SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE
– MEMBERSHIP –

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BILLS EXAMINED BUT NOT REPORTED ON*

NIL

*These bills were considered to raise no issues within the committee's terms of reference.

SECTION A

BILLS REPORTED ON

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

> *... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted*[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. CHILDREN SERVICES TRIBUNAL BILL 2000

Background

1. The Honourable A M Bligh MLA, Minister for Families, Youth and Community Care and Minister for Disability Services, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> *…. to establish the Children Services Tribunal to provide for the review of certain administrative decisions about services for children and young people.*

Overview of the bill

3. This bill is cognate with the *Commission for Children and Young People Bill 2000*, which was introduced into the Legislative Assembly on the same day.[3] It constitutes the Children Services Tribunal ("the tribunal"), whose primary function is to provide merit reviews of certain decisions made under other Acts (including decisions of the Commissioner for Children and Young People ("the commissioner") made under the firstmentioned bill[4]). The Tribunal is to replace the Children's Services Appeals Tribunal, which currently operates under the *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (the latter Act is to be repealed).

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[5]

- **clauses 7(f), 11(3)(b), 28(4) and 52(1)**

4. The following clauses of the bill expressly refer to Aboriginal and Torres Strait Island people or to Aboriginal tradition and Island custom:

   - clause 7(f), which provides that in making decisions involving children, the tribunal must take into account Aboriginal tradition and Island custom where Aboriginal people and Torres Strait Islanders are involved;

   - clause 11(3)(B), which provides that in recommending persons for appointment as members of the tribunal, the Minister must take into account the need for the membership of the Tribunal to include Aboriginal people and Torres Strait Islanders;

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3 That bill is reported on elsewhere in this Alert Digest.

4 Clause 121 of that bill confers the right of appeal to the Tribunal. The *Child Protection Act 1999*, the *Adoption of Children Act 1964* and the *Child Care Act 1991* all confer upon the Tribunal's predecessor, whose role it will inherit, jurisdiction to hear appeals against various decisions made under those Acts.

5 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.

- clause 28(4)(a), which provides that to the extent practicable, the tribunal when constituted by three members must include at least one member who is an Aborigine if a party, or a person entitled to elect to become a party is an Aborigine, and at least one member who is a Torres Strait Islander if a party or person entitled to elect to become a party is a Torres Strait Islander;

- clause 52(1), which provides that in conducting its procedures, the tribunal must take reasonable and practical measures to ensure its proceedings are conducted in a way that recognises, and is responsive to the customs, needs and traditions of parties or witnesses who are Aborigines or Torres Strait Islanders.

5. As mentioned in previous committee reports[6], Aboriginal and Island customary laws are in general not recognised within the Australian legal system, although they are given limited legislative recognition for certain purposes[7].

6. As also mentioned in those earlier reports, the fundamental legislative principle concerning Aboriginal tradition and Island custom does not require the recognition of customary laws, although it was described by the Electoral and Administrative Review Commission (EARC) as a "modest first step" in that direction.

7. None of the provisions of this bill can be regarded, in the view of the committee, as giving statutory effect to Aboriginal and Torres Strait Island customary law (the closest the bill comes to this is the provision of cl.7(f) which provides that Aboriginal tradition and Island custom "must be taken into account").

8. Nevertheless the bill, in relation to the constitution and operations of the tribunal, enhances in various ways the regard paid to Aboriginal tradition and Island custom.

9. The committee notes that cl.s7(f), 11(3)(b), 28(4) and 52(1) of this bill contain provisions which, in various ways, protect and enhance the positions of Aboriginal and Torres Strait Islander people, and require regard to be paid to Aboriginal tradition and Island custom.

10. The committee considers that the bill has sufficient regard to Aboriginal tradition and Island custom.

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

♦ clauses 91 to 96 inclusive

11. Part 4, Division 8 of the bill (cls. 91 – 96 inclusive) contains a number of provisions dealing with child witnesses which modify or displace traditional legal processes and requirements.

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6 See the committee's reports on the *Legislative Standards Amendment Bill 1998* (Alert Digest No. 1 of 1999 at pages 11-17), the *Penalties and Sentences and Other Acts Amendment Bill 2000* (Alert Digest No. 8 of 2000 at pages 5-7) and the committee's report elsewhere in this Alert Digest on the *Commission for Children and Young People Bill 2000*.

7 For example, in some jurisdictions Aboriginal customary practices in relation to child care are taken into account, as are customary marriages for the purposes of compensation and intestacy. One area in which the common law does of course recognise customary rights and interests is in relation to land (since *Mabo v Queensland (No. 2)* (1992) 175 CLR 1), and those rights have been accorded further recognition under the *Native Title Act 1993* (Cwth).

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

12. Clause 91 provides that a child cannot be compelled to give evidence in a proceeding, but must be willing to do so. Clause 92 provides that even if a child is neither a party nor a witness, the child has the right to express his or her views to the tribunal about relevant matters. Clause 93 severely restricts the range of persons who may be present whilst a child is giving evidence or expressing his or her views (cl.93(2) effectively limits these to the tribunal members and persons associated with the child). Clause 94 provides that a child giving evidence or expressing views must not be cross-examined, and limits the range of persons who may ask questions of a child (again, these are primarily the Tribunal members and persons associated with the child).

13. The provisions mentioned above will very significantly curtail the capacity of other parties to test the child's evidence, particularly by cross-examination, in the manner traditionally associated with court and tribunal hearings.

14. The Explanatory Notes state that these provisions are similar in most respects to those in s.112 of the *Child Protection Act 1999*, and that because the matters which may be canvassed are similar it was considered similar restrictions were appropriate. The Explanatory Notes go on to state:

> *Further, because the tribunal is not a court but an administrative decision making body, it was considered appropriate to restrict cross-examination altogether.*
>
> *These clauses are considered necessary to ensure accessibility of review processes to children and young people, to ensure their views and wishes are heard and to reduce the stress for children and young people who choose to give evidence. Many children and young people involved in reviews will have suffered abuse and neglect within their families. They should not be required to give evidence and be cross-examined in an administrative proceeding where a party is likely to be the person who abused them. The parties may also be persons who have considerable influence over the child and young person. Their presence may impact on the child's capacity to give their best possible evidence or to express their true views.*
>
> *These provisions seek to protect children and young people from further abuse in the system. The weight given to their evidence or views will be a matter for the tribunal to decide based o the child's Age and maturity balanced with all other evidence and information obtained by the tribunal. As the primary focus of the tribunal is to make the best possible decision in the interests of the child about whom the reviewable decision has been made rather that to decide between the competing cases of the parties, this protection is considered appropriate.*

15. The committee refers to Parliament the question of whether the restrictions which the bill imposes upon the calling of children as witnesses, and the processes which are to apply to the giving of evidence by children, have sufficient regard to the rights of other parties.

- **clause 17 (global privacy)**

16. Clause 17 empowers the Minister, for the purpose of deciding whether a person is suitable to be, or continue to be, a member of the tribunal, to ask the commissioner of the police Service for information about the person's criminal history. The commissioner of the police service must comply with that request.

17. Because of the manner in which "criminal history" is defined in the Dictionary to the bill, this provision will authorise the supply to the Minister of all previous convictions (including old convictions which would normally have the protection of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, and also of charges which did not result in a conviction.

18. The disclosure of these matters has obvious implications for the privacy of the person concerned.

19. The bill incorporates certain safeguards. Clause 17(5) provides that as soon as the information obtained is no longer needed for the purpose for which the Minister required it, the Minister must destroy the information as soon as practicable. Clause 42 imposes confidentiality obligations on tribunal members, staff and other persons associated with the tribunal in respect of information obtained by them in the course of performing their functions, where that information relates to another person's affairs.

20. The Explanatory Notes, in relation to this matter, state:

> *In their role of reviewing decisions made about children and young people, tribunal members are likely to have direct or indirect contact with and access to personal details about children and young people. This provision is justified to ensure the protection of these vulnerable children and young people by enabling the Minister to have access to all relevant information.*

21. The committee refers to Parliament the question of whether the provision of cl.17 authorising the Minister to obtain details of a tribunal member's "criminal history" (including old offences and charges which did not result in convictions), or that of an applicant for tribunal membership, has sufficient regard to the rights of those persons.

♦ **clauses 88(1), 141 and 142**

22. Clauses 88(1), 141 and 142 all prohibit the disclosure of information. Clause 88(1) concerns information acquired by a facilitator during alternative dispute resolution (ADR); cl.141 concerns publication of information relating to proceedings before the tribunal; and cl.142 generally prohibits the disclosure of information about persons' affairs by tribunal members, staff, experts and independent inquirers.

23. Breach of all these provisions is an offence punishable by financial penalties at levels which are unremarkable (except for the 1000 penalty unit ($75,000) maximum penalty which may be imposed on a corporation under cl.141), but all involve potential imprisonment for a maximum of 2 years.

24. The committee draws to the attention of Parliament that breaches of cl.s88(1), 141 and 142 may potentially be punished by terms of imprisonment not exceeding 2 years.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[9]

- **clause 143**

25. Clause 143 confers upon members of the tribunal, experts, facilitators and independent inquirers the same protection and immunity as a judge of the Supreme Court. The clause also confers on persons appearing before the tribunal for other persons, and witnesses in proceedings before the tribunal, the same protection as barristers and witnesses in the Supreme Court. Whilst the technical nature of the matters dealt with by the tribunal may or may not merit its being accorded the protection traditionally afforded to courts, the invariable involvement of children and issues concerning them may justify such immunity. In particular, the existence of immunity may well be a prerequisite if witnesses are to give evidence with the necessary candour.

26. The committee notes that cl.143 confers upon tribunal members and associated persons, persons appearing before it and witnesses, an immunity from legal liability equivalent to that of the Supreme Court.

27. Given the nature of the subject matter with which the tribunal deals, the committee does not object to this conferral of immunity.

Is the legislation consistent with the principles of natural justice?[10]

- **clauses 64, 66 and 67**

28. Clauses 66 and 67, taken in tandem, provide that parties other than children may not be represented before the tribunal by a lawyer or other agent without the tribunal's permission. Children, however, are entitled to be represented by a lawyer (and presumably by an agent other than a lawyer). Clause 64(2) recognises the obvious fact that a party which is a corporation must of necessity appear by an agent, but provides that that agent must be an officer of the corporation and must not be a lawyer.

29. The Explanatory Notes state that the more liberal provisions of the bill about representation of children reflect the fact that "most children and young people do not have the skills or the life experience to represent themselves adequately". The Explanatory Notes declare that the restriction of representation (whether by legal or non-legal agents) in relation to all parties other than children:

> *(mirrors) existing provisions in the current legislation and is a standard feature of administrative review tribunals. Because the purpose of such tribunals is to review administrative decisions on merit and make the best possible decision in the*

[9] 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.

[10] 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.

> *circumstances rather than determining which party has presented the more convincing case, increased powers to control the management and direction of the proceedings are a feature of these bodies. The power to determine whether the parties should be represented is an important means by which a tribunal can control the direction of the proceedings.*

30. As a general rule, representation by a lawyer enhances a person's right to natural justice, in that it provides them with the means to most efficiently present their case to the Tribunal before which they are appearing. On the other hand, factors such as the cost which legal representation imposes upon users of the tribunal, possible lengthening of proceedings, the "practical" nature of the subject-matter and the possibility that not all parties may in fact be able to afford legal representation, may support arguments that the exclusion of lawyers promotes the effective and even-handed operation of particular tribunals and therefore benefits persons accessing them generally, or that it gives parties (where not all parties can actually afford legal representation) equal rights of access to the tribunal.

31. The committee refers to Parliament the question of whether the provisions of the bill dealing with representation of parties have sufficient regard for the principles of natural justice.

- **clause 105**

32. Clause 105 provides that the tribunal may make "confidentiality orders", which prohibit or restrict the disclosure to a party of all or some of the evidence given before the tribunal, or whole or part of the contents of a document given to the tribunal for the review. Clause 105(3) provides that the tribunal may exclude a party and the parties represented from part of the review, or deal with the document in such a way that it is not disclosed to a party. Clause 105(4) provides that a confidentiality order may only be made if the tribunal is satisfied that otherwise a child is likely to be harmed or the safety of another person is likely to be endangered.

33. The Explanatory Notes (at page 7) provide several examples of factual situations in which it is envisaged such an order might be made.

34. Restricting the access of a party to material presented to the tribunal, and on which it may act in reaching its decision, is a clear denial of that party's right to natural justice. Natural justice includes the right of a person to be made aware of evidence adverse to that person, and a right to make submissions in relation to it. To the extent that the part of the evidence or document in question is not relevant to the issues before the tribunal and will therefore in fact not be acted upon by it, cl.105 may not significantly disadvantage the party. However, in many or even most cases, it is probable that the excluded evidence or material will be relevant and will be taken into account by the Tribunal in reaching its decision.

35. The Explanatory Notes state in relation to cl.105:

> *(The tribunal and the Tribunal established under the Guardianship and Administration Act 2000 both) have a welfare jurisdiction with a focus on the best interests of vulnerable persons. The overarching principle of the Bill is that the best interests of children are paramount. Another principle contained in clause 7 is that children are entitled to be protected from harm. These principles require that where*

the safety and wellbeing of a child conflicts with the rights of the parties, the child's interests must take precedence.

36. Clause 105 provides that, by various means, a party to a hearing before the tribunal may be deprived of access to evidence given to the tribunal, where a child is likely to be harmed or the safety of another person is likely to be endangered. In the committee's view, the making of an order under cl.105 will clearly deny the affected party natural justice.

37. The committee refers to Parliament the question of whether, in the particular circumstances specified in the bill, the conferral of a power to make such orders is justifiable.

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?[11]

38. Clause 9 provides that in exercising its jurisdiction the tribunal is not subject to the direction of the Minister.

39. Moreover, in her Second Reading Speech, the Minister emphasises that the bill establishes the tribunal as an entity separate from the Commission for Children and Young People:

to provide it with complete independence.

40. Clause 16 provides the grounds upon which the Governor in Council may remove a member of the tribunal from office. They are that the member:

(a) is mentally or physically incapable of properly discharging the functions of a member; or

(b) has demonstrated a disregard of the principles stated in section 7 in carrying out the member's duties; or

(c) has been found guilty of an offence the Minister considers makes the member inappropriate to perform official duties.

41. Whilst these provisions might be unremarkable in the case of many statutory boards, paragraph (b) is broadly framed and paragraph (c) gives the Minister significant discretion.

42. Where a body is intended to be completely independent, it is usual for the grounds of removal from office to be both relatively precise and relatively limited in their scope. The grounds upon which the termination of the appointment of the Commissioner for Children and Young People may be terminated under cl.27 of the *Commission for Children and Young People Bill 2000* exemplifies these characteristics.

43. The committee seeks information from the Minister as to why, given the apparent intention that the tribunal should operate independently of the Minister, the grounds of removal for

[11] 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.

members of the tribunal under cl.16 of the bill are not more precisely and objectively defined.

2. COMMISSION FOR CHILDREN AND YOUNG PEOPLE BILL 2000

1. The Honourable AM Bligh MLA, Minister for Families, Youth and Community Care and Minister for Disability Services, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> *… to repeal the Children's Commissioner and Children's Service Appeals Tribunals Act 1996 and provide for the re-establishment of the Children's Commission as the Commission for Children and Young People ("the commission") to promote and protect the rights, interests and well being of children in Queensland.*

Background to the bill

3. This bill is cognate with the *Children Services Tribunal Bill 2000*, which was introduced into the Legislative Assembly on the same day.[12] The two bills replace the current *Children's Commissioner and Children's Services Appeals Tribunal Act 1996*. In essence, the subject-matter of that Act is now to be distributed between two statutes.

4. The principal emphasis of this bill is as follows:

- to provide a mechanism for the making to, and investigation and resolution by, the Commissioner for Children and Young People ("the commissioner") of complaints about services provided by service providers to certain children;
- to provide a system of community visitors to protect the rights of children residing in certain places, by visiting those places;
- to provide a system of employment screening for certain types of child-related employment and certain child-related businesses; and
- to authorise the conduct of criminal history checks on staff of the Commission for Children and Young People ("the Commission").

5. In legislating for these matters, the bill raises a number of issues related to the fundamental legislative principles. These issues are dealt with below.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[13]

♦ **clauses 18(d) and 158**

6. Clause 18 provides that the commissioner, in performing his or her functions, must, amongst other requirements:

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12 That bill is reported on elsewhere in this Alert Digest.

13 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.

(d) be sensitive to the ethnic or cultural identity and values of children including, in particular, Aboriginal and Torres Strait Islander children.

7. Although the bill is overwhelmingly about children, the bill contains several references to the parents of children (see Schedule 1, Part 1, paragraphs 3 and 4).

8. The term "parent" is defined in cl.158. Whilst cls.158(1) and (2) contain general definitions of the term, cls.158(3) and (4) provide as follows:

(3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.

(4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.

9. As mentioned in earlier committee reports[14], Aboriginal and Island customary laws are in general not recognised within the Australian legal system, although they are given limited legislative recognition for certain purposes[15].

10. As also mentioned in the earliest of those reports, the fundamental legislative principle relating to Aboriginal tradition and Island custom does not require the recognition of customary laws, although it was described by the Electoral and Administrative Review Commission (EARC) as a "modest first step" in that direction.

11. The committee does not consider cl.18(d) gives statutory effect to Aboriginal and Torres Strait Island customary laws. It may nevertheless, in the view of the committee, be characterised as enhancing, at least to some extent, the regard paid by the law to Aboriginal tradition and Island custom in the context of the commissioner's operations.

12. In the cl.158 definition of "parent", the express inclusion of persons regarded as parents under Aboriginal tradition or Island custom constitutes an express recognition of this aspect of customary law, albeit within a relatively narrow field of operation.

13. The committee notes that under cl.18(b), the commissioner is expressly required to be sensitive to the ethnic or cultural identity and values of Aboriginal and Torres Strait Islander children, and that under cl.158 the term "parent" includes persons who under Aboriginal tradition or Island custom are regarded as a parent of a child.

14. These provisions enhance the regard paid by the law, in the context of this bill, to Aboriginal tradition and Island custom and, for certain purposes, expressly recognise it.

15. The committee considers that the bill has sufficient regard to Aboriginal tradition and Island custom.

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[14] See the committee's reports on the *Legislative Standards Amendment Bill 1998* (Alert Digest No. 1 of 1999 at pages 11-17), the *Penalties and Sentences and Other Acts Amendment Bill 2000* (see Alert Digest No. 8 of 2000 at pages 5-7) and the *Succession and Other Acts Amendment Bill 2000* (see Alert Digest No. 8 of 2000 at page 15).

[15] For example, in some jurisdictions Aboriginal customary practices in relation to child care are taken into account, as are customary marriages for the purposes of compensation and intestacy. One area in which the common law does of course recognise customary rights and interests is in relation to land (since *Mabo v Queensland (No. 2)* (1992) 175 CLR 1), and those rights have been accorded further recognition under the *Native Title Act 1993* (Cwth).

Does the legislation have sufficient regard to the rights and liberties of individuals?[16]

- **clauses 95-128 inclusive**

16. Part 6 of the bill (clauses 95-128 inclusive) establishes a system of employment screening for certain child-related employment and business activities.[17]

17. The core of the statutory regime is the system of "suitability notices" issued by the commissioner. In order to commence or continue in "regulated employment"[18], or to carry on a "regulated business"[19], persons must have a current "positive notice"[20]. The bill provides that positive notices remain current for 2 years (with the need to apply for a new notice at the end of each such period), and stipulates various circumstances in which positive notices may be cancelled or in which (particularly upon the occurrence of a conviction) persons with positive notices must cease their activities. A breach of these, or a number of other, statutory provisions is an offence punishable by significant maximum penalties including imprisonment.

18. Clause 118 provides that once a negative notice has been issued to a person, an application to cancel it may not be made within 2 years from its issue or from any previous application.

19. The bill therefore imposes very significant restrictions upon the capacity of persons to conduct certain child-related businesses or to be employed in certain child-related employment. In relation to these matters, the Explanatory Notes state:

> *The infringements are considered necessary in order to uphold children's entitlement to be cared for in a way that protects them from harm and promotes their wellbeing.*
>
> *Employment screening involves an assessment of a person's suitability to work with children based on whether the person has a criminal history and what that criminal history is. Employment screening is considered an essential component of any child protection strategy for child-related employment. Employment screening diminishes children's risk of harm and enhances their wellbeing by ensuring that only suitable persons are employed in child-related employment.*
>
> *The Bill subjects persons working in child-related employment to a similar level of scrutiny to that which currently applies to teachers, staff of the Department of Families, Youth and Community Care, child care workers, foster carers, and persons wishing to adopt children. Persons working with children tend to be subjected to a greater degree of scrutiny than for other forms of employment. Many community organisations, which provide services to, and activities directed at, children have already embraced criminal history checks as a necessary probity check for ascertaining suitability to work with children. Media coverage in recent times has*

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

17 The relevant types of employment and business ("**regulated employment"** and "**regulated business**") are listed in Schedule 1, Parts 1 and 2 of the bill.

18 Regulated employment, which is defined in Schedule 1 Part 1 of the bill, covers various types of child-related employment.

19 A regulated business, which is defined in Schedule 1 Part 2 to the bill, covers various types of child-related business activities.

20 Under cl.102, the commissioner may issue suitability notices which are either "positive notices" or "negative notices".

constantly highlighted the need for vigilance and greater regulation in relation to people working in this field.

20. The committee refers to Parliament the question of whether the establishment by Part 6 of the bill of a system of employment screening for certain child-related employment and business activity, has sufficient regard to the rights and liberties of persons in, or proposing to undertake, such employment or business activity.

♦ **clauses 21(3), 102, 122, 128, 132, 133 and 136 (criminal history)**

21. The bill contains a significant number of provisions which refer to persons' criminal history, or convictions for offences, or to their having been the subject of charges or investigations. These include:

- clause 21(3), which provides that a person cannot be appointed as commissioner if the person does not consent to a criminal history check beforehand, or has a conviction for an indictable offence;
- clause 102, which provides that in deciding an application for a "suitability notice" (by issuing either a "positive notice" or a "negative notice"), the commissioner must decide the application, in a variety of stipulated circumstances, by reference to the existence of convictions and/or charges;
- clause 122, which provides that for various purposes in relation to "suitability notices" the commissioner may ask the police commissioner for information, or for access to the police commissioner's records, to enable the commissioner to establish what criminal history (if any) the relevant person has and to obtain a brief description of the circumstances of any convictions or charges mentioned in the criminal history. The police commissioner must comply with that request;
- clause 128, which provides that if on commencement of the bill an employer knows, or reasonably suspects, that an employee has a criminal history that may make the employee unsuitable for child-related employment, the employer may apply to the commissioner for a "suitability notice";
- clause 132, which provides that a person seeking to become a staff member of the commission must disclose, before being engaged, any criminal history the person has;
- clause 133, which provides that if there is a change in a staff member's criminal history that change must be immediately disclosed to the commissioner;
- clause 136, which is broadly analogous to cl.122 and provides that in relation to a commission staff member (or person seeking to become a staff member) who has given the commissioner a disclosure of criminal history, the commissioner may ask the police commissioner for information about that criminal history, including descriptions of convictions and charges, and information about investigations relating to the possible commission of "serious offences" by that person. The commissioner must comply with that request, although cl.136 places limitations upon the circumstances in which the police commissioner can supply information about investigations.

22. If it were not for the specific provisions of the above clauses, matters relating to a person's criminal record would be subject to the provisions of the *Criminal Law (Rehabilitation of*

Offenders) Act 1986. That statute establishes a general rule whereby, if the "rehabilitation period" (generally 10 years for indictable offences and 5 years for other offences) has elapsed and no further convictions have been recorded, the old convictions need not be disclosed. Furthermore, the Act expressly excludes charges from a person's criminal history.

23. The combination of:

- the various clauses mentioned earlier, which expressly refer to charges and investigations as distinct from convictions
- the provisions of cls.98 and 130 (which, in relation to their respective Parts, are stated to apply despite the *Criminal Law (Rehabilitation of Offenders) Act)* and
- the definition of "criminal history" in the Dictionary to the bill (which includes charges as well as convictions

has the effect of displacing the usual application of that Act. In short, a person's criminal record for the purposes of the bill will generally include both old convictions and charges (and, in some cases, even investigations).

24. The committee has previously reported on provisions of this kind[21]. As the committee has previously observed, it has become increasingly common for such provisions to be included in legislation involving dealings with children, and this may well reflect increased public expectations in this area. Similar provisions have also been encountered in bills dealing with gaming, and with the conduct of retirement villages.

25. The committee notes that several provisions of the bill (cls.126, 138 and 152) provide safeguards in requiring that information which has been obtained about a person's criminal history must not be used for purposes other than those stipulated in the bill, and that confidentiality must be maintained with respect to the information. Further, with the exception of cl.21(4) (which relates to appointment of the commissioner) and certain provisions of cl.102 (about suitability notices), possession of a criminal history is neither an absolute disqualification nor necessitates a decision adverse to the person concerned. Rather, cls.102 and 138 require the criminal history, or relevant aspects of it, to be taken into account by the decision-maker. In addition, various provisions of the bill require that, before a person's criminal history is considered, he or she must be given an opportunity to make submissions in relation to it, and to its significance for the matter which is being decided (see cls.103 and 139).

26. The above issues are addressed in several parts of the Explanatory Notes.[22] Broadly speaking, the Notes justify the relevant provisions of the bill on the basis of the need to provide adequate protection for children.

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[21] See, for example, the committee's reports on the Family Service's Amendment Bill 1999 (Alert Digest No. 4 of 1999 at pages 22-25) and the Road Transport Reform Bill 1999 (Alert Digest No. 6 of 1999 at pages 17-18), the Prostitution Bill 1999 (Alert Digest No. 14 of 1999 at pages 15-16) and the Retirement Villages Bill 1999 (Alert Digest No. 9 of 1999 at pages 21-22).

[22] Due to their length, the relevant passages are not reproduced in this report.

27. The committee refers to Parliament the question of whether the provisions of the bill which exclude the protection from disclosure afforded by the *Criminal Law (Rehabilitation of Offenders) Act*, and thereby require the disclosure of charges, old offences and sometimes even investigations, have sufficient regard to the rights of the persons to whom they relate.

♦ **clauses 21(3)(b), 108, 109, 111, 115, 116, 135, 146, 152, 156 and 157 (penalties)**

28. The bill contains a significant number of provisions breach of which constitutes an offence punishable by a substantial maximum penalty. The committee notes that the penalty imposed may, in respect of each of these provisions, include a term of imprisonment. The relevant provisions are:

- clause 108, which provides that a person must not apply for, or start or continue in, "regulated employment" if a "negative notice" is current (maximum penalties of up to 500 penalty units or 5 years imprisonment)

- clause 109, which provides that a person must not carry on a "regulated business" unless the person has a current "positive notice" (maximum penalties of up to 500 penalty units or 5 years imprisonment)

- clause 111, which provides that, if a person with a current "positive notice" is convicted of a "serious offence", the person must not until a further positive notice is issued commence regulated employment or, if already employed, carry out any work, or start of continue carrying out a regulated business (maximum penalty 500 penalty units or 5 years imprisonment)

- clause 115, which provides that a person must not make false or misleading statements to a proposed employer or to the commissioner (maximum penalty 100 penalty units or 2 years imprisonment)

- clause 116, which provides that a person must not give the commissioner a document known to be false or misleading (maximum penalty 100 penalty units or 2 years imprisonment)

- clause 135, which provides that a person must not fail to give the commissioner a required disclosure, or give a disclosure which is false or misleading (maximum penalty 100 penalty units or 2 years imprisonment)

- clause 152, which provides that a present or past commissioner, staff member or selection panel member must not disclose, or give access to, information or documents about a person's criminal history, acquired in the course of their activities (maximum penalty 100 penalty units or 2 years imprisonment)

- clause 156, which provides that a person must not take a reprisal against another person (maximum penalty 150 penalty units or 2 years imprisonment).

29. Clauses 146(1) and (3) provide that whilst offences against the bill are generally summary offences, those against cls.108, 109 and 110 are indictable offences if the person charged has a conviction for a "serious offence" involving a child. Clause 146(2) provides that in all circumstances an offence against cl.156 (taking a reprisal) is an indictable offence.

30. Whilst the distinction between indictable and other offences, in technical terms, is largely related to the manner in which the charges are commenced and heard, indictable offences are

generally considered to be more serious in nature.[23] The categorisation of certain of the abovementioned offences as indictable is therefore a matter of significance.

31. Moreover, it should also be noted that a range of statutes (such as statutes establishing a licensing regime or statutory offices) impose disqualifications or restrictions upon persons who have been convicted of "indictable offences". Clause 21(3)(b) of this bill, which provides that a person cannot be appointed as the commissioner if the person "has a conviction for an indictable offence", is an example of such a provision.

32. The committee draws to Parliament's attention the range of offences against the bill for which terms of imprisonment may be imposed, and the fact that certain offences against the bill are categorised as indictable offences.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[24]

- **clauses 59, 124 and 162**

33. Several clauses of the bill confer immunities. They are:

- clause 59, which provides that it is a lawful excuse for the publication of any defamatory statement made in a report by the commissioner (consequent upon investigation of a complaint) that the publication is made in good faith and is, or purports to be, made for the purposes of the bill

- clause 124, which provides that, if it would be a contravention of the bill for a person to employ another in "regulated employment", the employer must not employ the person "despite another act or law or any industrial award or agreement", and the employer does not incur any liability for not employing the person

- clause 162, which provides that a person is not liable for disclosing information to the commissioner that would help the commissioner in assessing or investigating a complaint.

34. The qualified immunity conferred by cl.59 does not appear to be unreasonable, and it in any event replicates one of the general defences to defamation actions available under the *Defamation Act 1889*. The immunity conferred upon employers by cl.124 is both appropriate and necessary, given the obligations which the bill imposes upon them in relation to employment of persons in "regulated employment".[25] In relation to cl.162, the Explanatory Notes state:

> *The conferral of immunity from prosecution or proceedings is considered reasonable, given the nature of the commission's work and the overriding need to safeguard the*

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23 Clause 147, as increasingly occurs in statutes, provides some scope for indictable offences under the bill to be dealt with summarily).

24 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.

25 The types of employment and business activity which constitute "regulated employment" are set out in Schedule 1, Parts 1and 2 of the bill.

interests of vulnerable children. Clause 162 is a standard provision which accords with the protection afforded to whistleblowers under the Whistleblowers Protection Act 1994. The protection of whistleblowers serves the interests of children by providing a mechanism for people with relevant information which would assist the commissioner in the investigation of a complaint, to come forward with information knowing that they have some protection from further proceeding or prosecution. This protection if particularly relevant if the information of the whistleblower assists in protecting a child from abuse or other forms of harm.

35. The committee notes that cl.162 contains no requirement that the person act in good faith or without negligence or recklessness.

36. Clauses 59, 124 and 162 of the bill confer various forms of immunity. The committee considers the immunity conferred by cls.59 and 124 to be reasonable.

37. The committee refers to Parliament the question of whether the general immunity conferred by cl.162, in all the circumstances, has sufficient regard to the rights of persons who may be adversely affected by the disclosures which it protects.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[26]

38. Clause 69 of the bill provides that a community visitor may enter a "visitable site" in stipulated circumstances. Apart from situations where the person in charge consents or where a warrant is obtained, entry is only permitted if the "visitable site" is a public place and the entry is made when it is open to the public. These additional powers of entry may therefore be described as relatively limited. It is noted, however, that "visitable sites", which are defined in cl.64, will often be premises conducted by the State.

39. Clauses 74-76 confer a range of powers which a community visitor may exercise after entering a visitable site. Again, these are less extensive than corresponding powers contained in a number of other bills the committee has examined.

40. The range of entry and post-entry powers conferred must of course be assessed in light of the fact that the role of community visitors is to "promote and protect the rights interests and wellbeing of children" residing at visitable sites.

41. The committee notes that the bill confers on community visitors powers of entry which extend beyond situations where the occupier consents or where a warrant has been obtained. The committee notes that once entry has been effected, the bill confers on community visitors various other powers, including power to obtain information.

42. The committee brings these matters to the attention of the Parliament.

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

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

- **clause 145**

43. Clause 145 sets out a number of matters which, in proceedings under or in relation to the bill, need not normally be proved or in relation to which a certificate signed by the commissioner is evidence. The latter are listed in cl.145(4). Whilst the matters stated in paragraphs (a) and (b) of cl.145(4) appear reasonable, the committee is concerned that paragraph (c) permits additional matters to be prescribed by regulation.

44. As provisions such as cl.145 displace the procedural requirement that evidence be introduced through witnesses who appear before the court or tribunal, it is important that they deal only with matters which are technical and non-controversial. As mentioned earlier, the committee does not object to any of the other specific matters presently listed in cl.145.

45. However, the committee cannot recall having previously encountered an evidentiary provision which enabled the categories of matters in it to be enlarged by regulation. Given the nature of such evidentiary provisions, the committee regards this as being quite undesirable.

46. The committee recommends that the bill be amended to delete cl.145(4)(c).

[27] 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.

3. DANGEROUS GOODS SAFETY MANAGEMENT BILL 2000

Background

1. The Honourable S Robertson MLA, Minister for Emergency Services, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, as indicated by the Explanatory Notes, is:

> *…. to protect people, property and the environment from harm from hazardous materials, such as petrol or liquefied petroleum gas.*

Overview of the bill

3. The bill deals with the storage and handling of "hazardous materials", particularly dangerous goods and combustible liquids, and with the operation of "major hazard facilities" (cls.5 (a) and (b)). It also contains provisions relating to the provision of advice and help for emergencies involving hazardous materials (cl.5(c)). The matters concerned all self-evidently involve danger to persons, property and the environment.

4. The bill is therefore primarily regulatory in nature and, like several other bills upon which the committee has reported in recent years[28] contains a large number of provisions which impinge on the rights of individuals. These include provisions imposing safety obligations upon persons involved with the storage or handling of hazardous materials, including occupiers, employees, manufacturers, importers, suppliers, designers and installers. The bill also includes provisions conferring upon authorised officers a wide range of entry, seizure, inquisitorial and directive powers.

5. The explanation for this extensive set of controls and obligations lies clearly with the nature of the materials involved. In this regard, the Minister's Second Reading Speech contains the following statements:

> *Dangerous goods are used everywhere. There is ample evidence that if not handled properly, they can cause death or severe injury, as well as damage to property and the environment.*
>
> *The legislation emerges from identified community needs relating to public safety, including the need to regulate hazardous industry and the need for uniformity in chemical safety legislation.*
>
> *It guards against tragic incidents involving hazardous materials such as the Netherlands fireworks explosion or the Longford gas explosion happening here in Queensland.*

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[28] *The Explosives Bill*, reported on in Alert Digest No. 11 of 1998 at pages 15-29, the *Radiation Safety Bill 1999*, reported on in Alert Digest No. 3 of 1999 at pages 26-41, the *Coal Mining Safety and Health Bill 1999*, reported on in Alert Digest No. 4 of 1999 at pages 1-14 and the *Mining and Quarrying Safety and Health Bill 1999*, reported on in Alert Digest No. 4 of 1999 at pages 29-30.

6. Accordingly, the restrictions which the bill imposes upon the rights and liberties of individuals involved in, or associated with, the storage and handling of hazardous materials, must be balanced against the rights and liberties of persons (including employees and persons in, or passing through, neighbouring areas) who would be directly affected by fires, explosions and the like involving hazardous materials.

7. The committee observes that, generally speaking, the numerous provisions of the bill which impact upon individual rights and liberties appear to have been drafted with significant regard to fundamental legislative principles.

8. Nevertheless, various provisions of the bill require comment, and these are dealt with below.

Does the legislation have sufficient regard to the rights and liberties of individuals?[29]

- **clauses 16-27 inclusive**

9. Clauses 16 to 27 inclusive impose a range of "safety obligations" upon various persons associated with the storage and handling of hazardous materials. Clause 18 makes the breach of these obligations an offence, and prescribes very substantial maximum penalties. Many of the "safety obligations" are broadly-framed, and effectively oblige the relevant persons not to act negligently. This arises from the fact that the bill defines the relevant obligations as being "to take all reasonable precautions and care to achieve an acceptable level of risk", and from the fact that "acceptable level of risk" is defined (see cl.17) as being achieved "when risk is minimalised as far as reasonably practicable".

10. These provisions impose obligations which mirror those imposed under the civil law of negligence. Persons suffering personal injury or property damage as a result of negligent acts committed in relation to the storage and handling of hazardous materials could of course sue in the civil courts for damages. However, as mentioned above, the bill also makes breach of the common law duty of care a statutory offence, for which heavy penalties are imposed. In this regard, the bill continues a legislative trend exemplified in, for example, the *Workplace Health and Safety Act 1995*, the *Explosives Act 1999*, the *Coal Mining Safety and Health Act 1999* and *the Mining and Quarrying Safety and Heath Act 1999*.

11. It should also be pointed out that the bill extends these obligations well beyond persons actually working in the storage and handling of hazardous materials, and includes designers, manufacturers and importers of the relevant goods and storage and handling systems, as well as installers of such systems. However, these broadly-framed negligence-related obligations are subject to the provisions of any regulations and "recognised standards" made under the bill (see cl.29). These will dictate relevant obligations (see cl.21), presumably of a specific nature, in respect of safety issues. If, as seems likely, they cover a significant part of the field, they will narrow the residual area to which, under cl.18, the general negligence-related obligations will apply.

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

12. It can of course be argued that broadly-framed offence provisions are necessary because of the considerable harm which may result from carelessness in the storage and handling of hazardous materials.

13. The committee draws to the attention of Parliament the fact that the bill creates broadly-framed statutory offences, with heavy penalties including imprisonment, for negligent acts in relation to the storage and handling of hazardous materials.

♦ **clause 18**

14. Clause 18 sets a range of maximum penalties for breach of the "safety obligations" contained in cls.16-27 inclusive.

15. The penalties, which are expressly related to the types of harm caused by the contravention of a safety obligation, range from 3000 penalty units ($225,000) or 3 years imprisonment (where multiple deaths and serious harm to property or the environment are caused) down to 750 penalty units ($56,250) or 6 months imprisonment where serious harm to property or the environment is caused. A residual penalty for all other breaches of the safety obligations, in an amount of 500 penalty units ($37,500), is also stipulated[30].

16. The Minister, in his Second Reading Speech, declares that:

> *The bill imposes a high level of penalties, particularly for offences with serious consequences.*

17. The Minister would doubtless justify the high penalties by reference to the potentially very harmful consequences of the offending actions.

18. In addition, cl.166 declares that any offence against the provisions of the bill, for which the maximum penalty of imprisonment is 2 years or more, is an indictable offence. All other offences are summary offences. Whilst the distinction between summary and indictable offences, in a technical sense, relates largely to the type of court proceedings employed, indictable offences are regarded as being more serious than summary offences.

19. This is reflected in the fact that many statutes (such as those establishing licensing regimes or statutory offices) impose disqualifications or restrictions on persons who have been convicted of "an indictable offence".

20. The committee draws to the attention of Parliament: (a) the level of maximum penalties imposed by the bill for breach of many of its provisions; and (b) the fact that some offences against the bill are classified as indictable offences.

[30] Various other provisions of the bill impose monetary penalties, but they are generally much lower than the ones just mentioned (the most substantial is 500 penalty units for failure to comply with a directive (cl.101(1)).

♦ **clause 28(3)**

21. Clause 28 sets out grounds of defence against proceedings brought for a contravention of the cl.18(1) obligation to discharge "safety obligations".

22. Clause 28(3) provides that ss.23 and 24 of the *Criminal Code* do not apply in relation to the contravention of a safety obligation. Section 23 of the *Code* incorporates a general requirement that an offending act must have been performed with intent, and s.24 excuses acts done in an honest and reasonable, but mistaken, belief in the existence of facts.

23. The Explanatory Notes indicate that these exclusions are designed to accelerate the investigative and prosecutorial processes. The notes also assert that the exclusion:

> *….is consistent with exclusions in other modern safety legislation, such as the Workplace Health and Safety Act, the Coal Mining Safety and Health Act 1999 and the Mining and Quarrying Safety and Health Act 1999. The exclusion of these sections of the Criminal Code is balanced by the fact that defences are written into the bill in cl.28(2). It is a defence for a person to prove that the commission of the offence was due to causes over which the person had no control.*

24. Whilst the committee does not endorse the removal of the ss.23 and 24 defences, it would seem that these exclusions are of limited significance in respect of those offences which are negligence-based. If negligence itself is effectively rendered an offence, there would seem to be limited (if any) scope for a requirement of intent. Indeed, s.23 of the *Criminal Code* states that it "is subject to the express provisions of this Code relating to negligent acts and omissions".

25. As regards other offences (such as, for example, breaches of cls.23(c),(d),(e),(f) and (g)), the provisions of cl.28(3) would normally have been relevant.

26. The committee would not, as a general rule, endorse the denial of the defences available under ss.23 and 24 of the *Criminal Code* to persons charged with breaches of the bill's safety obligations.

27. The committee notes that these defences might not in any event have been available in respect of a significant number of offences against the bill.

♦ **clauses 163 and 165**

28. Clause 163 contains a number of provisions which provide that certain certificates and documents "are evidence" of specified matters.

29. Provisions of this nature, which are designed to facilitate the introduction in court proceedings of evidence about relatively non-contentious matters without having to call a witness, are not generally considered by the committee to be unreasonable. However, much depends on the precise nature of the matters about which the documents are deemed to be evidence. The committee notes that:

- clause 163(1)(c) provides that a chief executive certificate is evidence that on a stated day or during a stated period a standard issued or published by the National Occupational Health and Safety Commission or Standards Australia was or was not in force; and

- clause 163(2) provides that a document purporting to be published by or under the authority of either of those bodies is on its production in a proceeding evidence of the matters appearing on and in the document.

30. The committee considers these provisions extend to a considerable degree the range of documents which would normally have the benefit of an "evidentiary aids" provision such as cl.163.

31. The committee further notes that cl.165 provides that a signed "analyst's report" produced by the prosecutor or defendant in a prosecution is evidence of various maters, including the results of the analysis (conducted by the analyst on samples mentioned in the report).

32. Again, this appears to extend the benefit of "evidentiary aids" provisions somewhat beyond clearly non-contentious matters. Moreover, the term "analyst's report" is not defined in the bill.

33. Both types of documents mentioned above may of course contain matters of considerable importance to the parties.

34. The committee is unable to discern any clear justification for relaxing the usual rules of evidence, particularly in relation to cl.165. In the normal course of events, there should be nothing to prevent an expert who has prepared a report for proceedings being available to give evidence in relation to that report.

35. The committee seeks information from the Minister as to why the normal rules of evidence applicable to legal proceedings have been relaxed, with respect to the particular matters mentioned above, by cls.163 and 165.

36. The committee also seeks information from the Minister as to why the term "analyst's report" is not defined in cl.165 of the bill.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[31]

♦ **clauses 62-80 inclusive and 122-125 inclusive**

37. Clauses 62-80 confer upon authorised officers extensive powers of entry, which extend beyond situations where the occupier consents or the entry is authorised by a warrant. In particular, entry is available as of right to "major hazard facilities" and "dangerous goods locations", and to workplaces sufficiently connected with them (including workplaces of contractors away from those places).

[31] 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.

38. At this point the committee observes that it is uncertain whether the qualification in cls.62(1)(d)(i) and (ii) (about being open for carrying on business or otherwise open for entry) applies to major hazard facilities, dangerous goods locations and relevant workplaces, or only to the latter.

39. Once entry has been achieved, the bill confers on authorised officers a further wide range of powers. These include powers of seizure (cls.71-80) and powers to obtain information (cls.68(3)(f) and (g), cl.81 and (not exclusively in relation to post-entry powers) cls.83 and 86).

40. The Explanatory Notes (at pages 2 and 3) deal with these entry and post-entry powers at some length.

41. Clause 122 of the bill authorises a "hazmat adviser" to enter a place in which a "hazardous materials emergency" is happening *if asked to do so by a prescribed officer* (that is, a police officer, a fire officer, a mines inspector etc) *at the place*. After entry has been effected, cl.123 confers various powers upon the hazmat adviser, including the power to require a person at the place to give the hazmat adviser reasonable help. These powers are again only exercisable if the hazmat adviser is asked to do so by the "prescribed officer".

42. Whilst these powers are significant, it is fair to say that they are contingent upon requests being made by "prescribed officers" who themselves have analogous entry and post-entry powers. Therefore, the powers conferred by cl.s122 and 123 do not involve any significant augmentation of the powers conferred upon other officers under other Acts (in most cases these officers have, under their own Acts, power to take onto premises any persons they reasonably require for exercising their powers (such as the power conferred under cl.68(3)(e)).

43. The committee notes that the bill confers on authorised officers significant powers of entry, which extend beyond situations where the occupier consents or a warrant has been obtained. The committee notes that once entry has been effected, the bill confers on authorised officers a wide range of powers.

44. The committee further notes that the bill confers upon hazmat advisers entry and post-entry powers, although in both cases a request must be made to them by a "prescribed officer" and the powers may therefore not constitute a significant extension of powers which presently exist in other Acts.

45. Departures from the safeguards provided by search warrants should always be carefully considered and adequately justified, in the context of the subject-matter of the particular bill.

46. The committee brings these matters to the attention of Parliament.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[32]

- **clause 29**

47. Clause 29 provides that the Minister may make "recognised standards".

48. These instruments are of considerable practical importance, as they state ways to achieve "an acceptable level of risk", and under cl.21(3) a person's safety obligations under the bill can only be discharged (where a recognised standard has been made) if the person adopts one of the ways of achieving an acceptable level of risk stipulated in the standard or "another way that achieves a level of risk that is equal to or better than the acceptable level".

49. Clause 29(2) provides that the Minister must notify the making of a recognised standard, and cl.29(3) provides that the standard takes effect on the day that notice is notified or published in the gazette or a later stipulated day.

50. Clause 29(6) declares the gazette notice to be subordinate legislation.

51. The committee has previously commented adversely on provisions which permit matters, which it might reasonably be anticipated would be dealt with by regulation, to be processed through some alternative means which does not constitute subordinate legislation[33].

52. The significance of providing for matters to be dealt with by these alternative processes, as opposed to regulations, is of course that the relevant instruments are not "subordinate legislation" and are not subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*.

53. The committee notes that whilst, under the bill, the standards themselves are not "subordinate legislation", cl.21(6) declares the gazette notice notifying the making of the standards to be subordinate legislation. This proposal, which can be described as a "half-way house" arrangement, is similar to that employed in several other bills which the committee has previously examined.

54. In considering whether this scheme is appropriate, the committee takes into account the importance of the subjects dealt with, and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation.

55. The Explanatory Notes address this issue as follows:

> *Many of the standards that may be recognised under this Bill exist in some form already, for example, some industry codes of practice and Australian Standards. However, they will not become recognised standards, automatically. They will need to undergo a formal recognition process, which will accommodate input from industry and the community. The Dangerous Goods Working Group which includes*

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[32] 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.

[33] See, for example, Alert Digest No. 8 of 1998 at pages 9-10.

representatives of both groups will review potential standards for recognition, as well as developing new standards. Any new standards developed will undergo a public consultation phase. All recognised standards would be subject to regular review. the making of standards is preferable to the development of subordinate legislation for the following reasons:

(a) It enables extensive consultation in the review and development of material.

(b) The highly technical and specialist requirements (contained in codes, etc.) are difficult to translate to legislative format.

(c) Numerous standards will be considered for recognition.

56. The committee refers to Parliament the question of whether the provisions of cl.29 of the bill, which enables the Minister to make recognised standards (notifiable by a gazette notice which is subordinate legislation), are an appropriate alternative to the incorporation of the relevant material into regulations.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[34]

- **clause 137**

57. Clause 137, which relates to the conduct of boards of inquiry, provides that the board of inquiry must give the occupier of the place where a major accident happened an opportunity of making a defence to all claims against the occupier, "either in person or by the occupier's lawyer or agent".

58. The bill appears to contain no other provisions relating to representation of persons appearing before boards of inquiry.

59. The committee seeks information from the Minister as to whether it is intended that persons other than the occupier should have a right to appear by an agent (including a lawyer).

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[35]

- **clauses 172 and 173**

60. Clause 172 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes its executive officers).

[34] 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.

[35] 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.

61. Clause 173 obliges executive officers of a corporation to ensure that the corporation complies with the bill, and provides that if the corporation commits an offence against the provision of the bill, each executive officer also commits an offence.

62. This latter provision reverses the onus of proof, since under the law, a person generally cannot be found guilty of an offence unless he or she has the necessary intent. The effect of cl.172 appears to be generally similar.

63. The committee notes that both 172 and 173 provide grounds upon which this liability may be avoided. These grounds are that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of a relevant person or corporation.

64. The Explanatory Notes deal with this reversal of the onus of proof as follows:

> *Under clause 172, an act committed or omitted on behalf of another person by a representative of the person is taken to have been committed or omitted also by the person. Like clause 173 (see paragraph 9), this is a standard feature of modern safety legislation, such as the Workplace Health and Safety Act, the Coal Mining Safety and Health Act and the Mining and Quarrying Safety and Health Act. The clause is designed to assist in meting evidentiary requirements when attempting to penalise a person for breach of a safety obligation under the bill. Clause 172(3) allows the defence that the person could not, by the exercise of reasonable diligence, have prevented the act or omission.*
>
> *Under clause 173(3), evidence that a corporation has been convicted of an offence against a provision of the Act is evidence that each of the executive officers complies with the provision. This clause is necessary in this Bill to ensure that executive officers of a company do not escape personal liability by hiding behind a corporate structure. The persons most likely to have knowledge of the structure, operations and distribution of responsibilities in a company are its executive officers. Therefore, it is appropriate that they bear the burden of proof regarding:*
>
> *(a) their exercise of diligence to ensure compliance; or*
>
> *(b) their inability to influence the corporation in relation to the offence.*
>
> *These are defences under section 173(4).*

65. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.

66. Whilst the difficulties of determining liability in certain circumstances (for example corporations) are appreciated, the committee as a general rule does not approve of such provisions.

67. The committee refers to Parliament the question of whether cls.172 and 173 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[36]

♦ **clause 187**

68. Clause 187(3) empowers the Governor in Council to make regulations imposing penalties of:

- not more than 200 penalty units for breach of regulations setting requirements for the operation of major hazard facilities; and
- not more than 100 penalty units for breach of regulations imposing requirements for storage or handling of dangerous goods or combustible liquids and dangerous goods locations.

69. The committee has previously considered the appropriateness of provisions delegating legislative power to create offences and prescribe penalties.

70. The committee has concluded that this should only be done in limited circumstances, and provided certain safeguards are observed. The committee has formalised its views on the delegation of legislative power to create offences and prescribe penalties. In part, the committee considers that:

- rights and liberties of individuals should not be affected and the obligations imposed on persons by such delegated legislation should be limited; and
- the maximum penalty should be limited, generally to 20 penalty units[37].

71. The committee observes that the permissible penalties under cl.187(3)(a) and (b) are ten and five times respectively the maximum figured favoured by the committee.

72. The Explanatory Notes address this issue as follows:

> *The bill provides for breaches of the regulation to incur penalties of up to 200 penalty units. While this maximum limit might appear high for the regulatory offences, it is consistent with the maximum for regulatory offences in other legislation protecting the community from harm from hazardous materials, such as: the Explosives Act 1999 (200 penalty units); the Coal Mining Safety and Health Act and the Mining and Quarrying Safety and Health Act (both 400 penalty units); and the Environmental Protection and Health Act 1994 (165 penalty units). Furthermore, it is consistent with the high level of penalties in the Bill (which range form 3000 penalty units for a contravention causing multiple deaths and serious harm to property or the environment to 750 penalty units for a contravention causing serious harm to property or the environment). The level of penalty units in the bill and the maximum proposed for the regulation reflect the seriousness of the consequence of the contravention.*

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[36] 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.

[37] Alert Digest No. 4 of 1996 at pages 6-7, Alert Digest No. 6 of 1997 at page 11, Alert Digest No. 10 of 1997 at pages 6-7, Alert Digest No. 10 of 1997 at pages 6-7, Alert Digest No. 11 of 1998 at pages 26-27.

73. Clause 187(3) provides for regulations to create offences and impose penalties of not more than 200 and 100 penalty units respectively. The committee is generally concerned by the delegation of legislative power to impose penalties exceeding 20 penalty units.

74. The committee refers to Parliament the question of whether the delegation of power to make regulations imposing penalties of this magnitude is appropriate in the circumstances.

Does the legislation have sufficient regard to the institution of Parliament?[38]

75. The bill appears to form part of national scheme legislation[39]. Both the Minister's Second Reading Speech and the Explanatory Notes refer to the bill being based on national standards, and it would appear that many of the statutory obligations imposed by the bill are drawn from the contents of two national standards developed by the National Occupational Health and Safety Commission. This would suggest that the bill's genesis lies in an intergovernmental agreement.

76. National schemes of legislation have been a source of considerable concern, both to the committee and to its interstate and Commonwealth counterparts[40]. These schemes take a number of forms and the objection to them is greatest when they involve predetermined legislative provisions.

77. Ministers sponsoring bills of the latter type will generally object to any amendments being made to them during their passage through Parliament, on the basis that such amendments would be inconsistent with the legislative terms agreed to by the relevant intergovernmental body.

78. The committee notes that bill contains an unusual provision which enshrines an additional "national scheme legislation" component. One of the pivotal terms in the bill, namely "dangerous goods", is defined in cl.9 by reference to the "ADG Code". This latter term is defined in the Dictionary to the bill as follows:

> *"ADG Code" means the Australian Code for the Transport of Dangerous Goods by Road and Rail approved by the Ministerial Council for Road Transport, as in force from time to time* (underlining added)

79. The Ministerial Council for Road Transport is one of a number of intergovernmental bodies which comprise State, Territory and Commonwealth Ministers responsible for a particular subject (such as transport or health). The precise nature of the ADG Code is not discussed in the Explanatory Notes or the Minister's speech, but it is presumably either a document

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

39 The committee uses this term to describe broadly:

any and all methods of developing legislation, which is

- uniform or substantially uniform in application
- in more than one jurisdiction, several jurisdictions or nationally.

40 The relevant issues are canvassed in detail in *Scrutiny of National Schemes of Legislation – A Position Paper of Representatives of Scrutiny of Legislation Committees throughout Australia*, October 1996.

developed and maintained by the Council, or another document adopted by it. In either case the Parliament will have no control over the content of the Code, which no doubt will change from time to time. The additional question arises as to whether the Code is, or will be, published regularly and be made readily available to members of the public and other persons or organizations wishing to examine it.

80. This bill forms part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.

81. The committee refers to Parliament the question of whether the bill has sufficient regard to the institution of Parliament.

82. The committee also seeks information from the Minister as to the nature of the ADG Code referred to in cl.9 of the bill, and as to whether this document is readily available to the general public.

4. JUSTICE AND OTHER LEGISLATION (MISCELLANEOUS PROVISIONS) BILL 2000

Background

1. The Honourable M J Foley MLA, Attorney-General and Minister for Justice and Minister for the Arts, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, as indicated by the Minister in his Second Reading Speech, is to:

> *…. (amend) a number of statutes (with a view to) curing anomalies, correcting errors, repealing obsolete provisions and undertaking some discrete law revision.*

Overview of the bill

3. This bill amends 24 Acts administered by the Attorney-General.

4. The amendments made by the bill are generally either technical in nature or involve policy issues, and accordingly do not in the committee's view raise issues within its terms of reference.

5. One such amendment inserts into the *Property Law Act 1974* a statutory condition applicable to all contracts for the sale of land. The provision is designed to deal with situations where a purchaser is unable to check the vendor's title to the land on the day of completion of the contract, due to computer malfunctions within the Land Titles Office.

6. The following provisions of the bill, however, call for comment.

Does the legislation have sufficient regard to the institution of Parliament?[41]

- **Schedule, *Acts Interpretation Act 1954***

7. The bill makes several amendments to the *Acts Interpretation Act 1954.* Amongst those is the insertion of a new s.13B, subsection (1) of which provides that:

> *(1) An Act enacted after the commencement of this section affects the rights, powers or immunities of the Legislative Assembly or of its members or committees only in so far as the Act expressly provides.*

8. Whilst, as the Minister explains in his Second Reading Speech, statutes are already generally interpreted in a manner consistent with this provision, the new provision formally incorporates a statutory rule of interpretation to that effect. This amendment was, as the Minister also mentions, a recommendation of the Members Ethics and Parliamentary

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

Privileges Committee of this Parliament in its 1999 *Report on the Powers, Rights and Immunities of the Legislative Assembly, its Committees and Members.*

9.	In the committee's view, this amendment enhances the institution of Parliament.

Does the legislation have sufficient regard to the rights and liberties of individuals?[42]

♦ **Schedule, *Criminal Code***

10. The bill repeals s.432 of the *Criminal Code*, which is in the following terms:

> **Pretending to exercise witchcraft or tell fortunes**
>
> ***432.*** *Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from the person's skill or knowledge in any occult cult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of a misdemeanour, and is liable to imprisonment for 1 year.*

11. In his Second Reading Speech, the Attorney states:

> *This provision appears to be the relic of a more superstitious age and is now archaic and outmoded.*
>
> *If the relevant conduct being targeted in this offence is essentially fraud, then it should be appropriately and sufficiently covered by the fraud provisions in the Criminal Code.*

12. A person who, in the course of providing services of the type mentioned in s.432, acted in a way which constituted criminal fraud, would as the Attorney says be liable to punishment under the provisions of the *Code* dealing with that subject. That issue aside, the lifting of the statutory prohibition on providing the relevant services seems consistent with the right of individuals to associate with, and seek advice from, whomever they please[43].

13.	The committee does not object to the repeal of s.432 of the *Criminal Code.*

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

[43] The committee notes in passing that a person who "pretends or professes to tell fortunes for gain or payment of any kind" remains liable, under s.4(1)(o) of the *Vagrants, Gaming and Other Offences Act 1931*, to a penalty of $100 or imprisonment for 6 months.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[44]

- **Schedule, *Law Reform Act 1995***

14. The bill amends s.18A(1) of the *Law Reform Act 1995*. As indicated by the Explanatory Notes, the purpose of this amendment is:

> *to allow for the attachment of Crown employees' wages.*

15. Section 18A(1) presently provides as follows:

> *(1) A court may, in a proceeding, order the attachment or charging of the salary or wages of a **public service employee** to satisfy a debt, liability, action or other amount ordered by the court to be paid.*

16. The bill inserts the words "***or other employee of the State***" after the word "***employee***".

17. Section 18A(2) replicates the terms of current s.18A(1), except that it confers the relevant power on "the registrar of a court" rather than "a court….in a proceeding".

18. From the nature of the amendment, it is clear that it is intended to authorise a garnishee of the wages of State employees other than public servants. Garnishee is the process whereby a person who owes money to a second person against whom a court judgment has been obtained by a third person, can be ordered to refrain from paying that money to the second person and to pay it instead to the third person.

19. The State is not generally subject to the garnishee process, as there exists no general statutory provision which overcomes the presumption against the Crown being bound by statutes.

20. However, there has for many years been a statutory exception in the specific case of debts which are wages or salary owed by the State to public servants employed by it. This exception is currently to be found in s.18A.

21. This statutory exception, as presently framed, applies only in relation to "public service employees"[45], and not to other persons who are in some way employees of the State (such as persons employed by Government Owned Corporations (GOCs)).

22. The bill will extend the statutory provisions so as to enable the wages and salaries of these other State employees to be garnisheed by their creditors. Although "a court….in a proceeding" might normally include a registrar of the court, the distinction which ss.18A(1) and (2) draw between courts and registrars leads, in the committee's view, to the possibility that s.18A(1) does not include registrars.

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[44] 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.

[45] These are State employees employed under the *Public Service Act 1996*.

23. It is the committee's understanding that at least at the magistrate's court level, garnishee orders are generally obtained from a registrar, and not from a magistrate during a trial or other court proceeding.

24. Whilst the circumstances suggest that the intent of the bill is to enable garnishee orders against the additional categories of State employees to be obtained from either a court or a registrar, the committee considers the failure to amend sub-section (2) as well as sub-section (1) might have the effect of excluding the latter process.

25. The committee recommends that the bill be amended to clarify whether it is intended that registrars, as well as courts, are to have the power to make garnishee orders against the additional State employees covered by the bill.

♦ **Schedule, *State Penalties Enforcement Act 1999,* Item 22**

26. Item 22 of the amendments of the *State Penalties Enforcement Act 1999,* which amends s.118(1)(a) of that Act, appears to contain an error in that the words *omit, insert* should read *insert*.

27. The committee draws this drafting issue to the attention of the Attorney.

5. NATURE CONSERVATION AND OTHER LEGISLATION AMENDMENT BILL 2000

Background

1. The Honourable RJ Welford MLA, Minister for Environment and Heritage and Minister for Natural Resources, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, as indicated by the Minister in his Second Reading Speech is:

> *….(to provide) the legislative framework to set aside around 425,000 hectares of State forest and timber reserve land as protected areas under the Nature Conservation Act 1992. It is a significant step for nature conservation and nature-based recreation in Queensland.*

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[46]

- **clause 24 (proposed s.70F)**

3. Clause 24 inserts into the *Nature Conservation Act 1992* a new Part 4A (Forest reserves).

4. Part 4A, in the words of proposed s.70A, is intended to assist the dedication of areas within State forests, timber reserves and *Land Act* reserves as protected areas. It achieves that purpose by providing, as an interim measure, for the dedication of land as forest reserves. It is intended that all land dedicated as forest reserves will then become protected areas as soon as practicable.

5. Proposed s.70C provides that the Governor in Council, by regulation, may dedicate stated areas of land within State forests, timber reserves or *Land Act* reserves, as forest reserves. Proposed s.70F provides that a forest reserve is to be managed so as to achieve a number of objects. One of these, set out in s.70F(1)(b), is to:

> *provide for the continuation of any existing use of the land.*

6. A number of specific examples of existing uses are set out in the paragraph. However, s.70F(2) provides that s.70F(1)(b):

> *only applies to the use of the land for commercial logging if the purpose of the logging is to remove plantation trees to restore the land's conservation values.*

7. "Commercial logging" is defined in s.70F(4).

8. The effect of s.70F(2) is, in the words of the Explanatory Notes:

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

> *that commercial logging (defined in 70F(4)) is not a lawful use of the land (in keeping with the South East Queensland Forests Stakeholder/Government Agreement) unless the logging involves the removal of plantation trees for the purpose of restoring the land's conservation values.*

9. Commercial logging is presumably conducted by loggers under the authority of permits or licences issued by the State. It would appear that, upon the dedication of land as a forest reserve under this bill, any current permits or licences will cease to be of any effect in respect of that land. In some circumstances permits and licences can constitute "property", and in that event any legislative extinguishment of the rights attached to them would arguably be an "acquisition" of that property[47].

10. Permits and licences for commercial logging are no doubt issued for a fixed term, and the extent of any acquisition of property would of course be heavily dependent upon the length of the relevant unexpired terms.

11. In his Second Reading Speech, the Minister refers to the Regional Forest Agreement (RFA) and the South East Queensland Forest Agreement (SEQFA). The Minister states:

> *Mr Speaker, the management principles of Forest Reserves reflect the future protected area status of the land. These management principles also provide for the continuation of any lawful existing use of the land such as apiculture, foliage harvesting, recreation, grazing and mining.*
>
> *Commercial logging is not permitted, as this use has been catered for on other land identified in the SEQFA process.*

12. The committee seeks information from the Minister as to whether there are presently in existence any permits or licences authorising loggers to conduct commercial logging on areas which will be declared as forest reserves under the bill.

13. If so, the committee seeks information from the Minister as to what (if any) arrangements are to be made to compensate the persons holding such permits and licences.

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47 In relation to the related provisions of s.51(xxxi) of the *Commonwealth Constitution*, see *Commonwealth v Western Mining Corporation Ltd* (1996) 136ALR353. In that case, a majority of the Full Federal Court held that legislation extinguishing the rights attached to a permit to explore for petroleum in the Timor Sea effected an acquisition of the property represented by the licence-holder's interests. Black CJ held that the extinguishment of the rights and of the correlative obligations of the Commonwealth produced identifiable benefits for the Commonwealth, which was then free to deal with the Timor Sea unencumbered by the former rights of the licence holder, and accordingly there was an acquisition of the licence holder's property.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[48]

- **clause 20(proposed s.39B)**

14. Clause 20 inserts a new Part 4, Division 2, Subdivision 4 – Environmental Impact Statements (proposed ss.39A to 39C inclusive). The new provisions provide that the chief executive may, where a person seeks under ss.34, 35 or 38 an interest in land of a protected area, require the person to supply an environmental impact statement (EIS) for a stated use of the land under the interest.

15. Proposed s.39C provides that if an environmental impact statement has been given, the chief executive or other person who may create the interest "must take the EIS into account" before deciding whether or not to create the interest.

16. Proposed s.39B(2) provides:

> *The EIS must be prepared in the way prescribed under a regulation.*

17. The Explanatory Notes state, in relation to this provision:

> *39B(2) states that the interest must be prepared in the way prescribed under a regulation. This could be a regulation under another Act if it was considered appropriate to utilise procedures already prescribed elsewhere.*

18. The term "environmental impact statement" is not presently defined in the *Nature Conservation Act*, nor is it defined in the amendments which cl.5 of the bill makes to the definitions section of the Act.

19. Given the apparent significance of environmental impact statements the committee queries whether it might be appropriate to set out in the bill, even if only in broad detail, matters which an EIS must contain and any matters relating to its preparation.

20. The committee seeks information from the Minister as to why requirements about the preparation of environmental impact statements are not set out in the bill itself.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[49]

- **clause 34**

21. Clause 34 inserts new s.174A, which provides that the chief executive may, by gazette notice, approve or make codes of practice for:

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[48] 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.

[49] 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.

- protected areas
- forest reserves under Part 4A
- protected wildlife.

22. The committee has previously queried provisions of bills which enable codes of conduct, guidelines and the like to be made by chief executives, Ministers and others, rather than being contained in regulations. The principal significance of such instruments not being made as regulations is that they are thereby not subject to the parliamentary tabling and disallowance provisions of ss. 49 and 50 of the *Statutory Instruments Act 1992*.

23. In the present case, the Explanatory Notes assert that the codes:

> *are of an administrative nature, often providing detailed guidelines (eg relating to care of captive wildlife or fire management procedures on a protected area) or addressing matters that might otherwise be inserted as conditions of a permit or other authority. It would not be appropriate to make the codes by subordinate legislation.*

24. These are factors which might well justify the adoption of an alternative process to regulations.

25. More importantly, however, the committee notes that under s.174A(2), ss.49, 50 and 51 of the *Statutory Instruments Act* are expressed to apply to the codes of practice as though they were subordinate legislation.

26. The codes of practice will therefore be subject to the scrutiny of Parliament to the same extent as regulations.

27. The committee does not object to the provisions of proposed s.174A.

Does the legislation have sufficient regard to the rights and liberties of individuals?[50]

♦ **clause 40**

28. Clause 40 amends Schedule 2A of the *Statutory Instruments Act 1992* to exempt the *Nature Conservation (Protected Areas) Regulation 1994* from the operation of the Act's Part 7 expiry provisions.

29. These provisions provide that as a general rule regulations expire after a period of 10 years from the date they were made.

30. The committee has previously criticised provisions in a number of bills, which conferred exemptions from the operation of various control mechanisms contained in the *Statutory Instruments Act*. The automatic expiry of regulations is one such control mechanism.

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

31. The Explanatory Notes deal with this issue at some length:

> *Clause 40 amends Schedule 2A of the Statutory Instruments Act 1992. The effect of the amendment is to exempt the Nature Conservation (Protected Areas) Regulation 1994 from the expiry provisions of Part 7 of that Act.*
>
> *The Nature Conservation (Protected Areas) Regulation 1994 dedicates and declares protected areas under the terms of the Nature Conservation Act 1992. It consists of a list of protected areas, their names, and Lot on Plan descriptions of the land. The current classes of protected area in the regulation are national parks (scientific), national parks, conservation parks, resource reserves, nature refuges and coordinated conservation areas.*
>
> *Of these, national parks (scientific), national parks and conservation parks are already exempt from the expiry provisions pursuant to section 57 of the Statutory Instruments Act 1992. World Heritage management areas, none of which has yet been declared, are also exempt under the same provision. Under the terms of the proposed amendment to section 32 of the Act (Clause 14), resource reserves would also be exempt.*
>
> *However nature refuges, coordinated conservation areas, wilderness areas and international agreement areas are not exempt from the expiry provisions, as they may be revoked without a resolution of the Legislative Assembly.*
>
> *Nature refuges, coordinated conservation areas and wilderness areas may be the subject of conservation agreements or conservation covenants under the terms of sections 45 and 49 of the Act. Many agreements are binding not only on the landholder, but also on the landholder'' successors in title (section 45(5) of the Act). Because of the binding nature of these agreements and covenants, it is appropriate that their declaration should be exempt from the expiry provisions under the Statutory Instruments Act.*
>
> *International agreement areas may give effect to obligations under international treaties. For that reason, it is appropriate that their declaration should also be exempt.*
>
> *Section 53(a) of the Statutory Instruments Act 1992 establishes that one of the primary purposes of the expiry provision for subordinate legislation is to reduce the legislative burden without compromising environmental objectives. It could be argued that subjecting these classes of protected area to expiry could compromise environmental objectives.*

32. In view of the nature of the regulations in question, the committee considers there is some merit in the arguments advanced in the Explanatory Notes.

33. Given the nature of the regulations in question, the committee does not object to the relevant Regulation being exempted by cl. 40 from the automatic expiry provisions of the *Statutory Instruments Act*.

6. WITNESS PROTECTION BILL 2000

Background

1. The Honourable PD Beattie MLA, Premier, introduced this bill into the Legislative Assembly on 22 June 2000.

2. The object of the bill, in the words of the Explanatory Notes, is:

> …. *to provide protection for witnesses.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[51]

♦ **Overview of the bill**

3. In summary, the bill establishes a statutory regime under which the appropriate State agencies can provide protection to persons who have helped, or are helping, a law enforcement agency in the performance of its functions (in particular, by giving evidence) where there is a perceived danger to that person or a related or associated person (in particular, a danger that figures involved in major and organised crime will assault or murder such persons). The protection program self-evidently involves providing physical protection for those persons, relocating them to a new, secret location and, where necessary, providing them with a new identity.

4. A scheme of this type raises the following issues in relation to the rights and liberties of individuals.

Rights of witness and role of government

5. Assault, homicide and other attacks upon the person of individuals have always constituted crimes under the common law (and nowadays often under statute). It can therefore be said that citizens have a right not to be subjected to unlawful violence by others.

6. It is implicit in our legal and constitutional systems that the role of Executive government is not just to apprehend persons who have already breached the law and to bring them to trial, but to take reasonable steps, where there is a real prospect of a crime being committed in the foreseeable future, to prevent that from occurring. The establishment of a witness protection system therefore not only has the effect of greatly inhibiting the commission of crimes against particular individuals, but can be said to enhance those persons' right not to be subjected to unlawful violence.

7. It can also be said to be consistent with the provisions of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory. Article 6 of the *Covenant* provides that:

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

….every human being has the inherent right to life. This shall be protected by law.

8. Article 9 of the *Covenant* provides that everyone has the right to liberty and security of person, and that no one shall be deprived of that liberty except on such grounds and in accordance with such procedures as are established by law.

9. Where a witness protection system is voluntary, it cannot be said to infringe in any way the rights and liberties of the witness. Although the bill does not expressly state that the program it establishes only takes effect if the witness is agreeable to being included in it, that is implicit from the bill's requirement that a witness must sign a "protection agreement".

Rights of third parties

10. However, the nature of a witness protection program (which involves placing a person in hiding and sometimes providing them with a new identity) could self-evidently impact upon the rights which third parties may have against that person. In particular, as mentioned in the Explanatory Notes, creditors may be impeded in identifying and locating a protected witness who is the debtor in order to pursue legal proceedings (or the threat of same) against them to recover the monies owed to them. In addition, children and present or former spouses seeking to enforce custody, access and maintenance rights may be similarly disadvantaged through being unable to identify and locate the witness.

11. To maintain the safety of protected witnesses, it will be necessary to impose prohibitions and penalties to prevent persons with relevant information disclosing it. This naturally impacts upon the rights of those other persons, including by rendering them liable to prosecution.

12. Further, on those occasions when protected witnesses do in fact emerge from hiding under legal compulsion (particularly where they are required to give evidence in court), restrictions will often have to be imposed upon the manner in which they carry out their obligations, in order to protect them. Where protected witnesses are to give evidence in relation to the matters which caused them to initially be placed under witness protection, they will naturally give evidence under their "old" identity even if they have been given a new one. However, restrictions will obviously need to be placed upon trial procedures which might result in their secret residential address becoming known. Further, if by chance they should be required to give evidence in relation to some new matter occurring after they adopted their new identity (the Premier in his Second Reading Speech gives the example of a protected witness subsequently being a witness to a motor vehicle accident) any trial procedures must be excluded which might lead to the person's former identity being revealed, if the person's safety is to maintained.

13. The various issues mentioned above are addressed in the bill. The committee's comments in relation to the relevant provisions of the bill are as follows.

♦ **clause 6**

14. Clause 5 establishes a witness protection program, run by the witness protection division of the Criminal Justice Commission ("the commission"). Under cl.6(1), persons may be included in the program (thereby becoming a "protected witness") if they appear to need protection from a danger arising because they have helped, or are helping, a law enforcement

agency or because of their relationship or association with such persons, and if it is appropriate to include the person in the program.

15. The bill provides that a person included in the program must sign a protection agreement with the chairperson of the commission (cl.7). The agreement is to incorporate various terms upon which the protection program inclusion will operate (cl.8).

16. Clause 6(3) requires that in deciding to include a person in the program, the chairperson of must have regard to a number of matters, including:

- the person's criminal history[52]; and
- medical, psychiatric or psychological information about the person.

17. Given the terms of cls.6, 7 and 8, it would seem that a person can only be included in the witness protection program if the person is prepared to reveal, or have revealed, the matters mentioned above. The release of the relevant information obviously impacts upon the person's right to privacy.

18. The committee notes that the bill requires persons to reveal, or consent to others revealing, information about their criminal history and medical, psychiatric and psychological condition if they wish to be included in a witness protection program.

19. The committee refers to Parliament the question of whether such requirements, in the circumstances, have sufficient regard to the rights of persons who wish to be included in the witness protection program.

♦ **clauses 24-27 inclusive**

20. These clauses establish procedures designed to protect the interests of protected witnesses who, having been given a new identity, are required to give evidence in legal proceedings under that new identity.

21. A non-disclosure certificate may be given, which prevents the person being asked any question at the hearing that may lead to the disclosure of the person's former identity or current address, prevents other witnesses being asked questions which might have that effect, and prevents persons involved in the proceedings from making statements that disclose or could disclose these matters (cl.26). The bill provides exceptions to these general prohibitions (see cl. 27).

22. These provisions are generally similar to those contained in the *Evidence (Witness Anonymity) Amendment Bill 2000*, which was reported on by the committee in Alert Digest No. 6 of 2000 at pages 5-8.

[52] The committee notes that the bill does not attempt to expand the meaning of "criminal history" so as to displace some or all of the provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986.* Accordingly, it will not include old convictions which that Act protects from disclosure, or charges which did not result in a conviction.

23. They raise the same issue, that is, they can prevent parties from being able to properly confront their accuser in court (where protected a witness's evidence is adverse to them).

24. The committee refers to Parliament the question of whether, in all the circumstances, the provisions of cls.24 to 26 inclusive have sufficient regard to the rights of parties to proceedings, against whose interests a protected witness may give evidence.

♦ **clause 43(2)**

25. Clause 43 provides that where a protected witness who has been relocated or given a new identity is under investigation for, is arrested for, or is charged with a "serious offence"[53], the chairperson may release to an "approved authority" a protected witness's new identity or location, criminal history and fingerprints and other information relating to the person.

26. This has obvious implications for the privacy of the protected witness.

27. In relation to cl.43, the Explanatory Notes state:

> *The clause recognises that the fact of a protected witness's relocation or change in identity should not interfere with the course of justice by obstructing any investigation of alleged criminal conduct by that person.*

28. In these circumstances, the making of information available for the purposes outlined in cl. 43 does not appear to be unreasonable.[54]

♦ **clause 36**

29. Clause 36 provides that a person must not knowingly, directly or indirectly, disclose or record information about a relevant person if the information compromises the security of a relevant person or the integrity of a witness protection program.

30. The maximum penalty for breach of cl.36 is 10 years imprisonment. This is a very substantial maximum penalty. However, given the nature of the information to which it relates, its presence is perhaps not unreasonable.

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53 "Serious offence" is defined in the bill as an offence against the law of Queensland, the Commonwealth or another State, which is punishable by at least 1 year's imprisonment.

54 As noted in an earlier footnote to this chapter, the definition of "criminal history" in this bill is consistent with the provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, and that old offences and charges which did not result in a conviction will not be included.

Does the legislation have sufficient regard to the institution of Parliament?[55]

31. The bill forms part of national scheme legislation[56]. This is abundantly clear from the Minister's Second Reading Speech, in which he states that the national scheme has already been legislated in all jurisdictions other than Tasmania and the Northern Territory.

32. National schemes of legislation have been a source of considerable concern, both to the committee and to its interstate and Commonwealth counterparts[57]. These schemes take a number of forms and the objection to them is greatest when they involve predetermined legislative provisions.

33. Ministers sponsoring bills of the latter type will generally object to any amendments being made to them during their passage through Parliament, on the basis that such amendments would be inconsistent with the legislative terms agreed to by the relevant intergovernmental body.

34. The Minister in his Second Reading Speech states that the bill "largely mirrors witness protection legislation in other jurisdictions".

35. This bill forms part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.

36. The committee refers to Parliament the question of whether the bill has sufficient regard to the institution of Parliament.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[58]

- **clauses 6, 8, 10, 11, 14 and 31**

37. Under the bill's provisions a number of decisions may be taken which are adverse to the interests of individuals. These include decisions under cl.6 as to whether a person is or is not to be included in the witness protection program, as to the contents of the protection agreement (cl.8), the variation of such agreements (cls.10 and 11), the ending of protection

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

56 The committee uses this term to describe broadly:

any and all methods of developing legislation, which is

- uniform or substantially uniform in application
- in more than one jurisdiction, several jurisdictions or nationally.

57 The relevant issues are canvassed in detail in *Scrutiny of National Schemes of Legislation – A Position Paper of Representatives of Scrutiny of Legislation Committees throughout Australia*, October 1996.

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.

(cl.14), and steps aimed at ensuring protected witnesses do not avoid obligations to third parties (cl.31).

38. The bill does not provide any system of review. Moreover, amendments made in Schedule 1 to the bill have the effect of excluding all of the decisions mentioned above from the operation of the *Judicial Review Act 1991* (Schedule 1 also exempts them from the operation of the *Freedom of Information Act 1992*).

39. The justification in the Explanatory Notes for the exclusion of the *Judicial Review Act* is similar to that provided in the Notes to the *Witness Anonymity Bill*[59] for the failure to provide any form of review in that bill.

40. The Explanatory Notes address this issue as follows:

> *The Bill provides that decisions made by the chairperson in relation to witness protection are excluded from the operation of the Judicial Review Act 1991. This is considered justified as internal levels of assessment within the Criminal Justice Commission are strict and numerous. Also, evidence required to be adduced in a judicial review of a decision involving witness protection, may well disclose processes which could prejudice witness protection methods. That in turn may put at risk witnesses under protection. If an external reviewer is involved there are increased opportunities for unauthorised dissemination of sensitive information.*
>
> *This approach is consistent with provisions of the Federal Witness Protection Act 1994. The chairperson's decisions will still be open to review by the Parliamentary Criminal Justice Committee and the Parliamentary Commissioner in accedence with the Criminal Justice Act 1989.*
>
> ……
>
> *The Bill provides that documents relating to witness protection are excluded from the operation of the Freedom of Information Act 1992.*
>
> ……
>
> *Witness protection documents currently fall within the exemptions that may by claimed under this Act, however, this is not considered sufficient protection as these provisions do not give automatic exemption and could involve review of an exemption claim. Again, for the reasons outlined above, external review processes have the potential to compromise the security of the program and put witnesses at risk.*

41. The committee refers to Parliament the question of whether the absence of any review system, and the exclusion of the *Judicial Review Act* and *Freedom of Information Act*, has sufficient regard to the rights of those individuals affected by those provisions.

[59] Mentioned earlier in this chapter.

Is the legislation consistent with the principles of natural justice?[60]

- **clauses 11, 14 and 21**

42. The exclusion of the *Judicial Review Act* (mentioned above) means that decisions by persons taken under the bill's provisions cannot be set aside by Courts on the basis that (amongst other procedural shortcomings) persons affected have not been given notice of the proposed decision or an opportunity to make submissions. However, cls.11, 14 and 21 do impose varying obligations on the chairperson in relation to the conferring of natural justice in specific circumstances.

43. All of these concern decisions taken once a person has been included in the witness protection program. None relate to the original decision under cl.6 as to whether a person should be included in the program. The rationale is presumably that once a person has been placed in a witness protection program, he or she acquires legitimate expectations, and should be afforded natural justice if a potentially adverse decision is to be made. It must be stressed again, however, that a failure by the chairperson to comply with these statutory requirements would not enable the *Judicial Review Act* to be invoked.

44. The committee notes that, whilst the bill contains no review provisions and excludes the operation of the *Judicial Review Act*, cls.11, 14 and 21 of the bill impose procedural requirements in relation to the conferring of natural justice in specific situations (all of which concern persons who have already been included in the witness protection program).

[60] 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.

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.*[61]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[62] of a provision may therefore be considered as extrinsic material in its interpretation.

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

62 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

7. DRUGS MISUSE AMENDMENT BILL 2000

Background

1. The Honourable TA Barton MLA, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 17 May 2000. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No. 6 of 2000 at pages 1-4. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation have sufficient regard for the rights and liberties of individuals?[63]

♦ **The bill generally**

3. The committee noted that the bill generally represents a legislative shift to a different and more punitive statutory enforcement regime for performance and image enhancing drugs. The committee referred to Parliament the question of whether this shift has sufficient regard to the rights and liberties of those who use, or are in some way associated with the use of such drugs.

4. The Minister responded to the committee's comments as follows:

> *During development of the Bill the benefits or otherwise of adopting a more punitive enforcement scheme were discussed in great detail. In particular, a review of the legislative schemes of other jurisdictions and recommendations of the Australian Olympic Committee, the Model Criminal Code Officer's Committee, the Department of Justice and Attorney-General and the Director of Public Prosecutions were considered.*
>
> *It was decided that, while other jurisdictions presently impose a range of penalties from six months imprisonment up to life imprisonment, the Commonwealth Government's intermediate stance of a maximum penalty of five years imprisonment for trafficking, manufacture and importation of Performance and Image Enhancing Drugs (PIEDs) was the preferred Queensland approach. The imposition of a lesser penalty of two years imprisonment for unlawful possession was also determined to reduce the concerns of lawful user groups. This approach takes into account:-*
>
> - *the nature of PIEDs and their potential for harm;*
> - *the legitimate human and veterinary use of such substances; and*

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

- *the cultural and attitudinal distinctions between users of PIEDS and other illicit substances.*

I believe that by adopting this approach the Bill provides a level of enforcement that best reflects the community's dislike for the misuse of all drugs, while still ensuring that unlawful users of PIEDs are not unduly penalised. Further, it is expected that the impact of these issues will be minimal due to the limited size of the user groups and the positive effect of the Government's drug diversion strategies

5. The committee notes the Minister's comments.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[64]

♦ **The bill generally**

6. Section 57(c) of the Act reads:

Proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place.

7. The committee noted that with image and performance enhancing drugs now included in Schedule 2A of the bill, this section may impact on proprietors of gymnasiums, sporting clubs and training centres. The committee sought information from the Minister as to why it is considered appropriate that section 57(c) should apply in the context of Schedule 2A drugs.

8. The committee also referred to Parliament the question of whether applying the reversal of the onus of proof provisions of s 57(c) of the *Drugs Misuse Act* to users of Schedule 2A drugs, and to persons relevantly associated with such use, is reasonable in the circumstances.

9. The Minister provided the following response:

The committee correctly identifies that there has been a reported increase in the use of steroids by persons wishing to enhance their performance and/or image, however, other concerning increases include the use of anabolic steroids by teenagers and the community generally, and the development of black market structures arising from this increased demand. As disturbing, is the identified relationship between persons involved in the supply, traffic and manufacture of Schedule 1 and 2 dangerous drugs and Schedule 2A dangerous drugs.

The approach taken in the Bill to reduce these trends is to adopt the same investigative, procedural and evidentiary requirements as exist for Schedule 1 and 2 dangerous drugs. In particular to your question, this includes the application of

64 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.

section 57(c) of the DMA to Schedule 2A dangerous drugs. This provision will allow police to adequately investigate and prosecute those persons who cloak or separate themselves from their involvement in offences involving Schedule 2A dangerous drugs. As previously discussed, disassociation from the actual criminal activity is not restricted to suppliers of hard drugs as the benefits of a reduced likelihood of prosecution and asset protection are equally applicable to persons involved in the supply, traffic etc. of all types of dangerous drugs.

Accordingly, I believe that it is both appropriate and reasonable to apply section 57(c) to persons misusing Schedule 2A drugs.

10. The committee notes the Minister's response.

8. GST AND RELATED MATTERS BILL 2000

Background

1. The Honourable D J Hamill MLA, Treasurer, introduced this bill into the Legislative Assembly on 1 June 2000. The bill was passed by the Legislative Assembly on 20 June 2000.

2. The committee commented on this bill in its Alert Digest No. 8 of 2000 at pages 1-4. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[65]

- **Schedule 3, *Queensland Building Services Authority Act 1991*, paragraphs 10-13 inclusive**

3. The committee noted that the bill placed an onus on builders to prove that their name was inserted in a contract without their approval. The committee expressed its view that this clause had the effect of reversing the onus of proof and sought information from the Minister as to why it was considered justifiable to deem a person to be the builder who carried out, or was to carry out, residential construction work simply because that person's name is stated in the relevant contract.

4. The Minister provided the following information:

> *One of the objectives of the Building Services Authority (BSA) is to create and maintain an acceptable balance between the interests of homeowners and contractors. The onus of proof in relation to insurable building work is one avenue in creating that balance.*
>
> *The current legislative requirements provide that a contractor's name, licence number and address must be present on a contract to establish an onus of proof that the contractor is responsible for the performance of that building work. The current provision does not have the practical effect that was intended, that being, to place responsibility on the builder who carried out the building work and has therefore been amended. BSA considers that the proposed amendments are not inconsistent with the original intention of the current provisions and the onus implicit in them.*
>
> *The onus of proof in relation to the contractor's name on a building contract or insurance notification form may come in two forms, written and printed. The amendments are designed to specifically capture the printed version of contracts and insurance notification forms. It is the current trend in building contracts for*

[65] 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.

contractors to have standard contracts produced bearing their name. In these instances it is considered appropriate to establish, prima facie, that the contractor whose name is printed on the building contract is responsible for the building work.

When considering proof of responsibility BSA looks to all items listed in sections 71 and 72 collectively. While a contractor whose name may be written on a contract may be deemed to be responsible for the construction, BSA considers that it would not act on that information without other acceptable proof that the contractor was indeed responsible for the construction.

This specific reasoning is not contained in the provisions due to the two means by which a contractor's name may appear on a contract – written and printed.

The defences to the onus of proof are such that a contractor would merely need to establish that the signature on the contract was not theirs or that payments in relation to the building work had not been made to them.

In all instances the contractor has the right to seek a review, in the Queensland Building Tribunal, of the BSA's decisions in relation to establishing responsibility for building work and for any recovery action which may take place in relation to that work.

BSA contends that the provisions create a balance between the interests of homeowners and contractors and that the reversal of the onus of proof is justifiable in those circumstances.

5. The committee notes the Minister's response.

Does the legislation have sufficient regard to the institution of Parliament?[66]

6. The committee expressed its general opposition to bills which form part of national schemes of legislation. The committee noted that this Bill is less objectionable than other national scheme legislation in that it is drafted in Queensland and that it does not merely adopt other laws. The committee referred to Parliament the question of whether the bill has sufficient regard to the institution of Parliament.

7. The Minister responded to the committee's comments:

The Premier signed the Intergovernmental Agreement (IGA) on the Reform of Commonwealth-State Financial Relations. Under the IGA, Queensland agreed to a number of actions that required legislation to implement.

The States and Territories agreed under the IGA to attach it as a schedule to relevant State and Territory legislation, and to use their best endeavours to ensure that their legislation complies with the IGA.

Attaching the IGA to State legislation does not give it the force of law. Such agreements are regarded as political agreements by the Courts, who will not enforce them. No sanctions for non-compliance are included in the IGA.

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

The Bill states that it is the intention of the State to comply with, and give effect to, the IGA. Queensland is enacting its own legislation to give effect to the principles contained within the IGA and this legislation does not adopt predetermined legislative provisions. The State Parliament retains control over the implementation and operation of these principles in Queensland.

8. The committee notes the Minister's comments.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[67]

- **clause 2(4)**

9. The committee noted that if the bill was not assented to by 1 July 2000 that some of its clauses would have retrospective effect.

10. The Minister responded as follows:

As the Bill makes a number of changes which must be in place before the GST commences, it is intended that the Bill will be assented to before 1 July 2000. The appropriate arrangements will be made for this to occur following the passage of the legislation.

11. The committee notes the bill received royal assent on 23 June 2000.

This concludes the Scrutiny of Legislation Committee's 9th report to Parliament in 2000.

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.

Linda Lavarch MLA
Chair

18 July 2000

[67] 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.

– APPENDICES –

Appendix A	–	Ministerial Correspondence
Appendix B	–	Terms of Reference
Appendix C	–	Meaning of “Fundamental Legislative Principles”
Appendix D	–	Table of bills recently considered

APPENDIX A - MINISTERIAL CORRESPONDENCE

APPENDIX B – TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established on 15 September 1995 by s.4 of the *Parliamentary Committees Act 1995*.

Terms of Reference

22.(1) The Scrutiny of Legislation Committee's area of responsibility is to consider—

(a) the application of fundamental legislative principles[68] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[69].

(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).

68 "Fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, s.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.

69 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*, s.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.[70]

(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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70 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

(Appendix D is not reproduced in this Alert Digest – copies of the Appendix can be obtained from the Committee's Secretariat upon request.)