SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

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SCRUTINY OF LEGISLATION COMMITTEE

48TH PARLIAMENT
SECOND SESSION

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TABLE OF CONTENTS

SECTION A - BILLS REPORTED UPON

1. CRIMINAL LAW AMENDMENT BILL 1996

Background

1.1. This Bill was introduced on 4 December 1996 by the Honourable D E Beanland MLA, Attorney-General and Minister for Justice.

1.2. The aim of the Bill is set out in the Explanatory Notes:

> *The legislation repeals the unproclaimed Criminal Code 1995 and, in its stead, implements a raft of amendments to the Criminal Code 1899 which are designed to update and streamline that Code.*

General Comment - sufficiently clear and precise drafting?[1]

1.3. The Committee has long interpreted s. 4(3)(k) of the *Legislative Standards Act*[2] as a requirement that the legislation be drafted in "plain language" or "plain English". Legislation which is drafted in "plain English" should be comprehensible to the intended readers, clear, precise and organised in such a way as to enhance its comprehension. In the Committee's view, this provision is designed to ensure that the general public are able to understand the law and how it affects their rights and liberties.

1.4. The Criminal Code (the Code) is one of the most important statutes, affecting the rights and liberties of Queenslanders and governing their lives on a daily basis. There would seem to be few other pieces of legislation which it is desirable to express in language that is easily comprehended by the citizens of Queensland generally rather than by lawyers alone.

1.5. As a general rule, Bills drafted or amended in Queensland over the past few years have been drafted in plain English. In the amendment of the Code, however, there were other relevant considerations on the issue of drafting which are referred to in the following extract of a letter from the Attorney-General:

> *Sir Samual Griffith, Chief Justice of Queensland from 1893-1903, drafted the current Queensland Criminal Code.*
>
> *... Generally most of the provisions of the existing Griffith Code have worked well. Their meaning is clear and understood, having been interpreted over the years by successive appellate courts.*

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1 s. 4(3)(k) of the *Legislative Standards Act*

2 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.

> *(an attempt) to rewrite the entire Code in a modern drafting style ... would only have resulted in a huge increase in the work of this State's Court of Appeal which would have bought increased costs for victims, defendants and the community.*

1.6. The Committee notes that the language of the Code has generally been retained in this Amendment Bill. It also notes, however, that the amendments are, in organisation and structure, more easily comprehensible than the provisions of the original Code. The Committee also recognises that, although it may be desirable for an entire Act to be drafted or redrafted in plain English, an Act that contains both plain English and standard English could lead to confusion.

1.7. Although this Amendment Bill has not been fully drafted in plain English, the Committee notes the observation of the Attorney-General that such a redraft may have introduced doubt as to the meaning of redrafted provisions.

1.8. The Committee therefore takes the view that, in the specific circumstances of this Amendment Bill, arguments justifying deviation from the usual practice of drafting in plain language are sustainable.

General Comment - increased penalties and "tougher" offences.

- **Increased penalties**

1.9. The justified rationale of the criminal law is the application of sanctions that restrict the rights and liberties of those who engage in socially harmful or disruptive behaviour. It protects other citizens whose rights and liberties would be significantly and unjustifiably restricted by a continuation of similar activity by the offender or others. However, despite the justification for the use of such sanctions on deterrence, punishment or the reduction of the opportunity to re-offend, offenders remain citizens in our society with rights and liberties which should not be curtailed more than is necessary for the effective functioning of the criminal justice system.

1.10. As law makers, it is therefore arguable that Parliamentarians should always carefully consider proposals for the increase of penalties under the criminal law to ensure that such increases are proportionate and necessary for the effective operation of the criminal justice system.

1.11. Many penalties have been increased under the *Criminal Law Amendment Bill*. For example, penalties for sex offences and offences against property have been increased substantially. The policy underlying these particular increases was referred to by the Attorney-General in his second reading speech:

> *It is also the Government's view that sentences being imposed and upheld by our courts for sex offences in general, and especially those related to offences*

against children are out of proportion to the criminality involved and out of proportion to the sentences in other cases such as offences of dishonesty.

This Bill sends a clear message to the judiciary that existing lenient sentencing practices in these areas will need to be re-examined.

It also sends a warning to would-be adult sex offenders not to expect sympathy.[3]

...

Generally, for the offence of stealing without circumstances of aggravation the maximum penalty will be increased from 3 to 5 years imprisonment and for the offence of stealing with circumstances of aggravation the maximum penalty will be increased from 7 to 10 years imprisonment.[4]

1.12. In some instances, the penalties have increased substantially. A sample of these increases is set out below.

Section	Offence	Current Maximum Penalty	Proposed Maximum Penalty	Increase in Penalty
75	Threatening violence (at night time)	2 years imprisonment	5 years imprisonment	150%
215	Carnal knowledge of girls (between age 12 and 16)	5 years imprisonment	14 years imprisonment	180%
346	Assaults in interference with the freedom of trade or work[5]	3 months imprisonment	5 years imprisonment	1900%

3 Hon D E Beanland MLA, Attorney-General and Minister for Justice, Second Reading Speech, at pp. 9-10

4 ibid., at p. 17

5 The rights of citizens to take industrial action by, for example, peaceful picketing of a workplace, are well established and have long been recognised in Australia and internationally. These are subject to reasonable regulation to protect the rights of others and this section is among a number of such provisions. The Committee would not condone the physical assault of other persons by those involved in picketing and other activities. There is, however, a danger that if penalties are too high, those engaging in lawful industrial protest without the intent of committing assault (but with the intent to hinder another person's lawful trade or business) may be restrained from exercising their rights. This is especially the case with assaults which, despite the popular misconception, do not require actual touching but can include gestures threatening to apply force. (see definition below).

Definition of "assault" - 245(1) A person who strikes, touches, or move, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an "assault".

364	Cruelty to children under 16	1 year imprisonment	5 years imprisonment	400%
419	Burglary	7 years imprisonment	14 years imprisonment	100%
442	Other fraudulent practices (eg receiving stolen property, obtaining property by passing valueless cheques)	$2000 (corporation), 1 year imprisonment (individual)	$255,000 (corporation), 7 years imprisonment (individual)	12,650% 600%

1.13. This may be contrasted to other sections covering offences that have caused great public concern but have not been increased. The maximum penalty for fraud remains at 5 years (or 10 years if aggravated by a number of factors such as where the offender had been a trustee of the property misappropriated).

1.14. The increase of maximum penalties should not, however, be viewed in isolation. In its consideration of this issue Parliament may also have regard to the following statement by the Attorney-General in his second reading speech on increased penalties for sex offenders, which applies equally to all increased penalties:

> *Of course, nothing being said here is intended to diminish the courts' independence and discretion to impose lenient sentences where they are called for by the facts of a particular case.*[6]

1.15. The Committee therefore notes that although the penalties have been increased, the severity or leniency of the penalty remains a matter within the control of the Judge in each individual case.

- **"tougher" offences**

1.16. In addition to an increase in the maximum penalties applicable to offences, the elements of some offences have been altered to make them "tougher" on crime. By way of example, ss.274 - 279 provide defences against various property offences. Changes have been introduced to these sections to allow persons, in defence of property, to use such force as is reasonably necessary provided that it does not inflict grievous bodily harm[7] on the other person (the alleged offender). The Code currently permits this defence, provided that the person does not inflict bodily harm[8] on the alleged offender. Under the proposed amendments, a person may therefore use such force as may inflict bodily injury interfering with health or

6 Hon D E Beanland MLA, Attorney-General and Minister for Justice, Second Reading Speech, at p. 10

7 Grievous bodily harm is defined in the proposed amendment to s. 1 of the Code, to mean:

(a) the loss of a distinct part or an organ of the body; or

(b) serious disfigurement; or

(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

8 Bodily harm is defined by Code to mean *any bodily injury which interferes with health or comfort*..

comfort so long as it does not constitute grievous bodily harm by, for example, endangering life or causing permanent injury to health as defined.

1.17. A further example of an amendment to an offence which "toughens" it is the change to the offence of burglary. The current offence of housebreaking-burglary makes it a crime for any person to:

- break and enter the dwelling of another with the intent to commit an indictable offence therein; or
- to break out of a dwelling, having entered it with the requisite intent or having committed and indictable offence therein.

1.18. The proposed amended s. 419 dealing with burglary makes it an offence for any person to be in or to enter another person's dwelling with intent to commit an indictable offence. The requirement for breaking in or breaking out of the dwelling has been removed and the maximum penalty of 14 years remains. Under the proposed amendment, if the offender enters the dwelling by means of any break he or she is liable to imprisonment for life.

1.19. The definition for what constitutes a break and what constitutes entry to a building is set out in s. 418(1) and (2) of the Code:

> ***418 (1)*** *A person who breaks any part, whether external or internal, of a building, or opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar, flap, or other thing, intended to close or cover an opening in a building or an opening giving passage from one part of a building to another, is said to break the building.*
>
> ***(2)*** *A person is said to enter a building as soon as any part of the person's body or any part of any instrument used by the person is within the building.*

1.20. As matters affecting the rights and liberties of individuals, the Committee brings the increases in penalties, and amendments to "toughen up" certain offences, to the attention of Parliament for its consideration when debating this Bill.

General comments - Sufficient regard to Aboriginal tradition and Island custom?[9]

1.21. In accordance with its terms of reference under s.22 of the *Parliamentary Committees Act 1995,* the Committee examines and considers the application of fundamental legislative principles to all Bills. Section 4(3)(j) of the *Legislative Standards Act* requires that legislation have sufficient regard to the rights and liberties of individuals, for example, by having sufficient regard to Aboriginal tradition and Island custom.

[9] s. 4(3)(j) of the *Legislative Standards Act*

1.22. Considering the substantial amount of information available on the detrimental impact of the criminal justice system on persons of Aboriginal and Torres Strait Islander extraction, the Committee is of the view that regard should be had to Aboriginal tradition and Island custom in any amendment of the Criminal Code.

1.23. As is the case with all fundamental legislative principles, conflict with Aboriginal tradition and/or Island custom does not automatically mean that a legislative provision should be abandoned, merely that such departures should be fully justified if "sufficient regard" is to be paid.

1.24. In view of the requirement for legislation to have sufficient regard to Aboriginal tradition and Island custom, the Committee requests information from the Attorney-General on how, and to what extent, attempts were made to comply with this requirement. Further information addressing the question of whether or not these amendments pay sufficient regard (either because they do not conflict with Aboriginal tradition and Island custom or because such conflicts are justified and hence pay "sufficient regard") to this requirement would also be appreciated.

Sufficient regard to rights and liberties of individuals?[10] - cl. 4 (proposed amendment to s. 6 - limitation of civil remedies)

1.25. The following two subsections are proposed to be inserted into s. 6 of the *Criminal Code Act 1899* dealing with civil remedies:

> ***(2)*** *A person who suffers loss or injury in, or in connection with, the commission of an indictable offence of which the person is found guilty has no right of action against another person for the loss or injury.*
>
> ***(3)*** *Subsection (2) applies whether or not a conviction is recorded for the offence.*

1.26. According to the Attorney-General's second reading speech, this amendment directly reflects the coalition policy which calls for an amendment:

> *to prohibit civil actions by criminals who have suffered personal injuries where they have suffered those injuries during illegal activities.*[11]

1.27. The Committee always takes care when reviewing provisions in legislation which restrict the rights of citizens to have free access to the courts. In this instance, persons found guilty of an indictable offence are still persons with rights within our society. Their rights to access remedies under the civil law are entirely removed by this amendment which appears to leave no discretion for a judge or court to make a ruling appropriate to the specified circumstance of individual cases.

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10 s. 4(2)(a) of the *Legislative Standards Act*

11 Hon D E Beanland Attorney-General and Minister for Justice, Second Reading Speech, at p. 10

1.28. The Committee is concerned that this amendment creates the potential for injustice where the loss or injury suffered was substantial and out of proportion to the offence committed. The right to civil remedies would be lost even if the conviction was for such a minor offence that a conviction was not recorded. For example, it would appear that a person taking an apple from a tree on private property would be guilty of theft. If the person were critically injured by the landholder but convicted of the theft, they would have no recourse under the civil law against the person inflicting that harm.[12]

1.29. The Parliament may, of course, alter the Common Law with respect to the nature and extent of the rights of action of individual citizens. It is one of the Parliament's most important functions. However, extinction of such rights to civil action has significant consequences:

- it removes the individual from the protection of the civil law;
- amending the civil law is to be differentiated from excluding access to it; and
- detailed changes to the Common Law may be considered by the Parliament with an understanding of their effects, whereas the effects of a blanket removal may not be so obvious.

1.30. The Committee is concerned about the blanket removal of the rights to civil remedies of persons found guilty of indictable offences in the circumstances of this amendment.

1.31. The Committee therefore requests the Attorney-General to consider more targeted amendments to the common law that preserve the integrity of this clause but have the flexibility to take cognisance of injustice caused or hardship suffered in particular cases.

Sufficient regard to the rights and liberties of individuals?[13] - cl. 32 (proposed s. 222 - Incest)

1.32. The offence of incest traditionally outlaws sexual intercourse between a person and his or her close blood relatives, for example, a person's lineal ascendants, descendants and siblings. The reference, in incest, to blood relationships was to reflect the traditional view that such relationships were morally reprehensible and also to prevent genetic defects in offspring resulting from parents being too closely related by blood.

1.33. The existing sections of the Code dealing with incest[14] make it a criminal offence to have carnal knowledge of a lineal descendant, ascendant or sibling (of the

12 Note: the person may, however, claim criminal compensation pursuant to the *Criminal Offence Victims Act 1995*. Such compensation is limited in scope compared to damages available at common law.

13 s. 4(2)(a) of the *Legislative Standards Act*

14 s. 222 - incest by man, s. 223 - incest by adult female

opposite sex). The element of consent is immaterial to the offence of incest, however, there is a requirement for the person to have knowledge of the relevant proscribed relationship.

1.34. Proposed s. 222 creates a single offence of incest by any person and also incorporates the act of sodomy[15]. The Committee notes that the definition of the crime is expanded to include carnal knowledge between a person and their uncle, aunt, nephew or niece. The definition of "offspring", "lineal descendent", "sibling" and "parent" is further expanded beyond blood relatives to include relationships of the type that are half, adoptive or step relationships. A "step relationship" is in turn stated to include one resulting from defacto or foster relationships.[16]

1.35. The Committee is concerned that the considerably increased ambit of this crime, which carries a maximum penalty for imprisonment for life, has the potential to produce unjust and anomalous results. The Committee notes the recommendation of the Advisory Working Group (AWG):

> *That s. 222 NOT be amended to cover carnal knowledge with other ascendants not presently covered.*[17]

1.36. The Committee also notes that the AWG recommended against:

> *...further expansion of the offence of incest by extending the class of relatives to include, for example step children.*[18]
>
> *...to extend these provisions to all stepchildren might well produce anomalous results. It would be incest for a man to have carnal knowledge of the daughter of a deceased wife although she was of mature years when he married, was never adopted by him and had never lived under his roof.*[19]

1.37. The potential for anomalies is a matter of concern to the Committee. By way of a further example: the marriage of the widowed father of a man to the divorced mother of that man's wife would immediately result in the relationship between husband and wife being one of stepbrother and sister and thereby being incestuous due to their step relationship. Another aspect of this example which is of concern to the Committee is that the new laws could result in breaches of the criminal law being committed within existing, and otherwise lawful relationships.

1.38. The Committee appreciates that there is an important policy reason behind the extension of the crime of incest from being applicable to relationships outlined in 1.32 above, to addressing the abuse of power within family relationships for sexual purposes. However, the extensions proposed may well go beyond such relationships to include those where there is no abuse of power as is illustrated by the hypothetical examples above. The Committee queries whether the very

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15 Due to the amendment of the term "carnal knowledge" in s.1.

16 *Criminal Law Amendment Bill 1996,* proposed ss. 222(5) and (6).

17 *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996, at p. 37

18 ibid., at p. 37

19 ibid., at p. 38

important principle of the protection of the young and vulnerable from sexual exploitation might not be better and more reliably served by a separate offence rather than the extension of incest.

1.39. The Committee has serious concerns about the potential of the expanded definition of incest (as currently drafted) to produce unintended consequences.

1.40. The Committee refers these concerns to Parliament for its consideration.

Sufficient regard to rights and liberties of individuals?[20] - cl. 36 (proposed s. 267 - Defence of dwelling)

1.41. Proposed s. 267 provides as follows:

> ***Defence of dwelling***
>
> ***267.*** *It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds¾*
>
> *(a) the other person is attempting to enter or to remain in the dwelling with the intent to commit an indictable offence in the dwelling; and*
>
> *(b) it is necessary to use that force.*

1.42. The proposed amended section makes it lawful for a person to use force to repel another person or prevent them from entering or remaining in the dwelling. The existing s. 267 of the Criminal Code allows force to be used *to prevent the forcible breaking and entering of the dwelling*.

1.43. The test for the use of force in this proposed section requires a subjective belief, by the person defending the dwelling, that is supported by reasonable grounds. It appears that the requirement that it be reasonably necessary to use force in defence of a dwelling would be interpreted to involve an element of proportionality between the force used and the threat posed.

1.44. It would appear to the Committee that the power to lawfully defend a dwelling has been extended and that, in considering whether the use of force was necessary (on reasonable grounds) the court may require the force to have been proportionate to the threat posed. The Committee seeks clarification from the Attorney-General on this point and refers the response to Parliament for its consideration.

[20] s. 4(2)(a) of the *Legislative Standards Act*

Sufficient regard to rights and liberties of individuals (Physical integrity) - cl. 43 (proposed s. 280 - Domestic discipline)

1.45. The current clause of the Criminal Code dealing with domestic discipline allows a parent, person acting in place of a parent, or a school master to use such force as is reasonable under the circumstances against a child by way of correction. The Amendment Bill proposes the addition of the words "discipline", "management" and "control" to this section.

1.46. While there is debate over whether physical force should be used in the disciplining of children, the Committee recognised that both in Australia and internationally, there is acceptance of the principle that children should be provided with appropriate direction and guidance from a person (or persons) standing in a specified relationship to the child. Some communities consider that actions which would otherwise constitute an assault on a child may be justified as punishment for a child's misdeeds (correction).

1.47. The proposed amendment would allow force to be applied to children in other circumstances in the course of "management" and "control" of the child. This raises two main areas of concern:

- uncertainty as to the extent of the meaning of "management" and "control"; and
- the consequence that force may be applied to children who have not committed misdeeds.

1.48. The section being amended makes reference to a "schoolmaster" rather than a gender neutral word like "school teacher". Although the term schoolmaster would almost certainly be read to include the female schoolteachers, this does not appear to be so, on the face of the Bill. If it is intended to give female schoolteachers the same rights as their male colleagues, it may be better not to use the exclusively masculine term "schoolmaster" which would not ordinarily be applied to female schoolteachers.

1.49. The Bill also seeks to remove the rights of a "master" to discipline apprentices. This archaic provision is rightly removed.

1.50. The Committee refers these issues to Parliament for its consideration.

Sufficiently clear and precise drafting[21] - cl. 66 (proposed s. 408C - Fraud)

[21] s. 4(3)(k) of the *Legislative Standards Act*

1.51. Proposed s. 408C creates the new offence of fraud, which replaces several existing sections in the Code (ss. 427 - 429) and also applies to various circumstances not previously part of an offence.

1.52. For the sake of convenience, proposed s. 408C is set out below:

> ***Fraud***
>
> ***408C (1)*** *A person who dishonestly¾*
>
> *(a) applies to his or her own use or to the use of any person¾*
>
> *(i) property belonging to another; or*
>
> *(ii) property belonging to the person, or which is the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or*
>
> *(b) obtains property from any person; or*
>
> *(c) induces any person to deliver property to any person; or*
>
> *(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or*
>
> *(e) causes a detriment, pecuniary or otherwise, to any person; or*
>
> *(f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or*
>
> *(g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or*
>
> *(h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;*
>
> *commits the crime of fraud.*

1.53. With the addition of sub paragraphs (b) to (h) the Committee is concerned that this new offence is so broad in scope as to make it difficult to predict where the boundaries of fraud will lie. This is particularly so with respect to s. 408C(e) and (f).

1.54. It is easy to see the rationale of extending fraud beyond the misappropriation of property to pecuniary and other advantages. However, it is unclear just how far this goes, for example, if a manufacturer dishonestly makes claims in its advertising so that the sales of a rival are diminished, the manufacturer has been dishonest and has caused a detriment to another.

1.55. The criminal law affects and restricts the rights and liberties of citizens and therefore, in the Committee's view, an extension thereof should be clear and precise so that individual citizens are certain as to their position under the law, and their rights and liberties are not unduly restricted as a result of uncertainty.

1.56. The Committee is of the view that Parliament should clearly set the boundaries of the offence of fraud and express its intent more accurately, rather than leaving the interpretation of the scope of this section as a matter for the courts to decide.

1.57. The Committee refers its comments and concerns to Parliament for its consideration.

Reversal of onus of proof in criminal proceedings without adequate justification?[22] - cl. 67 (proposed s. 408D - Computer hacking and misuse)

1.58. Proposed s. 408D deals with computer hacking and misuse and provides in part:

> ***Computer hacking and misuse***
>
> ***408D.(1)*** *a person who uses a restricted computer[23] without the consent of the computer's controller[24] commits an offence.*
>
> *...*
>
> ***(4)*** *It is a defence to a charge under this section to prove that the use of the restricted computer was authorised, justified or excused by law.[25]*

1.59. The Committee is of the view that this proposed section reverses the onus of proof with respect to the offence of the unauthorised use of a restricted computer. It would appear that the effect of this provision is that once evidence has been led that the accused used a restricted computer without the consent of its controller, the persuasive burden of proof shifts to the accused to prove (on the balance of probabilities) that there was a lawful excuse, justification or authorisation for their use of the restricted computer. If the accused fails to so prove, he or she will be guilty of an offence.

1.60. 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 matter the subject of proof by the defendant is a matter peculiarly in the knowledge of the

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22 s. 4(3)(d) of the *Legislative Standards Act*

23 **Definition of "restricted computer"** means a computer for which—

(a) a device, code or a particular sequence of electronic impulses is necessary in order to gain access to or to use the computer; and

(b) the controller—

(i) withholds or takes steps to withhold access to the device, or knowledge of the code or of the sequence or of the way of producing the code or the sequence, from other persons; or

(ii) restricts access or takes steps to restrict access to the device or knowledge of the code or of the sequence, or to the way of producing the sequence, to a person or a class of person authorised by the controller.

24 **Definition of "controller"** means a person who has a right to control the computer's use.

25 cl. 67 s. 408D(1) and (4)

defendant, or whether it would require considerable expenditure on the part of the crown and would be extremely difficult to establish.

1.61. Another issue considered by the Committee in relation to justification is anything said in the explanatory notes or second reading speech which provides justification for the reversal of onus of proof. Whilst this section is addressed in the explanatory notes on two occasions, neither appears to provide information on the rationale behind this infringement of rights and liberties. It is not clear that it would be uniquely within the knowledge of a person accused to establish that their use of the restricted computer was authorised, justified, or excused by law. Neither is there anything to suggest that the prosecution of these matters would incur substantial expense on behalf of the crown.

1.62. The Committee notes that the AWG did not recommend the use of a reversal of onus of proof in its draft amendment.[26]

1.63. With respect to the reversal of the onus of proof, the Committee is of the view that Parliament would not be in a position to effectively assess the sufficiency of the justification for this abrogation of a legislative principle without further information on point.

1.64. The Committee seeks information from the Attorney-General as to the rationale or justification for this reversal of onus of proof. In the absence of an explanation the Committee recommends the removal of s. 408D with a view to its possible redrafting to omit the reversal of onus of proof.

Reversal of onus of proof in criminal proceedings without adequate justification?[27] - schedule 2 (proposed s. 37C of the Vagrants, Gaming And Other Offences Act 1931 - Possession of a graffiti instrument)

1.65. Subsection 1 of proposed s. 37C to the *Vagrants, Gaming And Other Offences Act* provides as follows:

> ***Possession of a graffiti instrument***
>
> ***37C.(1)*** *A person must not without lawful excuse, the proof of which lies on him or her, possess a graffiti instrument under circumstances that give rise to a reasonable suspicion that the instrument has been used or is intended to be used to commit a graffiti offence.*
>
> *Maximum penalty¾70 penalty units or 2 years imprisonment.*[28]

[26] *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996, at p. 75

[27] s. 4(3)(d) of the *Legislative Standards Act*

[28] Schedule 2, *Criminal Law Amendment Bill 1996*

1.66. The Committee is of the view that this proposed section reverses the onus of proof with respect to the offence of possession of a graffiti instrument. It would appear that the effect of this provision is that once evidence has been led that the accused was in possession of a graffiti instrument under circumstances giving rise to a reasonable suspicion that the instrument is intended to be or has been used to commit a graffiti offence, the persuasive burden of proof shifts to the accused to prove, on the balance of probabilities, that there was a lawful excuse for their possession of the graffiti instrument under these circumstances. If the accused fails to so prove, he or she will be guilty of an offence.

1.67. 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 matter the subject 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.

1.68. Another issue considered by the Committee in relation to justification is anything said in the explanatory notes or second reading speech which provides justification for the reversal of onus of proof. Whilst this section is addressed in the explanatory notes on two occasions, neither appears to provide information on the rationale behind this infringement of rights and liberties. It is not clear that it would be uniquely within the knowledge of a person accused to establish that their possession of a graffiti instrument under the circumstance was lawfully excused. Neither is there any information indicating that the prosecution of these matters would incur substantial expense on behalf of the crown.

1.69. The Committee notes that the AWG incorporated a reversal of onus of proof in its recommended draft of this section.

1.70. With respect to the reversal of the onus of proof, the Committee is of the view that Parliament would not be in a position to effectively assess the sufficiency of the justification for this abrogation of a legislative principle without further information on point.

1.71. The Committee therefore seeks information from the Attorney-General as to the rationale or justification for this reversal of onus of proof.

Sufficient regard to rights and liberties? - cl. 100 (proposed s. 568

1.72. Proposed amendments to s. 568 allow a single charge to be laid against a person, instead of several, if certain conditions are met. This provision applies to some offences of dishonesty.

1.73. The major change brought about by this section is that, even if, for example, a person is to be charged with stealing property from different persons, at different times, the charges can be rolled into one single charge. If a jury were then to be

satisfied that property was stolen from one or some (but not all) of the persons listed, the charge is still proven against the accused.

1.74. This could have a detrimental effect on an accused person. If, for example, the stealing counts were separated out, a jury would only convict on those counts on which they are satisfied that the stealing is established by the evidence.

1.75. The Committee has been informed that an accused person could still apply for such a potentially prejudicial charge to be quashed. There does not, however, appear to be any means by which an argument could be made for a single charge on an indictment to be separated out.

1.76. The Committee is concerned that this proposed amendment could be potentially detrimental to an accused person. It recommends that consideration be given to allowing the court to separate the charge into multiple counts in appropriate circumstances.

Sufficient regard to rights and liberties of individuals?[29] - cl. 113 (s. 632 - Corroboration)

1.77. Many provisions throughout the Bill are amended to remove existing requirements for a judge to warn the jury of the danger of acting on the uncorroborated testimony of one witness unless it is corroborated in some way by other evidence.

1.78. The effect of these amendments was outlined as follows by the Attorney-General in his second reading speech:

> *Judges will no longer be allowed to tell juries that the law regards any particular class of complainant (such as women or children or complainants in sex cases) as unreliable witnesses.*
>
> *The requirement of corroboration will be retained for offences such as sedition, perjury and like offences.*
>
> *Nothing will affect the ability of a trial judge to otherwise comment about the evidence as is appropriate in the interests of justice in any given case.*[30]

1.79. As there may be some who argue that this change will place persons accused by certain categories of witness in a precarious position, the Committee has decided to provide an overview of the rationale for the corroboration rules and the reasons for their removal in this Bill. Some of the reasons for the development of these rules over time are outlined in the following extract:

> *The justification for the principles of corroboration (i.e., those requiring corroborative evidence, or at least a warning) are various.*[31] *They have been*

29 s. 4(2)(a) of the *Legislative Standards Act*

30 Hon D E Beanland, Attorney-General and Minister for Justice, Second Reading Speech, at p. 6

> *assembled on a case-by-case basis, by the common law courts or the legislatures. They are rooted by and large in considerations of experience and common sense. The rules are justified in some cases because the witness himself or herself is of a category requiring caution¾thus, the child witness must be approached cautiously, because of his or her immaturity; the accomplice's testimony must be approached cautiously, because he or she may have a private interest to serve (such as to deflect blame upon a co-accused and escape conviction); and the testimony of an alleged victim of a sexual assault must be approached with circumspection, given the not infrequent tendency of people to make false allegations of this type against another. The rules are justified in other cases (some of them overlapping with this first category) because the act alleged to ground criminal or civil liability is of such a nature that it is easily alleged and rebutted only with great difficulty, especially, perhaps, because it is of such a nature that there will be little or no independent, direct evidence of its occurrence.*[32]

1.80. In its report to the Attorney-General the AWG referred to wide spread criticism of the corroboration rules in every common law jurisdictions as being:

> *inflexible, highly technical and complex, potentially confusing for a judge, calculated to confuse a jury and a fruitful source of appeal.*[33]

1.81. The AWG also referred to legislative changes to the corroboration rules in other Australian jurisdictions and particularly to the leading Australian High Court case of Longman[34] in which the following comments were made on the meaning and effect of the legislative changes to the corroboration rules in the *Western Australian Evidence Act*:

> *The mischief at which the* (amending) *provision appears to have been aimed is the adverse reflection which a warning "required by any rule of law or practice" casts indiscriminately on the evidence of all alleged victims of sexual offences, the vast majority of whom are women, and the corresponding protection which the giving of a warning confers on an accused in all cases of sexual offences. It is evident that the legislature* (passing the WA amending legislation) *regards the reflection as unwarranted and the protection as unjust. If the alleged victims of sexual offences, as a class, are not regarded by the legislature as suspect witnesses, judges should no longer warn juries that allegations of sexual offences are more likely to be fabricated than other classes of allegations.*

1.82. Clause 113 of the *Queensland Criminal Law Amendment Bill* proposes to replace s. 632 of the Code with a section dealing with corroboration. The proposed section provides that:

- a person can be convicted on the uncorroborated testimony of one witness;[35]

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31 Judical comments on this topic include *Holman v. The Queen* [1970] W.A.R. 2, at 11; *D.P.P. v. Hester* [1972] 3 All E.R. 1056, at 1059, 1072.

32 Gillies, *Law of Evidence in Australia,* Legal Books, NSW 1987 at p. 596

33 *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996, at p. 109

34 *Longman v. The Queen* (1989) 168 CLR 79, at p. 85

35 Except where the Code expressly provides to the contrary, for example, in relation to sedition, false evidence before Parliament, false claims etc.

- judges are no longer required by any rule of law or practice to warn juries of the danger of convicting on the basis of uncorroborated evidence; and

- judges may still make comments on the evidence at trial that are appropriate in the interest of justice but must not warn or suggest that any class of witness or complaint is considered to be unreliable.

1.83. The amendment will therefore remove the stigma attaching to all classes of witness currently regarded as being unreliable, regardless of the circumstances of any individual case.

1.84. The Committee does not have any concerns to report in relation to this proposed amendment.

Appropriate protection against self-incrimination?[36] - cl. 117 (proposed s. 644A - Witness giving incriminating answers)

1.85. Proposed s. 644A provides as follows:

> ***Witness giving incriminating answers***
>
> ***644.(1)*** *A person who is called as a witness in any proceeding for an offence against section 59, 60, 87, 103, 118, 120, 121, 122, 127 or 133[37], must not be excused from answering any question relating to the offence on the ground that the answer to the question may incriminate or tend to incriminate himself or herself.*
>
> ***(2)*** *An answer to a question in a proceeding to which this section applies is not admissible in evidence against the person giving the answer other than in the proceeding or in a prosecution for perjury in respect of the answer.*

- **Abrogation of the right to silence**

1.86. The Committee has considered the issue of abrogation of the right to silence at length in reporting on the *Fair Trading Amendment Bill 1996*[38]. For convenience, its reasoning is again set out below.

> ***2.14*** The common law privilege against self-incrimination was well established in England[39] by the time of the 1769 edition of Blackstone's *Commentaries* where he gave a succinct summary of the law and policy behind the privilege against self-incrimination:

36 s. 4(3)(f) of the *Legislative Standards Act*

37 Section 59 (Member of Parliament receiving bribes), 60 (Bribery of member of Parliament), 87 (Official corruption), 103 (Bribery), 118 (Bargaining for offices in public service), 120 (Judicial corruption), 121 (Official corruption not judicial but relating to offences), 122 (Corrupting or threatening jurors), 127 (Corruption of witnesses) or 133 (Compounding crimes)

38 Alert Digest No. 8 of 1996, at pp. 9-13

39 O'Neill N and Handley R *Retreat from Injustice*, *Human Rights in Australian Law*, 1994, The Federation Press, p 161

> *For, at the common law, nemo tenebatur prodere seipsum (no man should be obliged to give himself away) and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.*[40]

2.15 This remains a part of the common law of Australia, except where it is expressly or by necessary implication qualified or excluded by legislation.

2.16 In Queensland, the privilege has been specifically adopted as an example of the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals by, for example, providing appropriate protection against self-incrimination.[41]

2.17 In its consideration of this abrogation of the right to silence in proposed ss.30F(5) and 12F(5), the Committee has referred to the view of the Senate Standing Committee for the Scrutiny of Bills[42] on this point:

> *The Committee is likely to accept such an interference* (with the right to silence) *only if the matters requiring evidence are peculiarly within the knowledge of the person concerned and there is some sort of indemnity against the use of any information obtained. Ideally, the indemnity should be against the direct or indirect use of any information obtained other than in the matter in relation to which the information was originally sought.*

2.18 The Committee, in developing its approach to the abrogation of the right to silence, has drawn on the substantial experience and expertise of the Senate Committee which is reflected in their policy quoted above.

2.19 The "use immunity" to which the Senate Committee refers, allows answers supplied under a section compelling the provision of information to be used for the purposes of the section in question, but provides that the answers are not admissible in evidence against the person in other proceedings. "Derivative use immunity" refers to information indirectly obtained as a result of the provision of the information in question. "Derivative evidence" was described by Murphy J in *Sorby v The Commonwealth of Australia*[43] as evidence obtained by using the testimony as a basis of investigation.

- **Restriction on the use of information gained through s. 644A**

1.87. Proposed s. 644A(2) provides that an answer to a question under compulsion of the section *is not admissible in evidence against the person giving the answer other than in the proceedings or in a prosecution for perjury...* . The explanatory notes make it clear that such an answer shall not be used *in any proceeding civil or criminal... against the person answering*. It would, however, appear that there

40 *Commentaries*, Blackstone 1769 edition, 293.

41 *Legislative Standards Act 1992*. Section 4(3)(f)

42 The Senate Standing Committee was first established in November 1981. The first of its five Terms of Reference is to report on Bills and Acts which by express words or otherwise, *trespass unduly on personal rights and liberties.* The Senate Committee considers the abrogation of the privilege against self-incrimination to come within that Term of Reference.

43 [1983] 57ALJR 248

is no restriction on the derivative use of the information gained pursuant to proposed s. 644A.

- **Clear and precise drafting**

1.88. The Committee has reviewed proposed s. 644(2) and its relevant explanatory note at length and has formed the view that the words *... in the proceeding ...*create confusion. The Committee therefore requests further clarification of the meaning of these words.

- **Policy behind proposed s. 644A - extension to bribery offences generally**

1.89. Proposed s. 644A abrogates the rights to silence of persons appearing as witnesses in a proceeding for an offence of bribery or bribery related offences. Under the current Code this provision only applies to offences involving secret commissions. The proposed section extends its operation to all bribery related offences.

1.90. In its report, the AWG provided the following comments on the reasons for this amendment:

> *The rationale for the suggested change is the difficulty in proving the giving or acceptance of a bribe. Often the only direct proof can be provided by the parties to the corrupt transaction. If such a rationale is accepted, ... the reasoning is applicable to all bribery offences generally, rather than being restricted as they are in the current Code, to offences involving secret commissions under Chapter 42A.*

- **The Committee's view on the abrogation of the right to silence in proposed s.644A**

1.91. Like the Senate Standing Committee for the Scrutiny of Bills, the Committee is more likely to be persuaded that an abrogation of the right to silence has sufficient regard to rights and liberties *if the matters requiring evidence are peculiarly within the knowledge of the person concerned and there is some sort of indemnity against the use of any information obtained*. In this case, the explanatory note makes it clear that the section is aimed at the other party to a bribery offence where that party is a witness against the person charged. In these circumstances, it would clearly be a matter uniquely within the knowledge of that other party. The proposed section also provides indemnity against the use of the information in other civil or criminal proceedings.

1.92. The Committee, however, remains concerned at the likelihood of the derivative use of information obtained under proposed s. 644A to gain further evidence to be subsequently used against the person compelled to provide the information. It therefore requests that the Attorney-General consider an amendment to add protection against the derivative use of information gained pursuant to this proposed section.

1.93. The Committee also seeks further clarification of the meaning of the words *... in the proceeding ...* in proposed s. 644(2).

This concludes the Scrutiny of Legislation Committee's 2nd Report to Parliament in 1997 with respect to Bills tabled during the week of sittings commencing 3 December.

Tony Elliott MLA
Chairman

17 March 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[44] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[45].

(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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44 "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.**

45 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.[46]

(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

if authorised by an Act.

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[46] 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.