SCRUTINY OF LEGISLATION COMMITTEE

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Scrutiny of Legislation Committee
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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*[1]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[2] of a provision may therefore be considered as extrinsic material in its interpretation.

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1 Section 14B(3)(c) *Acts Interpretation Act 1954*.

2 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. ARCHITECTS AMENDMENT BILL 1998

Background

1.1. The Honourable Dr D J Watson MLA, Minister for Public Works and Housing introduced the bill into the Legislative Assembly on 4 March 1998.

1.2. This bill amends the *Architects Act 1985*. It establishes an independent tribunal to hear disciplinary charges made against architects and approved architectural companies throughout Queensland.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[3]

– **Proposed Part 5, Division 3, Subdivision 1.**

1.3. The committee notes that under the bill, investigators have substantial powers once inside a place.

1.4. The committee has long sought protection in legislation to safeguard against the use of the power to enter premises with the consent of the occupier and seize evidence. The committee is pleased that these safeguards are incorporated in proposed part 5 of the bill.

1.5. However, the committee observes that dwellings do not appear to be protected from entry without consent or a warrant.

1.6. The committee requests the minister to consider introducing an appropriate amendment[4] to restrict entry to a dwelling house to only with the consent of the occupier or with a warrant.

[3] 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.

[4] Such as s. 26(1)(d) of the *Transport Operations (Road Use Management) Act 1995* which excludes dwelling house from entry.

2. BUILDING AND INTEGRATED PLANNING AMENDMENT BILL 1998

Background

2.1. The Honourable D E McCauley MLA, Minister for Local Government and Planning introduced the bill into the Legislative Assembly on 5 March 1998.

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

- *to implement the integrated development assessment system (IDAS) created under the Integrated Planning Act 1997 (IPA) for the development related approval systems in the current Building Act 1975 and the Environmental Protection Act 1994;*
- *to introduce a system of private building certification by independent accredited building certifiers throughout the State as an alternative to local government assessment and certification of building plans;*
- *to provide a uniform accreditation system for both private and local government employed building certifiers;*
- *to clarify and simplify the current complex swimming pool fencing requirements;*
- *to refine the Integrated Planning Act 1997 to correct identified errors and anomalies.*[5]

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[6]

– **clause 24(2) (amending s. 67(2)(d) of the *Building Act 1975*)**

2.3. Clause 24(2) of the bill increases the penalty for an offence against a regulation made under the *Building Act 1975* which a regulation may prescribe from 20 penalty units ($1500) to 165 penalty units ($12375).

2.4. The committee has previously considered the question of delegation of legislative power to create offences and prescribe penalties. This led to the committee adopting a formal policy on this issue in July 1996 which is reproduced below:

> *1. The Committee accepts that legislative power to create offences and prescribe penalties may be delegated in limited circumstances provided the following safeguards are observed:*
>
> - *rights and liberties of individuals should not be affected, and the obligations imposed on persons by such delegated legislation should be limited; and*

5 Explanatory notes at p. 1.

6 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.

- *the maximum penalties should be limited, generally to 20 penalty units; and*
- *where possible, the types of regulation to be made under such provisions, which are foreseeable at the time of drafting the Bill, should be specified in the Bill; or*
- *where the types of regulation to be made are not reasonably foreseeable at the time of drafting the Bill, a sunset clause (for a period not exceeding two years) should be set in respect of the relevant provision to allow time to identify the necessary penalties and offences.*

  If further offences and penalties are required that do not fall within the types of regulation outlined in the Bill, they can be added by amendment to the principal Act. The principal means of creating offences should always be through Acts of Parliament rather than delegated legislation.

2. *Where provisions in regulations are made pursuant to delegated legislative power to create offences and prescribe penalties without having regard to these safeguards, the Committee will consider moving for the disallowance of the relevant provisions.*[7]

2.5. This amendment substantially increases the amount of a fine that can be imposed by regulation (for an offence against a regulation) from 20 penalty units to 165 penalty units.

2.6. In this case, the committee takes the view that the power to prescribe a maximum penalty of $12375 for an offence against a regulation may be inappropriate for subordinate legislation. In the committee's opinion, provisions imposing high penalties should be contained in principal legislation and subject to Parliamentary debate. The maximum penalties that a regulation may impose should generally be limited to 20 penalty units.

2.7. The committee requests the minister to provide information on the rationale behind the substantial increase in the amount of fines which can be imposed pursuant to the regulation making power under cl.24(2) of the bill. The committee understands and supports the objective of consolidating all provisions in one document. The committee is of the view, however, that significant penalties are justified for some breaches of the current building code, and that provisions imposing such significant penalties ought to form part of principal legislation rather then regulation.

2.8. In other legislation, this difficulty has been overcome by incorporating the whole document in principal legislation.[8] The committee suggests that similar procedures could be adopted.

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7 *Education (Overseas Students) Bill 1996* – Alert Digest No. 4 of 1996 at pp. 6 – 7.

8 ***Attachment–National Electricity Law***

9.(1) *Attached to this Act is a copy of the National Electricity Law set out in the schedule to the National Electricity (South Australia) Act 1996 (the* ***"National Electricity Law"****)*

(2) *The attachment must be revised so that it is an accurate copy of the National Electricity Law as amended from time to time.*

(3) *The revision under subsection (2) must happen in the first reprint of this Act after an amendment of the National Electricity Law.*

(4) *A copy of any amendment of the National Electricity Law passed by the Parliament of South Australia must be tabled in the Legislative Assembly by the Minister within 14 sitting days after receiving Royal Assent.*

(5) *A copy of any regulation made under the National Electricity (South Australia) Act 1996, part 4 must be tabled in the Legislative Assembly by the Minister within 14 sitting days after it comes into force.*

(6) *This section does not affect the operation of sections 6 and 7.*

3. CIVIL JUSTICE REFORM BILL 1998

Background

3.1. The Honourable D E Beanland MLA, Attorney–General and Minister for Justice introduced the bill into the Legislative Assembly on 4 March 1998.

3.2. In accordance with the explanatory notes the objectives of this bill are:

(a) to provide adequate powers and procedures for the making of uniform court rules for civil proceedings in the Supreme, District and Magistrates Courts in Queensland and to generally reform the rule making powers applicable to those courts

(b) to make necessary consequential amendments to other legislation that will be redundant or inconsistent with uniform court rules and to provide a sufficient basis in principal legislation for the uniform rules generally, especially in relation to the enforcement of court decisions

(c) to reform the law regulating the relationship between solicitors and their clients in relation to fees and costs

(d) to provide for the establishment of a single Small Claims Tribunal and for certain other reforms to enhance the efficiency of that jurisdiction, including the establishment of the position of Tenancy Claims Administrator.[9]

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[10]

– **clauses 2, 27 and schedule 2 (amending s.118(1) of the *District Court Act 1967*)**

3.3. Clause 27 amends s.118(1) of the *District Court Act*. Under existing s.118(2), a party who is dissatisfied with a final judgment of a District Court in its original jurisdiction may appeal to the Court of Appeal in certain circumstances.[11]

3.4. However, existing s.118(1) provides that the provision *does not apply to an appeal from a judgment of a District Court exercising criminal jurisdiction, other than an appeal brought before a District Court under the Justices Act 1886, section 222*.[12]

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9 Explanatory notes at p.1.

10 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.

11 Section 118(2) of the *District Court Act 1967*.

12 The District Court's criminal jurisdiction is contained in part 4 of the *District Court Act*. Section 222 of the *Justices Act 1886* provides that when any person feels aggrieved as complainant, defendant, or otherwise by any order made by any justices or justice in a summary manner upon a complaint for an offence or breach of duty, such person may appeal to a District Court Judge.

3.5. Clause 27 clarifies the effect of existing s.118(1) that a person may appeal to the Court of Appeal in relation to a decision of a District Court on an appeal to that court under s.222 of the *Justices Act*. Clause 2 provides that the proposed amendment to s. 118(1) is taken to have commenced on 1 August 1997.

3.6. The explanatory notes to the bill provide the following information.

> *The amendment to section 118 of the District Court Act 1967, contained in schedule 2 of this Bill, operates retrospectively. This amendment is essential to clarify that section 118 of the District Courts Act 1967, as amended by the Courts Reform Amendment Act 1997, does not prevent persons from appealing to the Court of Appeal from decisions on an appeal under section 222 of the Justices Act 1886. Chapter 67 of the Criminal Code contains rights of appeal from judgements of the District Court on indictable offences.*
>
> *Section 4(3)(g) of the Legislative Standards Act 1992 provides that one of the fundamental legislative principles is whether legislation adversely affects rights and liberties, or imposes obligations, retrospectively. This amendment to the District Court Act 1967 does not breach this provision. The amendment is necessary to clarify that rights of appeal were not removed by the Courts Reform Amendment Act 1997.*[13]

3.7. The committee always takes care when examining legislation with retrospective effect to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue.

3.8. The committee understands that the purpose of the proposed amendment is to clarify the effect of existing s.118(1). It would appear to the committee that the proposed amendment does not operate to impose obligations on individuals retrospectively.

3.9. The committee has no further comment on this amendment.

Does the legislation have sufficient regard to the rights and liberties of individuals?[14]

– **clauses 5 and 6 (amending the *Queensland Law Society Act 1952*)**

3.10. This bill contains changes to the law regulating the relationship between solicitors and their clients about fees and costs. According to the explanatory notes:

> *… the present system, providing only limited protection for clients, dates from the last century. It is centered on a costs assessment or auditing process, called taxation, conducted by an officer of the Supreme Court.* [15]

13 Explanatory notes at pp. 4–5.

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

15 Explanatory notes to the bill at page 2.

3.11. This bill introduces a system of costs assessment by costs assessors. Under cl. 5 of the bill, the chairperson of the Solicitors Complaints Tribunal may approve as a costs assessor for the tribunal a person who has the qualifications required under the tribunal's rules. The committee feels there is potential for difficulties to arise where an assessor who has other dealings with a particular solicitor is selected as the assessor to assess a client's disputed bill.

3.12. In view of the importance of the costs assessor's roles, it is essential that the assessor has the necessary qualifications, experience and standing to assess costs impartially. It is important that the assessor not only is impartial, but is seen to be impartial.

3.13. The committee seeks information from the minister as to how issues such as the independence of the costs assessor and potential conflict of interests issues will be addressed.

– **clause 8 (amending the *Queensland Law Society Act 1952*)**

3.14. Clause 8 inserts proposed s. 6ZB into the *Queensland Law Society Act*. Proposed s. 6ZB provides as follows:

> ***6ZB.(1)*** *A client who asks for the appointment of a costs assessor under this division is taken to dispute only the amount payable under the client agreement.*
>
> ***(2)*** *The client may not subsequently challenge the validity or enforceability of the client agreement.*

3.15. The committee understands that a costs assess or will assess a solicitor's account under a solicitor's client agreement. While a client may agree to have the account assessed by the costs assessor, a client may prefer to have other aspects of the client agreement, such as the validity or enforceability of the agreement, determined by the court.

3.16. Proposed s. 6AB(2) appears to remove the client's right to challenge other aspects of the client agreement. The committee considers this interfering with the legal right of a client, like any party to a contract, to challenge the basis of the contract itself, as well as rights accruing under that contract. The committee seeks information from the minister as to whether this is intentional. If so, the committee recommends that the clause be amended to restore the client's traditional rights at law and in equity.

Has there been compliance with the guidelines for regulatory impact statements?[16]

– **clause 21 (inserting proposed s.118B into the *Supreme Court of Queensland Act 1991*)**

[16] Part 5 of the Statutory Instruments Act 1992 sets out the guidelines for regulatory impact statements.

3.17. Proposed s.118B excludes the making of rules of court from the requirements in part 5 of the *Statutory Instruments Act 1992* to prepare a regulatory impact statement.

3.18. The committee has consistently taken objection to bills providing express exemptions to the requirements of the regulatory impact statements (RIS) guidelines. One of the reasons is that the RIS guidelines were introduced in the *Statutory Instruments Act* specifically to ensure that consultation and cost benefit analyses take place prior to making subordinate legislation. The guidelines do not anticipate that their effect will be overridden by subsequent legislation, and in fact, Parliament expressly stated its intention at the time that the RIS guidelines be complied with.[17]

3.19. A second reason for the committee's previous objection to such express exemptions is that the RIS guidelines already envisage numerous and comprehensive circumstances under which the preparation of an RIS would not be necessary.

3.20. The committee has consistently opposed provisions in principal legislation which exempt subordinate legislation from the RIS requirements. In the circumstances of this bill, however, the committee notes the following view expressed in the explanatory notes:

> ***section 118B*** *provides that certain parts of the Statutory Instruments Act 1992 do not apply to rules of court, as defined by section 12 of that Act. In particular, part 5, which contains requirements about regulatory Impact Statements (RISs), will not apply to rules of court. Rules govern the practices and procedures of courts and the matters and processes associated with such impact statements would inappropriately involve the judiciary in the matters and deliberations of executive government.*[18]

3.21. The committee understands that the proposed *Uniform Civil Procedure Rules* have been the subject of extensive consultation. The explanatory notes provide the following information.

> *A draft set of uniform rules, the Uniform Civil Procedure Rules—Consultation Draft, was launched in October 1997 and comment from the judiciary, the legal profession and members of the public was sought, including by advertisements in major Queensland newspapers. A supplement to the consultation draft, about lawyers' costs and probate, was released in January 1998. This included draft provisions of this Bill about the relationship between solicitors and their clients about fees and costs.*
>
> *As a result of this process, over 70 submissions were received, including from all levels of the judiciary, departments, agencies, professional associations, interest groups and individuals. In addition, the Department of Justice was involved in a two day seminar on the rules, conducted by the Queensland University of Technology. Leading lawyers and judicial officers were panellists. In relation to the*

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17 *Statutory Instruments Act 1992* s.40(3).

18 Explanatory notes at p. 19.

finalisation of the rules, consultation is ongoing. This represents the most extensive consultation process ever undertaken in Queensland about the civil justice system in this State.

The consultation draft and supplement identified key legislative areas requiring amendment and also made clear the heads of rule making power and other provisions requiring principal legislation. In addition, the proposed uniform rules are themselves based on a draft prepared by a Supreme Court Working Committee set up in 1983 by the then Chief Justice, Sir Walter Campbell. It was chaired by the Honourable Justice Williams. The draft of this committee was finally produced in 1991. The draft uniform rules also contain provisions drawn from the work of the Litigation Reform Commission's projects that were unfinished at the time that it ceased to function.[19]

3.22. The committee observes that the proposed exemption applies to all rules of court. It understands that the bill requires all rules of court to be made only with the consent of the rules committee consisting of judges from all courts. In particular, the committee recognises that there has been extensive consultation on the proposed *Uniform Civil Procedure Rules*.

3.23. As a general principle, the committee does not support provisions in principal legislation that specifically excludes proposed subordinate legislation from part 5 of the *Statutory Instruments Act*.

3.24. There have been many attempts by government and courts in recent times to examine the cost of litigation.[20] Court rules do impose appreciable costs on litigants and there would appear to be nothing in principle that the benefits of a regulatory impact statement process should not apply to court rules. For example, if court rules were to impose an onerous obligations on country litigants that would add to their filing costs, then that would clearly be a matter of concern.

3.25. In this case, the committee refers to Parliament for its consideration the question of whether the proposed exemption of rules of court from the regulatory impact statement requirements is justified.

Staged automatic expiry of subordinate legislation[21]

– **clause 21 (inserting proposed s.118B into the *Supreme Court of Queensland Act 1991*)**

3.26. One of the Scrutiny of Legislation Committee's areas of responsibility as listed in s.22(2)(b) of the *Parliamentary Committees Act 1995* is to monitor the operation of part 7 of the *Statutory Instruments Act*. Part 7 deals with the staged automatic expiry of subordinate legislation.

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19 Explanatory notes at p. 5.

20 For example: Commonwealth of Australia Access to Justice; An Action Plan, Access to Justice Advisory Committee, 1994.

21 Part 7 of the *Statutory Instruments Act 1992* provides that subordinate legislation expires on the tenth anniversary of the day it is made unless it is sooner repealed or expires, or a regulation is made exempting it from expiry.

3.27. Further, s. 53 of the *Statutory Instruments Act* contains the purposes of the staged automatic expiry provisions. They are—

- reduce substantially the regulatory burden on the people of Queensland without compromising law and order and essential economic, environmental and social objectives; and
- ensure subordinate legislation is relevant to the economic, social and general wellbeing of the people of Queensland; and
- otherwise ensure the part of the Queensland Statute Book consisting of subordinate legislation is of the highest standard.

3.28. Section 54 states the principle that subordinate legislation expires on the 10th anniversary of the day of its making unless it has sooner been repealed, expired or exempted from expiry (for a limited period). The staged automatic expiry provisions commenced on 1 December 1994. To prevent subordinate legislation older than 10 years expiring without being reviewed, s.61 provides that subordinate legislation that expires before 1 July 1998 is deemed to expire on 1 July 1998.

3.29. In addition to exempting rules of court from the automatic expiry provisions under part 7 of the *Statutory Instruments Act,* proposed s. 118B specifically extends the validity of several rules of court mentioned in proposed s.118B(2)(b) to 31 December 1998, beyond the staged automatic expiry date of 1 July 1998.

3.30. The explanatory notes to this bill provide the following rationale.

> *An arbitrary system of automatic expiry is inappropriate for such rules. However, in relation to the items listed in section 118B(2)(b), which are matters to be subsumed in new uniform court rules, an area in need of reform for modern conditions and on which work is well advanced, an extension to 31 December 1998 only is appropriate.*[22]

3.31. In his second reading speech, the minister explained that:

> *... the extension of the current rules until 31 December this year will ensure that the feedback from an extensive consultation process will be incorporated, making sure the new uniform civil procedure rules truly address the needs of the people of Queensland.*[23]

3.32. The minister further indicated that:

> *…without this extension to the operation of the existing rules, the court system will be left without any rules, or with new rules that cannot adequately be considered by the judiciary in the limited time before the expiration date for existing rules.*
>
> *This would be an unsatisfactory situation.*
>
> *... the Chief Justice has told me that it is his hope and expectation that the new rules committee, which can and will be established as soon as this bill is assented*

22 Explanatory notes at p. 19.

23 Second reading speech at p.4.

to, will be in a position to finalise and implement an appropriate set of uniform court rules before the end of the year.

3.33. The committee notes the reasons given to justify proposed s.118B. However, the committee recognises that Parliament passed the staged automatic expiry provisions to ensure the ongoing review of subordinate legislation. The provisions allow departments and the Office of Queensland Parliamentary Counsel to identify subordinate legislation that are or have become inappropriate, overly burdensome, inefficient or ineffective. Agencies would then revise and amend or remove the identified subordinate instruments where necessary.

3.34. The committee takes the view that exemption from the staged automatic expiry provisions should not be lightly given. The committee brings these matters to Parliament for its consideration and refers to it for consideration the question of whether proposed s.118B is justified in this instance. It has been argued that the imposition of uniform court rules is a long overdue initiative. Staged automatic expiry provides an on–going incentive for regular review of subordinate legislation.

3.35. With a view to the extension of existing court rules, the committee accepts the argument of the Attorney–General that without the extension of the existing rules to cover the interim period, the court system will be left without any rules to regulate court proceedings.

3.36. If Parliament does not accept the committee's views and decides to exempt court rules form the staged automatic expiry provisions and regulatory impact statement guidelines, the committee takes the view that such an exemptions should be contained in the *Statutory Instruments Act* rather than in different pieces of legislation.

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

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[25]

– **clause 24 (inserting proposed s.134 into the *Supreme Court of Queensland Act 1991*)**

3.37. Proposed s.134 provides that:

> ***134.(1)*** *If a provision of the Supreme Court Act 1995 is inconsistent with this Act, this Act prevails to the extent of the inconsistency.*
>
> ***(2)*** *In this section¾*
>
> ***"inconsistency"*** *includes¾*
>
> *(a) direct inconsistency; and*

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

[25] 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.

(b) covering the field inconsistency.

***"this Act"** includes the Uniform Civil Procedure Rules made under this Act.*

3.38. Since proposed s.134(2) includes the proposed *Uniform Civil Procedure Rules* in the definition of the term "this Act", the proposed rules will prevail over an inconsistent provision of the *Supreme Court Act 1995*.

3.39. The explanatory notes to the bill provide the following information justifying the provision.

> *In this context, however, it may be noted that proposed new section 134 of the Supreme Court of Queensland Act 1991, inserted by this Bill, states that the uniform court rules will prevail, to the extent of any inconsistency, over the Supreme Court Act 1995. Although the uniform court rules will be subordinate legislation and the 1995 Act is principal legislation, this delegation of power is appropriate for these reasons—*
>
> - *It allows the rules to prevail over the Supreme Court Act 1995, but not to amend or repeal that Act.*
> - *The rules will not prevail over any other Act.*
> - *The subject matter of the rules themselves will be limited to essentially procedural provisions and some other related matters, like evidence. Therefore, the rules will not be capable of affecting the more fundamental provisions in the 1995 Act.*
> - *The rules and any amendments to the rules will be subject to disallowance by the Legislative Assembly.*
> - *The rules will have been produced as a result of an extensive consultation process and the consent of the judiciary will be required in relation to the making of, and any amendments to, the rules.*
> - *The 1995 Act was never passed as an Act by the Parliament but was created by the Statute Law Revision Act (No. 2) 1995, when the Supreme Court Act 1921 was renamed and a number of other older enactments were relocated into it. This was done without a detailed examination of the provisions of the various Acts that were relocated. It is intended that the arrangement whereby the rules may prevail over the 1995 Act is only to be a temporary one until a thorough assessment of that Act can be undertaken.*
> - *Towards that end, the Bill provides that one of the functions of the new Rules Committee, to be chaired by the Chief Justice and to be made up of members of judiciary from the Supreme, District and Magistrates Courts, will be to examine the 1995 Act and advise the* [Minister] *about the repeal, reform or relocation of the provisions of that Act.*[26]

3.40. Despite the suggestion contained in the explanatory note, the committee regards proposed s.134 as a "Henry VIII" clause because it allows the effect of an Act of

[26] Explanatory notes at pp. 3–4.

Parliament (the *Supreme Court Act 1995*) to be superseded by a subordinate instrument (the uniform Civil Procedure Rules).

3.41. The committee is concerned that proposed s.134 could cause the courts to be embroiled in controversy because this will invite the judiciary through the proposed Rules Committee to exercise the power to essentially undertake judicial legislation

3.42. At the least, the committee requests the Attorney-General to consider inserting an appropriate sunset provision into proposed s.134 to limit the operation of that provision as a counterbalance to the effect of the provision as a "Henry VIII" type clause.

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?[27]

– **clause 26, Schedule 1 (amending part 2 of the *Small Claims Tribunals Act 1973 (the SCT Act*))**

3.43. Under proposed part 2 of the *Small Claims Tribunal Act*, the small claims tribunal is constituted by a referee sitting as a referee in its tenancy or general division.[28]

3.44. Proposed s.12 of part 2 provides that:

> ***12.(1)*** *Each magistrate is a referee.*
>
> ***(2)*** *The chief executive may appoint as referees the other persons the chief executive considers necessary to appoint for the proper functioning of the tribunal.*
>
> ***(3)*** *Persons appointed under subsection (2) are to be employed under the Public Service Act 1996.*

3.45. The committee understands that a referee may decide or mediate the issue in dispute in a proceeding. In the committee's view, it is important that a referee has the necessary qualifications, experience, or standing appropriate to exercise the referee's power under the *Small Claims Tribunal Act*.

3.46. The committee notes that each magistrate is a referee and accepts that magistrates will have the necessary experiences standing and qualifications. However, proposed s.12 of part 2 appears to empower the chief executive to appoint any person to be a referee.

3.47. The committee therefore requests the minister to consider introducing appropriate amendments to further define the chief executives power to appoint persons to act as referees.

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27 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.

28 Proposed s.6(2) of amended part 2 of the *Small Claims Tribunal Act* in schedule 1 of the bill.

3.48. The committee observes that there is other legislation which requires the Governor–in–Council to appoint assessors or members of tribunals such as the *Workcover Queensland Act 1996* in relation to members of the General Medical Assessment Tribunal.[29] For consistency it may be appropriate for the Governor–in–Council to also appoint referees under the Small Claims Tribunal Act. If it is not appropriate, the committee also seeks clarification as to why referees are not to be appointed by the Governor–in–Council.

[29] Section 426(2) of the *Workcover Queensland Act 1996.*

4. GOVERNMENT OWNED CORPORATIONS AND OTHER LEGISLATION AMENDMENT BILL 1998

Background

4.1. The Honourable J M Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts introduced the bill into the Legislative Assembly on 4 March 1998.

4.2. The bill removes provisions from the *Government Owned Corporations Act* that could be regarded as "Henry VIII Clauses". According to the explanatory notes it also:

> *... bring(s) the processes to be followed for the corporatisation of company GOCs into line with that applying to statutory GOCs.*[30]

4.3. Other objectives of the bill include amendments to the corporatisation modelled in the *Local Government Act 1993* and amendments to the *Transport Infrastructure Act 1994* to clarify the functions of Queensland Rail.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[31]

4.4. The first stated purpose of the *Legislative Standards Act* is to ensure that Queensland legislation is of the 'highest standard'. This is the purpose of the requirement that fundamental legislative principles be considered by instructing officers, Parliamentary Counsel, the Attorney–General's department, cabinet, the Parliament and, of course, this committee. The entire scrutiny process is not just about avoiding low standards but seeking to establish high standards. For this reason, the committee has, since its inception, given positive recognition to legislation which extends the rights and liberties of citizens and has respect for Parliament.

4.5. This bill seeks to remove a large number of Henry VIII clauses from the *Government Owned Corporations Act* and other related Acts. The committee wishes to commend the Treasurer and the drafters of this legislation for that achievement. The fact that there are a number of other concerns with the bill as drafted does not detract from this commendation.

30 Explanatory notes at p. 1.

31 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.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[32]

4.6. As already mentioned the bill deletes several "Henry VIII" clauses in the *Government Owned Corporations Act* and the *Local Government Act*. This is done through clauses 32, 36 and Schedule 1 whose sole purpose is the removal of such clauses. The earlier legislation applied a specified legislative provision to a Government Owned Corporations (GOC) (or a variant of a GOC) with *all necessary changes* and *any changes prescribed by regulation* or merely with *any changes prescribed by regulation*. In all cases, this bill amends these provisions to read *with all necessary changes*.[33]

4.7. This Committee had taken strong objection to Henry VIII clauses when they were introduced and when subordinate legislation sought to use the power outlined (see the committee's report *The Use of "Henry VIII" Clauses in Queensland Legislation*, January 1997 and Subordinate Legislation Report No 20 of 1997). The objection was set out in full therein but the gist of it is that such provisions allowed the alteration of the effect of other legislation as if the text of the relevant Act were being changed for the bodies concerned.

4.8. The welcome removal of the provision for *changes prescribed by regulation* focuses attention on the remaining provision: *with all necessary changes*. The Committee is unclear as to the meaning and effect of this remaining provision. While it is hard to argue against necessity, there can be many arguments about what is, in fact, necessitated by any situation.

4.9. The wording suggests a number of questions. What changes are envisaged? Who will make the changes and how will the changes to the principal legislation be scrutinised by Parliament? What kind of necessity is meant - legal, practical, logical? Who would decide if a change were necessary? What processes would be followed to determine that changes were necessary? What processes would be used to inform those who might be affected?

4.10. While changes were made by regulation, the answers to most of the above questions were either unnecessary or clear because all issues were decided by the relevant Minister in proposing regulations and the House in deciding to allow or disallow them. However, the answers are not so clear with the bare permission of 'necessary changes'. This leads to concerns that the drafting is now not 'clear and precise' (section 4(3k)).

4.11. To the extent that the remaining words might be interpreted as permitting someone other than the Parliament to make '"necessary" changes' in place of those made by regulation, the revised legislation would offend against all three sub-sections of

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[32] 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.

[33] For example s.57B(1)–(5) *Government Owned Corporations Act 1993* are amended in cls.11 and 12 of the bill.

s.4(4) of *Legislative Standards Act* in that it would pay insufficient regard to the requirement that the bill:

- allows the delegation to of a legislative power only in appropriate cases and in appropriate circumstances;
- in sufficiently subjects the exercise of a delegated power to the scrutiny of the Legislative Assembly; and
- authorises the amendment of an Act by means other than another Act.

4.12. The Committee is in no doubt as to the good faith of the Treasurer and presumes that these are merely unintended consequences of an entirely benign alteration to the relevant Acts caused by, perhaps, an excess of caution or the drafting style of the original Acts. The Committee seeks further information on the meaning and effect of these words and an indication of why they are thought to be required.

4.13. If this provision is merely intended to cover cases where the relevant primary legislation could not, as a matter of law or logic, apply to the relevant GOC or variant, then it is unnecessary.

4.14. The Treasurer is to be commended for proposing the removal of large numbers of Henry VIII clauses.

4.15. The committee is, however, unsure of the meaning of the remaining words *all necessary changes*. This phrase appears to allow primary legislation relating to GOCs (and their variants) to be applied with *all* (or *any*) *necessary changes*. In many ways this has more adverse consequences in terms of the fundamental legislative principles than the GOC Act as currently drafted.

4.16. The committee office has, however, been informed that the intention behind the amendments in this bill is to comply with the fundamental legislative principles and any outcome to the contrary is unintentional. Unless this matter is corrected in the committee stage, the amendment could well have more adverse effects than the existing provisions.

4.17. The committee therefore seek clarification on this issue (and particularly the issues raised at paragraphs 4.9 and 4.11) from the Treasurer. If the questions raised by the committee cannot be resolved the committee requests that the bill be further amended to remove the words *all* (or *any*) *necessary changes* where they occur in the relevant context.

Does the legislation provide appropriate protection against self-incrimination?[34]

– **Schedule 1 cl.87 Obtaining evidence**

[34] 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.

4.18. Proposed s87 provides as follows:

> Witness giving incriminating answers
>
> ***87.(8)*** *It is not a reasonable excuse for a person to fail to comply with a notice under subsection (1) that complying with the notice might tend to incriminate the person.*
>
> ***(9)*** *Neither an answer given by a person under this section, nor any information, document or other thing obtained as a direct or indirect consequence of the person giving the answer, is admissible against the person in a criminal proceeding (other than a proceeding relating to the falsity of the answer) if¾*
>
> *(a) the person, before giving the answer, claimed that giving the answer might tend to incriminate the person; and*
>
> *(b) the answer might in fact tend to incriminate the person.*
>
> ***(10)*** *The fact that a document was produced by a person under this section is not admissible in evidence against the person in a criminal proceeding (other than a proceeding relating to the falsity of the document) if¾*
>
> *(a) the person, before producing the document, claimed that producing the document might tend to incriminate the person; and*
>
> *(b) producing the document might in fact tend to incriminate the person.*

♦ **Abrogation of the right to silence**

4.19. The Committee has considered the issue of abrogation of the right to silence at length in reporting on the *Fair Trading Amendment Bill 1996*[35]. For convenience, its reasoning is again set out below.

> ***2.14*** *The common law privilege against self-incrimination was well established in England*[36] *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:*
>
> > *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.*[37]
>
> ***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*

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

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

37 *Commentaries*, Blackstone 1769 edition, 293.

the rights and liberties of individuals by, for example, providing appropriate protection against self-incrimination.[38]

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*[39] *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*[40] *as evidence obtained by using the testimony as a basis of investigation.*

- **Explanatory Notes**

Unfortunately there is no discussion of this matter in the Explanatory Notes which would aid the Committee or Parliament in considering this section.

- **The Committee's view on the abrogation of the right to silence in proposed s.87 of schedule 1**

4.20. 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*.[41] In this case, the explanatory note provides no assistance.

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

39 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.

40 [1983] 57ALJR 248

41 Where from???? PROF.

4.21. The Committee remains concerned at the likelihood of the derivative use of information obtained under proposed s.87 to gain further evidence to be subsequently used against the person compelled to provide the information. Therefore, as it has done in earlier cases, the Committee requests that the Treasurer consider an amendment to add protection against the derivative use of information gained pursuant to this proposed section.

5. INTERACTIVE GAMBLING (PLAYER PROTECTION) BILL 1998 WAGERING BILL 1998

Background

5.1. The Honourable J M Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts introduced these two bills into the Legislative Assembly on 5 March 1998.

5.2. The *Interactive Gambling (Player Protection) Bill* provides a legislative basis for regulating interactive games (games where participation is by means of a telecommunications device, for example, gambling on the internet). In addition, the *Interactive Gambling (Player Protection) Bill* provides a legislative framework for the implementation in Queensland of an inter–jurisdictional scheme to regulate gambling on the internet and other interactive forms of gambling. This scheme will allow Queensland to recognise products offered by providers licensed in participating jurisdictions and enter into taxation sharing arrangements with participating jurisdictions.

5.3. The explanatory notes to the *Interactive Gambling (Player Protection) Bill* state that:

> *The* [Interactive Gambling (Player Protection)] *Bill incorporates significant consumer protection strategies. A crucial element is the focus on requirements aimed at ensuring the integrity of industry participants and the fairness of products being provided.*

5.4. The objective of the *Wagering Bill* establishes a regulatory framework for the conduct of wagering in Queensland. The explanatory notes to the *Wagering Bill* state that it ensures the highest standards of integrity, probity and consumer protection in Queensland for wagering activities conducted by persons licensed to conduct wagering.

5.5. Since both bills contain similar provisions, for the benefit of the members, the committee has addressed these provisions by referring to the *Interactive Gambling (Player Protection) Bill* and footnoted the relevant provisions of the *Wagering Bill*. The points raised (where footnoted) in relation to the *Interactive Gambling (Player Protection) Bill* apply equally to the *Wagering Bill*.[42] At the end of this chapter, the committee has addressed provisions only found in the *Wagering Bill*.

[42] References to “interactive gambling” will become “wagering”.

Does the legislation have sufficient regard to the rights and liberties of individuals?[43] (Privacy of information)

♦ **General observations on the *Interactive Gambling (Player Protection) Bill***

5.6. A number of the provisions of this bill have significant implications for the rights and liberties of individuals. The bill is designed to regulate the interactive gaming industry.[44] In doing so, it contains provisions which allow certain people to be excluded from the industry. In addition, it subjects participants in the industry to close and direct scrutiny, and imposes on them substantial obligations which they will be required to fulfil if they wish to continue to participate in the industry.

5.7. The bill contains provisions which will impact on the rights of three categories of people.

- people who wish to participate in the industry, either as licensed providers (Part 3), employees of licensed providers undertaking particular functions (key persons - Part 4), or agents of licensed providers (Part 5);[45]
- business and executive associates of licensed providers;
- people who wish to participate in the interactive gambling industry as consumers.

5.8. The provisions which relate to licensees, key persons, and agents of licensees[46] are designed to assess the suitability of a person to enter the industry. In addition there are provisions designed to ensure the ongoing suitability of these people to continue to be part of the industry. Such provisions clearly impact on the privacy of people wanting to be involved in the industry. However, there are very strong arguments for attempting to ensure the integrity and probity of people and corporations participating in the industry. In addition, it could be argued that these people accept these impositions when deciding to become involved in the industry.

5.9. The bill allows the suitability of these persons to be determined by investigations (see for example cls.35, 56, 68, 85 and 109[47]). These investigations could include seeking a report about the person's criminal history (cls.58, 87 and 111[48]), and requiring the person to give information or a document considered relevant to the investigation (cls.57, 86 and 110[49]).

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

44 Or wagering operations.

45 Parts 4, 5, 7 and 8 of the *Wagering Bill.*

46 See cl.95, 98 and 140 of the *Wagering Bill*.

47 Clauses 13, 14, 62, 63, 113, 146 and 147 of the *Wagering Bill.*

48 Clauses 25, 42, 70, 80, 107, 122 and 152 of the *Wagering Bill.*

49 Clauses 40, 41, 78, 79, 120, 121, 150 and 151 of the *Wagering Bill.*

5.10. Provisions which subject a business or executive associate of an industry participant to a similar investigative regime (cls.34 and 35(2)[50]) are also clearly an attempt to protect the industry from negative influences.

5.11. However, the "business or executive associate" may not have the same option as the industry participant of choosing not to participate. Provisions relating to investigations apply to the business or executive associate of a licensed provider or agent (see cls.35 and 109(2)[51]). These people may become subject to the investigatory regime due to circumstances outside their control.

5.12. Once again, the committee recognises the public interest arguments for ensuring that people involved in the interactive gambling industry[52] display the highest levels of integrity. Further, the committee is pleased to note that the terms "business associate" and "executive associate" are defined in the legislation. However, neither the provisions allowing investigation of a business or executive associate, or the definitions of the term restrict the investigatory powers of the minister to situations where it is likely, or could be reasonably anticipated that the business or executive associate may have an impact on the operations of the licensed provider. It would appear to the committee that these provisions may be broader than necessary to achieve the objectives of the legislation.

5.13. Finally, the bill contains provisions which regulate the conduct of consumers in the industry. These provisions prohibit consumers from knowingly participating in interactive gambling which is not "authorised" within the terms of the legislation (cl.16(2)). Clause 17(2) prohibits the a person from participating as a player unless the player is registered with the authorised provider.

5.14. The bill also contains provisions which allow consumers to be excluded from interactive gambling. These provisions will be considered specifically below.

5.15. The committee notes the substantial powers in the bill and their effect on the privacy of persons becoming involved in the interactive gambling industry.[53] However, the committee also recognises that these provisions are typical of many gaming control statutes. Further, the committee recognises the strong public interest reasons for regulating an industry in which members of the public may be vulnerable to exploitation by unscrupulous operators.

5.16. The committee is, therefore, of the view that the aim of protecting consumers and ensuring probity and integrity of service providers in the interactive gambling industry[54] may justify the infringement to privacy of persons involved in the industry.

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50 Clauses 38 and 39 of the *Wagering Bill.*

51 Clauses 38 and 149 of the *Wagering Bill.*

52 Wagering operations.

53 Wagering activities.

54 Wagering activities.

5.17. The committee considers that the privacy infringements to business and executive associates of licensed providers may not be justified in circumstances where such associates will not have the opportunity to influence the interactive gambling operations.[55] The committee considers that the objective of consumer protection could be equally well achieved by a more strictly worded provision, limiting the power of the minister to investigate business and executive associates to circumstances where such associates may influence the operations of the interactive gambling licensed provider.[56]

5.18. However, the committee is pleased to note the confidentiality requirement under cl.260[57] which provides that a person who is, or was, an inspector, or officer or employee of the department, must not disclose information gained by the person in performing functions under this bill.

5.19. The committee refers these privacy issues to Parliament for its consideration.

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?[58]

- **clauses 13 and 14 of the *Interactive Gambling (Player Protection) Bill***

– **clause 13**

5.20. Clause 13 contains a provision for the minister to provide authorisation to conduct a particular interactive game. Clause 13(3) states that:

> *The Minister has an absolute discretion to refuse to authorise an interactive game for which the Minister's authorisation is sought.*

5.21. Further, cl.59,[59] together with Schedule 1 of the bill, have the effect of excluding such a decision from judicial review. Together these provisions have the effect that a person could be prevented from conducting an interactive game, on the basis of the exercise of an administrative power, which is defined as being a matter in the Minister's "absolute discretion" and is not subject to any review.

5.22. The committee notes cl.13(4) which provides that:

> *If the Minister decides to refuse an application, the Minister must promptly give the applicant written notice of the decision and the reasons for it.*

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55 Wagering operations.

56 Wagering operators.

57 Clause 308 of the *Wagering Bill.*

58 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.

59 See paragraph 5.61 to this chapter.

5.23. Although the committee supports the requirement to give reasons for the decision the benefits of this requirement are largely neutralised by the facts that the minister has an absolute discretion to refuse to authorise an interactive game and there is no avenue of appeal.

5.24. The committee takes the view that this administrative power is not "sufficiently defined" and that the minister's discretion should be subject to set criteria. Further, the committee notes that the exercise of this power is not subject to any review. Whether such a broadly defined administrative power which is not subject to review is justified in the circumstances is a question for Parliament to consider and decide.

– **clause 14**

5.25. Clause 14(1)(c) provides that:

> ***14.(1)*** *The Minister may, by written notice given to a licensed provide, change the conditions on which a particular interactive game is authorised if the Minister is of the opinion¾*
>
> *(a) the conditions are not stringent enough to prevent cheating or other contravention of this Act; or*
>
> *(b) compliance with the conditions cannot be effectively monitored or enforced; or*
>
> *(c) there is some other good reason to change the conditions.*

5.26. Paragraphs (a) and (b) clearly define circumstances in which the power may be exercised. However, paragraph (c) is extremely broad. Further, under cl.59 and Schedule 1 decisions made under this section are not subject to review.

5.27. Clause 15(1)(c) provides a similarly broad ground for the revocation of an authorisation.

5.28. The committee notes that the Treasurer may change the conditions on which a particular interactive game is authorised. Whether the breadth of the provision is justified in the circumstances is for the Parliament to consider and decide.

5.29. The committee is pleased to note both of these provisions require the Minister to give the licensed provider written notice of the decision, and the reasons for it, and an opportunity to make representations.

5.30. The committee refers these matters to Parliament for its consideration.

Does the legislation have sufficient regard to the rights and liberties of individuals?[60] (privacy and fingerprint records)

– **clauses 31 and 66[61] of the *Interactive Gambling (Player Protection) Bill***

5.31. Clauses 31(2) and 66(2)[62] require applicants for interactive gambling licences and key person licences to provide fingerprints and a photograph before the Minister or chief executive is required to consider the application.

5.32. The committee has previously considered provisions similar to these clauses in the *Keno Bill 1996* and the *Lotteries Bill 1997*. In addition, the *Wagering Bill 1998*, which is currently before the committee for consideration also contains a comparable provision. The committee has previously expressed concern at the potential imposition on the rights and liberties of individuals in the provisions of those bills (now enacted). However, the committee also recognised the need to ensure that individuals in the gambling industry are of sound character.

5.33. The committee is of the view that similar principles apply to these clauses of the *Interactive Gambling (Player Protection) Bill*. That is, the committee considers that in the circumstances the requirement to provide fingerprints and photographs may be justified by the need to ensure that participants of the interactive gambling industry are of sound character.

5.34. The committee is pleased to note cl.93[63] which requires the destruction of fingerprints when they are no longer necessary, that is, when the licence is refused, cancelled, lapses or is surrendered.

5.35. Parliament may form the view that the requirements for applicants for key person licences (and whatever else) to provide fingerprints may be justified by the need to ensure that these persons are of sound character.

Is the legislation consistent with the principles of natural justice?[64] (sufficiency of notice)

– **clauses 36(2), 39 and 40[65]**

5.36. The committee is please to note that a number of provisions in the bill promote the principles of natural justice by requiring the minister or chief executive to give

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

61 Clauses 104 and 139 of the *Wagering Bill.*

62 Clause 104(2) of the *Wagering Bill*.

63 Clause 139 of the *Wagering Bill.*

64 Section 4(3)(b) 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 consistent with the principles of natural justice.

65 Clauses 26(3) and 68(4) of the *Wagering Bill.*

written notice of a decision, and the reasons for the decision, and provide the affected person with an opportunity to make representations with respect to the decision. These provisions include cls.14, 15,26,45-47,69,78,101, and 152[66]

5.37. On the other hand, cl.36(2)[67] provides that if the minister refuses to grant an application for an interactive gambling licence, the minister must promptly give the applicant written notice of the decision. However, there appears to be no provision in the division requiring the minister to provide written reasons for the decision. Further, there seems to be no provision giving the applicant an opportunity to make representations following the decision of the minister. This decision is exempt from judicial review under cl.59.[68]

5.38. Similarly, cls.39 and 40, which provide for the minister to change the conditions of a licence, do not require the minister to provide reasons, or to provide the licensed provider with an opportunity to make representations.

5.39. The committee notes that a minister's decision is exempt from judicial review under cl.59.[69] It is of the view that providing a person with an opportunity to make representations regarding an adverse finding which has been made about the person by the minister is an essential element of natural justice.

5.40. The committee refers to Parliament for its consideration the issue of whether this potential for denial of natural justice is justified in the circumstances.

– **Clause 48, 79 and 102[70]**

5.41. Clause 48[71] provides for the immediate suspension of an interactive gambling licence as follows:

> ***48.(1)*** *The Minister may suspend an interactive gambling licence immediately if the Minister believes¾*
>
> *(a) a ground exists to suspend or cancel the licence; and*
>
> *(b) the circumstances are so extraordinary that it is imperative to suspend the licence immediately to ensure¾*
>
> *(i) the public interest is not affected in an adverse and material way; or*
>
> *(ii) the integrity of the conduct of the interactive games by the licensed provider is not jeopardised in a material way.*
>
> ***(2)*** *The suspension¾*

66 Clauses 31, 44, 51, 54, 82, 108, 109, 114, 154 and 155 of the *Wagering Bill.*

67 Clauses 26(3) and 68(4) of the *Wagering Bill.*

68 Clause 94 of the *Wagering Bill.*

69 Clause 94 of the *Wagering Bill.*

70 Clauses 52, 130 and 162 of the *Wagering Bill.*

71 Clause 52 of the *Wagering Bill.*

*(a) must be effected by written notice (a **"suspension notice"**) given to the licensed provider with a show cause notice; and*

(b) operates immediately the suspension notice is given; and

(c) continues to operate until the show cause notice is finally dealt with.

5.42. Similarly, cl.79[72] provides for the immediate suspension of a key person licence and cl.102[73] provides for the immediate suspension of an agent's operations.

5.43. These provisions operate to suspend the respective licences immediately before the affected licensees can make representations. Further, there does not appear to be any avenue for appeal against decisions to immediately suspend the respective licences under these provisions.

5.44. The explanatory notes state that provisions like cl.48 are to:

> *provide for the immediate suspension of an interactive gambling licence in a case where a ground exists to suspend or cancel the licence and the seriousness of the situation justifies immediate action in order to safeguard the public interest or the integrity of the conduct of interactive games.*[74]

5.45. In the circumstances it would appear that the tests contained in cls.48(1), 79(1)(b) and 102(1)(b) are extremely broad.

5.46. The committee recognises that there are circumstances where it will be necessary to deny natural justice in order to achieve the objectives of the Act. Further, it may be in the public interest to do so, where the denial of natural justice is necessary to protect consumers in the industry. However, in such cases the committee is of the view that the circumstances where actions which do not give full effect to the principles of natural justice can be taken should be strictly defined.

5.47. The committee refers to Parliament the issues of:

- whether the failure to fully implement the principles of natural justice is justified in the circumstances; and
- whether the circumstances which justify actions under cls.48, 79 and 102[75] are sufficiently defined.

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72 Clause 130 of the *Wagering Bill.*

73 Clause 102 of the *Wagering Bill.*

74 Explanatory notes to the *Interactive Gambling (Player Protection) Bill* at p. 9. Explanatory notes to the *Wagering Bill* at p. 8.

75 Clauses 52, 130 and 162 of the *Wagering Bill.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[76] (judicial review ousted)?

– **clause 59[77] of the *Interactive Gambling (Player Protection) Bill***

5.48. Clause 59[78] provides that:

> ***59.(1)*** *A decision of the Governor in Council or Minister made, or appearing to be made, under this Act about an interactive gambling licence, a person with an interest or a potential interest in an interactive gambling licence, the authorisation (or revocation of the authorisation) of an interactive game or the approval (or cancellation of the approval of an exemption scheme¾*
>
> *(a) is final and conclusive; and*
>
> *(b) cannot be challenged appealed against, reviewed, quashed, set aside, or called in question in another way, under the Judicial Review Act 1991 or otherwise (whether by the Supreme Court, another court, a tribunal or another entity); and*
>
> *(c) is not subject to any writ or order of the Supreme Court, another court, a tribunal or another entity on any ground.*
>
> ***(2)*** *The decision to which subsection (1) applies include, but are not limited to¾*
>
> *(a) a decision of the Governor in Council mentioned in schedule 1, part 1; and*
>
> *(b) a decision of the Minister mentioned in schedule 1, part 2.*
>
> ***(3)*** *In this section¾*
>
> ***"decision"*** *includes¾*
>
> *(a) conduct engaged in to make a decision; and*
>
> *(b) conduct related to making a decision; and*
>
> *(c) failure to make a decision.*

5.49. This clause applies to a number of significant provisions. These are listed in Schedule 1[79] of the bill.

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

[77] Clause 94 of the *Wagering Bill.*

[78] Clause 94 of the *Wagering Bill* provides:

> ***94.*** *A decision to which this part applies¾*
>
> (a) *is final and conclusive; and*
>
> (b) *cannot be challenged, appealed against, reviewed, quashed, set aside, or called in question in another way, under the Judicial Review Act 1991 or otherwise (whether by the Supreme Court, another court, a tribunal or another entity); and*
>
> (c) *is not subject to any writ or order of the Supreme Court, another court, a tribunal or another entity on any ground.*

[79] Schedule 1 of the *Wagering Bill.*

5.50. Provisions which remove rights of review of decisions made under a legislative power have significant implications for the rights of individuals. The committee has previously reported that it generally considers that legislation should only limit full access to judicial review in exceptional and compelling circumstances.[80]

5.51. The explanatory notes state:

> *... these provisions are absolutely necessary in the public interest to ensure integrity in the conduct of interactive games. They are consistent with other Queensland legislation regulating or controlling lawful forms of gambling.*[81]

5.52. The fact that similar ouster clauses have been incorporated in Queensland gaming legislation does not, in the committee's view, legitimise or justify the abrogation of this fundamental legislative principle.

5.53. The committee notes the Treasurer's previous response to its similar comments in relation to the keno and lotteries legislation.[82] The committee understands the argument that the availability of review by the courts may hamper the ability of the Governor in Council and the minister to act swiftly and decisively in the public interest since they have to carefully evaluate confidential information and prevent dishonest persons from entering into the industry.

5.54. As a general principle the committee opposes the ousting of access to judicial review. Whether the objectives of this legislation justifies the removal of appeal rights in the circumstances of this clause is a question which the committee refers to Parliament to decide.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[83]

– **clauses 113 and 117 of the *Interactive Gambling (Player Protection) Bill*[84]**

5.55. Clause 113[85] of the bill requires an "interactive gambling tax" to be calculated and paid to the chief executive on a basis fixed under a regulation. Clause 117[86] provides that a licensed provider under the bill must pay the chief executive a penalty for the late payment of an interactive gambling tax or licence fee outstanding. The penalty is a percentage, to be prescribed by regulation, of the unpaid amount. An additional penalty may also be prescribed by regulation.

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80 *Lotteries Bill 1997* – Alert Digest Number 7 of 1997 at p. 6.

81 Explanatory notes to the *Interactive Gambling (Player Protection) Bill* at p. 2. Explanatory notes to the *Wagering Bill* at p. 8 (cl.52).

82 *Keno Bill 1996* – Alert Digest No. 11 of 1996 at p. 38. *Lotteries Bill 1997* – Alert Digest No. 8 of 1997 at pp. 15 and 16.

83 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.

84 Clauses 166 and 170 of the *Wagering Bill.*

85 Clause 166 of the *Wagering Bill.*

86 Clause 170 of the *Wagering Bill.*

5.56. It has long been one of the most important principles of the Westminster system that taxes should only be levied by Parliament and not by the Executive. This constitutes one of the most fundamental legislative principles concerning the institution of Parliament. Taxation matters are unsuitable for delegation. Although there are some grey areas in the collection of revenue, this does not appear to be one of them. This is generally indicated by the use of the word "tax" to describe the relevant revenue measure (although the committee does not consider that this is simply a matter of terminology).

5.57. It is the view of the committee that Parliament should not surrender its powers to control taxation without the most careful argument and consideration.

5.58. With respect to both cls.113 and 117[87] the committee asks the Treasurer for her reasons for seeking to make tax rates under this bill a matter of Executive discretion rather than Parliamentary provision.

5.59. The Senate Standing Committee for the Scrutiny of Bills is of the view that taxation is a matter for principal legislation. Where it is impracticable to set the tax rates in primary legislation that committee considers that primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.[88]

5.60. This committee maintains the view that taxation should be a matter for principal legislation.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[89]

– **Proposed Part 8, Division 2, Subdivision 4 of the *Interactive Gambling (Player Protection) Bill*[90]**

5.61. The committee has previously considered the *Keno Bill 1996*[91] and the *Lotteries Bill 1997*[92]. Both of these bills (now enacted) contained similar provisions. In addition, the Wagering Bill, currently being considered by the committee contains similar provisions.

5.62. Proposed s.196[93] of the bill allows an inspector to enter a place if:

87 Clauses 166 and 170 of the *Wagering Bill.*

88 Senate Standing Committee, 16th Report 1995 at p. 340.

89 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.

90 Proposed Part 12, Division 2, Subdivision 3 of the *Wagering Bill.*

91 *Keno Bill 1996* – Alert Digest No. 10 of 1996 at pp. 6–7.

92 *Lotteries Bill 1997* – Alert Digest No. 7 of 1997 at pp. 9–10.

93 Clause 238 of the *Wagering Bill.*

- the occupier consents;
- the entry is authorised by a warrant; or
- the place is a place of business and the entry is made when the place is open for business.

5.63. Once the inspector has entered the place there are broad powers to search, and seize evidence set out in cl.204.[94] The bill also allows seizure without a warrant or consent under cl.207[95] if an inspector reasonably believes the thing to be seized is evidence of an offence against the bill and the seizure is necessary.

5.64. By contrast, if an inspector enters a place with consent, the inspector may seize a thing at the place if:

- the inspector reasonably believes that thing is evidence of an offence; and
- seizure of the thing is consistent with the purpose of entry as told to the occupier when asking for the occupier's consent.

5.65. If an inspector applies to a magistrate for a warrant there are several safeguards in cl.200[96] of the bill to ensure that the issuing of a warrant is justified, for example:

- the magistrate is to be given all the information the magistrate requires;
- the magistrate must be satisfied that there are reasonable grounds for suspecting that there is or may be evidence of an offence in the place.

5.66. If an inspector enters the place with a warrant, the inspector may seize the evidence for which the warrant was issued.

5.67. In view of the breadth of the powers under proposed Subdivision 4 of the bill to search, inspect, seize evidence etc, and in view of the fact that a person not reasonably providing assistance to those carrying out powers commits an offence (maximum penalty $3000 fine[97]), there appears to be a need for some further safeguards.

5.68. Clause 208(5) provides that:

> *Also, the inspector may seize a thing at the place if the inspector reasonably believes it is being, has been or is about to be sued in committing an offence against this Act or a corresponding law.*

5.69. The committee notes that the phrase "is about to be used in committing an offence" was not included in the comparable provisions in the *Keno Act 1996* or the *Lotteries Act 1997*. Further, the phrase is not incorporated into the Wagering Bill

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94 Clause 246 of the *Wagering Bill.*

95 Clause 207 of the *Wagering Bill.*

96 Clause 242 of the *Wagering Bill*.

97 Clauses 205 and 206 of the *Interactive Gambling (Player Protection) Bill* and cls.247 and 248 of the *Wagering Bill.*.

currently before Parliament. This provision has the potential to have adverse consequences for a person who, in fact, has done nothing unlawful.

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

5.71. The committee notes that some standard clauses imposing requirements gaining an occupier's consent to enter a place have been incorporated into the bill.

5.72. However, it would therefore appear reasonable that departures from the safeguards provided by search warrants should only be considered in exceptional circumstances.

5.73. The committee requests the Treasurer to provide reasons for considering the power to seize evidence after entering a place without consent or warrant to be justified. The committee refers these matters to Parliament for its consideration.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[98]

– **clause 246 of the *Interactive Gambling (Player Protection) Bill*[99]**

5.74. Clause 246 effectively provides that an act or omission of a person's representative (relating to an offence under the bill) is taken to have been done by the person themselves – if the representative was acting within the scope of their authority. The person will therefore be taken to have committed the relevant offence unless they can prove that they could not, *by the exercise of reasonable diligence, have prevented the act or omission*.

5.75. In the committee's view, this provision makes a principal vicariously liable for the acts or omissions of the principal's representative. The committee notes that "representative" is broadly defined to include an employee or agent of an individual and of a corporation. In the case of a corporation an executive officer is also a "representative".

– **clause 247 of the *Interactive Gambling (Player Protection) Bill*[100]**

5.76. Clause 247 provides that, if a corporation is convicted of an offence against the bill, each executive officer of the corporation is taken to have committed the offence of failing to ensure that the corporation complies with that provision. The provision therefore effectively presumes the executive officers' guilt until the officers can prove that:

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98 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.

99 Clause 288 of the *Wagering Bill.*

100 Clause 289 of the *Wagering Bill.*

- they exercised reasonable diligence in ensuring the corporation's compliance with a provision; or

- they were not in a position to influence the conduct of the corporation in relation to the offence.

♦ **The committee's assessment of the reversals of onus of proof in cls.246 and 247.**

5.77. The committee is of the view that these clauses effectively reverse the onus of proof with respect to the offence deemed to be committed.

5.78. Although cls.246 and 247[101] provide defences for the person concerned, the affected person will be presumed guilty unless they can raise an effective defence under the relevant section.

5.79. Where the committee has formed the view that a fundamental legislative principle has been infringed, as is the case with these clauses, it refers to the explanatory notes for information justifying such a breach. There does not, however, appear to be anything in the explanatory notes to this bill justifying these reversals of onus of proof.

5.80. The committee has considered these types of reversal of onus of proof before.[102] It appreciates the difficulties of determining liability in certain circumstances, for example, in corporations.

5.81. The committee notes the possible argument that public interest and integrity of wagering operations may require that responsible officers of wagering operations be liable for any offences under the bill in an area for which they hold responsibilities. Having said that, as a general principle, however, the committee does not approve of provisions in legislation which effectively reverse the onus of proof without adequate justification.

5.82. The committee refers to Parliament the question of whether cls.246 and 247[103] contain justifiable reversals of onus of proof – and therefore have sufficient regard to the rights and liberties of the individuals affected.

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101 Clauses 288 and 289 of the *Wagering Bill.*

102 *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 & 212 – Alert Digest No. 7 of 1997; *Revenue Laws Amendment Bill 1997,* cl.25 – Alert Digest No. 8 of 1997; *Transport Legislation Amendment Bill 1997*, cls.124 and 129 – Alert Digest No. 11 of 1997; *Electricity Amendment Bill (No.3) 1997*, cls.39 and 64 – Alert Digest No. 12 of 1997; *Integrated Planning Bill 1997*, cls.4.4.3 and 4.4.14 – Alert Digest No. 12 of 1997; *Tobacco Products (Prevention of Supply to Children) Bill 1997*, cl.25 – Alert Digest No. 13 of 1997.

103 Clauses 288 and 289 of the *Wagering Bill.*

Does the legislation have sufficient regard to the institution of Parliament (transitional regulation making power)?[104]

– **clause 329 of the *Wagering Bill***

5.83. Clause 329 provides:

> ***329 (1)*** *A regulation may make provision of a saving or transitional nature for which—*
>
> *(a) it is necessary or convenient to assist the transition from the conduct of wagering under the existing Act to the conduct of approved wagering under this Act; and*
>
> *(b) this Act does not make provision or sufficient provision.*
>
> *(2) A regulation under this section may have retrospective operation to a day not earlier than the commencement day.*
>
> *(3) Subject to subsection (4), a regulation under this section expires 1 year after it is made.*
>
> *(4) This section expires 1 year after the commencement day.*

5.84. When similar transitional regulation making powers have been used in bills in the past, ministers have defended the need for these powers based on the exceptional nature of the subject legislation. In particular, they have referred to the following elements of the legislation:

- the urgent nature of the legislation and the restrictive timetable for its effective implementation;
- the potential for unintended consequences with substantial effects resulting from the complexity of the legislation;
- the innovative nature of the legislation; and
- the need to swiftly correct unintended consequences to avoid substantial repercussions.

5.85. The committee notes that these factors do not appear to have been specifically addressed in the explanatory notes.

5.86. The committee requests information from the Treasurer justifying the need for broad transitional regulation making powers with potential retrospective effect. This information should address the points raised above. In the absence of such justification the committee recommends the removal of cl.329 of the bill.

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

Does the bill allow the delegation of legislative power only in appropriate cases?[105]

– **clause 329(1) of the *Wagering Bill***

5.87. Clause 329(1) allows regulations to be made providing for matters of a saving or transitional nature for which the transitional provisions of the bill *does not make provision or sufficient provision.* Similar subsections have previously been commented upon adversely by the committee.[106]

5.88. The committee recognises that there may be circumstances under which regulations may need to be made that were not anticipated under the bill. As previously indicated, the committee 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 1992* 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*

5.89. The committee notes that regulations under cl.329(1) are subject to a 12 month sunset clause contained in cl.329(3). Furthermore, the transitional regulation making power is also subject to a 12 month general sunset clause contained in cl.329(4).

5.90. The committee is in a position to move a disallowance motion on any subordinate legislation that breaches s. 4(5)(c) of the *Legislative Standards Act 1992.* The committee would recommend that the powers be limited to designated matters which are appropriate to subordinate legislation rather than having to deal with the matter by disallowance.

5.91. The committee is pleased to note that both this power and regulations made pursuant to it are subject to sunset clauses. It is also pleased to note the absence of "Henry VIII clauses[107]" also typically found in transitional regulation making powers.

5.92. The committee maintains the view that it has expressed on similar provisions in the past. It generally recommends against any provision allowing regulations to

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105 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.

106 For example, *Local Government Amendment Bill 1996*, cl.137ZZG – Alert Digest No. 2 of 1996 at pp 19 - 20; *Suncorp Insurance and Finance Amendment Bill 1996*, cl.15 – Alert Digest No. 3 of 1996 at p 17; *Sugar Industry Amendment Bill 1996*, cl.32 – Alert Digest No. 4 of 1996 at p 27; *Ambulance Service Amendment Bill 1996*, cl.17 – Alert Digest No. 7 of 1996 at pp. 2 - 3; *State Financial Institutions and Metway Merger Facilitation Bill 1996*, cl.96 – Alert Digest No. 7 of 1996 at pp 20 - 21; *Statutory Bodies Financial Arrangements Amendment Bill 1996*, cl.8 – Alert Digest No. 10 of 1996 at pp 18-19; *Electricity Amendment Bill 1997* cl.53 – Alert Digest No. 5 of 1997 at pp 33-34; and *Legal Aid Queensland Bill 1997*, cl.88 – Alert Digest No. 5 of 1997 at pp 55-56.

107 The committee considers "Henry VIII" clauses to be clauses in an Act of Parliament which enable the Act to be expressly or impliedly amended by subordinate legislation or Executive action.

legislate with respect to matters that are not covered in a principal Act of Parliament but should have been so covered.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[108]

– **clause 329(2) of the *Wagering Bill***

5.93. Clause 329(2) allows transitional regulations to have retrospective operation to a date not earlier than the commencement of the bill.

5.94. The committee has previously made adverse comments on similar provisions.[109] The committee does not object to curative retrospective legislation without significant effects on the rights and liberties of citizens. However, when the delegation of legislative power is as broad as it is under sub-section (2), subordinate legislation should not be allowed to have retrospective operation.

5.95. The committee has the power to recommend the disallowance of regulations that retrospectively affect the rights and liberties of citizens and is committed to exercising its responsibilities under the *Legislative Standards Act 1992*. However, the committee's preference is that primary legislation should more clearly circumscribe the delegated legislative power, and retrospective legislation with the potential to adversely affect rights and liberties should be subject to the scrutiny of parliamentary debate.

5.96. The committee recommends the removal of cl.329(2) from this bill.

[108] 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.

[109] For example, *Sugar Industry Amendment Bill 1996*, cl.32 – Alert Digest No. 4 of 1996 at p. 27 and Alert Digest No. 6 of 1996 at p. 33; *Statutory Bodies Financial Arrangements Amendment Bill 1996*, cl.8 – Alert Digest No. 10 of 1996 at p. 19; *Justice and Other Legislation (Miscellaneous Provisions) –Bill 1997*, cl.2 – Alert Digest No. 4 of 1997 at pp. 1-3; *Lotteries Bill 1997*, cl.245 – Alert Digest No. 7 of 1997 at pp. 12-15.

6. JUSTICE AND OTHER LEGISLATION (MISCELLANEOUS PROVISIONS) BILL 1998

Background

6.1. The Honourable D E Beanland MLA, Attorney–General and Minister for Justice introduced the bill into the Legislative Assembly on 5 March 1998.

6.2. The bill makes "minor or technical amendments" to a number of statutes administered by the Department of Justice. For example some amendments are made to the *Justices Act 1886*, the *Property Law Act 1974* and the *Vexatious Litigants Act 1981*.

General observation

6.3. The purpose of miscellaneous provisions bills is to make amendments that are of a minor or technical nature to a number of Acts. The committee, however, is concerned that there appears to be a move over time, to amendments of a more substantial nature being included.

6.4. The committee notes the Attorney–General's comment that departures from the convention to only deal with minor or technical amendments "*may be justified under appropriate circumstances*".[110] The Attorney–General did not provide any justifications for departure from the convention in his speech.

6.5. The committee seeks information from the Attorney–General as to when such departures would be justified.

6.6. The committee is of the view that when there is a departure from the convention, and more substantial amendments are proposed, such amendments should be enunciated by the minister responsible for the bill in the explanatory notes.

Does the legislation have sufficient regard to the rights and liberties of individuals?[111] (freedom of movement)

– **clause 6 (proposed amendment of the *Bail Act 1980* new s. 19E)**

6.7. The proposed new ss.19B-F contained in cl.6 of the bill insert new provisions concerned with the review of certain bail decisions. Section 19E applies where a decision is made other than by the Supreme Court to release a person on bail. If a police officer or a person appearing on the Crown's behalf indicates to the court

110 Second reading speech at p.2.

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

that they will make an application to review the decision made to release the person on bail then the release of the person must be deferred.

6.8. Section 19E(3) provides that the deferral of release will end on whichever of the following happens first:

(a) the review is completed;

(b) a police officer, or a person appearing on behalf of the Crown, gives the person or court that made the decision a written notice that the Crown does not wish to proceed with the review;

(c) the end of 72 hours from when the decision was made.

6.9. This new provision allows a person to be detained for up to a further 3 days even though a decision has already been made to release that person on bail. The nature however of making such an application appears to require some form of deferral on release, pending the decision on review.

6.10. The committee notes that while the new provision s.19E does restrict the freedom of movement of the individual, the nature of the review requires that a deferral of release be allowed. The committee refers to Parliament the question of whether sufficient regard has been had to the rights of the detainee in enabling a review against the release of that person on bail.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[112]

– **Clause 39 (proposed amendment of the *Crimes (Confiscation) Act 1989* new s.13(1A))**

6.11. Clause 39 amends the *Crimes (Confiscation) Act 1989* by inserting a new provision which expands the definition of tainted property.

***(1A)** Also, tainted property in relation to a serious offence includes¾*

(a) for a provision of this Act other than section 90 and if the offence is against section 90¾ the tainted property mentioned in section 90 in relation to which the offence is committed or intended to be committed; and

(b) for a provision of this Act other than section 92 and if the offence is against section 92¾ the property suspected of being tainted property mentioned in section 92 in relation to with the offence is committed or intended to be committed.

6.12. The meaning of the new section (1A) is not clearly apparent on the first reading. The department has advised the committee that this was a difficult provision in terms of drafting. The intention of the provision is to expand the definition and if the

[112] 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.

offence is against s.90 or 92[113] include in the definition that property suspected of being tainted under ss.90 or 92.

6.13. The committee notes that the meaning of proposed s.13(1A) of the *Crime (Confiscation) Act 1989* is not apparent on first reading.

6.14. The committee therefore requests the Attorney-General to confirm the intention of the new provision.

Is the content of the explanatory note sufficient?[114]

– **clause 39 (proposed amendment of the *Crimes Confiscation Act 1989*)**

6.15. The explanatory notes do not appear to clarify the meaning of proposed s.13(1A). They state:

> ***Clause 39*** *amends section 13 by inserting two new subsections regarding the definition of "tainted property" to include the tainted property mentioned in relation to which the offence is committed or intended to be committed.*[115]

6.16. As explanatory notes may be used to interpret legislation and this proposed provision is not easy to understand it is important that the explanatory notes are sufficient.

6.17. The committee has brought this to the attention of the department and requests the minister to clarify the intention of the provision in the explanatory notes.

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113 **90.(1)** A person who engages in money laundering is guilty of a crime.

Maximum penalty–3 000 penalty units or 20 years imprisonment.

(2) A person engages in money laundering if–

(a) the person—

(i) engages, directly or indirectly, in a transaction involving money or other property that is tainted property; or

(ii) receives, possesses, disposes of or brings into Queensland money or other property that is tainted property; or

(iii) conceals or disguises the source, existence, nature, location, ownership or control of the tainted property; and

(b) the person knows, or ought reasonably to know, that the property is derived from some form of unlawful activity.

92.(1) A person must not receive, possess, dispose of, bring into Queensland, conceal or disguise property that may reasonably be suspected of being tainted property.

Maximum penalty—100 penalty units or 2 years imprisonment.

(2) If a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that the person had no reasonable grounds for suspecting that the property mentioned in the charge was either tainted property or derived from any form of unlawful activity.

114 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.

115 Explanatory notes at p. 7.

– **Clause 55 (proposed amendment of the *Roman Catholic Church (Incorporation of Church Entities) Act 1994* s. 3(3) definitions of "bishop" and "officer")**

6.18. Clause 55 amends the definitions of "bishop" and "officer" by omitting the words "the Code of" where they appear in relation to the references to the canon law. The explanatory notes to the bill however state that:

> *It also omits from section 3 (Definitions) the following definitions, "bishop" and "officer". The unnecessary words, 'the Code of', have also been omitted from this section.*[116]

6.19. The bill therefore proposes to omit the words "the Code of" from the definitions of "bishop" and "officer", while the explanatory notes state that the entire definitions of these terms are to be omitted. The committee office has communicated with the Department of Justice about this conflict between the explanatory notes and the terms in the bill. The department has clarified the position and advised the committee that the intention was only to remove the words "the Code of" from the two definitions and therefore that there is a typographical error in the explanatory notes to the bill.

6.20. As explanatory notes may be used to interpret legislation the committee considers it essential that they be in the *Queensland Explanatory Notes for Bills passed during the year* accurate. It therefore requests that the Attorney-General clarify the intended contents of the explanatory notes to cl.55 and that he ensure that the corrected explanatory note is published with this Act.

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

– **Schedule 1 – *Fair Trading Act 1989***

6.21. The committee notes the amendment in schedule 1 to s.90(6A) of the *Fair Trading Act* – which corrects an erroneous amendment from "section" to "subsection".

6.22. The committee has no objection to retrospectively curing inadvertent or typographical errors.

Schedule 1 *Legal Aid Act 1989*

6.23. Section 42(3)(c) of the *Legal Aid Act* is amended by inserting the words *an exempt public authority under the Corporations Law* to the definition of Legal Aid. The effect of the amendment is to provide that Legal Aid is now also an exempt public

116 Explanatory notes at p. 10.

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.

authority for the purposes of the Corporations Law. This new provision is taken to have commenced on 1 July 1997 and so has effect retrospectively.

6.24. The amendment appears to exempt Legal Aid from obligations under the Corporations Law and therefore does not appear to disadvantage individuals by the retrospective commencement date.

6.25. The committee has no further comment with respect to this provision providing retrospective commencement of s.43(3)(c).

7. POLICE AND OTHER LEGISLATION (MISCELLANEOUS PROVISIONS) BILL 1998

Background

7.1. The Honourable T R Cooper MLA, Minister for Police and Corrective Services and Minister for Racing introduced the bill into the Legislative Assembly on 5 March 1998.

7.2. This bill makes amendments to both minor and technical issues and significant policy matters in a range of legislation in the policing portfolio and related Acts, including:

- *Police Powers and Responsibilities Act 1997*;
- *Drugs Misuse Act 1986;*
- *Police Photographs Act 1966*;
- *Police Service Administration Act 1990*;
- the *Criminal Code*;
- *Environmental Protection Act 1994*; and
- *Weapons Act 1990*.

Positive Aspects of the Bill

7.3. The bill introduces some new safeguards for the individual.

7.4. For example:

> *(a) Clause 9 allows the commissioner to impose conditions on disclosure of the records held by the Police Service. It also imposes sanctions in the form of a criminal offence for improper disclosure of that information by the increasing numbers of persons lawfully in possession of that information.*
>
> *(b) Clause 57 ensures that extensions of the detention periods in Part 8 beyond 12 hours can only be ordered by a Stipendiary Magistrate*

7.5. Clause 60 requires a report on the outcome of a covert search warrant to be given to the Public Interest Monitor as well as the issuing judge.

♦ **AMENDMENTS TO THE POLICE SERVICE ADMINISTRATION ACT 1990**

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?[118]

– **Clause 7 (amendment of s.7.2 of the *Police Service Administration Act 1990* – Duty concerning misconduct or breaches of discipline)**

7.6. Section 7.2 of the *Police Service Administration Act 1990* casts a duty on any officer or staff member of the Police Service who is aware of conduct that is either misconduct or a breach of discipline to report that to the commissioner and the Criminal Justice Commission and to take action as prescribed by regulation.

7.7. Clause 7 (3) empowers the commissioner, *by written instrument*, to exempt officers or staff members from that duty *either generally or on stated grounds* in the case of contraventions of the *Anti-Discrimination Act 1991*. Under subclause (4) the commissioner may do so only if satisfied that the exemption will not adversely affect the welfare of the officers or staff members affected by or involved in the conduct. Once the commissioner exempts the person from the duty to report the misconduct subclause (8) provides that the commissioner is also not required to report the misconduct.

7.8. It is unclear to the committee what this clause is designed to achieve. There is no reference to its purpose in the minister's second reading speech. The explanatory memorandum states:

> *The exemptions remove the restrictive reporting requirements that greatly reduce the capacity of persons performing support and counselling roles to operate effectively. For example, a welfare officer dealing with an alleged contravention of the* Anti-Discrimination Act 1991 *would not then be required to report information against the wishes of the aggrieved.*

7.9. The committee notes, however, that subclauses (6) and (7) specifically provide for exemption for officers or staff members appointed to provide confidential professional counselling to officers and staff members and that this only operates while they are providing professional counselling services in an official capacity.

7.10. Subclause (5) prevents a general exemption from applying to a person who is the subject of a specific complaint.

7.11. These clauses appear to empower the commissioner to exempt any officer from the duty to report misconduct or disciplinary breaches in **any case of a breach of the *Anti-Discrimination Act 1991*** by a member of the police service. Section 7.2 (1) of the *Police Service Administration Act 1990* defines "conduct" to mean:

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[118] 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.

... conduct of an officer, wherever and whenever occurring, whether ... on or off duty ...

7.12. The provisions of the *Anti-Discrimination Act 1991* apply to all Queensland citizens, not merely members of the Queensland Police Service. Hence the discriminatory behaviour by a member of the police service constituting misconduct could be in respect of members of the public as well as other members of the police service and includes discriminatory behaviour on the basis of sex, age, race and disability.

7.13. There is no mechanism in the bill for a review of the decision by the commissioner to exempt an officer from a duty to report this particular category of improper activity. There are also no criteria in the bill governing or guiding the making of the decision by the commissioner, other than reasonable satisfaction that the exemption will not affect the welfare of the *officers affected by or involved in the conduct.*

7.14. The committee is concerned that the clause as presently drafted appears to allow the commissioner to exempt any breach of the *Anti-Discrimination Act 1991* by any member of the Queensland Police Service in respect of any other person.

7.15. There does not seem to be any criteria guiding this exercise of discretion which is not reviewable. In addition, it seems that the object of the amendment as described in the explanatory notes is achieved by subclauses (6) and (7).

7.16. The committee, therefore, requests the minister to consider amending cl.7 to:

- further define its scope; and
- subject the commissioner's discretion to set guidelines or criteria. The committee brings these comments to the attention of Parliament.

Does the legislation have sufficient regard to the rights and liberties of individuals (privacy)?[119]

Is the legislation consistent with the principles of natural justice?[120]

– **clause 9 (amendment of s.10.2 – authorisation of disclosure)**

7.17. Section 10.2 (1) of the *Police Service Administration Act 1990* presently allows the commissioner to authorise disclosure, in writing, of *information* in the possession of the Police Service. This must accord with any regulations made under section 10.2 (1A) of the Act in relation to disclosure of such information. To date it appears that there are no regulations governing the disclosure of information. The present

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

[120] Section 4 (3) (b) 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 consistent with the principles of natural justice

clause in the bill allows the commissioner, subject to such regulations, to impose conditions on such disclosure. Contravention of such conditions is an offence attracting a penalty of 40 penalty units ($3,000).

7.18. The committee notes that the power to impose conditions on the release of information is discretionary.

7.19. Clause 5 of the bill includes in the definition of "proper records" which the commissioner is responsible for (under s.4.8(2)(t) of the *Police Service Administration Act 1990*) the following:

> *"including, but not limited to, records about–*
>
> *(I) the action taken by a police officer or someone else in relation to a person* ***suspected*** *of having committed an offence; and*
>
> *(ii) the* ***result*** *of any proceeding against the person for the offence."*

7.20. The committee is concerned that the bill does not require, at least in the case of information about suspected and convicted offenders and about the result of criminal proceedings (which may include an acquittal, directed verdicts of not guilty or dismissal of a charge for various reasons), the imposition of mandatory requirements on disclosure. At present there is no privacy legislation in Queensland regulating the disclosure of such information.

7.21. The legislation also does not afford any opportunity to the persons affected by such disclosure to know of the contents of any record of information that is to be disclosed or to have the opportunity to correct or challenge it.

7.22. Section 10.2 of the *Police Service Administration Act* and amendments in cl.9 of this bill may adversely affect the right of individuals to privacy.

7.23. The committee requests that the minister consider amending this provision to include, in the case of information about both suspected and proven criminal offenders, mandatory conditions on disclosure which address:

- what the recipients of the information may use it for; and
- to whom those persons may disclosure that information.

7.24. The committee also asks the minister to consider allowing affected individuals to view the contents of the record and be afforded an opportunity to correct or challenge the record.

7.25. Finally, the committee also questions whether the conditions governing the disclosure of such potentially damaging information ought to be the subject of regulation or whether it is more appropriate that the conditions be included in the *Police Service Act 1990* itself. At least it appears necessary for a regulation to be made promptly to regulate the disclosure of such information.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[121]

– **clause 12 (amendment of s.10.12 – legal proceedings)**

7.26. This clause of the bill alters the existing section 10.12 of the *Police Service Administration Act 1990* by extending the matters that may be proved by allegation or statement to include *stated property is the property of the commissioner under this Act*. This increased evidentiary aid applies to *any* proceeding and it enlarges on the previous narrow, technical categories of:

> *(a) stating that a place is a police station;*
>
> *(b) stating that anything in a police station is appropriated to the use of, or is used by the police service;*
>
> *(c) stating the commissioner has not authorised or consented to an action, omission etc in relation to anything referred to in (a) and (b)*

7.27. The section will also be changed by providing that such an allegation or statement *is evidence of the thing alleged or stated*. Presently the Act states that it *is sufficient proof of the matter alleged or averred in the absence of evidence to the contrary*.

7.28. The committee notes that this extends the matters that may be proved without otherwise legally admissible evidence ordinarily required under the rules of evidence. This will often be in proceedings where the Crown or the complainant carry the legal burden of proof beyond reasonable doubt. In this situation the defendant or other party to the proceedings has cast upon them a burden of disproving the allegation or statement of ownership by the commissioner.

7.29. The explanatory memorandum states that this new paragraph is intended to remove evidentiary difficulties where, for example, undercover operatives purchase drugs with Police Service funds, by making it clear that ownership of such property is always retained by the Commissioner and is not the property of any other person. The committee is informed that it is already unlawful to possess such drugs under section 9 of the *Drugs Misuse Act 1986*. In addition section 32 of the *Drugs Misuse Act 1986* provides for the forfeiture of dangerous drugs to the Crown on order of the court whether a person is convicted of an offence or not. Such an application can be made in the absence of any other party and all that need be proved is that the thing is a dangerous drug [or, as proposed in clause 18 of the bill a *chemical used... in... manufacturing a dangerous drug*. In that event such thing is:

> *freed from all other claims of title, property or interest and may be*
>
> *(a) destroyed or disposed of; or*
>
> *(b) retained by any person;*

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[121] Section 4 (3) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the 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.

in accordance with the written direction of the Minister.[122]

7.30. The provision as drafted, however, extends to *anything* that the commissioner states is the property of the commissioner.

7.31. The committee seeks information from the minister on the need for this broad evidential aid given that the difficulties identified in the explanatory memorandum appear to already be covered by the provisions in the *Drugs Misuse Act 1986.*

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[123]

– **clause 13 (proposed ss.10.21A – unlawful possession of prescribed articles; and 10.21B – killing or injuring police dogs and police horses)**

7.32. The proposed s.10.21A makes it an offence to *unlawfully* possess or supply a *prescribed article.* The clause defines a “prescribed article” as any print, video recording or a transcript of an audio or video recording *that is the property of the commissioner.* The definition of "print" has been extended by clause 4 to include *an audio recording of an interview*.

7.33. Subclause (3) allows a person to supply a print, an audio recording, or a transcript of an audio or video recording to a person charged with an offence or their lawyer for the purpose of defending the charge. Subclause (4) makes it an offence to possess a print, an audio recording, or a transcript of an audio or video recording *supplied under subsection (3)* after the time allowed for an appeal unless it is kept as part of a lawyers records. Hence it would not appear to be an offence to possess a video recording supplied This appears to be a drafting error.

7.34. The section, however, only makes the retention of such articles unlawful after the expiration of the appeal period in the case of supply for the purpose of defending a charge. Under clause 8 of the bill the proposed section 9A (2)(1) of the *Police Administration Act 1990* entitles a person (on payment of a fee) to a print *for a prescribed purpose.* Subsection 9 A (4) of the Act will define *a prescribed purpose* to include not only to answer a charge of an offence but also:

> *"(b) for a proceeding started in a court or tribunal, whether it is the proceeding in which a print ...is an exhibit or another proceeding;*
>
> *(c) for deciding whether to start a proceeding in a court or tribunal or to make a particular claim in the proceeding;*
>
> *(d) for deciding whether to defend a proceeding that may be started in a court or tribunal or to make or resist a particular claim in the proceeding."*

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122 Subsection 31 (6) Drugs Misuse Act 1986

123 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.

7.35. Thus there will be situations where, potentially, a person will be *lawfully* entitled to possess a print [which by definition includes an audio recording of an interview] which has not been supplied for the purposes of defending a charge. In that event it will not be unlawful to possess it even if the person is proceeded against for an offence and an appeal period will otherwise run.

7.36. A general problem with "prescribed article" appears to be that it is by definition only those articles *the property of the commissioner*. It is doubtful that once a print is possessed upon payment of a fee that it remains the property of the commissioner. There is nothing in the bill that states that such prints supplied are to remain the property of the commissioner.

7.37. The explanatory memorandum states that this clause is:

> *intended to prevent persons from possessing or retaining prescribed articles where it serves no official purpose and where, in some cases, the possession may be used to facilitate another offence.*[124]

7.38. The memorandum then gives the example of a person:

> *who keeps a photograph which shows injuries ... to intimidate another person into submission.*

7.39. The following observations may be made. Although in ordinary usage one often speaks of having a "photograph" of someone or something when referring to an exposed print of a negative, a "print" by definition in the bill would not include a photograph[125]. A photograph is not defined in the Act or the bill. One is generally understood to "photograph" someone or something when they expose light from that person or thing onto a photosensitive negative using a camera. That action is said to be done by a photographer. However the "printing" of the negative is not generally understood to be an act of photographing. On a proper construction of the bill a photograph would probably refer to the image captured as a negative of the subject on the film. This is reinforced by the language of clause 8 of the bill where the proposed section 9A of the *Police Administration Act 1990* is as follows:

> ***"Procedure to obtain print for prescribed purpose***
>
> ***3.(1)*** *A person who requires a print...may...ask the person who has custody of the print or, if it is a photograph, the negative of the print,...*
>
> *...*
>
> ***(4)*** *If the person who has custody of the negative is satisfied that the person ...is entitled to the print...the person must cause the print to be made and supplied."*

7.40. It is now common to photograph a print made from a photographic negative in order to preserve it when the original photographic negatives are lost or destroyed. If this was done in the case of a photographic print lawfully possessed or supplied it may not be a "prescribed article" because it seems that it would not be the property of

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124 explanatory notes at p. 6.

125 Under Clause 4 both the definition of "marked print" and "print" use the terminology "means a print **of a photograph.**"

the commissioner. If that in turn was "printed" would that be a "prescribed article" because it somehow became the property of the commissioner? The problem is compounded if the print, while lawfully possessed, is digitally altered. Similar problems may be advanced in the case of a subsequent videorecording of the playing of a video recording on a television screen while in lawful possession and so on.

7.41. The committee notes that the clause only applies to articles that come into the possession of the police service and generally become exhibits in a trial. It does not apply to articles that are either taken by the person themselves or by other entities such as the electronic or print media which may be obtained by the person.

7.42. The committee also notes that the lawfulness of retention after the appeal period only is excepted in the case of court and lawyers records. No account has been taken of the records of the unrepresented accused.

7.43. The committee is concerned that the provision may not be drafted in a sufficiently clear and precise way so as to achieve its objectives.

7.44. The committee suggests that it could be redrafted to correct the reference in subclause (3) and (4) to "audio recording" where it appears to intend to refer to "video recording".

7.45. It also appears to the committee that the definition of *prescribed articles* needs to be clarified so that it refers to photographic negatives as well as prints.

7.46. The question of ownership of prints lawfully supplied and possessed on payment of a fee also needs to be addressed so as to make it clear that they remain the property of the commissioner.

♦ **AMENDMENT OF THE *DRUGS MISUSE ACT 1986***

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[126]

– **clause 18 (amendment of s.32 – forfeiture of dangerous drugs**

7.47. This clause extends the present power of a court to order forfeiture of a dangerous drug to include chemicals used in or for manufacturing a dangerous drug and property contaminated by such chemicals. Such forfeiture can only be ordered by a court when it is satisfied beyond reasonable doubt that the chemical etc was used or intended to be used in or for manufacturing a dangerous drug. Clause 2 of the bill exhibits a clear intention to have the retrospective effect of providing that clause 18 is taken to have commenced on 25 January 1995. The explanatory memorandum states that although this situation is provided for by the *Police*

[126] 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.

Powers and Responsibilities Act 1997 it will only apply to chemicals and contaminated property taken possession of after 6 April 1998 when that Act comes into effect.

7.48. Section 108 of the *Police Powers and Responsibilities Act 1997* provides that when anything is seized by a police officer they must apply within 28 days to a magistrate for an order unless**,** among other things, proceedings are commenced with respect to it or it is destroyed because it is a dangerous drug or thing used in or for manufacturing a dangerous drug.

7.49. There is a presumption against retrospective changes in the law. However, if a provision can properly be regarded as merely procedural the presumption against retrospectivity is rebutted.

7.50. Although clause 18 of the bill is taken to have commenced on 25 January 1995 any application for forfeiture under it will have to be made to a court in the future. It may be argued that the proposed amendment of section 33 of the *Drugs Misuse Act 1986* is merely procedural in nature and although it relates to past events the retrospectivity would not offend the common law presumption.

7.51. Even if it is not merely procedural in nature the Parliament may well take the view that its clear retrospective operation is justified given that the court must be satisfied that the chemicals were used or intended to be used to commit the crime of Producing Dangerous Drugs in Section 8 of the *Drugs Misuse Act 1986.*

7.52. The committee notes that the provision may arguably be procedural in nature and hence not offend the common law presumption against retrospectivity.

7.53. The committee notes that even if it is not procedural in nature the standard of proof that must be satisfied, that of proof beyond reasonable doubt, that the chemicals were used or intended to be used to commit the crime of producing dangerous drugs may be seen to justify the retrospective operation of the provision

Does the legislation have sufficient regard to the institution of Parliament in that it sufficiently subjects the exercise of delegated legislative power to the scrutiny of the Legislative Assembly[127]

– **clause 19 (proposed part B – Trial planting of Cannabis Sativa for commercial fibre production)**

7.54. This part provides for the exemption of persons from the provisions of the *Drugs Misuse Act 1986* in order to enable research to be carried out under controlled conditions into the suitability of low-level drug content cannabis sativa as a commercial fibre crop.

[127] 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.

7.55. Cannabis sativa is a dangerous drug listed in schedules 2 and 3 of the *Drugs Misuse Regulations 1987.* Section 9 of the *Drugs Misuse Act 1986* makes unlawful possession of it a crime carrying at least 15 years imprisonment and in the case of a quantity exceeding 500 grams, 20 years imprisonment. Section 8 of the Act makes the unlawful cultivation of it a crime carrying the same respective penalties. Under s.6 a person who unlawfully supplies cannabis sativa to another is also guilty of a crime and liable in these circumstances to 15 years imprisonment.

7.56. The proposed clause intends to exempt approved growers from the provisions of the *Drugs Misuse Act 1986* to enable the person to grow low-level drug content cannabis sativa and perform research functions, including plant-breeding, consistent with the purposes of this part". The explanatory memorandum adds that "the regulation will strictly control any trial by placing comprehensive and stringent conditions on their operation." No indication of the sorts of comprehensive and stringent conditions appear in the bill.

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

♦ **AMENDMENT TO THE *CRIMINAL CODE***

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[128]

– **clause 22 (proposed s.427 – unlawful entry of a vehicle for committing indictable offence)**

7.58. This clause of the bill creates an additional offence in the Criminal Code relating to the entry of a vehicle with intent to commit an indictable offence. The explanatory memorandum states that this new provision identifies the more serious matter of entering a person's vehicle without consent with the intention of committing more serious offences such as rape, abduction, and assaults arising from 'road rage' incidents.

7.59. The committee notes that the existing offence in s.421 of the *Criminal Code* already makes it an offence to enter premises *or be in* premises with intent to commit an indictable offence. The definition of premises includes "a vehicle". This offence carries the same penalty of 10 years imprisonment and would cover the intention to commit the offences identified in the explanatory memorandum. It is also broader than the proposed s.427(1) in that if the intent is formed after the entry into the vehicle the offence is still committed. The proposed section in the bill requires proof of the intention at the time of entering the vehicle.

7.60. In addition the existing s.421 creates the aggravated offence of committing an indictable offence while in the motor vehicle. This offence carries 14 years

[128] 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.

imprisonment and would cover the cases in the proposed s.427(2)(b)(i) *use or threat of actual violence* [ie an assault under the *Code*]; (iv) *damages... or attempts to damage property* [ie wilful damage under the *Code*].

7.61. The additional matters of aggravation proposed in the new section and not covered in the existing section 421 are

> *(a) the offence is committed in the night";*
>
> *(b) ...*
>
> > *(ii)(the offender) is or pretends to be armed with a dangerous or offensive weapon ...*
> >
> > *(iii) is in company with 1 or more persons; or*
> >
> > *(iv) damages or threatens ... to damage any property.*

7.62. The committee asks the minister to consider amending section 421 to include these additional matters of aggravation in the case of all premises and not just those of a motor vehicle. This would avoid the need to create a separate and substantially duplicated offence.

7.63. If that were to occur s.552B(1)(e) of the *Criminal Code* would have to be amended to include in the summary jurisdiction of the Magistrates Court all offences against s.421, additionally cl.23(1) of the bill would not need to be enacted.

♦ **AMENDMENT OF THE *POLICE POWERS AND RESPONSIBILITIES ACT 1997***

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?[129]

– **Clause 47(amended s.13(5) – general power to make inquiries etc)**

7.64. This clause amends s.13(5) of the Act. As presently drafted the section requires the consent of the owner, if the premises are used exclusively for residential purposes before police can enter. “Premises” is defined in the dictionary to include the land or water where a building is situated.

7.65. The clause proposes a change so that the police can enter without consent that part of the premises that is not the dwelling – ie the land and buildings around the dwelling.

7.66. This represent a material departure from the section as recently passed by the Parliament. The explanatory memorandum states that this was the original intention of the section.

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[129] 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.

7.67. The committee is concerned that the previous language of the subsection appears quite clear and unambiguous. The amendment represents a material interference with the fundamental rights in respect of private property.

7.68. The subject of police entry on private property was dealt with by the High Court in *Coco v R*[130]. Mason CJ, Brennan, Gaudron and McHugh JJ said this at p 435-436:

> *"Every unauthorised entry on 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".*

7.69. The committee has significant concerns about the impact of this clause on the rights that individuals presently have over their private property. This concern is reinforced by the fact that the Parliament has only recently passed the provision in clear terms which protected premises that contained dwelling houses from non consensual entry.

Does the legislation have sufficient regard to the rights and liberties of individuals (due process)?[131]

– **clause 54 (amendment to s.46(2) – court may order immediate arrest of person who fails to appear)**

7.70. This clause appears to alter the way that proof of service is affected when a recipient of a notice to appear fails to do so. As presently drafted the court may issue a warrant for the arrest of the person only if satisfied on oath that the person was served in time for it to be practicable for the person to appear before the court and that there is evidence substantiating the offence for which the notice was served. The subsequent section 47 of the Act requires the court to strike out the notice to appear if not satisfied the person was served as required under the Act.

7.71. The proposed amendment appears to do away with the requirements of proof on oath of both service and of evidence substantiating the offence and simply provides that the notice to appear is evidence of the service of the notice. The committee is concerned that this reduces the protections of the individual not to have their fundamental right to liberty taken away without due process. The amendment would render the operation of section 47 of the *Police Powers and Responsibilities Act 1997* virtually useless.

130 (1993-94) 179 CLR 427

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

7.72. The committee questions the removal of a basic judicial safeguard against arrest so soon after the Parliament has approved it in the existing form of Section 46 (2) of the *Police Powers and Responsibilities Act 1997.*

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[132]

– **clause 55 (amendment of s.48 – application of Part 8 – Investigations and questioning)**

7.73. This clause amends section 48 (1) of the Act. The section as proposed will provide as follows:

> ***48.(1)*** *This part applies only to a person detained for-*
>
> *(a) questioning about an indictable offence; or*
>
> *(b) the investigation of an indictable offence*
>
> ***(2)*** *Also, this part applies only to a person who-*
>
> *(a) is lawfully arrested for an indictable offence*
>
> *(b) is refused bail; or*
>
> *(c) is in custody because bail has been revoke; or*
>
> *(d) is in custody under a sentence of imprisonment or, for a child, a detention order*

7.74. However, section 50 of the Act remains in its present terms as follows:

> ***50.(1)*** *A police officer may detain a person mentioned in section* ***48 (2)*** *for a reasonable time to investigate, or question the person about–*
>
> *(a) if the person is in custody following an arrest for an indictable offence¾the offence for which the person was arrested; or*
>
> *(b) in any case¾any indictable offence the person is suspected of having committed, whether or not the offence for which the person is in custody.*
>
> ***(2)*** *However, the person must not be detained for more than 8 hours, unless the person is charged with an indictable offence or is lawfully held in custody.*

7.75. There are two powers in the Act that could be identified as that to "arrest for an indictable offence". The first is the general arrest power in s.35. Under that a lawful arrest may be made if the police officer reasonably suspects the person has committed an offence and it is reasonably necessary for a variety of identified reasons. That arrested person is to be identified as "a suspect". It is probable that these persons must be taken before a justice as soon as reasonably practicable

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[132] 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.

under s.39 unless they are being detained in custody under Part 8 for an indictable offence.

7.76. The second arrest power is in section 36 which allows a lawful arrest of a person (also a "suspect") whom the police officer reasonably suspects has committed an offence *for questioning about the offence or investigating the offence under Part 8*.

7.77. This person arrested under section 36 is more readily identified, not as a person arrested for an indictable offence, but rather as a person "arrested for questioning about the offence or investigating the offence under part 8."

7.78. It is thus possible that as a matter of construction these people are, pursuant to the amended section 48 (1) of the bill *detained for questioning about an indictable offence or the investigation of an indictable offence*. In that event there is no specific provision detailing what they may be questioned about and for how long as there is in section 50 (1) in relation to the categories of people in section 48 (2).

7.79. The explanatory memorandum states simply that it *amends the section to clarify its application*.

7.80. This committee expressed concerns about the drafting of Section 48 at the time of the introduction of the original bill. One of those concerns was that the now section 50 of the Act only provides that a police officer may detain a person "mentioned in section 48 (2)" for the initial 8 hour period.

7.81. The committee is of the view that the amendments discussed above do not sufficiently clarify the meaning of section 48 and 50 of the *Police Powers and Responsibilities Act 1997.*

7.82. The committee suggests that if the provisions of Part 8 are intended to apply to both the person arrested for questioning and investigation under section 36 of the Act and other persons in custody including those actually arrested for an indictable offence [whether it be under section 35 of the Act or any other existing power of arrest for an indictable offence] then section 48 and 50 of the Act should clearly say so.

7.83. In the committees view one simple way to clarify the matter is to amend Section 48 to read "arrested pursuant to section 36 for" instead of "detained for" and to amend section 50 (1) to refer to persons mentioned in both section 48 (1) and (2).

7.84. This would have the additional benefit of making it clear that "volunteers" who go to the police station of their own accord to assist the police are not subject to the detention periods in part 8 – a concern also raised by this committee on the introduction of the original bill.

Does the legislation have sufficient regard to the rights and liberties of individuals?[133]

– **clause 71 (amendment of dictionary – definition of "question")**

7.85. This clause defines "question" for parts 8 and 12 as meaning *question a suspect about his or her involvement in an indictable offence*.

7.86. The explanatory notes states that:

> *the obligation to warn a person about their right to silence should only arise before asking a question that relates to the person's involvement in an offence.*
>
> *The obligation should not arise before a question that is not related to the persons involvement in an offence, such as a question asking if a person is prepared to go to the police station to answer questions or to take part in an identification parade.*[134]

7.87. The committee warned of the inroads into the fundamental rights and freedoms of the individual introduced by the *Police Powers and Responsibilities Bill 1977.* Significant enlargement of the power to detain for investigation and questioning were introduced particularly in part 8 but the safeguards in part 12 were introduced to balance that erosion of fundamental rights. The Act specifically protects the right to silence in s.92 and the right not to take part in an identification parade in s.59.

7.88. In the committee's view this amendment undermines fundamental rights – all persons should be warned of their right not to answer questions or take part in an identification parade before either going to the police station, or when there pursuant to a power under the Act, before any questioning commences. These positive requirements should be spelled out in the responsibilities code.

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

Is the content of the Explanatory Note sufficient?[135]

– **clause 4 (amendment of s.1.4 – definitions)**

7.90. The explanatory notes states that clause 4 amends section 1.4 of the *Police Service Administration Act 1990* by

> *inserting redrafted definitions previously contained in the ...Police Photographs Act 1966 as a consequence of the consolidation of* [those Acts] *and includes a new definition of "police horse".*[136]

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

134 Explanatory notes at p. 18.

135 Section 23 (10 (h) of the *Legislative Standards Act 1992* requires the explanatory note for a Bill must include the following information about the Bill in clear and precise language-a simple explanation of the purpose and intended operation of each clause of the Bill.

136 Explanatory notes at p.4.

7.91. The committee notes however that the definition of "print" previously contained in the *Police Photographs Act 1966* is also extended to include an *audio recording of an interview*.

7.92. The committee again emphasises the need for explanatory notes, as possible aids to interpretation, to be accurate.

♦ **meaning of "subordinate legislation"**

– **clause 7 (proposed s.7.2)**

7.93. Under part 6 of the *Statutory Instruments Act 1992* all subordinate legislation must be notified in the Gazette and under divisions 2 and 3 of part 6 the subordinate legislation must then be tabled in the Legislative Assembly and is subject to disallowance resolutions by the Parliament. Although under the proposed clause of the Bill the commissioner may only exempt *by written instrument* (cl.7) it is doubtful that this term subjects the exemption to the provisions of the *Statutory Instruments Act 1992.* Under s.4.9 of the *Police Service Administration Act 1990* the commissioner may give *written directions* to members of the Police Service in discharging the prescribed responsibilities under s.4.8. This may be contrasted with the language *written instrument* in the bill. However, although under the *Statutory Instruments Act 1992* s.6 an "instrument" is "any document", it is only a "statutory instrument" if it satisfies subsections (2) and (3) of the Act. In the committees view it is arguable that the commissioners *written instrument* may not satisfy any of the requirements of subsection (3)[137] and is thus not subordinate legislation subject to the scrutiny of the Parliament.

7.94. the committee requests that the minister clarify the status of the instrument of exemption referred to in proposed s.7.2(3).

7.95. The committee also seeks information on the scrutiny, if any to which these exemptions (which are not reviewable) will be subjected. In the committee's view it would be desirable to require the exercise of the commissioner's discretion to exempt to be subject to some scrutiny by Parliament – for example by requiring the general use of the delegated power to be reported to Parliament annually.

[137] Section (3) The instrument must be of 1 of the following types-a regulation, an order in council, a rule, a local law, a by-law, an ordinance, a local law policy, a statute, a proclamation, a notification of a public nature, a standard of a public nature, a guideline of a public nature, another instrument of a public nature by which the entity making the instrument unilaterally affects a righ or liability of another entity."

8. REVENUE LAWS (RECIPROCAL POWERS) AMENDMENT BILL 1998

Background

8.1. The Honourable J M Sheldon MLA, Deputy Premier, Treasurer and Minister for the Arts introduced the bill into the Legislative Assembly on 4 March 1998.

8.2. Queensland Parliament passed the *Fuel Subsidy Act 1997* to provide a legislative basis for the payment of fuel subsidies to Queenslanders. According to the explanatory notes, a key element of the fuel subsidy legislation is a robust and effective enforcement regime to ensure that opportunities for abuse of the scheme are detected and stopped.

8.3. For Queensland investigators to conduct investigations outside Queensland, the Parliament of the jurisdiction in which the Queensland related investigations are to be conducted must authorise investigations for that purpose. The existing *Revenue Laws (Reciprocal Powers) Act 1988* (the Act) is part of a national regime for the conduct of investigations by revenue authorities across Australia.

8.4. This bill amends the Act to facilitate investigations in Queensland by designated interstate revenue officers for the purpose of interstate subsidy legislation.

Does the legislation provide appropriate protection against self-incrimination?[138]

– **clause 6 (amending existing s.10(5) of, and inserting proposed s.10(8) into, the Act)**

8.5. Under the existing provisions of the Act, a designated revenue officer from another State may seek approval from the Queensland principal revenue officer to conduct investigations in Queensland about a matter connected with a recognised revenue law. The bill does not change this existing reciprocal arrangement.

8.6. Existing s.10(5) of the Act provides that a person is not excused from providing information or answering a question on the ground that the information or answer might tend to incriminate the person. However, any evidence obtained under s.10(5) is not admissible against the person in any proceedings against that person in a court in Queensland for an alleged offence except in respect of proceedings for an offence:

- related to making false or misleading information;
- against a Queensland revenue law; or
- in connection with verification of information or answer by oath or affirmation.

[138] 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.

8.7. The bill does not alter the effect of these existing provisions. However, cl.6 of the bill inserts a new s.10(8) into the Act to excuse a person from complying with the requirement to provide information or answer a question if:

> *(a) the requirement relates to a matter arising under a recognised revenue law that provides for the payment of subsidy in relation to goods; and*
>
> *(b) complying with the requirement might tend to incriminate the person.*

8.8. While the committee welcomes this amendment to the Act, it notes that the exception only applies to investigations about a subsidy in relation to goods. The rest of the existing regime under the Act remains unchanged.

8.9. The explanatory notes to the bill provide the following information.

> *The Revenue Laws (Reciprocal Powers) Act 1988 provides a range of investigation powers for the purposes of investigating compliance with revenue laws. Except as noted below, the amendments necessary to include subsidy legislation within the operation of the Revenue Laws (Reciprocal Powers) Act 1988 do not affect the operation of these existing powers. It is considered that these amendments do not breach fundamental legislative principles.*
>
> *The operation of section 10 of the Revenue Laws (Reciprocal Powers) Act 1988 in relation to the privilege against self incrimination has been amended to accord with the policy intention of related provisions in the Fuel Subsidy Act 1997. The result is that a person is excused from complying with a requirement under section 8 or 9 of the Revenue Laws (Reciprocal Powers) Act 1988 relating to a matter arising under subsidy legislation where the information or answer required to be provided may tend to incriminate the person.*
>
> *The remaining powers in the Revenue Laws (Reciprocal Powers) Act 1988 which relate to investigations for the purposes of recognised revenue laws have not been modified for the purposes of subsidy laws as they form part of a reciprocal regime for the conduct of interstate investigations.*
>
> ***Consultation***
>
> *Each State and Territory which will be enacting fuel subsidy legislation has been requested to amend their reciprocal powers legislation consistently with the amendment to the Revenue Laws (Reciprocal Powers) Act 1988 which is being effected by the Revenue Laws (Reciprocal Powers) Amendment Bill 1998. Consultation will be undertaken with those jurisdictions as necessary as part of the drafting of their amending legislation.*[139]

8.10. The committee notes that proposed s.10(8) upholds the fundamental legislative principles under the *Legislative Standards Act* by expressly recognising the principle against self–incrimination. It appears that the scope of proposed s.10(8) has not been limited to fuel but applies to goods generally.

8.11. While the committee has scrutinised the provisions of the bill in light of the fundamental legislative principles, it observes that the existing provisions of the Act

[139] Explanatory notes at pp. 2–3.

that are not affected by the bill were made before the passing of the *Legislative Standards Act 1992*.

8.12. The committee notes that consultation will be undertaken with other jurisdictions concerning amendments to the Act.

8.13. The committee requests that the Treasurer will have regard to the fundamental legislative principles when taking part in this process. Her commitment to achieving high quality legislation has already been demonstrated – not only by the amendment introduced in this bill but by other legislation produced by Treasury generally.

9. STATE HOUSING AMENDMENT BILL 1998

Background

9.1. The Honourable Dr D J Watson MLA, Minister for Public Works and Housing introduced the bill into the Legislative Assembly on 4 March 1998.

9.2. The objective of this bill is to *update the provisions of the State Housing Act 1945 that relate to the making of regulations.*

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[140]

– **clause 5 (amending s. 15 of the *State Housing Act 1945*)**

9.3. Existing s.15 of the *State Housing Act 1945* (the Act) provides that:

> ***15. (1)*** *The provisions set forth in the schedule shall be applicable to the business of the commission and to all matters therein dealt with in aid of the effectual administration of the Act.*
>
> *(2) Such provisions may, from time to time be altered or added to by the Governor in Council, by order in council published in the gazette, and the said schedule as so altered or added to shall thereupon become, for the time being, the schedule and have effect accordingly.*

9.4. According to s.14(4) of the *Acts Interpretation Act 1954*, a schedule of an Act is part of the Act. Existing s. 15(2) therefore permits the Governor in Council to amend, by order in council, provisions forming part of the Act. The schedule to the Act makes provision for matters such as repayment of advance money for dwelling houses and mortgagor's powers.

9.5. The committee has previously looked at this type of provision in its *Report on the use of "Henry VIII" clauses in Queensland*,[141] (report on "Henry VIII" clauses) in that report, the committee defines a "Henry VIII" clause as follows:

> *… a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.*[142]

9.6. Clause 5 of the bill removes existing s. 15. It inserts proposed s.15 into the Act to continue the application of the schedule to the Act to the Queensland Housing Commission but removes the power of the Governor in Council to amend the schedule to the Act by subordinate legislation.

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140 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.

141 Tabled in the Legislative Assembly on 28 January 1997.

142 Ibid., at page 56 paragraph 5.7.

9.7. The committee welcomes this proposed amendment and it thanks the minister for upholding the principle contained in s. 4(4)(c) of the *Legislative Standards Act 1992* by removing the “Henry VIII” clause from s.15.

10. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 1998

Background

10.1. The Honourable R E Borbidge MLA, Premier introduced the bill into the Legislative Assembly on 4 March 1998.

10.2. According to the explanatory note, the primary objective of the bill is to improve the quality of statute law in Queensland by making a number of minor, concise and non-controversial amendments to 23 Acts. For example the *Acts Interpretation Act 1954* is amended to provide for calculation of time.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[143]

– **Schedule – *Transport (Gladstone East End to Harbour Corridor) Act 1996* clauses 1 and 2 (proposed amendments to schedules 1, 2 and 4)**

10.3. Under cls.1 and 2 of the bill, schedules 1, 2 and 4 to the *Transport (Gladstone East End to Harbour Corridor) Act* (the Act) are omitted and new schedules are inserted into the Act.

10.4. The relevant section of the Act to which schedule 1 refers provides for acquisition of land for rail transport corridor: It provides as follows:[144]

> ***(1)*** *The following land is taken by the State for use by a railway manager as part of a rail transport corridor under the Transport Infrastructure Act 1994 -*
>
> *(a) alienated land described in schedule 1, part 1;*
>
> *(b) the part of the reserve under the Land Act 1994 described in schedule 1, part 2*
>
> ***(2)*** *Land taken under subsection (1) becomes unallocated State land free of any interest or obligation.*
>
> ***(3)*** *This section has effect despite any other Act.*

10.5. Section 3 of the Act refers to schedule 2 land and provides for acquisition of land for road purposes . It provides as follows:

> ***(1)*** *The following land is taken by the State for road purposes -*
>
> *(a) alienated land described as new road on a plan mentioned in schedule 2, part 1;*

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143 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.

144 Section 2 of the *Transport (Gladstone East End to Harbour Corridor) Act 1996*.

(b) the part of the reserve under the Land Act 1994 described as new road on a plan mentioned in schedule 2, part 2.

***(2)** The following land that is not already unallocated State land becomes unallocated State land -*

(a) land taken under subsection (1);

(b) land included in schedule 2, part 3.

***(3)** Land mentioned in subsection (2) is taken to be dedicated as a road for public use under the Land Act 1994, section 94*[145] *and open for public use.*

***(4)** This section has effect despite any other Act.*

10.6. Clause 2 of the bill amends the Act by removing schedule 4 and inserting a new schedule. Section 5 of the Act refers to schedule 4 and provides for the partial closure of certain roads. It provides as follows:

The parts of the roads described in schedule 4 are closed on a day to be fixed by the Minister by gazette notice.

10.7. These substantial amendments to the schedule of the Act are taken to have commenced on 12 December 1996 (the date of commencement of the Act) and are therefore retrospective.[146]

10.8. The committee always takes care when examining legislation with retrospective effect to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has "sufficient regard", the committee typically has regard to the following factors:

- whether the retrospective application is beneficial to persons other than the government;
- whether the retrospective application imposes undue obligations retrospectively; and
- whether individuals have relied on the legislation and have a legitimate expectation under the legislation prior to the retrospective clauses commencing.

10.9. The amendments appear to be beneficial for the purposes of government; they do not appear to impose undue obligations retrospectively and they do not appear to have effect on individuals legitimate expectations.

10.10. The explanatory notes to the bill state that the bill is consistent with fundamental legislative principles and that:

The retrospective application of the amendments to the Transport (Gladstone East End to Harbour Corridor) Act 1996 does not effect any individual as any new

145 Section 94 (Dedication of road by gazette notice).

146 *Statute Law (Miscellaneous Provisions) Bill 1998* at p. 31.

> *corridor land, as reflected in the schedules following the survey and realignment of part of the corridor, is either existing public road or existing unallocated State land.*[147]

10.11. The Premier's Department has also advised the committee that these amendments to the schedules arose after the corridor was resurveyed. As a result of the resurvey part of the corridor was moved but no land has been taken from any individual. The department stated that this amendment is just a technicality and was made retrospective so that the corridor will always be the one which resulted from the resurvey.

10.12. In light of the explanatory notes to the bill and the advice received from the Premier's Department, the committee takes the view that while the amendments take effect retrospectively, the bill does not appear to adversely affect the rights and liberties of individuals.

10.13. The committee requests that the Premier confirm that this is the case.

Is the content of the explanatory note sufficient?[148]

– **schedule 1 (amendment to s.22 of the *Legislative Standards Act*)**

10.14. The *Statute Law (Miscellaneous Provisions) Bill* amends s. 22(1) of the *Legislative Standards Act 1992* by omitting the words "Minister who presents a Government" and replacing them with the words "Member who presents a". The effect of this amendment is that explanatory notes must be prepared for all bills presented to the Legislative Assembly, not just bills presented by ministers.[149]

10.15. The committee notes the statement in the explanatory notes to the bill that:

> *The amendment to the Legislative Standards Act 1992 implements recommendation 35 of the Legal, Constitutional and Administrative Review Committee's report No 8. Recommendation 35 of the Report on the Criminal Law (Sex Offenders Reporting) Bill 1997 recommends* [which] *that the Legislative Standards Act 1992 be amended to extend the requirement to circulate explanatory notes to apply to all Members who present Bills to the Legislative Assembly.*[150]

10.16. The committee had not criticised the lack of explanatory notes produced by private members in recognition of the fact that they must produce them themselves without the assistance of the Office of Parliamentary Counsel. However, in its last Alert Digest the Scrutiny of Legislation Committee reported that it experienced some difficulty scrutinising the *Criminal Law (Sex Offenders Reporting) Bill 1997* in the

147 Explanatory notes at p. 3.

148 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.

149 Explanatory notes at p. 2.

150 Explanatory notes at p. 4.

absence of an explanatory note. The committee therefore suggested that an amendment to the *Legislative Standards Act* to require explanatory notes to be produced for all bills would be warranted.[151] The committee, however, also recommended that s.7 of the *Legislative Standards Act* be amended to required:

> *the Office of Queensland Parliamentary Counsel to draft explanatory notes to private members bills on request.*[152]

10.17. The committee is concerned that this amendment will impose obligations on private members, without providing adequate resources to assist them in the preparation of explanatory notes. The committee notes the Premier's response that adequate resources already exist within government and the opposition to assist members in preparing explanatory notes and requests that the Premier provide further information detailing these resources.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[153]

– **Schedule – *Transport (Gladstone East End to Harbour Corridor) Act 1996* cls.1 and 2 (proposed amendments to schedules 1, 2 and 4)**

10.18. The committee notes that s.2(2) of the *Transport (Gladstone East End to Harbour Corridor) Act 1996 provides that:*

> ***(2)*** *The following land that is not already unallocated State land becomes unallocated State land -*
>
> *(a) land taken under subsection (1);*
>
> *(b) land included in schedule 2, part 3.*

10.19. There is statutory provision for land taken by the State (to be used for a rail transport corridor) to become unallocated state land free of any interest.[154] The committee seeks information from the Premier as to whether this acquisition of land affects native title, and if so, to what extent.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[155]

– **schedule – *State Financial Institutions and Metway Merger Facilitation Act 1996***

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151 *Criminal Law (Sex Offenders Reporting) Bill 1997* – Alert Digest No. 1 of 1998 at p. 25 para 2.58 – 2.60.

152 *Criminal Law (Sex Offenders Reporting) Bill 1997* – Alert Digest No. 1 of 1998 at pp. 25-26.

153 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.

154 Section 2(2) of the *Transport (Gladstone East End to Harbour Corridor) Act 1996.*

155 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.

10.20. Clause 1 amends the definition of "Metway" by correcting a typographical error in the company number. The provision is taken to have commenced on the assent of the *State Financial Institutions and Metway Merger Facilitation Act* and so has effect retrospectively. The explanatory notes to the bill state:

> *The retrospective application of the amendment to the State Financial Institution and Metway Merger Facilitation Act is necessary so that the correct Australian Company Number is reflected in the Act from the Act's commencement date.*[156]

10.21. It appears that this retrospective provision would not affect the rights and liberties of individuals and merely has a curative effect.

10.22. The committee recognises that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals, is justified to correct unintended legislative consequences. Clause 1 appears to fall within this category.

10.23. The committee does not have any further concerns with this retrospective clause.

156 Explanatory notes at p. 4.

11. TELECOMMUNICATIONS (INTERCEPTION) QUEENSLAND BILL 1998

Background

11.1. The Honourable T R Cooper MLA, Minister for Police and Corrective Services and Minister for Racing introduced the bill into the Legislative Assembly on 5 March 1998.

11.2. According to the explanatory notes the objective of the bill is to establish:

> *... a recording, reporting and inspection regime to complement the Commonwealth Telecommunications (Interception) Act 1979, so that the Queensland Police Service (QPS), the Queensland Crime Commission (QCC) and the Criminal Justice Commission (CJC) may use telecommunications interception as an investigative tool for serious offences prescribed as either Class 1 or Class 2 offences (see schedule for relevant provisions of the Commonwealth Act).*
>
> *Obtaining telecommunications interception warrants for the investigation of serious offences by the QPS, the QCC and the CJC, forms an integral part of the Governments law and order policy.*[157]

Does the legislation have sufficient regard to the rights and liberties of individuals (invasion of privacy)?[158]

- **Are fundamental rights and liberties eroded by the legislation?**

11.3. The legislation introduces a regime which allows the invasion of the fundamental right to privacy of Queensland citizens. This is achieved by granting power to three separate Queensland agencies to apply for a warrant to intercept communications over the telecommunications system. Telecommunications interception will be available not only to eavesdrop on conversations between individuals talking on the telephone but also to intercept anything passing over the telecommunications system. Thus, facsimile transmissions and communications between individuals computers via modems will also be accessible.

11.4. This is a clear interference with privacy and in the view of many, including the Parliamentary Criminal Justice Committee, is at least as intrusive as other electronic surveillance methods such as listening devices and the like.[159]

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157 Explanatory notes at p. 1.

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

159 *A Review of the Criminal Justice Commission's report on Telecommunications Interception and Criminal Investigation in Queensland* Legislative Assembly of Queensland , Parliamentary Criminal Justice Committee: Report No 29, 18 May 1995 at pp 13-14

11.5. Such a power inevitably lead to the interception of the communications and conversations of law abiding citizens who are not suspected of any criminal activity or wrong doing. It also leads to the interception of private non-incriminatory conversations of suspects that have nothing to do with the subject matter of the investigation.

- **Is the legislation consistent with the principles of natural justice?**[160]

11.6. Because of the very nature of the use of the investigative tool of telecommunication interception the process of obtaining a warrant and intercepting the communication is done in a covert way. The persons who are to be the subject of the interception have no right to be heard on whether the warrant should issue as that would frustrate the investigation from the outset. The ordinary principles of procedural fairness that allow persons affected by decisions to be heard in the decision making process are therefore not applied.

- **What are the safeguards and accountability mechanisms introduced by the Legislation?**

11.7. Clause 3 of the bill states that the objectives are to establish a recording, reporting and inspection regime to complement the *Telecommunications (Interception) Act 1979* of the Commonwealth so that the QPS, CJC and QCC may use telecommunications interception as a tool for the investigation of particular serious offences

11.8. The Bill essentially meets the minimum preconditions set out in s.35 of the *Telecommunications (Interception) Act 1979* of the Commonwealth. These must be met before the federal minister is able to make a declaration that the three Queensland eligible authorities are agencies for the purpose of the Commonwealth Act and thus able to apply under the Commonwealth Act for warrants to intercept.

11.9. Section 35 of the Act requires three basic things:

1. Firstly that the chief officer of the agency keep records that correspond with section 80 (2) and 81 (2) and (3) of the Act. This is achieved in Part 2 of the bill and means records of the warrants issued and notified to the Commissioner of the Australian Federal Police, the revocation of warrants, certificates of information about the execution of the warrants and information communicated and evidence given in relation to information obtained as a result of the warrant etc. It also requires restricted records to be kept in a secure place only accessible to the independent inspector and which must be destroyed when it is judged that it is no longer required for a purpose under the Act. The chief officer is also to give a report about the use made of information obtained from a warrant and to whom that information was communicated to the State Minister.

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160 Section 4 (3) (b) 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 consistent with the principles of natural justice

2. Secondly, the State Minister is charged with the responsibility of giving to the Commonwealth Minister similar reports as received from the chief officer of the agency. Also the minister is required to forward copies of the reports received from the independent inspector to the Commonwealth Minister. These responsibilities are addressed in part 2 and s.22 of the bill.

3. Thirdly, an independent inspector must be established and allowed access to and sufficient power to regularly inspect the records of the agency and report to the State Minister on whether there has been compliance by the agency with the requirements under the Act. In addition, the inspector is to be empowered to report to the State minister if any officer of the agency has contravened their responsibilities under the Act. This is generally achieved by part 3 of the bill. The independent inspector in the bill is to be the Public Interest Monitor appointed under the *Police Powers and Responsibilities Act 1997.*

♦ **Obtaining a warrant under the Commonwealth Act**

11.10. A warrant may only be issued by a Judge or a Member of the Administrative Appeals Tribunal appointed under the Act by the Minister. In any case it must comply with the requirements of division 3 of part VI of the Act. This stipulates that the form and content of the application must be by way of affidavit. Also the Judge or member must be satisfied on the information that there are reasonable grounds for suspecting that a particular person is using the service and that information intercepted would be likely to assist in the investigation of the offence.

11.11. There are two classes of offence that may be the subject of an application for a warrant. Class 1 offences are more serious and include murder, kidnapping and narcotic offences. Class 2 offences are less serious but must attract at least 7 years imprisonment and involve serious injury, damage, fraud, trafficking, bribery and corruption and the like and what may be described as organised criminal activity.

11.12. Warrants for Class 1 offences are issued pursuant to s.45 of the Act. The Judge or member must be satisfied of the things mentioned above before a warrant will be issued. They will have regard to the other methods available to investigate without using interception and the likelihood of the information being obtained by those other methods.

11.13. Class 2 offence warrants are issued pursuant to s.46. In this case the Judge or member *shall* have regard to how much *privacy* of any person would be likely to be interfered with by intercepting, the gravity of the conduct constituting the offence, *how much* the information would be likely to assist in the investigation, to what extent other methods of investigation are available and how much they would be likely to assist or prejudice the investigation.

♦ **Record keeping and accountability mechanisms under the Commonwealth Act**

11.14. Part VIII of the Commonwealth Act contains a general requirement that details of all warrants issued be kept in a central register of the Australian Federal Police. This includes not only information about the issue of the warrant but also about the certificates of information issued, details of the restricted records kept, particulars

of communications of the information, details of when the information was given in evidence etc. The Act contains strict limitations on the disclosure of information both lawfully and unlawfully obtained. Information obtained through lawful interception can only basically be used for bona fide law enforcement purposes. Unlawful interception and disclosure are criminal offences under the Act.

11.15. The Commissioner of the Australian Federal Police must also keep a general register of all warrants and a special register of expired warrants both of which must be sent to the Commonwealth Minister every three months for inspection.

11.16. Under this part of the Commonwealth Act an ombudsman is also established who must inspect the records in order to ascertain:

- the accuracy of the general register;
- the extent of compliance with the recording requirements;
- the accuracy of the special register; and
- to report to the Minister about the results of inspections.

11.17. The ombudsman is also to inspect the records of the Commonwealth agencies at least twice a year to determine the extent of compliance. The ombudsman must report once a year to the minister about the inspection of these records also. Furthermore, the ombudsman must report any contraventions of the reporting requirements.

11.18. In order to carry out these duties the ombudsman is given wide powers of access under the Act.

11.19. In addition the ombudsman is empowered under the Act to communicate with and exchange information with State inspecting agencies. Similar powers are contained in the bill for the Queensland inspector to communicate with the Commonwealth ombudsman.

11.20. The Commonwealth minister in turn is required to report annually to both Houses of the Commonwealth Parliament about details of warrants issued under the Act. This report must be extremely detailed to comply with the Act including details about the effectiveness of the warrants issued by each agency.

11.21. Sections 107A and B of the Act provide for civil remedies for persons aggrieved by unlawful interceptions of telecommunications or communication of such information.

♦ **Are the safeguards introduced sufficient to balance the increase in power?**

11.22. The committee notes that the Parliamentary Criminal Justice Committee (PCJC) heard submissions on the adequacy of the safeguards in the Commonwealth Act during its inquiry into the CJC report on Telecommunications Interception. The

PCJC concluded that the Act, as it stood at that time did not provide sufficient safeguards.[161]

11.23. The view had been expressed to the committee that the safeguards in the Commonwealth Act could not be enlarged upon as the Commonwealth had exclusive jurisdiction over telecommunications interception. Acting on advice from senior counsel the committee concluded that it was open to the Queensland Parliament to comply with the minimum Commonwealth requirement and introduce additional requirements that were not inconsistent with the Commonwealth requirements[162].

11.24. The PCJC therefore recommended that the power to intercept telecommunications be extended to the Queensland Police Service and the Criminal Justice Commission [the Crime Commission had not then been established]. It recommended that the following further safeguards be incorporated, in a second Act of Parliament if necessary.

1. The agency furnish a report to the issuing judge to facilitate a review of and control over the use of such warrants

2. At an appropriate stage in a criminal proceeding, such as the committal stage, there be a requirement of full disclosure of the existence of the warrant, any conditions attaching to its grant, the material relied upon in obtaining the warrant , and all material collected pursuant to the warrant.

3. That a disciplinary regime (not including criminal sanctions) apply to the agencies to enforce confidentiality.

4. To protect legal professional privilege agencies be prevented from making an application for a warrant relating to a legal practitioners office unless there is cogent evidence that the legal practitioner is personally involved.

5. That it be a disciplinary offence for an officer not to destroy material obtained when it is not likely to be required for a permitted purpose in relation to the agency.

6. That agencies only apply for warrants for particularly serious offences.

7. That the use of warrants be the subject of regular audits by the Queensland Ombudsman or proposed Privacy Commissioner at least every 2 years.

8. That the Queensland legislation be subject to a "sunset clause" at the conclusion of three years.

9. Where intercepted evidence is sought to be adduced in evidence in a Queensland Court or Tribunal, that evidence may be excluded in the discretion of the Court or Tribunal if it is satisfied that the evidence was obtained pursuant to a warrant under the Commonwealth Act, and that the material relied upon in order to secure the warrant was untruthful, inaccurate or exaggerated.

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161 A Review of the Criminal Justice Commission's Report on Telecommunications Intercept op cit at 19.

162 ibid at pp 22-31.

10. Where intercepted evidence is sought to be adduced in evidence in any proceeding in a Queensland Court or Tribunal, that evidence obtained pursuant to a warrant granted under the Commonwealth Act may be admitted in the discretion of the Court or Tribunal if the accused has been charged with an indictable offence and:

    - the accused is not a person identified in the material pursuant to which the warrant was granted; or

    - the material pursuant to which the warrant was granted related to an offence of an entirely different character.

11. That the State legislation provide that the information required to be supplied by either the QPS or CJC in the affidavit supporting the application for a telecommunications interception warrant should include, where applicable, the matters required to be addressed in relation to an application for a listening device warrant as set out by PCJC recommendation 6.2.5. in Report No 28

11.25. The committee notes that none of those additional matters appears in the bill.

11.26. The committee refers to the Parliament the PCJC concerns about the adequacy of the Commonwealth legislative safeguards and its recommendations for extending them.

11.27. This bill provides powers for the Queensland Police Service, the Queensland Crime Commission and the Criminal Justice Commission to intercept the communication and conversations of Queensland citizens. It clearly allows the right to privacy of affected individuals to be breached. However, the bill also contains various safeguards (detailed above) as requested by the *Commonwealth Telecommunications (Interception) Act 1979*.

11.28. The committee refers to Parliament the question of whether the safeguards incorporated into the bill are sufficient to counterbalance the abrogation of the right to privacy of affected individuals.

11.29. The committee takes the view that proclamation of this bill should not occur until the complimentary legislation recommended by the PCJC is passed.

12. TRANSPORT INFRASTRUCTURE AMENDMENT BILL 1998

Background

12.1. The Honourable B G Littleproud MLA, Minister for Environment introduced the bill into the Legislative Assembly on 4 March 1998.

12.2. The bill retrospectively validates all matters relating to extractive industry dredging activities undertaken by dredgers operating in tidal waters within the Port of Mackay during the years 1994 to 1996 and in the Brisbane River during the years 1986 to 1997.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[163]

– **clauses 5 & 6 (amending the Transport Infrastructure Act 1994)**

12.3. The explanatory notes to the bill provide helpful background information to assist readers in understanding the validating provisions set out in cls.5 and 6 of the bill. The explanatory notes state the following.

> *Under the provisions of the Transport Infrastructure Amendment Act 1994 and the Administrative Arrangements Amendment Order (No. 4) 1994 the Chief Executive of the Department of Environment became responsible for the issuing of new permits for sand and gravel removal in tidal waters throughout Queensland from 1 July 1994. Prior to that date permits were issued by the various Port Authorities and the Harbours/Ports Corporations of Queensland under their own By-laws. Permits that existed just prior to 1 July 1994 continued in force until they expired.*
>
> *However in the case of Mackay Port Authority the Authority issued new permits to dredgers in its area on 1 July 1994 for periods of up to 12 months rather than prior to that date while the Port of Brisbane Authority (now the Port of Brisbane Corporation) did not issue formal permits to dredgers on the Brisbane River prior to 1 July 1994 but allowed dredgers to continue dredging on the basis of old permits issued in March 1986 by the Director of the former Department of Harbours and Marine. Those old Brisbane River permits had no expiry date but stated that they continued in force until cancelled.*[164]

12.4. In his second reading speech, the minister said that legal advice had suggested that there is doubt over the validity of the permits under which dredgers operated in each area. As a result, there is a need to pass validating legislation to authorise the dredging activities carried out in both areas at that time and to ensure that royalties/fees were collected lawfully.[165]

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163 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.

164 Explanatory notes at p. 1.

165 Second reading speech of the minister.

12.5. Clauses 5 and 6 of the bill contain the retrospective validating provisions. To ensure that the permits issued and the dredging activities in both areas are valid, and that the collection of royalty payments is lawful, the bill:

- declares retrospectively from 1 July 1994 that the *Marine Land Dredging By-Law 1987* as well as certain provisions[166] of the *Harbours Act 1955* continue to have effect;
- validates 1994–95 permits issued by the Mackay Port Authority;
- confirm that a holder of a 1994-95 permit for Mackay Harbour (who continued to remove sand and gravel after the expiry of that the 1994-95 permit and the commencement of a 1996-97 permit) is taken to have held a permit under the *Marine Land Dredging By-law 1987* subject to the same conditions as the 1994-95 permit;
- validates 1986 permits issued by the Director of Harbours and Marine for an area in the Brisbane River and confirms that these permits are taken to have been valid to 21 May 1992;
- declares that a holder of a validated 1986 permit (who continued to remove sand and gravel from the Brisbane River from 21 May 1992) are taken to have held a permit under the *Port of Brisbane Sand and Gravel By-law 1992* valid until 30 June 1994 (1992 permit);
- declares that a holder of a 1992 permit (who continued to remove sand and gravel from the Brisbane River after 30 June 1994) is taken to have a dredging permit issued under the *Marine Land Dredging By-law 1987* subject to the same conditions as the 1992 permit valid until a certain date.
- confirms the fees payable under the permits and that the Port of Brisbane Corporation may retain the survey and supervision costs collected during the period after 30 June 1994.

12.6. The committee always takes care when examining legislation with retrospective effect to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has "sufficient regard", the committee typically has regard to the following factors:

- whether the retrospective application is beneficial to persons other than the government;
- whether the retrospective application imposes undue obligations retrospectively; and
- whether individuals have relied on the legislation and have legitimate expectation under the legislation prior to the retrospective clauses commencing.

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166 Dealing with the removal of certain materials from Queensland waters, the power to make by-laws, the by-laws made the Harbours Corporation.

12.7. The committee observes that by clarifying the validity of the permits issued, the legality of dredging activities is put beyond doubt. The royalty payments also appear to be unaffected by the bill because of the continuance of the conditions of the permits being validated. The validating measure therefore appears to enhance the permit holders' legitimate expectations.

12.8. The committee notes the retrospective nature of the bill. It requests the minister to confirm the above observations and that the bill does not operate to adversely affect the rights of permit holders by diminishing their rights or entitlements.

12.9. The committee refers these matters to Parliament for its consideration.

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*[167]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[168] of a provision may therefore be considered as extrinsic material in its interpretation.

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167 Section 14B(3)(c) *Acts Interpretation Act 1954*.

168 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

13. AGENTS AND MOTOR DEALERS BILL 1997

Background

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

13.2. The committee commented on the bill at pages 1 – 13 of its Alert Digest No. 1 of 1998.

Does the legislation have sufficient regard to the rights and liberties of individuals?[169] (privacy)

– **clauses 32 and 499**

13.3. In its last alert digest, the committee referred to Parliament the question of whether cls.32 and 499 are justifiable and have sufficient regard to the rights of the individuals affected. It noted that these provisions give substantial investigative powers to the chief executive and therefore affect the privacy of the persons specified in cl.32(2) and a licensee's employee under cl.499. Under these provisions, the chief executive has power to ask the commissioner of the police service for a written report about the criminal history of any of the persons from whom information is being sought about an applicant for a licence or a licensee. Under cl.499 the chief executive can investigate a licensee's employee and may ask the police commissioner for a report of the employee's criminal history.

13.4. The committee sought clarification from the minister as to whether cls.32 and 499 will operate in conjunction with the *Criminal Law (Rehabilitation of Offenders) Act 1986* which prohibits disclosure of certain convictions upon the expiration of the rehabilitation periods contained in that Act. In response to the committee's request the Minister advised as follows:

> *Clause 33(1) provides that an officer, employee or agent of the department must not, directly or indirectly, disclose to anyone else a report about a person's criminal history, or information contained in a report given under clause 32 (investigations about suitability of applicant and licensees).*
>
> *This clause provides a penalty of 100 penalty units for the unauthorised disclosure of a person's criminal history.*
>
> *The department is also bound by the requirements of the Criminal Law (Rehabilitation of Offenders) Act 1986 in relation to criminal histories.*

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

As the Committee acknowledges, the powers of inquiry are necessary to ensure that the public interest is protected and that people involved in the industry are "suitable persons".

13.5. The committee thanks the minister for his response and notes that the proposed cls.32 and 499 of *Agents and Motor Dealers Bill 1998* were passed unamended.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[170]

- **Immunity for an objector – clauses 47, 462 and 544**

13.6. The committee noted that the proposed immunity for an objector under cl.47(4) of the bill may be inconsistent with cls.520 and 521 which seek to deter people from giving false or misleading information to an official.

13.7. The committee was also concerned that providing a defence of absolute privilege to an objector under cl.47(5) may operate to adversely affect the interests of a bona fide applicant for a licence. In light of the defence of absolute privilege, the committee was of the view that it would mean cls.520 and 521 may not be effective in deterring an objector from publishing matter in an objection that the objector knows to be false and misleading. The committee was of the view that the privilege should be qualified to ensure the objector may still be liable for publishing material, maliciously knowing it to be false or misleading, or with an improper motive.

13.8. The committee requested the minister introduce appropriate amendments to address the committee's concerns. In response to the committee's request the minister advised as follows:

The Committee will note that I moved an amendment to clause 47 during the second reading debate of the Bill.

That amendment will overcome the concerns of the Committee, as it will make clause 47 subject to the provisions of clauses 520 and 521.

13.9. The committee thanks the minister for his response and notes that a new provision s.47(6) has been inserted. It provides that: *Subsection (4) is subject to sections 520 and 521*.

- **Immunity for an official (cls.462 and 544(1))**

13.10. The committee noted that under cl.544(1), an official is not civilly liable for an act done, or omission made, honestly and without negligence under the bill. Clause 462 was noted as protecting the chief executive from liability when a payment is

[170] 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.

made from the Fidelity Guarantee Fund in good faith, and there is insufficient money in the fund to make such a payment.

13.11. In response to the committee's request that the minister provide information to justify these proposed immunities the minister advised:

> *The justification for the immunity under clause 462 is that under clause 461, the chief executive could be made personally liable for claims which could potentially amount to many hundreds of thousands of dollars.*
>
> *It is not considered appropriate that the chief executive should be exposed to action in relation to such large sums of money.*
>
> *The general immunity contained in clause 544 can be found in any number of Queensland statutes, and was included in this bill as a routine matter. As the Committee noted, the clause provides no immunity for negligence, even if the acts are done in good faith.*

13.12. The committee thanks the minister for this information and notes that these clauses have not yet been dealt with in the debate in the House.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[171]

– **clauses 127(2)(4)(5), 128(2)(5), 175(2)(4)(5), 176(2)(5), 216(2)(4)(5), 217(2)(7), 275(1)(3)(4) and 276(2)(5)**

13.13. The committee expressed the view that these provisions effectively reversed the onus of proof in criminal proceedings against various principle entities by deeming them liable for the unlawful acts of corresponding entities. It noted that the explanatory notes to the bill did not appear to provide sufficient reasons to justify the proposed reversals of onus of proof and requested the minister to provide information as to any justification for the provisions. The minister provided the following information:

> *Any reversal of the onus of proof in these provisions is justifiable because of the specific nature of beneficial interest provisions.*
>
> *The purpose of beneficial interest provisions is to ensure that the seller obtains the best possible price for the property and that the seller can deal "at arm's length" with the agent.*
>
> *Provisions must be in place to ensure that, for example, principal cannot use a salesperson to obtain a beneficial interest on his or her behalf. This kind of situation can very easily occur and it is important that the legislation acts as a strong deterrent to put principals on notice that they must act with total propriety towards the client.*

[171] 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.

It must be remembered also that the client contracts with the principal and it is imperative that the principal protects the client's interest and ensures that their salespersons act in an ethical manner. The principal and the salesperson are the only people who can establish whether a prohibited transaction has taken place, therefore, it is justifiable that such an onus should be placed on them to establish the true state of affairs.

13.14. The committee thanks the minister for providing this information.

Is the legislation consistent with the principles of natural justice?[172]

– **clauses 452 and 453**

13.15. The committee was concerned that cl.452 and cl.453 allows the registrar of the Agents and Motor Dealers Board to decide claims against the Fund of less than $5000 and claims with no monetary limits, with no requirement for the registrar to consider any submissions previously made to the chief executive. It noted that the claimant and a respondent to a claim, while able to appeal to the court[173] may not have the opportunity to make submissions before the registrar or board decides the claim without a hearing.

13.16. The committee requested that the minister provide information on how the bill envisages further submissions may be made to the registrar or board by the claimant or respondent before they decide to proceed to decide the claim without a hearing under cls.452 or 453. The committee also requested the minister consider introducing appropriate amendments to address these concerns. The minister advised as follows:

Under clause 450(1) of the bill, the chief executive must refer unsettled claims to the register.

I believe that it is implicit in that provision that the chief executive would be required to forward all documentation relating to the claim to the registrar. It would be highly unlikely that the registrar would not be provided with any documents through an investigation, or through the claims process provided for in clause 449.

However, I will be moving an amendment to the Bill when the debate on the Bill resumes, to legislatively ensure that all information is passed to the registrar.

The Committee's report also suggests that the respondent should be able to give further information to the registrar on board before they decide a claim.

In this respect, clause 449 of the bill sets out a detailed procedure, whereby the chief executive must give notice of a claim to a respondent and the notice must contain particulars of the claim. The respondent may give information to the chief executive and may attempt to settle the claim. If this process is unsuccessful, the matter will proceed to the registrar.

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172 Section 4(3)(b) 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 consistent with the principles of natural justice.

173 Clauses 533 and 534 of the bill.

It can be seen that the respondent is given ample opportunity to put his or her case forward.

However, when the second reading debate of the Bill resumes, I will enshrine in the Bill that the respondent will have the right to give information to the Registrar or the board when they come to decide the claim.

13.17. The committee thanks the minister for his response and notes that he will be moving amendments to the bill when the second reading debate of the Bill resumes. These amendments will provide that all documentation relating to the claim must be forwarded to the registrar and that the respondent is given the right to provide information to the registrar or board when they come to decide the claim.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[174]

– **clause 490**

13.18. The committee expressed its concern about cl.490 permitting an inspector to enter and search a place with or without a warrant. It noted its conclusions on previous occasions that there should be appropriate safeguards in place as once authorised persons gain entry they have significant powers of search and seizure.

13.19. The committee requested the minister consider inserting further safeguards into these provisions dealing with entry by consent such as in s.174 of the *Keno Act 1996*. It also suggested an inspector should be required to issue a receipt for and eventually return things seized under cl.490 to make it consistent with cl.494. The committee also requested the minister consider introducing amendments to apply the "post-seizure procedure" under cl.494 to any documents or things seized under cl.490(5) of the bill. In response to the committee's request the minister advised as follows:

In accordance with the recommendation of the Committee, I will be amending clause 494 to ensure that a receipt is provided for documents and things after seizures.

In relation to the Committee's recommendation that written consent be obtained prior to entry, I consider that this proposal is impractical and would have a detrimental effect on the efficacy of compliance programs.

In order to ensure that compliance with the Bill is taking place, I consider that it is reasonable to permit inspectors to enter business premises without a warrant and to carry out search and seizure on those premises, because it would make the legislation unworkable if an inspector had to obtain a warrant on every occasion before an inspector could enter a business place.

This is particularly so in relation to motor dealers, where spot checking to stock books and checking of compliance plates is necessary to detect offences under the

[174] 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.

Act. The powers are also required generally, to detect defalcations in trust accounts.

It should also be noted that the powers are only exercisable in relation to business premises which are open for business or otherwise open for entry. The Bill confers no power on inspectors to enter residential premises without the consent of the occupier.

On a general level, care was taken in the drafting of the Bill to ensure that the inspectors' powers complied with the fundamental legislative principles.

I consider, however, that the restriction recommended by the Committee would compromise the effective administration of the Act.

13.20. The committee thanks the minister for his response and notes that he will be moving an amendment to cl.494 of the bill.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[175]

– **clauses 528 and 529**

13.21. The committee was concerned that cl.528 makes a principal vicariously liable for the acts or omissions of the principal's representative. The committee was also concerned that cl.529 presumes an executive officer of the corporation to be guilty if a corporation is convicted of an offence against eh bill, unless the officer can prove one of the defences provided in the bill.[176]

13.22. The committee requested information on whether there is adequate justification for cls.528 and 529. The minister advised as follows:

The Committee's comments in relation to clause 528 are noted.

In relation to the Committee's comments regarding clause 529, I would make the observation that the principles in that clause are generally consistent with those contained in the Corporations Law.

13.23. The committee thanks the minister for his response.

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?[177]

– **Clause 546**

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175 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.

176 Clause 529(4)(a) and (b) of the bill.

177 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.

13.24. The committee was concerned that cl.546(2)(b) dealing with the regulation making power allows regulation to impose high penalties (up to 50 penalty units); and expressed its view that the maximum penalties a regulation may impose should generally be limited to 20 penalty units. The committee referred to its policy on this issue.[178]

13.25. The committee requested the minister to provide information as to the rationale behind this clause and to consider the committee's view on the matter. The minister advised as follows:

> *I do not consider it appropriate to limit the maximum penalties that a regulation may impose to 20 penalty units, as when the nature of the offences dealt with under the regulations is examined, 20 penalty units would not be sufficient.*
>
> *These offences include the keeping or destruction of motor vehicle identifiers and compliance plates and the keeping of receipts and evidence of expenditure.*
>
> *These serious matters, and a penalty of the amount suggested by the committee would not act as a sufficient deterrent in these cases.*

13.26. The committee thanks the minister for his response. The committee maintains its view that serious matters imposing high penalties should be contained in principal legislation where they are subject to Parliamentary debate.

[178] Alert Digest No.4 of 1996 at pp.6-7, *Education (Overseas Students) Bill 1996*.

14. CRIMINAL LAW (SEX OFFENDERS REPORTING) BILL 1997

Background

14.1. Mrs L R Bird MLA, Member for Whitsunday, introduced this private members bill into the Legislative Assembly on 18 November 1997. In accordance with a resolution of Parliament, the Legal Constitutional and Administrative Review Committee examined the bill and tabled its report, entitled *The Criminal Law (Sex Offenders Report) Bill 1997* on Wednesday 25 February 1998

14.2. The committee commented on the bill at pages 14 – 26 of its Alert Digest No. 1 of 1998.

Is the content of the explanatory note sufficient?[179]

– **General comment**

14.3. The committee expressed the view that it has experienced some difficulty in scrutinising this bill in the absence of an explanatory note. It therefore requested that the Premier, as the Minister responsible for the *Legislative Standards Act 1992*, amend ss.7 and 22 of the Act to require:

- explanatory notes to be produced for all bills; and
- the Office of Parliamentary Counsel to draft explanatory notes to private members bill, on request.

14.4. The premier has responded to the committee's request as follows:

> *In response to those recommendations contained in the Committee's Alert Digest No 1 of 1998 which are directed to me, I wish to inform the Committee that the Government will be amending the provision of the Legislative Standards Act 1992 as proposed in recommendation 35 of the Legal Constitutional and Administrative Review Committee's report No 8 into the Member for Whitsunday's Private Member's Criminal Law (Sex Offenders Reporting) Bill.*
>
> *The Government does not support the extension of the role of the Office of the Parliamentary Counsel to include the drafting of explanatory notes and considers that adequate resources and sufficient expertise exists within the confines of Parliament and the Opposition for Members to obtain any assistance they might require.*

14.5. The committee thanks the Premier for his response and notes the amendment to s.22 of the *Legislative Standards Act* in the *Statute Law (Miscellaneous Provisions) Bill 1998*. The proposed amendment imposes an obligation on <u>all members</u> (not

[179] 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.

only ministers) who present a bill to the Legislative Assembly to circulate an explanatory note for the bill.

14.6. The committee is, however, concerned that this amendment will impose obligations on private members, without providing adequate resources to assist them in the preparation of explanatory notes. The committee notes the Premier's response that adequate resources already exist within Parliament and the opposition to assist members in preparing explanatory notes and requests that the Premier provide further information detailing these resources.

15. OFFSHORE MINERALS BILL 1997

Background

15.1. The Honourable T J G Gilmore MLA, Minister for Mines and Energy introduced the bill into the Legislative Assembly on 19 November 1997. It was subsequently passed on 5 March 1998.

15.2. The committee commented on the bill at pages 27 – 37 of its Alert Digest No. 1 of 1998. The minister's comments are referred to, in part, below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[180]

– **clauses 43 and 44**

15.3. In its Alert Digest No. 1 of 1998, the committee noted that cl.43 and 44 subordinates native title rights during the life of a tenure. It referred to the explanatory notes to the bill which expressed the view that subordination of native title rights during the life of a tenure is consistent with subordination of any other rights other interested parties may have in the tenure area. The committee also noted that cl.43 expressly provides that a grant of tenure or special purpose consent does not extinguish native title; and that it also re–states the position regarding payment of compensation under s.23(5)(b) of the *Native Title Act 1993* (Cwth).

15.4. The committee referred this matter to Parliament to consider whether cls.43 and 44 have sufficient regard to the fundamental legislative principle in s.4(3)(j) of the *Legislative Standards Act 1992*.

15.5. In responding to the committee's observation, the minister provided the following clarification:

> *The Offshore Constitutional Settlement of 1979 required offshore legislation of the States to mirror that of the Commonwealth as far as possible. To this end, the Minerals Legislation Subcommittee of the Australian and New Zealand and Energy Council (ANZMEC) has prepared a Model Bill. The Model Bill mirrors the Offshore Minerals Act 1994 (Cth) and the native title provisions have been prepared in consultation with the legal advisers of the Department of the Prime Minister and Cabinet*
>
> *The Queensland Offshore Minerals Bill is derived from the Model Bill and therefore has been drafted to ensure consistency with the future acts provisions of the Native Title Act 1993 (Part 2, Division 3). The Right to Negotiate (Part 2, Division 3*

[180] 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.

Subdivision B of the Native Title Act 1993) does not apply to an offshore place. However, permissible future acts, including grants of tenure or special purpose consents, must comply with Subdivision A of Division 3.

In expressly providing that the grant of a tenure or special purpose consent does not extinguish native title, clause 43 reflects the non-extinguishment principle (s.23(4)(a) of the Native Title Act 1993). Under the non-extinguishment principle (s.238(3)(4)) native titleholders may still exercise their rights and interests attached to the native title so long as they are not inconsistent with the rights and duties under a tenure or consent. This position is reflected in clauses 43(2) and 44 of the Bill.

15.6. The committee thanks the minister for the information and notes that the provision was passed unamended. The committee reiterates its comment that one of the difficulties with national scheme legislation is that is that they are drafted without due regard to the principles contained in the *Legislative Standards Act*.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[181]

– **clauses 353 and 366**

15.7. The committee noted that the immunity in these clauses protects the minister; a delegate of the minister; and a person acting under the direction or authority of the minister or the minister's delegate from an action, suit or proceeding for acts or omissions made in good faith and without negligence. The minister stated that:

... the position of my department has adopted is no different to that taken by other Government departments in the development legislative proposals and that is, that liability should not lie with the individual but with this State as indicated in clauses 353(3) and 366(3) of the Bill.

15.8. The committee thanks the minister for providing this information.

Does the legislation provide appropriate protection against self-incrimination?[182]

– **clauses 372(2) and 373**

15.9. the committee noted that the contents of cl.372(1) of the bill which provides a person is not excused from complying with the minister's request on the grounds the request may tend to incriminate the person.

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181 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.

182 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.

15.10. The committee was pleased to note that the indemnity in cl.373 of the bill against the use of information compulsorily obtained intends to indirectly obtain information. However, it suggested that cl.373 could be further enhanced by adding another safeguard to ensure that persons subject to the exercise of power are only those who have peculiar knowledge of the information required. The minister responded as follows:

> *I believe that the safeguards against self–incrimination under clause 373 of the Bill are sufficient. The request for information from an individual is relevant to the operation of the Act in particular to that part of the Act which is "Information Management".*

15.11. The committee thanks the minister for his response and notes the provisions were passed unamended. It maintains its view that it would be beneficial to further enhance the safeguards to this abrogation of the privilege against self–incrimination.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[183]

– **clause 379**

15.12. The committee noted that in relation to *tenure–related land*[184] or a *tenure–related building, structure, vehicle or aircraft*[185] cl.379(5) provides that, for cl.379(1), land or a building, structure, vehicle, vessel or aircraft is tenure–related if—

(a) it is used in connection with activities carried out under a tenure or special purpose consent; or

(b) records about activities of that kind are kept there.

15.13. Clause 379(1) permits an inspector to inspect these properties without a warrant if the inspection is reasonably necessary. The committee noted the safeguards provided in the bill.[186]

15.14. The committee expressed concern that this provision allowed an inspector to enter other tenure–related premises that are not a residence without the need to obtain the occupier's prior consent. The committee requested the minister to clarify whether an inspector must first provide written information to the occupier of premises about the purposes of the inspection before entering or requesting entry to the premises. It also requested the minister to consider inserting further

183 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.

184 Clause 379(1) of the bill.

185 Clause 379(1)(b) of the bill.

186 Clause 379(2) of the bill.

safeguards into these provisions dealing with entry by consent such as those provided in s.174 of the *Keno Act 1996*.

15.15. In response to the committee's request, the minister provided the following information:

> *It was decided that for the sake of consistency between jurisdictions, particularly when mining operations may straddle both Queensland and Commonwealth waters, the powers of entry and search under clause 379 should be the same as those contained in the Commonwealth Act.*

15.16. The committee thanks the minister for his response.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[187]

– **clauses 404 and 443**

15.17. The committee expressed its concern that cl.404(3)(4)(5) reverses the onus of proof so that the owner of a vessel and a person in command are presumed to be guilty until they can raise an effective defence, of being within a safety zone. It further noted that cl.443 provides that as executive officer of a corporation is taken to have committed an offence if the corporation of where they are executive commits an offence against the bill. Clause 443 does provide some defences but presumes the guilt of the executive officer until they can prove one of the defences. The committee sought information from the minister to justify these reversals of the onus of proof as the explanatory notes did not provide clarification of justification. In response the minister advised as follows:

> *the establishment of safety zones around offshore structures is critical to the prevention of human and environmental disasters of monumental proportions in offshore waters. It is because of this that under clause 404 of the Bill, the onus of proof must lie with the offender, and in so doing, act as a deterrent to an offence being committed. The requirement under clause 443 that executive officers must ensure that their corporation must comply with the Act, to my knowledge is a current uniform requirement in an attempt to make corporation executive officers more responsible for their actions.*

15.18. The committee thanks the minister for his response and notes that these provisions were passed without amendment.

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?[188]

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187 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.

188 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.

– **clause 439**

15.19. The committee was concerned that reference in cl.439 to "an appropriately qualified officer of the department or employee" empowers the minister to delegate functions under the bill to:

- an appropriately qualified officer of the department; or
- an employee of the department.

15.20. The committee sought clarification from the minister as to whether the phrase "appropriately qualified" only applies to "an officer" of the department and not to "an employee". It was concerned the delegation may be made to any employee of the department. In response to this request the minister advised as follows:

> *Clarifying delegations under clause 439, I will only delegate to an "appropriately qualified" officer who is also an employee of the department. I agree wit the Committee that clause 439 could have been better constructed to ensure certainty.*

15.21. The committee thanks the minister for this information.

Is the content of the explanatory note sufficient?[189]

15.22. The committee noted that the bill did not contain the information required by ss.23(1)(b) to (g) and 23(2) of the *Legislative Standards Act*. It noted further that the explanatory note did not state a reason for note including this information as required by s.23(2) of the *Legislative Standards Act*. The committee therefore requested the minister to provide this information. The minister responded to this request as follows:

> *I note the requirements under s.23(1)(b) to (g) of the Legislative Standards Act regarding the Bill's explanatory notes have not been met. I have been informed that the required information was forwarded to the printers for preparation of appropriate documentation, but for some unknown reason, the information was not included in the printed material. Detailed in Attachment A is the information that should have been included in the explanatory notes that accompanied the Bill under s.23(1)(b) to (g) of the Legislative Standards Act.*

15.23. The committee thanks the minister for the information provided.

This concludes the Scrutiny of Legislation Committee's 2nd report to Parliament in 1998. This digest relates to bills tabled in Parliament during the sitting week commencing on 3 March 1998.

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.

189 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.

Tony Elliott MLA
Chairman
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– APPENDICES –

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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[190] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[191].

(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).

190 "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.**

191 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.[192]

(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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192 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.
Agents and Motor Dealers Bill 1997 Bill No. 80 of 1997	30 October 1997 Not yet passed	• cls. 32 & 499 • cls. 47, 462 & 544 • cls. 127(2)(4)(5), 128(2)(5), 175(2)(4)(5), 176(2)(5), 216(2)(4)(5), 217(2)(7), 275(1)(3)(4), 276(2)(5), 528 & 529 • cls. 452 & 453 • cl.490 • cl.546	• Does the legislation have sufficient regard to the rights and liberties of individuals? (privacy) • Does the legislation confer immunity from proceeding or prosecution without adequate justification? • Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Is the legislation consistent with the principles of natural justice? • 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 bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	1/98 & 2/98
Architects Amendment Bill 1998 Bill No. 9 of 1998	4 March 1998 Not yet passed	• Part 5, Div 3 Sub 1	• Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?		2/98
Building and Integrated Planning Amendment Bill 1998	5 March 1998	• cl. 24(2)	• Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?		2/98

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Bill No. 14 of 1998	Not yet passed				
Civil Justice Reform Bill 1998 Bill No. 6 of 1998	4 March 1998 Not yet passed	• cls.2, 27 & sch.2 • cls.5, 6, 8 & 21 • cl.21 • general • cl.24 • cl.26 sch.1	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Does the legislation have sufficient regard to the rights and liberties of individuals? • Staged automatic expiry of subordinate legislation. • Does the legislation have sufficient regard to the institution of Parliament? • Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause"? • Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?		2/98
Criminal Law (Sex Offenders Reporting) Bill 1997 Bill No. 82 of 1997	18 November 1997 Not yet passed	• cls. 3(1)(b), 5(1), (3)(a) & 7(4) • cl.3(2)(b) • cls. 5(3)(b) & (5) • cls. 6(2)(b) & (4) • cls. 8(2)(e) & (4)(d) • general • general	• Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Does the legislation have sufficient regard to the rights and liberties of individuals? (Ignorance of the law) • Does the legislation have sufficient regard to the rights and liberties of individuals? (Freedom of movement) • 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) • Is the content of the explanatory notes sufficient?	• Information provided.	1/98 & 2/98

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Government Owned Corporations and Other Legislation Amendment Bill 1998 Bill No. 4 of 1998	4 March 1998 Not yet passed	• general • general • sch.1	• Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation provide adequate protection against self–incrimination?		2/98
Interactive Gambling (Player Protection) Bill 1998 Bill No. 12 of 1998	5 March 1998 Not yet passed	• general	• Does the legislation have sufficient regard to the rights and liberties of individuals (Privacy of Information)? • 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 and fingerprint records)? • Is the legislation consistent with the principles of natural justice? • Does the legislation have sufficient regard to the rights and liberties of individuals (judicial review ousted)? • Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons? • 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 provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Does the legislation have sufficient regard to the institution of Parliament (transitional regulation making power)? • Does the bill allow the delegation of legislative power only in appropriate cases?		2/98

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
			• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		
Justice and Other Legislation (Miscellaneous Provisions) Bill 1998 Bill No. 15 of 1998	5 March 1998 Not yet passed	•	• Does the legislation have sufficient regard to the rights and liberties of individuals (freedom of movement)? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Is the content of the explanatory note sufficient? • Does the legislation adversely affect rights and liberties, or impose obligations retrospectively?		
Offshore Minerals Bill 1997 Bill No. 87 of 1997	19 November 1997 Not yet passed	• cls. 43 & 44 • cls. 353 & 366 • cls. 372(2) & 373 • cl.379 • cls. 404 & 443 • cl.439 • general	• Does the legislation have sufficient regard to Aboriginal tradition and Island custom? • Does the legislation confer immunity from proceeding or prosecution without adequate justification? • Does the legislation provide appropriate protection against self-incrimination? • 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 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? • Is the content of the explanatory note sufficient?	• Information provided. • Information provided. • Information provided. • Information provided. • Information provided. • Information provided. • Information provided.	1/98 & 2/98

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Police and Other Legislation (Miscellaneous Provisions) Bill 1998 Bill No. 18 of 1998	Not yet passed	• cl.7 • general • cl.9 • cl.12 • cl.13 • cl.18 • cl.19 • cl.22 • cl.47 • cl.54 • cl.55 • cl.71 • cls.4, 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)? • Is the legislation consistent with the principles of natural justice? • Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification? • Is the legislation unambiguous and drafted in a sufficiently clear and precise way? • Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Does the legislation have sufficient regard to the institution of Parliament in that it sufficiently subjects the exercise of delegated legislative power to the scrutiny of the Legislative Assembly? • 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 legislation have sufficient regard to the rights and liberties of individuals (due process)? • 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? • Is the content of the Explanatory Note sufficient?		
Revenue Laws (Reciprocal Powers) Amendment Bill 1998	4 March 1998	• cl.6	• Does the legislation provide appropriate protection against self-incrimination?		

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Bill No.5 of 1998	Not yet passed				
State Housing Amendment Bill 1998 Bill No.10 of 1998	4 March 1998 Not yet passed	• cl.5	• Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?		
Statute Law (Miscellaneous Provisions) Bill 1998 Bill No. 2 of 1998	4 March 1998 Not yet passed	• Schedule *Transport (Gladstone East End to Harbour Corridor) Act 1996* cls.1, 2 • Schedule *Legislative Standards Act* s.22 • Schedule *Transport (Gladstone East End to Harbour Corridor) Act 1996* cls.1, 2 • Schedule *State Financial Institutions and Metway Merger Facilitation Act 1996*	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? • Is the content of the explanatory note sufficient? • Does the legislation have sufficient regard to Aboriginal tradition or Island custom? • Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		
Telecommunications (Interception) Queensland Bill 1998 Bill No.19 of 1998	5 March 1998 Not yet passed	• general	• Does the legislation have sufficient regard to the rights and liberties of individuals (invasion of privacy)?		

BILL (SHORT TITLE)	DATE INTRODUCED /PASSED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	AD No.
Transport Infrastructure Amendment Bill 1998 Bill No.7 of 1998	4 March 1998 Not yet passed	• cls.5, 6	• Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?		