SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE

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50TH PARLIAMENT, 1ST SESSION

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* 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. BRISBANE CASINO AGREEMENT AMENDMENT BILL 2001

Background

1. The Honourable Terry Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 18 October 2001.

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

> *… to cease the operation of the Henry VIII provisions in the Brisbane Casino agreement Act 1992 ("Agreement Act") and to give approval to the proposed amendments to the Brisbane Casino Agreement ("Agreement") on the terms as contained in clause 12 of the Bill.*

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[3]

♦ **Clause 6 and 7**

3. The bill amends the *Brisbane Casino Agreement Act 1992*, which is an "agreement Act". As the committee commented in its Report on "T*he Use of 'Henry VIII Clauses" in Queensland Legislation,*[4] agreement Acts typically contain the following elements:

- A 2 – 4 page Act referring to the agreement incorporated in a schedule to the Act
- A provision giving the agreement the force of law or stating that it is effective as if it were an enactment
- A provision allowing the agreement to be varied by further agreement, approved by regulation.
- A statement that if a provision of the agreement is inconsistent with the principal Act (or in some circumstances any other Act or law), the agreement prevails to the extent of the inconsistency.

4. The *Brisbane Casino Agreement Act 1983* currently provides (in s.6) for the Agreement to be amended in the manner mentioned above.

5. In its Report, the committee expressed the view that the provisions of agreement Acts enabling the agreement to be varied by further agreement, approved by regulation, were "Henry VIII clauses", and reiterated its objection to such provisions as undermining the institution of Parliament.

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

[4] January 1997, at page 33.

6. The committee stated:

> *Where the Government enters into a significant agreement, dealing with matters that should be contained in principal legislation, the Committee is of the view that such an agreement can be contained in a schedule to an Act. Any amendments to such an agreement should, however, be carried out by further Act of parliament. This option would be suitable where the agreement is not frequently amended and amendments are not likely to be urgent. This option would also suit those situations where the Act and agreement are desired to override inconsistent legislation.*

7. The *Brisbane Casino Agreement Act 1992* would clearly appear to fall within this category.

8. In its report, the committee cited with approval an amendment to the *Central Queensland Coal Associates Agreement Act 1968* made by the *Central Queensland Coal Associates Agreement Amendment Bill 1997*[5]. In that case, a provision of an agreement Act which enabled the agreement to be varied "pursuant to agreement between the Premier and the companies under the authority of any Act or with the approval of the Governor in Council by Order in Council…" was removed and replaced with a provision under which the agreement could be varied "pursuant to agreement between the parties to the agreement under the authority of any Act". This effectively prevented the agreement from being further varied otherwise than by another Act of Parliament.

9. The current bill achieves a similar result, in that s.6 of the *Brisbane Casino Agreement Act 1992* provides as follows:

> *6.(1) The casino agreement may be varied by a further agreement between the Minister and the other parties to the agreement.*
>
> *(2) The Minister may make a further agreement only if the proposed further agreement has been approved by regulation.*

10. The bill will require that the "further agreement" mentioned in s.6(1) to "(correspond) to the proposed further agreement set out in the schedule ", and will omit s.6(2).

11. The committee commends the Minister on the removal of a "Henry VIII clause" from the *Brisbane Casino Agreement Act 1992*.

Does the legislation have sufficient regard to the rights and liberties of individuals?[6]

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?[7]

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5 Reported on by the committee in its Alert Digest No 12 of 1997 at pages 5 – 6.

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

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

♦ **Clause 12, Schedule**

12. As mentioned earlier, the *Brisbane Casino Agreement Act 1992* is an "agreement Act". Under s 5 of that Act the provisions of the original agreement and of the proposed further agreement (set out in the schedule of the bill), "have the force of law and take effect as if (they) were an enactment of the Act".

13. The proposed further agreement in the schedule to the bill amends the original Agreement and inserts a number of significant additional provisions. The schedule amendments to the Agreement, in the words of the Minister in his second reading speech:

> *Operate independently to limit or control the application of other Acts to the Brisbane Casino-Hotel Complex;*
>
> *Refine the limits and controls as to the application of other Acts in respect to development of the Brisbane Casino-Hotel Complex and works that can be carried out in Queens Park;*
>
> *Refine the limits and controls as to the application of other Acts in respect to development of the Brisbane Casino-Hotel Complex and works that can be carried out in Queens Park;*
>
> *Refine the heritage protection measures in respect to development of the Brisbane Casino-Hotel Complex (including the creation of a Heritage Management Plan) and works that can be carried out in Queens Park; and*
>
> *Update and simplify the agreement..*

14. One of the major purposes underlying "agreement Acts", especially those relating to commercial land development, is to exempt a particular development from the normal range of statutory requirements and processes governing the establishment and operation of such undertakings, and to make it subject instead to specific requirements and provisions set out in the Agreement. It is therefore not surprising to note that the provisions of the proposed further Agreement in the schedule to the bill exclude the operation of various statutes and statutory provisions governing property development, gaming operations and other aspects of the operations of the Brisbane Hotel Casino Complex, in both its present and proposed forms. A range of analogous processes, including a system of ministerial decisions and internal reviews, is instead prescribed by the Agreement.

15. The Explanatory Notes refer to the following specific exemptions:

> *The approval of the proposed amendments to the Agreement as contained in the Bill will operate to restrict the application of the Judicial Review Act 1991, Integrated Planning Act 1997 , Land Act 1962 and Queensland Heritage Act 1992 to certain decisions made under the Agreement in relation to Development of the Complex and Works that can be carried out in Queens Park..*

16. The Explanatory Notes continue:

> *Generally, the exclusion of Judicial Review Act 1991 is consistent with the approach adopted for other Casino developments Also, the Agreement itself provides for alternative review processes in relation to various decisions concerning Development of the Complex. To the extent that the application of the other acts are restricted, the Agreement provides for alternative heritage protection and development approval processes.*

17. In his second reading speech, the Minister states in relation to these matters:

> *Generally, Mr Speaker, the exclusion of those Acts in respect to decisions of a developmental nature for the Brisbane Casino-Hotel Complex and Queens Park is consistent with the approach adopted for other casinos and the existing limitations contained within the Brisbane Casino Agreement Act 1992 and the Agreement.*
>
> *Furthermore, the exclusion of Judicial Review is an approach that has been agreed to by the Parliament on the basis of the significant costs and capital requirements for such developments and the need to limit the ability of third parties to unreasonably subvert or delay the development of such projects.*
>
> *Mr Speaker, the Integrated Planning Development Act 1997 will not apply to the extent that ta new scheme that specifically addresses Development (other than development involving only plumbing or drainage works or major public works) of the Complex and Queens Park is to be provided for in the Agreement.*
>
> *…Also, the Development approval process which is to be contained within the Agreement is a comprehensive one and incorporates an assessment criteria which is generally consistent with Integrated Planning Act 1997 principles.*
>
> *The Queensland Heritage Act 1992 will not apply to the extent that a new scheme that specifically addresses the cultural significance of the Complex and Queens Park, other than major park works, is to be provided for in the Agreement.*

18. The effect of these provisions on the rights of the parties to the Agreement, namely the State and certain companies, is not a matter of concern, given that they have willingly submitted to this statutory regime. However, the exclusion or modification by the Agreement of various laws which normally govern such developments, given legal effect by the Act, may impact adversely on the interests of individuals (such as neighbouring land owners) affected by the establishment and operation of the Brisbane Hotel Casino Complex.

19. The committee notes that the provisions of the Agreement and the proposed further agreement, which are given the force of law by the principal Act, exclude or restrict certain statutory provisions including the *Judicial Review Act*, and might potentially impact adversely upon the rights of individuals affected by the operations of the Casino.

20. The committee refers to Parliament the question of whether such exclusions and restrictions are reasonable in the circumstances.

2. COASTAL PROTECTION AND MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable Dean MacM Wells MP, Minister for Environment, introduced this bill into the Legislative Assembly on 17 October 2001.

2. The objects of the bill, as indicated by the Explanatory Notes, are to:

- *Implement the integrated development assessment system (IDAS) created under the Integrated Planning Act 1997 from development-related approval systems in the Beach Protection Act 1968, the Canals Act 1958 and sections 223 and 236 of the Transport Infrastructure Act 1994 (dealing with sanctions, approvals and permits saved from the repealed Harbours Act 1955);*
- *Provide for the application of the Coastal Protection and Management Act 1995 as the primary legislation governing the assessment of development activities in coastal management districts (previously called control districts);*
- *Provide the necessary statutory authority to enable the achievement of sound coastal management outcomes;*
- *Integrate remaining provisions form the Beach Protection Act 1968, the Canals Act 1958 and sections of the Harbours Act 1955 into the Coastal Protection and Management Act 1995 and allow for the repeal of these statutes upon commencement of the provisions of the bill.*

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

♦ **Clause 15**

3. Clause 15 of the bill inserts a large number of provisions which amend *the Coastal Protection and Management Act 1995*. Amongst these are Part 5 (proposed ss.61E-61ZH inclusive), which deals with allocation of quarry materials below high water mark and dredge management plans, and Part 6 (proposed ss.61ZI-61ZZ), which deals with development approvals for assessable development in the coastal zone and development applications involving artificial waterways.

4. Decisions under the cl.15 provisions which are adverse to applicants will presumably, if they involve development applications, be appellable under *the Integrated Planning Act 1997* to the Planning and Environment Court. In his Second Reading Speech, the Minister states that:

> *As a result of the repeal of the three statutes, existing requirements to make application to carry out development separately under each piece of coastal legislation will be replaced by the single IDAS application and approval process.*

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

> *…Other advantages of the single integrated system will be explicit time frames for completion of an assessment, better integration with local government decision making and the provision of the rights to appeal development decisions to the Planning and Environment Court.*

5. However, cl.15 also inserts a number of provisions relating to matters which presumably do not involve "development decisions", and which would therefore not have access to the appeal system established under the *Integrated Planning Act*. Decisions on applications under Part 5 (quarry materials and dredge management plans)[9] and under Part 6 (dredge management plans)[10] are the most obvious examples of such provisions.

6. Quarrying entitlements are, of course, in the nature of a *profit a prendre,* under which the State agrees to permit a person to exploit natural assets which are the property of the State, in exchange for royalty payments to the State.

7. It is not immediately apparent from the bill what (if any) appeal processes, other than the relatively limited option of judicial review, will be available to aggrieved persons in relation to these "non-development" decisions.

8. The committee seeks information from the Minister as to what, if any, avenues of appeal will be available to aggrieved applicants under those cl.15 provisions not covered by the *Integrated Planning Act* appeals system.

9. If no appeal processes are to be available, could the Minister advise why that is considered appropriate.

♦ **Clause 15 (proposed ss.61P, 61Q, 61S(7), 61ZC, 61ZD and 61ZF(7))**

10. Proposed s.61P provides that the chief executive may amend an allocation of quarry materials if, amongst other grounds, "the chief executive is satisfied, or reasonably believes, the amendment is necessary or desirable for coastal management". Proposed s.61Q authorises suspension or cancellation of allocations on the same ground. Proposed s.61S(7) provides that "the amendment, suspension or cancellation of an allocation does not give the holder a right to compensation for any loss or damage arising from the amendment, suspension or cancellation".

11. Given that the allocation is in the nature of an agreement between the holder of the allocation and the State that the holder can exploit quarry materials owned by the State in exchange for royalty payments to the State, and given also that the holder may have incurred financial commitments in reliance on the allocation, a question might arise as to the reasonableness of denying the allocation holder compensation in all circumstances.

12. Proposed ss.61ZC, 61ZD and 61ZF(7) contain analogous provisions in relation to dredge management plans, and accordingly, raise the same issue.

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[9] Including decisions on the granting of applications for allocations of quarrying materials, on the attaching of conditions to allocations, on transfers, renewal, amendment, suspension and cancellation of allocations.

[10] Part 6 involves various decisions similar in nature to those in relation to quarrying allocations.

13. The committee notes that proposed ss.61S(7) and 61ZF(7) deny holders of quarry allocations and dredging plans any right to compensation for loss or damage arising from the amendment, suspension or cancellation of the allocation or dredge management plan.

14. The committee seeks information from the Minister as to why, given the nature of quarry allocations and dredge management plans, this is considered appropriate.

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[11]

- **Clause 15 (proposed s. 61ZU)**

15. Proposed s.61ZU provides that no compensation is payable because of a "land surrender condition", and that a person may not appeal to the Planning and Environment Court against the imposition of such a condition.

16. A "land surrender condition" is a condition imposed by the chief executive requiring that part of a lot situated completely or partly within a coastal management district, in relation to which an application for reconfiguration has been made, must be surrendered to the State for coastal management in order for the reconfiguration to proceed (see proposed ss.61ZO and 61ZP).

17. Land surrender conditions are imposed in relation to what is essentially a voluntary process, namely, the making of an application for reconfiguration of a lot. Accordingly, in the committee's view the process does not involve a compulsory acquisition of property. Nevertheless, a question might arise as to the appropriateness of prohibiting challenges to this type of condition whilst allowing them in relation to other "development conditions".

18. In relation to this provision, the Explanatory Notes state;

> *The land surrender condition can only be imposed on those development applications where the applicant is seeking to increase development rights over the land through the reconfiguring of a lot. Further, only those lands in a coastal management district that are also within an erosion prone area or are within 40 m of the foreshore (eg. where the erosion prone area is nil) may be sought to be surrendered under this division.*
>
> *In deciding whether to impose a land surrender condition and the extent of the surrender, the chief executive must consider how the surrender of land would avoid or minimise detrimental impacts on coastal management.*
>
> *As was the case under the Beach Protection Act 1968, a land surrender condition imposed under the Coastal Protection and Management Act 1995 in relation to this division will be non-appealable and not subject to compensation. However, a person may seek judicial review of the conduct engaged for the purpose of making a decision to impose a land surrender condition or for similar purposes.*

[11] 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.

19. The Minister in his Second Reading Speech also refers to this matter as follows:

> *…these provisions will enable the Governor in Council to require surrender of land to the state of land within an erosion prone area without compensation. This power has existed in the Beach Protection Act 1968 since 1984 and is fundamental to achieving sustainable management of our coastal lands. The land surrender condition is consistent with the Government's policy of maintaining public access to the coast.*
>
> *…Queenslanders rightly expect Governments to protect their rights and Labor is delivering yet again by ensuring public access to the coast.*
>
> *This bill will also protect coastal land vulnerable to coastal and tidal erosion. It is fundamental that this vulnerable coastal land is kept undeveloped and in public ownership in order to prevent the proliferation of costly coastal protection works such as rock walls and groynes which can detrimentally affect our beaches and foreshores.*

20. The committee notes that proposed s.61ZU denies persons applying for reconfiguration of a lot within a coastal management district any entitlement to compensation for, and any entitlement to appeal against, the imposition of a "land surrender condition". The committee notes that the Minister's Speech and the Explanatory Notes refer to these matters in some detail.

21. The committee refers to Parliament the question of whether the provisions of proposed s.61ZU have sufficient regard for the rights of landowners adversely affected by land surrender conditions.

3. CRIME AND MISCONDUCT BILL 2001

Background

1. The Honourable Peter Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 16 October 2001.

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

> *To repeal the Criminal Justice Act 1989 and the Crime Commission Act 1997 and replace them with new updated legislation merging the previous Criminal Justice Commission (CJC) and Queensland Crime Commission (QCC) established under those Acts into a new, refocussed commission aimed at corruption prevention and enhancing the integrity of the public sector as well as the previous major and organised crime and paedophilia functions of the QCC.*

Overview of the Bill

3. The bill is an important and relatively complex piece of legislation. In the time available, the committee has been unable to conduct a detailed analysis of its contents, but as the committee understands the bill is to be debated during the current sitting week it has decided to report on the bill.

Does the legislation have sufficient regard to the rights and liberties of individuals?[12]

♦ The bill generally

4. The Crime and Misconduct Commission ("the commission"), which is established by this bill to replace the current Criminal Justice Commission (CJC) and Queensland Crime Commission (QCC), has the statutory function of combating major crime, as well as misconduct in the public sector (cls.4 and 5). In the words of cl.5(2) the commission "is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate particular cases of major crime".

5. Not surprisingly therefore, the bill contains many provisions conferring upon the commission powers which self-evidently may intrude upon the rights and liberties of individuals. They are too numerous and detailed to canvass in the time available, but they include:

- power to require information or documents;
- power to enter premises;
- notices to produce documents or answer questions;
- notices to attend hearings;

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

- power to obtain search warrants;
- power to search persons;
- power to seize property;
- power to use surveillance devices;
- power to conduct covert searches.

6. In relation to these powers, the Explanatory Notes state:

> *The commission has extensive powers that raise issues about the rights of individuals. These powers are equivalent to those presently given to the CJC and QCC. Apart from the specific matters above, great care in drafting has ensured that where powers have been updated, they have not resulted in an increase in power in respect of crime or misconduct investigations. The powers continue to be necessary and justified on the basis of the important functions that the commission will carry out.*
>
> *The breach of fundamental legislative principles is justified on the basis that the power is necessary to allow the commission to perform its operational responsibilities. Surveillance devices are an effective way of obtaining evidence, particularly in relation to possible police involvement in organised crime. Furthermore it is considered that appropriate safeguards such as court scrutiny and the Public Interest Monitor are included in the legislation which will minimise the adverse impact. The commission's use of such powers for crime functions will now be subject to the additional oversight by the parliamentary committee and parliamentary commissioner.*
>
> *The powers in the bill are also consistent with similar powers in the Police Powers and Responsibilities Act 2000 and the Drugs Misuse Act 1986.*

7. The committee notes that the bill confers upon the Crime and Misconduct Commission a wide range of intrusive powers.

8. The committee refers to Parliament the question of whether, given the nature of the commission's role and functions, the extent of these powers has sufficient regard for the rights and liberties of individuals.

♦ **Clause 213**

9. Given the nature of the various entities established under this bill, it is not surprising to note that cl.213 imposes secrecy obligations upon "relevant officials". This term includes a wide range of persons (commission officers, members of the parliamentary committee, the parliamentary commissioner, and offices of the Parliamentary Service and the Public Interest Monitor, amongst others). Clause 213 also incorporates a range of exemptions from the secrecy requirement.

10. The committee notes that cl.213 imposes secrecy obligations upon a wide range of persons, subject to various exceptions.

Does the legislation provide appropriate protection against self-incrimination?[13]

♦ **Clauses 188, 190, 192, 194 and 197**

11. As mentioned earlier, the bill confers upon the commission a very extensive range of coercive powers. Amongst these are powers to require persons to answer questions and/or produce documents in various circumstances. Cls.190 and 192, combined with the definition of "privilege" in the Dictionary to the bill, make substantial inroads into the availability to these persons of the benefit of the rule against self-incrimination. However, the bill incorporates certain safeguards including power to appeal to the Supreme Court in certain circumstances (cl.195, 196), and the imposition of restrictions upon the use which may be made of the information or document given or produced, in subsequent civil, criminal or administrative proceedings (cl.197).

12. The committee notes that cls.188, 190, 192, 194 and 197 remove any automatic entitlement to the benefit of the rule against self-incrimination. The committee notes that various safeguards are incorporated.

13. The committee refers to Parliament the question of whether, in the circumstances, the provisions of the bill reducing or removing rights to the benefit of the rule against self-incrimination, have sufficient regard for the rights of the persons affected by those provisions.

♦ **Paragraphs 224, 225, 226, 230, 231, 232, 236 and 278**

14. Clauses 223 to 238 inclusive contain provisions dealing with the appointment of commissioners. Under cl.231, the appointment of a commissioner must be for a term not longer than 5 years, and the total of a commissioner's time in office under all terms of appointment must not be more than 5 years. Clause 236 provides grounds upon which the appointment of a commissioner may (and, in one case, must) be terminated. This clause must be read in conjunction with the definition of "ineligible person" in the Dictionary to the bill.

15. The various provisions appear generally appropriate, given the nature of a commissioner's role.

16. However, the committee notes that under cl.225(a), in order for a lawyer to be qualified for appointment as a part-time commissioner he or she must have "a demonstrated interest in civil liberties".

17. This formal restriction would appear to exclude a large number of lawyers who might otherwise be considered suitable for appointment.

18. The committee notes that the bill contains provisions relating to the membership, and appointment of members of, the commission.

[13] Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination

19. The committee seeks information from the Premier as to whether he is satisfied the imposition by cl.225(a) of a statutory requirement that a lawyer, in order to be eligible for appointment, must have "a demonstrated interest in civil liberties", is appropriate.

♦ **Clause 330 and Dictionary, definition of "criminal history"**

20. Clause 330 provides that a person cannot be appointed to various offices under the bill if the person does not consent to a "criminal history check". Cl.330(3) provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986* ss.6, 8 and 9, do not apply in relation to the appointment of a commission officer.

21. This means that in relation to such persons, a higher standard will be set in that old convictions, which would otherwise be protected from disclosure by the *Criminal Law (Rehabilitation of Offenders) Act* will be disclosed and taken into account. In addition, the definition of "criminal history", in the Dictionary to the bill, includes not only convictions but charges which did not result in convictions.

22. The committee notes that in relation to the appointment of commissioned officers, cl.330 imposes a significantly higher standard in respect of persons' criminal history, in that the rehabilitation period provisions of the *Criminal Law (Rehabilitation of Offenders) Act* will not apply, and charges as well as convictions will be disclosed and considered.

23. The committee brings these provisions to the attention of Parliament.

♦ **Clauses 357 and 369**

24. Clause 357 provides that the Chairperson of the Criminal Justice Commission under the repealed *Criminal Justice Act 1989* goes out of office as the chairperson and as a member of the CJC on commencement of this bill. Clause 359 contains a similar provision in relation to the Crime Commissioner under the *Crime Commission Act 199,* who also goes out of office.

25. Both clauses provide that if the relevant person is offered, and accepts, as appointment as chairperson or an assistant commissioner under this bill, the person will not be entitled to an amount that might otherwise have been payable to the chairperson because the chairperson went out of office.

26. Both clauses expressly state that they do not affect the relevant person's superannuation or leave entitlements.

27. Given the nature of the relevant positions, it might be assumed that the incumbents will suffer some financial detriment through the statutory abolition of their offices.

28. The committee notes that cls.357 and 359 provide that the Chairperson of the Criminal Justice Commission, and the Crime Commissioner, both go out of office on the commencement of this bill.

29. The committee seeks confirmation from the Premier that the appointment arrangements for both these persons provide for an appropriate degree of financial compensation for the statutory abolition of their offices.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[14]

- **Clause 376**

30. Clause 376 authorises the making of transitional regulations. Clauses of this type have often given rise to difficulties, and the committee has often commented adversely upon them.

31. The cl.376 regulation-making power is framed in broad terms, as it authorises regulations about matters to achieve the transition from the operation of the current legislation to that of the new legislation, and in relation to which this bill 'does not make provision or sufficient provision'.

32. Further, the regulations may be retrospective, although only to the date of commencement of the bill. On the other hand cl.376, in contrast to some other such provisions, is not framed in such a manner as to constitute a 'Henry VIII clause'.

33. Finally, cl.376(4) provides that both the clause and any transitional regulation made under it will expire 1 year after the bill commences.

34. The committee notes that cl.376 authorises the making of transitional regulations. These regulations may be retrospective to the date of commencement of the bill. However, both they and cl.376 will expire 1 year after commencement of the bill.

35. The committee refers to Parliament the question of whether the nature of the transitional regulation-making power contained in cl.376 is reasonable.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[15]

- **Clause 203**

36. Clause 203 confers upon the presiding officer of a commission hearing, the same protection and immunity as a Supreme Court judge. It also confers corresponding protection upon lawyers appearing for persons at such hearings, and upon persons required to attend or

[14] 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.

[15] 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.

appearing as witnesses. In both cases the protection is equivalent to that conferred in the Supreme Court.

37. Given the nature of commission hearings, the conferral of this immunity does not appear to be inappropriate.

38. Clause 203(4) provides that no criminal civil liability, other than under the bill, attaches to a person for complying, or purporting to comply in good faith, with a requirement made under the bill. Cl.204(5) refers, in this regard, to the particular case of a person required to produce a document or thing under a notice to discover or a notice to produce.

39. Given the nature of the requirements which the commission may make of persons under its enforcement and investigatory powers, this latter immunity seems appropriate.

40. Clause 203 of the bill confers immunity upon the presiding officer of commission hearings, and upon lawyers and witnesses at such hearings. Cl.203 also confers immunity upon persons of whom a requirement is made under the provisions of the bill.

41. In relation to all these matters, the immunities conferred appear to the committee to be unobjectionable.

4. DUTIES BILL 2001

Background

1. The Honourable Terry Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 17 October 2001.

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

> *To replace the Stamp Act 1894 with modern legislation expressed in clear language that can be easily complied with and administered.*

Overview of the bill

3. This is a voluminous bill, containing 347 pages and 6 schedules.

4. However, the majority of its contents consist of provisions outlining the circumstances in which duty is imposed upon specific types of transactions, and the circumstances in which exemptions from that tax liability may apply. Most of the provisions concerning administration of the tax regime established by this bill are contained in the *Taxation Administration Bill 2001*, which was introduced into Parliament together with this bill and which is to be read together with it.[16]

5. However, this bill (the *Duties Bill 2001*) does contain a number of provisions other than those imposing tax and outlining exemptions. The following comments relate to these other provisions.

Does the legislation have sufficient regard to the rights and liberties of individuals?[17]

♦ Clause 482

6. Clauses 480 to 485 inclusive create offences in relation to duty. All but one of these are fairly specific, and do not call for comment. However, cl.482(1) provides as follows:

> ***(1)*** *A person who acts under an instrument that has not been properly stamped must immediately give notice in the approved form to the commissioner.*
>
> *Maximum penalty – 200 penalty units.*

7. Clause 482(2) provides a defence, which is available if the person concerned can prove that they did not know, and could not reasonably have been expected to know, that the instrument or transaction was dutiable and had not been properly stamped.

8. The fact remains, however, that 'acting under' an instrument is a very broad concept. If the wide range of persons who could potentially be subject to this clause are to escape liability, they will have to discharge the onus of establishing the defence set out in cl.482(2).

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16 *Taxation Administration Bill 2001*, s.3.

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

9. The committee's concern is that, whilst the persons referred to in cls.480, 481, 483, 484 and 485 are all persons who can be presumed to have some knowledge of duty obligations, cl.482 could apply to a wide range of persons, including large numbers who may have little or no knowledge of the statutory duty regime.

10. The committee seeks information from the Treasurer as to whether he is satisfied the creation of an offence provision in the very broad terms of cl.482(1) is reasonable.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[18]

- **Clause 508(2)(b)**

11. Clause 508 authorises the making of regulations under the bill.

12. Clause 508(2)(b) provides that a regulation may:

> *Exempt, or provide a concession for, an instrument or transaction from the imposition of duty.*

13. Apart from the possibility that this clause may constitute a 'Henry VIII clause' as defined by the committee,[19] the more general question arises as to the reasonableness of including a provision framed in such general terms.

14. The committee seeks information from the Treasurer as to the types of circumstances in which it is envisaged cl.508(2)(b) will be utilised.

- **Clause 550**

15. Clause 550 authorises the making of transitional regulations. Such clauses have in the committee's experience often given rise to difficulties, and the committee has often commented adversely upon them.

16. The cl.550 regulation-making power is framed in broad terms, as it authorises regulations about matters to achieve the transition from the operation of the current legislation to that of the new legislation, and in relation to which this bill 'does not make provision or sufficient provision'.

17. Further, the regulations may be retrospective, although only to the date of commencement of the bill. On the other hand the clause, in contrast to some other such provisions, is not framed in such a manner as to constitute a 'Henry VII clause'.

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[18] 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.

[19] See the committee's report on *The Use of Henry VIII clauses in Queensland Legislation*, January 1997.

18. Finally, cl.550(4) provides that both the clause and any transitional regulation made under it will expire, although not until 5 years after the bill commences.

19. The committee notes that cl.550 authorises the making of transitional regulations. These regulations may be retrospective, although all such regulations and the clause itself will ultimately expire.

20. The committee refers to Parliament the question of whether the nature of the transitional regulation-making power contained in cl.550 is reasonable.

5. ELECTORAL (FRAUDULENT ACTIONS) AMENDMENT BILL 2001

Background

1. The Honourable Lawrence Springborg MP, Shadow Attorney-General and Shadow Minister for Innovation, IT and Rural Technology, Shadow Minister for Fair Trading, Member for Southern Downs, introduced this bill into the Legislative Assembly on 18 October 2001.

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

> *…(to) amend the Electoral Act 1992 by inserting a new section making it an offence to fraudulently do any act with intent to influence the outcome of an election held pursuant to the Electoral Act.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[20]

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[21]

♦ **Clause 3**

3. Clause 3 inserts into the *Electoral Act 1992* an additional paragraph 160A ('Fraudulently Influencing Election Outcomes'). Proposed s.160A provides, in subsection (1), that a person must not 'do an act with intent to fraudulently influence the outcome of an election'. A general maximum penalty of 3 years imprisonment is stipulated.

4. Subsection (2) provides that, without limiting subsection (1):

> *'a person is taken to have done an act with intent to fraudulently influence the outcome of an election if—*
>
> *(a) the person does an act with intent to have a person, whether the person or someone else, enrolled for an electoral district; and*
>
> *(b) the person doing the act is aware the person to be enrolled is not entitled to be enrolled for the electoral district.'*

5. In respect of subsection (2), a minimum penalty of 3 months imprisonment is prescribed.

6. As can be seen, proposed s.160A(1) is broadly-framed, dealing as it does with 'act(s) (intended to) fraudulently influence the outcome of an election'. The committee can envisage actions of this type including the following, although there may well be others:

- fraud in relation to the entry or retention of a name on the electoral roll (as where a person not entitled to be on the roll achieves this result by means of fraud, or where

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

[21] 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.

the name of a dead or fictitious person is entered on the roll with a view to being utilised on election day by someone for the purpose of casting a vote)

- fraud in relation to the actual casting of a vote (as where someone impersonates a legitimately-enrolled elector and casts a vote, or someone fraudulently claims an entitlement to a 'declaration vote' under, for example, s.106(c))

- knowingly giving electors intending to vote misleading or false information which would be likely to alter the way in which they vote (as where someone publishes a false allegation against a candidate in the election)

- carrying out a fraudulent act in relation to the counting of votes (it seems unlikely many cases of this nature would arise)

- (perhaps) obtaining registration as a political party by fraud, given that one of the consequences of this is the presumed advantage of having a party name next to that of the candidate.

7. Part 9 of the *Electoral Act 1992* (ss.149-177 inclusive) already contains a significant number of offence provisions, most of which are reasonably specific in nature. These include:

- making a false or misleading statement (s.153)

- giving a false, misleading or incomplete document (s.154)

- forging or uttering electoral papers, etc (s.159)

- misleading voters (s.163)

- voting if not entitled, etc (s.170).

8. A number of the acts which these offence provisions prohibit would appear to fall within the scope of proposed s.160A. Questions might arise as to the manner in which persons guilty of overlapping offences are intended to be dealt with. Section 45 of the *Acts Interpretation Act 1954* might prevent a person being prosecuted under both s.160A and one of the other offence provisions, but even if it does the bill provides no guidance as to which of the two options should be pursued. The Explanatory Notes address the issue by stating:

> *The preferred course of action is for the amendments contained in this bill to serve as 'catch all' provisions to ensure that, where there is no other specific offence provision, the fraudulent actions of those who, with intent to influence the outcome of an election are punished.*

9. This policy intent, in the opinion of the committee, should be expressly stated in the bill.

10. Other noteworthy features of the bill are:

- unlike the existing specific offence provisions, proposed s.160A provides only for imprisonment, and does not provide the option of a monetary penalty.

- the maximum penalty (3 years imprisonment) is higher than that provided in relation to the existing specific offence provisions

- in relation to fraud concerning enrolment, a minimum penalty of 3 months imprisonment is prescribed.

11. Finally the committee notes the following statement in the Member's Second Reading Speech:

> *These provisions do not include any statute bar or time limitation, as such a person can be punished for an offence whenever committed.*
>
> *Commissioner Tom Sheperdson noted when handling down his findings into the Australian Labor Party vote rorting affair that the statute of limitations of twelve months which existed in effect tied his hands in making recommendations for prosecutions for many of the matters which came before him even though the evidence was strong.*

12. The committee considers this statement is incorrect, insofar as it suggests that no time limitation will apply in relation to proceedings brought under proposed s.160A.

13. The statutory limitation to which Commissioner Shepherdson referred, s.52 of the *Justices Act 1886*, is of general application, and in the absence of a specific time limitation in the *Electoral Act 1992* (no such specific limitation is contained either in it or this bill) will govern any offence proceedings under the latter Act (including those under proposed s.160A).[22]

14. If it is desired to remove this 12 month time limit, the bill would need to do so expressly.

15. The committee notes that the bill inserts proposed s.160A, which creates a broadly-framed offence in relation to acts intended to fraudulently influence the outcome of an election. The committee further notes that the section provides for a maximum 3 years imprisonment and, in relation to fraudulent enrolments, a minimum of 3 months imprisonment.

16. The committee refers to Parliament the question of whether the proposed provision has sufficient regard to the rights of persons who may be prosecuted under it.

17. The committee also draws to the attention of Parliament the drafting issues referred to in this Chapter.

[22] By virtue of s.44(2)(d) of the *Acts Interpretation Act*, offence proceedings under the *Electoral Act 1992* are brought as summary proceedings under the *Justices Act 1886*.

6. EMERGENCY SERVICES LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable Mike Reynolds MP, Minister for Emergency Services and Minister Assisting the Premier in North Queensland, introduced this bill into the Legislative Assembly on 16 October 2001.

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

> *….change the status of the Queensland Fire and Rescue Authority (QFRA) and the Queensland Ambulance Service (QAS) from statutory authorities to become divisions of the Department of Emergency Services (DES). The principal objective is to improve co-ordination and effective utilisation of resources in the emergency services portfolio and strengthen corporate governance arrangements.*

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[23]

- **Clause 11 (proposed s.86) and clause 24 (proposed s.189)**

3. The bill amends the *Ambulance Service Act 1991* and the *Fire and Rescue Authority Act 1990* to discontinue the corporate status of the respective emergency services and convert them to divisions of the Department of Emergency Services.

4. Clause 11 inserts into the *Ambulance Service Act*, and cl.24 into the *Fire and Rescue Authority* Act, identical provisions (proposed ss.86 and 189 respectively). These provisions confer power to make transitional regulations facilitating the transition from the current statutory regime to that which will exist if the bill is passed, and in relation to which the Acts do not make any or any sufficient provision.

5. The committee has found that transitional regulation-making powers (of which ss.86 and 189 are examples) can give rise to a range of issues, and has commented adversely on some such provisions. The committee notes that the regulation-making power conferred by ss.86 and 189 is broadly framed. On the other hand, the sections do not purport to authorise regulations affecting the operation of the Acts in such a manner as to constitute "Henry VIII clauses". Moreover, they do not (as is sometimes the case) permit transitional regulations which are retrospective, and any transitional regulations and the sections themselves, expire 1 year after commencement of the sections.

6. The Explanatory Notes state that the relevant provisions:

> *…may prevent the need for urgent legislation to fix technical drafting issues.. .*

[23] 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.

7. The committee notes that proposed s.86 and 189 confer broad transitional regulation-making power. However, retrospective regulations are not permitted and the sections both provide that both they and any regulations made under them expire 1 year after commencement of the sections.

8. The committee refers to Parliament the question of whether, in the circumstances, the provisions of proposed ss.86 and 189 are reasonable.

7. FREEDOM OF INFORMATION AMENDMENT BILL 2001

Background

1. The Honourable Rod Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 17 October 2001.

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

- (to amend) *the Freedom of Information Act 1992 (FOI Act) to enhance the capacity of agencies to deal with widely defined and voluminous applications, and to negotiate with applicants to ensure that applications are appropriately targeted;*
- (to amend) *the FOI Act to provide that a Regulation may require applicants to pay charges for the processing of applications for access to non-personal affairs information; and*
- (to provide) *for decisions to be made about the waiver of charges on grounds of financial hardship.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[24]

♦ Clauses 4-6 inclusive and Schedule, Item 5

3. Clauses 4 to 6 inclusive and Schedule, Item 5 of the bill make a range of amendments to the *Freedom of Information Act 1992* ('the *FOI Act'*). Those amendments achieve the following purposes.

4. Firstly, they enhance the capacity of agencies and Ministers to refuse access to documents where the application is so widely framed that the Minister or agency considers processing the application will substantially and unreasonably divert the agency's resources or substantially and unreasonably interfere with the performance of the Minister's functions. At the same time, it enhances scope for the Minister or agency to negotiate with applicants to narrow down the scope of the application to an agreed extent.

5. Secondly, the amendments enables fees to be set by regulation for the processing of applications for access to 'non-personal affairs' information. Deposits may also be required, and fees may be waived on the ground of financial hardship.

6. There is little doubt that if the bill enacted certain applicants for information will be placed in a less advantageous position than at present.

The committee's approach to freedom of information issues

7. This committee's major area of responsibility, under s.22 of the *Parliamentary Committees Act 1995*, is to examine all bills and subordinate legislation and assess their level of compliance with "fundamental legislative principles".

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

8. Section 4(2) of the *Legislative Standards Act 1992* specifies two major categories of fundamental legislative principles, one of which is that legislation has sufficient regard to "rights and liberties of individuals". Section 4(3) lists a number of specific examples of this fundamental legislative principle.

9. Since the Scrutiny of Legislation Committee commenced its scrutiny of bills and subordinate legislation in October 1995, it has interpreted the concept of "rights and liberties" referred to in section 4(2) in an expansive manner. The committee has always considered that it encompasses not only established common law rights, but also rights (such as privacy) which are only partly recognized under common law, and even on occasions rights which are attributable to Australia's international treaty obligations.

10. Accordingly, whilst there is no common law right of citizens to access government-held information, and whilst the only general rights of that nature currently conferred on citizens by Queensland law derive from the *FOI Act*, the committee has since 1995 commented on freedom of information-related issues on a number of occasions.

11. The committee's comments on these issues have mostly related to "outsourcing".[25] The committee has repeatedly queried whether private or semi-private entities authorised by bills to conduct particular activities for the State are to be subject to the usual public sector accountability mechanisms such as judicial review and freedom of information.

12. The committee has commented only relatively infrequently on other freedom of information-related matters.

13. The reasons for that do not appear to have been expressly stated, but the approach of previous committees appears consistent with that of the current committee.[26]

14. This is as follows:

- entitlements to access government-held information are an entirely statutory concept (introduced *via* the *FOI Act*), and are not based on any established common law right
- the right to access information *via* the *FOI Act* has, moreover, always been far from unqualified, as that Act contains a very extensive range of exemptions and restrictions
- whilst the committee considers s.4(2) provides it with scope to comment on freedom of information issues in appropriate cases, the "right" which the committee may thereby recognize cannot be regarded as unconditional (for example, whilst a person may have a right to access personal information <u>about themselves</u>, no one would seriously argue such a right would generally extend to accessing personal information about <u>other persons</u>).

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[25] A number of bills examined by the committee have completely cut off access to the *FOI Act* by excluding its application to particular bodies, for example, "corporatised corporations" established by local governments and "transport GOC"s (in respect of the latters' commercial operations).

[26] The current committee was appointed in May 2001. Bills so far examined by it do not appear to have raised any significant freedom of information issues.

The current bill

15. The committee recognises that the administration of freedom of information laws entails significant cost to Government, as the processing of information applications is a painstaking and labour-intensive task.

16. The initiatives in the current bill are designed to ameliorate these difficulties, by reducing the demands which the system places upon departmental and agency staff and by obtaining at least a partial financial contribution from applicants in relation to applications other than those involving the applicant's personal affairs. At the same time, of course, these changes will place many applicants in a position less favourable than that under the current Act.

17. The committee notes that this bill enhances the power of agencies to refuse access to documents pursuant to broadly-framed applications. The bill also authorises the imposition of fees in relation to the processing of applications for information other than about the personal affairs of the applicant.

18. In the circumstances, and given the general approach of the committee to freedom of information-related issues (see paragraph 14, above), the committee has concluded that the issues raised by this bill are essentially policy-related.

19. The committee refers to Parliament the question of whether the changes which the bill makes to the current statutory freedom of information regime have sufficient regard to the rights of applicants.

8. GUARDIANSHIP AND ADMINISTRATION AND OTHER ACTS AMENDMENT BILL 2001

Background

1. The Honourable Rod Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 17 October 2001.

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

> *To amend the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998 to clarify that a health provider may withhold or withdraw life-sustaining measures when the commencement or continuation of those measures is inconsistent with good medical practice.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[27]

♦ **Clauses 3-14 inclusive, 16-33 inclusive**

3. The bill makes a number of amendments to the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* in relation to decisions by others to withhold or withdraw 'life sustaining measures' from persons with impaired capacity.

4. In broad outline, the bill provides as follows:

- Where a health provider reasonably considers the commencement or continuation of life-sustaining measures for a person in relation to whom the guardian or attorney is authorised to act under their respective legislation would be inconsistent with good medical practice, the health provider may withhold or withdraw those measures if a guardian or attorney consents. The bill negates the possibility that the *Guardianship and Administration Act 2000*, which took effect in June 2000, requires consent to be given by the Guardianship and Administration Tribunal rather than by a guardian or attorney.

- The bill provides for one situation in which, if a health provider reasonably considers that, consistent with good medical practice, a life-sustaining measure should be withheld or withdrawn from an adult with impaired capacity, the health provider may take that action without obtaining the consent of any person. This provision of the bill is only applicable where an immediate decision is necessary, and is intended to apply only in emergency situations.

5. In considering this bill, the committee notes the following:

- In relation to the withholding or withdrawal of life-sustaining measures, it had not been the practice (prior to commencement of the *Guardianship and Administration*

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

Act 2000) for health providers to seek approval of the Supreme Court (which had, and still has, inherent jurisdiction in relation to such matters, and that such decisions had been made in accordance with good medical practice and in consultation with the person's family.[28]

- That at common-law, the cessation of futile life-sustaining measures was not unlawful. [29]

- The relevant provisions of this bill are subject to a number of conditions which the committee considers appropriate, including requirements that the action be consistent with good medical practice and that all relevant decisions be properly documented.

- There is scope for the adult guardian to consult family members, mediate between them in the event of a dispute, and if considered appropriate, ultimately opt to refer a matter to the Tribunal for a decision about consent.

6. It should also be noted that the measures to which this bill refers do not involve the taking of active steps to bring a person's life to an end.

7. The 'emergency situations' provision, under which the health provider need not seek the consent of any person, does not appear to the committee to be inappropriate, given the nature of such situations and the restrictions incorporated in the bill.

8. The committee notes that the bill enables a health provider to withhold or withdraw life sustaining measures from a patient with impaired capacity, if that is consistent with good medical practice and if a guardian or attorney consents. The bill further provides that in emergency situations the health provider need not obtain the consent of any person. The bill incorporates restrictions in relation to the exercise of the powers in both situations.

9. The committee refers to parliament the question of whether the provisions of the bill have sufficient regard to the rights and liberties of patients and their families.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[30]

♦ **Clause 15 (proposed s.262A)**

10. Proposed s.262A (inserted by cl.15) effectively confers immunity upon a health provider who, since commencement of the *Guardianship and Administration Act 2000* on 1 July 2000, has withheld or withdrawn a life-sustaining measure in the circumstances mentioned in the bill, without obtaining consent of the Tribunal (or of the Supreme Court). By virtue of s.262A, the health provider is taken to have obtained appropriate consent, and to have delivered health care authorised by the Act.

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28 Explanatory Notes, page 2.

29 Explanatory Notes, page 2.

30 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.

11. In the circumstances, and given the other provisions of the bill, the protection afforded by proposed s.262A for actions taken during the relevant period appears to be appropriate.

12. The committee notes that cl.15 (proposed s.262A) effectively confers immunity upon health providers who, since commencement of the *Guardianship and Administration Act 2000* on 1 July 2000, have in relevant circumstances withheld or withdrawn life-sustaining measures without obtaining the consent of the Tribunal or the Supreme Court.

13. In the circumstances, the conferral of such immunity appears reasonable.

9. OMBUDSMAN BILL 2001

Background

1. The Honourable Peter Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 16 October 2001.

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

> *…to replace and update the Parliamentary Commissioner Act 1974 (the PC Act) to provide improved processes for citizens to seek review of administrative actions by Government agencies.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[31]

- **Clauses 11–13 inclusive and 58–72 inclusive**

Nature of Ombudsman

3. The office of "ombudsman" has been progressively established throughout New Zealand, Great Britain and all Australian jurisdictions over the past 40 years.

4. The basic function of an ombudsman is to investigate complaints by citizens about administrative decisions of Government.[32] Grievances of this type had traditionally been taken up by members of Parliament on behalf of their constituents. However, the increasing number and range of grievances, and the expansion of bureaucratic structures, meant that Parliamentarians were confronted with increased difficulties in performing this role. The development of the ombudsman model appears to have been, at least in part, a response to these pressures.

5. Consistent with this model, the ombudsman has always in Queensland been an officer of Parliament.

6. Given the nature of the ombudsman's role, it is particularly important that he or she be both totally impartial and independent of influence or pressure by Government. It is also essential that the ombudsman be endowed with sufficient powers to effectively perform his or her investigatory and reporting functions.

7. The following paragraphs deal with the first aspect, namely, the impartiality and independence of the ombudsman. The second subject is dealt with later in this Chapter.

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

[32] Including local government.

Impartiality and Independence of Ombudsman

8. The ombudsman, as is the case under the current legislation (the *Parliamentary Commissioner Act 1974*, which is to be repealed by this bill) is an officer of the Parliament, not of the Executive Government (cl.11)

9. The bill provides that "subject to any other Act or law", the ombudsman is not subject to direction by any person about –

   (a) the way the ombudsman performs the ombudsman's functions under (the bill); or

   (b) the priority given to investigations (cl.13).

10. Clause 75 contains similar provisions in relation to officers of the ombudsman.

11. A number of provisions of the bill are clearly directed towards ensuring the impartiality, particularly political impartiality, of the ombudsman. These include cl.59, which provides that a person may only be appointed as ombudsman[33] if national press advertisements calling for applications for the position have been placed, and if the Minister (that is, the Premier) has consulted with the relevant parliamentary committee[34] about the process of selection for appointment and the appointment of the person proposed as ombudsman. Clause 60 provides that a person cannot be appointed if the person has within the last 3 years been a member of any State or Commonwealth Parliament or held any position as mayor, councillor or member of an Australian local government.

12. As to the ombudsman's independence and freedom from Executive government influence and pressure, cl.61 provides that the ombudsman is to be appointed for a fixed term of not more than 5 years, and not on an indefinite basis. The ombudsman may be reappointed, but not for a period which will result in the total terms of appointment exceeding 10 years. These provisions would appear to provide scope for the Ombudsman to be granted a suitable level of tenure, although a practice of appointing persons for terms well below the maximum of 5 years would appear generally undesirable. Clause 62 provides that the ombudsman's remuneration, which is to be determined by the Governor in Council, must not be reduced during the ombudsman's term of office without his or her consent.

13. The ombudsman may be removed from office or suspended by the Governor on an address from the Legislative Assembly (cls.67 and 68). The motion for the address may be moved only by the Premier, who must consult with the relevant parliamentary committee and obtain agreement from at least a majority of its members.[35] (not comprised wholly of government members). When the Assembly is not sitting, the Governor in Council can suspend the ombudsman temporarily (the suspension cannot extend beyond 6 sitting days after it takes effect) (cl.69). Although the bill does not expressly say so, it seems clear that the above are the only means by which the ombudsman may be removed from office or suspended.

14. In relation to a position such as that of ombudsman it is essential, in order to ensure appropriate independence, that the grounds upon which he or she may be removed or

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33 The appointment is made by the Governor in Council under cl.58.

34 The Legal, Constitutional and Administrative Review Committee of the Legislative Assembly.

35 The majority must not be comprised wholly of government members (cls.67(3)9d) and 68(3)(d).

suspended are both appropriately defined and exhaustively stated. Clause 66 provides that "(a) proved incapacity, incompetence or misconduct" and "(b) conviction of an indictable offence" are grounds for removal or suspension of the ombudsman. The ground stated in (b) is appropriate, as is that stated in (a), despite the latter's somewhat general nature.

15. The bill does not tie these cl.66 grounds to the Parliamentary address process in the explicit manner of its counterpart in the current Act (s.6), Accordingly, it is not as manifest that the cl.66 grounds are the only grounds for suspension or removal, although that would seem to be the intention. Given the nature of the ombudsman's office, the committee considers it would be desirable if this were to be spelled out in cl.66.

16. Subject to this, it would appear to the committee that the provisions of the bill in relation to the impartiality and independence of the ombudsman are satisfactory.

17. The committee notes that the bill provides for the appointment of an ombudsman, and for his or her suspension or removal from office.

18. The committee considers the provisions of the bill are generally adequate in terms of assuring the impartiality and independence of the ombudsman.

19. The committee recommends, however, that cl.66 be amended to expressly state that the grounds mentioned in it are the only grounds for removal or suspension of the ombudsman.

♦ **Clause 46**

20. Clause 46(1) provides that Cabinet proceedings are excluded from the jurisdiction of the ombudsman. Clause 46(2) states that in that regard a certificate issued by the chief Executive, with the Premier's approval, stating that any information, question or document is Cabinet-related "is conclusive of the fact so certified".

21. This provision effectively prevents a citizen or the ombudsman from disputing any claim of Cabinet exemption. By way of contrast, cl.17 confers a general right on the ombudsman (to which cl.46 is an exception) to apply to the Supreme Court for a decision as to whether he or she has jurisdiction in relation to particular matters.

22. The committee notes that cl.46(2) effectively pre-empts any question as to whether particular material is Cabinet-related, and therefore exempt from investigation by the ombudsman.

23. The committee seeks information from the Premier as to why this provision is necessary.

♦ **Clause 92**

24. Clause 92(I) imposes secrecy obligations upon officers of the ombudsman or of agencies, and upon other persons, who obtain information through the ombudsman's activities. Clause 92(2) sets out a number of exceptions. However, the committee notes that these do not include one commonly listed in such provisions, and to which the committee does not

object, namely, an exception authorising the release of such information when that "is required by law" or the like.

25. The committee seeks information from the Premier as to whether the secrecy obligations imposed by cl.92 are intended to negate any other legal or statutory obligation to release that information.

Does the legislation have sufficient regard to the rights and liberties of individuals?[36]

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[37]

♦ **Clauses 27–43 inclusive**

26. As mentioned earlier in this chapter, proper performance by the ombudsman of his or her function of investigating citizens' complaints about administrative actions of "agencies"[38] entails the provision of adequate, though not excessive, investigatory powers.

27. The relevant provisions are set out in Part 4 (proposed sections 27–43) of the bill.

28. Part 4 confers upon the ombudsman a number of standard investigatory powers, including powers enabling him to require a person to give an oral or written statement or information or provide documents (cl.28), and to require a person to attend and give information and documents and answer questions (cl.29). The cl.28 and 29 powers, it should be noted, are exercisable against any person, not just officers of agencies.

29. These powers are backed up by powers to obtain subpoenas for non-compliance (cl.31) and to ultimately seek arrest warrants. (cl.36) The ombudsman also has power to refer contempts to the Supreme Court in order that the Court can consider punishment of the transgressor (cls.38 and 39).[39] Clauses 41-43 inclusive create a number of offences in relation to the giving of false or misleading statements or documents, and assaulting or obstructing the ombudsman or his or her officers.

30. In addition, cl.34 of the bill confers on the ombudsman, subject to giving reasonable notice, a general power of entry onto places occupied by "agencies". A range of post- entry powers is also conferred. Neither a warrant nor consent of the agency is required in order for the entry power to be exercised.

31. Because of the nature of the ombudsman's role and because "agencies" are government or other public bodies, the committee does not consider these powers to be objectionable.

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36 Section 4(2)(1) of the *Legislative Standards Act 1*992 requires legislation to have sufficient regard to rights and liberties of individuals.

37 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 issu4ed by a judge or other judicial officer.

38 The term "agency" is defined in cl.8. The committee notes that cl.10(c) of the bill defines administrative actions of agencies so as to include actions taken for an agency by an entity that is not an agency. This, as the Explanatory Notes state, is intended to bring within the ombudsman's jurisdiction administrative activities "outsourced" by agencies to private providers.

39 Moreover, a certificate by the ombudsman to the Court in relation to the contempt constitutes evidence of the matters stated in the certificate (cl.39(10)).

Indeed, they are probably essential for the proper performance of the ombudsman's functions.

32. Finally, cl.44 makes a number of provisions of the *Criminal Code* applicable to ombudsman investigations, including provisions relating to perjury, fabrication of evidence and corruption of witnesses.

33. To summarise, the bill confers on the ombudsman an extensive range of powers to support his or her investigatory and reporting functions. Many of the powers appear to be specifically tailored to that role.

34. The committee notes that the bill confers on the ombudsman an extensive range of powers, including entry and post-entry powers, power to issue subpoenas and obtain arrest warrants, and other powers. It also contains a number of other provisions supportive of the conduct of his investigatory activities.

35. The committee brings the range and extent of these powers to the attention of Parliament.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[40]

- **Clauses 12 and 19**

36. Clauses 12 and 19 both refer to "statutory committees" of the Legislative Assembly.

37. Statutory committees are committees which owe their existence to legislation (see, for example, s.4, *Parliamentary Committees Act 1995*, and s.115, *Criminal Justice Act 1989*). However, Parliament can create other types of committees, namely, standing committees (created by Standing Orders) and select committees (created by resolution of the Assembly).[41]

38. Under cls.12 and 19 as presently worded, none of these other committees would be able to refer matters to the ombudsman.

39. The committee notes that cls.12 and 19 of the bill authorise only statutory committees of the Parliament to refer matters to the ombudsman. The clauses do not mention or include other types of Parliamentary committees.

40. The committee seeks information from the Premier as to whether this reflects the policy intent underlying the bill and, if it does, as to the reasons for that policy.

- **Clause 49(2)(g)**

41. Clause 49 sets out the grounds upon which the ombudsman may report on an administrative action he or she has investigated. Many are long-established legal concepts, well-known

[40] 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.

[41] The Travelsafe Committee is an example of this type of committee.

especially in the field of administrative law ("contrary to law", "unreasonable", "unjust", "taken for an improper purpose" and "based on a mistake of law or fact"). However the final ground, set out in paragraph (g), is that the administrative action "was wrong".[42]

42. This is a term which does not have an established legal meaning, and which is inherently somewhat imprecise. However, as the bill is intended to facilitate the investigation of citizens' grievances against State or other public bodies, this imprecision does not concern the committee.

43. The committee notes that one of the grounds on which the ombudsman may report on administrative actions of agencies is that the ombudsman considers the action in question "was wrong".

44. Given that the ombudsman's investigatory process enhances the rights of citizens, the committee is not concerned by the element of imprecision associated with this term.

[42] This ground is also amongst those listed in the current Act.

10. PROSTITUTION AMENDMENT BILL 2001

Background

1. The Honourable Tony McGrady MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 16 October 2001.

2. The objects of the bill, as indicated by the Explanatory Notes, are to:

- *improve the processes for determining applications for development approvals for brothels;*
- *improve the processes for determining applications for brothel licences; and*
- *amend the Act to clarify existing provisions and address operational issues.*

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

♦ **Clauses 5 – 8 inclusive, clause 13 (proposed s.64U(5))**

3. Section 15 of the *Prostitution Act 1999* requires that the Prostitution Licensing Authority must refuse to grant a brothel licence if it is satisfied that the applicant falls within a number of disqualifications listed in paragraphs (a) to (d) of s.16(1) of the Act. One of these, listed in paragraph (b), is that the applicant "has been convicted of an offence, the facts of which constitute the running of a brothel".

4. Clause 5 of the bill deletes this automatic disqualification, and amends s.17 of the Act to provide that this matter is now only one of the "relevant matters", listed in s.17(1), which the authority "must consider" in making its decision.

5. Clauses 7 and 8 of the bill make analogous amendments to ss.41 and 42 of the Act, which correspond to ss.16 and 17 in respect of applications for the grant of approved managers certificates (these certificates authorise a person to manage a licensed brothel).

6. In its report on the bill for the *Prostitution Act 1999*, the committee noted the automatic disqualification provision.[44] The committee commented that whilst there might be differing views on its inclusion, that inclusion was not unreasonable.

7. By the same token, the committee considers the current proposal to remove that absolute prohibition and replace it with a requirement that the conviction simply be one of a number of matters the Authority must consider in deciding relevant applications[45] is also not unreasonable. The decision whether an absolute prohibition should be imposed is, in the committee's view, ultimately for Parliament to decide.

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

44 See Alert Digest No.14 of 1999 at page 14

45 Which means that an application may still in appropriate circumstances be refused because of such prior convictions.

8. The committee notes that cls.5 to 8 inclusive remove the present absolute prohibition on persons with previous convictions for running a brothel obtaining brothel licences or approved managers certificates, and replace it with a requirement that the Authority have regard to those convictions in reaching its decision.

9. The committee refers to Parliament the question of whether these amendments have sufficient regard to the rights of applicants and of the community.

♦ **Clause 13 (proposed sections 64B and 64E)**

10. Clause 13 inserts proposed s.64A to s.64V, which provide for appeals about decisions on "code assessable development applications" relating to brothels to be made to an "independent assessor", in place of the present appeals to the Planning and Environment Court.

11. The Planning and Environment Court is constituted by District Court Judges who are notified by the Governor in Council from time to time as judges of the Planning and Environment Court (s.4.1.8, *Integrated Planning Act 1997*). The Planning and Environment Court is a court of record (s.4.1.1, *Integrated Planning Act*). Given these provisions, a very high degree of independence on the part of that Court can be assumed.

12. The "independent assessor", on the other hand, is a lawyer of at least 5 years standing who is appointed by the Minister on terms and conditions decided by the Minister (proposed s.64B) apart from allowances, which are decided by the Governor in Council (proposed s.64D). The bill does not provide for any minimum term of appointment, nor does it stipulate the grounds upon which the assessor's office becomes vacant or he or she may be removed.

13. On the other hand, proposed s.64E provides that the independent assessor "is not subject to control or direction by anyone in the way the independent assessor performs the independent assessor's functions".

14. Clause 13 establishes the office of "independent assessor" and contains provisions relating to that person's appointment, tenure and conditions. The assessor will hear matters presently dealt with by the Planning and Environment Court, which is constituted by judges of the District Court and is a court of record.

15. The committee refers to Parliament the question of whether the provisions of cl.13 are sufficient to ensure an appropriate degree of independence for the "independent assessor".

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[46]

- **Clause 13 (proposed s.64H)**

16. Proposed s.64H(1) confers upon the independent assessor "the same protection and immunity as a Supreme Court Judge has in a proceeding in a Supreme Court". Section 64H(2) confers upon a person representing a party before the "independent assessor" the same protection and immunity as a lawyer appearing for a party in a Supreme Court proceeding. Section 64H(3) confers on a person making oral submissions to the "independent assessor" the same protection as a witness in a Supreme Court proceeding.

17. The committee notes that the "independent assessor" will be hearing appeals of a type which are presently dealt with by the Planning and Environment Court, a court of record constituted by District Court judges.

18. The committee notes that proposed cl.13 (proposed s.64H) confers upon the "independent assessor", persons representing parties appearing before the independent assessor, and persons making oral submissions to the independent assessor, the same immunity and protection as enjoyed by judges of the Supreme Court and lawyers and witnesses appearing in the Supreme Court.

19. Given the nature and functions of the "independent assessor", the committee considers this immunity to be reasonable.

- **Clause 13 (proposed section 64U)**

20. Clause 13 inserts proposed s.64U, which contains provisions about the decision of an "independent assessor" on an appeal referred to him or her. Subsection 64U(4) provides that the assessor's registrar must give all parties to the appeal, and the Brothel Licensing Authority, notice of the decision and the reasons for it. However, ss 64U(5) provides that the assessor's decision "cannot be appealed against under this Act or the *Integrated Planning Act*".

21. The committee notes that, under s.4.1.56 of the *Integrated Planning Act 1997*, a party to a proceeding before the Planning and Environment Court may appeal a decision of that court on the ground of error or mistake in law on the part of the Court, although only with leave with the Court of Appeal or a Judge of the Court of Appeal. Section 4.1.58 provides the Court of Appeal with a number of options on an appeal, including power to "make an order the Court of Appeal considers appropriate" (paragraph (c)). The Courts may also "… substitute another order or decision for the Court's or Judge's decision" (paragraph (b)).

[46] 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.

22. In relation to proposed s.64U(5), the Explanatory Notes state:

> *This section also makes clear that there is no appeal against a decision of the independent assessor under the Act or the Integrated Planning Act. Section 64U is not intended to exclude an judicial review of a decision of the independent assessor pursuant to the Judicial Review Act 1991.*

23. As the "independent assessor" will be hearing matters of a type previously heard by the Planning and Environment Court, it might be presumed that the appeal rights from the assessor's decision would be similar to those presently available from the Planning and Environment Court. As the Explanatory Notes point out, a person may still seek judicial review of the "independent assessor's" decision, but judicial review does not generally enable the reviewing Court to substitute its own decision for that of the original decision-maker. Such a power is clearly conferred in relation to appeals from the Planning and Environment Court. On the other hand, appeals from that Court can only be made with leave of the Court of Appeal or a Judge of the Court of Appeal.

24. A comparison of the two sets of appeal rights is therefore a somewhat difficult task, although the most striking difference appears to be the incapacity, under the bill, for the reviewing Court to substitute its own order or decision or make another order it considers appropriate in lieu of the original decision.

25. The committee seeks information from the Minister as to whether he is satisfied the appeal rights provided under this bill in relation to the decisions of the "independent assessor" are equivalent to those which parties presently enjoy against decisions made in the Planning and Environment Court. If the Minister considers the appeal rights conferred by the bill are more limited, could the Minister advise why that is considered appropriate.

Is the legislation consistent with the principles of natural justice?[47]

- **Clauses 14 and 16**

26. Section 65 of the *Prostitution Act 1999* presently enables a police officer, the authority or an authorised officer of the relevant local government to apply to a Magistrates Court for an order declaring that particular premises are a prohibited brothel. The bill will also permit applications to be made for a temporary declaration to that effect before, or contemporaneously with, an application for the current type of s.65 order.

27. Clause 16 inserts new s.66A, which provides details about the temporary declaration process. This process is clearly intended as a temporary expedient pending disposal of an application for a "permanent" order under s.65.

[47] 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.

28. However, the committee notes that proposed s.66A(3) provides as follows:

> *'(3) The issuer may make the declaration only if it is satisfied that the applicant has made a reasonable attempt to notify* (underlining added) *the owner or occupier of the premises of the making of the application.*

29. This would appear to set a somewhat lower standard for notification of the owner or occupier than that required for a current s.65 "permanent" order. That would have a consequential effect upon the capacity of these interested persons to make submissions to the Court in relation to the application for the temporary declaration, and in so doing would impact adversely upon the rights of these persons to natural justice. Section 66(2) of the Act currently provides in relation to an application for a "permanent" order:

> *(2) The Court may make the declaration only if it is satisfied that, at least 72 hours before the hearing, notice of the application was given* (underlining added) *to the owner or occupier of the premises that are the subject of the application.*

30. The committee notes that cl.14 and cl.16 provide for the making of temporary declarations that premises are a prohibited brothel. The bill requires only that a "reasonable attempt" be made to notify the owner or occupier, and the application may therefore potentially proceed in their absence.

31. The committee refers to Parliament the question of whether, in the circumstances, the provisions of the bill in relation to temporary declarations under proposed s.66A have sufficient regard for the rights of the owner and occupier of those premises to natural justice.

11. TAXATION ADMINISTRATION BILL 2001

Background

1. The Honourable Terry Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 17 October 2001.

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

> *To provide an administrative framework to support the Duties Bill 2001, incorporate the arrangements currently provided for under the Revenue Laws (Reciprocal Powers) Act 1988, and then to progressively apply the new administrative arrangements to the Pay-Roll Tax Act 1971 and the Land Tax Act 1915.*

Overview of the Bill

3. This bill, as the Explanatory Notes indicate, provides most of the administrative provisions relating to administration of the *Duties Bill 2001* and of the *Payroll Tax Act 1971* and the *Land Tax Act 1915* once those statutes have been brought within its terms.[48]

4. Clause 3 of the bill provides that it must be read together with the *Duties Bill 2001* and, ultimately, with the other revenue laws.

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?[49]

- **Clauses 75–77 inclusive and cl.132**

5. Part 6 of the bill (ss.63–77 inclusive) establishes objection and appeals processes in relation to assessments of tax. The objection process involves the commissioner reconsidering the disputed assessment, and the appeal process involves an appeal to the Supreme Court if the commissioner disallows an objection.

6. However, cl.77 excludes the operation of the *Judicial Review Act 1991* in relation to assessments, and cls.75 and 76, taken together, preclude any form of review, appeal or access to judicial review or other legal process in relation to a range of decisions described as 'non-reviewable decisions'.

7. The ouster of the *Judicial Review Act* in relation to assessments is supported by cl.132, which provides that in legal proceedings, production of a copy assessment notice signed by the commissioner is conclusive evidence of 'the proper making of the assessment' and, in proceedings other than appeals to the Supreme Court under the bill, of the correctness of the amount and other particulars of the assessment.

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48 It is presumably intended to redraft those statutes prior to that occurring.

49 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.

8. The Explanatory Notes deal with these provisions in some detail. In short, the rationale provided is as follows:

- In relation to assessments, the bill provides a comprehensive scheme of objections and appeals, which allow for a complete review of the merits of the assessment, and it is therefore inappropriate that additional legal challenges in relation to procedural matters (such as would be brought under the Judicial Review Act) should be permitted. It is for this reason that the commissioner's copy of the assessment notice is conclusive of the 'proper making' of the assessment and, except in appeals under the bill, of the correctness of the amount and particulars of the assessment.

- The range of matters which are categorised as 'non-reviewable decisions' is, in the words of the Explanatory Notes, 'principally that those may be made in the commissioner's discretion to confer a special benefit on a person that would not otherwise exist but for the discretion'. These include a refusal of the commissioner to make an assessment in cases where self-assessment is possible or where the taxpayer liability is nil (c.11(3)), a 'comprise assessment' agreed upon between the commissioner and the taxpayer (c12(3)), and the commissioner's decision not to make a reassessment of a taxpayer's liability (cl.17(5)). Other 'non-reviewable decisions' are set out in cls.20(3), 34(6) and 65(3). The Explanatory Notes argue that in most cases these discretions are necessary and should be exercised in unusual or extreme cases, but that the commissioner should not be under any legal pressure in relation to the making of those decisions.

- The Explanatory Notes point out that the operation of the *Judicial Review Act* is not excluded except in relation to assessment and to 'non-reviewable decisions'.

9. The committee notes that whilst the bill provides a process of objection and appeals in relation to assessments of tax, it also excludes the operation of the *Judicial Review Act* in relation to assessments, and makes a number of other decisions under the bill non-reviewable.

10. The committee refers to Parliament the question of whether these restrictions upon the right of external judicial review are reasonable in circumstances.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[50]

11. Part 7 of the bill (cls.78–110) confers a range of powers upon investigators.

12. Included amongst these are powers of entry (cl.90). These extend beyond situations where the occupier consents or where a warrant is obtained, in that they permit entry to 'a public place … when it is open to the public', and to 'a place used for conducting an enterprise … when … the enterprise is being conducted or … is otherwise open for entry'. The term

[50] 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.

'enterprise' could cover a very wide range of premises, although they must of course be open or being conducted at the time.

13. A range of post-entry powers and ancillary powers to compel the answering of questions and the production of information and documents, is also provided (see cls.87, 88 and 96), along with powers of seizure and forfeiture of chattels (cls. 97 and 101). Clause 103(3) empowers investigators to use reasonable force in exercising their powers. Finally, cl.106 provides a scheme under which compensation can be paid for damage suffered by a person in relation to the exercise or purported exercise of investigators' powers, if a court thinks it just to make such an order.

14. The Explanatory Notes assert that the entry powers are necessary to cover:

> *The limited cases where access to a place must be taken without prior notice to ensure that the continued existence of information relevant to the determination of tax liability is not jeopardised. The ability to act quickly to access and secure the information or documents will be essential on some occasions.*

15. The Part 7 powers are generally similar to powers included in many recent bills which establish a regulatory regime. The committee notes that while many of these powers are quite extensive, significant efforts have been made within that context to take account of fundamental legislative principles.

16. The committee notes that part 7 of the bill (cls.78-110 inclusive) confers upon investigators an extensive range of entry and post-entry powers, as well as powers to obtain information and documents.

17. The committee draws to the attention of Parliament the nature and extent of these powers.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[51]

♦ **Clauses 124 and 125**

18. Clauses 124 and 125 provide that it is not a reasonable excuse for a person to fail to comply with a requirement to give information or a document to the commissioner or an investigator, or to lodge a document, simply because that might tend to incriminate the person. The clauses go on to provide, however, that evidence directly or indirectly derived from the information or document that might tend to incriminate the person is not admissible in evidence against the person in a criminal proceeding (subject to one limited exception).

19. The committee considers that provisions removing the benefit against self-incrimination needs to be adequately justified. The committee looks for indications that:

[51] 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.

- The questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and which it would be difficult or impossible to establish by any alternative evidentiary means; and

- The bill should prohibit use of the information obtained in prosecutions against the person.

20. The Explanatory Notes state, in relation to cls. 124 and 125:

> *… the principle in abrogating the self incrimination privilege is to ensure that the Commissioner can access all relevant information to properly determine a taxpayer's tax liability, any information so obtained cannot be used in criminal proceedings except where the falsity or misleading nature of the information is relevant.*
>
> *This approach recognises that taxpayers often uniquely possess the information necessary to enable the Commissioner to determine whether or not they have properly satisfied their tax liabilities, so that any refusal to provide that information would preclude the making of an accurate assessment of liability. It is therefore considered to strike an appropriate balance between revenue protection of the State and taxpayers' rights.*

21. The committee notes that cls.124 and 125 deny persons required by the commissioner or an investigator to give information or a document, or to lodge a document, the benefit of the rule against self-incrimination. However, the clauses impose restrictions upon the use of which may be made of information obtained through that process.

22. The committee refers to Parliament the question of whether the removal by cls.1245 and 125 of the benefit of the rule against self-incrimination is justified in the circumstances.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[52]

♦ **Clause 130**

23. The bill contains a number of provisions facilitating the presentation of evidence in legal proceedings on behalf of the commissioner (see cls.128-133).

24. Amongst these is cl.130, which states:

> *A statement made by or for the commissioner in a complaint starting a proceeding is evidence of the matter stated.*

25. It seems clear from the wording of this clause that it goes beyond what might be regarded as non-controversial matters, and that under it, any assertion in a complaint that facts constituting the elements of the relevant offence existed, are evidence of those matters.

26. This is an "averment" provision of a type which the committee has queried in a number of Alert Digests,[53]

[52] 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.

27. The committee notes that cl.130 appears to provide that a statement made in a complaint starting a proceeding is evidence of the matters which comprise the elements of the alleged offence. The committee is concerned by the quite general terms of this provision.

28. The committee seeks information from the Treasurer as to whether he is satisfied that the insertion of a provision such as cl.130 is necessary, and even if the Treasurer considers it is, whether the matters to which it is to relate could not be more restrictively defined.

♦ **Clauses 131 and 132**

29. Clauses 131 and 132 enable evidence of a number of matters to be put before a court by means of a certificate signed by the commissioner. Provisions of this nature, which reduce the administrative workload of the commissioner, are unexceptionable provided that the matters dealt with are essentially non-controversial. Most of the matters listed in cl.131 fall within this category. However, a number of others (paragraphs (a)(iii), (vi) and particularly (vii), might fall outside that category.

30. Further, cl.132(1)(b)(i) provides that production of a document signed by the commissioner purporting to be a copy of a tax assessment notice is, in a proceeding on an appeal against an assessment, evidence 'that the amount and all particulars of the assessment are correct'.[54]

31. The committee notes that cls.131 and 132(1)(b)(i) provide that certificates or similar documents are evidence of a number of matters in proceedings. It appears that several of the matters covered by these certificates could be contentious in nature.

32. The committee seeks information from the Minister as to the justification for including such matters in the list of things about which evidence can be presented by certificate.

Does the legislation have sufficient regard to the rights and liberties of individuals?[55]

♦ **Clause 136**

33. Clause 136 provides that a proceeding for an offence against the tax law must start within 5 years after commission of the offence. These proceedings are brought in a summary way by complaint under the *Justices Act 1886* (cl.135).

34. The general limitation period applying to complaints under the *Justices Act* is one year (see s.52).

35. Many statutes provide specific limitation periods for offences prosecuted under that particular Act, but in the committee's experience the limitation period is usually considerably less than 5 years. On the other hand, cl.136 does not contain a provision, often

53 See, most recently, the committee's report on the *Health Legislation Amendment Bill*: Alert Digest No.5 of 2001 at p16.

54 The contents of cl.132(1)(a) and (b)(ii) have been commented on earlier in this chapter.

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

inserted in such cases, which allows a prosecution to also be commenced within a stated time of the matter coming to the attention of the prosecuting authority.

36. The committee seeks information from the Treasurer as to the reason for a 5 year limitation on the prosecution of offences.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[56]

- **Clause 163**

37. Clause 163 authorises the making of transitional regulations. Such clauses have in the committee's experience often given rise to difficulties, and the committee has often commented adversely upon them.

38. The cl.163 regulation-making power is framed in broad terms, as it authorises regulations about matters to achieve the transition from the operation of the current legislation to that of the new legislation, and in relation to which this bill 'does not make provision or sufficient provision'.

39. Further, the regulations may be retrospective, although only to the date of commencement of the bill. On the other hand the clause, in contrast to some other such provisions, is not framed in such a manner as to constitute a 'Henry VII clause'.

40. Finally, cl.163(4) provides that both the clause and any transitional regulation made under it will expire, although not until 5 years after the bill commences.

41. The committee notes that cl.163 authorises the making of transitional regulations. These regulations may be retrospective, although both they and the clause will ultimately expire.

42. The committee refers to Parliament the question of whether the nature of the transitional regulation-making power contained in cl.163 is reasonable.

[56] 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.

12. TRANSPORT LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable Stephen Bredhauer MP, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 16 October 2001.

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

> *…to provide for amendments to a range of statutes administered by the Department of Transport and Department of Main Roads.*

Air Navigation Act 1937

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

♦ **Clause 11 (proposed ss.16 and 17)**

3. Clause 11 inserts a new *Part 3 –Recovery of Damages* (proposed ss.12 to 17 inclusive) into the Act. Under the proposed new ss.16 and 17 of Part 3 an owner, operator and person entitled to control navigation would be jointly and severally liable for injury, loss, damage or destruction caused to a person on the ground by the impact of an aircraft or falling object. Damages would be recoverable without proof of intention, negligence or other cause of action. A person entitled to control the navigation of the aircraft would not be liable if they have taken all reasonable steps to prevent the unauthorised use of the aircraft.

4. The Explanatory Notes indicate that these amendments reflect provisions of the *Damage by Aircraft Act 1999* (Cwlth) the purpose of which is stated:

> *…to relieve an injured person from the expense and delay of suing every potential defendant and than having to establish which of them was negligent – a process that can be very long and expensive if, for example, 2 aircraft collide. Owners and operators are already largely covered by insurance for third party on-ground liability.*

5. The committee notes that owners and operators are largely covered by insurance for third party on-ground liability.

6. The committee refers to Parliament the question of whether the imposition of civil liability on innocent parties is reasonable in the circumstances.

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

Transport (Busway and Light Rail) Amendment Act 2000

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[58]

- **Clause 19 (proposed s.180QA)**

7. Clause 19 amends s.13 inserting new chapters 7A-7C which deal with the operation of busways, contracts, regulation of busway environs and authorisation of busway use.

8. The proposed s.180QA(3) will make it an offence for a person to construct, maintain, operate or conduct ancillary works and encroachments on a busway contrary to any notification by the chief executive. For the purposes of a prosecution for an offence against this provision the proposed s.180QB(2) provides:

> *'(2) Each person whose product or service is advertised on the sign is taken to maintain the sign, unless the person proves the advertisement was placed without the person's knowledge or permission.*

9. The committee is of the view that this provision effectively reverses of the onus of proof, as the person whose product or service is advertised is taken to maintain the sign unless they can prove that the sign was placed without their knowledge or approval.

10. It may be that this reversal of onus is not unjustifiable in the circumstances as is noted in the Explanatory Notes "it is reasonable to assume that it is within the knowledge of the advertiser as to who is responsible for maintaining the sign."

11. As a general principles the committee does not approve of provisions in legislation which effectively reverse the onus of proof.

12. The committee refers to Parliament the question of whether cl.19 contains a justifiable reversal of the onus of proof, and therefore has sufficient regard to the rights and liberties of individuals.

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[59]

- **clause 19 (proposed s.180QC)**

13. Proposed s.180QC(4) confers authority on the chief executive to cause or direct the alteration, relocation, removal or making safe ancillary works and encroachments or their use that were constructed, maintained, operated or conducted on a busway under an approval, requirement or contract under s.180QA.

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[58] 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.

[59] 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.

14. A person must comply with a direction of the chief executive under subsection (4). Having complied with the direction subsection (6) provides:

> *'(6) If ancillary works and encroachments are altered, relocated, made safe or removed because of a direction under subsection (4), the chief executive may enter into an agreement with the owner of the ancillary works and encroachments for making a contribution towards the cost of the alternation, relocation, making safe or removal.*

15. It would seem that even if a person constructs, maintains, operates or conducts ancillary works or encroachments on a busway in compliance with requirements specified by the chief executive or as required by a contract with the chief executive, that if the chief executive requires action to be taken pursuant to subsection (4) that it is discretionary as to whether the chief executive contributes to the costs of any such action.

16. The committee seeks information from the Minister as to why a person should not be compensated in full for the costs of action required to be taken pursuant to a direction of the chief executive if the person is not at fault in any way.

Transport Infrastructure Act 1994

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

- **Clause 35**

17. Clause 35 amends s.187Q of the *Transport Infrastructure Act 1994* which requires the chief executive to give public notice of a draft waterway transport management plan. It is proposed to insert a new subsection (5) which provides that the "section does not apply if the draft deals only with fees or a minor error." A minor error is defined in a proposed subsection (6).

18. The committee notes that there is no qualification placed on the term "fees". Accordingly the changes to fees may merely reflect changes in the consumer price index (CPI) or they may be increased significantly beyond an increase in the CPI. Even in the latter case where appreciable costs could be imposed on the community the chief executive would not be required to give public notice of the proposed change to the plan.

19. The Explanatory Notes suggest that this was not the intention of this provision as they state:

> *Clause 35 provides that minor changes to Waterways Transport Management Plans can be made without the need for full process of community consultation. This will have the effect that if a simple error requires correction or a fee needs adjustment to reflect changes in the consumer price index then these changes can be made without prohibitive administrative requirements.*

20. The committee recommends that cl.35 be amended to ensure that the chief executive is only exempted from the normal requirements regarding notification of draft waterway transport management plans if all amendments, including those to fees are of a minor, routine nature.

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

Transport Operations (Passenger Transport) Act 1994

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[61]

♦ **Clause 82 (proposed s.126C)**

21. It is proposed to amend the *Transport Operations (Passenger Transport) Act 1994* in part 10. Clause 82 inserts new ss.126A- 126G into chapter 11. The proposed s.126C provides:

> *'126C Powers supporting seizure*
>
> *'(1) To enable a thing to be seized, an authorised person may require the person in control of it –*
>
> *to take it to a stated reasonable place by a stated reasonable time; and*
>
> *if necessary, to remain in control of it at the stated place for a reasonable time.*
>
> *'(2) The requirement must be made by notice in the approved form.*
>
> *'(3) However, if for any reason it is not practicable to give the notice, the requirement may be made orally and confirmed by notice in the approved form as soon as practicable.*
>
> *'(4) A further requirement may be made under this section about the same thing if it is necessary and reasonable to make the further requirement.*
>
> *'(5) A person of whom a requirement is made under subsection (1) or (3) must comply with the requirement, unless the person has a reasonable excuse.*
>
> *Maximum penalty for subsection (5) – 60 penalty units.*

22. Subsection (4) refers to "further requirements". The nature of these "further requirements" is not entirely clear.

23. The committee considers that the clarity of this proposed provision would be improved by the inclusion of examples of possible "further requirements".

Does the legislation provide appropriate protection against self-incrimination?[62]

♦ **Clause 82 (proposed s.126M)**

24. Clause 82 inserts a new Part 3B which deals with powers of authorised persons for dangerous situations involving rail vehicles. The proposed s.126M provides:

> *'126M Additional power to require information or produce document*
>
> *'(1) This section applies if an authorised person reasonable believes a person may be able to give information or produce a document that will help deal with a dangerous situation.*

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61 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.

62 Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

'(2) The authorised person may require the person to give the information or produce the document.

'(3) The person must give the information or produce the document, unless the person has a reasonable excuse.

Maximum penalty –

if the contravention results in the death of, or grievous bodily harm to, a person – 270 penalty units; of

otherwise – 135 penalty units.

'(4) The fact that giving the information or providing the document might tend to incriminate the person is not a reasonable excuse for subsection (3).

'(5) However, evidence of, or directly or indirectly derived from, the information or the production of the document that might tend to incriminate the person is not admissible in evidence against the person in a proceeding, other than a proceeding for –

an offence against section 130 or 131;[63] *or*

another offence about the falsity of the information or document.

25. The committee notes that the requirement to give information or produce documents is quite widely cast to encompass anything that "an authorised person reasonably believes… will help deal with a dangerous situation."

26. A "dangerous situation" is defined in proposed s.126L(2) as follows:

(2) A"dangerous situation" is a situation involving the transportation of dangerous goods by rail that is causing, or is likely to cause, imminent risk of-

(a) death of, or significant injury to, a person; or

(b) significant harm to the environment; or

(c) significant damage to property.

27. Subsection (4) prevents a person from declining to give the information or providing the documents on the basis that to do these things might tend to incriminate him or her. However, the committee's view is that a denial of the protection afforded by the self-incrimination rule is justifiable if the bill prohibits the use of the information obtained in prosecutions against the person.

28. Subsection (5) provides that the information given cannot be used as evidence against a person in criminal proceedings except for an offence set out in ss.130 and 131 relating to the giving of false or misleading statements or false, misleading or incomplete documents.

29. The committee is generally concerned by provisions, which deny persons the benefit of the rule against self-incrimination.

30. The committee refers to Parliament the question of whether the denial by cl.126M of that right is, in the circumstances, justified.

63 Section 130 (False or misleading information) or 131 (False, misleading or incomplete documents)

♦ **Clause 84**

31. Clause 84 amends s.129 (Power to require production of certain documents) by omitting the current subsections and inserting the following:

> *'(2) An authorised person may require a person to produce for inspection a document issued, or required to be kept, under the Transport Infrastructure Act 1994, chapter 8AA[64] or a law of another State or the Commonwealth about transporting dangerous goods by rail.*
>
> *'(3) The person must comply with the requirement under subsection (1) or (2), unless the person has a reasonable excuse.*
>
> *Maximum penalty – 60 penalty units.*
>
> *'(4) The authorised person may keep the document to copy it.*
>
> *'(5) If the authorised person copies it, the authorised person may ask the person responsible for keeping the document to certify the copy as a true copy of the document.*
>
> *'(6) The authorised person must return the document to the person as soon as practicable after copying it.'.*

32. The committee notes that the provision only concerns documents that are required to be kept by the *Transport Infrastructure Act 1994* or a law of another state or the Commonwealth and that the provision does not expressly exclude the benefit of the rule against self-incrimination.

33. The Explanatory Notes indicate that "No protection against self-incrimination is given" however, the provision indicates that a person must comply unless they have a reasonable excuse. A reasonable excuse would be that the production of the documents might tend to incriminate the person, as this is not expressly excluded by the provision.

34. The committee seeks information from the Minister as to the policy intent of this provision. If it is intended that the provision exclude the protection against self-incrimination the committee suggests that this should be expressly stated.

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

♦ **Clause 87 (proposed s.153A)**

35. Clause 87 inserts a new s.153A to provide that in a prosecution for a contravention of chapter 11 of the *Transport Operations (Passenger Transport) Act 1994* or chapter 8AA of the *Transport Infrastructure Act 1994*, where an authorised person gives evidence that the officer believes certain matters in relation to dangerous goods, the court must accept the matter as proved if satisfied:

- the belief is reasonable given the authorised person's experience or qualification; and

64 Transport Infrastructure Act 1994, chapter 8AA (Transporting dangerous goods by rail)

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.

- there is no evidence to the contrary.

36. The committee accepts that the matters of which the authorised person expresses his belief may not be a significant issue in proceeding against a person for contravention of an offence against the Acts. However, this provision alters the normal rules of evidence and denies judges the right to exercise their discretion as to whether or not to accept the matters as proved in the circumstances of individual cases.

37. The committee notes that the Explanatory Notes state that "Where the court considers the belief to be reasonable, and there is no evidence to the contrary, the court may accept the matter as proved." This would suggest that it was intended that the court still be permitted to exercise a discretion. However, the provision clearly states that the court "must accept the matter as proved."

38. The committee refers to Parliament the question of whether the reversal of the onus of proof is reasonable in the circumstances.

13. WATER AMENDMENT BILL 2001

Background

1. The Honourable Stephen Robertson MP, Minister for Natural Resources and Minister for Mines, introduced this bill into the Legislative Assembly on 16 October 2001.

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

> *… to allow for a range of amendments to the Water Act 2000 ('the Act'). The need for the changes has been identified as a result of 12 months of implementation of the Act. Certain limitations have been identified within the existing framework of the Act, and accordingly these amendments are proposed to give greater flexibility to the processes under the Act.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[66]

♦ **Clauses 2, 4(1), 4(2) and 105**

3. Clause 2 provides that cl.4(1) of the bill is taken to have commenced on 1 July 2000, and that cls. 4(2) and 105 are taken to have commenced on 13 September 2000.

4. Clause 4(1) amends the numbers of 2 sections of the *Integrated Planning Act 1997* referred to in the *Water Act 2000*. The Explanatory Notes state that this is in order to correct an incorrect section reference. Clause 4(2) provides for the retrospective commencement of s.1063 of the *Water Act*, and cl.105 inserts amendments to s.1063 which are given retrospective operation. The Explanatory Notes state, in relation to these latter amendments:

> *In addition it 4(2) allows for the retrospective commencement of section 1063. This section which gives meaning to the term "service area", is linked to other sections that have already commenced, and it is necessary for this clause to have commenced at the earlier date to give proper effect to those other sections.*

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

- Whether the retrospective application is adverse to persons other than the Government;
- Whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.

[66] 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.

6. The committee has been unable to identify any aspect of these retrospective provisions which appears inconsistent with the statement in the Explanatory Notes (see page 3) that none of these sections affect individual's rights.

7. The committee notes that cls.4(1), 4(2) and 105 are given retrospective operation. The committee has been unable to identify any aspect of these provisions which is adverse to any person.

8. In the circumstances, the committee has no concerns in relation to these retrospective provisions.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[67]

- **Clause 112 (proposed s.1132)**

9. Clause 112 inserts proposed s.1132, which confers power to make transitional regulations facilitating the transition from the repealed legislation to the *Water Act 2000* and in relation to which the *Water Act* does not make any or any sufficient provision.

10. The committee has found that transitional regulation-making powers (of which s.1132 is an example) can give rise to a range of issues, and has commented adversely on some such provisions. The committee notes that the s.1132 regulation-making power is broadly framed, and that it moreover allows transitional regulations to have retrospective operation (although only to the date upon which s.1132 commences). On the other hand, the section does not purport to authorise regulations affecting the operation of the Act in such a manner as to constitute a "Henry VIII clause". In addition, the committee notes that any transitional regulations made under s.1132, and the section itself, expire 1 year after commencement of the section.

11. The committee notes that proposed s.1132 confers broad transitional regulation-making powers. It confers power to make regulations which are retrospective (although only to the date of commencement of the section). However, the section also provides that both it and any regulation made under it expire 1 year after commencement of the section.

12. The committee refers to Parliament the question of whether, in the circumstances, the provisions of proposed s.1132 are reasonable.

[67] 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.

SECTION B

COMMITTEE RESPONSE TO MINISTERIAL ORRESPONDENCE

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[68]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[69] of a provision may therefore be considered as extrinsic material in its interpretation.

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[68] Section 14B(3)(c) Acts *Interpretation Act 1954*.

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

SECTION B– COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

14. ENVIRONMENTAL PROTECTION LEGISLATION AMENDMENT BILL (NO.2) 2001

Background

1. The Honourable Dean Wells MP, Minister for Environment, introduced this bill into the Legislative Assembly on 11 September 2001. 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 2001 at pages 3 to 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 bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[70]

- **Clause 3**

3. Clause 3 of the bill (proposed s.13(4)) enables a resource in specified circumstances to be excluded by regulation from the definition of 'waste' contained in section 13(1) of the *Environmental Protection Act 1994*. The committee identified the new s.13(4) as a "Henry VIII clause". The committee does not generally endorse the use of such provisions and sought information from the Minister as to the circumstances in which proposed s.13(4) would be employed.

4. The Minister provided the following information:

> *The new section 13(4) has been proposed to give the administering authority the power to be able to assess a waste for its suitability for reuse and recycling. This section will apply only for those materials that have specific and demonstrated reuse and recycling capabilities. This narrows in the first instance the power of the administering authority.*
>
> *Under certain circumstances, it is practical that a waste be reused or recycled and this needs to be assessed on a case by case basis. The toxicity and contamination level of waste varies from source to source and it is difficult to generalise their ambient characteristics. Due to the potentiality for environmental harm such materials require to be classified as waste. An example for such generalisation is fly ash.*
>
> *Fly ash needs to be controlled as a waste because depending on the source material, production process etc., the contamination level and hence the toxicity would vary. Some fly ash is suitable for concrete batching and should be recycled without compromising environmental qualities. Some with elevated contamination level are not suitable for recycling and need to be treated or disposed of accordingly. That is why fly ash needs to be classified as waste and simultaneously an approval mechanism must be in place for those*

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

types of fly ash that are not toxic and can be under specified circumstances reused or recycled. There are other examples like biosolids and green waste.

It is understood that such discretionary power is not favoured by the Committee but for limited cases this power is required by the Environmental Protection Agency (EPA) to be able to exempt certain materials after a careful consideration of risk factors. I hope that the Committee will understand the EPA's position and would allow the new section 13(4) to be incorporated within this Bill.

5. The committee notes the Minister's response.

15. PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable Henry Palaszczuk MP, Minister for Primary Industries and Rural Communities, introduced this bill into the Legislative Assembly on 11 September 2001. The committee notes that this bill was passed, with amendments, on 16 October 2001.

2. The committee commented on this bill in its Alert Digest No 6 of 2001 at pages 21 to 25. 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 to the rights and liberties of individuals?[71]

- **Clauses 32 and 33**

3. Clauses 32 and 33 extend the time within which proceedings for statutory offences committed against the *Timber Utilisation and Marketing Act 1987* may be instituted from 6 to 12 months after knowledge of the commission of an offence comes to the complainant's knowledge, and imposes a 7 year cap on the time within which proceedings may be brought. The committee referred to Parliament the question of whether the changes have sufficient regard to the rights of persons who may be prosecuted for the relevant offences.

4. The Minister responded as follows:

> *The Timber Utilisation and Marketing Act 1987 (TUMA) is designed to provide consumer protection through the control of the sale of certain timber. It is essential therefore that offence provisions in the Act balance this protection of the consumer against the rights of those accused of breaches of the Act.*
>
> *At the moment, consumers are not being protected because it has been proved that six months is not sufficient time to adequately investigate a complaint. An additional six months is essential if successful prosecutions are to be brought.*
>
> *At present the necessary balance has not been achieved. The potential offender is totally protected, he may never be prosecuted because an investigation cannot be completed. The additional six months proposed will restore that balance by ensuring that the matter can be adequately investigated. Whilst it can be considered that this amendment is more onerous on the accused, it is only to the extent necessary to protect consumers.*
>
> *The reason for the 7 year cap is to ensure that the balance is not tipped too far against the accused. Any flaw in timber caused by a breach of the TUMA should be identified within a 7 year period. It would therefore be unreasonable to put a person through the stress and potential expense of an investigation once that period has elapsed.*

5. The committee notes the Minister's response.

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

♦ **Clause 54 (proposed s.25, definition "disqualifying offence")**

6. Clause 54 of the bill amends the *Veterinary Surgeons Act 1936* by inserting proposed s.25, which lists a range of "disqualifying offences". These include "an offence relating to obtaining, administering, dispensing, prescribing or selling a drug or poison as prescribed under a regulation". The committee sought information from the Minister as to why the types of drug or poison-related offences under proposed s.25 cannot be stated in the bill itself rather than being left to regulations.

7. The Minister responded:

> *The prescription by regulation of the administration, dispensing and selling of certain drugs or poisons will not be done under the Veterinary Surgeons Act 1936. The regulations have already been made under relevant State and Commonwealth Health Acts.*
>
> *In Queensland it is done by the Health (Drugs and Poisons) Regulation 1996 which is made under the Health Act 1937. It is understood that that this method has been adopted because the list of drugs and poisons in these regulations is extensive and ever evolving. Since this is the method of listing controlled drugs and poisons throughout Australia, there is no option but to refer to those relevant regulations in these amendments.*

8. The committee notes the Minister's response.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[72]

♦ **Clause 37 (proposed s.2A(3))**

9. Proposed s.2A(3) (inserted by cl.37) provides that a regulation may declare certain animal husbandry or animal dentistry procedures to be exempted from the definition of "veterinary science", which then may be legally performed by persons who are not veterinary surgeons. The committee identified proposed s.2A(3) as a "Henry VIII clause". The committee does not generally endorse the use of such provisions and referred to Parliament the question of whether the provision has sufficient regard to the institution of Parliament.

10. The Minister provided the following response:

> *There is justification as to why exclusions from the definition of "veterinary science" are to be prescribed by regulation.*
>
> *Firstly, in an emergency, where it is necessary to initiate control measures very quickly, there may not be enough veterinary surgeons available to adequately respond to the emergency. In these circumstances it will be essential that other persons are able to carry out the procedures. In the case of a potential large scale disease outbreak, some examples that would necessitate response include:*
>
> - *TB Testing – this requires the injection of antigen intradermally and then reading results 3 days later; and*

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

- *Foot and Mouth Disease – testing requires procedures to take samples out of pharynx (throat).*

Secondly, there is a diverse range of agricultural practices that farmers should be free to carry out. Given the potential timeframe for an amendment to an Act to be prepared and passed by Parliament, the inability to prescribe by regulation an accepted practice could potentially undermine Queensland's competitiveness in the relevant field of agriculture. It would be impractical and unacceptable for affected farmers and industry to face such a delay.

11. The committee notes the Minister's response.

Is the legislation consistent with the principles of natural justice?[73]

♦ **Clause 46**

12. The committee noted that under proposed s.15F(3) and 3(A)) (inserted by cl.46) a party to proceedings before the Veterinary Tribunal of Queensland has a general entitlement to representation by a lawyer or another person. The committee noted that the Tribunal has the discretion to deny representation in certain circumstances, and that a decision to deny representation must be based upon a range of considerations stipulated in subsection (3A). The committee referred to Parliament the appropriateness of the Tribunal's ability to refuse a person's request to be represented by a lawyer or other person.

13. The Minister provided the following comments:

The ability of the Tribunal to determine that legal representation is not appropriate has been included to reflect the expanded functions of the tribunal following the enactment of these amendments.

Previously, the Tribunal only considered disciplinary matters, where it is clearly appropriate that a party to the proceedings have legal representation. The Tribunal's expanded functions, however, will include the approval of premises for use as a veterinary practice. This new function involves issues that are far more practical in nature and would rarely take the involvement of a lawyer to resolve.

Given this background, the power to exclude lawyers from certain proceedings is designed to assist parties to proceedings by ensuring they are not put to unnecessary expense when purely practical matters are being discussed. The rights of parties to proceedings are adequately safeguarded against any abuse of this clause by the matters set out in sub clause (3A) that the Tribunal must have regard to in making its decision about legal representation. Those matters are all clearly designed to relieve any unnecessary burden on a party to the proceedings.

14. The committee notes the Minister's response.

[73] 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.

This concludes the Scrutiny of Legislation Committee's 7th report to Parliament in 2001.

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.

Warren Pitt MP
Chair

30 October 2001

APPENDICES

Appendix A	—	Ministerial Correspondence
Appendix B	—	Terms of Reference
Appendix C	—	Meaning of “Fundamental Legislative Principles”
Appendix D	—	Details of Bills considered by the committee.

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[74] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[75].

(2) The committee's area of responsibility includes monitoring generally the operation of—

(a) the following provisions of the *Legislative Standards Act 1992*–

- section 4 (Meaning of "fundamental legislative principles")
- part 4 (Explanatory notes); and

(b) the following provisions of the *Statutory Instruments Act 1992*–

- section 9 (Meaning of "subordinate legislation")
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)
- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 10 (Transitional)

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74 "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.

75 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.[76]

(2) The principles include requiring that legislation has sufficient regard to –

1. rights and liberties of individuals; and
2. 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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[76] 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 – DETAILS OF BILLS CONSIDERED BY THE COMMITTEE

Details of all bills considered by the committee since its inception in 1995 are contained in the Bills Register kept by the Committee's Secretariat.

Information about particular bills (including references to the Alert Digests in which they were reported on) can be obtained from the Secretariat upon request.