SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE
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50TH PARLIAMENT, 1ST SESSION

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	Dr Max Spry
Committee Staff:	Mr Christopher Garvey, Research Director
	Ms Anita Sweet, Principal Research Officer
	Ms Meg Hoban, Senior Research Officer (part-time)
	Ms Lynn Knowles/Ms Carolyn Heffernan, Executive Assistant

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

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BILLS EXAMINED BUT NOT REPORTED ON *

NIL

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

SECTION A

BILLS REPORTED ON

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

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted[1]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[2] of a provision may therefore be considered as extrinsic material in its interpretation.

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

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

SECTION A – BILLS REPORTED ON

1. ADOPTION OF CHILDREN AMENDMENT BILL 2002

Background

1. The Honourable J C Spence MP, Minister for Families and Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services of Queensland, introduced this bill into the Legislative Assembly on 16 April 2000.

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

> *To amend the Adoption of Children Act 1964 to provide for more efficient and child focussed adoption application processes that reflect contemporary adoption practice.*
>
> *To make minor technical amendments to the Child Care Act 1991 and the Child Protection Act 1999.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[3]

♦ **The bill generally**

3. A major focus of the bill is to insert into the *Adoption of Children Act 1964* a range of amendments to the provisions under which persons wishing to adopt children register themselves with the relevant department. The amendments are quite detailed and need not be canvassed at length here.

4. The amendments terminate the requirement that the claims of persons to adopt any of the small number of children currently available be considered in the order of the claimants' registration on the relevant departmental list or register. The bill substitutes a new system under which such persons will be assessed in accordance with a range of criteria designed to ascertain who will best suit the needs of the children who are available for adoption.

5. There is no doubt that the net effect of these provisions will be to place some prospective adoptive parents who are presently registered, in a less advantageous position than at present.

6. In this regard, it seems to the committee that the following matters are relevant.

7. Firstly, the new system is claimed in both the Minister's Second Reading Speech and the Explanatory Notes, to favour the interests of adoptive children rather than those of potential adoptive parents. The Explanatory Notes argue that the changes are consistent with the underlying philosophy of the *Adoption of Children Act*, expressed is s.10, that:

> *For all purposes of this Part and of Part 2* (effectively for the purpose of all adoptions*), the welfare and interests of the child concerned shall be regarded as the paramount consideration.*

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

8. The committee fully supports this general principle, and accordingly does not consider the new system to be objectionable.

9. Secondly, adoption of children is not a process known to the common law, and is essentially a creature of statute. That being the case, decisions about the nature of the statutory assessment system can be regarded as being primarily policy-based.

10. The committee notes that the principal effect of the bill is to remove the requirement that prospective adoptive parents be assessed in chronological order, and to replace it with a system directly related to the welfare and interests of the adoptive children.

11. The committee does not object to the insertion of these provisions.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[4]

- **Clause 6 (proposed ss.13AA(4) and 13AC(2)) and cl.9 (proposed s.13E(2))**

12. Clause 6 inserts proposed ss.13AA(4) and 13AC(2), and cl.9 inserts proposed s.13A(2). These provisions concern the adoption lists and assessment registers upon which the names of prospective adoptive parents may be entered. The provisions each require that the chief executive must remove a person's name from the adoption list or register if:

> *(a) the person is, as prescribed under a regulation, ineligible to have the persons name entered in the (adoption list or register)…. .*

13. The Explanatory Notes (at page 10) indicate that the eligibility criteria stipulated in the *Adoption of Children Regulation 1999*, made pursuant to current provisions of the Act similar to the proposed provisions, will continue to apply once the bill becomes law.

14. Whilst the position is complicated by the fact that the bill is intended to enact a range of interim amendments pending a complete review of the Act (see the Minister's speech and the Explanatory Notes), the committee remains concerned about the appropriateness of the matters referred to in paragraph (a) being left completely to regulations, rather than at least the more important of the eligibility requirements being included in the Act itself. An examination of the *Adoption of Children Regulation 1999*, Part 2, confirms that many of the specified criteria (such as residence, domicil and citizenship) are important enough to merit inclusion in the Act.

15. The committee notes that matters which may render a person ineligible to have their name entered in an adoption list or register are, under a number of provisions of the bill, to be prescribed by regulation rather than being included in the bill itself.

16. The committee recommends that the Minister consider incorporating at least the more important of these matters in the bill.

[4] 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 make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[5]

- **Clause 13**

17. Clause 13 amends current s.14D of the *Adoption Act* to enlarge the range of decisions of the chief executive against which a person may appeal to a tribunal,[6] so as to include decisions about removal of a person's name from the lists referred to in the bill.

18. This amendment indirectly draws attention to the fact, expressly mentioned in the Explanatory Notes, that the range of appellable decisions will not include (and never has included), the ultimate decision of the chief executive to place an individual child with particular prospective adoptive parents. Any legal challenge to such a decision could presumably only be brought under the *Judicial Review Act*. The Explanatory Notes cite the difficulties in providing notice to all other prospective adoptive parents (including privacy issues), and the delay a review process would cause. The Notes go on to state that accountability for placement decisions will be considered during the forthcoming review of the Act.

19. The committee notes that, whilst various other decisions of a chief executive can be appealed to a tribunal, the bill does not change the current situation whereby decisions of the chief executive to place a child with particular prospective adoptive parents are not subject to merits review. This matter is canvassed in the Explanatory Notes.

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

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[7]

- **Clause 20**

21. A major thrust of the bill is to replace the current system, whereby prospective adoptive parents are entitled to have their claims considered in the order in which their names are entered in the adoption lists and registers, with a system whereby they are effectively assessed in terms of the strength of their case.

22. Clause 20 inserts a number of transitional provisions, including proposed s.74. Section 74 expressly extinguishes any "expectations" which a person may have had, immediately before the commencement of the bill's provisions, to have their claims assessed by the chief

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5 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.

6 Defined in the Act as a children's services appeal tribunal established under the *Children's Commissioner and Children's Services Appeals Tribunals Act 1996*.

7 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.

executive in chronological order. "Expectation" is defined as including "right, privilege, entitlement or eligibility".

23. Section 74 therefore appears to be retrospective in nature.

24. 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.

25. Undoubtedly, this provision will adversely affect some persons already on the list, who presently have entitlements to have their claims considered in chronological order.

26. In relation to this matter, the Explanatory Notes state:

> *If a right or expectation under the current Act to be assessed or matched with a child in accordance with the applicant's chronological order on a list exists, any argument for the preservation of this right or expectation must be balanced, in the contemporary context, against the legislative obligation to ensure for children the best possible adoptive placements.*

27. In the circumstances, and given that the committee unreservedly accepts that the interests of the prospective adoptive child should be paramount, the committee does not find this provision objectionable.

28. The committee notes that cl.20 inserts proposed s.74, which extinguishes "expectations" prospective adoptive persons may previously have had to have their claims assessed in chronological order.

29. Given that the relevant statutory changes are designed to promote the interests of adoptive children, the committee has no concerns about this provision.

2. ANIMAL AND PLANT HEALTH LEGISLATION AMENDMENT BILL 2002

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Rural Communities, introduced this bill into the Legislative Assembly on 9 April 2002.

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

> *enhance Queensland's legislative capacity to prepare for and respond to potentially devastating exotic terrestrial and aquatic animal diseases and the exotic economic and environmental pest, red imported fire ant.*

Overview of the bill

3. The principal purpose of the bill is to amend five primary industry-related statutes, namely, the *Agricultural Standards Act 1994*, the *Exotic Diseases in Animals Act 1991*, the *Fisheries Act 1994*, the *Plant Protection Act 1989* and the *Stock Act 1915*. The amendments made by the bill are heavily oriented towards conferring additional enforcement powers upon inspectors and other officials, and expanding the operational scope of important regulatory mechanisms such as quarantine orders. The bill also significantly increases a range of financial and imprisonment penalties which may be imposed for a breach of the various statutory provisions.

4. As the amendments involves a number of statutes and are in a large part generic in nature, this report will deal them by reference to their subject matter, rather than statute by statute.

5. The Minister in his Second Reading Speech indicates that the bill is, in a large part, a response to a number of significant and disturbing events, including the recent outbreak of foot and mouth disease in the United Kingdom and the discovery of two species of exotic fire ants in Queensland.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[8]

- **Clauses 5, 8, 13, 28 and 39**

6. Clauses 5, 8, 13, 28 and 39 confer upon officials a range of additional or enhanced entry and post-entry powers, under various statutes. The nature and extent of the additional or enhanced powers varies from statute to statute.

7. An examination of the relevant provisions of the bill indicates that the powers conferred are generally similar to powers found in many bills scrutinised by the committee in recent years.

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[8] 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. They include, for example:

- power for inspectors under the *Agricultural Standards Act 1994* to enter non-residential premises at a reasonable time, but without consent or a warrant, to check for compliance with the provisions of the Act and to prevent the introduction of, or to control the spread of, exotic diseases (cl.5); and

- power for inspectors under the *Plant Protection Act 1989* to enter non-residential premises without consent or a warrant if the chief executive is reasonably satisfied this is necessary to avoid an imminent risk of a pest infesting plants or other things on land outside a relevant pest quarantine area (cl.28).

9. The Explanatory Notes canvass at some length the arguments in favour of these additional powers. As the justification varies from statute to statute, and as the relevant provisions of the Explanatory Notes are quite lengthy, they are not reproduced here.

10. The committee notes that the bill confers upon inspectors and other officials new or enhanced powers of entry which extend beyond situations where the occupier consents or where a warrant has been obtained. The bill also confers additional or enhanced post-entry powers.

11. The committee draws to the attention of Parliament the nature and extent of these additional and enhanced powers.

Does the legislation have sufficient regard to the rights and liberties of individuals?[9]

♦ **Clauses 18(3), 22 to 25 inclusive and 36**

12. Clauses 18(3), 22 to 25 inclusive and 36 amend a number of provisions in various Acts which enable Ministers or chief executives to issue notices or make declarations imposing very significant controls on individuals, in relation to specific or anticipated pest or disease events. Clause 36 inserts a new provision of a similar nature into the *Stock Act 1915*. In general terms, the current provisions provide that the Ministerial or chief executive notices or declarations remain in force for stated maximum periods. The bill increases these maximum periods, most commonly from 21 days to 3 months.

13. These extensions of the periods during which notices and declarations will remain in force will self-evidently have an impact upon the rights and liberties of individuals affected by them.

14. The Explanatory Notes argue in favour of the extensions on the basis that the existing times are insufficient to adequately identify pest distributions, and also to prepare the regulations which will be required to give effect to the notices or declarations.

15. The committee notes that cls.18(3), 22 to 25 inclusive and 36 extend the periods during which various notices and declarations will have effect, and that this will impact upon the

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

rights and liberties of affected persons..

16. The committee refers to Parliament the question of whether these extensions of time are reasonable in the circumstances.

♦ **Schedule 1 (Amendment of Penalties)**

17. Another major focus of this bill is to substantially increase many of the penalties contained in the *Exotic Diseases in Animals Act 1981* and the *Stock Act 1915*.

18. The number of provisions involved, and the magnitude of the increases in penalties, are both quite significant. In the circumstances, it is quite appropriate that the amendments affecting penalties should be separately listed, as they are in this bill. The committee commends the Minister for adopting this drafting device.

19. The nature and extent of the amendments is further highlighted by a particularly helpful table in the Explanatory Notes (at pages 31-41).

20. Clause 15 of the bill also declares certain offences under the *Stock Act* (namely, offences against ss.9(3), 11(1), 4(2) and 17(1)) to be misdemeanours. The relevant offences are accordingly indictable offences, that is, offences of a more serious nature which are normally tried before a judge and jury.

21. The increases in penalty are dealt with in the Minister's Speech and in the Explanatory Notes, both of which advance arguments for making the changes. The arguments are perhaps best summarised by the statement at the head of the Table in the Explanatory Notes, which reads as follows:

> *The penalties are being increased to reflect the gravity of the implications of non-compliance with disease or pest control measures. The penalty increases will create a reasonable parity with other similar penalties in the Queensland statute book.*

22. The bill increases the penalties for a range of offences in the statutes it amends. These increases are quite substantial, and in some cases very large.

23. The penalty increases are listed separately in a Schedule to the bill. The committee commends the Minister on this drafting technique, which highlights these important provisions. The increases are also canvassed at some length in both the Minister's Second Reading Speech and the Explanatory Notes.

24. The committee refers to Parliament the question of whether the magnitude of these increases in penalties is appropriate in the circumstances.

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?[10]

- **Clause 14**

25. Clause 14 inserts into the *Exotic Diseases in Animals Act 1981* a new s.24A. Section 24A effectively removes any capacity of a person to legally challenge a decision of the Minister under s.22 of that Act ordering the destruction of an animal, animal product, carcass or other thing or ordering the removal or destruction of a animal pathogen or biological preparation.

26. In relation to this removal of the common law right of persons to access the courts, the Explanatory Notes state:

> *Whilst the amendment contemplates powers that override rights of ownership, pre-emptive slaughter is intended to reduce the total number of animals slaughtered and the total cost of eradication by ensuring that the eradication program proceeds ahead of the disease spread. In order to be successful, eradication must remove infected premises more quickly than new infections occur.*
>
> *Fair compensation for this type of destruction under section 22 at market value will be payable under Part 3 of the Exotic Diseases Act.*

27. The committee generally opposes "privative clauses" such as proposed s.24A.

28. The committee notes that cl.14 inserts a privative clause which will deny persons the right to challenge in the courts certain decisions of the Minister under s.22 of the *Exotic Diseases and Animals Act 1981*. The committee is generally opposed to provisions of this nature.

29. The committee notes that the Minister's Speech and the Explanatory Notes both advance arguments in favour of this provision.

30. The committee refers to Parliament the question of whether cl.14 has sufficient regard to the rights of persons who may wish to challenge the decisions in question.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[11]

- **Clause 16**

31. Clause 16 of the bill amends in s.47 of the *Exotic Diseases and Animals Act 1981* (which deals with the power to make regulations) by inserting a new subsection (3), which provides that a regulation may impose a penalty of no more than 80 penalty units ($6,000) for contravention of a regulation.

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[10] 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.

[11] 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.

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

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

- Rights and liberties of individuals should not be affected and the obligations imposed by such delegated legislation should be limited; and
- The maximum penalty should be limited, generally to 20 penalty units.[12]

34. The committee observes that the permissible maximum penalty under proposed s.47(3) is four times that favoured by the committee as a maximum figure for penalties created in regulations. The Explanatory Notes address this matter as follows:

> *The level of 80 penalty units has been set to reflect the penalties for serious offences that already exist in the Exotic Diseases in Animals Regulation 1988. This level of penalty is comparatively high for breach of a regulation. It has been set at this level to reflect the potentially serious effects that breaches of regulations designed to prevent the spread of exotic diseases, such as foot and mouth, can have.*

35. Clause 16 authorises the making of regulations which create offences and impose penalties of not more than 80 penalty units. The committee is generally concerned by the delegation of legislative power to impose penalties exceeding 20 penalty units.

36. Whilst the committee notes that this provision merely relocates one already included in the Act, and that penalties up to a level of 80 penalty units are already prescribed in the *Exotic Diseases and Animals Regulation 1988*, the committee reiterates its general opposition to delegation of power to impose penalties of this magnitude.

37. The committee recommends that the Minister take the opportunity to amend the bill to substantially reduce the maximum penalties which may be imposed by regulation.

Is the content of the explanatory note sufficient?[13]

38. As mentioned earlier in this chapter, one of the major purposes of this bill is to substantially increase a range of penalties contained in a number of Acts. Given the importance of this aspect of the bill it is appropriate, as the committee states above, that the provisions dealing with penalties should be separately grouped as in Schedule 1 of the bill.

39. As the committee also comments above, the Table set out in pages 32-41 of the Explanatory Notes, which lists the particular penalty provisions, describes the penalties concerned, and lists the current and new penalties, is also extremely helpful to persons wishing to understand this aspect of the bill.

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

[13] Section 23 of the *Legislative Standards Act 1992* sets out the information required to be included in an explanatory note for a bill. If the explanatory note does not include any of this information, it must state the reason for non-inclusion.

40. The committee commends the Minister on the provision in the Explanatory Notes of a Table setting out details of the increases in penalties being brought about by the bill.

3. BRISBANE MARKETS 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 11 April 2002.

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

> *To facilitate the sale of the Brisbane Markets assets and business owned and operated by Brisbane Market Corporation Limited ("BMC"). BMC is a company government owned corporation.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[14]

- **Clauses 3 and 4**

3. Clauses 3(1) and (2) of the bill provide that if at any time before the bill's commencement, building work was carried out at the Brisbane Market site without an approval required by the law then in force, "the approval is taken to have been issued". Clauses 4(1) and (2) provide that if during the same period the site or premises on it were used or occupied without an approval required by the law then in force, "the approval is taken to have been issued". Clause 4(3) further provides that the use or occupation, if it continues after the bill's commencement, "is taken to be with the approval".

4. The purpose of these provisions, as indicated in the Minister's Second Reading Speech and the Explanatory Notes, is to facilitate the proposed sale of the Brisbane Markets' assets and business by overcoming any doubts as to whether the Brisbane Market Corporation Limited (BMC), which operates the premises as a company government owned corporation, or its predecessors, were entitled to immunity from the application of State town planning, building and other related legislation. The Brisbane Markets have operated at the site since March 1960.

5. BMC and its predecessor State entities at all times assumed that they were entitled to such immunity.

6. The bill if passed will ensure that all building work on the site, and the use and occupation of the site and the premises on it, is taken to have been appropriately approved.

7. The bill can therefore be categorised as validating legislation.

8. As the Minister's speech and the Explanatory Notes point out, the bill does not affect the question of whether the relevant building work was carried out in such a way as to comply with applicable building codes. Further, it does not affect the power of any relevant

[14] 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.

authority to take action if, for example, a building on the site is, or in future becomes, dangerous or unfit for use or occupation.

9. 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.

10. The bill may perhaps be adverse to the interests of landowners in the Markets site area, as it will regularise a series of developmental activities in relation to which they were denied the opportunity to lodge objections, or which may even have been of a type prohibited outright or in some other way restricted, by planning legislation. The extent, if any, to which neighbouring landowners could be said to be disadvantaged by the bill is a complex issue, and impossible to determine on the available information.

11. In short, the committee is unable on the available information to clearly identify any adverse consequences flowing from the validations made by the bill.

12. It also appears from the Minister's speech and the Explanatory Notes that the situation may be one where there is an element of doubt about whether legal requirements have previously been complied with, rather than one where there has been a clear breach of such requirements.

13. The committee notes that cls.3 and 4 of the bill, which are essentially validating in nature, have retrospective effect.

14. The committee has been unable to identify any clearly adverse consequences to individuals which might result from the passage of the bill.

15. The committee makes no further comment on the retrospective aspects of the bill.

4. ENVIRONMENTAL PROTECTION AND ANOTHER ACT AMENDMENT BILL 2002

Background

1. The Honourable D MacM Wells MP, Minister for Environment, introduced this bill into the Legislative Assembly on 16 April 2002. It was subsequently passed as an urgent bill on 18 April 2002 following suspension of Standing Orders.

2. Upon receiving the Governor's assent, the bill becomes an Act. The committee only has jurisdiction to comment on bills, and once assent has been given the committee has no jurisdiction to comment upon it.

3. Even if the bill has not yet been assented to, there is in practice no scope for it to come back before Parliament once it has passed the third reading stage. Accordingly, it would be futile for the committee to attempt to comment on the bill's contents.

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

5. The committee accordingly makes no comment in respect of this bill.

5. REVENUE AND OTHER 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 11 April 2002.

2. The Minister's Second Reading Speech states:

> *The Revenue and Other Legislation Amendment Bill 2002 makes a number of amendments to the State's revenue, grant, subsidy and financial legislation, including those necessary to implement revenue initiatives announced in the State's 2001-2002 Budget.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[15]

- **Clauses 2(1), 2(2), 2(3), 2(4) and 2(5)**

3. This bill amends eight current statutes, most of which have a direct revenue orientation.

4. Clauses 2(1), 2(2), 2(3), 2(4) and 2(5) declare that various amendments made by the bill are taken to have commenced on a range of past dates, the earliest of which is 17 April 2001 and the most recent of which is 1 March 2002.

5. These retrospective provisions are quite varied, and are addressed in some detail in the Explanatory Notes. The committee agrees with the author of the Notes that the bulk of the amendments are in fact beneficial to individuals, and are therefore not of concern.

6. The only two amendments which do not clearly fall within that category are those made by cls.11 and 45 of the bill.

7. Clause 11 amends s.533 of the *Duties Act 2001* and declares (see cl.11(3)) that (a mortgage mentioned s.533) is a mortgage for s.248 and s.252(2) applies to it.

8. The passage in the Explanatory Notes related to this amendment is as follows:

> *With respect to the amendment to the Duties Act 2001 to confirm that the Act applies to mortgages executed prior to 1 March 2002 where there is a dutiable further advance secured by that mortgage after 1 March 2002, the amendment confirms the current assessing practice of the Commissioner under the Duties Act 2001. That practice was published in a Practice Direction on the date of commencement of the Act and was confirmed in public presentations on the new legislation. The current provisions of the Duties Act 2001 support the assessing practice and the amendment is being made only to remove any uncertainty as to the operation of the relevant provisions in the Act and for the avoidance of doubt. Consequently, taxpayers will not be adversely affected by the amendment and it is not considered to raise any fundamental legislative principle issues.*

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[15] 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. 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.

10. Clause 11, on the face of it, might adversely affect the position of mortgagors in that it renders it certain that further advances after the date of commencement of the *Duties Act 2001* on mortgages executed prior to that date attract additional duty. However, the committee considers the following factors are relevant:

- The position under the current legislation may well be the same as that expressly provided for in cl.11, which is passed merely to remove any element of doubt. The committee agrees with the assertion in the Explanatory Notes that the bill may well not vary the current law.
- The amendment made by cl.11 is consistent with assessing practice adopted by the commissioner since commencement of the *Duties Act 2001*, which was published in a Practice Direction on the commencement date.

11. The other relevant clause (cl.35) amends the *Fuel Subsidy Act 1997* by inserting new s.132A. Subsection (2) of that section provides in effect that a subsidy recipient's right to seek a review of the commissioner's decision about the amount of subsidy may be removed if the commissioner and the person enter into a written agreement. The Explanatory Notes state in relation to this matter:

> *The amendment to the Fuel Subsidy Act 1997 enabling the Commissioner to enter into a written agreement with a subsidy recipient as to the repayment of an estimated overpaid amount will remove a subsidy recipient's right to seek a review of the Commissioner's decision as to the amount. It would be inappropriate to allow a recipient to seek a review where the recipient agrees with the estimated amount.*

12. In relation to this matter, the committee notes particularly that the provision is one based upon written agreement between the commissioner and the subsidy recipient. Whilst the circumstances appear somewhat complex, the committee is unable to conclude that this retrospective provision operates adversely to subsidy recipients in any significant way.

13. The committee notes that a number of provisions of the bill will operate retrospectively. Only those made by cls.11 and 35 are not clearly beneficial to individuals.

14. Upon an examination of the circumstances, the committee has no concerns about the retrospective operation of cl.11. In relation to cl.35, the committee has been unable to positively identify any significant adverse effects upon individuals.

15. The committee makes no further comment in relation to these retrospective provisions.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[16]

- **Clause 10**

16. Clause 10 adds to s.508 of the *Duties Act 2001* a new subsection (3), as follows:

> *(3) A regulation may exempt from the imposition of duty an instrument or transaction for a financial arrangement entered into by a statutory body as defined in the Statutory Bodies Financial Arrangements Act 1982 as provided in that or another Act.*

17. This provision, which expressly enables instruments or transactions to be exempted from the imposition of duty in certain circumstances, seems clearly to be a "Henry VIII clause" within the definition of that term adopted by the committee.[17]

18. The Explanatory Notes state in relation to this provision:

> *The amendment to the Duties Act 2001 to provide an exemption by regulation for transactions or instruments for a financial arrangement entered into by a statutory body under the Statutory Bodies Financial Arrangements Act 1982 reinstates a provision contained in the Statutory Bodies Financial Arrangements Act 1982 which was omitted by the Duties Act 2001. The power is limited by the definitions for financial arrangements and statutory bodies as set out in the Statutory Bodies Financial Arrangements Act 1982. For this reason it is not considered to raise any fundamental legislative principle issues.*

19. The committee notes that cl.10 inserts what appears to be a "Henry VIII clause".

20. The committee cannot identify any sufficient justification for the inclusion of this provision. The committee recommends that it be deleted.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[18]

- **Clause 39**

21. Clause 31 replaces current s.38 of the *Fuel Subsidy Act 1997* with a new s.38. Clause 2(2) declares that this section is taken to have commenced on 25 June 2001.

22. The new s.38 requires certain persons claiming fuel subsidy to lodge a return in the approved form within certain periods. A maximum penalty of 100 penalty units ($7,500) is prescribed.

23. Clause 39 inserts a new s.158, which provides as follows:

> ***158 No retrospective criminal liability***
>
> *Section 38 is not effective to impose criminal liability retrospectively.*

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16 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.

17 See the committee's January 1997 report on *The Use of "Henry VIII Clauses" in Queensland Legislation.*

18 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.

24. The Explanatory Notes state in relation to this provision:

> *Clause 39 inserts a new section 158 to ensure that a criminal liability will not be imposed retrospectively in relation to an offence under new section 38 of the Act.*

25. Section 107 of the *Fuel Subsidy Act* provides that an offence against the Act may be prosecuted in a summary way under the *Justices Act 1886*.

26. The committee notes that new s.158 refers to "criminal" liability.

27. The new s.38 contains no special provision in relation to offences against it. Accordingly, such offences are offences for breach of statutory duty, and are not indictable offences.

28. In the circumstances, the committee assumes the word "criminal" is intended to apply to the liability to be prosecuted under the *Justices Act* for offences against s.38.

29. The committee notes that cl.39 inserts a provision which declares that the new s.38 does not impose "criminal" liability retrospectively. The committee assumes this is reference to liability to be prosecuted under the *Justices Act 1886* for breach of the statutory duties contained in the new s.38.

30. The committee seeks confirmation from the Minister that this is the case.

6. STATE HOUSING AND OTHER ACTS 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 16 April 2002.

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

- *The primary object of the State Housing and Other Acts Amendment Bill 2002 is to implement recommendations arising from the National Competition Policy review of the State Housing Act 1945.*
- *The second purpose of the State Housing and Other Acts Amendment Bill 2002 is to empower the Queensland Housing Commission to make loans to residential service industry operators, for the purpose of undertaking repairs and improvements, thereby enabling operators to meet the registration and accreditation standards under the proposed Residential Services (Accreditation) Bill 2002.*
- *The third object of the State Housing and Other Acts Amendment Bill 2002 is to make minor amendments to the commercial leasing provisions of the State Housing Act 1945.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[19]

♦ **Clause 4**

3. Under s.24 of the *State Housing Act 1945*, the Queensland Housing Commission has power to sell Commission land (upon which a house may already be erected) to eligible persons. This is usually done by means of an immediate transfer of title to the purchaser, with payment of the purchase monies to the Commission being secured by a mortgage over the land. In previous times, although apparently not to any extent currently, the Commission has sold residential property under instalment contracts. Under these contracts, the purchaser takes immediate possession of the property and pays the purchase price (together with interest) by instalments over a period of years. Title to the property is not transferred to the purchaser until the final instalment is eventually paid: in the meantime, it remains in the name of the Commission.

4. One circumstance in which instalment contracts have apparently always been employed is when a person is purchasing a share in a Commission property.

5. A person purchasing property from the Commission under an instalment contract would theoretically have the benefit of s.19 of the *State Housing Act*.

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

6. Section 19 provides:

19 Exemption from rating

> *Land…….for the time being vested in fee simple in the commission or occupied by it for the purpose of carrying on the business of the commission shall not be deemed to be rateable land within the meaning of the Local Government Acts.*

7. The direct consequence of s.19 is that rates are not payable to local governments in relation to Commission-owned lands. It appears, however, that instalment purchasers did not in fact derive any benefit from this rating immunity. Departmental staff have advised that the Commission's instalment contracts have always included a provision requiring the purchaser to pay to the local government an amount equivalent to normal council rates (utility charges for water, garbage collection and the like were always payable separately).

8. The practical significance of the bill is therefore limited to the matter of local government's capacity to sell the relevant land for arrears of rates.

9. Under the *Local Government Act 1993*, local governments may sell land upon which rates remain unpaid for three years. However, as the lands referred to in the bill are not "rateable lands", local governments could not exercise this option if purchasers did not make the rates-equivalent payments required by their instalment contracts.

10. It has apparently always been the Commission's practice, where a person is purchasing a share in a residential property to employ the instalment contract option.

11. The Explanatory Notes state in relation to this matter:

> *The proposal to allow local government rates to be levied directly on properties being purchased under instalment contract type home loan schemes with the Commission, or where people have purchased a share in a property from the Commission under an instalment contract home loan scheme, will not alter the obligation of those home buyers to pay rates. However, it will allow local governments to recover rates directly from these home buyers, including the power of sale in the event of default, by local governments, whereas at present, only the Commission has this entitlement.*
>
> *Although this proposal will have a minor impact on the existing rights and obligations of purchasers, it is not considered to be in breach of the fundamental legislative principles as set out in the Legislative Standards Act 1992.*

12. In the opinion of the committee it is not unreasonable that this distinction between home purchasers, all of whom will eventually achieve full unencumbered ownership of their properties and all of whom occupy the properties as their home, should be removed, as it is a consequence of a purely technical issue, namely, the manner in which the purchase is legally structured.

13. The committee notes that cl.9 of the bill makes home buyers who purchase properties from the Queensland Housing Commission under instalment contracts subject to be the same liability to have their property sold for arrears of rates as other home purchasers.

14. In the opinion of the committee, this amendment does not unreasonably impact upon the rights of current instalment contract purchasers.

♦ **Clause 8**

15. Clause 6 of the bill inserts new provisions which authorise the Commission to make loans to persons who provide "residential services" under the *Residential Services (Accreditation) Bill 2002*.[20] This provision is intended to assist persons who presently provide boarding house and other relevant types of accommodation to bring their premises up to the standard required to obtain accreditation and registration under the new statutory regime governing such premises.

16. Clause 8 amends s.32AB of the *State Housing Act 1954* by providing that s.32AB(4) shall not apply to advances of the type just mentioned. Section 32AB(4) requires that interest payable under advances made by the Commission must generally be at a rate which is expressed by reference to a "standard interest rate" or be set under a formula which refers to that rate. This provision is designed to ensure that consumers are always able to establish the effective interest rate on their loans.

17. As mentioned earlier, this consumer protection measure will not apply to advances made to providers of "residential services".

18. Neither the Minister's speech nor the Explanatory Notes provide any explanation for this distinction. It may be, however, that it is based upon the fact that the persons to whom these advances are made will be business operators rather than home owners.

19. The committee notes that cl.8 denies providers of residential accommodation to whom monies are advanced by the Queensland Housing Commission the benefit of a consumer protection measure available to all other persons who obtain advances from the Commission.

20. The committee seeks information from the Minister as to why a distinction is drawn between the two classes of borrowers.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[21]

♦ **Clause 9 (proposed s.49)**

21. Clause 9 inserts proposed ss.49 and 50. Proposed s.49 validates "anything done or purported to have been done under a Land Act by the Minister administering this Act, during the validation period, in relation to a lease under s.22B(2)". The section goes on to provide that "if the thing would have been validly done by the Minister administering the Land Act, it is as valid as if it had been done by that Minister". The "validation period" is defined as being the period from the day that s.22B commenced to the day this bill commences. The committee notes that s.22B was inserted in 1950.

22. Section 22B of the *State Housing Act*, to which proposed s.49 refers, enables the Commission to seek to have the Governor in Council surrender Commission land so that it

[20] This bill is presently before the Parliament.

[21] 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 obligation, retrospectively.

may be made available to a person or body corporate for conducting an industry, trade or business, and empowers the Governor in Council to then lease the land in perpetuity or for a term of years to the relevant person or body corporate.

23. The only background information in relation to this provision appears in the Explanatory Notes, which state that the bill will validate "approvals for dealings under s.22B given prior to the date of the amendment".

24. 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.

25. Section 49 appears to concern the identity of the Minister performing certain actions in relation to s.22B, and it may well involve matters which are of a purely technical nature.

26. However, the committee does not consider the explanation provided in the Explanatory Notes contains sufficient detail to make it clear whether the validation will have any significant adverse impact upon the rights of individuals.

27. The committee notes that proposed s.49, inserted by cl.9, validates things done by a particular Minister in relation to s.22B(2) of the *State Housing Act 1954*.

28. The committee seeks further information from the Minister as to the background to this provision.

7. TRANSPORT (COMPULSORY BAC TESTING) AMENDMENT BILL 2002

Background

1. Mr V G Johnson MP, Shadow Minister for State Development and Small Business, Shadow Minister for Transport and Main Roads and Shadow Minister for Aboriginal and Islander Policy and Member for Gregory, introduced this bill into the Legislative Assembly on 18 April 2002 as a private member's bill.

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

> *to amend the provisions relating to laboratory tests, to insert a new provision relating to the taking of blood samples from certain road accident victims and to amend protection from liability under the Transport Operations (Road Use Management) Act 1995.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[22]

- **Clause 5 (proposed ss.80A and 80B)**

3. Clause 5 of the bill introduces into the *Transport Operations (Road Use Management) Act 1995* a number of new provisions relating to the taking of blood samples from accident patients in hospitals. These new provisions are a legislative response to the fact that persons who are hospitalised as a result of traffic accidents are often not tested for blood alcohol content.

4. A person may be taken from an accident site to hospital before police arrive at the site, or while police are otherwise engaged at the site. Even if police arrive at the site before the person is removed to hospital, the person may by reason of injuries or real or feigned unconsciousness be unable to take a breath test. When the person arrives at the hospital, medical staff will normally only take blood samples if the person consents. If the person refuses, or because of real or feigned unconsciousness appears unable to consent, no sample will be taken. Such persons are therefore not tested either at the accident site or at the hospital.

5. Clause 5 of the bill attempts to address this situation by inserting proposed s.80A. Section 80A(2) places a positive obligation upon doctors and appropriately accredited nurses at a hospital to take a sample of the blood of a patient who is at the hospital for examination or treatment because of a road accident. Failure to comply with this statutory obligation is an offence punishable by a maximum penalty of 20 penalty units ($1,500). Proposed s.80A(3) provides that the doctor or nurse must take the blood sample "as soon as practicable and whether or not the accident patient consents to the taking of the sample". Breach of this provision is again an offence punishable by a maximum penalty of 20 penalty units.

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

6. Proposed s.80A(4) specifies a number of circumstances in which the obligation will not apply, and s.80A(5) provides a number of defences for doctors and nurses charged with these offences. Clause 6 of the bill, which amends s.167 of the Act, also extends to doctors and nurses who take blood samples a conditional protection against civil liability.

7. Proposed s.80B supports the provisions of S.80A by providing that a person "must not obstruct a doctor or a nurse in the performance of a duty under s.80A", and that a person "must not wilfully behave in a way that prevents a doctor or nurse from taking a sample of the person's blood as required by s.80A". Breaches of these provisions are offences punishable, in the case of the latter offence, by a maximum of 50 penalty units ($3,750) or 2 years imprisonment for a patient who was, in particular, a driver or passenger in a vehicle involved in the accident.

8. The new provisions clearly impact upon the rights and liberties of the person whose blood is taken, because that may occur against the person's wishes or in circumstances where he or she is unable, by reason of injury or unconsciousness, to consent. They can also be said to impact upon the relevant doctors and nurses, in that the bill imposes an obligation upon them to take blood samples from patients who may not have consented.

9. In relation to this issue, the Member in his Second Reading Speech stated:

> *I know that there are civil liberties issues associated with this proposal. They were addressed in some depth by the Travelsafe Committee and were also addressed in the other jurisdictions where similar provisions exist.*
>
> *Just like the decision that was taken when random breath tests were introduced I believe that the rights of innocent motorists and the expectations of the relatives of road accidents victims are more important than the civil liberty considerations.*

10. The report to which the Member refers is that of the Parliamentary Travelsafe Committee on *Compulsory BAC Testing*, tabled in December 1997. That Report unanimously recommended provisions generally in line with those contained in the bill. The relevant issues are canvassed in detail in the Report.[23]

11. The committee notes that cl.5 of the bill inserts a number of provisions designed to ensure that where a person involved in a road accident is admitted to a hospital for treatment, a blood sample is taken whether or not the person consents or is capable of consenting.

12. The committee refers to Parliament the question of whether the impact of the bill upon the rights and liberties of the person whose blood is taken, and upon those of the relevant doctors and nurses, is justifiable.

[23] The reference to civil liberties issues, to which the Member refers, is contained in paragraphs 132 and 133 of the Report, at page 33.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[24]

- **Clause 5 (proposed ss.80G and 80H)**

13. Proposed s.80G provides that a certificate signed by an analyst is evidence of a number of matters stated in it. These provisions are 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 the matters dealt with are non-contentious.

14. Section 80G(c) provides that the certificate is evidence that the concentration of alcohol in a person's blood indicated by the laboratory test was a stated number of milligrams of alcohol in the blood per 100 mL of blood, or that a stated drug or metabolite of a stated drug was indicated by the laboratory test to be present in the person's blood.

15. The fact that assertions in a certificate 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.

16. Moreover, these provisions are directly linked to the existing provisions of s.80 of the Act, which give such indicated test results the status of conclusive evidence unless the court is persuaded to the contrary by evidence led by the person whose blood is tested.

17. The committee further notes that proposed s.80H(1) provides that an analyst cannot be required to attend before the court to give evidence about the matters referred to in the certificate unless the court requires the person to do so. Section 80H(3) provides that a court may only require an analyst to attend to give evidence if it is satisfied there is a reasonable possibility the specimen of blood analysed –

    - was not the defendant's blood; or
    - gave a higher BAC than it otherwise would have given because it was contaminated; or
    - was taken in a way that did not comply with a code of practice for taking specimens of blood; or
    - the court is satisfied that requiring the analyst to give evidence would materially help the court find out relevant facts.

18. Taken as a whole, the provisions of s.80H impose significant restrictions upon the capacity of a defendant to have the analyst attend the court to give evidence about relevant matters.

19. In all the circumstances the provisions of proposed ss.80G and 80H constitute, in the view of the committee, a reversal of onus of proof. However, the committee notes that the provisions are consistent with a general policy underlying the provisions of the *Transport*

[24] 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.

Operations (Road Use Management) Act 1995 about readings obtained from blood, breath and urine tests.

20. The committee notes that proposed ss.80G and 80H enable significant matters to be put in evidence by means of a certificate. The committee is concerned by the inclusion of evidentiary certificate provisions relating to any matter which may be contentious in nature.

21. The committee refers to Parliament the question of whether the provisions of ss.80G and 80H have sufficient regard to the rights of persons against whom evidence of blood, breath or urine test results may be led.

8. TRANSPORT LEGISLATION AMENDMENT BILL 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 16 April 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 legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[25]

♦ **Clause 36**

3. Clause 36 of the bill replaces current Part 7 of the *Transport Operations (Marine Pollution) Act 1995* ("Prevention of Pollution by Sewerage") with a new Part 7 dealing with the same subject. The new Part 7 consists of proposed ss.45 to 51C.

4. Proposed ss.47, 48 and 50 all create offences in relation to the discharge from a ship into specified waters of sewage (in some cases treated sewage, in others untreated). In each case, each "culpable person" commits an offence (a "culpable person" is defined as the ship's owner or master, or another crew member who caused or contributed to the discharge).

5. In each case the relevant section declares that it applies "despite the *Criminal Code*, ss.23 and 24". These sections of the *Criminal Code* would normally enable persons charged with the relevant offences to escape liability if the relevant discharge happened independently of their will or was accidental (s.23) or if the person held an honest and reasonable, but mistaken, belief in a state of things related to the discharge (s.24).

6. Proposed ss.47, 48 and 50 must be read in conjunction with proposed s.51A, which stipulates certain grounds of defence against such proceedings. These are that the discharge "was necessary for the purpose of securing the safety of a ship or saving life at sea" or "resulted from damage, other than intentional damage, to the ship or its equipment and all reasonable precautions were taken after the damage happened or the discharge was discovered to prevent or minimise discharge". Section 51A defines "intentional" damage as meaning that the ship's owner, master or other crew member acted with intent to cause damage, or acted recklessly and with knowledge that damage would probably result.

7. The net effect of all the abovementioned provisions is, in the committee's view, to reverse the onus of proof. If the relevant sewage discharge occurs, each "culpable person" will be held strictly liable unless they can establish one of the relevant grounds of defence.

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[25] 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.

8. The general tenor of these provisions is similar to that of a number of other current provisions of the Act, and to those of some of the provisions which it replaces.

9. In relation to this reversal of onus, the Explanatory Notes state:

> *The abhorrence of ship sourced marine pollution is reflected in the convention and the large number of countries which have implemented MARPOL into their domestic legislation.*
>
> *Queensland in many ways, with its proximity to the Great Barrier Reef and Torres Strait, has a particular interest in preventing ship sourced marine pollution and there is a deterrent effect if prosecutions are successful. The legislature has previously deemed that it is appropriate to exclude the operation of ss.23 and 24 of the Criminal Code in the offence provisions of the Act and it is consistent with the remainder of the Act that this scheme is continued.*

10. The committee notes that proposed ss.47, 48 and 50 (inserted by cl.36) effectively reverse the onus of proof in relation to offences of discharge of sewerage in specified waters. As a general rule, the committee does not endorse such provisions.

11. The committee refers to Parliament the question of whether, in the circumstances, proposed ss.47, 48 and 50 contain a justifiable reversal of onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

Does the legislation have sufficient regard to the rights and liberties of individuals?[26]

- **Clause 43**

12. Clause 43 inserts into the *Transport Operations (Marine Safety) Act 1994* a new s.107A. This provides that if a ship damages or destroys an aid to navigation, the master and the owner of the ship are jointly and severally liable for the expense of repairing or reinstating the aid to navigation. The section goes on to provide that the amount of the expense may be recovered as a debt by the State by action in a court of competent jurisdiction.

13. This provision, it should be noted, does not create an offence, but simply imposes a civil liability.

14. However, this liability appears to be imposed regardless of how the ship comes to damage or destroy the navigational aid. It does not appear to be necessary that the master or owner has been negligent in any way. In relation to this matter, the Explanatory Notes state:

> *The Act allowed the prosecution of a person who damaged an aid to navigation but did not provide for the repair or reinstatement to be paid by any particular person. This was left to common law principles. The amendment directs the recovery of these costs to the persons who are most likely to have insurance cover or capacity to pay, and who are most likely to be able to supervise operations to prevent damage to aids to navigation.*

15. The committee notes that proposed s.107A (inserted by cl.43) appears to impose a form of strict liability upon the master and owner of a ship which damages a navigational aid, in

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

relation to the expense of repairing or reinstating the navigational aid.

16. The committee seeks confirmation from the Minister that this provision is intended to impose strict liability and, if so, seeks information as to why that form of liability is considered to be appropriate in the circumstances.

Is the legislation consistent with the principles of natural justice?[27]

- **Clause 51 (proposed ss.47(3) to (8) inclusive)**

17. Current s.48(1) of the *Transport Operations (Marine Safety) Act 1994* provides that the chief executive may, by notice given to a holder, amend, suspend or cancel the holder's service contract if the holder convenes a condition of the contract. The bill amends s.47(1) to provide that this may also be done if the chief executive reasonably believes a contravention of the contract "is imminent".

18. The bill also inserts proposed subsections (3) to (8). Subsection (3) provides that the chief executive may by notice to a holder immediately amend, suspend or cancel the holder's service contract "if the chief executive reasonably believes that the holder is unable to provide any or all of the services required under the contract". Current s.47(2) provides that before taking action under s.47(1) the chief executive must give the holder written notice of the intended action, and allow the holder an opportunity to make written representations about the intended action within 10 working days. No such notice will be necessary where the chief executive acts to immediately amend, suspend or cancel a service contract under proposed s.47(3).

19. Many bills examined by the committee contain a provision enabling licences and the like to be suspended or cancelled immediately, without any prior notice to the holder, where there is a risk to public health or safety, or for other similar reasons. It does not appear that s.47(3) involves any such issues. The Explanatory Notes address the matter as follows:

> *Clause 51 amends section 47 (Breach of service contracts) to allow the chief executive to move immediately to amend, suspend or cancel a service contract where the breach of that contract amounts to a full or partial withdrawal of services. It is also proposed to enable the chief executive to act if there is reasonable belief that such a breach of a service contract is imminent. This is required to help ensure that the department can act promptly to maintain essential services.*

20. Proposed subsections (4) to (7) provide that a contract holder may claim compensation from the State if the holder incurs a cost, damage or loss because of the chief executive's action under subsection (3). However, the bill goes on to provide (see subsection 47(6)) that a court may order the payment of compensation only if satisfied that "there were no reasonable grounds for believing that the holder was unable to provide any or all of the services" and that "it is just to make the order in the circumstances of the particular case". Subsection (8) provides that the compensation process "has effect to the exclusion of any other remedy".

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[27] Section 4(3)(b) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with the principles of natural justice.

21. There appear to be significant limitations upon the recovery of compensation, particularly as it is essential the holder prove the chief executive could not reasonably have believed that the holder was unable to provide the services. As mentioned earlier, subsection (8) denies the holder any other form of legal remedy.

22. The committee notes that cl.51 enables the chief executive to immediately amend, suspend or cancel a holder's service contract if the chief executive reasonably believes the holder is unable to provide any or all of the services required under the contract. The holder will not have an opportunity to make any submissions in relation to the matter beforehand. The bill incorporates a compensation regime, but it appears to be subject to quite significant limitations.

23. The committee refers to Parliament the question of whether, in the circumstances, the denial of natural justice to the service contract holder under the s.47(3) procedure is acceptable.

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[28]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[29] of a provision may therefore be considered as extrinsic material in its interpretation.

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

[29] 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

9. ELECTORAL AND OTHER ACTS 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 March 2001. The committee notes that this bill was passed, without amendments, on 16 April 2002.

2. The committee commented on this bill in its Alert Digest No 3 of 2002 at pages 9 to 13. The Attorney's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[30]

Does the legislation have sufficient regard to the institution of Parliament?[31]

♦ **The bill generally**

3. This bill makes a number of amendments to electoral-related legislation. The committee noted 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. The committee referred 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.

4. The Attorney commented as follows:

- *The Bill regulates the internal affairs of parties only to the extent necessary to ensure appropriate transparency and accountability to members and the public.*
- *The regulation is linked to the process of registration under the Electoral Act 1992. As the Committee has noted, registration brings with it considerable benefits to a political party by way of public funding and the right to have the party name (or an abbreviation) printed next to candidates' names on ballot papers for State elections. It is only proper that parties which seek to access public funding and obtain the political advantage of official recognition meet obligations of accountability not only to their members but to the public.*
- *The Bill permits flexibility in party structures and processes but requires certain fundamental information be contained in party constitutions. This is to ensure that these matters are open to public scrutiny. Compliance with specific criteria is required in relation to members (or applicants for membership) who have been convicted of electoral fraud and preselection ballots. This is no more than is*

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

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

necessary to preserve public confidence in the democratic process and encourage more people to participate in the political life of the State.

- *The ban on members who have been convicted of electoral offences is a justifiable restriction to enforce honesty and integrity in political parties. The Explanatory Notes accompanying the Bill note that this restriction does raise issues regarding the right to freedom of association and the right of citizens to take part in the conduct of public affairs.*
- *Both of these rights are recognised in the International Covenant on Civil and Political Rights which does not form part of the domestic law of Australia. However, were it to be made so, the Bill would not be prohibited by the Articles of the Covenant. As stated in the Explanatory Notes, Article 22 of the Covenant recognises that there may be restrictions on the right to freedom of association if they are necessary in a democratic society in the interests of public order. Similarly, Article 25 makes it clear that the right to take part in the conduct of public affairs is also not absolute but is limited by "reasonableness". The proposed restriction on party membership is a reasonable measure to maintain the integrity of the electoral process and to diminish the opportunity for electoral fraud.*
- *Preselection ballots, as stated in the Shepherdson Inquiry: An Investigation into Electoral Fraud, pp 168 –171, play a vital role in the election process. Queensland electors, as well as party members, are entitled to expect that such ballots are conducted fairly and in accordance with democratic principles. The Bill is not prescriptive in that there is no obligation on parties to adopt any specific preselection process, but where preselection involves direct voting by members the Bill reasonably requires that such ballots conform to certain requirements and are subject to audit by the Electoral Commission of Queensland.*

5. The committee notes the Attorney's response.

Does the legislation have sufficient regard to the rights and liberties of individuals?[32]

♦ **Clause 17 (proposed ss.148J and 148N)**

6. Proposed ss.148J and 148N (inserted by cl.17 of the bill) relate to inquiries by the Queensland Electoral Commission (QEC) into particular preselection ballots and its conduct of random audits respectively. Proposed s.148K (also inserted by cl.17 of the bill) relates to frivolous or vexatious claims made by a person to the Commission. The committee noted that the bill imposes substantial penalties on "registered officers" of political parties who fail to supply information required by the QEC in relation to an inquiry into, or random audit of, preselection ballots. The committee drew the magnitude of these penalties to the attention of Parliament.

7. The committee also noted that the bill prohibits the making of repeat complaints to the QEC which are frivolous or vexatious, and provides for an imprisonment option as well as a monetary penalty. The committee sought information from the Attorney as to why a potential term of imprisonment is considered justifiable in relation to an offence of this nature.

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

8. The Attorney provided the following information:

- *Under the Electoral Act, the formal relationship of the Electoral Commission with a registered political party is conducted through the registered officer. The Bill establishes a scheme for audit of preselection ballots which imposes certain obligations on the registered officer (as the person with whom the Commission formally deals) to provide information necessary for the Commission to conduct its inquiry or audit. The imposition of obligations without appropriate sanctions would establish a loophole which would subvert the effective operation of the scheme.*

- *The offence created by section 148K (Frivolous or vexatious complaint) is modelled on section 216 of the Crime and Misconduct Act 2001. It is aimed at deterring abuse of the audit process by disaffected candidates or supporters who seek to gain political advantage by repeatedly making unsustainable complaints to the Commission. The very fact of the making of a complaint can clearly damage another candidate's credibility and diminish confidence in the preselection process. It is, in addition, extremely wasteful of Electoral Commission resources. In many circumstances a financial penalty alone may be considered an acceptable risk to a complainant given the potential political and financial benefits of discrediting an opponent. Accordingly, the serious consequences that can flow from the making of such frivolous and vexatious complaints justify an appropriately serious sanction.*

9. The committee notes the Attorney's response.

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

10. Clause 51 of the bill relocates into the *Criminal Code* a number of offence provisions of the type previously contained in the *Electoral Act 1992*. The committee noted that proposed ss.98B, 98C and 98D provide very substantial maximum terms of imprisonment for the offences that they create. The committee referred to Parliament the question of whether these maximum penalties are appropriate in the circumstances.

11. The Attorney responded:

- *These provisions implement the express commitments contained in Restoring Integrity – the Beattie Good Government Plan for Queensland which were to make the penalties for electoral fraud the toughest in Australia. The high penalties reflect the seriousness with which the government regards offences of this nature.*

12. The committee notes the Attorney's response.

♦ **Clauses 58, 61 and 62**

13. Clauses 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". The committee referred 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.

14. The Attorney provided the following response:

- *As the Committee has recognised there is nothing unprecedented in these clauses. Parliaments in the Westminster tradition have always legislated a range of qualifications and disqualifications for people nominating as candidates for election and being elected, and also legislated grounds for vacation of a seat. The existing Queensland legislation prohibits nomination, election or sitting as a Member of the Legislative Assembly if a person is convicted of certain specified electoral offences. There are similar prohibitions in relation to election to local governments and the holding of office as a local government councillor. The Bill has expanded the grounds of disqualification to ensure the Queensland public can have full confidence in the integrity and honesty of elected representatives.*

15. The committee notes the Attorney's response.

♦ **Clause 54**

16. The committee noted that cl.54 of the bill denies applicants for membership of registered political parties, and candidates for election to a local government or the Legislative Assembly, the benefit of the rehabilitation period provided for under the *Criminal Law (Rehabilitation of Offenders) Act 1986*. The committee referred to Parliament the question of whether the denial of this benefit is appropriate in the circumstances.

17. The Attorney responded:

The exclusion of the operation of the Criminal Law (Rehabilitation of Offenders) Act is necessary in order to achieve the objectives of the Bill. The preservation of public respect for elected representatives is fundamental.

18. The committee notes the Attorney's response.

10. PUBLIC RECORDS BILL 2001

Background

1. The Honourable P T Lucas MP, Minister for Innovation and Information Economy, introduced this bill into the Legislative Assembly on 12 December 2001. The committee notes that this bill was passed, with amendments, on 17 April 2002.

2. The committee commented on this bill in its Alert Digest No 1 of 2002 at pages 23 to 29. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[33]

- **Clause 26 (privacy)**

3. The bill establishes a comprehensive regime for the "making, managing, keeping and preserving of public records in Queensland". Clause 26 of the bill establishes the process of applying to the archivist for authority to dispose of public records. The committee noted that the applications referred to in cl.26 appear to be limited to applications by "the public authority that has control of the records". The committee sought information from the Minister as to why the bill does not confer upon individuals with a legitimate interest in the contents of particular public records, the capacity to apply to the archivist for their disposal (that is, for their destruction).

4. The Minister provided the following information.

> *Under the current legislation, an individual who seeks to have a record or records destroyed applies to the public authority responsible for those records. If that public authority agrees the record or records should be destroyed, then the request is referred to the State Archivist for a decision.*
>
> *It is intended that the same process would be followed under the Public Records Bill 2001. This allows the relevant public authority to assess its own requirements for the retention of records for legal, business and other reasons. Even if a different procedure were to be adopted in the future, it would always be necessary to seek the views of the relevant public authority on the retention or destruction of the records.*
>
> *The rights of individuals in regard to the destruction or deletion of information is dealt with under Part 4 of the Freedom of Information Act 1992. This framework is also used for administering Principle 7 of the State Cabinet approved Information Standard 42: Information Privacy (IS42). Under section 53 of the Freedom of Information Act 1992, an individual may apply in writing to an "agency" requesting that a public record be altered or annotated where that person believes that personal information relating to them or a deceased person to whom they are the next of kin is incorrect, incomplete, misleading or out-of-date. Where the agency does not agree to alter or amend the information as requested, the applicant may also request an internal review (s.60 of the Freedom of Information Act 1992) or, should this request be unsuccessful, lodge a request for an external review under*

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

section 71 of the Freedom of Information Act 1992. In this way the Public Records Bill 2001 and the Freedom of Information Act 1992 may be applied in tandem to balance the interests of the public authority and individual in matters relating to the disposal of personal information.

5. The committee thanks the Minister for this information.

♦ **Clause 12**

6. Clause 12(1) of the bill provides that a person must not "damage" a public record more than 30 years old. Under cl.12(2) the obligation applies whether or not the public record is in the custody of the archives. The definition of "damage" in cl.12(4) includes to "neglect the record in a way that causes, or is likely to cause, damage of the record". The committee noted that a public record may sometimes be "neglected" in this way for a variety of reasons and recommended that cl.12 be amended to provide that a person is not guilty of the offence of "neglecting" a public record if the person has a reasonable excuse.

7. The Minister provided the following response:

The intention of this clause is to protect records of significant long-term value. Public authorities that have such records in their custody are required to take reasonable steps to ensure that records are not neglected to the extent that they suffer extensive damage or deterioration. Public authorities may have to commit resources to ensure the protection of such records. Unfortunately there have been cases in the past where very significant records of long-term value have been stored in inappropriate conditions, resulting in damage or loss.

If a public authority is unable to provide appropriate storage for older records of long-term value, they can apply to transfer those records to Queensland State Archives where they will be housed in secure, environmentally controlled premises. However, should it be demonstrated that there is a legitimate reason that prevents a public authority from providing the appropriate level of physical care for a public record (for example, as a result of damage caused by an outbreak of silverfish or white ants, or mould from conditions of high humidity), then it is my view that it is appropriate to amend clause 12 of the Public Records Bill 2001 to exempt damage to a public record where the person concerned has a "reasonable excuse".

8. The committee notes the Minister's response. The committee notes that the bill, which has now been passed by Parliament, was amended to address the committee's concerns.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[34]

♦ **Clause 25**

9. The committee noted that cl.25(1)(f) of the bill authorises the archivist to "make policies and standards, and issue guidelines, about the making, keeping, preserving, managing and

[34] 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.

disposing of public records". The committee observed that such processes do not constitute subordinate legislation and are not subject to parliamentary tabling and disallowance provisions. The committee sought information from the Minister as to the nature of the matters which it is envisaged will be dealt with by policies, standards and guidelines issued under cl.25.

10. The Minister provided the following information:

> *The policies, standards and guidelines issued under clauses 24 & 25 of the Bill would relate to all aspects of government recordkeeping, including storage, the management of information, preservation, transfer procedures, and the migration and management of records in electronic formats. They would set a general framework within which each public authority would operate. The policies and standards will reflect national and international best practice and will be developed in consultation with all relevant stakeholders within and outside of State and Local Government.*
>
> *This policy framework will need to be constantly updated, particularly to ensure that public authorities comply with corporate governance requirements in the electronic environment.*
>
> *The policies, standards and guidelines issued under clauses 24 and 25 would provide public authorities with strategic and operational direction to facilitate their compliance with this Bill (for example clauses 7 and 8) and other relevant Acts (for example the Electronic Transactions Act 2001 and Evidence Act 1977). It would also provide a platform for establishing consistent and accountable recordkeeping across State and Local Government. Examples of the topics or issues to be addressed by policies, standards and guidelines issued under clauses 24 and 25 of the Bill include managing records of webpages and websites, managing electronic records and managing electronic messages. These policies, standards and guidelines would complement existing policies and standards such as Information Standard 40: Recordkeeping and Information Standard 31: Retention and Disposal of Government Information issued under the Financial Management Standard 1997.*
>
> *Over the past decade advances in recordkeeping practices and communication technologies have seen archives' legislation around the world evolve to reflect the archival authority's role in facilitating improvements to government efficiency and accountability through better records management practices. Archival authorities, such as Queensland State Archives, are regarded as lead agencies in the development and implementation of whole-of-government policy frameworks for records management.*
>
> *Clauses 24 & 25 of the Bill provide Queensland State Archives with the authority to undertake this lead agency role.*

11. The committee thanks the Minister for this information.

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?[35]

- **Clauses 39 to 41 inclusive**

12. Clauses 39 to 41 inclusive provide a review process whereby "public authorities" may seek review of decisions of the archivist not to authorise the disposal of particular public records or classes of public records. Clause 41 of the bill provides that the Public Records Review Committee may confirm, amend, revoke, or substitute a new decision for, the archivist's decision. The committee recognised that the review process provided under cl.39 – 41 is adequate in respect of the range of applicants presently contemplated by the bill and expressed the view that if the range of applicants were to be broadened, an enhanced review process should be provided.

13. The Minister responded as follows:

> *For the reasons stated ... [in relation to clause 26 above], it is not intended to extend the right of application for disposal of public records to individuals. There is no mechanism in archives legislation in Australia which enables an individual to appeal a disposal decision.*
>
> *It appears that in exceptional circumstances there may be potential for the Judicial Review Act 1991 to be used to appeal a disposal decision. This Act defines how to determine if someone who is aggrieved has "standing" on which to make an application to review an administrative decision made under an enactment. Only a person whose interests are, or would be, adversely affected by the decision has standing to make the application. Under Judicial Review, a person may be able to bring an application for a statutory order for review in the Supreme Court if they can establish standing.*
>
> *The Public Records Review Committee will comprise representatives from both Government agencies and the community who have an interest in, or expertise in, issues relating to the management of public records. Up to five members of the Committee would be drawn from the community.*

14. 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?[36]

- **Clauses 46 to 48 inclusive**

15. The committee noted that by cl.46 - 48 inclusive, the bill confers on 'authorised officers' powers of entry that extend beyond situations where a warrant has been obtained, and that once entry has been effected the bill confers on these persons a wide range of powers. The

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35 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.

36 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.

committee drew these extensive powers of entry, and other significant powers, to the attention of Parliament.

16. The Minister responded:

> *These clauses are a continuation of provisions in the existing legislation (that is, the Libraries and Archives Act 1988). The intention of these clauses is to allow Queensland State Archives' (QSA) staff to inspect records where and when necessary. For example, QSA staff may need to inspect records in order to assess their suitability for retention or destruction. Where there is a concern that unauthorised disposal or other breaches of the Bill may have occurred, a right of inspection would allow for the matter to be investigated.*
>
> *To administer this provision of the Bill, it is the intention of the State Archivist to investigate the potential use of search warrants as an additional safeguard for QSA's authorised officers. The ability to collect information for the purpose of a potential prosecution will require detailed administrative procedures to be in place at QSA and the establishment of appropriate partnerships to undertake any subsequent investigations.*
>
> *QSA staff are regularly invited by public authorities to inspect records and recordkeeping systems. The right to inspect the records of public authorities is a common feature in Australian archival legislation.*

17. The committee notes the Minister's response.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[37]

- **Clause 53**

18. The committee noted that cl.53(2)(b) confers apparently wide immunity under certain circumstances upon the author of a public record or "another person" in respect of material that legitimately becomes part of the public records of that public authority. The committee sought information from the Minister as to the range of persons who will be afforded immunity under cl.53(2)(b), and why it is considered appropriate that all such persons should be afforded protection in respect of the original supply of the record to the public authority or the archives.

19. The Minister provided the following information:

> *Public records include both records made by the Government and records received by the Government. It is not unreasonable to provide protection for those persons who legitimately provide or transfer records to a public authority, including Queensland State Archives. The purpose of this clause is to provide such persons protection in accordance with the qualified privilege provisions relating to the publication of defamatory matter in s.16 of the Defamation Act 1889. This clause does not extend protection to the author of a public record should the content of a public record be regarded as defamatory. The liability in this case remains with the original author of the record. Clause 53 is consistent with the Defamation Act 1889.*

[37] 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.

20. The committee thanks the Minister for the information provided. The committee notes that the bill, which has now been passed by Parliament, was amended to address the committee's concerns.

11. RESIDENTIAL SERVICES (ACCOMMODATION) 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 6 March 2002. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 3 of 2002 at pages 14 to 17. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[38]

♦ The bill generally

3. The bill establishes a regulatory framework for the "residential services" industry, which up until now has basically been governed by the law of contract. The committee noted that 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. The committee referred 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.

4. The Minister commented as follows:

> *Turning to paragraph 9 of the Digest, the Committee refers to Parliament the question of whether the Bill has sufficient regard to the rights of providers of such accommodation, as well as those of consumers.*
>
> *The object of the Bill is to balance the rights of both parties. The key mechanism to achieve this balance is to set out in Part 2 of the Bill the respective responsibilities of both parties. This section of the Bill acknowledges the provider's fundamental rights to be paid for the provision of the accommodation, to have the premises looked after and to be able to manage the premises to ensure the rights of all residents.*
>
> *At the same time, residents' rights to safe and secure accommodation and to quiet enjoyment of the premises are also acknowledged. The Bill has been specifically tailored to the nature of accommodation provided in residential services to ensure the rights of both parties are balanced. Consequently, I am confident that the balance the Bill strikes between the rights of both service providers and residents is a fair one.*

5. The committee notes the Minister's response.

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

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[39]

- **Clause 44**

6. Clauses 40-43 of the bill inclusive 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. The committee noted 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 expressed the view that this clause may constitute a "Henry VIII clause". The committee does not generally endorse the use of such provisions and sought information from the Minister as to why the insertion of paragraph (b) is considered appropriate.

7. The Minister provided the following information:

> *The Committee has sought information concerning Clause 44(b) of the Bill which enables the "allowed period" for applications to the Tribunal in relation to rental bond payments to be extended by regulation.*
>
> *This provision has been included to ensure consistency with the bond provisions of the* Residential Tenancies Act 1994 *(RTA). The provisions of Part 5 "Rental Bonds" of the Bill mirror the provisions of the RTA Part 3 Rental Bonds which applies to residents of residential services. This consistency is essential to ensure parties to rental bonds in residential services are not disadvantaged with the commencement of the Bill's provisions relating to rental bonds.*
>
> *The provision in the Bill to extend the allowed period for an application to a tribunal is used to ensure neither party is disadvantaged by using the Bill's dispute resolution provisions to apply to a Tribunal which initially requires an application to the Residential Tenancies Authority Dispute Resolution Service. Clause 44(a) provides a minimum period of 14 days in which to commence a dispute resolution process. However, the first step, conciliation, is not a decision making step. There are some cases where conciliation is unsuccessful but the party objecting to the proposed distribution of the bond does not then move to the arbitration by applying to the Small Claims Tribunal. The Authority would then be unable to pay out the bond as the parties have not agreed and there is no Tribunal order. The regulation making power under the RTA is used to set a time limit of seven days after the issuing of a notice of unresolved dispute to ensure the bond can be paid out.*
>
> *Essentially the regulation making power is used to ensure the rights of parties using the Bill's dispute resolution process are maintained and that parties have a reasonable time to exercise these rights while at the same time ensuring that the process is time limited.*

8. The committee notes the Minister's response.

[39] 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.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[40]

- **Clauses 130 and 131**

9. The committee noted that cls.130 and 131 of the bill effectively reverse the onus of proof in proceedings for offences by persons (including corporations) against the bill's provisions, and referred to Parliament the question of whether, in the circumstances, this reversal is justified.

10. The Minister responded:

> *The Committee has also referred to Parliament the question of whether the reversal of the onus of proof created by Clauses 130 and 131 has sufficient regard to the rights and liberties of individuals.*
>
> *In the case of these particular offences, the fact to be proved is clearly within the knowledge of the offenders and therefore can be easily disproved by them. In contrast, it is difficult to gather evidence to prove those facts. Given that the legislative scheme introduced by this Bill is designed to protect 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.*
>
> *If the corporation itself was prosecuted then fines would be paid, only if the corporation was still in existence and only if it had funds available. If a corporation was convicted of an offence against the Act, but not any of its executive officers, those officers would be free to establish a new corporation, and obtain registration to operate a new residential service. No offence would be recorded against those individuals.*
>
> *As the Committee has noted, these clauses do provide some safeguards by the inclusion of grounds upon which liability may be avoided. I believe that the courts would apply these provisions fairly on the facts presented to them and therefore believe that the provisions are essential to ensure the consumer protection objectives of this legislation.*
>
> *Consequently I believe that these provisions are therefore warranted to ensure that there is effective accountability at a corporate level.*

11. The committee notes the Minister's response.

[40] 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.

12. RESIDENTIAL SERVICES (ACCREDITATION) 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 6 March 2002. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 3 of 2002 at pages 18 to 21. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this digest.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[41]

- **Clauses 113 to 135 inclusive**

3. This bill regulates the conduct of residential services. The committee noted that by cls.113, and 119 to 135 inclusive, the bill confers on authorised officers powers of entry that extend beyond situations where the occupier consents or where a warrant has been obtained. Once entry has been effected the bill confers on these persons significant powers to obtain information. The committee drew these extensive powers of entry, and other significant powers, to the attention of Parliament.

4. The Minister commented as follows:

> *The Committee notes that the Bill confers powers of entry on authorised officers which extend beyond situations where the occupier consents or where a warrant for the purposes of entry has been obtained. In particular, authorised officers may also enter premises which are open to the public. There is also a wide range of powers once entry is obtained.*
>
> *I believe that the powers of enforcement set out in the Bill are necessary to achieve the consumer protection objectives of this legislation. Further, the overriding public interest in protecting vulnerable residents in these types of accommodation is paramount. The Bill establishes a new regulatory regime for residential services and my Department has an obligation to ensure that service providers are complying. I note that these powers of entry are similar to those established in the Retirement Villages Act 1999 and the Introduction Agents Act 2001.*
>
> *I also note and appreciate the Committee's comments that:*
>
> *"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" and that*
>
> *"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."*

[41] 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.

5. The committee notes the Minister's response.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[42]

- **Clauses 171 and 172**

6. The committee noted that cls.171 and 172 of the bill effectively reverse the onus of proof in proceedings for offences against the bill's provisions, and referred to Parliament the question of whether, in the circumstances, this reversal is justified.

7. The Minister responded as follows:

> *The Committee has referred to Parliament the question of whether the reversal of the onus of proof created by Clauses 171 and 172 has sufficient regard to the rights and liberties of individuals.*
>
> *The Committee has noted the justification for the reversal of the onus of proof as set out in the Explanatory Notes. As stated in those notes, in the case of these particular offences, the fact to be proved is clearly within the knowledge of the offenders and therefore can be easily disproved by them. In contrast, it is difficult to gather evidence to prove those facts.*
>
> *Clause 172 provides that if a corporation commits an offence against the Act, then its executive officers also commit an offence. It is noted that the committee as a general rule does not endorse such provisions, which constitute a reversal of the onus of proof.*
>
> *I note however, that residential services established as a corporation do exist. If the corporation itself was prosecuted then fines would be paid, only if the corporation was still in existence and only if it had funds available. If a corporation was convicted of an offence against the Act, but not any of its executive officers, those officers would be free to establish a new corporation, and obtain registration to operate a new residential service. No offence would be recorded against those individuals.*
>
> *As the Committee has already noted, these clauses do provide some safeguards by the inclusion of grounds upon which liability may be avoided. I believe that the Courts would apply these provisions fairly on the facts presented to them and therefore believe that the provisions are essential to ensure the consumer protection objectives of this legislation.*

8. The committee notes the Minister's response.

[42] 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.

Does the legislation provide appropriate protection against self-incrimination?[43]

♦ **Clauses 134 and 135**

9. The committee noted that cls.134 and 135 of the bill deny persons the benefit of the rule against self-incrimination in certain situations, and referred to Parliament the question of whether, in the circumstances, this denial is justifiable.

10. The Minister responded:

> *The Committee has referred Parliament to the question of whether denial of the rule against self-incrimination in relation to the compulsory production of documents required to be kept or issued to the service provider under the Bill, is justifiable.*
>
> *While these provisions curtail the protection against self-incrimination, I believe they are necessary to protect the health and safety of residents, many of whom may have impaired capacity or some other disability which places them at significant risk.*
>
> *The inspection of documents by an authorised officer of the accreditation agency will ensure that services are being provided lawfully, safely and appropriately. In the absence of a requirement to produce documents, the work of the accreditation agency in protecting the health and safety of residents could easily be frustrated.*
>
> *The provision will only apply to documents which must be maintained under the legislation.*
>
> *Provisions requiring the keeping of certain records would be rendered ineffective if compliance checks could not be conducted on those records. I would also like to point out that service providers will be aware from the outset that they will be subject to inspection of such records. The requirement to produce those records is necessary to determine whether or not offences have occurred or it is falsely alleged that an offence has been committed by a service provider.*

11. The committee notes the Minister's response.

[43] 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.

AMENDMENTS TO BILLS[44]

NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST

This concludes the Scrutiny of Legislation Committee's 4th 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

8 May 2002

[44] 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
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APPENDIX B – TERMS OF REFERENCE

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

Terms of Reference

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

(a) the application of fundamental legislative principles[45] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[46].

(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)

45 "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.

46 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.[47]

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

1. rights and liberties of individuals; and
2. the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation –

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill –

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation –

(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only –

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

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[47] 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.