



SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



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SCRUTINY OF LEGISLATION COMMITTEE

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50TH PARLIAMENT, 1ST SESSION

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BILLS EXAMINED BUT NOT REPORTED ON *

AGRICULTURAL COLLEGES AMENDMENT BILL 2002

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

SECTION A

BILLS REPORTED ON

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

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted¹

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment² of a provision may therefore be considered as extrinsic material in its interpretation.

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

² The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 *Acts Interpretation Act 1954*.

SECTION A – BILLS REPORTED ON

1. CONSUMER CREDIT (QUEENSLAND) AMENDMENT BILL 2002

Background

1. The Honourable Merri Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 6 March 2002.
2. The object of the bill, as indicated by the Explanatory Notes, is:
 - to extend the operation of the Consumer Credit Code (“the Code”), an appendix to the Consumer Credit (Queensland) Act 1994 to:*
 - (1) *require the publishing of mandatory comparison rates for fixed term consumer credit products; and*
 - (2) *provide a time limitation period for civil penalty applications under the Code.*

Does the legislation have sufficient regard to the institution of Parliament?³

◆ The bill generally

3. This bill amends the *Consumer Credit Code*, which is set out in an appendix to the *Consumer Credit (Queensland) Act 1994*. As stated in the Explanatory Notes, the *Code* is national scheme legislation. Under the Act, any amendments to the Queensland *Code* (which by virtue of local legislation applies automatically in most other States and Territories), require two-third majority support from the State and Territory Ministers for Fair Trading and Consumer Affairs. The Notes states that that support has been obtained in relation to these amendments.
4. National schemes of legislation have been a source of considerable concern, both to the committee and to its interstate and Commonwealth counterparts.⁴ These schemes take a number of forms, and the objection to them is greatest when they involve predetermined legislative provisions.
5. Ministers sponsoring bills of the latter type will generally object to any amendments being made to them during their passage through Parliament, on the basis that such amendments would be inconsistent with the legislative terms agreed on by the relevant intergovernmental body.
6. Given the background provided in the Explanatory Notes, it seems quite clear the Minister would adopt that stance in relation to this bill.

7. 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

³ Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

⁴ 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.

committees nationally as undermining the institution of Parliament.

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

Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?⁵

◆ **Clause 6 (proposed s.146T)**

9. As mentioned earlier, this bill amends the *Consumer Credit Code*, which is set out in an appendix to the *Consumer Credit (Queensland) Act 1994*.
10. The principal amendment to the *Code* made by the bill is the insertion of a new Part 9A – Comparison Rates. This contains a number of provisions aimed at assisting consumers to identify the true cost of credit offered by credit providers. The final provision of Part 9A is proposed s.146T (“Regulations – exemptions and other matters”). Section 146T provides, in part, as follows:

A regulation may make provision about the following (a) exempting any class of persons or matters from the operation of any provision of this Part ...

11. This provision, which expressly authorises changes to the application of the legislation by means of regulation, is clearly a “Henry VIII clause”. It is moreover of reasonably wide application, since it authorises exemptions from the operation of any of the various provisions of Part 9A.
12. Whilst the committee accepts that one of the circumstances in which the use of “Henry VIII clauses” may be justified is to facilitate the application of national scheme legislation,⁶ the committee does not automatically accept the appropriateness of such clauses in that context. Alternatively, the question arises as to whether the provision simply involves an inappropriate delegation of legislative power.⁷
13. Neither the Explanatory Notes nor the Minister’s Second Reading Speech address these issues.

14. The committee notes that proposed s.146T of the bill enables regulations to be made exempting persons and matters from the operation of Part 9A. The range of subjects that may be dealt with in this manner is reasonably wide. The clause is, in the committee’s view, clearly a “Henry VIII clause”.

15. The committee seeks information from the Minister as to whether she is satisfied that the use of this “Henry VIII clause” is necessary to achieve the bill’s objectives.

⁵ 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.

⁶ See the committee’s January 1997 report on *The Use of “Henry VIII Clauses” in Queensland Legislation*, at page 56.

⁷ See s.4(4)(a) of the *Legislative Standards Act 1992*.

◆ Clause 6 (proposed s.146R)

16. In addition, proposed s.146R(2) provides as follows:

For the purposes of calculating the relevant comparison rate, credit fees or charges are not ascertainable and need not be included in the calculation if their imposition or amount is dependent on events that may or may not happen (unless a regulation under this section otherwise provides) (underlining added.)

17. This provision is probably a “Henry VIII clause” within the definition of that term adopted by the committee in its 1997 Report, although it is less overt than that contained in proposed s.146T. The comments made in relation to proposed s.146T also apply in relation to this provision.

18. The committee seeks similar information from the Minister in relation to proposed s.146R(2).

2. CRIMINAL LAW AMENDMENT BILL 2002

Background

1. The Honourable Rod Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 6 March 2002.

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

(to amend the Criminal Code, the Penalties and Sentences Act 1992, the Evidence Act 1977, the Justices Act 1886, the Bail Act 1980, the Jury Act 1995 and the Drug Rehabilitation (Court Diversion) Act 2000 to improve the responsiveness of the criminal justice system to the needs of persons, including jurors, witnesses and victims of crime.

The Bill also increases penalties for stock theft, provides a mechanism to ensure persons detained pursuant to section 18 of the Criminal Law Amendment Act 1945 cannot be released without supervision and includes a number of amendments to correct drafting anomalies.

Overview of the bill

3. The bill amends a number of statutes associated with the criminal justice system. The amendments cover a range of quite disparate matters. The amendments are, as the Explanatory Notes state, largely intended to “improve the responsiveness of the criminal justice system to the needs of persons, including jurors, witnesses, and victims of crime”.

4. Provisions modifying any facets of the criminal justice system will on the one hand inevitably affect the rights of suspects, accused persons and convicted persons, whilst having a corresponding impact upon the community’s level of security from crime.

5. Within the context of this bill, most of the amendments which it makes can, in the committee’s view, be regarded as policy issues upon which Parliament must ultimately decide. However, the following aspects of the bill require comment.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?⁸

◆ **Clauses 2(2), 33 and 65**

6. The bill contains a number of provisions which either expressly or by implication have retrospective effect.

7. Clause 2(2) of the bill expressly provides that Amendment 1 of the amendments to the *Criminal Code* contained in the Schedule to the bill “is taken to have commenced on 28 February 2002.” The relevant amendment, which along with the other amendments in the Schedule is described as a “minor amendment”, simply substitutes a reference to one

⁸ 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.

section of the *Criminal Code* for a reference to another section, and amends two headings contained in the *Code*. None of these amendments appear to be of real significance.

8. Clause 33 inserts into the *Criminal Code* a new s.712 (“Transitional Provision for *Criminal Law Amendment Act 2002*”). Section 712 refers to ss.568(6) to (8) of the *Code* and provides that these provisions in their previous form continue to apply to matters where the indictment has been presented before the commencement of the bill. However, where an alleged offence has occurred prior to commencement of the bill, but the indictment is not presented until after commencement, the situation will be governed by the new laws. In this respect cl.33 might arguably have retrospective effect, although it may perhaps be classifiable as a change affecting procedural matters and therefore not one which the law would regard as retrospective.
9. Moreover, the changes are in large part intended to overcome a recently-identified anomaly by expressly providing that where the maximum offence for relevant alternative offences is the same, the trial judge is to decide on the offence for which the conviction is to be entered. The balance of the provisions, in the words of the Explanatory Notes, “reflect amendments made in 1997 to ss.419, 421 and 433 (of the *Criminal Code*)”. An examination of the existing and proposed provisions reveals that the amendments are of an essentially formal nature.
10. In summary therefore, any retrospective effect which cl.33 may have does not appear to be adverse to any person.
11. Finally, cl.65 inserts into the *Penalties and Sentences Act 1992* a transitional s.210. Section 210 provides that for applying s.92(1)(b)(i) for the purpose of making or amending a probation order, “it does not matter whether the offence was committed before or after the commencement of this section”. The bill amends s.92(1)(b)(i) of the *Penalties and Sentences Act 1992* to enable a probation order to be coupled with terms of imprisonment up to 12 months (under the current law the maximum relevant term of imprisonment is 6 months).
12. Insofar as this provision may have retrospective effect it appears to be favourable, rather than adverse, to convicted persons.

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| <ol style="list-style-type: none">13. The committee notes that cls.2(2), 33 and 65 of the bill have, or may have, retrospective effect.14. The committee notes, however, that the relevant provisions do not appear to be adverse to any person.15. The committee accordingly has no concerns about these retrospective provisions of the bill. |
|---|

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?⁹

◆ Clause 9 (proposed s.119A)

16. Clause 9 of the bill inserts into the *Criminal Code* proposed s.119B, which outlaws the taking of retaliation against judicial officers, jurors, witnesses or members of their families because of anything lawfully done by them as judicial officers or in any judicial proceeding. The prohibited conduct constitutes a crime, punishable by a maximum penalty of 7 years imprisonment.
17. The bill also inserts proposed s.119A, in which the term “family” is defined as comprising various categories of persons including a “child” of the person. Section 119A includes in the definitions of both “family” and “child” a person who, if an Aboriginal person, is recognised under Aboriginal tradition as a member of the person’s family, and an individual who is recognised under Aboriginal tradition as a child of the person. Similar provisions apply in relation to Torres Strait Islanders, in respect of persons recognised under Island custom.
18. These provisions of the bill mirror those contained in several recent pieces of legislation on which the committee has reported.¹⁰ Whilst Aboriginal and Island customary laws are in general not recognised within the Australian legal system, they are given limited legislative recognition for certain purposes. Also, in some jurisdictions Aboriginal and Island customary practices in relation to child care are taken into account.
19. Accordingly, the express inclusion of persons regarded as “family” and “children” under Aboriginal tradition and Island custom constitutes an express recognition of this aspect of customary law.

20. The committee notes that under this bill “family” and “children” are defined so as to include persons who are regarded under Aboriginal tradition or Island custom as “family” or “children”.
21. The committee considers that, by defining these terms in this manner, the bill has sufficient regard to Aboriginal tradition and Island custom.

Does the legislation have sufficient regard to the rights and liberties of individuals?¹¹

◆ Clauses 17 to 21 inclusive

22. The bill amends various provisions of the *Criminal Code* providing for offences relating to stock. Clauses 17 to 21 inclusive of the bill redefine the offences created by these provisions as misdemeanours, and increase the maximum potential term of imprisonment

⁹ Section 4(3)(j) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

¹⁰ See, for example, the *Succession and Other Acts Amendment Bill 2000*, Alert Digest No. 8 of 2000 at p.15, and the *Domestic Violence Legislation Amendment Bill 2001*, Alert Digest No. 8 of 2001 at p.10 – 11.

¹¹ Section 4(2) (a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

from 1 year to 5 years. The bill also increases the maximum fine which may be imposed in relation to these offences from \$5,000 to \$50,000.

23. These increases in the maximum term of imprisonment and maximum fine are very significant.

24. The committee notes that cls.17 to 21 inclusive of the bill introduce very substantial increases in the maximum terms of imprisonment and maximum fines which may be imposed in relation to a range of stock-related offences.

25. The committee draws these very substantial increases to the attention of Parliament.

◆ **Clause 64**

26. Clause 64 amends s.171 of the *Penalties and Sentences Act 1992*, which prescribes a period of time before a court can review an indeterminate sentence, where the nominal sentence is life imprisonment. That period has been increased from 13 years to either 15 or 20 years depending on the circumstances.

27. The Minister's Second Reading Speech and the Explanatory Notes both state that this increase has been brought about in order to align these periods with the time which must be served before a prisoner sentenced to serve life imprisonment is eligible for parole under the *Corrective Services Act 2000*.

28. The committee notes that the bill lengthens the minimum period before which a nominal life imprisonment sentence may be reviewed by a court from 13 years to 15 or 20 years, depending upon the circumstances. The Minister's Speech and the Explanatory Notes provide background to this amendment.

29. The committee refers this matter to Parliament for its consideration.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?¹²

◆ **Clause 48**

30. Clause 48 inserts into the *Evidence Act 1977* a new s.95A, which deals with DNA evidentiary certificates. Proposed s.95A is of a generally similar nature to clauses found in many statutes, which enable evidence of stipulated matters to be placed before a court by means of a certificate signed by a relevant official. Such provisions are designed to reduce the workload of officials administering the statute. Provisions of this nature are unexceptionable provided that the matters dealt with are non-controversial.

31. It appears to the committee that at least some of the matters referred to in proposed s.95A involve matters which may be contentious.

¹² Section 4(3)(d) of the *Legislative Standards 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals Act depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

32. The fact that assertions in a certificate issued under the section “are evidence” of those matters means that whilst the court is not obliged to accept those statements it may (particularly in the absence of contradictory evidence) do so.
33. Section 95A applies in relation to criminal proceedings, where the rights and liberties of defendants are of considerable importance.
34. The matters of which a certificate is evidence which principally concern the committee are those in s.95A(2)(c) (that a stated DNA profile has been obtained from a stated thing) and (d) (that the DNA analyst examined the laboratory’s records relating to the receipt, storage and testing of the stated thing and confirms that the records indicate that all applicable quality assurance procedures were complied with).
35. Given the importance of DNA evidence in many criminal proceedings, these matters are clearly significant. Not surprisingly, the Explanatory Notes argue in favour of the insertion of these provisions on the basis of administrative convenience, and also refer to various safeguards incorporated in the section. These safeguards include a requirement that the DNA analyst must be called to give evidence at the hearing and that a party challenging a matter stated in the certificate may, with the leave of the court, require the party relying on the certificate to call any person involved in the receipt, storage or testing of the thing to give evidence at the hearing. Such leave may be granted only if the court is satisfied about certain stipulated things.
36. The Explanatory Notes emphasise that, whilst the obtaining of a stated DNA profile may be put in evidence by certificate, the evidence of comparison of DNA profiles, which is naturally of very great importance in this context, must be given directly by an analyst.
37. The Explanatory Notes point out that an analogous provision (s.95, *Evidence Act*) already exists in relation to the admissibility of statements produced by computers.
38. Finally, the Explanatory Notes state:

It is submitted that the provision as drafted balances the competing considerations (of the unrestricted cross-examination of relevant prosecution witnesses as opposed to the administrative convenience provided by certificate evidence).

39. The committee notes that the bill inserts into the *Evidence Act 1977* a provision which will enable various matters relating to DNA analysis to be put in evidence by means of a certificate. The committee is concerned by the inclusion of evidentiary certificate provisions in relation to any matter which may be other than non-contentious.
40. The committee notes that the provision incorporates a number of safeguards.
41. The committee refers to Parliament the question of whether the insertion of proposed s.95A has sufficient regard to the rights of persons against whom evidence of DNA analysis may be led.

3. ELECTORAL AND OTHER ACTS AMENDMENT BILL 2002

Background

1. The Honourable Rod Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 6 March 2001.
2. The object of the bill, as indicated by the Explanatory Notes, is:

to amend the Electoral Act 1992 (the Act), Referendums Act 1997, Local Government Act 1993 and Criminal Code and make consequential amendments to the Legislative Assembly Act 1867 and Parliament of Queensland Act 2001 to:

 - (a) *implement electoral reforms contained in the document, Restoring Integrity – The Beattie Good Government Plan for Queensland which was released by the Premier in Barcaldine on 21 January 2001 (the Barcaldine Reforms); and*
 - (b) *give effect to recommendations of the Legal, Constitutional and Administrative Review Committee (LCARC) Report No. 23: May 2000: Issues of Queensland electoral reform arising from the 1998 State election and amendments to the Commonwealth Electoral Act 1918.*

Does the legislation have sufficient regard to the rights and liberties of individuals?¹³

Does the legislation have sufficient regard to the institution of Parliament?¹⁴

◆ The bill generally

3. As the Explanatory Notes indicate, this bill makes a number of amendments to electoral-related legislation largely aimed, as the Minister stated in his Second Reading Speech:

at eliminating electoral fraud and restoring public confidence in the electoral process.
4. One of the most notable features of the bill is that a significant number of the amendments which it contains are intended (either directly or indirectly) to control, or at least strongly influence, various aspects of the internal operations of political parties. This is at first sight a somewhat novel legislative initiative.
5. The bulk of the outcomes which the bill seeks to bring about are reflected in the contents of the “complying constitution” of political parties (set out in proposed s.73A, inserted by cl.11). The matters in question are largely procedural and are in large part directed towards the conduct of preselection ballots (internal party selection of candidates for political office). However, one significant stipulation of a “complying constitution” is that under it persons convicted of a “disqualifying electoral offence” are prohibited from becoming a member of the party for 10 years, and from continuing as a member of the party if convicted of such an offence.

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

¹⁴ Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

6. However, it should be noted that the bill does not purport to impose absolute obligations in respect of the relevant matters. Rather, it provides that if a political party's constitution is not a "complying constitution" the Queensland Electoral Commission must refuse to register the party (cl.10, proposed s.73(5)). Refusal of registration is of course a quite significant sanction: its two main consequences are that the party is ineligible for public funding, and also loses the important practical advantage of being able to have its name, or an abbreviation thereof, printed adjacent to its candidates' names on ballot papers at State elections.
7. The bill contains other provisions which intrude upon the internal operations of political parties. Part 8A (proposed ss.148H to 148O, inserted by cl.17), authorises the Queensland Electoral Commission to inquire into particular preselection ballots held within political parties, and empowers the Commission to require a party's "registered officer" to supply it with relevant information. Further, the Commission is required to conduct a random audit of preselection ballots of candidates immediately after each State election has been held. The bill again empowers the Commission to require the "registered officer" to supply it with relevant information. The Commission is required to report to the Minister if it finds that any contraventions of "model procedures" or of the party's constitution have occurred (proposed s.148N(5)).
8. These powers are again in most senses not substantive, in that they merely result in the provision of a report to the Minister.
9. Our system of government is still based upon the election of individual members to Parliament. However, the reality is that the successful candidates are usually the endorsed nominees of political parties. It might therefore be argued that the public has an interest in the integrity of the internal operations of those organizations.
10. An analogy can possibly be drawn between the legislative controls which this bill imposes upon political parties, and the legislative provisions which for many years have governed the registration and operation of trade unions. These latter bodies are extensively regulated, although it is fair to say that the existence of a system of registration for industrial organisations (representing both employer and employee interests) is essential, given Australia's still largely institutionalised industrial relations system.
11. As mentioned above, the bill's legislative initiatives are basically non-prescriptive in nature. However, it is still in the committee's view possible to conclude that the bill impacts upon the rights and liberties of members and controllers of political parties generally, and in particular upon the rights and liberties of persons who have been convicted in the last 10 years of "disqualifying electoral offences".
12. The committee notes that the bill includes a number of provisions which either directly or indirectly encroach upon the capacity of political parties to run their own affairs without outside interference, and upon the capacity of persons to join and remain members of such organisations.
13. The committee refers to Parliament the question of whether these provisions have sufficient regard for the rights and liberties of the abovementioned persons, as well as those of the public in general.

Does the legislation have sufficient regard to the rights and liberties of individuals?¹⁵**◆ Clause 17 (proposed ss.148J and 148N)**

14. Proposed ss.148J and 148N (inserted by cl.17) relate to inquiries by the Queensland Electoral Commission into particular preselection ballots and its conduct of random audits respectively. Both sections require the “registered officer” of the relevant political party to give the Commission relevant information required by it. In each case failure to provide the information is an offence punishable by a maximum penalty of 400 penalty units (\$30,000). These are substantial penalties.
15. Proposed s.148K, also inserted by cl.17, relates to frivolous or vexatious claims made by a person to the Commission. The Commission is empowered to give a person notice that a complaint made by the person appears to fall within this category, and to advise the person that if the person again makes the same or substantially the same complaint the person commits an offence. The section goes on to provide that a subsequent repeat claim constitutes such an offence. A maximum penalty of 85 penalty units (\$6,375) or 1 years imprisonment is provided for. Whilst the monetary penalty is unexceptional, the committee queries whether the offence is such as to merit an imprisonment option.
16. The Explanatory Notes address this issue as follows:

The purpose is to deter abuse of the complaint process by disaffected candidates who seek to make the same or substantially the same complaint to the Commission after having been advised that it will not be investigated.

17. The committee notes that the bill imposes substantial penalties on “registered officers” of political parties who fail to supply information required by the Queensland Electoral Commission in relation to an inquiry into, or random audit of, preselection ballots. The committee draws the magnitude of these penalties to the attention of Parliament.
18. The committee also notes that the bill prohibits the making of repeat complaints to the Commission which are frivolous or vexatious, and provides for an imprisonment option as well as a monetary penalty.
19. The committee seeks information from the Minister as to why a potential term of imprisonment is considered justifiable in relation to an offence of this nature.

◆ Clause 51 (proposed ss.98B, 98C and 98D)

20. Clause 51 relocates into the *Criminal Code* a number of offence provisions of the type previously contained in the *Electoral Act 1992*. These include the giving of false or misleading information to the Queensland Electoral Commission (proposed s.98B), bribing someone in order to influence that person’s election conduct, and receiving such a bribe (proposed s.98C). Section 98D deals with forgeries of papers related to elections and referenda.

¹⁵ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

21. The first two provisions carry maximum penalties of 7 years imprisonment, and the third a maximum penalty of 10 years imprisonment.
22. These are very substantial penalties, and much higher than the penalties previously imposed.
23. In relation to these matters, the Explanatory Notes state:

The most serious electoral offences, including bribery, forging or uttering electoral papers, giving false or misleading information and voting if not entitled, will be removed from the Act and relocated in the Criminal Code. The penalties for these electoral offences have been increased to levels exceeding, or equal to, the penalties for commensurate offences in other Australian jurisdictions.

24. The committee notes that proposed ss.98B, 98C and 98D provide very substantial maximum terms of imprisonment for the offences which they create.
25. The committee refers to Parliament the question of whether these maximum penalties, which are very substantially higher than those previously imposed, are appropriate in the circumstances.

◆ **Clauses 58, 61 and 62**

26. Clauses 61 and 62 respectively provide a prohibition upon candidature for election to the Legislative Assembly, and for vacation of a seat in the Legislative Assembly, on the basis of the candidate or member having been convicted of a “disqualifying electoral offence”. Clause 58 imposes a similar prohibition upon candidature for election to a local government, and for a corresponding vacation of a councillor’s seat.
27. As the committee has previously observed,¹⁶ Parliaments in the Westminster tradition have always legislated a range of qualifications and disqualifications relating to voting in, and candidature for, their own elections. They have also legislated grounds upon which a member’s seat will be vacated. There is accordingly nothing unprecedented in the nature of cls.61 and 62. The appropriateness of these provisions is essentially a policy issue, which in the final analysis is for Parliament to decide.
28. As to s.58, local governments are of course creatures of statute. Again the issue is one of policy, upon which Parliament must ultimately decide.

29. The committee notes that cls.58, 61 and 62 of the bill impose prohibitions upon candidature for, and the holding of a seat in, the Legislative Assembly and local governments, in relation to persons who have been convicted of a “disqualifying electoral offence”. In the case of candidatures, the prohibition applies if a conviction has occurred within the previous 10 years.
30. The committee refers to Parliament the question of whether these provisions have sufficient regard for the rights of the candidates, members and councillors concerned, and whether they have sufficient regard for the institution of Parliament.

¹⁶ See the committee’s report on the *Local Government Amendment Bill 2001*, Alert Digest No. 1 of 2002 at page 19.

◆ Clause 54

31. Clause 54 amends s.9A of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Section 9A contains a list of exceptions to the general scheme of that Act, under which once the relevant “rehabilitation period” has expired a person’s conviction of an offence is generally disregarded. The additional exceptions inserted by cl.54 relate to applicants for membership of a registered political party, candidates for election to a local government and candidates for election to the Legislative Assembly. These persons are not entitled to rely upon the Act in relation to “disqualifying electoral offences” or other offences of a corresponding nature. Accordingly, all relevant offences committed, no matter how old, will need to be disclosed.
32. A number of bills which the committee has examined have excluded the operation of the *Criminal Law (Rehabilitation of Offenders) Act*. These have related, in particular, to persons having dealings with children, but have also encompassed certain other categories. The committee notes that cl.54 broadens further the range of such persons.

33. The committee notes that, in respect of determining what is a relevant “disqualifying electoral offence”, cl.54 denies applicants for membership of registered political parties, and candidates for election to a local government or the Legislative Assembly, of the benefit of the rehabilitation period provided for under the *Criminal Law (Rehabilitation of Offenders) Act 1986*.
34. The committee refers to Parliament the question of whether this denial is appropriate in the circumstances.

4. RESIDENTIAL SERVICES (ACCOMMODATION) BILL 2002

Background

1. The Honourable Robert Swarten MP, Minister for Public Works and Minister for Housing, introduced this bill into the Legislative Assembly on 6 March 2002.
2. The objects of the bill, as indicated by the Explanatory Notes, are to:
 - *balance the rights and responsibilities of residents and service providers relating to the provision of accommodation in the residential services industry;*
 - *regulate the making, context, operation and ending of residential service agreements;*
 - *establish a process for resolving disputes about residential service agreements;*
 - *establish administration and compliance process for the legislation.*

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

◆ The bill generally

3. The bill establishes an extensive regulatory regime in relation to the “residential services” industry. This industry supplies a variety of types of accommodation, including boarding houses, supported accommodation and aged rental accommodation. A distinguishing feature of this industry is that the persons for whom it caters, whether they be described as boarders, lodgers or otherwise, generally occupy the relevant accommodation as licensees rather than as tenants. They accordingly do not have any entitlement to exclusive possession of the premises within which they lodge, and have a relationship with the accommodation provider which is purely contractual.
4. Up until now, the relationship between the providers and consumers of this type of accommodation has essentially been governed by the common law (primarily by the law of contract). This contrasts with the provision of residential accommodation under tenancies,¹⁸ which for a considerable period of time has been subject to statutory regulation.
5. As the Explanatory Notes state, the regulatory regime embodied in this bill is modelled on the principles of general tenancy legislation, although tailored to the particular needs of the “residential services” sector.
6. Not surprisingly, therefore, most of the bill’s provisions impinge in one way or another upon the common law rights of both providers and consumers of “residential services” accommodation. In the final analysis, it is for Parliament to determine whether the provisions of the bill strike a reasonable balance between the competing interests of these groups.

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

¹⁸ Essentially the letting of houses, units and flats where the tenant has a right to exclusive possession of the rented premises.

7. This bill is cognate with the *Residential Services (Accreditation) Bill 2002*, which is presently before the Parliament. The latter bill establishes a registration and accreditation scheme for residential service providers and premises.

8. The committee notes that this bill establishes a regulatory framework for the “residential services” industry, which until now has basically been governed by the law of contract. The bill’s regulatory regime is broadly similar to that applying in relation to tenancies, although tailored to the needs of the residential services industry.

9. The committee refers to Parliament the question of whether the bill has sufficient regard to the rights of the providers of such accommodation, as well as those of its consumers.

Does the bill authorise the amendment of an Act only by another Act (by a “Henry VIII clause”)?¹⁹

◆ **Clause 44**

10. Clauses 40-43 inclusive, which relate to payments by the Residential Tenancies Authority of rental bonds held by it, enable a person to apply to a Tribunal for an order in relation to payment of a bond, and to give the Authority notice of the application. Clause 44 provides that the “allowed period” for doing these things is:

(a) 14 days after the giving of the Authority’s notice; or

(b) if a longer period is prescribed under a regulation – the longer period.

11. In the opinion of the committee, paragraph (b) probably constitutes a “Henry VIII Clause” within the meaning adopted by the committee,²⁰ as it effectively provides that the operation of a provision of an Act may be modified by the making of a regulation. Even if the clause in question were not a “Henry VIII Clause”, an issue would still arise as to whether it constituted an inappropriate delegation of legislative power.²¹

12. The Explanatory Notes refer to the capacity to alter the “allowed period” by regulation, but do not provide any justification for it.

13. The committee notes that cl.44(b) of the bill enables the “allowed period” for applications to the Tribunal in relation to rental bond payments, to be extended by regulation. The committee considers this probably constitutes a “Henry VIII clause”.

14. The committee seeks information from the Minister as to why the insertion of paragraph (b) is considered appropriate.

¹⁹ 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.

²⁰ See the committee’s January 1997 report on *The Use of “Henry VIII Clauses” in Queensland Legislation*.

²¹ 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.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?²²

◆ **Clause 108**

15. Clause 108 provides that a conciliator under the *Residential Tenancies Act 1994* who performs a conciliation of a “service dispute” between a service provider and a resident has the same protection and immunity as a Supreme Court judge performing the functions of a judge. Corresponding Supreme Court-like immunity is conferred upon parties to the conciliation, the parties’ representatives and documents produced during the conciliation.
16. It seems unlikely that conciliators would in this context be dealing with particularly large sums of money. However, the issue of defamation might perhaps arise.

17. The committee notes that cl.108 of the bill confers upon conciliators of service disputes, upon parties to the conciliations and their representatives, and upon documents produced during conciliations, the same protection as would apply in the Supreme Court.
18. In the circumstances, the committee does not consider the conferral of these immunities to be unreasonable.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?²³

◆ **Clauses 130 and 131**

19. Clause 130 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).
20. Clause 131 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.
21. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.
22. Clauses 130 and 131, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

²² 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.

²³ 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.

23. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.
24. 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.
25. The committee refers to Parliament the question of whether cls.130 and 131 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?²⁴

◆ Clause 162, definition of “relative”, Dictionary, definition of “relative”

26. Clause 162 inserts into the Dictionary to the *Residential Tenancies Act 1994* a definition of “relative”. The Schedule to the bill (Dictionary) inserts an identical definition of the term “relative” for use in relation to this bill.
27. In each case the general definition of “relative” contained in paragraph (a) of the definition is extended to provide that, for Aboriginal and Torres Strait Islander persons, it is also taken to include respectively “a person who, under Aboriginal tradition, is regarded as a relative of the Aboriginal person” and “a person who, under Island custom, is regarded as a relative of the Torres Strait Islander person”.
28. The committee notes that provisions of this nature have been included in definitions incorporated in a number of bills recently examined by it.²⁵ The committee has previously commented that Aboriginal and Island customary laws are in general not recognised within the Australian legal system, although they are given limited legislative recognition for certain purposes, and that the express inclusion of definitions of this kind constitutes an express recognition of this aspect of customary law.

29. The committee notes that under this bill “relative” is defined so as to include persons regarded under Aboriginal tradition and Island custom as a relative.
30. The committee considers that, by defining these terms in this manner, the bill has sufficient regard to Aboriginal tradition and Island custom.

²⁴ Section 4(3)(j) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

²⁵ See, for example, the *Domestic Violence Legislation Amendment Bill 2001*, (Alert Digest No. 8 of 2001 at pages 10-11).

5. RESIDENTIAL SERVICES (ACCREDITATION) BILL 2002

Background

1. The Honourable Merri Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 6 March 2002.
2. The objects of the bill, as indicated by the Explanatory Notes, are to regulate the conduct of residential services to:
 - *protect the health, safety and basic freedoms of residents;*
 - *encourage service providers to continually improve the way they conduct residential services; and*
 - *support fair trading in the residential services industry.*
3. This bill is cognate with the *Residential Services (Accommodation) Bill 2002*, currently before the Parliament. Readers are referred to the report on that bill elsewhere in this Alert Digest.

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

◆ Clauses 113 to 135 inclusive

4. Clause 113 of the bill confers 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.
 5. Clauses 119 to 135 inclusive confer an extensive range of post-entry powers, generally similar to those employed in a number of bills previously examined by the committee.
 6. 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. For example, cl.120 requires authorised officers, when entering or exercising powers in rooms in registered premises occupied by persons as their place of residence, to “preserve, as far as practicable, the privacy of anyone living at the residence”.
7. The committee notes that the bill confers upon authorised officers 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 powers.

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

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

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?²⁷

◆ **Clauses 171 and 172**

9. Clause 171 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).
10. Clause 172 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.
11. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.
12. Clauses 171 and 172, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.
13. The Explanatory Notes state in relation to these provisions:

These provisions effectively provide for the reversal of the onus of proof. However, it should be noted that the matters to be proved by the defendant are not elements of the offence. The facts that support the defence will usually be entirely within the defendant's knowledge and impossible for the prosecutor to prove in the negative. Given that the legislative scheme introduced by this bill is designed to protect the health, safety and welfare of a vulnerable section of the community, it is appropriate that:

- *persons be required to oversee the conduct of their representatives and, in doing so, make reasonable efforts to ensure that their employees and agents comply with the requirements of the legislation.*
- *an executive officer who is in a position to influence the conduct of a corporate licensee, be required to ensure that the corporation complies with the legislation; and*
- *an executive officer, who is responsible for a contravention of the legislation, be accountable for his or her actions and not be able to "hide" behind the corporation.*

The provisions are therefore warranted to ensure that there is effective accountability at a corporate level.

²⁷ 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.

14. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.
15. 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.
16. The committee refers to Parliament the question of whether cls.171 and 172 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

Does the legislation provide appropriate protection against self-incrimination?²⁸

◆ Clauses 134 and 135

17. Clause 134 provides that an authorised officer may require a “service provider” to make available for inspection by an authorised officer, or produce to an authorised officer for inspection, at a reasonable time and place nominated by the officer, “a document required to be kept by the service provider under (the bill)” or “a document issued to the service provider under (the bill)”, unless the person has a reasonable excuse. Clause 135(1) provides that a service provider who does not comply with this requirement commits an offence carrying a maximum penalty of 50 penalty units (\$3750). Clause 135(2) provides that it is not a reasonable excuse that complying with the requirement might tend to incriminate the individual.
18. Provisions similar to this have appeared in a number of bills considered by the committee in recent years.
19. The committee’s views on provisions denying persons the benefit of the rule against self-incrimination are well known.²⁹ In short, the committee normally considers such provisions are only potentially justifiable if:
 - *the matters concerned are matters peculiarly within the knowledge of the persons 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 the information obtained in prosecutions against the person*
 - *in order to secure this restriction of the use of the information obtained, the person should not be required to fulfil any conditions such as formally claiming the right.*
20. The bill does not appear to contain any express restriction on the use of the information obtained through the production of the relevant documents (“derivative use immunity”). However, the denial of the self-incrimination protection only applies in relation to

²⁸ Section 4(3)(f) of the *Legislation 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.

²⁹ 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).

“a document required to be kept by the service provider under (this bill)” and “a document issued to the service provider under (this bill)”.

21. The committee notes that cls.134 and 135 deny persons the benefit of the rule against self-incrimination in relation to the compulsory production of documents required to be kept under the bill, or issued to the service provider under the bill. 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.
22. The committee refers to Parliament the question of whether the denial of the benefit of the self-incrimination rule by cls.134 and 135 is justifiable.

6. TOURISM, RACING AND FAIR TRADING (MISCELLANEOUS PROVISIONS) BILL 2002

Background

1. The Honourable Merri Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 6 March 2002.
2. The objects of the bill, as indicated by the Minister in her Second Reading Speech, are to:
 - *amend a number of Acts administered by the Department of Tourism, Racing and Fair Trading; and*
 - *repeal two Acts and one regulation as part of the implementation of the recommendations contained in National Competition Policy reviews.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?³⁰

◆ Clauses 2(1) and 2(2)

3. Clause 2(1) of the bill states that cl.33 “is taken to have commenced on 27 June 2000”. Clause 2(2) similarly provides that Part 18 of the bill “is taken to have commenced on 23 June 2000”.
4. Clause 33 amends a Schedule to the *Collections Act 1966* to accurately identify an entity that has been making appeals for support. This change does not appear to the committee to have any adverse consequences. Part 18 makes two seemingly inconsequential amendments to the *Racing and Betting Amendment Act 2000*.

5. The committee notes that cls.2(1) and 2(2) give retrospective operation to certain provisions of the bill. These provisions do not appear to be adverse to any person.
6. The committee accordingly has no concerns about these retrospective provisions.

◆ Clauses 13 and 111 (proposed s.632)

7. Clauses 13 and 111 insert two related provisions which have retrospective effect.
8. Clause 12 of the bill amends s.170 of the *Body Corporate and Community Management Act 1997* to provide that an information sheet given under that Act must be attached to a contract for a proposed lot, immediately beneath a warning statement of the type required by s.366 of the *Property Agents and Motor Dealers Act 2000* to be attached as the top sheet of a contract.

³⁰ 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.

9. It appears from the Explanatory Notes that when the latter Act was enacted it inadvertently did not contain this amending provision.
10. The positioning of the relevant information sheet and warning statement at the front of a contract could provide grounds for termination of the contract.
11. Whilst the bill amends the requirements in relation to proposed lots to accord with what was originally intended, it also inserts a transitional provision (cl.13, proposed s.294) which provides that a failure since 1 July 2001³¹ to comply with the requirements now enacted by this bill does not entitle a buyer to cancel the contract.
12. A corresponding provision (proposed s.632) is inserted by cl.111 into *the Property Agents and Motor Dealers Act 2000*.
13. The provisions have retrospective effect in that they apply to contracts which have been entered into since 1 July 2001. They will prevent a buyer under such a contract from cancelling the contract on the basis of failure to comply with the law as then in force, and in that respect might be regarded as adverse to the interests of such buyers.
14. However, both transitional provisions are expressed to apply only to relevant contracts which have not by the date of commencement of this bill been settled or lawfully terminated. In other words, buyers who have already terminated on the basis of the non-compliance will not be prejudiced, and there would seem to be nothing preventing buyers who have not so far terminated from doing so provided they act before this bill becomes law. The committee notes that this bill was introduced into the Legislative Assembly on 6 March 2002. Moreover, and without having examined the matter in detail, it appears to the committee to be arguable that the defect involved is of a relatively technical nature, concerning simply the order in which two sheets at the top of a contract are placed.

15. The committee notes that cls.13 and 111 insert transitional provisions which are retrospective to 1 July 2001, and which are potentially adverse to certain buyers of land. However, the effect of these provisions is ameliorated by certain provisos which are also included.
16. In the circumstances, the committee makes no further comment on these retrospective provisions.

◆ **Schedule, *Motor Vehicle, Securities and Other Acts Amendment Act 2001*, amendment 9**

17. A schedule to the bill contains “minor amendments” made to a number of Acts. Amendment 9 of the amendments to the *Motor Vehicles, Securities and Other Acts Amendment Act 2001* inserts a new s.46A. This section states:

‘To remove any doubt, it is declared that the Motor Vehicles Securities and Other Acts Amendment Act 2001, s.19(4), part 3, s.35, 36, 38, to 40, 42 and 46(2) are always taken to have commenced on 7 June 2001.’

18. The committee notes that the date or dates upon which the provisions mentioned in new s.46A actually commenced is difficult to establish by reference to the *Statutory Annotations*

³¹ The *Property Agents and Motor Dealers Act 2000* came into force on 1 July 2001.

and *Updaters*. The committee notes the effect of the section is to declare that these provisions are taken to have commenced on 7 June 2001.

19. Neither the Minister's Second Reading Speech nor the Explanatory Notes make any reference to this presumably retrospective provision.

20. The committee seeks information from the Minister about the background to proposed s.46A of the *Motor Vehicles Securities and Other Acts Amendment Act 2001*, which is inserted by the Schedule to the bill.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?³²

◆ **Clause 40**

21. Clause 40 amends s.109 of the *Fair Trading Act 1989*. Amongst other things, that section currently exempts "the Crown" and "any person" from liability:

on account of any disclosure or publication made by the (Commissioner for Fair Trading) or on the Commissioner's behalf concerning –

- *the supply of goods or services*
- *the commercial or business reputation of any person associated with the supply of goods or services*
- *the quality or standard of goods or services supplied by any person*
- *a contravention or alleged contravention of (the Fair Trading Act) or the operation or enforcement of (that Act).*

22. The amendment replaces the relevant provisions with new provisions which extend the exemption from liability to disclosures or publications made by the Minister as well as the Commissioner. On the other hand, the new provisions introduce express requirements, applicable to both the Minister and Commissioner, that the disclosure or publication be made in good faith and that the Minister or Commissioner be satisfied that it is in the public interest to make the disclosure or publication.

23. Self-evidently these statements, especially those made by the Minister, may have a very substantial detrimental effect upon the business reputation and profitability of businesses or persons adversely mentioned in them. Whilst under normal defamation laws a number of qualified defences might be available to the Minister and/or Commissioner, the new provisions will categorically exclude any liability, subject to the two statutory conditions. The provisions inserted by cl.40 are therefore of considerable significance.

24. In relation to these provisions, the Explanatory Notes state:

This amendment is needed to enable the Minister to issue warnings to consumers about inappropriate business practices and to deter individuals and businesses from acting in an

³² 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.

inappropriate manner towards consumers in the future. It is consistent with the protection already afforded the Commissioner for Fair Trading. In some circumstances it is likely that warnings from the Minister will attract greater media attention and have greater positive impact on consumer protection and on deterring inappropriate behaviour than similar warnings issued by the Commissioner for Fair Trading.

Ministers are protected from liability in similar circumstances under other consumer protection legislation such as s.594 of the Property Agents and Motor Dealers Act 2000.

In New South Wales, the Minister for Fair Trading is provided with the protection from liability in relation to statements in the course of the administration or execution of the Fair Trading Act 1987 (NSW).

The Minister will establish protocols for ensuring that disclosures and publication of information will only be made in the appropriate circumstances.

25. The committee notes that cl.40 of the bill confers upon the Minister an absolute exemption from liability in relation to disclosures or publications made by the Minister concerning businesses and persons. A corresponding exemption is presently conferred upon the Commissioner.
26. The new exemption provisions, both in relation to the Minister and the Commissioner, will require that the disclosure or publication be made in good faith, and that they are satisfied the public interest requires it to be made.
27. The committee refers to Parliament the question of whether this extension of exemption from liability in relation to statements made by the Minister, has sufficient regard to the rights of persons adversely mentioned in those statements, as well as the interests of consumers.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?³³

◆ Clauses 103 and 106

28. Clause 103 amends s.547 of the *Property Agents and Motor Dealers Act 2000*, which deals with the powers of inspectors to enter places. The bill will expand the range of places to which entry may be effected without either a warrant or the consent of the occupier. The bill will authorise entry to a licensee's or marketeer's place of business when it is open for carrying on business or otherwise open for entry and (in the case of a licensee's place of business) when it is required to be open for inspection as a condition of the licensee's licence. However, entry may not be effected to a part of the place where a person resides.
29. As the Explanatory Notes state, the additional entry powers conferred by the bill are not dissimilar to those conferred by a range of other statutes.
30. Clause 106 of the bill also inserts a section (proposed s.556A) which confers upon an inspector power to require marketeers or other persons having possession of documents

³³ 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.

related to marketeer sales and other relevant matters, to produce them to the inspector if required. The section provides that the inspector may require production of the document either at a stated reasonable place and time, or immediately. Again, this provision is not dissimilar to provisions included in a number of other bills examined by the committee, although its authorisation of demands for immediate production of documents is less common.

31. The Explanatory Notes state, in relation to these entry and post-entry powers:

These powers are needed to meet the consumer protection objectives of the PAMDA. Without these powers, inspectors cannot make on the spot inspections to collect evidence, avoiding the possibility of evidence being destroyed, to enforce the Act.

These are similar powers of entry contained in other Queensland legislation, including s.30H of the Motor Vehicles Securities and Other Acts Amendment Act 2001, s.65 of the Introduction Agents Act 2001 and s. 31 of the Consumer Credit (Queensland) Act 1994.

32. The committee notes that the bill confers on inspectors additional powers of entry, in circumstances where there is neither occupier consent nor a warrant. The bill also confers power to demand production of marketeer-related documents.
33. The committee draws to the attention of Parliament these extensions of inspectors' entry and post-entry powers.

Does the legislation have sufficient regard to the rights and liberties of individuals?³⁴

◆ Clauses 81 to 83 inclusive

34. Clauses 81 to 83 insert into the *Property Agents and Motor Dealers Act 2000* several provisions relating to the appointment of pastoral houses for sales of residential property. The new provisions impose upon pastoral houses obligations to inform clients about certain matters prior to signing of an appointment, and prohibit reappointment of the pastoral house under a sole or exclusive agency earlier than 14 days before the term of that agency ends.
35. Breach of these provisions constitutes an offence punishable by specified maximum penalties. In the case of individuals these are 300 penalty units, but in the case of pastoral houses they are 1,000 penalty units (\$75,000).

36. The committee notes that cl.81 to 83 of the bill create offences which, if committed by a pastoral house, are punishable by very substantial maximum penalties.
37. The committee draws these substantial penalties to the attention of Parliament.

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

SECTION B

COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

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

*... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted*³⁵

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment³⁶ of a provision may therefore be considered as extrinsic material in its interpretation.

³⁵ Section 14B(3)(c) *Acts Interpretation Act 1954*.

³⁶ The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 *Acts Interpretation Act 1954*.

**SECTION B – COMMITTEE RESPONSE TO MINISTERIAL
CORRESPONDENCE**

**(NO MINISTERIAL CORRESPONDENCE IS REPORTED ON IN THIS
ALERT DIGEST)**

AMENDMENTS TO BILLS³⁷

DOMESTIC VIOLENCE LEGISLATION AMENDMENT BILL 2001

The committee reported on this bill, as originally introduced, in its Alert Digest No 8 of 2001 at pages 8-11. During the committee stage of debate, Parliament agreed to an amendment proposed by Mrs E Cunningham MP. The bill was subsequently passed, with that amendment incorporated in it, on 8 March 2002.

The relevant amendment provided for increased maximum penalties for breach of an order made under the *Domestic Violence (Family Protection) Act 1989*, where the respondent had previously been convicted of at least 2 breaches of such orders within the proceeding 3 years.

TRADING (ALLOWABLE HOURS) AMENDMENT BILL 2002

The committee reported on this bill, as originally introduced, in its Alert Digest No 2 of 2002 at page ii. The committee reported that it had examined the bill but considered it raised no issues within the committee's terms of reference. During the committee stage of debate, Parliament agreed to certain amendments proposed by the Minister sponsoring the bill, the Honourable Gordon Nuttall MP, Minister for Industrial Relations. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 6 March 2002.

The amendments proposed by the Minister raised no issues within the committee's terms of reference.



This concludes the Scrutiny of Legislation Committee's 3rd 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 dealt with in this digest.

Warren Pitt MP

Chair

9 April 2002

³⁷ 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.*

APPENDICES

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

APPENDIX B – TERMS OF REFERENCE

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

Terms of Reference

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

- (a) the application of fundamental legislative principles³⁸ to particular Bills and particular subordinate legislation; and
- (b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation³⁹.

(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)

³⁸ “Fundamental legislative principles” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, s.4(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

* The relevant section is extracted overleaf.

³⁹ A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, s.50.

APPENDIX C - MEANING OF "FUNDAMENTAL LEGISLATIVE PRINCIPLES"

- 4.(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.⁴⁰
- (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.

⁴⁰ Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

APPENDIX D – DETAILS OF BILLS CONSIDERED BY THE COMMITTEE

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

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