



SCRUTINY OF LEGISLATION COMMITTEE

Report No. 26

Scrutiny of Bills for Constitutional Validity

December 2002

1. BACKGROUND

- 1.1. The Second Reading debate on the *Liquid Fuel Supply Amendment Bill 2002*, a private member's bill, took place on 30 October and 7 November 2002. The committee had previously reported on the bill in its Alert Digest No. 8 of 2002 at pages 16 to 17.
- 1.2. During the debate, several members made statements suggesting they believed that the lack of any reference in the committee's report to the issue of a bill's constitutional validity, was an indication that the committee had no concerns regarding that matter.¹
- 1.3. In the circumstances, the committee feels obliged to clarify this aspect of its scrutiny function, in order to assist members of Parliament and other readers of its reports.

2. THE COMMITTEE'S CHARTER

- 2.1. The committee's statutory charter, which is set out in section 103 of the *Parliament of Queensland Act 2001*, includes the function of scrutinising all bills for compliance with the "fundamental legislative principles" (FLPs). The committee reports its scrutiny of bills to Parliament *via* its Alert Digests.
- 2.2. The FLPs are defined in section 4 of the *Legislative Standards Act 1992*. Subsections (1) and (2) of that section provide as follows:
 - 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.*
 - 4.(2) *The principles include requiring that legislation has sufficient regard to –*
 - (a) *the rights and liberties of individuals; and*
 - (b) *the institution of Parliament*
- 2.3. Subsections (3) and (4) then respectively list examples of the two more general FLPs mentioned in subsection (2).
- 2.4. It will be noted that section 4 makes no express reference to the issue of constitutional validity. However, because FLPs are defined in broad terms in subsections (1) and (2) and because the matters listed in subsections (3) and (4) are only examples, this does not of itself indicate that the committee lacks capacity to consider this issue.

¹ See *Queensland Parliamentary Debates*, 30 October 2002, pp 4285 and 4295, and 7 November 2002, pp 4599-4600 and 4607.

- 2.5. Indeed, both current and previous Scrutiny of Legislation Committees have proceeded on the basis that the FLPs encompass constitutional validity, although they have not stated this view expressly.

3. THE COMMITTEE'S APPROACH

- 3.1. The constitutional validity of legislation in the Australian context is a complex and difficult subject. An Act of the Queensland Parliament could theoretically be invalid on several distinct grounds, namely:
- it might exceed the Parliament's competence to legislate extra-territorially
 - it might conflict with the entrenched "manner and form" provisions of the *Constitution of Queensland 2001*
 - it might offend, in any of a large number of ways, against the provisions of the *Commonwealth Constitution* or the *Australia Acts 1986*.
- 3.2. The committee considers it would be a breach of the FLPs for Parliament to enact laws which are clearly constitutionally invalid. Such cases, however, are likely to be comparatively rare. On the other hand, there will be a much larger number of cases in which there might simply be an element of doubt (even significant doubt) about a bill. In the committee's view, it would not generally be a breach of the FLPs for Parliament to enact bills of the latter type.
- 3.3. Two further factors are relevant from the committee's standpoint.
- 3.4. Firstly, the committee has neither the significant expertise required to investigate the constitutional validity of every bill which comes before it, nor the considerable financial resources which would be required to obtain such expertise externally.
- 3.5. Finally, in most cases time would not permit such an investigation.²
- 3.6. In light of the considerations mentioned above, the general approach of past and present committees to the issue of constitutional validity has been not to conduct a detailed examination of that aspect of bills, but to consider and report on it only where it is readily apparent such an issue exists. This might, for example, be as a result of the committee's own scrutiny of a bill, or because the matter dealt with by the bill is known to have been the subject of recent judicial consideration, or because the issue is raised in the Explanatory Notes or in the Minister or Member's Second Reading speech.
- 3.7. Where the committee does report on an issue about the constitutional validity of a bill, its approach has been almost always been to query the sponsoring Minister as to whether he or she is confident the bill is constitutionally valid.³
- 3.8. Given the matters outlined above, the lack of any mention of the issue of constitutional validity in the committee's report on a bill cannot be interpreted as an implicit statement that the committee is satisfied the bill is constitutionally valid.

² Standing Orders allow second reading debate on a bill to resume as early as 13 calendar days after its introduction.

³ See, for example, the committee's report on the *Motor Accident Insurance Bill 2000*, Alert Digest No 6 of 2000 at pp 19-20.

4. CONCLUSION

- 4.1. Given recent events, it has become essential that the committee expressly declare its position on the matter of its scrutiny of bills for constitutional validity.**
- 4.2. The committee considers that constitutional validity falls within the fundamental legislative principles, and that accordingly it has the technical capacity to examine and report on that aspect of bills.**
- 4.3. However, for the reasons mentioned in this report, the committee does not generally conduct a detailed examination of the constitutional validity of bills.**
- 4.4. In consequence of this approach, the lack of any mention of the issue of constitutional validity in the committee's report on a bill is not to be taken as an indication that the committee:**
 - has conducted a detailed examination of that matter in relation to the bill; or**
 - is satisfied that the bill is constitutionally valid.**

Warren Pitt MP
Chair

4 December 2002

**SCRUTINY OF LEGISLATION COMMITTEE
MEMBERSHIP**

50TH PARLIAMENT, 1ST SESSION

Chair:	Mr Warren Pitt MP, Member for Mulgrave,
Deputy Chair:	Mr Peter Wellington MP, Member for Nicklin
	Ms Bonny Barry MP, Member for Aspley
	Ms Margaret Keech MP, Member for Albert
	Ms Rosa Lee Long MP, Member for Tablelands
	Mr Jeff Seeney MP, Member for Callide
	Mrs Carryn Sullivan MP, Member for Pumicestone
Legal Advisers to the Committee:	Mr Tim Carmody SC
	Professor Gerard Carney
	Mr Robert Sibley
	Ms Margaret Stephenson
Committee Staff:	Mr Christopher Garvey, Research Director
	Ms Anita Sweet, Principal Research Officer
	Ms Carolyn Heffernan / Ms Lynn Knowles, Executive Assistant



Scrutiny of Legislation Committee
Level 6, Parliamentary Annexe
Alice Street
Brisbane QLD 4000
Phone: 07 3406 7671
Fax: 07 3406 7500
Email: scrutiny@parliament.qld.gov.au