State is able to carry out its obligations under the Deed of Agreement to secure the execution and enforcement of the provisions of the agreement.*[248]

13.9. The committee notes that no other types of relief are excluded by the legislation. For example, a person may still bring an action for damages for any detriment suffered as a result of the implementation of the project.

13.10. The committee refers to Parliament the question of whether this administrative power is subject to appropriate review.

247 Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

248 Explanatory notes at p. 5.

SECTION B

COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

> *... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted*[249]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[250] of a provision may therefore be considered as extrinsic material in its interpretation.

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249 s. 14B(3)(c) Acts Interpretation Act 1954.

250 The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s. 15 *Acts Interpretation Act 1954.*

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

14. CENTRAL QUEENSLAND UNIVERSITY BILL 1997; GRIFFITH UNIVERSITY BILL 1997; QUEENSLAND UNIVERSITY OF TECHNOLOGY BILL 1997; UNIVERSITY OF QUEENSLAND BILL 1997; AND UNIVERSITY OF SOUTHERN QUEENSLAND BILL 1997

Background

14.1. The Honourable R J Quinn MLA, Minister for Education, introduced these bills into the Legislative Assembly on 8 October 1997. At the time of printing of this digest, the bills had not yet been passed.

14.2. The committee commented on these bills at pages 1 – 8 of its Alert Digest No. 11 of 1997. The minister's response to those comments is referred to below and is reproduced in full in Appendix A to this digest.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[251]

– **Part 6[252] (Central Queensland University Bill 1997)**

14.3. In its last digest, the committee expressed concern about the use of the word "statutes" to describe delegated legislation made by a university council. The committee concluded that this terminology was ambiguous and had the potential to cause confusion between the university statutes and principal Acts of Parliament.

14.4. The committee noted that when this issue was previously raised with the minister, in relation to the *James Cook University of North Queensland Bill 1997*, he had expressed the view that there was no ambiguity or confusion and that, as the use of the term "university statutes" is a traditional practice for public universities in Queensland, he did not see any need to change this.

14.5. In his response to the committee, the minister provided the following information:

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251 Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

252 Pt. 6 – *Griffith University Bill 1997*; Pt. 6 – *Queensland University of Technology Bill 1997*; Pt. 6 – *University of Queensland Bill 1997*; Pt. 6 – *University of Southern Queensland Bill 1997*.

I note the Committee's comment on the use in the explanatory notes to the Bills of the term "subordinate legislation" following the word "statute". The purpose of this was not, as suggested by the committee, to distinguish university statutes from university Acts, but to clarify for readers the intention that the statutory instruments called university statutes which are made by the governing bodies of universities are subordinate legislation, and as such they may only be made about matters which are legislative in character.

It has been traditional practice for public universities in Queensland and in some other States of Australia to use the term "university statutes" for subordinate legislation made by the universities' governing bodies and I do not see any need to change this.

14.6. The committee thanks the minister for the information provided, however, it maintains the view that using the term "statute" for subordinate legislation has the potential to cause confusion with principal Acts of Parliament.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[253]

– **clause 15(4)[254] (Central Queensland University Bill 1997)**

14.7. In its report to Parliament, the committee noted that cl. 15(4) allowed the university council to override the process of election for elected members of the university council. It concerned the committee that there appeared to be no criteria to limit the exercise of this discretion by the council.

14.8. The therefore committee requested that the minister consider further defining the exercise of this power by the university council.

14.9. The minister responded to this suggestion as follows:

The same provisions which provide for these discretionary powers were also included in the James Cook University Bill 1996. Although the Committee scrutinised that Bill it did not make any comment on these provisions.

The existing legislative provisions governing the representation of student convocation members on governing bodies are confusing and inconsistent. The existing Acts categorise these members as "appointed" members of the senate or council, and they currently authorise the relevant bodies (convocation or the

253 Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

254 cl. 15(4) – *Queensland University of Technology Bill 1997*; cl. 15(5) – *University of Queensland Bill 1997*; cl. 15(5) – *University of Southern Queensland Bill 1997*.

student body) to "appoint" (e.g. The University of Queensland convocation) or "to appoint or elect" (in the case of other universities).

The actual process used by the body concerned in each case must be in accordance with a university statute (made by the governing body of the university) – therefore, the decision as to whether the members are elected or appointed as "elected members" of the governing body currently resides with the governing body (the council or the senate).

For example, while convocation members of the University of Queensland are described in the existing legislation as "appointed", the senate actually prescribes by university statute that an election will be the process of appointment.

Whereas in the case of the QUT student guild, the current Act permits student members of the university council to be "elected or appointed" and the university council prescribes by university statute that the process will be appointment by the council of the guild.

When the new Bills were drafted, considerable attention was paid to the merits of prescribing more clearly the various categories of membership of governing bodies. Under this regime, the term "appointed members" is restricted to those members appointed by the Governor in Council. Members representing the university community itself – staff, students, convocation – are categorised as "elected members" , although, as pointed out above, there currently exists discretion for the council or senate to authorise (currently by statute) either an election or appointment process for the convocation and student members in those categories.

It was not the purpose of the present review of legislation to force universities to make major changes in existing practice authorised by the governing bodies. The discretion provided in clause 15(4) of the Bill does no more than reflect the discretion which governing bodies currently have to authorise (by statute) the process by which representatives of convocation/alumni organisations, or student organisations, become "elected members" of the governing body.

This discretion which is currently authorised by the existing Acts but subject to making of a university statute by the governing body will under the new Acts now reside directly with the governing body rather than be subject to the making of a university statute by the governing body.

A governing body would, in any case, not be able to make a change in the current arrangements other than by formal resolution, which would necessarily expose the matter to debate by representatives of the convocation or the student body, and to negotiation with those bodies.

14.10. In relation to the point that the committee did not raise this point in its earlier report on the *James Cook University Bill 1997*, the committee does not regard itself as being restricted by its earlier comments. It has not waived the right to report on new issues that have been brought to its attention.

14.11. The committee thanks the minister for the information provided.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?

– **clause 57[255] (Central Queensland University Bill 1997)**

14.12. Clause 57(2)(c),[256] of the bill permits the university council to deal with matters relating to the disciplining of students in a university statute.

14.13. Under the bills, appeals against disciplinary decisions are to be made to the university council rather than to an independent body. The committee expressed the view that this may result in a perception that the decision–maker lacks impartiality.

14.14. In response, the minister provided the following information:

> *The universities will be required to develop new university statutes on student discipline under the new Act. As previously indicated to the Committee it is my intention to draw this concern to the universities for consideration in the drafting of these new university statutes.*

14.15. The committee thanks the minister for undertaking to bring its concerns about appeals from decisions relating to student discipline to the attention of the universities. This is an issue which the committee will be able to review when the relevant university statutes are tabled in Parliament.

Does the legislation have sufficient regard to fundamental legislative principles?

– **clause 58[257] (Central Queensland University Bill 1997)**

14.16. In its report to Parliament on these bills, the committee noted that university statutes, being exempt instruments, did not have to be prepared by the Office of the Queensland Parliamentary Counsel (OQPC). It again requested that the minister consider requiring that draft university statutes be reviewed by the OQPC and certified as meeting legislative standards as set out in the *Legislative Standards Act*.

14.17. The minister provided the following information on this point:

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255 cl. 60 – *Griffith University Bill 1997*; cl. 56 – *Queensland University of Technology Bill 1997*; cl. 52 – *University of Queensland Bill 1997*; cl. 56 – *University of Southern Queensland Bill 1997*.

256 cl. 60(2)(c) – *Griffith University Bill 1997*; cl. 56(2)(c) – *Queensland University of Technology Bill 1997*; cl. 52(2)(c) – *University of Queensland Bill 1997*; cl. 56(2)(c) – *University of Southern Queensland Bill 1997*.

257 cl. 62 – *Griffith University Bill 1997*; cl. 57 – *Queensland University of Technology Bill 1997*; cl. 53 – *University of Queensland Bill 1997*; cl. 57 – *University of Southern Queensland Bill 1997*.

The decision that university statutes be no longer drafted by the OPC or approved by the Governor in Council resulted form a number of factors. I outlined these at length in my response to the Committee on the James Cook University Bill.

However, in light of the concerns expressed by the Committee on this matter on that occasion, I am writing to universities to propose a protocol for the review of statutes, by at least the Office of Higher Education and the Crown Solicitor prior to their being made by the university governing bodies. The purpose of this review will be to ensure that the draft statute is appropriate, clear, sufficient, effective and fair, including confirmation that the proposed statute:

(a) complies with the Act governing the university in question;

(b) complies with any other law impacting on the university; and

(c) in particular does not infringe fundamental legislative principles, or any guidelines which the Office of Parliamentary Counsel may issue about exempt instruments under the Legislative Standards Act 1992.

This process will ensure that, in addition to the input of universities' own legal advisers and governing bodies, a level of government scrutiny is exercised before the publication of university statutes and their tabling in the Parliament. I continue to support the preparation of guidelines by the Office of the Parliamentary Counsel to assist persons drafting exempt instruments.

14.18. The committee thanks the minister for the information provided.

14.19. The committee notes the ministers proposal to introduce a protocol for the review of statutes by the Office of Higher Education and the Crown Solicitor, prior to their being made by the university governing bodies, to ensure that the drafting is a of high standard and consistent with the *Legislative Standards Act*.

14.20. In the committee's view, the protocol proposed by the minister will provide a more effective mechanism for ensuring that the university statutes comply with the fundamental legislative principles. It thanks the minister for addressing its concerns.

14.21. The committee also requests that the minister notify it of the outcome of this proposal.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[258]

[258] Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

– **clause 9[259] of schedule 1 (Central Queensland University Bill 1997)**

14.22. In its report on this clause, the committee expressed concern about several matters relating to the power to seize a vehicle and have it removed under certain circumstances.

14.23. The committee invited the minister to comment on the points raised by it in paragraph 1.45 of Alert Digest No. 11 of 1997. The committee's points are set out below with the minister's response to each point quoted in italics.

- Removing a vehicle may leave the driver without transport in potentially urgent or stressful circumstances which may expose them to danger (for example by being left without transport late at night). The committee is of the view that the legislation should require consideration of driver safety and convenience before these powers are exercised.

  ... universities provide wide-ranging security services, which include such devices as after hours security presence, and emergency call buttons. A person is no more likely to be left in danger on a university premises late at night if their vehicle has been removed than they would be if their vehicle has been towed away in the city late at night, particularly as emergency assistance is available on campus.

- The notice provisions do not allow for the vehicle's owner/driver to know what has happened to the vehicle immediately—and not until a written notice is sent up to some 14 days later. In the committee's opinion there are more effective options available for notifying drivers of impounded vehicles. For example, through the use of weighted signs left where vehicles were allegedly illegally parked and/or the prominent display of a 24 hour "hotline" that can be called for information on impounded vehicles.

  ... while the legislation does not specify the detailed administrative process for seizing a vehicle, universities do have administrative procedures in place for handling such matters. These include such arrangements as a prior warning, attached to the vehicle for a specified time. In any case, fourteen days is the maximum period for notification, and is only likely to be necessary where the university has difficulty establishing ownership.

- It appears that neither the bill nor the existing Act provides a means by which a decision made pursuant to cls. 9 or 10 of schedule 1 could be challenged or reviewed. The committee is not persuaded by views previously expressed by ministers that it is impractical to make such decisions subject to appeal – it seems to be good policy to ensure that legislation is being properly enforced and officials are not exceeding their powers.

  ... I have given consideration to a mechanism by which a person might have prompt review of a decision to remove or impound a vehicle, and the

[259] cl. 9 – *Griffith University Bill 1997*; cl. 9 – *Queensland University of Technology Bill 1997*; cl. 9 – *University of Queensland Bill 1997*; cl. 9 – *University of Southern Queensland Bill 1997*.

requirement to pay for the cost of seizing, removing, holding and returning the vehicle. While it is very difficult to establish any device which would provide a timely form of review of such decisions, I draw the Committee's attention to the wording of clause 9(6) of Schedule 1 of for example the Central Queensland University Bill 1997.

There is a subtle but important difference between these provisions and those in the James Cook University Bill, in that they give the university discretion as to whether or not it will demand payment for the cost of seizing the vehicle.

The words "must pay the costs of seizing ..." which were used in the James Cook University Bill have been replaced in each of the 5 Bills with the words "must pay to the university the amount demanded by it for the cost of seizing ..."

This provides an avenue for a person to make a case for special consideration of their circumstances at the time, when the decision to remove the vehicle was made.

For example, the university after considering the extenuating circumstances that existed at the time of the offence may then decide that it will not demand any payment for the cost of removing the vehicle.

I also wish to inform the Committee of the intention for each university's traffic offences corresponding penalties for each individual offence to be included in the Justices Regulation 1993 so that Part 4A of the Justices Act 1886, which contains provisions about infringement notices and includes "owner onus" and SETONS, will then apply to the university's traffic offences.

The regulation will refer for example, to the offence under section 6(2) and the various offences in relation to regulatory notices under section 7(2) in Schedule 1 of the Central Queensland University Act 1997.

14.24. The committee thanks the minister for this feedback on points previously raised.

15. TRANSPORT LEGISLATION AMENDMENT BILL 1997

Background

15.1. The Honourable V G Johnson MLA, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 7 October 1997. As at the date of printing this digest, this bill had not yet been passed.

15.2. The committee commented on this bill at pages 34 – 45 of its Alert Digest No. 11 of 1997. The minister's response to those comments is referred to below and is reproduced in full in Appendix A to this digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[260]

– **clause 36 (proposed s. 72 of the *Traffic Act 1949*)**

15.3. In its last digest, the committee observed that proposed s. 72 might have the effect of preventing a party to a "wheel clamping" agreement, as invalidated by proposed s. 60, from recovering any money payable for services already provided before the commencement of proposed s. 72. The committee sought clarification from the minister on this point.

15.4. The minister provided the following information.

> *Does section 72 prevent the recovery of money for services provided before the commencement of this secton?*
>
> *Short answer: No.*
>
> *Section 72 does not create any retrospectivity in relation to agreements which currently exist between a property owner/occupier and the providers of parking management which includes the detainment of illegally parked vehicles by the attachment of wheel clamps or detention of the vehicle in some way. It clearly states that, upon commencement section 60 (Clause 34 of the Bill) of the Traffic Act "is of no legal effect to the extent to which it authorises, or purports to authorise, a person to–." Therefore agreements which include the use of wheel clamps are valid agreements until the commencement of clause 34 (section 60).*
>
> *Does section 72 require the repayment of money received after the commencement of this section for services already provided?*
>
> *Short answer: Yes.*

[260] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

Section 72(2) must be read in conjunction with section 72(1) and relates only to any money received prior to the commencement of the section for services to be rendered after the commencement of the section (in other words "prepaid" service payments). It also requires the repayment of any money paid for these services after the commencement of the section.

This section mirrors section 90H – Wheel clamping agreements of the Victorian Road Safety (Wheel Clamping) Act 1996 – Act No. 25/1996. There are no reported problems known to Queensland Transport with this provision in Victoria.

15.5. The committee thanks the minister for providing additional information to clarify the intended effect of proposed s. 72.

15.6. The committee refers to Parliament the question of whether proposed s. 72 should be better drafted to accurately reflect the position contained in the minister's response.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[261]

– **clauses 113 & 119 (proposed ss.26(1)(d)(e) and 46A of the *Transport Operations (Road Use Management) Act 1995*)**

♦ **Power to enter a place (clause 113)**

Proposed s. 26(1)(d)

15.7. The committee observed that proposed s. 26(1)(d) empowers an authorised officer to enter a dwelling house to alleviate a dangerous situation involving dangerous goods. In response to this observation, the minister replied as follows.

This provision empowers an authorised officer to enter a place which includes a dwelling house. As the Committee has noted, this power is justified on the basis that it is to alleviate a dangerous situation. No further comment appears necessary.

15.8. The committee thanks the minister for confirming its interpretation of the effect of proposed s. 26(1)(d).

♦ **Power to seize certain vehicles for sale (clause 119)**

15.9. The committee expressed the view that the authorised officer's power under proposed s. 46A to seize vehicles for sale should be justified. The committee queried whether proposed s. 46A should require the authorised officer to attempt

261 Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

to contact the last registered owner of a vehicle at the last known address before seizing the vehicle.

15.10. The minister responded as follows.

The reason for not having included this requirement is that for vehicles offered for sale in locations impacted by Section 46A (roadside locations), in addition to the Safety Certificate, there is a requirement for the owner of the vehicle or their agent to display beside the Safety Certificate their name and address or phone number. This is to enable authorised officers to make contact in accordance with the requirements of Section 46A(8) which outlines the reasonable attempts an officer must make to contact the owner of the vehicle or their agent. These attempts are: To make reasonable inquiries at an address indicated on or near the vehicle not more than 10 kilometres from the vehicle; or to make a telephone call to a telephone number displayed on or near the vehicle.

The person who identifies themselves as the owner of the vehicle will have either transferred the registration into their own name or they will have left it, perhaps intentionally, in the name of the previous owner.

In the former case, a registration search will reveal the last registered name to be the same as that displayed on the vehicle. In the latter case, it will reveal that the vehicle was sold, but the registration had not been transferred leaving the previous owner responsible for any parking and similar offences incurred by the vehicle. Apart from this, it is not considered that the previous owner will have any interest in what the person they sold the vehicle to is now doing with the vehicle.

In such circumstances, there would therefore seem little merit in imposing additional checks to be made by enforcement officers.

If the Committee's concerns are in the area of sales of vehicles shortly after they [were] *stolen, there would be some legitimacy in contacting the last registered owner. However, removing the vehicle to a place of impounding may in fact give authorities sufficient time to reveal that the vehicle is stolen.*

It should also be noted that while technology is currently available to both police and transport officers to identify the owner of the vehicle, that person may live potentially hundreds of kilometres away from where the vehicle is being offered for sale e.g. a vehicle stolen in Bundaberg and being offered for sale on the Gold Coast.

For the small additional safeguard that would therefore be built into the legislation by requiring contact with the last registered owner of the vehicle, it is considered completely impractical in an enforcement sense. Another argument against the proposal is that it is reasonable to expect that the phone number or address displayed on the vehicle belong to the person in control of the vehicle. In addition these details can be cross-checked against the particulars on the Safety Certificate.

15.11. The committee thanks the minister for providing additional information on this issue.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[262]

– **clauses 121 & 122 (proposed ss. 50A and 51D of the *Transport Operations (Road Use Management) Act 1995*)**

15.12. The committee noted that there does not appear to be a mechanism for the review of a remedial action or a dangerous situation notice. It therefore sought information from the minister on this matter. In response, the minister provided the following information.

> *Clause 122 of the Transport Legislation Amendment Bill amends Section 50 of the Transport Operations (Road Use Management) Act 1995 to allow for the giving of Remedial Action Notices. The decision to impose a Remedial Action Notice is not a reviewable decision covered by the general appeal provisions of the Transport Operations (Road Use Management) Act 1995.*
>
> *The purpose of the Remedial Action Notice is to prevent disaster. The decision to impose a Remedial Action Notice as a reviewable decision subject to appeal would be directly counter to the safety aims of the Remedial Action Notice system.*
>
> *Persons breached for failing to comply with a Remedial Action Notice can appeal to the Magistrates Court as they will either be issued a Penalty Infringement Notice (which gives the option of seeking a review by the Magistrates Court) or, if a higher penalty is imposed commensurate with a very serious breach, they will be dealt with directly by the Magistrates Court.*

15.13. The committee thanks the minister for providing additional information in relation to a remedial action notice. The committee requests that the minister confirm whether his response equally applies to a dangerous situation notice.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[263]

- **clause 122 (proposed s. 51E of the *Transport Operations (Road Use Management) Act 1995)***

15.14. The committee sought clarification from the minister as to whether a person who is asked by an authorised officer to help in a dangerous situation may

[262] Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

[263] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

independently decide to exercise the powers of the authorised officer to the extent necessary to prevent the danger. The minister clarified as follows.

> *This is intended to allow persons with expertise in the handling or neutralisation of dangerous goods to participate in the process of responding at a dangerous situation with enough freedom of action to make a reasonable contribution to preventing danger. There are inbuilt limitations to the use of this power. Firstly, the authorised officer must reasonably believe the person has appropriate knowledge and experience to be able to help. Secondly, the powers apply only to the extent reasonably necessary for the person to help.*
>
> *In the case where a bystander is asked to help keep members of the public away from the area of the dangerous situation, or to stop traffic, they would be taken to have the powers of an authorised officer to the extent reasonably necessary to help by carrying out the particular task.*
>
> *It is exceedingly likely that a person who is asked to help will have no idea of the extent of the powers of an authorised officer. Thus the decision to exercise these powers would not arise. Authorised officers will be instructed to be specific about the kind of help that is wanted when a person is asked to help.*

15.15. The committee thanks the minister for providing additional information on the effect of proposed s. 51E. In the light of the minister's response, the committee refers to Parliament the question of whether proposed s. 51E should expressly require the authorised officer to clearly specify the kind of help needed when the officer asks a person to help in the dangerous situation.

Does the legislation provide appropriate protection against self-incrimination?[264]

- **clause 122 (proposed s. 51C of the *Transport Operations (Road Use Management) Act 1995)***

15.16. The committee noted the requirement for a person not to provide "false and misleading" statements, and "false, misleading and incomplete" documents when asked by an authorised officer. The committee queried whether proposed s. 51C provided adequate protection against self-incrimination.

15.17. The minister provided the following explanation.

> *The provisions allow for substantial but not unconditional indemnity for a natural person but do allow information obtained to be used in actions against corporate persons. The explanatory notes make all the necessary justification for the proposed provisions – which are recognised to be part of the nationally uniform dangerous goods legislation prepared as part of the 1982 Heads of Government Agreement.*

[264] Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

15.18. The committee notes the information provided by the minister and refers to Parliament for consideration the question of whether the protection against self-incrimination is adequate under proposed s. 51C.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[265]

– **clauses 124 & 129 (proposed ss. 57, 57A, and 57B of the *Transport Operations (Road Use Management) Act 1995*)**

15.19. The committee expressed concern that there may be adequate justifications for proposed ss. 57, 57A and 57B that reverse the onus of proof in proceedings against executive officers of corporations, representatives, and influencing persons.

15.20. The minister provided the following information to justify the provisions.

> *The provisions require an executive officer in such a situation to prove that: If the officer was in a position to influence the conduct of a driver or other person in relation to the act or omission, the influencing person exercised reasonable diligence and took reasonable steps to prevent the act of omission, or; the influencing person was not in a position to influence the conduct of the driver or other person in relation to the act or omission.*
>
> *For an executive officer to be placed in this situation it must first be established that an offence was committed by a driver or other person in control of a vehicle [s. 57B(2)]. Only after this fact has been established (not just alleged) can proceedings against executive officers of corporations be commenced.*
>
> *It is believed that the matters an executive officer may be required to prove are reasonable.*

15.21. The committee thanks the minister for providing additional information.

15.22. The committee refers to Parliament the question of whether proposed ss. 57, 57A and 57B are justified and have sufficient regard to the rights and liberties of individuals.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[266]

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265 Section 4(3)(d) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

266 Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

- **clause 129 (proposed s. 79L of the *Transport Operations (Road Use Management) Act 1995)***

15.23. The committee sought clarification from the minister as to whether proposed s. 79L protects a helper in a dangerous situation from civil claims if the helper has helped honestly and in good faith (yet still negligently).

15.24. The minister responded as follows.

> *This provision substantially reflects the Commonwealth provision, differing in that it uses the expression "and without negligence" whereas the Commonwealth provision uses the expression "and in good faith". This expression has been used to remain consistent within the Act [refer s. 83(2) of the Transport Operations (Road Use Management) Act] and to remain consistent with other legislation, viz the Law Reform Act 1995 which uses similar phrasing in relation to help provided at accidents by persons with medical training.*
>
> *A consequence of this difference is that a person who acts negligently, whether in good faith or not, would not have the benefit of immunity from civil claims.*
>
> *With regard to justifying the immunity offered by this provision, it is believed that there are community benefits from having persons willing to volunteer to help in dangerous situations, knowing that in doing so they have a substantial immunity from civil claims against them for their actions.*

15.25. The committee thanks the minister for providing this additional information. The committee notes the justification given in the minister's response that the community will benefit from having persons willing to volunteer to help in dangerous situations, knowing that in doing so they have a substantial immunity from civil claims.

15.26. The committee notes the minister's confirmation that proposed s. 79L does not fully reflect s. 49(1) of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cwlth) because proposed s. 79L, unlike the Commonwealth provision, does not protect helpers from civil claims for negligent acts or omissions.

15.27. The committee refers to Parliament for consideration whether proposed s.79L represents a substantial immunity that is justified in the circumstances as advocated.

This concludes the Scrutiny of Legislation Committee's 12th report to Parliament in 1997. This digest relates to bills tabled during the week of sittings commencing 28 October 1997.

The committee wishes to thank all departmental officers and ministerial staff for their assistance in providing information to the committee office on bills dealt with in this digest.

Tony Elliott MLA
Chairman
17 November 1997

– APPENDICES –

Appendix A	–	Ministerial Correspondence
Appendix B	–	Terms of Reference
Appendix C	–	Meaning of “Fundamental Legislative Principles”
Appendix D	–	Table of bills recently considered

APPENDIX A - MINISTERIAL CORRESPONDENCE

APPENDIX B – TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established on 15 September 1995 by s. 4 of the *Parliamentary Committees Act 1995*.

Terms of Reference

22.(1) The Scrutiny of Legislation Committee's area of responsibility is to consider—

(a) the application of fundamental legislative principles[267] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[268].

(2) The committee's area of responsibility includes monitoring generally the operation of—

(a) the following provisions of the *Legislative Standards Act 1992*–

- section 4 (Meaning of "fundamental legislative principles")
- part 4 (Explanatory notes); and

(b) the following provisions of the *Statutory Instruments Act 1992*–

- section 9 (Meaning of "subordinate legislation")
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)
- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 10 (Transitional).

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267 "Fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, section 4(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

*** The relevant section is extracted overleaf.**

268 A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, section 50.

APPENDIX C - MEANING OF "FUNDAMENTAL LEGISLATIVE PRINCIPLES"

4.(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.[269]

(2) The principles include requiring that legislation has sufficient regard to–

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation–

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill–

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation–

(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only–

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

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269 Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

APPENDIX D – TABLE OF BILLS RECENTLY CONSIDERED

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Arts Legislation Amendment Bill 1997 Bill No. 70 of 1997	29 October 1997 Not yet passed	• cl. 7 • cl. 21 • part 7	• Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the legislation have sufficient regard to the rights and liberties of individuals? (privacy) • Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		12/97
Central Queensland Coal Associates Agreement Amendment Bill 1997 Bill No. 63 of 1997	28 October 1997 Not yet passed	• cl. 5 • general	• Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")? • Is the content of the explanatory note sufficient?		12/97
Central Queensland University Bill 1997 Bill No. 55 of 1997	8 October 1997 Not yet passed	• part 6 • cl. 15(4) • cl. 57 • cl. 58 • cl. 9 of schedule 1	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • Does the legislation have sufficient regard to fundamental legislative principles? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Crime Commission Bill 1997 Bill No. 78 of 1997	30 October 1997 Not yet passed	• cls. 4(1), 6, 7, 8, 22(1)(d), 24(2), 73(5), 74(6)(b) 76, 93(6), 105(2) & 107(3) • cls. 14 & 78 • cls. 16, 46 & 69(1) • cls. 37, 68, 82(10), 82(12) & 82(16) • cls. 73, 93, 95 & 97 • cl. 76 • cls. 107 & 110 • cls. 75 & 99	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation have sufficient regard to the rights and liberties of individuals? (issues generally arising) • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined? • Does the legislation have sufficient regard to the rights and liberties of individuals? (privacy) • Does the legislation have sufficient regard to the rights and liberties of individuals? (exercise of coercive powers) • Does the legislation have sufficient regard to the rights and liberties of individuals? (availability of appeal) • Does the legislation provide appropriate protection against self-incrimination? • Is the content of the explanatory note sufficient?		12/97
Education and Other Legislation Amendment Bill 1997 Bill No. 68 of 1997	29 October 1997 Not yet passed	• cls. 6 & 21 • cl. 8 • cl. 21 • cls. 53 to 55	• Does the legislation have sufficient regard to the rights and liberties of individuals? • Does the legislation have sufficient regard to the rights and liberties of individuals? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation have sufficient regard to the rights and liberties of individuals?		12/97
Electricity Amendment Bill (No.3) 1997	30 October1996	• cl. 33 & 39 • cl. 39	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?		12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Bill No. 81 of 1997	Not yet passed	• cls. 39 & 64 • cl. 43 • cl. 66(2) & 96 • cl. 80	• Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the legislation confer immunity from proceeding or prosecution without adequate justification? • Does the bill allow the delegation of legislation power only in appropriate cases and to appropriate persons?		
Environmental and Other Legislation Amendment Bill 1997 Bill No. 73 of 1997	29 October 1997 Not yet passed	• cl. 21 • cl. 21 • cl. 35	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? • Does the subordinate legislation contain only matter appropriate to subordinate legislation?		12/97
Griffith University Bill 1997 Bill No. 56 of 1997	8 October 1997 Not yet passed	• part 6 • cl. 60 • cl. 62 • cl. 9 of schedule 1	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • Does the legislation have sufficient regard to fundamental legislative principles? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?	• Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Integrated Planning Bill 1997 Bill No. 75 of 1997	30 October 1997 Not yet passed	• cls. 2.2.7(4), 2.2.16, 2.2.22 & 2.5.2 • cl. 2.6.22 • cls. 3.2.1 & 3.5.6 • cls. 4.4.3 & 4.4.14 • chapter 5, part 3 • cl. 5.8.4 • general	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation provide for the compulsory acquisition of property only with fair compensation? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons? • Does the legislation have sufficient regard to the rights and liberties of individuals? • Does the legislation have sufficient regard to Aboriginal tradition and Island custom?		12/97
Justice and Other Legislation (Miscellaneous Provisions) Bill (No.2) 1997 Bill No. 79 of 1997	30 October 1997 Not yet passed	• cl. 58 • cl. 90	• Does the legislation affect rights and liberties, or impose obligations, retrospectively? • Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?		
Natural Resources and Other Legislation Amendment Bill 1997 Bill No. 77 of 1997	30 October 1997 Not yet passed	• cls. 7, 11, 25(2), 28, 61(2), 70, 130 & 132 • cls. 45 & 48 • cl. 175	• Does the legislation adversely affect the rights, or impose obligations, retrospectively? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation have sufficient regard to the rights and liberties of individuals?		12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Petroleum and Gas Legislation Amendment Bill 1997 Bill No. 67 of 1997	29 October 1997 Not yet passed	• cl. 25	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		12/97
Police Powers and Responsibilities Bill 1997 Bill No. 74 of 1997	30 October 1997 Not yet passed	• cl. 9 • cl. 135 • cls. 17 & 35 • cls. 17 & 27 • cls. 23, 28, 48, 50, 57, 63, 64, 68, 69, 74, 79(5), 104 & 127 • cl. 121	• Does the legislation have sufficient regard to the institution of Parliament? • Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? • Does the legislation have sufficient regard to the rights and liberties of individuals? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way?		
Queensland University of Technology Bill 1997 Bill No. 57 of 1997	8 October 1997 Not yet passed	• part 6 • cl. 15(4) • cl. 56 • cl. 57 • cl. 9 of schedule 1	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • Does the legislation have sufficient regard to fundamental legislative principles? • Does the legislation make individual rights and	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
			liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?		
Statute Law (Miscellaneous Provisions) Bill 1997 Bill No. 69 of 1997	29 October 1997 Not yet passed	• Schedule	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		12/97
Transport Legislation Amendment Bill 1997 Bill No. 54 of 1997	8 October 1997 Not yet passed	• cl. 36 • cls. 113 & 119 • cls 121 & 122 • cl. 122 • cl. 122 • cls 124 & 129 • cl. 129 • general	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation provide appropriate protection against self-incrimination? • Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Does the legislation confer immunity from proceeding or prosecution without adequate justification? • Is the content of the explanatory note sufficient?	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Tweed River Entrance Sand Bypassing Project Agreement Bill 1997 Bill No. 72 of 1997	29 October1997 Not yet passed	• general • cl. 7	• Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?		12/97
University of Queensland Bill 1997 Bill No. 58 of 1997	8 October 1997 Not yet passed	• part 6 • cl. 15(5) • cl. 52 • cl. 53 • cl. 9 of schedule 1	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • Does the legislation have sufficient regard to fundamental legislative principles? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97
University of Southern Queensland Bill 1997 Bill No. 59 of 1997	8 October 1997 Not yet passed	• part 6 • cl. 15(5) • cl. 56 • cl. 57 • cl. 9 of schedule 1	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review? • Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • Does the legislation have sufficient regard to fundamental legislative principles? • Does the legislation make individual rights and liberties, or obligations, dependent on administrative	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	11/97 & 12/97

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
			power only if the power is sufficiently defined and subject to appropriate review?		