



## SCRUTINY OF LEGISLATION COMMITTEE

# ALERT DIGEST



Tabled and Ordered to be Printed  
26 November 2002

Issue No 11 of 2002

# SCRUTINY OF LEGISLATION COMMITTEE

## MEMBERSHIP

### 50<sup>TH</sup> PARLIAMENT, 1<sup>ST</sup> 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 Meg Hoban, Senior Research Officer (part-time)
	Ms Carolyn Heffernan/Ms Lynn Knowles, Executive Assistants



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](mailto:scrutiny@parliament.qld.gov.au)

## TABLE OF CONTENTS

<b>TERMS OF REFERENCE .....</b>	<b>v</b>
<b>FUNDAMENTAL LEGISLATIVE PRINCIPLES .....</b>	<b>v</b>
<b>PART I - BILLS .....</b>	<b>1</b>
<b>SECTION A – BILLS REPORTED ON .....</b>	<b>1</b>
<b>1. Discrimination Law Amendment Bill 2002.....</b>	<b>1</b>
Background.....	1
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>1</i>
◆ Clauses 4 and 5 (conferral of equal legal status upon various forms of relationships).....	1
◆ Clauses 22 and 24 (extension of vilification laws) .....	2
◆ Clauses 14 to 21 inclusive (extension of prohibited grounds of discrimination, and amendments to exemptions) .....	3
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>	<i>5</i>
◆ Clause 43 (proposed s.269(2)) .....	5
<i>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? .....</i>	<i>6</i>
◆ Clause 72.....	6
<b>2. Education (Miscellaneous Amendments) Bill 2002 .....</b>	<b>7</b>
Background.....	7
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>	<i>7</i>
◆ Clauses 2, 6 and 28 to 33 inclusive.....	7
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>8</i>
◆ Clause 36.....	8
<i>Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? .....</i>	<i>9</i>
◆ Clauses 39 and 40 .....	9
<b>3. Environmental Legislation Amendment Bill 2002 .....</b>	<b>10</b>
Background.....	10
<i>Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? .....</i>	<i>10</i>
◆ Clause 9 (proposed ss.49 to 83 inclusive).....	10
<b>4. Industrial Relations Amendment Bill 2002.....</b>	<b>12</b>
Background.....	12
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>12</i>

♦ Clauses 6 and 7 .....	12
<b>5. Queensland Building Services Authority and Other Legislation Amendment Bill 2002 .....</b>	<b>13</b>
Background.....	13
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>13</i>
♦ Clauses 32 to 34 inclusive.....	13
<i>Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?.....</i>	<i>14</i>
♦ Clauses 6 and 36 .....	14
<i>Does the legislation provide appropriate protection against self-incrimination?.....</i>	<i>15</i>
♦ Clauses 22(4) and 38 (proposed ss.106B and 106C) .....	15
<i>Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant? .....</i>	<i>15</i>
♦ Clause 39.....	15
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>	<i>16</i>
♦ Clauses 43 (proposed ss.18, 19, 21, 22, 23, 24 and 25) and 52 .....	16
<b>6. Sexual Offences (Protection of Children) Amendment Bill 2002.....</b>	<b>17</b>
Background.....	17
Overview of the bill.....	17
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>17</i>
<i>Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?.....</i>	<i>17</i>
♦ Clause 17 (Proactive entrapment strategies).....	17
♦ Clause 17 (proposed s.218A(8))(Reversal of the onus of proof).....	19
<i>Is the legislation unambiguous and drafted in a sufficiently clear and precise way? .....</i>	<i>19</i>
♦ Clause 17 (proposed s.218A) (Extraterritoriality) .....	19
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>20</i>
<i>Is the legislation unambiguous and drafted in a sufficiently clear and precise way? .....</i>	<i>20</i>
♦ Clause 18.....	20
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?.....</i>	<i>21</i>
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>	<i>21</i>
<i>Is the legislation unambiguous and drafted in a sufficiently clear and precise way? .....</i>	<i>21</i>
♦ Clauses 21 and 23 .....	21
<b>7. Statute Law (Miscellaneous Provisions) Bill 2002.....</b>	<b>23</b>
Background.....	23
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively? .....</i>	<i>23</i>
♦ Clause 2.....	23
<b>8. Statutory Bodies Financial Arrangements Amendment Bill 2002.....</b>	<b>24</b>
Background.....	24
<b>9. Transport Legislation Amendment Bill (No.2) 2002 .....</b>	<b>25</b>

Background.....	25
<i>Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?</i> .....	25
◆ Clauses 4 and 5 .....	25
<i>Does the legislation provide appropriate protection against self-incrimination?</i> .....	26
◆ Clause 17.....	26
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?</i> .....	27
◆ Clause 19.....	27
<b>10. Treasury Legislation Amendment Bill 2002 .....</b>	<b>29</b>
Background.....	29
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?</i> .....	29
◆ Clause 21.....	29
◆ Clauses 26 and 27 .....	30
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?</i> .....	31
◆ Clause 22.....	31
<b>11. Weapons and Another Act Amendment Bill 2002.....</b>	<b>33</b>
Background.....	33
<b>12. WorkCover Queensland Amendment Bill 2002 .....</b>	<b>34</b>
Background.....	34
<i>Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?</i> .....	34
◆ Clause 12.....	34
<i>Does the legislation have sufficient regard to the institution of Parliament?</i> .....	35
◆ Clauses 8 and 14 .....	35
<b>SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE .....</b>	<b>37</b>
<b>13. Racing Bill 2002 .....</b>	<b>37</b>
Background.....	37
<i>Does the legislation have sufficient regard to the rights and liberties of individuals?</i> .....	37
◆ Clauses 8, 9, 10, 213 and 227 .....	37
◆ Clause 317.....	38
◆ Clause 326.....	38
◆ Clause 341.....	39
<i>Does the legislation confer immunity from proceeding or prosecution without adequate justification?</i> .....	40
◆ Clause 191.....	40
<i>Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?</i> .....	40
◆ Clauses 270 – 304 .....	40
<i>Does the legislation provide appropriate protection against self-incrimination?</i> .....	41
◆ Clause 304(2).....	41

<i>Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?</i> .....	42
♦ Clause 339 .....	42
<i>Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?</i> .....	42
♦ Clause 397 .....	42
<i>Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficient defined and subject to appropriate review?</i> .....	43
♦ Clauses 24, 58, 131 and 141 .....	43
<b>SECTION C – AMENDMENTS TO BILLS</b> .....	<b>44</b>
<i>(NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST)</i> .....	44
<b>APPENDIX</b>	
<b>PART II – SUBORDINATE LEGISLATION</b> .....	<b>45</b>
<b>SECTION A – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCERNS</b> .....	<b>45</b>
<b>SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES (including list of correspondence)</b> .....	<b>46</b>

**NOTE:**

*Details of all bills considered by the committee since its inception in 1995 can be found in the Committee's Bills Register. Information about particular bills (including references to the Alert Digests in which they were reported on) can be obtained from the Committee Secretariat upon request.*

*Alternatively, the Bills Register may be accessed via the committee's web site at:*

**[HTTP://WWW.PARLIAMENT.QLD.GOV.AU/COMMITTEES/SLC/SLCBILLSREGISTER.HTM](http://www.parliament.qld.gov.au/committees/slc/slcbillsregister.htm)**

## TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established by statute on 15 September 1995. It now operates under the provisions of the *Parliament of Queensland Act 2001*.

Its terms of reference, which are set out in s.103 of the *Parliament of Queensland Act*, are as follows:

- (1) *The Scrutiny of Legislation Committee's area of responsibility is to consider—*
- (a) *the application of fundamental legislative principles<sup>1</sup> to particular Bills and particular subordinate legislation; and*
  - (b) *the lawfulness of particular subordinate legislation; by examining all Bills and subordinate legislation.*
- (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).*

## FUNDAMENTAL LEGISLATIVE PRINCIPLES

The "fundamental legislative principles" against which the committee assesses legislation are set out in section 4 of the *Legislative Standards Act 1992*.

Section 4 is reproduced below:

- 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.<sup>2</sup>*

<sup>1</sup> "Fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, section 4(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

\* The relevant section is extracted overleaf.

<sup>2</sup> 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.

- (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.*



# **PART I**

## **BILLS**

**PART I - BILLS****SECTION A – BILLS REPORTED ON****1. DISCRIMINATION LAW AMENDMENT BILL 2002****Background**

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 6 November 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:
  1. *To amend a range of Queensland laws to ensure that de facto partners (regardless of their sexual orientation) have rights and obligations consistent with those of married spouses where possible.*
  2. *To amend the Anti-Discrimination Act 1991 (ADA) to improve its operation and achieve greater consistency with similar laws in other States; and*
  3. *To amend the Registration of Births, Deaths and Marriages Act 1962 to allow post-operative transgenders to obtain new birth certificates in their reassigned sex.*
3. The bill amends a large number of statutes in a variety of ways.
4. The major initiatives to which it gives effect are considered below, in terms of the fundamental legislative principle issues which they raise.

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>3</sup>****◆ Clauses 4 and 5 (conferral of equal legal status upon various forms of relationships)**

5. The bill, firstly, endeavours in a general sense to equate the rights associated with marriage relationships and two other forms of relationship, namely, *de facto* heterosexual relationships and same sex relationships.
6. It does this by inserting into the *Acts Interpretation Act* new s.32DA, which contains generic definitions of “*de facto* partner” and “*de facto* relationship”, and by amending s.36 of that Act to insert a definition of “spouse” which includes a *de facto* partner.
7. The definition of “*de facto* partner” in proposed s.32DA lists a number of criteria which may be taken into account in determining whether a person has that status. The section incorporates same sex partners into the concept by providing (in subsection (5)) that “the gender of the persons concerned is not relevant”.
8. The bill ensures that these definitions will from now on be applicable generally in the interpretation of all current Acts by declaring (in s.32DA(6)) that:

<sup>3</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

*In an Act enacted before the commencement of this section, a reference to a spouse includes a reference to a de facto partner as defined in this section unless the Act expressly provides to the contrary.*

9. The bill then proceeds to specifically amend various current Acts to insert references to “a spouse”. In most such cases, it qualifies the new general interpretational rules by requiring that, for the purposes of the particular Act, the *de facto* relationship must have existed for a period of at least 2 years.
10. The committee is generally supportive of the right of persons to equality before the law, and to equal protection by the law. The committee has made this point in a number of its reports on bills.<sup>4</sup>
11. The committee considers the general thrust of the relevant provisions of this bill is consistent with this principle.
12. Of course, this legislative initiative will ultimately operate in a large number of specific contexts as diverse as organ transplantation and workers compensation. It appears that in many (and perhaps most) such contexts the bill’s enhancement of the rights of *de facto* heterosexual couples and same sex couples will not result in any direct reduction of the current legislated rights of other individuals. The Explanatory Notes, which are to be commended in this regard, have identified two contexts, namely intestacy laws and some superannuation schemes, where that may occur. However, as the Notes also point out, the 2 year minimum cohabitation period which the bill inserts into most of the specific statutes it amends, is a more stringent requirement than some of these Acts currently impose.

13. The committee notes that cls.4 and 5 of the bill, and various clauses which amend specific statutes, endeavour in a general sense to equate the rights associated with marriage relationships, *de facto* heterosexual relationships and same sex relationships.
14. The committee considers these provisions are consistent with the principle of equality before the law and equal protection by the law, which the committee supports.

◆ **Clauses 22 and 24 (extension of vilification laws)**

15. Clauses 22 and 24 of the bill, which amend ss.124A and 131 of the *Anti-Discrimination Act 1991*, extend current vilification laws (which relate to race and religion) so as to include vilification on the basis of sexuality or gender identity.
16. Vilification provisions were originally inserted in the Act by the *Anti-Discrimination Amendment Bill 2001*, on which the committee reported in Alert Digest No. 1 of 2001 at pages 3 to 15 inclusive. The Attorney’s response to the committee’s report was published in Alert Digest No. 2 of 2001 at pages 14 to 24 inclusive. The various issues raised by vilification laws were canvassed at length in that report and the Attorney’s response, to

<sup>4</sup> The committee, after its establishment in 1995, several times criticized provisions of bills which conferred immunity upon public officials if they merely acted “in good faith”, without regard to possible negligence on their part. That has generally ceased to be a live issue because bills nowadays routinely require both good faith and an absence of negligence before immunity is conferred. The committee has also queried the appropriateness of a provision of another bill on the basis that it drew a distinction, for the purposes of stamp duty exemption, between one class of share investors and all other such investors (see the committee’s report on the *Revenue and Other Legislation Amendment Bill 1998*, Alert Digest No 1 of 1999 at page 25).

which readers are referred. The issues raised by the extension of such laws to vilification based on sexuality and gender identity are essentially identical.

17. The committee notes that cls.22 and 24 of the bill extend current vilification provisions of the *Anti-Discrimination Act* to include vilification on the grounds of sexuality or gender identity.
18. The committee refers to Parliament the question of whether these provisions of the bill have sufficient regard to the rights and liberties of persons subject to such vilification, and to the rights and liberties of other persons (including the right to free speech).

◆ **Clauses 14 to 21 inclusive (extension of prohibited grounds of discrimination, and amendments to exemptions)**

19. Clauses 14 to 21 inclusive of the bill also amend the *Anti-Discrimination Act 1991* in various respects.
20. Clause 14 modifies the attributes (listed in s.7) upon which discrimination is prohibited by:
  - replacing the attribute “religion” with that of “religious belief or religious activity”
  - broadening the application of the prohibition against discrimination based on breastfeeding (s.7(2) of the Act is omitted, thereby removing the restrictions which it currently imposes); and
  - including new prohibited discrimination attributes, namely, “gender identity”, “sexuality” and “family responsibilities”.
21. The bill also makes a number of significant amendments to the current exemption provisions of the Act, which authorise discrimination in certain contexts despite the Act’s general prohibition.
22. Clause 19 inserts proposed s.45A, which provides that the Act’s general prohibition on discrimination in the provision of goods and services does not apply to the provision of “assisted reproductive technology services”, provided the discrimination is on the basis of marital status or sexuality. Assisted reproductive technology services is defined as including in-vitro fertilisation, artificial insemination and other associated services. Clause 21 amends s.111 to provide capacity to restrict participation in a competitive sporting activity on the basis of gender identity, subject to stipulated conditions.
23. By way of contrast, the bill reduces the scope of a number of current exemption provisions, and deletes others.
24. Specifically, the bill makes the following changes:
  - Section 28 of the Act currently permits discrimination in work and work-related areas on the basis of “lawful sexual activity”, where the work involves the care or instruction of minors and certain other conditions are met. Clause 16 of the bill amends s.28 in such a way that, in conjunction with the bill’s amendment of the definition of “lawful sexual activity”, it will now only permit discrimination where the person discriminated against is a sex worker or a transgender person. It will no longer authorise discrimination against, in particular, homosexual persons, unless new conditions

stipulated in proposed s.28(2) are satisfied. These essentially require that the person has been convicted of an offence of a sexual nature involving a child, or has been disqualified from working with children under an Act.

- Clause 17 of the bill deletes s.29 of the Act. Section 29 currently permits educational and health-related institutions under the direction or control of religious bodies to discriminate (other than on the basis of age, race or impairment) in relation to work in such institutions, subject to certain conditions being met.
  - Clause 18 of the bill deletes s.42 of the Act. Section 42 presently permits “non-State school authorities” to discriminate against persons in the area of education (other than on the basis of race or impairment). This provision relates to the admission and subsequent treatment of students in such institutions.
  - Clause 20 of the bill amends s.109 of the Act, which deals primarily with matters related to the ordination and training of ministers and the performance of acts in accordance with religious observance or practice. Clause 20 provides that the generally-framed exemption in paragraph (d), which permits discrimination in acts by religious bodies subject to certain conditions, does not apply in work or work-related areas or in the education area.
25. Whilst the amendments mentioned above are of potentially more general application, their practical impact (as judged by media reporting since the bill was introduced) may well be in relation to policies adopted by schools operated by religious bodies, in respect of the employment of staff who are in *de facto* heterosexual relationships, or who are homosexual. Partially for this reason, the following discussion is primarily directed to this aspect of the amendments.
26. While such schools will retain the right to insist, if they so choose, that staff employed in their schools be of a particular religion,<sup>5</sup> it appears that their capacity to discriminate against staff (or applicants for employment), who are in heterosexual *de facto* relationships or who are homosexual, will cease.
27. This matter would appear to give rise to two principal and conflicting rights issues, namely:
- that persons should not be subject to discrimination in employment on the basis of matters related to their private lives, especially where they do not actively draw attention to such matters in their work environment
  - that private educational institutions, particularly those conducted by religious bodies, should be able to ensure that persons employed in those institutions are compatible with the values of the institution, and to select or retain staff accordingly.
28. The committee considers that in the final analysis, the appropriateness of these and the other changes made to the *Anti-discrimination Act* by cls.14 to 21 of the bill, is a matter for Parliament to decide.
29. The committee notes that cl.14 to cl.21 of the bill amend the grounds of discrimination prohibited by, and the exemptions available under, the *Anti-Discrimination Act 1991*.
30. The committee refers to Parliament the question of whether those amendments have

<sup>5</sup> Clause 15 amends s.25 of the Act by inserting Example 4, which expressly states this as an example of a “genuine occupational requirement” which can be imposed under the section.

sufficient regard to the rights and liberties of the various individuals affected by them.

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>6</sup>**

◆ **Clause 43 (proposed s.269(2))**

31. Clause 43 inserts transitional provisions relating to the amendments which the bill makes to the *Anti-discrimination Act 1991*. Proposed s.269(2) provides that, apart from the essentially procedural provisions mentioned in s.269(1), the amendments made by the bill “apply for the purposes of a complaint, whether the complaint was received by the commissioner before or after the commencement of this section”.
32. The changes to the prohibited grounds of discrimination, and to the range of exemptions available, would therefore seem to be applicable in cases where a complaint has already been made as at the date of commencement of the bill.<sup>7</sup> Insofar as the amendments made by the bill limit or remove various statutory permissions to discriminate, it would seem at least theoretically possible that in regard to some such current complaints, the position of the employing institution in particular might be adversely affected. For example, there might be an unresolved current complaint made by a teacher in a *de facto* heterosexual relationship.
33. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has “sufficient regard”, the committee typically has regard to the following factors:
  - whether the retrospective application is adverse to persons other than the government; and
  - whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.

34. The committee notes that under cl.43 some amendments which the bill makes to the *Anti-Discrimination Act* may have retrospective effect in certain circumstances.
35. The committee seeks information from the Attorney as to whether any party to a current complaint is likely to be adversely affected by the enactment of this bill.

<sup>6</sup> 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.

<sup>7</sup> On the general principles of statutory interpretation, the amendments made by the bill to the *Anti-Discrimination Act* in relation to the prohibited grounds of discrimination and the exemptions, would not apply to acts of discrimination occurring prior to the commencement date. Proposed s.269(2) makes an exception in relation to such acts, where a complaint has been made.

**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?<sup>8</sup>**

◆ **Clause 72**

36. Clause 72, which is one of a number of provisions of the bill amending the *Registration of Births, Deaths and Marriages Act 1962*, provides for changes to the Register of Births, Deaths and Marriages and reregistration of persons who have undergone a change of sex. Proposed s.28D provides that the registrar general must decide an application made under s.28B for such change or reregistration.

37. However, the bill does not expressly provide any form of merits review of the registrar general's decision, and an examination of the Act does not indicate that any such review is currently available under the Act.

38. The committee notes that cl.72 of the bill provides for the registrar general to decide applications for amendment of the Register of Births, Deaths and Marriages and reregistration of persons who have undergone a change of sex. However, no form of merits review appears to be provided.

39. The committee seeks information from the Minister as to whether any form of merits review is available in relation to such decisions.

---

<sup>8</sup> 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.

## 2. EDUCATION (MISCELLANEOUS AMENDMENTS) BILL 2002

### Background

1. The Honourable A M Bligh MP, Minister for Education, introduced this bill into the Legislative Assembly on 7 November 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*to amend eleven Acts relating to different areas of the Queensland education portfolio.*

### Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>9</sup>

#### ◆ Clauses 2, 6 and 28 to 33 inclusive

3. Clause 2 states that cls.6 and 28 to 33 of the bill “are taken to have commenced on 1 January 2002”.
4. The relevant provisions will therefore have retrospective effect.
5. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has “sufficient regard”, the committee typically has regard to the following factors:
  - whether the retrospective application is adverse to persons other than the government; and
  - whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.
6. In relation to these provisions, the Explanatory Notes state:

*All of the amendments to the transition provisions in the Education (Accreditation of Non-State Schools) Act 2001 will apply retrospectively from 1 January 2002. These amendments will confer rights upon applicants rather than remove rights and therefore their retrospective nature is justifiable.*

7. This statement appears to the committee to be correct.

8. The committee notes that cl.2 of the bill gives retrospective operation to a number of its provisions.
9. The relevant provisions do not appear to be adverse to any person, and the committee

<sup>9</sup> 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.



accordingly has no concerns in relation to them.

### Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>10</sup>

#### ◆ Clause 36

10. Clause 36 amends current s.144 of the *Education (General Provisions) Act 1989*, which imposes restrictions on the establishment in Queensland of places for teaching overseas curricula. Proposed s.144(3A)(b) provides that it is a condition of an approval for an “international educational institution” to be conducted in Queensland, that:

*A person must not teach at the institution if the Minister considers that the person may pose a risk to the safety of children at the institution.*

11. In relation to this provision, the Explanatory Notes state:

*This condition is intended to ensure that teachers at the IEI are suitable persons to be teaching children attending the IEI.*

12. Whilst the provision confers a very significant discretion on the Minister, the teachers concerned will presumably not be teachers registered in this state. On that basis, the conferral of such a ministerial power may well be justifiable.
13. In addition, proposed s.144(3C) provides that for the purpose of assisting the Minister to establish whether a teacher at the relevant institution poses a risk to the safety of children at the institution, the Minister may ask the commissioner of the police service for a written report about the “criminal history” of a person teaching at that institution. Section 144(3D) provides that the commissioner of the police service, if asked by the Minister, must give the Minister a written report about the person’s criminal history.
14. A definition of the term “criminal history” is also inserted by cl.36. This definition defines the term in such a way as to displace the “rehabilitation period” provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, which means that all convictions, no matter how old, will have to be disclosed. The definition also includes charges which have not resulted in a conviction. In relation to these matters, the Explanatory Notes state:

*The (provision) is justified on the grounds that it is necessary to have additional safeguards where an adult is charged with the supervision of children to minimise any risk of harm to children. The benefits of employing a careful screening approach on people who will be in regular contact with children far outweighs the infringement of liberties.*

15. The committee notes that cl.36 of the bill imposes a statutory condition which confers a wide discretion upon the Minister to direct that a person not teach at an “international educational institution” in Queensland if the Minister considers that person may pose a risk to the safety of children at the institution.
16. The committee considers that, in the case of such institutions, the conferral of this discretion is not objectionable.

<sup>10</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

17. The committee further notes that cl.36 enables the Minister to obtain the “criminal history” of such teachers, and defines that term in such a way as to exclude the rehabilitation provisions of the *Criminal Law (Rehabilitation of Offenders) Act*, and to include charges as well as convictions.
18. The committee refers to Parliament the question of whether these latter provisions, in the circumstances, have sufficient regard to the rights and liberties of the teachers concerned.

**Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?<sup>11</sup>**

◆ **Clauses 39 and 40**

19. Clauses 39 and 40 of the bill amend the *Education (Overseas Students) Act 1996*.
20. Clause 39 amends s.8 of the Act to include a provision that it is a statutory condition of a “registered provider’s” registration that the chief executive be allowed “to enter, at any reasonable time, a place at which the registered provider delivers, or intends to deliver, a course”. Such inspection must be for the purpose of inspecting the place for the purposes of the Act.
21. Clause 40 inserts proposed s.17A, which reinforces cl.39 by providing the chief executive with a statutory power of entry to the relevant places. The power of entry may be exercised “at any reasonable time” and is for the purpose of ensuring the place is suitable for delivering the course and that the staffing and resources are adequate for that purpose. Proposed s.17A(3) provides that if the chief executive inspects the place, the registered provider must pay the chief executive the fee prescribed under a regulation.
22. In order to exercise the entry power, the chief executive need not obtain a warrant or the consent of the registered provider.
23. The committee notes that cl.40 confers upon the chief executive wide powers of entry to places at which a registered provider is delivering a course, and that cl.39 makes it a condition of the registered provider’s registration that he or she allow such access. The statutory power of entry may be exercised without either a warrant or the consent of the registered provider.
24. The committee draws to the attention of Parliament the nature of this entry power.

<sup>11</sup> 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.

### 3. ENVIRONMENTAL LEGISLATION AMENDMENT BILL 2002

#### Background

1. The Honourable D MacM Wells MP, Minister for Environment, introduced this bill into the Legislative Assembly on 7 November 2002.
2. The object of the bill, as indicated by the Minister in his Second Reading Speech, is:

*(to provide) for amendments to five environmental management-related statutes as a package to continue the environmental reforms of the Government.*

*While these amendments do not constitute major changes to the legislation, they further refine the way in which the legislation can benefit conservation and the public enjoyment of Queensland's parks and forests.*

#### **Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?<sup>12</sup>**

##### ◆ **Clause 9 (proposed ss.49 to 83 inclusive)**

3. Clause 9 is one of a number of clauses of the bill which amend the *Brisbane Forest Park Act 1977*.
  4. Clause 9 inserts provisions which confer upon authorised officers powers of entry which extend somewhat beyond situations where the occupier of premises consents or where a warrant is obtained, in that it permits entry to be made to a public place at a time when it is open to the public. It also confers a particular power permitting entry to vehicles at or about the park or a public place or road in or adjoining the park.
  5. Given the broad definition of the term "place" inserted by cl.10 in the Dictionary to the Act, an authorised officer can enter a "place" which is neither in nor adjacent to Brisbane Forest Park, provided it is for a purpose for which the entry powers are conferred.
  6. Proposed ss.59 to 80 inclusive confer an extensive range of post-entry powers, generally similar to those employed in a number of bills previously examined by the committee.
  7. While these powers are quite wide, the committee recognises the significant efforts which have been made in drafting many of these provisions to take account of fundamental legislative principles.
8. The committee notes that cl.9 of the bill confers upon authorised officers under the *Brisbane Forest Park Act* powers of entry which extend somewhat beyond situations where the occupier consents or a warrant has been obtained. The committee further notes that once entry has been effected, the bill confers on authorised officers a wide range of additional

<sup>12</sup> 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

powers.

9. The committee draws to the attention of Parliament the nature and extent of these entry and post-entry powers.

## 4. INDUSTRIAL RELATIONS AMENDMENT BILL 2002

### Background

1. The Honourable G R Nuttall MP, Minister for Industrial Relations, introduced this bill into the Legislative Assembly on 7 November 2002.
2. The purpose of the bill, as indicated by the Explanatory Notes, is:

*to improve the operations of the Queensland Industrial Relations Commission.*

### Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>13</sup>

#### ◆ Clauses 6 and 7

3. The bill introduces revised arrangements for the management and administration of the Queensland Industrial Relations Commission. The current position of commissioner administrator is abolished, provision is made for the appointment of persons as deputy presidents, and responsibility for administration of the commission is conferred upon its vice president.
4. Proposed s.733(1), inserted by cl.7, provides that:
  - (1) *The person who, immediately before the commencement of (the bill), was the commissioner administrator, continues to be a commissioner after the commencement.*
5. The committee notes that under s.3A(1)(b) of the *Judges (Salaries and Allowances) Act 1967*, the salaries and allowances payable to the various members of the commission including the commissioner administrator are set by the Salaries and Allowances Tribunal. That Act further provides that “the total of the annual rates of salary and allowances payable must not be reduced by a determination (of the Tribunal)” (s.3A(2)).
6. Whilst the incumbent commissioner administrator will continue as a commissioner, it is not clear to the committee whether he or she will incur any loss of salary or allowances by virtue of the provisions of this bill.

7. The committee notes that cls.6 and 7 of the bill abolish the position of commissioner administrator, although the incumbent will continue as a commissioner.
8. The committee seeks information from the Minister as to whether the incumbent commissioner administrator will incur any loss of salary or allowances as a result of the enactment of this bill.

<sup>13</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

## 5. QUEENSLAND BUILDING SERVICES AUTHORITY AND OTHER LEGISLATION AMENDMENT BILL 2002

### Background

1. The Honourable R E Schwarten MP, Minister for Public Works and Minister for Housing, introduced this bill into the Legislative Assembly on 29 October 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*To amend the Queensland Building Services Authority Act 1991 and to make a number of administrative amendments to provide for the ongoing maintenance of proper standards in the building industry.*

### Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>14</sup>

#### ◆ Clauses 32 to 34 inclusive

3. The bill inserts into the *Queensland Building Services Authority Act 1991* a number of provisions designed, as indicated by the Minister in his Second Reading Speech, to extend provisions (inserted in 1999) which enable persons to be banned from the building industry for a 5 year period for demonstrated unsuitability. The bill will enable such persons, if they persist with unacceptable behaviour, to be banned for life.
4. Specifically, cls.31 to 34 inclusive respectively insert Parts 3B, 3C and 3D and 3E into the Act. These create the categories of:
  - “permanently excluded individuals”
  - “convicted company officers”
  - “banned individuals” and
  - “disqualified individuals”.
5. The new Parts contain detailed provisions related to each category. In the words of the Minister:

*The bill goes a number of steps further than the approach taken in 1999. This bill provides for life bans for second or subsequent financial failures, life bans for persons convicted of asset stripping, bans of three years or life for persons who carry out grossly defective building work and bans of three years or life for those who consistently fail to comply with their contractual and payment obligations.*

6. These provisions, which are designed to protect consumers, will obviously have a very significant impact on any building licensees against whom they are invoked.

---

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

7. The committee notes that cls.31 to 34 inclusive of the bill insert provisions which enable building licensees to be banned from the industry for life in the event of repeated behaviour of an unacceptable nature.
8. The committee refers to Parliament the question of whether the provisions inserted by these clauses have sufficient regard to the rights of building licensees, as well as those of consumers.

**Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?<sup>15</sup>**

◆ **Clauses 6 and 36**

9. Clause 6 replaces s.9A, which relates to the Board's policies. Under the existing section, board policies are divided into two categories, one of which was simply made by the Board and gazetted, and the other of which is deemed to be subordinate legislation. The new section removes the distinction between the two categories of policy, and provides that all policies must be made in the same way. This requires that all policies now must be approved by regulation, although none of them now have to be actually made in that manner.
10. Clause 36 amends s.69 of the Act to provide that terms and conditions of insurance for building work, which presently are prescribed by regulation, must now be contained in Board policies (which must now be approved by regulation).
11. Given the committee's view that incorporation of significant matter in subordinate legislation is *prima facie* preferable to mere approval of external documents by regulation, it considers that in terms of Parliamentary scrutiny, the cl.6 changes are partly positive and partly negative. The cl.36 change is negative.
12. Neither the Explanatory Notes nor the Minister's speech indicate the reasons for this shift in emphasis.

13. The committee notes that cls.6 and 36, while providing that all Board policies shall be approved by regulation, remove provisions which deem some policies to be subordinate legislation.
14. The committee seeks information from the Minister as to whether he is satisfied the changes made are necessary in the circumstances.

<sup>15</sup> Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

**Does the legislation provide appropriate protection against self-incrimination?<sup>16</sup>****◆ Clauses 22(4) and 38 (proposed ss.106B and 106C)**

15. Proposed s.50C(4A), inserted by cl.22, provides that it is not a reasonable excuse for a licensee to fail to comply with a requirement by the authority to produce certain documents for inspection, that complying with the requirement might tend to incriminate the person. Proposed ss.106B and 106C, inserted by cl.38, provide similarly in relation to requirements by inspectors that a person with relevant statutory obligations to produce certain documents for inspection, do so.
16. The committee's attitude to provisions which remove the protection of the self-incrimination rule is well known and has been frequently stated.<sup>17</sup>

17. The committee notes that cls.22(4) and 38 both insert provisions which remove the protection of the self-incrimination rule.

18. The committee refers to Parliament the question of whether this is reasonable in the circumstances.

**Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?<sup>18</sup>****◆ Clause 39**

19. Clause 39 amends s.107 of the Act, by expanding the current powers of inspectors to enter and inspect building sites. Section 107 currently requires a warrant or the consent of the occupier to enter such sites, and the bill will enable entry to be effected without such warrant or consent while work is being carried out on the site.
20. The Explanatory Notes state, in relation to this matter:

*Access without permission or warrant is necessary for the Authority to effectively pursue compliance activity.*

21. The committee notes that cl.39 broadens the range of entry powers currently conferred by the Act.

22. The committee draws this amendment to the attention of Parliament.

<sup>16</sup> 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.

<sup>17</sup> See, for example, the committee's report on the *Queensland Building Tribunal Bill 1999* (Alert Digest No. 13 of 1999 at pages 31 – 32) and the *Guardianship and Administration Bill 1999* (Alert Digest No. 1 of 2000 at pages 7 – 8)

<sup>18</sup> Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.



---

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>19</sup>****◆ Clauses 43 (proposed ss.18, 19, 21, 22, 23, 24 and 25) and 52**

23. Clause 43 inserts provisions validating various sections of the *Queensland Building Services Authority Regulation 1992*, and actions taken under them. The nature of the matters validated is varied.
24. The Explanatory Notes state:
- ...the retrospectivity does not adversely affect the rights and liberties of individuals as it merely legitimises what was thought to be the correct legal position.*
25. The committee agrees that the cl.43 validations all concern operational matters whose legitimacy would clearly have been assumed by all parties, and that the matters are such that it is probably appropriate to legislate as now proposed.
26. Clause 52 validates rentals set under the *State Housing Act 1945* on commercial leases since 1998. Annual rentals were based on 10% of the unimproved value of the land. It appears from the Explanatory Notes that in the absence of a validly-set annual rental the rental would be \$30.
27. Such a rental is clearly grossly inadequate by current standards, and the committee presumes that a rental of 10% of unimproved land value per year is reasonable by such standards.
28. On that basis, it is again appropriate to legislate as proposed.
29. The committee notes that cls.43 and 52 validate regulatory provisions, actions taken under those provisions, and annual rents on commercial leases.
30. In all cases, it appears to the committee to be appropriate that the validations should be enacted. The committee therefore has no concerns in relation to them.
- 

<sup>19</sup> 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. SEXUAL OFFENCES (PROTECTION OF CHILDREN) AMENDMENT BILL 2002<sup>20</sup>

### Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly 6 November 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*To amend the Criminal Code and the Penalties and Sentences Act 1992 to ensure that sentences imposed on child sex offenders reflect the significant physical and psychological consequences of these offences. The bill will also insert two new offences into the Criminal Code to permit the effective prosecution of child sex offenders. Finally, the bill contributes to improving police intelligence about the movements of convicted child sex offenders by enhancing the powers of courts and corrections boards to require ongoing reporting by child sex offenders.*

### Overview of the bill

3. The bill seeks to tackle the difficult task of dealing with the widespread use of the internet by paedophiles preying on young children. It does this by introducing a new offence which will allow for more effective proactive police investigation.
4. The bill also seeks to reverse an interpretation by the High Court of the offence of maintaining a sexual relationship with a child that is inconsistent with the intended effect of the original offence creating provision.
5. The bill also increases the protection of children by enlarging the circumstances in which a child sex offender can be ordered to regularly report to police following their release.

### **Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>21</sup>**

### **Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?<sup>22</sup>**

#### ◆ **Clause 17 (Proactive entrapment strategies)**

6. Clause 17 of the bill introduces into the *Criminal Code* a new offence (proposed s.218A). This offence provision is aimed at offenders who use the internet or other electronic communication to prey on young children. The elements of the offence are:

<sup>20</sup> The committee thanks Mr Robert Sibley, Senior Lecturer in Law, Queensland University of Technology, for his valued advice in relation to the scrutiny of this bill.

<sup>21</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

<sup>22</sup> 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.

- Using electronic communication (defined as email, Internet chat rooms, SMS messages and real time audio/video communication)

*Either*

- With intent to procure (defined as knowingly enticing or recruiting for sexual exploitation)
- Persons under 16 or 12
- To engage in a sexual act (widely defined in subsection (3))
- Either in Qld or elsewhere

*Or*

- To expose without legitimate reason
- Persons under 16 or 12
- To any indecent matter
- Either in Qld or elsewhere.

7. The Explanatory Notes make it clear that the intention is to allow police investigators to pose as children in order to proactively engage persons in electronic communication with a view to ‘entrapping’ them. The provision attempts to do this as follows:
  - It is immaterial that it is *impossible* in fact to commit the offence (subsection (6));
  - It is still an offence if the person *believes* the person being communicated with is a child of the relevant age (subsections (1)(a) and (b));
  - It is immaterial that the person *believed* to be a child of a particular age is in fact a *fictitious person represented to the adult as a real person* (subsection (7)).
8. Some members of the High Court in *Ridgeway v R* (1995) 184 CLR 19 held that whilst there was no defence of entrapment *per se* nevertheless the use of even legal but improper tactics which involved a degree of harassment or manipulation which is inconsistent with the minimum standards of acceptable police conduct might result in the exercise of a discretion to exclude the evidence if those tactics procured the commission of the offence. In that case the High Court excluded evidence of the importation of heroin and quashed the convictions because the federal police had procured the offenders to engage in a controlled importation of heroin.
9. The use, however, of precisely these proactive tactics by the former Queensland Crime Commission was sanctioned by Shanahan DCJ in *Queen v Cullen* DC 3393 of 2001 (delivered on 19 September 2002). There the Crime Commission had used internet chat rooms and email communications to ‘entrap’ a 45 year old offender who attempted to entice away a fictitious 12 year old girl for the purpose of unlawfully and indecently dealing with ‘her’. After reviewing the authorities and the evidence in the case the judge found that the accused had not been ‘beguiled or seduced [as] an unwilling accused to commit or attempt to commit the offences’ (per *R v Venn-Brown* [1991] 1 Qd R 458 at 469) even though there had been some aspect of encouragement.

10. Shanahan DCJ recognised that ‘the use of subterfuge in the investigation of this activity is a legitimate investigative tool. *Indeed, apart from monitoring of the internet, it is probably the only investigative tool in relation to such activity on the internet*’ (emphasis added).
11. The Explanatory Notes argue that the use of such strategies are just as defensible in the case of child sex offenders as they are in the case of drug traffickers and refer to the Commonwealth response to the High Court decision of *Ridgeway*. The committee concedes the force of this argument given the documented damage resulting from these types of offences and the difficulty of discovering and prosecuting the offenders (refer *Project Axis: Child Sexual Abuse in Queensland: The Nature and Extent and Offender Characteristics and Modus Operandi*.)

12. The committee notes that enforcement strategies for proposed s.218A will probably include the proactive entrapment of offenders.
13. The committee draws to the attention of Parliament the issues (mentioned above) which such a strategy raises, in terms of the rights and liberties of individuals.

◆ **Clause 17 (proposed s.218A(8))(Reversal of the onus of proof )**

14. Proposed s.218A(8), however, creates a rebuttable presumption that if the police operative represents to the offender that the fictitious person is under the age of 16 or 12 years then that is evidence that the offender *believed* the person was under that age. It is difficult to envisage circumstances where that presumption could ever be rebutted given that these communications are in artificial cyberspace. The choice of the *represented age* of the *fictitious person* will invariably be up to the entrapper. If the age is under 16 the penalty is 5 years. If the age is under 12 the penalty is 10 years. The choice in the case of a fictitious person may in many cases be a completely arbitrary one yet if under 12 is chosen the maximum penalty is doubled.

15. The committee is concerned that no criteria are suggested as to how a choice of age for the fictitious child should be made.
16. The committee seeks information from the Attorney as to how this choice is to be addressed in practice.

**Is the legislation unambiguous and drafted in a sufficiently clear and precise way?<sup>23</sup>**

◆ **Clause 17 (proposed s.218A) (Extraterritoriality)**

17. The Explanatory Notes emphasise that the offence created by cl.17 (new s.218A) is primarily directed at proactive policing for the protection of children (through related educative/deterrence of predatory paedophiles). In those cases, even where the offender is in another Australian State or overseas, some acts will ‘occur’ in Queensland and be directed at *albeit* fictitious Queensland children. However, s.218A also creates an offence capable of

<sup>23</sup> 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.

being committed in respect of real children. The way the offence is presently drafted it is capable technically of applying to anyone anywhere in the world.

18. The offence is constituted by the *use* of the electronic communication *with intent to procure a child to engage in a sexual act in Queensland or elsewhere*. Therefore all of the elements of the offence can be committed outside of the Queensland jurisdiction where the victim is also outside of Queensland.
19. Since the passing of the *Australia Act 1986* the Australian State Parliaments have power to pass extra territorial laws for the peace order and good government of the State. As Gillard J in the Victorian Supreme Court observed in *DPP v Sutcliffe* [2001] VSC 43 that power is not unlimited and there must be a link between the crime and the State enacting the law.<sup>24</sup> In *Sutcliffe* the Victorian offence of stalking was held to apply to a Victorian resident because although the harmful effects of the stalking occurred in Canada where the victim was resident throughout, Sutcliffe used communications, including electronic communications, that originated in Victoria. In those circumstances the presumption against extra territorial operation of the offence was impliedly rebutted.
20. Although the issue may be more theoretical than practical, the committee suggests that it be made clear that the extra territorial reach of s.218A is limited to require some link with Queensland. This could perhaps be achieved by adding the words ‘connected with Queensland’ after the word ‘person’ where it appears in s.218A(1)(a) and (b). Alternatively it could be stated that the offence must have some real and substantial link with Queensland.

- |  |
|--|
| <ol style="list-style-type: none"> <li>21. The committee recommends that the Attorney consider amending the bill in the manner indicated above.</li> </ol> |
|--|

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>25</sup>**

**Is the legislation unambiguous and drafted in a sufficiently clear and precise way?<sup>26</sup>**

◆ **Clause 18**

22. Clause 18 of the bill includes in the *Criminal Code* a new version of s.229B, which deals with the offence of maintaining a sexual relationship with a child. According to the Explanatory Notes, the change is to restore the intended focus of the offence to an unlawful sexual relationship or course of conduct. It is stated that the redrafted offence ‘does not require the jury to be unanimously agreed as to the commission of particular unlawful sexual acts, so long as they are unanimously satisfied beyond reasonable doubt that the evidence establishes an unlawful sexual relationship’.
23. This is in response to the High Court decision in *KBT v R* [1997] 191 CLR 417 where the High Court held that the elements of the offence (the *actus reus*) was the proof beyond

<sup>24</sup> For an extract of this case and an analysis of the complexities of jurisdiction in cyberspace see Fitzgerald B & A, *Cyberlaw* ,2002 LexisNexisButterworths, at Chapter 4.

<sup>25</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

<sup>26</sup> 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.

reasonable doubt of the commission of three offences of a sexual nature. The jury had to be unanimously satisfied of the same three acts before they could convict. Therefore the shift in focus of the offence was away from the maintenance of a sexual relationship to the proof of three specified offences of a sexual nature. This approach was criticised by the Queensland Court of Appeal in *R v S* [1999] 2 Qd R 89.

24. The elements of the new offence are as follows:

- An adult
- Who maintains
- An unlawful sexual relationship
- With a child

25. This is in essentially the same terms as the former provision.

26. Subsection (3) requires that the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.

27. The committee simply flags the obvious point that to achieve this shift in focus it will no longer be necessary for the prosecution to prove beyond reasonable doubt the commission of the same three offences of a sexual nature to the unanimous satisfaction of the jury.

28. The committee draws this matter to the attention of Parliament.

**Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>27</sup>**

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>28</sup>**

**Is the legislation unambiguous and drafted in a sufficiently clear and precise way?<sup>29</sup>**

◆ **Clauses 21 and 23**

29. The bill amends the *Criminal Law Amendment Act 1945*.

30. The Explanatory Notes state that the amendments put in place a new scheme that permits a judge to order a person convicted of a sexual offence against a child to report to police at regular intervals.

31. The criterion that a judge must be satisfied of before an order can be made under s.19(2) of the *Criminal Law Amendment Act 1945* will be changed from:

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

<sup>28</sup> 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.

<sup>29</sup> 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.

*'a substantial risk exists that the offender will thereafter commit any further offence of a sexual nature upon or in relation to a child under 16 years'* to simply *'a risk'*.

32. The committee is concerned that this change is such that an order can be made under s.19 in virtually all cases. It would perhaps be rare to find a case where there would not be *a risk* that a sexual offender against children would not commit such an offence again. As the law presently stands in Queensland this change will apply retrospectively to any offender because s.19 of the *Criminal Law Amendment Act 1945* has been held by a majority of the Court of Appeal to be protective and not punitive (*R v C* [2002] QCA 156).
33. This change will also introduce an inconsistency between the test required to be satisfied in order to make an order under s.19 and the test to be satisfied in order to revoke such an order. The opportunity for an offender to have an order revoked under (the renumbered s.19B) remains unchanged by the bill. Therefore, even if the judge who makes the order is satisfied that there is *a risk* of the commission of *a further offence of a sexual nature upon or in relation to a child under 16*, an offender can apply to have that order revoked if they can satisfy the court, beyond a reasonable doubt, that there is no *substantial risk* of committing an offence *of a sexual nature*.

34. The committee draws this inconsistency to the attention of Parliament.

35. At present s.19 only requires an offender to report once personally to the officer in charge of a police station. The orders proposed under the new s.19A(5) and (6) will allow a court to order an offender to report personally at stated frequencies determined by the court. The committee notes that this is a retrospective change which, though not technically 'punishment' within the meaning of s.11 of the *Criminal Code* (*R v S*) nevertheless represents a substantial imposition on an offender.
36. Clause 21 of the bill renumbers subsections (8) and (9) as (6) and (7) having omitted the present subsections (6) and (7). However, as subsection (5) was also repealed by Act 87 of 1999 the committee notes that it would seem more appropriate to renumber subsections (8) and (9) as (5) and (6).

37. The committee draws the first abovementioned matter to the attention of Parliament. In relation to the second abovementioned matter, the committee recommends that the Attorney consider amending the bill in the manner suggested.

## 7. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2002

### Background

1. The Honourable A M Bligh MP, Minister for Education, introduced this bill into the Legislative Assembly on 29 October 2002.
2. The object of the bill, as indicated by the Minister in her Second Reading Speech, is to:

*make amendments to 53 Acts, where the amendments are concise, of a minor nature and non-controversial.*

### Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>30</sup>

#### ◆ Clause 2

3. Clause 2 of the bill gives retrospective affect to 6 amendments affecting a variety of statutes.
4. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has “sufficient regard”, the committee typically has regard to the following factors:
  - whether the retrospective application is adverse to persons other than the government; and
  - whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.
5. In relation to each of the retrospective provisions mentioned above, the Explanatory Notes (which are incorporated in the bill) assert that the amendment does not adversely affect the rights of any person.
6. The committee’s examination of the bill indicates that this view is correct.

7. The committee notes that cl.2 gives retrospective operation to a number of miscellaneous amendments made by this bill. None of the amendments appear to be adverse to the interests of any persons.

8. The committee accordingly has no concerns about these retrospective provisions of the bill.

<sup>30</sup> 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.



**8. STATUTORY BODIES FINANCIAL ARRANGEMENTS AMENDMENT  
BILL 2002**

**Background**

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 29 October 2002.

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

*(to make) a number of clarifying and technical amendments to the Statutory Bodies Financial Arrangements Act 1982.*

3. The committee considers that this bill raises no issues within the committee's terms of reference.

## 9. TRANSPORT LEGISLATION AMENDMENT BILL (NO.2) 2002

### Background

1. The Honourable S D Bredhauer MP, Minister for Transport and Minister for Main Roads, introduced this bill into the Legislative Assembly on 6 November 2002.
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.*

### Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?<sup>31</sup>

#### ◆ Clauses 4 and 5

3. Clauses 4 and 5 of the bill amend the *Century Zinc Project Act 1997*.
4. Clause 4 omits current ss.21(2) to s.21(6) of the Act. These provisions effectively enabled a regulation to describe the boundaries of land affected by a proclamation taking an interest in land for the purposes of the Act:

*whether or not the boundaries described would, if this section had not been passed, be included within the boundaries referred to in the proclamation or in (either of 2 schedules to the Act).*

5. Section 21(5) provided that regulations under this section must be made within 2 years after the first proclamation. The provisions have therefore expired.
6. The current provisions of the Act arguably constitute a “Henry VIII Clause” within the meaning of that term adopted by the committee.<sup>32</sup>
7. The Explanatory Notes explain the background to cls.4 and 5 as follows:

*One of the objectives of the Act was to facilitate certain aspects of an agreement made under the right to negotiate provisions of the Native Title Act 1993 (Cwlth) regarding the establishment of a zinc mine, port facility and miscellaneous transport infrastructure corridor, to ensure that native title is not extinguished and to enable the determination of a development application on certain land in north-west Queensland.*

*At the time of drafting it was envisaged that property descriptions would need to be revised as more detailed surveying work was completed. A regulation-making power was provided to enable these changes to be made. This regulation-making power has now expired.*

<sup>31</sup> 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.

<sup>32</sup> See the committee’s report on *The Use of “Henry VIII Clauses” in Queensland Legislation*, January 1997.

*Rather than extend the regulation-making power, and so continue a potential breach of fundamental legislative principles, it has been decided to use an Act of Parliament to directly update the relevant property descriptions.*

8. The committee notes that cls.4 and 5 of the bill adopt a legislative approach which avoids the use of a potential “Henry VIII clause”.
9. The committee commends the Minister on avoiding the use of such clauses.

### **Does the legislation provide appropriate protection against self-incrimination?<sup>33</sup>**

#### **◆ Clause 17**

10. Clause 17 inserts into the *Transport Operations (Road Use Management) Act 1995* new s.50AA, which expands the existing powers conferred by s.50 of the Act under which an authorised officer may require information to be supplied in relation to an “information offence” involving a heavy vehicle. Proposed s.50AA enables the chief executive or commissioner, if he or she has information leading to a reasonable suspicion that such an offence has been committed, to require a person to give information about the offence at a stated reasonable time and place.
11. In contrast to current s.50, proposed s.50AA denies the person the capacity to refuse to give the information on the basis that it might tend to incriminate the person.
12. The committee’s view on provisions denying persons the benefit of the rule against self-incrimination are well known. In short, the committee normally considers such provisions are only potentially justifiable if:
  - The matters concerned are matters peculiarly within the knowledge of the person’s denied the benefit of the self-incrimination rule, and which it would be difficult or impossible to establish via any alternative evidentiary means;
  - The bill prohibits the use of information obtained in prosecutions against the person;
  - In order to secure this restriction of the use of information obtained, the person should not be required to fulfil any conditions such as formally claiming the right.
13. The Explanatory Notes, arguing in favour of the proposed provision, refer to the number of fatal accidents involving heavy vehicles and the fact that in the heavy vehicle industry, the actions of drivers may be influenced by other persons, such as employers, supervisors, customers and the like. The Explanatory Notes also refer to the fact that the proposed section forbids the use of the information obtained, and any evidence directly or indirectly derived from that information, against the person in a civil or criminal proceeding other than one related to the falsity of the information. This is a wide form of immunity.
14. The Explanatory Notes state:

*It is believed that these amendments are justified because they recognise the role that persons other than a driver may play in the way that heavy vehicles are used on the road.*

<sup>33</sup> 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.

*For example, one employer may influence the behaviour of several drivers. Clearly, being able to identify and address the persons adversely influencing drivers will lead to safer heavy vehicle driving practices. This in turn will mean a safer road environment for all road users.*

15. The committee notes that the proposed s.50AA, inserted by cl.17, denies persons the benefit of the rule against self-incrimination in relation to the giving of information to the chief executive or commissioner pursuant to a written notice. The committee also notes, however, that the proposed section confers broad “use” and “derivative use” immunity in relation to the relevant information.
16. The committee generally opposes the removal of the benefit of the self-incrimination rule, and usually only considers it potentially justifiable if certain conditions (mentioned above) are satisfied.
17. The committee refers to Parliament the question of whether the denial of the benefit of the self-incrimination rule by cl.17 is justifiable in the circumstances.

### **Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>34</sup>**

#### **◆ Clause 19**

18. Clause 19 amends s.57B of the *Transport Operations (Road Use Management) Act*. Section 57B currently provides that if the driver or other person in control of the heavy vehicle commits an “extended liability offence”, an “influencing person” is also taken to have committed the offence unless they can establish certain stipulated circumstances. These offences again relate to heavy vehicles.
19. Clause 19 inserts proposed s.57B(2A), which provides that the extended liability of “influencing persons” will apply even if the driver or other person is not prosecuted for the relevant offence. This, as the Explanatory Notes state, is intended to cover situations where for example the driver dies in an accident resulting from the relevant conduct, and is unable to be prosecuted.
20. The new provision, however, goes on to provide that it will only apply if, in the proceedings brought against the influencing person, the driver or other person in control is proved beyond a reasonable doubt to have committed the offence.
21. There would therefore appear to be no relevant difference between the two sets of circumstances, and the evidence required to be produced will be of the same order.
22. The committee notes that cl.19 extends the operation of the “extended liability offence” provisions of the *Transport Operations (Road Use Management) Act* by allowing those provisions to be invoked in circumstances where the offending driver or other person in control of the heavy vehicle has not been prosecuted. However, the standard of proof required in respect of all relevant matters does not appear to be any lower than that required under the current law.

<sup>34</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

23. In the circumstances, the committee does not consider the provisions of cl.19 to be unreasonable.

## 10. TREASURY LEGISLATION AMENDMENT BILL 2002

### Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 7 November 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*To make a number of technical changes to Acts administered by the Treasury Department.*

### Does the legislation have sufficient regard to the rights and liberties of individuals?<sup>35</sup>

#### ◆ Clause 21

3. Clause 21, one of a number of provisions of the bill which amend the *Motor Accident Insurance Act 1994*, imposes a limitation in relation to awards of damages for gratuitous services under the Act's compulsory third party insurance scheme. Clause 21 provides that damages for gratuitous services may only be recovered if the gratuitous services are provided, or are to be provided, for a total of 6 hours per week and for a period of at least 6 months.
4. Clearly therefore, cl.21 will impact upon claimants making relatively smaller claims of this nature.
5. A number of bills recently introduced into the Parliament (the *Voluntary Assumption of Risk Bill 2002*, the *Personal Injuries Proceedings Bill 2002* and the *Personal Injuries Proceedings Amendment Bill 2002*)<sup>36</sup> have all proposed reforms to the law governing personal injuries claims.<sup>37</sup> The principal purpose of all these bills has been to narrow, in one way or another, the range of circumstances in which damages may be recovered for personal injuries, and/or to reduce the amounts recoverable. The introduction of these bills has in all cases been attributed to current difficulties associated with the provision of public liability insurance.
6. The provisions of cl.21 are a further example of such restrictions.
7. The Treasurer, in his Second Reading Speech, states:

*The Personal Injuries Proceedings Act 2002 was passed by Parliament on 18 June 2002 and was the first stage of law reforms designed to encourage more affordable insurance premiums for the community.*

<sup>35</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

<sup>36</sup> The latter two bills are reported on in Alert Digests No 6 of 2002 and No. 8 of 2002 respectively.

<sup>37</sup> The *Personal Injuries Proceedings Bill* and the *Personal Injuries Proceedings Amendment Bill* were both enacted, although the *Voluntary Assumption of Risk Bill*, which is a private member's bill, has not yet been debated.

*In keeping with this objective, an examination of the Motor Accident Insurance Act 1994 has been undertaken to identify areas where inconsistency may exist between this legislation and the Personal Injuries Proceedings Act 2002. This process has identified some aspects where the approach taken in the Personal Injuries Proceedings Act 2002 would improve the operation of the CTP scheme. Of most significance are issues relating to the payment of damages and for some pre-court processes.*

8. The committee notes that cl.21 of the bill imposes a limitation upon the capacity of persons to recover damages for gratuitous services. The committee notes that this provision is consistent with the provisions of several other recent bills, and that the Treasurer attributes its introduction to a desire to achieve consistency with other relevant legislation.
9. Clause 21 clearly impacts upon the right of persons to recover damages. The Treasurer also cites an intention to ensure an appropriate balance between benefits and costs of insurance premiums.
10. The committee refers to Parliament the question of whether, in the circumstances, the provisions of cl.21 have sufficient regard to the rights of claimants.

◆ **Clauses 26 and 27**

11. Clauses 26 and 27 are amongst provisions of the bill which amend the *Superannuation (State Public Sector) Act 1990*.
12. Clause 26 amends s.3(3) of that Act, which currently declares that the Board of Trustees of the relevant superannuation scheme is a statutory body under the *Financial Administration and Audit Act 1977*. Clause 26 declares that it shall henceforth not have that status.
13. Clause 27 amends s.10 of the Act (which establishes the State Public Sector Superannuation Fund (QSuper) administered by the Board) to delete requirements for the Fund's accounts to be kept as part of departmental accounts, and to delete references to the *Financial Administration and Audit Act*.
14. In relation to these amendments, the Explanatory Notes (at page 3) state:
 

*This bill also amends the QSuper Act to remove references to the FA&A Act. The Queensland Audit Office has confirmed that the QSuper Fund is out of scope for Whole of Government reporting, and has endorsed the suggestion that the QSuper Act be amended to remove references to the FA&A Act.*
15. The Treasurer, in his Second Reading Speech, also states:
 

*The bill also seeks to amend the QSuper Act to remove references to the Financial Administration and Audit Act 1977. These references are no longer appropriate as the QSuper Fund is out-of-scope for Whole of Government reporting purposes.*
16. The provisions of the *Financial Administration and Audit Act*, to which the Board and the fund are currently subject, impose a range of audit and reporting requirements including auditing by the Auditor-General. It is not clear to the committee precisely what impact the removal of the Board and Fund from that statutory regime will have, in terms of

accountability. This is of some practical significance, given the nature and size of the QSuper Fund.

17. The committee notes that cls.26 and 27 of the bill remove the Board of Trustees of QSuper Fund, and the Fund itself, from the statutory regime established under the *Financial Administration and Audit Act*. The committee is uncertain what effect this might have upon the audit and reporting requirements presently imposed by the *Financial Administration and Audit Act*.
18. The committee seeks information from the Treasurer in relation to this matter.

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?**<sup>38</sup>

◆ **Clause 22**

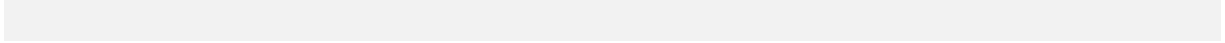
19. Clauses 14 to 17 of the bill amend *the Motor Accident Insurance Act 1994* with respect to the setting of insurers premiums for compulsory third party insurance policies coming into force after 13 June 2003. The amendments concern “input tax credit” issues related to the *New Tax System (Goods and Services Tax) Act 1999 (Commonwealth)*.
20. Clause 22 declares that anything done for setting insurers premiums for policies to commence after 1 July 2003, which was done in anticipation of the amendments made by cls.14 to 17 of this bill and that could have validly been done under the provisions of the bill, are “taken to have been validly done”.
21. The practice of making retrospectively validating legislation is not one which the committee endorses because such law could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. The committee does, however, recognise that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals, is justified to correct unintended legislative consequences.
22. It would appear that cl.22 relates to administrative actions which may have been performed in anticipation of the matters dealt with by the cls.14 to 17 amendments. The Explanatory Notes (at page 4) suggest that the costs may be in part related to:
 

*the system developments required at Queensland Transport to implement the changes in relation to GST which will be funded from the CTP administration fee applied to the insurance component of vehicle registrations.*
23. The effect of cl.22 would therefore be subject to legitimize disbursements incurred, and staff time expended, in relation to this matter. That would not appear to be adverse to any individual.

---

<sup>38</sup> 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.



24. The committee notes that cl.22 of the bill validates anything done in anticipation of the amendments made by cls.14 to 17 of the bill in relation to premiums on compulsory third party insurance policies. Clause 22 therefore has retrospective effect.
  25. The committee does not consider that the validations effected by cl.22 are adverse to any individual.
  26. The committee therefore has no concerns about the retrospective operation of cl.22.
- 

**11. WEAPONS AND ANOTHER ACT AMENDMENT BILL 2002****Background**

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 29 October 2002.
  2. The object of the bill, as indicated by the Explanatory Notes, is:
    - (to consolidate) *the laws regulating the purchase, possession, use, carrying and sale of weapons and articles to prevent the misuse of weapons.*
    - (and)
    - to ensure clarity, efficiency and investigative effectiveness in the administration and enforcement of the Act and the Police Powers and Responsibilities Act 2000 (the PPRa).*
  3. The committee considers that this bill raises no issues within the committee's terms of reference.
-

## 12. WORKCOVER QUEENSLAND AMENDMENT BILL 2002

### Background

1. The Honourable G R Nuttall MP, Minister for Industrial Relations, introduced this bill into the Legislative Assembly on 7 November 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:

*to provide for miscellaneous amendments to the WorkCover Queensland Act 1996*

### **Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?<sup>39</sup>**

#### ◆ **Clause 12**

3. Clause 12 of the bill inserts into the *WorkCover Queensland Act 1996* a new s.252A. This provision firstly declares that “nothing in this Act affects or has ever affected, the commencement of the period of limitation provided by the *Limitation of Actions Act 1974*, s.11”.<sup>40</sup> The section secondly declares that, “to remove any doubt”, the s.11 period of limitation applicable to actions for damages by workers for personal injuries is not affected in any way by the provisions of the *WorkCover Queensland Act*.<sup>41</sup>
4. Both of these provisions could apply in respect of injuries sustained prior to the commencement of the bill. They therefore have the potential to act retrospectively.
5. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has “sufficient regard”, the committee typically has regard to the following factors:
  - Whether the retrospective application is adverse to persons other than the government’s; and
  - Whether individuals have relied on the legislation and have legitimate expectation under the legislation prior to the retrospective clause commencing.
6. Proposed s.252A directly effects the capacity to bring legal proceedings to enforce claims for damages. If the section rendered such proceedings incapable of being commenced, then it would adversely effect the position of the relevant claimants.

<sup>39</sup> 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.

<sup>40</sup> Section 11 of the *Limitation of Actions Act* requires that an action for damages for personal injury must be brought within 3 years of the date because of action arose.

<sup>41</sup> Subject to an exception in favour of s.308 of the *WorkCover Queensland Act* (proposed s.252A(3)).

7. However, a very significant issue in the present circumstances is whether the bill actually alters the current state of the law. In *Tanks -v- WorkCover Queensland* [2001] QCA103 the Queensland Court of Appeal, whilst conceding the legislation was not entirely clear on the issue, found that its effect is as provided in proposed s.252A(1). As the Explanatory Notes state, s.252A(1) is simply intended to confirm (or perhaps more accurately, expressly state) its meaning. It would therefore appear that s.252A(1) does not in fact alter the current law, but only states it more expressly. Section 252A(1) relates to the commencement of the period of limitation in relation to the relevant actions for damages.
8. Section 252A(2) relates more generally to the length of that period of limitation itself. The bill effectively declares that the relevant period of limitation is that provided for in s.11 of the *Limitation of Actions Act*, which is the general provision relating to actions for personal injuries. The Explanatory Notes state that this provision is being inserted on advice from the Solicitor-General, who considered there was a need for a clear indication that the general 3 year limitation period applied irrespective of the issue of a notice or certificate under the *WorkCover Queensland Act*. Again, this provision appears to be generally consistent with views expressed by the court in *Tanks* case. It would therefore again seem that s.252A(2) does not alter the current state of the law, but merely states it more expressly.

9. The committee notes that cl.12 of the bill inserts proposed s.252A, which declares the effect of the provisions of the *WorkCover Queensland Act* upon the limitation period provisions of the *Limitation and Actions Act*, s.11, and upon the commencement of that limitation period. Proposed s.252A *prima facie* has retrospective effect.
10. However, it appears to the committee that the effect of proposed s.252A is not in fact to alter the current law, but simply to state it expressly. On that basis, cl.12 would not change the current substantive law.
11. The committee considers the cl.12 is unlikely to have any substantive retrospective effect, and accordingly has no concerns in relation to it.

### Does the legislation have sufficient regard to the institution of Parliament?<sup>42</sup>

#### ◆ Clauses 8 and 14

12. It is clear from the Explanatory Notes that various provisions of the bill, including cls.8 and 14 (which concern the establishment of workers compensation and damages entitlements where more than one jurisdiction maybe involved) have been agreed upon between Queensland, New South Wales and Victoria. They accordingly form part of national scheme legislation.<sup>43</sup>

<sup>42</sup> Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

<sup>43</sup> The committee uses this term to describe broadly:  
any and all methods of developing legislation, which is –

- *Uniform or substantially uniform in application;*
- *In more than one jurisdiction, several jurisdictions or nationally.*

13. National schemes of legislation have been a source of considerable concern, both to the committee and to its interstate and commonwealth counterparts.<sup>44</sup>
14. In this case, it appears from the amendments made by the bill that Queensland is, by and large, enacting its own legislation to give effect to principles embodied in the intergovernmental agreement. To that extent, the bill constitutes one of the less objectionable forms of national scheme legislation.
15. This bill is made pursuant to an intergovernmental Agreement, and forms part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.
16. The current bill is in the committee's view less objectionable than other national scheme legislation, in that it is drafted in Queensland and is therefore not in a predetermined form.
17. The committee makes no further comment on this aspect of the bill.

---

<sup>44</sup> The relevant issues are canvassed in detail in *Scrutiny of National Schemes of Legislation – A Position Paper of Representatives of Scrutiny of Legislation Committees throughout Australia*, October 1996.

**PART I - BILLS****SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE****13. RACING BILL 2002****Background**

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 17 September 2002. The committee notes that this bill was passed, with amendment, on 30 October 2002.
2. The committee commented on this bill in its Alert Digest No. 9 of 2002 at pages 3 to 10. The Minister's response to these 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?<sup>45</sup>****◆ Clauses 8, 9, 10, 213 and 227**

3. This bill provides a modern legislative framework for the management and regulation of the Queensland racing industry. The committee noted that various clauses of the bill displace the rehabilitation period provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, and include in the definition of "criminal history" charges which did not result in convictions. The bill also requires various applicants or associates of applicants to provide their fingerprints. The Explanatory Notes argue in favour of these provisions on the basis of a need to maintain the highest possible standards of integrity in the racing industry. The committee referred to Parliament the question of whether these provisions of the bill have sufficient regard to the rights and liberties of the persons affected by them.
4. The Minister responded as follows –

*The Committee referred to Parliament the question of whether these clauses of the Bill have sufficient regard to the rights of the persons affected by them. The effect of these provisions is that the chief executive may ask a person who is an executive officer of a corporation, that applies to be a control body for a code of racing, to provide the person's fingerprints. The chief executive may also obtain the person's criminal history to which provisions of the Criminal Law (Rehabilitation of Offenders) Act 1986 are excluded.*

*The information that the chief executive may obtain is similar to that required under other gaming and wagering legislation. As the Committee has noted, the legislation contains a number of safeguards to protect the privacy of the individuals concerned. I am informed that Parliamentary Counsel paid particular attention to this issue when drafting the legislation. As it is considered imperative that only those persons of the highest probity and integrity are associated with the management of a control body, the requirements, including*

<sup>45</sup> Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

*the obtaining of fingerprints and disclosure of a persons' full criminal history, are necessary to ensure that persons with a criminal background are not connected with the management of a control body in Queensland.*

5. The committee notes the Minister's response.

◆ **Clause 317**

6. The committee noted that cl.317 prohibits persons from possessing a "drug" at, amongst other places, a licensed race track, unless the person has a reasonable excuse. The term "drug" is defined by reference to a Commonwealth Standard. The committee is concerned at the potential impact of this broadly framed provision on innocent racing patrons. The committee sought information from the Minister as to: whether she is satisfied the provisions of cl.317 in relation to "licensed venues" are justified; and as to the range of "drugs" presently contained in the Commonwealth Standard.

7. The Minister responded as follows:

*The Committee has sought information as to whether I am satisfied that the provisions of clause 317 in relation to "licensed venues" are justified and as to the range of drugs presently contained in the Standard for the Uniform Scheduling of Drugs and Poisons ("the Standard") which is published by the Commonwealth.*

*The range of drugs contained in the Standard is extensive and it is for that reason that the Standard has been adopted in defining a "drug" for the Bill. Any substance listed in the Standard is capable of affecting the performance or physical condition of a licensed animal and therefore it is appropriate for all substances in the Standard to be included in the definition of "drug".*

*Clause 317 of the Bill provides that it is an offence for a person to be in possession of a "prohibited thing" at a racing venue, unless the person has a reasonable excuse.*

*While the Bill places the onus upon a person to provide a reasonable excuse as to why they are in possession of a drug or a prohibited thing, this is considered justified, considering the fundamental importance of drug control in racing. The viability of racing depends upon the public having confidence in the outcome of a race. If punters believe that some animals have an unfair advantage over others, due to the use of drugs, then the public will not be confident in betting on the outcome of a race.*

*The reversal of the onus of proof must be balanced against the absolute importance of drug control and the difficulties associated with proving that a person is in possession of a drug for the purpose of affecting the performance of a racing animal.*

8. The committee thanks the Minister for this information.

◆ **Clause 326**

9. The committee noted that cl.326 of the bill appears to impose a general prohibition upon betting in a public place and drew the attention of Parliament to the apparent breadth of this provision.

10. The Minister responded as follows:

*The Committee drew to the attention of Parliament the breadth of clause 326 that prohibits a person from betting in a public place, unless the betting is lawfully conducted under the Bill or other legislation.*

*The Committee's comments in relation to this provision are noted. As the provision does not apply to betting that is conducted lawfully, it is considered that this provision has been sufficiently limited to ensure that the rights and liberties of individuals are protected.*

11. The committee notes the Minister's response.

◆ **Clause 341**

12. The committee noted that, subject to certain exceptions, cl.341 of the bill renders betting contracts void and prohibits recovery of money or other property in relation to them. The committee drew this comprehensive provision to the attention of Parliament.

13. The Minister responded as follows:

*The Committee has drawn to the attention of Parliament clause 341 which provides that unlawful betting contracts are void. As the Committee has noted, the provision does not render void lawful bets by racing bookmakers. In addition, clause 342 provides that clause 341 does not render void betting contracts lawfully made under the following legislation:*

- *The Wagering Act 1998 (that is, bets taken by the Queensland TAB);*
- *The Charitable and Non-Profit Gaming Act 1999;*
- *The Gaming Machine Act 1991;*
- *The Keno Act 1996;*
- *The Lotteries Act 1997;*
- *The Casino Control Act 1982; and*
- *The Interactive Gambling (Player Protection) Act 1998.*

*The effect of clauses 341 and 342 of the Bill is that lawful betting contracts may be sued upon. Illegal betting contracts cannot be enforced by either party to the contract. In the circumstances, it is considered that the width of this provision is appropriate.*

14. The committee notes the Minister's response.



**Does the legislation confer immunity from proceeding or prosecution without adequate justification?<sup>46</sup>**

◆ **Clause 191**

15. The Committee noted that clause 191 confers upon members of the Racing Appeals Tribunal, persons appearing before it and witnesses at its hearings, the immunities and protection enjoyed in the District Court. The Committee stated that in the circumstances, it does not consider this grant of immunity to be objectionable.

16. The Minister responded as follows:

*The Committee's comments in relation to clause 191 are noted.*

17. The committee notes the Minister's response.

**Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?<sup>47</sup>**

◆ **Clauses 270 – 304**

18. The committee noted that the bill confers on authorised officers powers of entry which extend significantly beyond situations where the occupier consents or where a warrant has been obtained, and that once entry has been effected, the bill confers upon authorised officers a further wide range of powers. The committee also noted that the bill confers on authorised officers significant powers to obtain information. The committee drew to the attention of Parliament the nature and extent of the entry and post-entry powers mentioned above.

19. The Minister responded as follows:

*The Committee has drawn to the attention of Parliament the nature and extent of the entry and post-entry powers under the Bill.*

*Clause 270 sets out the limited circumstances in which authorised officers may search premises without a warrant, namely where:*

- *consent by the occupier of the premises has been obtained;*
- *the entry is made to a public place while it is open to the public;*
- *the entry is made to a place of business while it is open for entry; and*
- *the authorised officer believes that the premises or vehicle to be searched constitute or contains evidence of the commission of an offence under the Bill.*

<sup>46</sup> 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.

<sup>47</sup> 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.

*In relation to vehicles, clause 278 provides that an authorised officer may search a vehicle without a warrant where the authorised officer believes, in circumstances that are reasonable, that the vehicle constitutes or contains evidence of the commission of specified offences under the Bill.*

*While the legislation contains powers of entry without warrant in specified circumstances, the exercise of such powers by authorised officers must be reasonable in the circumstances.*

20. The committee notes the Minister's response.

### **Does the legislation provide appropriate protection against self-incrimination?<sup>48</sup>**

#### **◆ Clause 304(2)**

21. The committee noted that cl.304(2) of the bill denies persons the benefit of the rule against self-incrimination, in relation to the compulsory production of documents required to be kept by the person under the provisions of the bill. The committee generally opposes the removal of the benefit of the self-incrimination rule, and usually only considers that to be potentially justifiable if certain conditions are satisfied. The committee referred to Parliament the question of whether the denial of the benefit of the self-incrimination rule by cl.304(2) is justifiable in the present circumstances.

22. The Minister responded as follows:

*The Committee referred to Parliament the question of whether the denial of the benefit of the self-incrimination rule by clause 304(2) is justifiable.*

*Clause 304 only has application to a person who is required by the legislation to keep a document. Provisions requiring the keeping of records would be totally ineffective if those records could not be checked for compliance with the Act. A person who has a positive obligation to retain a document, should not be able to refuse to produce the document on the grounds that production (or non-production) of the document may render the person liable to a penalty.*

*Clause 304(2), which removes the protection of the rule against self-incrimination, may assist the chief executive and authorised officers who have the responsibility for monitoring the operations of control bodies from a probity, integrity and public accountability perspective. Without this abrogation, any control body that may not be managing its code of racing properly may be able to: conceal documents that may lead to diminution of public confidence in the racing of animals in Queensland for which betting is lawful; reduce the integrity of persons involved with racing or betting under the Bill; and/or interfere with the safeguarding of the welfare of animals involved in racing under the Bill.*

23. The committee notes the Minister's response.

<sup>48</sup> Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends no whether, for example, the legislation provides appropriate protection against self-incrimination.

**Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?<sup>49</sup>**

◆ **Clause 339**

24. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations. Whilst the difficulties of determining liability in certain circumstances (for example, corporations) are appreciated, the committee as a general rule does not endorse such provisions. The committee referred to Parliament the question of whether cl.339 contains a justifiable reversal of onus of proof, and therefore has sufficient regard to the rights and liberties of individuals.

25. The Minister responded as follows:

*The Committee stated that whilst the difficulties of determining liability in certain circumstances (for example corporations) are appreciated, the Committee as a general rule does not endorse such provisions.*

*The Committee referred to Parliament the question of whether clause 339 contains a justifiable reversal of the onus of proof, and therefore has sufficient regard to the rights and liberties of individuals. As the Committee has pointed out, there are difficulties in determining liability involving corporations. Due to corporations being separate legal entities to their directors, monetary penalties imposed on a company do not always prove to be an effective deterrent. A more effective deterrent is the threat of a penalty imposed on an executive officer of the company. It is a defence for an executive officer to prove their level of influence in the corporation, and if that influence exists, that reasonable diligence was used. These are matters that would be entirely within the knowledge of a corporation's executive officers.*

*In the circumstances, it is considered that the reversal of the onus of proof in these circumstances is justified.*

26. The committee notes the Minister's response.

**Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?<sup>50</sup>**

◆ **Clause 397**

27. The committee noted that cl.397 of the bill authorises the making of transitional regulations. These regulations may be retrospective to the date of commencement of the bill. However, both they and cl.397 will expire 1 year after commencement of the bill. The committee referred to Parliament the question of whether the transitional regulation-making power contained in cl.397 is reasonable.

<sup>49</sup> 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.

<sup>50</sup> 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.

28. The Minister responded as follows:

*The Committee has noted that clause 397 authorises the making of transitional regulations. These regulations may be retrospective to the date of commencement of the Bill. However, both the regulations and clause 397 will expire one year after commencement of the Bill. The Committee referred to Parliament the question of whether the transitional regulation-making power contained in clause 397 is reasonable.*

*It is considered that this provision is reasonable and necessary to ensure the smooth implementation of the Bill. It will allow a regulation to be made to deal with unforeseen circumstances that may arise during the first year after commencement. It is considered that the scope of the provision is sufficiently limited with both the provision and the regulations made under it expiring after one year.*

29. The committee notes the Minister's response.

**Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficient defined and subject to appropriate review?**<sup>51</sup>

◆ **Clauses 24, 58, 131 and 141**

30. The committee noted that the bill does not provide a process of merits review in relation to certain decisions of the Minister and chief executive in relation to control bodies and accredited facilities. The committee considers the denial of merits review in relation to decisions of the Minister concerning approval of control bodies is probably not objectionable. The committee referred to Parliament the question of whether the denial of merits review in relation to decisions of the Minister to discipline a control body, and of the chief executive about accredited facilities, has sufficient regard to the rights of persons affected by such decisions.

31. The Minister responded as follows:

*The Committee referred to Parliament the question of whether the denial of merits review in relation to decisions of the Minister to discipline a control body, and of the chief executive about accredited facilities, has sufficient regard to the rights of persons affected by such decisions.*

*Whilst the comments of the Committee are noted, for the reasons outlined in the Explanatory Notes, it is considered that the most appropriate method of reviewing the decisions of the Minister and chief executive is judicial review.*

32. The committee notes the Minister's response.

<sup>51</sup> 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.

**PART I - BILLS****SECTION C – AMENDMENTS TO BILLS<sup>52</sup>**

***(NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST)***

---

<sup>52</sup> On Wednesday 7 November 2001, Parliament resolved as follows:

*the House confers upon the Scrutiny of Legislation Committee the function and discretion to examine and report to the House, if it so wishes, on the application of the Fundamental Legislative Principles to amendments (to bills), whether or not the bill to which the amendments relate has received Royal Assent.*

On 18 February 2002 the committee resolved to commence reporting on amendments to bills, on the following basis:

- *all proposed amendments of which prior notice has been given to the committee will be scrutinised and included in the report on the relevant bill in the Alert Digest, if time permits*
- *the committee will not normally attempt to scrutinise or report on amendments moved on the floor of the House, without reasonable prior notice, during debate on a bill*
- *the committee will ultimately scrutinise and report on all amendments, even where that cannot be done until after the bill has been passed by Parliament (or assented to), except where the amendment was defeated or the bill to which it relates was passed before the committee could report on the bill itself.*

**PART I - BILLS**

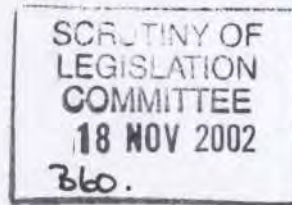
**APPENDIX**

**MINISTERIAL CORRESPONDENCE**



Queensland  
Government

Hon. Merri Rose MP  
Member for Currumbin



Minister for Tourism and Racing and  
Minister for Fair Trading

15 NOV 2002

Mr Warren Pitt MP  
Chair  
Scrutiny of Legislation Committee  
Parliament House  
George Street  
Brisbane Qld 4000

e-m@iled

15 NOV 2002

Dear Mr Pitt

Thank you for your letter of 21 October 2002 enclosing a copy of the relevant pages of the Committee's Alert Digest No.9 of 2002 relating to the *Racing Bill 2002* (the Bill).

Notwithstanding that the Bill was passed by Parliament on 30 October 2002, I thank the Committee for the opportunity to respond to the issues raised.

**Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?**

➤ **Clause 2(2)**

The Committee noted that clause 2(2) has a retrospective effect. However, the Committee had no concerns about the retrospectivity as the provision merely corrects a minor drafting error.

The Committee's comments in relation to clause 2(2) are noted.

**Does the legislation have sufficient regard to the rights and liberties of individuals?**

➤ **Clauses 8, 9, 10, 213 and 227**

The Committee referred to Parliament the question of whether these clauses of the Bill have sufficient regard to the rights of the persons affected by them. The effect of these provisions is that the chief executive may ask a person who is an executive officer of a corporation, that applies to be a control body for a code of racing, to provide the person's fingerprints. The chief executive may also obtain the person's criminal history to which provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986* are excluded.

The information that the chief executive may obtain is similar to that required under other gaming and wagering legislation. As the Committee has noted, the legislation contains a number of safeguards to protect the privacy of the individuals concerned. I am informed that Parliamentary Counsel paid particular attention to this issue when drafting the legislation. As it is considered imperative that only those persons of the highest probity and integrity are associated with the management of a control body, the requirements, including the obtaining of fingerprints and disclosure of a persons' full criminal history, are necessary to ensure that persons with a criminal background are not connected with the management of a control body in Queensland.

Electorate Office  
PO Box 581 Palm Beach  
Queensland 4221 Australia  
Telephone +61 7 5598 1387  
Facsimile +61 7 5598 1861  
Email currumbin@parliament.qld.gov.au

Ministerial Office  
Level 26 111 George Street Brisbane  
GPO Box 1141 Brisbane  
Queensland 4001 Australia  
Telephone +61 7 3224 2004  
Facsimile +61 7 3229 0434  
Email tourism@ministerial.qld.gov.au



**Does the legislation have sufficient regard to the rights and liberties of individuals?**

➤ **Clause 317**

The Committee has sought information as to whether I am satisfied that the provisions of clause 317 in relation to “licensed venues” are justified and as to the range of drugs presently contained in the Standard for the Uniform Scheduling of Drugs and Poisons (“the Standard”) which is published by the Commonwealth.

The range of drugs contained in the Standard is extensive and it is for that reason that the Standard has been adopted in defining a “drug” for the Bill. Any substance listed in the Standard is capable of affecting the performance or physical condition of a licensed animal and therefore it is appropriate for all substances in the Standard to be included in the definition of “drug”.

Clause 317 of the Bill provides that it is an offence for a person to be in possession of a “prohibited thing” at a racing venue, unless the person has a reasonable excuse.

While the Bill places the onus upon a person to provide a reasonable excuse as to why they are in possession of a drug or a prohibited thing, this is considered justified, considering the fundamental importance of drug control in racing. The viability of racing depends upon the public having confidence in the outcome of a race. If punters believe that some animals have an unfair advantage over others, due to the use of drugs, then the public will not be confident in betting on the outcome of a race.

The reversal of the onus of proof must be balanced against the absolute importance of drug control and the difficulties associated with proving that a person is in possession of a drug for the purpose of affecting the performance of a racing animal.

**Does the legislation have sufficient regard to the rights and liberties of individuals?**

➤ **Clause 326**

The Committee drew to the attention of Parliament the breadth of clause 326 that prohibits a person from betting in a public place, unless the betting is lawfully conducted under the Bill or other legislation.

The Committee’s comments in relation to this provision are noted. As the provision does not apply to betting that is conducted lawfully, it is considered that this provision has been sufficiently limited to ensure that the rights and liberties of individuals are protected.

**Does the legislation have sufficient regard to the rights and liberties of individuals?**

➤ **Clause 341**

The Committee has drawn to the attention of Parliament clause 341 which provides that unlawful betting contracts are void. As the Committee has noted, the provision does not render void lawful bets by racing bookmakers. In addition, clause 342 provides that clause 341 does not render void betting contracts lawfully made under the following legislation:

- The *Wagering Act 1998* (that is, bets taken by the Queensland TAB);
- The *Charitable and Non-Profit Gaming Act 1999*;
- The *Gaming Machine Act 1991*;
- The *Keno Act 1996*;
- The *Lotteries Act 1997*;



- The *Casino Control Act 1982*; and
- The *Interactive Gambling (Player Protection) Act 1998*.

The effect of clauses 341 and 342 of the Bill is that lawful betting contracts may be sued upon. Illegal betting contracts cannot be enforced by either party to the contract. In the circumstances, it is considered that the width of this provision is appropriate.

**Does the legislation confer immunity from proceeding or prosecution without adequate justification?**

➤ **Clause 191**

The Committee noted that clause 191 confers upon members of the Racing Appeals Tribunal, persons appearing before it and witnesses at its hearings, the immunities and protection enjoyed in the District Court. The Committee stated that in the circumstances, it does not consider this grant of immunity to be objectionable.

The Committee's comments in relation to clause 191 are noted.

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

➤ **Clauses 270 – 304**

The Committee has drawn to the attention of Parliament the nature and extent of the entry and post-entry powers under the Bill.

Clause 270 sets out the limited circumstances in which authorised officers may search premises without a warrant, namely where:

- consent by the occupier of the premises has been obtained;
- the entry is made to a public place while it is open to the public;
- the entry is made to a place of business while it is open for entry; and
- the authorised officer believes that the premises or vehicle to be searched constitute or contains evidence of the commission of an offence under the Bill.

In relation to vehicles, clause 278 provides that an authorised officer may search a vehicle without a warrant where the authorised officer believes, in circumstances that are reasonable, that the vehicle constitutes or contains evidence of the commission of specified offences under the Bill.

While the legislation contains powers of entry without warrant in specified circumstances, the exercise of such powers by authorised officers must be reasonable in the circumstances.

**Does the legislation provide appropriate protection against self-incrimination?**

➤ **Clause 304(2)**

The Committee referred to Parliament the question of whether the denial of the benefit of the self-incrimination rule by clause 304(2) is justifiable.

Clause 304 only has application to a person who is required by the legislation to keep a document. Provisions requiring the keeping of records would be totally ineffective if those records could not be



checked for compliance with the Act. A person who has a positive obligation to retain a document, should not be able to refuse to produce the document on the grounds that production (or non-production) of the document may render the person liable to a penalty.

Clause 304(2), which removes the protection of the rule against self-incrimination, may assist the chief executive and authorised officers who have the responsibility for monitoring the operations of control bodies from a probity, integrity and public accountability perspective. Without this abrogation, any control body that may not be managing its code of racing properly may be able to: conceal documents that may lead to diminution of public confidence in the racing of animals in Queensland for which betting is lawful; reduce the integrity of persons involved with racing or betting under the Bill; and/or interfere with the safeguarding of the welfare of animals involved in racing under the Bill.

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

➤ **Clause 339**

The Committee stated that whilst the difficulties of determining liability in certain circumstances (for example corporations) are appreciated, the Committee as a general rule does not endorse such provisions.

The Committee referred to Parliament the question of whether clause 339 contains a justifiable reversal of the onus of proof, and therefore has sufficient regard to the rights and liberties of individuals. As the Committee has pointed out, there are difficulties in determining liability involving corporations. Due to corporations being separate legal entities to their directors, monetary penalties imposed on a company do not always prove to be an effective deterrent. A more effective deterrent is the threat of a penalty imposed on an executive officer of the company. It is a defence for an executive officer to prove their level of influence in the corporation, and if that influence exists, that reasonable diligence was used. These are matters that would be entirely within the knowledge of a corporation's executive officers.

In the circumstances, it is considered that the reversal of the onus of proof in these circumstances is justified.

**Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**

➤ **Clause 397**

The Committee has noted that clause 397 authorises the making of transitional regulations. These regulations may be retrospective to the date of commencement of the Bill. However, both the regulations and clause 397 will expire one year after commencement of the Bill. The Committee referred to Parliament the question of whether the transitional regulation-making power contained in clause 397 is reasonable.

It is considered that this provision is reasonable and necessary to ensure the smooth implementation of the Bill. It will allow a regulation to be made to deal with unforeseen circumstances that may arise during the first year after commencement. It is considered that the scope of the provision is sufficiently limited with both the provision and the regulations made under it expiring after one year.

**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?**

➤ **Clauses 24, 58, 131 and 141**

The Committee referred to Parliament the question of whether the denial of merits review in relation to decisions of the Minister to discipline a control body, and of the chief executive about accredited facilities, has sufficient regard to the rights of persons affected by such decisions.

Whilst the comments of the Committee are noted, for the reasons outlined in the Explanatory Notes, it is considered that the most appropriate method of reviewing the decisions of the Minister and chief executive is judicial review.

I trust this information is of assistance and I would like to thank the Committee for its comments on the Bill.

Yours sincerely

[Original Signed]

**Hon. Merri Rose MP**  
**Minister for Tourism and Racing and**  
**Minister for Fair Trading**

# **PART II**

## **SUBORDINATE LEGISLATION**

**PART II – SUBORDINATE LEGISLATION****SECTION A – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCERNS\***

<b>Sub-Leg No.</b>	<b>Name</b>	<b>Date concerns first notified</b>
144	Building and Construction Industry (Portable Long Service Leave) Regulation 2002	30/7/02
201	Workplace Health and Safety Legislation Amendment Regulation (No.1) 2002	22/10/02
205	Plant Protection Regulation 2002	17/9/02
210	Fair Trading Amendment Regulation (No.1) 2002	17/9/02
215	Residential Services (Accreditation) Regulation 2002	22/10/02
228	Public Works Legislation Amendment Regulation (No.1) 2002	22/10/02
243	Coroners Amendment Rule (No.1) 2002	5/11/02
260	Electrical Safety Regulation 2002	22/10/02

---

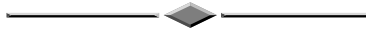
\* Where the committee has concerns about a particular piece of subordinate legislation, it conveys them directly to the relevant Minister in writing. The committee sometimes also tables a report to Parliament on its scrutiny of a particular piece of subordinate legislation.

**PART II – SUBORDINATE LEGISLATION**

**SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES\*\***  
*(INCLUDING LIST OF CORRESPONDENCE)*

<b>Sub-Leg No.</b>	<b>Name</b>	<b>Date concerns first notified</b>

(Copies of the correspondence mentioned above are contained in the Appendix which follows this Index)



This concludes the Scrutiny of Legislation Committee's 11<sup>th</sup> report to Parliament in 2002.

The committee wishes to thank all departmental officers and ministerial staff for their assistance in providing information to the committee office on bills and subordinate legislation dealt with in this digest.

Warren Pitt MP  
Chair

26 November 2002

---

\*\* This Index lists all subordinate legislation about which the committee, having written to the relevant Minister conveying its concerns, has now concluded its inquiries. The nature of the committee's concerns, and of the Minister's responses, are apparent from the copy correspondence contained in the Appendix which follows this index.