SCRUTINY OF LEGISLATION COMMITTEE

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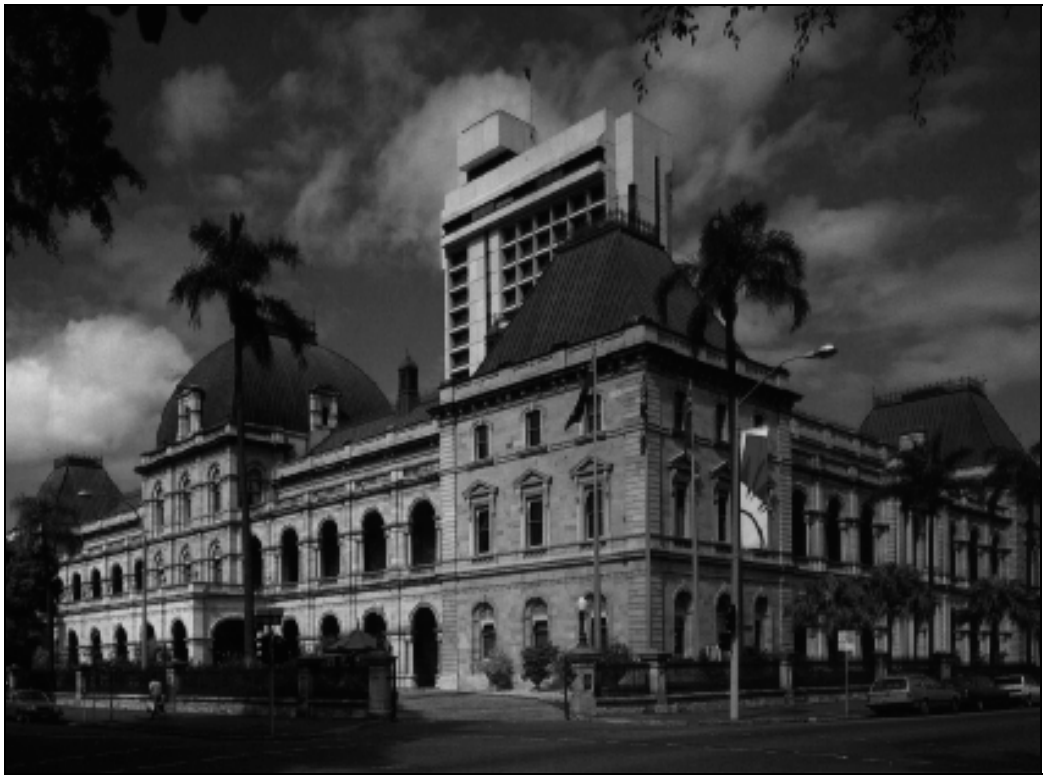

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SCRUTINY OF LEGISLATION COMMITTEE
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50TH PARLIAMENT, 1ST SESSION

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

TERMS OF REFERENCE

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

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

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

(a) the application of fundamental legislative principles[1] to particular Bills and particular subordinate legislation; and
(b) the lawfulness of particular subordinate legislation; by examining all Bills and subordinate legislation.

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

(a) the following provisions of the Legislative Standards Act 1992—
- *section 4 (Meaning of "fundamental legislative principles")*
- *part 4 (Explanatory notes); and*

(b) the following provisions of the Statutory Instruments Act 1992—
- *section 9 (Meaning of "subordinate legislation")*
- *part 5 (Guidelines for regulatory impact statements)*
- *part 6 (Procedures after making of subordinate legislation)*
- *part 7 (Staged automatic expiry of subordinate legislation)*
- *part 8 (Forms)*
- *part 10 (Transitional).*

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

4.(1) *For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.*[2]

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

* The relevant section is extracted overleaf.

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

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

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

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

- *(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and*
- *(b) is consistent with the principles of natural justice; and*
- *(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and*
- *(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and*
- *(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and*
- *(f) provides appropriate protection against self-incrimination; and*
- *(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and*
- *(h) does not confer immunity from proceeding or prosecution without adequate justification; and*
- *(i) provides for the compulsory acquisition of property only with fair compensation; and*
- *(j) has sufficient regard to Aboriginal tradition and Island custom; and*
- *(k) is unambiguous and drafted in a sufficiently clear and precise way.*

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

- *(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and*
- *(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and*
- *(c) authorises the amendment of an Act only by another Act.*

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

- *(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and*
- *(b) is consistent with the policy objectives of the authorising law; and*
- *(c) contains only matter appropriate to subordinate legislation; and*
- *(d) amends statutory instruments only; and*
- *(e) allows the subdelegation of a power delegated by an Act only –*
  - *(i) in appropriate cases and to appropriate persons; and*
  - *(ii) if authorised by an Act.*

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. APPROPRIATION 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 18 June 2002.

2. The purpose of this bill is to authorise the Treasurer:

- *to pay stipulated amounts from the consolidated fund for the departments listed in the bill, as their appropriation for the financial year commencing 1 July 2002; and*
- *to pay a stipulated amount from the consolidated fund for these departments for the financial year commencing 1 July 2003, to allow the normal operations of government to continue until the next annual Appropriation Bill receives assent.*

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

2. APPROPRIATION (PARLIAMENT) 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 18 June 2002.

2. The purpose of this bill is to authorise the Treasurer:

   - *to pay a stipulated amount from the consolidated fund for the Legislative Assembly and parliamentary service, as its appropriation for the financial year commencing 1 July 2002; and*
   - *to pay a stipulated amount from the consolidated fund for the Legislative Assembly and parliamentary service for the financial year commencing 1 July 2003, to allow the normal operations of these bodies to continue until the next annual Appropriation Bill receives assent.*

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

3. CARE OF TERMINALLY-ILL PATIENTS BILL 2002

Background

1. Mr P W Wellington MP, Member for Nicklin, introduced this bill into the Legislative Assembly on 19 June 2002 as a private member's bill.

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

> *to clarify the obligations of doctors treating terminally-ill patients, and to ensure that doctors and nursing staff who administer drugs to such patients for the purpose of pain relief are not held under threat of prosecution because an incidental effect of the treatment is to shorten the life of the patient.*

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

♦ **Clauses 2-5 inclusive**

3. This bill expressly addresses an issue which arises with some regularity in the provision of palliative care to terminally-ill patients. Such patients, particularly in the latter stages of their illness, are often in very considerable pain, which can only be relieved by the administration of large doses of drugs. Whilst this lessens the patient's discomfort, the high drug dosages may also have the effect of shortening the patient's remaining life span.

4. A series of English judicial decisions, starting with *R v Adams* (1957) Crim LR 365,[4] indicated that such treatment was nevertheless acceptable in terms of the criminal law. However, doubt has remained about the applicability of these decisions in Australian jurisdictions, and especially in those which (like Queensland) have codified their criminal law.

5. A particular issue in Queensland is s.296 of the *Criminal Code*, which provides as follows:

> ***Acceleration of death***
>
> *A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.*

6. Specific legislation on the lines of this bill was enacted in South Australia in 1995.[5]

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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.

[4] Followed in, for example, *R v Arthur* (1981) and *R v Cox* (1992) 12BMLR 38.

[5] *Consent to Medical Treatment and Palliative Care Act 1995* (Sth Aust), ss.17 and 18.

7. This bill provides that, subject to:

- obtaining of the patient's consent or, if the patient has impaired capacity, compliance with the relevant statutory provisions of the *Guardianship Administration Act 2000*, s.66; and
- the treatment being administered in good faith and without negligence; and
- the treatment being administered in accordance with proper professional standards of palliative care

the treatment is permissible provided that it is done:

> *with the sole intention of relieving pain or distress,…. even though an incidental effect of the treatment is to shorten the life of the patient.*

8. This area is one in which issues of causation have figured largely in the medico/legal debate. Medical and scientific writers, applying empirical criteria, would assert that in the situation in question the person administering the drugs has caused the accelerated death of the patient. Legal reasoning, on the other hand, often considers causation in the light of issues such as social control and political decisions in an attempt to attach blame and deliver judgements with restitutive or punitive outcomes.[6]

9. The common law legal decisions permitting the relevant types of treatment have sometimes proceeded on the basis that the administration of the drugs was not the operative cause of death. Clause 5 of the bill enshrines this approach by stipulating that "for the purposes of the law of the State" the administration of the relevant medical treatment "does not constitute an intervening cause of death".

10. Finally, the bill expressly declares (see cl.5) that it does not authorise the administration of medical treatment for the purpose of causing the death of the patient, nor does it authorise a person to assist the suicide of another.

11. The requirement of cl.3 that the medical treatment be administered with the sole intention of relieving pain or distress even though, as the clause states, an incidental effect of the treatment is to shorten the life of the patient, might, at least in theory, give rise to some difficulties.

12. Given that in the relevant situation the administration of large drug dosages may often self-evidently have the capacity to shorten the patient's remaining lifespan, questions might arise in some cases as to precisely what the medical practitioner's intentions were, and in particular, whether the intent to relieve pain or distress constituted only a predominant, as opposed to a sole, intention.

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

> *….the idea that a distinction can be drawn, between the intention of relieving pain and the intention of causing death, has been criticized – but of course it **can** be drawn. Doctors who*

[6] "Pain Relief and Causation of Death in the Context of Palliative Care", P G Brownstein, *Journal of Law and Medicine*, Vol 8 (4), May 2001 at p 456.

> *administer drugs know perfectly well what their intention is each time they administer the drugs, and if part of a doctor's motivation for his action is the desire to cause death, there will very likely be some objective evidence of that intent. It may be difficult for any of us to be really certain of another person's intent, but evidence tending to prove an accused person's intent is presented routinely in civil and criminal trials – as a judge once said "the state of a man's mind is just as much a matter of fact as the state of his digestion".*

14. The bill enhances the rights of individuals in the following ways:

- subject to the conditions stipulated in the bill, it authorises medical treatment which assists patients to avoid having to endure excessive pain
- it significantly assists medical practitioners to administer medical treatment, subject to appropriate consents and other conditions, with minimal doubt as to the legality of that treatment.

15. However, the bill has potential negative implications in terms of a patient's right to continue living.

16. In considering this bill, Parliament will need to take account of the bill's ramifications for patients and medical practitioners, as well as of the public interest in ensuring that medical treatment provided to patients is compatible with general community standards.

17. The committee notes that cls.2-5 inclusive of the bill permit medical practitioners to administer large doses of pain-relieving drugs to terminally ill patients, subject to conditions stipulated in the bill, for the sole intention of relieving the patient's pain or distress, even though that may incidentally shorten the patient's life.

18. The committee refers to Parliament the question of whether the provisions of the bill have sufficient regard to the rights and liberties of individuals.

4. CIVIL FORFEITURE OF THE PROCEEDS OF CRIME BILL 2002[7]

Background

1. Mr L J Springborg MP, Shadow Attorney-General and Shadow Minister for Justice, Shadow Minister for Innovation, Information Technology and Rural Technology, Shadow Minister for Fair Trading and Deputy Opposition Whip, introduced this bill into the Legislative Assembly on 16 May 2002.

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

> *.... to allow a Court to confiscate the assets of a person, without it being necessary for that person to be convicted of an offence on the criminal standard of proof it the Court finds it 'more probable than not' that the assets were derived from serious crime related activities.*
>
> *The bill also contains provisions which will allow law enforcement agencies to effectively identify property which has been derived from serious crime related activities. The bill then enacts provisions that allow confiscation of the proceeds of such property and for the proceeds to be recovered as a debt payable to the state.*

Overview of the bill

3. The principal object of the bill is:

> *... to provide for the confiscation, without requiring a conviction, of property of a person if a court finds it to be more probable than not the person has engaged in serious crime related activities.*[8]

4. The proposed legislation is intended to augment, rather than replace, the existing criminal confiscation jurisdiction of the courts under the *Crimes (Confiscation) Act 1989 ("CC Act (Qld)"),* which is dependent on the recording of a conviction for an indictable offence.

5. The bill introduces a new set of non conviction based, or civil, procedures for recovering the assets and proceeds of crime and provides for the making of four kinds of judicial forfeiture related orders:

- **restraining order:**[9] an order freezing all or stated property of a person reasonably suspected of having engaged in one or more serious crime related activity.

- **assets forfeiture order:**[10] a mandatory order forfeiting to the State all or any restrained property of a person found to have engaged in "serious crime related activity"[11] at any time prior to the making of the application.

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7 The committee thanks Tim Carmody SC, Barrister-at-law, for his valued advice in relation to the scrutiny of this bill.

8 Clause 3(a)

9 Clauses 15(1)(2); 16(1)

10 Clause 34(1)

11 *Serious crime related activity* is defined to mean a drug offence or prescribed indictable offences punishable by imprisonment for at least five years: cl.4 and Schedule; cf.cl. 34(1) (a) (b).

- **proceeds assessment order:**[12] an order requiring a person to pay to the Treasurer as a debt to the State[13] an amount assessed to be the value of the proceeds derived from an illegal activity[14] of the person that took place at any time before the commencement of proceedings.

- **enforcement order:**[15] an order declaring an interest in property found to be under the effective control of a person subject to a proceeds assessment order to be available to satisfy unpaid monies due under the order.

How does the bill differ from the *CC Act (Qld)*?

6. Apart from removing the requirement of a criminal conviction as a condition precedent to proceeds of crime actions, there are a number of features of the bill which distinguish it from the *CC Act (Qld)* and other similar conviction based regimes in Australia.[16] These include:-

   (a) Unlike those under the *CC Act (Qld)* forfeiture proceedings taken under the bill are part of the civil, not the criminal, court process;

   (b) The standard of proof is lower under the bill than under the *CC Act (Qld)*. Findings of criminal conduct against a person are made on the civil standard of probabilities rather than on a beyond reasonable doubt basis;

   (c) Restraining, forfeiture and proceeds assessment orders are mandatory under the proposed civil scheme rather than being either automatic or discretionary as they are under the *CC Act (Qld)*. Thus, under the bill if relevant matters are proved on the balance of probabilities the appropriate court must (not may) make one or more order.

   Automatic forfeiture under the *CC Act (Qld)* is broadly similar to the effect on an asset forfeiture order provided for in the bill, but it is not activated until six months after conviction and, in common with mandatory pecuniary penalty orders, applies, only in relation to serious drug offences viz. Those carrying a maximum penalty of imprisonment for 20 years or more.

   (d) Although innocent interests in restrained property can be excluded from the effect of restraining and forfeiture orders the bill reverses the onus of proof; thus requiring the claimant instead of the State to prove that particular property was neither criminally derived nor illegally acquired,[17]

   (e) Unlike the *CC Act (Qld)* the bill targets only the proceeds - not the instruments - of crime.

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12 This order is mandatory, in the case of serious crime related activity, but is otherwise discretionary: cls.39-40

13 Clause 45(1)(2)

14 The term *illegal activity* for the purposes of a proceeds assessment order includes serious crime related activity and all State and Federal offences and their equivalents: cls.4 and Schedule

15 Clause 42(1)

16 Eg. Proceeds of *Crime Act, 1987 (C'th); Confiscation of Proceeds of Crime Act 1989 (NSW); Criminal Assets Confiscation Act 1996 (SA); Confiscation Act 1997 (Vic); Crimes (Confiscation of Profits Act, 1988 (WA); Crimes (Forfeiture of Proceeds) Act 1988 (NT); Proceeds of Crime Act 1991 (ACT); Crime (Confiscation of Profits) Act 1993 (Tas)*

17 Clauses 37(3), 10 (when property is "illegally acquired property")

Logically, instruments of crime are susceptible to forfeiture on the basis of different and much narrower legal principles. Property intended for future use in criminal activity is subject to confiscation on incapacitation or preventative grounds. On the other hand, property that has already been used in, or in connection with, criminal activity is recoverable as a matter of principle only as part of the punishment received in respect of that offence i.e. after proof to the criminal standard or upon conviction. Unlike its criminal confiscation, however, civil forfeiture has no punitive function. Accordingly, property that is intended to be (but has not yet been) put to a criminal purpose, may justifiably be restrained and forfeited on the basis of a civil finding alone consistently with legal principle and public policy, but property that has already been used as an instrument of crime is not.[18]

(f) Confiscation under the *CC Act (Qld)* is limited to "tainted" property and can only be ordered against property, directly or indirectly, to the offence for which the relevant person was convicted. A correspondingly similar limitation applies to pecuniary penalty orders.

The proposed legislation, by contrast, has the potential of capturing **all the property** of the person found to have engaged in "serious crime related activity" **at any time** before the making of an assets forfeiture order application;

- A broader range of offences is covered by the bill than by its conviction based counterpart;
- The Director of Public Prosecutions and the Queensland Police Service are the authorities that institute post conviction confiscation for the purposes of the *CC Act (Qld*).
- The Crime and Misconduct Commission is the only agency nominated to administer the proposed civil forfeiture regime.

7. The civil forfeiture scheme provided for in the bill allows a wide ranging inquiry into the assets and proceeds of the suspected person beyond those directly related to the commission of a predicate offence. These include, but are not limited to, an order for the examination on oath of a person about the property and financial affairs, including the property dealings and commercial interests, of a suspected person or his or her spouse.[19]

8. The bill strengthens the information gathering powers of law enforcement agencies by enabling the Supreme Court to make **production orders**[20] compelling a person reasonably suspected of having a document that tracks the history of relevant property to produce it and issue **search and seizure warrants**[21] where forfeitable crime related things are either at or believed likely to be at a certain place within the next 72 hours;

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18 In its recent review of the operation of the *Proceeds of Crime Act 1989 (C'th)* the Australian Law Reform Commission did not support non conviction based regimes that allowed for the forfeiture of property used in or in connection with crime whether past or future.

19 Clause 21(1)(b)(c)

20 Clause 46

21 Clause 57

9. A Supreme Court judge may also authorise the seizure under warrant of property tracking documents, including those ordinarily protected by legal professional privilege, where they are likely to be on premises in the next 72 hours.[22]

10. In addition, financial institutions may be required to provide information about a relevant person under the terms of a **monitoring order.**[23]

How does the bill compare with other civil forfeiture legislation in Australia and elsewhere?

Australia

11. The proposed legislation closely resembles non conviction based arrangements introduced into New South Wales more than ten years ago with the enactment of what is now called the *Criminal Assets Recovery Act 1990 ("CAR Act, (NSW)").* There is, however, one important difference between the bill and the CAR Act (NSW) provisions. The bill requires a court to make a restraining forfeiture or proceeds assessment order if it finds that the suspected person engaged in serious crime related activity at any time before the commencement of proceedings. The operation of the New South Wales legislation, by contrast, is limited to serious crime related activities engaged in **no more than six years before** the institution of recovery proceedings.[24]

12. Civil procedures for confiscating assets and proceeds of crime were introduced in Victoria by the *Confiscation Act, 1997*. However, the Victorian scheme is limited to *serious drug offences* and, unlike the position under the bill and in New South Wales, forfeiture applications can only be made if a person has been or is about to be charged with a "*civil forfeiture offence*". This latter aspect of the Victorian scheme is particularly undesirable because it is likely to give rise to artificiality such as laying of charges as a device for the purpose of obtaining restraining and forfeiture advantages with no genuine intention of ever continuing with a criminal prosecution.

13. Western Australia is the latest jurisdiction in this country to introduce a species of civil forfeiture with the passing of the *Criminal Property Confiscation Bill 2000.*[25] The remedies under this legislation include **unexplained wealth declarations** which deem the living standards or the value of assets above the level of the apparent lawful sources of income and wealth accumulating capacity of a suspect to be crime proceeds payable to the Crown unless proven otherwise.

14. Furthermore, a person convicted three times of a serious drug offence in Western Australia within a 10 year period can be declared to be a drug trafficker and lose all property owned or under his or her control whether lawfully acquired or not.

15. The probable involvement in an acquisitive crime attracting a sentence of imprisonment for 2 or more years can result in a person being ordered to pay an amount equal to the value of the proceeds or profits derived from committing the offence.

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22 Clauses 65; 69

23 Clause 70

24 The absence of any period of limitation is justified, according to the Shadow Attorney-General's second reading speech, on the dubious basis that evidence of property being serious crime derived may not emerge for many years afterwards.

25 Replacing the *Crimes (Confiscation of Profits) Act 1988 (WA)* and Part V of the *Misuse of Drugs Act 1981 (WA)*

16. Restrained property of a person can also be automatically confiscated where no one makes a claim to release it within 28 days of the making of a restraining order.

17. The rationale for these draconian measures is said to be the difficulty under alternative procedures to prove a nexus between unexplained wealth and criminal activity.

Ireland and the US

18. Non conviction based forfeiture has been a feature of proceeds of crime law in the United States since the Racketeer Influenced and Corrupt Organisation (RICO) statute pioneered the use of legislation specifically designed to target unlawful assets and wealth in the 1970's.

19. Civil forfeiture legislation was passed in the Republic of Ireland in 1996.[26]

20. Civil forfeiture legislation in both the US and Republic of Ireland is 'property-directed'.

21. Assets are liable to forfeiture in the States on *in rem* proceedings whether they have been used in the furtherance of a crime in the past or are intended for that purpose in the future.

22. The forfeiture trigger in both countries is proof to the civil standard that particular items of property are proceeds of crime (or the instruments or intended instruments of crime in the US), but the recent *Civil Asset Forfeiture Reform Act 2000* shifted the onus of proof in forfeiture proceedings in the USA from the property owner back to the State in an attempt to minimise procedural controversies and continuing criticism by civil rights groups.

23. The civil forfeiture system proposed in the bill is fundamentally different to its analogues in the United States of America and Ireland.

24. The forfeiture model in the bill is based on the New South Wales *in personam* legislation. There are no additional sets of *in rem* provisions similar to those the in the United States and the Republic of Ireland and likely to be adopted soon in the UK. In certain limited circumstances *in rem* provisions would be used to target suspect property itself rather than the person who owns or possesses it.[27]

25. *In rem* actions would allow law enforcement agencies to deal more effectively with the common situation where large unexplained sums of money or other valuable property are found abandoned in highly suspicious circumstances[28] but nobody is prepared to come forward to claim it for fear of prosecution.

<u>The international trend towards civil forfeiture</u>

26. A scheme broadly similar to the Irish statute was introduced in South Africa in 1999.[29]

27. None of Austria, Germany, Greece or Luxemburg require a criminal conviction as a prerequisite to the confiscation of the proceeds of crime.[30]

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26 Proceeds of *Crime Act, 1996* and the *Criminal Assets Bureau Act 1996.*

27 *The Customs Act 1901 (C'th)* however does permit the automatic *in rem* confiscation of prohibited imports, including narcotic goods, and anything used to carry them, without the need for a prior conviction.

28 cf *Flack -v- The Queen* (1998) 156 ALR 501.

29 Chapter 6 *Prevention of Organised Crime Act, 1998*

28. In 2000 Ontario became the first Canadian province to pass civil forfeiture laws[31] as a counter measure to a growing organised crime problem.

29. A civil forfeiture procedure currently exists in the United Kingdom but is restricted to drug money seized at the border.[32]

30. However in 1999 a Home Office Working Group on confiscation in the United Kingdom proposed the introduction of a civil forfeiture system modelled on the United States and Irish schemes.

31. In making the recommendation the Home Office acknowledged the need for civil forfeiture powers to be drawn up in a way that gives expression to the European Convention on Human Rights (ECHR) which was fully incorporated into UK law by the *Human Rights Act, 1999*.

32. The Home Office considered the minimum human rights safeguards required for the proposals to be compatible with these human rights included, for example:

- a monetary threshold;
- the burden of proof remaining with the State to the civil standard;
- the provision of civil legal aid;
- third party compensation provisions;
- strict organisational arrangements to ensure that civil forfeiture was not adopted as a soft option in place of difficult criminal proceedings.

33. In June 1999 the Australian Law Reform Commission (ALRC) also recommended the expansion of the *Proceeds of Crime Act* 1989 *("POC Act (Cth)")* to include a non conviction based regime broadly comparable to the New South Wales arrangements[33] and the *Proceeds of Crime Bill 2002 and the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002* were introduced into the House of Representatives by the Minister for Justice and Customs Senator Chris Ellison on 13 March this year.

Is civil forfeiture consistent with legal principle and the common law tradition?

34. The concept of forfeiture or confiscation as a way of relieving against the consequences of crime dates back to biblical times and has been an entrenched feature of English law ever since the early Anglo Saxon and Norman rulers began the practice of confiscating dangerous things (or *deodand*) causing or contributing to the death of one of their subjects.[34]

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30 Financial Action Task Force on Money Laundering *Annual Report 1996 - 1997*

31 The *Remedies for Organised Crime and Other Unlawful Activities Act 2000*

32 Part II, *Drug Trafficking Act, 1994*

33 Australian Law Reform Commission *Confiscation That Counts: a Review of the Proceeds of Crime Act 1987* Report No. 87 1999 at p.75, para 4.144

34 Freiberg, A "Criminal Confiscation, Profit and Liberty" (1992) 25 ANZJ Crim 44, 46.

35. In medieval times forfeiture was automatic under English common law, in the event of conviction for a capital offence all the estates and chattels of a person were forfeited to the Crown, without the need for a judicial order under the twin doctrines of *attainder* and *corruption of blood*.

36. Attainder divested convicted felons or traitors of all property, real and personal, and prevented it from passing by inheritance to his successors. In contrast to the older notion of deodand common law forfeiture attached property, not because it caused damage or death, but because of the violation of its owner of the feudal notion of fealty.[35] Whereas attainder was an early form of *in personam* confiscation, based on personal guilt, the deodand was an *in rem* procedure that treated the property itself rather than the person as "guilty".

37. According to Blackstone, forfeitures were intended to make a convicted felon's property suffer as well as himself in order to *...help to restrain him, not only by the sense of his duty, and the dread of personal punishment, but also by his passions and natural affections; and will interest every dependant and relation he has, to keep him from offending...*[36]

38. Statutory forms of *in rem* forfeiture developed in the 17th century to enforce the English Navigation Acts and extended in the mid 19th century in aid of the customs and revenue laws. Under these procedures the owner of impounded goods had to prove that payment of duty had been made on the goods or else suffer their confiscation.

39. Since the abolition of deodands in 1846 and common law forfeitures in 1870, the confiscation of proceeds or instruments of crime in both Australia and the UK have been regulated wholly by statute.

40. There will understandably be concerns in the Queensland community about the civil liberties implications of civil forfeiture legislation and whether it represents a fair, as well as an effective, law enforcement response to the growing problem of serious, especially drug crimes. Such legislation involves a balancing of the rights of individuals against the intrusion of State power into their daily life.[37]

41. Other important public interest considerations that need to be kept firmly in mind when deciding whether civil forfeiture should be introduced in Queensland in aid of law enforcement effort against organised criminal activity are:

- Firstly, good law enforcement is essential to a free society and one of the most basic of all democratic rights. Without it, civil liberties would rapidly become eroded and devalued to the point that although they would theoretically continue to exist they would be practically worthless.

- Secondly, law abiding citizens have nothing to fear from civil based confiscation and no one, especially those involved in major or organised criminal activity has a legitimate right to unjust enrichment.

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35 R. -v- Cuthbertson [1981] AC 470,472

36 Blackstone's Commentary on the Laws of England Vol. 4 p.3785

37 Costigan F. "Organised Crime in a Free Society (1984) 17 ANZJ Crim 7

- Finally, organised crime poses just as great a threat to individual freedom as legislative or executive action and society cannot realistically expect to be protected against the risks that crime creates or the social injury it causes without accepting the rational enrichment of traditional privileges and balanced adjustment of property rights.

42. As the recent Australian Law Reform Commission (ALRC) report on the federal forfeiture arrangements rightly pointed out:

> *The concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrong doing. That is to say that, while a particular course of conduct might at the same time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the State to impose a punishment for the criminal offence and the nature of that punishment, are independent in principle on the right of the State to recover the unjust enrichment and vice versa 87 ALRC 31 2.78.*[38]

43. There is, of course, a careful balance to be struck between the civil rights of the individual and the need to ensure that the State has appropriate powers and tools to adequately protect society by tackling crime effectively.

Does the legislation have sufficient regard to the rights and liberties of individuals?[39]

♦ **The bill generally**

44. Civil forfeiture is a significant extension of the powers available to the State to deal with the proceeds of crime. It can be expected to be viewed as controversial by many because it extends to circumstances where there does not have to be a conviction to the criminal standard for assets to be deemed unlawful and therefore forfeited to the State.

45. Specifically, critics are likely to raise the question whether what is in reality a remedy in the nature of a penalty ancillary to and subsequent upon a criminal conviction could now fairly be used as a method of recovering unjust enrichments without the same degree of proof being required?

46. Freiberg suggests that there is "something deeply disturbing" about the tendency to discard conviction as a prerequisite for the imposition of sanctions but as Connolly J observed in *Brauer -v- DPP:-*[40]

> *"... desperate situations may call for desperate remedies and it is for Parliament to judge what those should be."*[41]

47. The public interest in winning the fight against crime, especially "the scourge of drug trafficking offences", may justify controlled and moderate abridgements of traditional rights and freedoms, without undermining and probably enhancing community confidence in the

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38 ALRC Report No. 87 1999 at p.31, para 2.78

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

40 (1989) 45 A Crim R. 109, 118

41 Op cit. at p.5l

legal system or the moral authority of the State, where conventional methods have proven to be inadequate or ineffective.

Criminal confiscation -v- civil forfeiture

48. Conviction based laws are justified by the principles of deterrence and retribution based on proven fault. Civil or non conviction based forfeiture laws, by contrast, are rooted in the equitable doctrine of unjust enrichment. They have as their main concern restoration, repatriation and atonement, irrespective of personal blame. Among other things, they are designed to financially incapacitate criminals, to remove the profit making potential and wealth accumulating capacity of crime, restore the costs of law enforcement and criminal justice expended by the State and compensate the community for the social harm crime causes.

49. The point of incapacitation, like quarantine, is not punishment but prevention by civil means.[42]

50. But the extent of interference with the civil liberties must be rational, proportionate and reasonably necessary so that they do not do more overall harm than good. Forfeiture of property without conviction should be permitted only to the extent that it can be shown to be essential to public order and good government.[43]

Property rights

51. Historical common law presumptions treat a wrong doer as being entitled to retain and enjoy criminal proceeds unless and only to the extent that another person can prove better title eg. the owner of stolen goods.[44]

52. All forfeiture laws, whether civil or criminal, interfere with the basic right of the individual to peaceful enjoyment of property, but it has never been questioned that the confiscation of the proceeds of crime is justified as a matter of principle on the public interest ground that no one should be allowed by law to retain - whether at the expense of someone else or the community as a whole - the profits of crime or other unjust enrichments.[45]

53. The obvious and most serious civil liberties objection is that an "innocent" person may be stripped of assets or an interest in property on the basis of involvement in criminal activity even though no crime is ever proved beyond reasonable doubt to have been committed.

- Accused persons are presumed innocent in criminal trials in Queensland, not because they actually are, but because society is so much stronger than the individual and as a general rule can afford to be generous. It is, however, a question of degree, varying according to circumstances, how far this generosity can or ought to be carried in the present day and age. Particular cases can be easily identified in which guilt, instead of innocence, should be assumed. The mere fact, for instance, that an unemployed man enjoys an ostentatiously lavish lifestyle will often - as a matter of common sense - justify

42 Fisse, B Confiscation of Proceeds of Crime, Funny Money, Serious Legislation (1989) Crim LJ 368 at 385

43 ALRC Report No. 87, 1999, at p.77, para 4.162

44 Gollan -v- Nugent and ors. (1988) 63 ALJR 11

45 cf. ALRC Report No. 87 1999 at 9.29, para 2.66

calling on him to show that he acquired his apparent wealth lawfully, simply because he - and not the State - knows where it came from.

54. In any event, since the proposed procedures for recovering crime derived proceeds and assets are civil and not criminal proceedings the issue of being presumed innocent until proven guilty does not strictly arise.

55. There is also likely to be genuine concerns expressed about the absence of any time limitation in the bill, either generally or on the specific ground that it offends the principle of proportionality.

56. Under the bill all or any of the property acquired by a person may be confiscated where it proved involvement in serious crime related activity at any time before the making of the application. Similarly, if the value of a relevant person's property after an illegal activity - whenever it took place - is more than it was before that time, the Court has no alternative but to treat the difference as *prima facie* illegally derived. This is perhaps the most controversial aspect of the bill because it relates back to the indefinite past and covers the entire period of ownership. Even the New South Wales legislation upon which the bill is clearly modelled has a six year period of limitation.[46]

57. There are measures, however, in the bill designed to protect legitimate property rights including a process for recognising and excluding the value of innocent interests from the operation of restraining and forfeiture orders plus the provision allowing the Court to refuse to make a restraining order if the State refuses to give an undertaking as to damages or costs.[47]

58. Those measures will avoid possible injustices in some cases, especially those arising out of the denial of an opportunity for third parties to be heard until after the making *of ex parte* restraining orders, but they will not eliminate harsh outcomes entirely.

59. It will not always be easy for a claimant to prove a negative state of affairs ie. that restrained property wasn't illegally acquired, especially when:

(a) the concept of illegal activity extends well beyond ordinary criminal offences and can include unrelated taxation and similar offences;

(b) property only stops being illegally acquired property when it's acquired for value and without knowing and in circumstances not likely to arouse a reasonable suspicion that the property was illegally obtained;[48] and

(c) it doesn't matter when the illegal activity that caused the property to become "illegally acquired property" happened, or whether the illegal activity took place before or after the commencement of the legislation.[49]

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46 The limitation period for commencing forfeiture proceedings under Ontario's *Remedies of Organised Crime and other Unlawful Activities Act 2000* is 15 years:s.3(5)

47 Clause 16(2)

48 Clause 11 "When property stops being or again becomes, illegally acquired property".

49 Clause 10 "When property is illegally acquired property"; cf. definition of "Illegal activity" in s.4 and Schedule.

60. The obvious concern is that forfeited assets and amounts assessed as being proceeds derived from illegal activity for the purposes of a proceeds assessment order may be more than is directly attributable to the illegality.

61. Moreover, the proposed legislation applies to any sort of asset or interest in **all of the property of the person.**[50] It therefore has the potential to interfere with third party rights in restrained or confiscated property and to cause financial hardship for spouses, dependants and business partners or creditors.

62. There are, however, some safeguards built into the proposed legislation eg. restraining orders cannot be made except in judicial proceedings and unless there are reasonable grounds to believe that the property was derived from serious criminal activity[51] and forfeiture can only be ordered on the basis of an adverse finding against a suspected person by a court on the balance of probabilities.[52]

63. The adverse effects of restraining or forfeiture orders on legitimate interests is also ameliorated to some extent by provisions allowing for the payment of reasonable business, living and (to a limited extent) legal expenses out of restrained property.[53]

Privilege, privacy and confidentiality rights

64. The strengthened search and seizure and information gathering powers under the bill raise the question - how are the privacy rights of financial institutions and their innocent customers respected or safeguarded?

65. The bill overrides privacy rights, duties of confidence and legal professional privilege where a person is being examined on oath about or required to produce a document concerning the financial affairs and property interests of a suspected person under cl.21.[54] It also provides that a person is not excused from compliance with a production order on the grounds that it would breach an obligation of confidence or legal might tend to incriminate the person or would breach legal professional privilege.[55]

66. While these powers are generally similar to powers that already exist under the *CC Act (Qld)* and are commonplace elsewhere in the common law world, the abrogation of legal professional privilege represents a significant extension of State power and the corresponding inroad into an important traditional civic right.

67. The privilege is regarded in Australia as more than merely an exception to the conventional rules of discovery and disclosure. It is a basic and pre-eminent legal protection that can, for instance, usually be asserted even against a search warrant[56] and relied upon by a witness as

50 cf. cl.8(1); 15 (3) (a)(iii)

51 Clause 50(1)(2)

52 Clause 34(1)

53 Clause 17(2)

54 Clause 22(1).

55 Clause 52(1).

56 *Baker and Campbell* (1983) 153 CLR 52 but cf. cl.69 of the bill which modifies the common law in this regard.

a reasonable excuse for refusing to answer a question or produce a relevant document at a compulsory hearing of the Crime and Misconduct Commission itself.[57]

68. Nonetheless, the reinforced information gathering powers may be justifiable having regard to the objectives of the bill. The first reason for this is the recognition that effective powers of this kind are essential to the success of civil forfeiture powers especially in the context of organised and major drug crime where proceeds are professionally disguised or concealed through devices such as family trusts and similar sham arrangements. The second is that the powers are judicially supervised and regulated by the Courts.

Additional Comments

69. The bill attacks the proceeds and not the instruments of crime. The conviction based legislation at State and Federal level applies to both. The New South Wales civil forfeiture legislation is limited to the recovery of proceeds not instruments of crime. This is consistent with the non punitive purpose of civil forfeiture. Instruments of crime should be covered on a conviction only basis. It is arguable however that like proceeds, property intended to be used in the future to commit crime is recoverable on a civil rather than a criminal basis because of the incapacitation and preventative aspects.

70. The legislation is purely *in personam* and does not have any *in rem* forfeiture provisions which would allow the commission to deal more effectively with the common situation where large unexplained sums of money or other valuable property are found in highly suspicious circumstances and no one comes forward and claims ownership for fear of prosecution. cf: *Flack -v- The Queen* (1998) 156 ALR 501.

71. The duration of restraining orders is currently 48 hours, which is in line with the New South Wales legislation. This may be too restrictive. The Victorian Act currently provides for a seven day period which may be more practical.

Summary

72. The major civil liberties concerns with the bill appear to be:

- The potential application of mandatory forfeiture orders to cover **all the property** of a person found to have engaged in serious crime related activity **at any time** before the commencement of proceedings combined with the reverse onus provisions requiring anyone who claims an innocent interest in forfeited property to prove that it is not tainted by any illegality could cause extreme and disproportionate hardship to spouses and other third party claimants.

- The possibility, at least theoretically, that a claimant may be put in the position of having to prove that an interest in property acquired more than ten years ago was acquired lawfully and is not derived from any form of illegality. This task may in some cases e.g. those going back 20 or more years be virtually impossible due to the destruction of material documents or the death or incapacity of relevant witnesses.

[57] cf.ss. 72-75; 185; 190(2), 194, 196 of the *Crime and Misconduct Act 2002*

- A period of limitation of six or seven years generally applies in relation to other civil claims and the CAR Act (NSW) only relates back for six years.

- The abolition of legal professional privilege objections in the face of compulsory information gathering powers also represents a substantial new abridgement of traditional common law protections.

73. This bill impacts in various ways upon the rights and liberties of individuals whose property may be subject to confiscation under its provisions.

74. The committee refers to Parliament the question of whether the bill has sufficient regard to the rights and liberties of those persons on the one hand, and of the community as a whole on the other.

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[58]

♦ **Clauses 15 to 45 inclusive**

75. The bill is clearly designed to take away property rights without any compensation in the case of serious crime derived property on the basis, according to the Second Reading Speech, of the (legally incorrect) assumption that the person against whom the order is made has no clear title or legitimate claim to a right or interest in it.[59]

76. There is a definite pattern of legislative action, whether on a post conviction or non conviction basis, being taken nationally and internationally to recover unjust enrichments without compensation, and this bill is not unusual in that regard.

77. The bill does, however, provide for adequate compensation to be paid to adversely affected innocent third parties under cl.38(1)(b).

78. This bill enables the property rights of individuals to be forfeited, without compensation, in certain circumstances.

79. The committee refers to Parliament the question of whether the provisions of the bill have sufficient regard to the rights of individuals whose property may be subject to forfeiture.

58 Section 4(3)(i) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.

59 cf. Gollan -v- Nugent and ors. (1988) 63 ALJR

Is the legislation consistent with the principles of natural justice?[60]

- **Clauses 15 to 45 inclusive**

Standard of Proof

80. A number of procedural consequences follow from the classification of confiscation actions as part of the civil, as opposed to criminal, process.

81. Some of these are spelt out in cl.7 of the bill which provides for the application of the civil rules of procedure evidence and construction to all forfeiture proceedings.

82. Thus, contentious questions are to be decided on the civil standard of proof, that is, on the balance of probabilities rather than on the higher criminal standard of reasonable doubt.[61]

83. The same standard of proof currently applies to applications made under the *CC Act (Qld)* and its equivalent.[62]

Equality of parties

84. The right to a fair hearing in both criminal and civil cases, implies that each party will be afforded a reasonable opportunity of presenting his or her case under conditions that do not place him or her at a substantial forensic disadvantage. Clause 47(1) might potentially offend this aspect of procedural fairness because it displaces the ordinary rules of practice and evidence by permitting hearsay and opinion evidence to be given in a forfeiture application as to the market value of drugs and their street price for the purpose of making a proceeds assessment order.

85. The principle would not be offended if, as is probably envisaged, the deponent was subject to cross-examination.

Reversal of the onus of proof

86. The principle may also be potentially offended by the reverse onus provisions which require those seeking to exclude property from forfeiture or restraint orders to prove that it was not tainted by illegality. In a discretionary regime a court will take into account any forensic difficulties that a person may have and any disadvantages in leading suitable evidence to discharge this onus of proof. In the absence of evidence to the contrary the Court may well find that the onus of a third party claimant is discharged by even slight evidence that his or her interest is untainted.

87. However, the proposed scheme is a mandatory one based on the assumption that those with ownership rights or other interests in property are in the best position to prove matters in

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60 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.

61 In *Cornwell -v- Commissioner of Australian Federal Police* (1990) 94 ALR 495 @ 507 Wilcox J held that the *Briginshaw* standard required a feeling of actual persuasion and that the court was not to resolve issues of credit by considering the witnesses evidence in isolation and without forming an opinion about the credibility of other evidence.

62 Section 94(1) of the CC Act (Qld) provides a proceeding for restraining forfeiture or pecuniary penalty or special forfeiture orders is not a criminal proceeding and questions of fact on the application must be decided on the balance of probabilities..

respect of that property. This may not be so in the case of all innocent third parties who may be unjustly burdened by loss for the want of sufficient proof or, notwithstanding the power of the Court to provide for the payment of reasonable legal expenses out of restrained property[63] in adequate financial resources to fund a contested application.

Notice

88. Notice of judicial or administrative action likely to interfere with personal rights, interests or legitimate expectations is a procedural fairness requirement. Although restraining orders may be applied for and granted *ex parte*[64] they have force for only 2 days unless the Court grants an extension or forfeiture action is taken. Notice of a restraining order must be given to affected parties so that they can apply to vary the order or exclude affected property.[65] Notice must also be given to a person against whom an application for an assets forfeiture order has been made[66] or a proceeds assessment order is sought[67] or enforcement action is being taken.[68]

89. Many of the provisions of this bill impact upon the rights of individuals to natural justice.

90. The committee refers to Parliament the question of whether these provisions of the bill have sufficient regard to the rights of such individuals.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[69]

- **Clauses 37, 38 and 41**

91. There will inevitably be community, academic and professional concern that reversal of the onus of proof, by effectively displacing the presumption of innocence, is contrary to core principles of criminal justice protection.

92. The bill does reverse the onus of proof in respect of applications to exclude property from the effects of restraining and forfeiture orders under cls.37-38 and for the purposes of making proceeds assessment orders[70] under cl.41(2)(3).

93. The first thing to notice here, however, is that proceedings under the bill are **civil not criminal** and are based on equitable notions of restitution and reparation rather than the criminal justice concepts of criminal responsibility and punishment.

63 Clause 17(2); 26

64 Clause 15(2)

65 Clause 20(2); 37(9)

66 Clause 33(2)

67 Clause 39(3)

68 Clause 42(2)

69 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.

70 Clause 47(3)

94. As the presumption of innocence occupies such an entrenched position in Australian law the courts have ensured that all common law or statutory presumptions which form part of the law of evidence are subordinated to the fundamental principle. Thus, the doctrine of recent possession must be displaced by a suspect to avoid guilty inferences being drawn. However, these rules do not place a burden of proof on the accused. All he has to do is raise a reasonable doubt as to his guilt in common with other evidentiary onuses.

95. The raising of a doubt whether a person engaged in serious crime related activity or whether an offence is a drug offence or not is specifically not enough of itself to avoid an adverse finding for the purpose of a forfeiture order.[71]

96. It may be argued that while shifting the onus of proof on a particular issue is permissible in criminal cases because of the extra protection afforded by the requirement of proof beyond reasonable doubt there is no justification in doing so in a civil proceeding.

97. A leading commentator on this kind of legislation once observed:

> *"Like most other reverse onus causes, this kind is drafted for political capital, or distrust of the commonsense of courts, or both. It is submitted that reference to the total value of assets, and the reversal of onus, are unnecessary, unjust and lead to gross complication of what ought to be a relatively simple measure".*[72]

98. However, there is nothing unfair or contrary to the natural justice rule of equality of parties in transferring the onus shifting in a civil matter once reasonable suspicion has been established. It is quite reasonable in a context where it appears to a court that the goods are likely to be the proceeds of crime that a person in possession of them be asked to account for their source. He or she is in a unique position to do so.

99. Although contentious in the criminal law context, reverse onus mechanisms are central to the capacity of civil based forfeiture scheme to achieve their basic objectives.

100. They are arguably justified, not only by logic, legal tradition and the force of common sense reasoning but by important practical considerations as well.

101. In this context it is easier generally speaking for a person to prove the origin of his assets or means by which he lives than it is for the State to prove that he obtained them by illegal means.

102. Without provisions of this kind, criminals are able to insulate themselves from law enforcement penetration and protect their illicit profits against their capture by distancing themselves from the illegal activity from which their wealth is accumulated.

103. It is often argued that the State should bear the persuasive onus of proof to the higher criminal standard in all confiscation related proceedings on the ground that forfeiture really amounts to a criminal proceeding because it implies serious criminality on the part of the owner of the property or someone else.

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71 Clause 34(3)

72 Goode, M "The Confiscation of Criminal Profits" (1986) 67 Proceedings of the Institute of Criminology, University of Sydney, 35

104. However, the underlying purpose of civil forfeiture is preventative (depriving criminals of the instruments of crime) or restorative (reimbursing the state for the cost of crime), not punitive.

105. The chief object of criminal confiscation is deterrence and retribution based on proven fault. The aim of civil forfeiture, by contrast, is restitution relying on equitable principles of unjust enrichment irrespective of personal blame. Thus, while the former is an integral part of the criminal justice process the latter clearly is not, then it is quite wrong to treat it as if it was.

106. There are well established precedents for criminal conduct such as fraud, forgery, assault and trespass to form the basis of a civil suit for damages - eg. where a person acquitted of murder is, in subsequent civil proceedings, held liable in damages in wrongful death proceedings.

107. Reverse onus provisions are, in fact, a natural extension of the basic common law principle that the burden of proving or negativing a state of affairs should rest on the person who has superior or peculiar knowledge of the essential facts.[73]

108. The common law doctrine of recent possession and a failure of a person to give an innocent explanation for suspicious circumstances are familiar and practical examples of the shifting nature of the evidentiary burden of proof even in criminal matters.[74]

109. As Derrington J acknowledged in *Brauer -v- DPP*[75] a reverse onus aimed at the proceeds of crime is legally acceptable where it appears in a controlled legislative scheme that safeguards against unjustly depriving a suspected person of any of his or her property. For example, allowing the Court to take into account any difficulty associated with proving a negative or other forensic disadvantage - eg. the person's inability to lead material evidence would be relevant.

Rebuttable Presumptions

110. The bill provides for the assessment of proceeds to be calculated either on the basis of an assets betterment test or nett worth analysis and requires a Court to treat the difference between the value of a relevant persons property after an illegal activity and the value of his property before that activity as proceeds derived by illegal activity except to the extent that the increase in value was due to unrelated causes.[76]

111. Similarly any expenditure of the relevant person within six years before the making of an application for a assessment of proceeds order are deemed to be proceeds of crime other than to the extent that the expenditure was funded from income from other sources unrelated to illegal activity.[77]

112. The presumption of a causal link between the commission of illegal activity and a corresponding increase in wealth is a mandatory one unless the Court is satisfied otherwise.

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73 cf *Williamson -v- Ah On* (1926) 39 CLR 95, 113 - 114.

74 cf R. -v- Bruce (1987) 74 ALR 219; R. -v- Weissensteiner (1993) 178 CLR 217, 243

75 (1989) 91 ALR 490, 501-2

76 Clause 41

77 Clause 41(3)

This qualification is a minimum safeguard against the potential oppressive effect of sub-sections (2) and (3) of cl.41.

113. These presumptions of illegal derivation in cl.41(2)(3) of the bill are to the same effect as those currently found in s.37(4) and (5) of *CC Act (Qld*) and are similar to the legislative techniques employed in other Statutes dealing with special social problems and threats such as terrorism.[78]

114. This bill contains a number of provisions which either expressly or implicitly reverse the onus of proof (see above).

115. The committee refers to Parliament the question of whether these reversals of onus are justified in the circumstances.

Does the legislation provide appropriate protection against self-incrimination?[79]

- **Clauses 21(6), 22(1) and 22(4)**

116. Clause 21(6) of the bill confers a power on a Court to order the compulsory oral examination of the spouse or other person on oath about the financial affairs and property interests and dealings of a relevant person for forfeiture related purposes.

117. Refusal to answer questions asked in a compulsory examination or under the terms of a production order[80] constitutes a criminal contempt. Clause 22(1) of the bill abrogates legal professional privilege and also precludes examinees from declining to answer a question or produce a document or other thing on the grounds of self-incrimination. Arguably, however, the privilege is not completely removed by the bill but merely made subject to a discretion.[81] In exercising the discretion to disallow incriminating questions both under the existing and proposed scheme, the harm that may be done to the witness by requiring an answer is balanced against the benefit likely to accrue as to disclosure of assets.[82]

118. Clause 22(4) prevents a compelled answer or production from being used against a person in subsequent criminal proceedings.

119. The *CC Act (Qld)* contains similar provisions.[83] So do both the non conviction based New South Wales Act and the existing conviction based legislation at Federal level.

120. The bill provides for "direct use" immunity in respect of compelled answers or information provided by a person under oral examination or information order. It does not provide "derivative use" immunity, that is, additional compensation against the use of any information derived from the use of a compelled answer or information. The issue whether

78 cf. *DPP -v- Kedeline and ors.* (1999) 4 All E. R. 801, 843

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

80 Clause 52(1) but use of any incriminating document produced unwillingly under the force of such an order in later criminal proceedings is not permitted.

81 *Re Gordon* (1982) 13 OCLR 520

82 *Mortimer -v- Brown* (1970) 122 CLR 493

83 45(6) - (8).

immunity should extend beyond direct use to derivative use is something for the legislature to consider.[84]

121. Protection against the derivative use of compelled answers is sometimes, but not usually, accorded in legislation because it is often impractical and contrary to principle.[85]

122. However the existing Commonwealth legislation and the civil forfeiture legislation in New South Wales both provide for use and derivative use immunity.[86]

123. The *CC Act, (Qld),* s.45(8) also provides both forms of immunity.

124. On the other hand, recent amendments to existing and new legislation in Western Australia, Tasmania, South Australia and Victoria exclude derivative use immunity.[87]

125. This bill contains a number of provisions which expressly deny individuals the benefit of the rule against self-incrimination.

126. The committee refers to Parliament the question of whether these provisions are justifiable in the circumstances.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[88]

♦ **Clauses 10 and 12**

127. In his Second Reading Speech, Mr Springborg MP stated that the bill does not have retrospective effect. This is probably right.

128. The operative provisions apply to all or any property of a person who is suspected or found to have engaged in serious crime related activity at any time before the making of the relevant application.

129. Interpreted properly, the bill applies to activities engaged in and property acquired prior to its commencement.

130. The proposed legislation is clearly intended to cover property before it was enacted but only after the commission of a serious offence whether it was committed before or after the commencement of the legislation.

131. Under cl.10(1), for example, illegally acquired property is all or any part of property derived from illegal activity. It does not matter when the relevant illegal activity happened

84 Environmental Protection Agency -v- Caltex (19930 178 CLR 477, 543

85 Hamilton -v- Oades (1989) ALR 1

86 Sections 48(6), 66(13) POC Act 1987 (C'th), CAR Act, 1990 (NSW), s.13(2) and 35(2).

87 *Crime (Confiscation of Profits) Act 1993 Tas* s.30(4); *Criminal Assets Confiscation Act 1996 (SA);* s.34(2); *Confiscation Act 1997 (Vic)* s.99(2); *Criminal Property Confiscation Act 2000 (WA)* s.61(7)

88 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.

or whether it took place before or after the commencement of the proposed legislation (cls.10(2) and (3): cf. 12(2) and (3)).

132. However, technically speaking, the bill if enacted will have a prospective not a retrospective effect. The focus of the bill is property and although its operative provisions are triggered by past criminal conduct they take effect only in respect of property interests (whenever they were acquired or derived) of a person at the time an application is made. Thus only property rights existing after the commencement of the proposed legislation that are attached or affected by adverse consequences.

133. While the bill looks at events pre-dating the acts of commencement its operation is not retrospective[89] and the bill does not affect or adjust the ownership or effective control interests in any property prior to commencement.

134. Whilst this bill will affect certain matters which pre-date its enactment, the committee is of the view that it is probably not retrospective in nature.

[89] cf: s.13(2), 11(2)

5. CORRECTIVE SERVICES AMENDMENT BILL 2002

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 18 June 2002.

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

> *to amend section 57 and Schedule 1 of the Corrective Services Act 2002 (the Act) to ensure the ongoing viability of the Work Outreach Camps (WORC) Program without compromising community safety.*

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

6. JUVENILE JUSTICE 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 and Minister for Seniors, introduced this bill into the Legislative Assembly on 19 June 2002.

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

> *to amend the Juvenile Justice Act 1992, the Bail Act 1980, the Childrens Court Act 1992, the Criminal Code, the Criminal Offence Victims Act 1995, the District Court Act 1967, the Evidence Act 1977, the Jury Act 1995, the Police Powers and Responsibilities Act 2000 and other relevant legislation to provide an improved, relevant and cohesive legislative basis to the administration of juvenile justice.*

♦ Overview of the bill

3. This bill substantially overhauls the legislation governing juvenile justice in Queensland.

4. Children, provided they are of a sufficient age, can be held criminally responsible for their acts or omissions.[90] They are accordingly subject to the various aspects of the criminal justice system. However, because children have not reached the stage of full maturity the law has traditionally modified, in various ways, the application of the criminal justice system to them.

5. Prior to 1992 in Queensland, this was primarily achieved *via* an extensive range of special statutory provisions contained in the *Childrens Services Act 1965*, which was said to:

> *reflect the ethos prevalent during the mid-1960s that children guilty of criminal offences should be dealt with primarily on the basis of their welfare needs.*[91]

6. The position in Queensland was substantially changed by the enactment of the *Juvenile Justice Act 1992* ("the 1992 Act"). This Act was said to be based upon the principle that:

> *children who commit offences must be held accountable and be encouraged to accept responsibility for their offending behaviour; however they should also be given the opportunity to develop in responsible, beneficial and socially acceptable ways. This includes a recognition of the importance of a child's family.*[92]

7. Similar legislation has been enacted in several other Australian jurisdictions in recent years.

8. The 1992 Act provides in considerable detail about various processes related to the passage of juveniles through the criminal justice system. These include:

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90 See s.29, Criminal Code.

91 Explanatory Notes to Juvenile Justice Bill 1992, p.1.

92 Ibid, p.1.

- *alternatives to commencing proceedings against children*
- *youth justice conferences*
- *confidentiality requirements in relation to personal information about the child*
- *creation of a special court for hearing most cases involving children*
- *special provisions about bail for children*
- *special provisions about detention of convicted child offenders*
- *various sentencing options.*

9. The current bill, which primarily amends the 1992 Act but which also makes complementary amendments to a number of other statutes, is likewise heavily process-oriented. While this renders the task of assessing the bill's impact more complex, the primary issue remains whether, taken overall, it maintains a reasonable balance between the rights of juvenile wrongdoers and those of the community as a whole. This is a matter which only Parliament can ultimately determine.

10. The committee considers that, whilst the provisions of the 1992 Act and this bill are primarily intended as a legislative response to the specific needs of children who come into contact with the criminal justice system, the legislative scheme which they establish appears overall, in comparison with the earlier common law rules, to operate to the advantage of juvenile offenders. Accordingly, even if a particular provision of the bill were to appear adverse to juvenile offenders, it should be borne in mind that it forms part of a structure which is generally advantageous to such persons.

11. These general comments aside, there are a number of specific provisions of the bill which call for comment. These are dealt with below.

Does the legislation have sufficient regard to the rights and liberties of individuals?[93]

♦ **Clause 103 (proposed s.209A)**

12. Clause 103 of the bill inserts into the 1992 Act new s.209A. This provides that if a detention centre employee "becomes aware, or reasonably suspects" that a child detained in a detention centre has suffered harm, the employee must immediately report the harm to the chief executive. A breach of this statutory obligation is an offence punishable by a maximum penalty of 20 penalty units ($1,500). The term "harm" is broadly defined as:

> *any detrimental effect of a significant nature on the child's physical, psychological or emotional well being.*

13. Proposed s.224AS, inserted by cl.109, provides some support for the relevant detention centre employees, by requiring that anyone who receives their report or becomes aware of their identity must not disclose the officer's identity to another person except pursuant to statutory authority. This is presumably intended to minimise the chance of an informant employee being victimised by others who may not wish the harm to be revealed.

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

14. Further, the employee is not obliged to report the harm if "the employee has a reasonable excuse" (s.209A(1)), or if reporting the matter "might tend to incriminate the employee" s.209A(4)).

15. The committee notes that proposed s.209A (inserted by cl.103) obliges detention centre employees who become aware of, or reasonably suspect, that a child inmate has suffered harm, to immediately report that harm to the chief executive, and that failure to do so constitutes an offence.

16. The committee also notes that the reporting obligation is subject to a number of safeguards.

17. The committee refers to Parliament the question of whether the reporting obligation imposed upon detention centre employees is reasonable in the circumstances.

♦ **Clause 104 (proposed s.213A)**

18. Clause 104 inserts into the 1992 Act, proposed s.213A. This provision enables the chief executive to ask the commissioner of the police service for a report about the criminal history of "a person visiting, or who has applied to visit, a detention centre". The commissioner is obliged to supply the written report.

19. The report is to include references to convictions otherwise covered by s.6 of the *Criminal Law(Rehabilitation of Offenders) Act 1986*. This means that all convictions, no matter how old, must be included. Moreover, "criminal history" is defined in proposed s.213A as including "the court briefs for the offences".

20. These provisions obviously impact upon the right to privacy of visitors or intending visitors to detention centres.

21. The Explanatory Notes address this issue as follows:

> *It may be argued that this power impacts adversely on an individual's right to privacy. However, it is considered that this power is necessary to ensure that the manager of a youth detention centre can assess the risk posed to children in the detention centre or to the staff and security of the centre, and that, on balance, it is justified.*
>
> *The section is modelled on section 244 of the Corrective Services Act 2002, which allows the criminal history of visitors to prisons to be revealed to the Department of Corrective Services. As an existing power in relation to the administration of adult correctional facilities, it is regarded as an important tool in maintaining the security and good order of correctional facilities.*
>
> *Also, to limit any impact on a person's privacy, section 213AA clarifies that if any criminal history is obtained, this can only be used to assess and address any risk posed by the person to a child in a youth detention centre or to the staff and security of the centre.*

22. The committee notes that proposed s.203A (inserted by cl.104) empowers the chief executive to require from the commissioner of the police service the criminal history of persons visiting, or who have applied to visit, detention centres. The criminal history is to include old offences, and court briefs for offences.

23. The committee refers to Parliament the question of whether the conferral of this statutory power upon the chief executive is reasonable in the circumstances.

♦ **Clause 109 (proposed s.224AG)**

24. Proposed s.224AG (inserted into the 1992 Act by cl.109) forms part of new "Part 6A – Confidentiality".

25. It provides that a person must not:

> *record or use* (information relating to a child dealt with under the Act)*, or intentionally disclose it to anyone, other than under* (the provisions of the Act)*, or ….recklessly disclose the information to anyone.*

26. Breach of this requirement is an offence punishable by a maximum penalty of 100 penalty units ($7,500) or 2 years imprisonment.

27. The committee notes that the section is expressly stated to apply to intentional disclosures, and that this is consistent with traditional common law principles. However, the section goes on to expressly extend its operation to "reckless" disclosures. Whilst this of course does not encompass disclosures which are merely negligent, it does extend the operation of the section somewhat beyond the usual limits of such provisions.

28. The committee notes that proposed s.224AAG (inserted by cl.109) imposes a confidentiality obligation in relation to intentional, and also reckless, disclosures of information about children dealt with under the *Juvenile Justice Act*.

29. The committee draws the extent of this statutory obligation to the attention of Parliament.

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[94]

♦ **Clause 7 (proposed ss.16 and 30C)**

30. The bill contains a number of provisions which specifically deal with Aboriginal and Torres Strait Islander children. Proposed s.16 (inserted into the 1992 Act by cl.7) provides that if a caution is to be administered to such a child, the relevant police officer must attempt to identify and contact a "respected person" of the child's community, and request that person to administer the caution. Proposed s.30C (also inserted by cl.7) provides that the convenor of a youth justice conference must, if the child is an Aboriginal or Torres Strait Islander person from a community, consider inviting a "respected member" of the community and (and if there is a community justice group in the community) a representative of that group, to attend the conference.

31. Schedule 1 to the bill, which inserts into the *Juvenile Justice Act* a set of "juvenile justice principles" which are to underlie the operation of the Act (see cl.4), provides (in

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

paragraph 13) that "if practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way which involves the child's community".

32. These provisions are clearly likely to benefit the relevant Aboriginal and Torres Strait Islander children.

33. The committee notes that several clauses of the bill stipulate additional requirements which are likely to benefit Aboriginal and Torres Strait Islander children who are being dealt with under the *Juvenile Justice Act*.

34. The committee considers that, by including such provisions, the bill has sufficient regard to Aboriginal tradition and Island custom.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[95]

♦ **Clause 7 (proposed s.30A)**

35. Clause 7 of the bill inserts into the 1992 Act Part 1B (proposed ss.29-30J inclusive), which deals with youth justice conferences. Such conferences may be held, upon the referral of a police officer or court, after a child has admitted an offence to a police officer or after a finding of guilt for an offence is made by a court. In the words of proposed s.29(2), the conference process:

> *Allows the child, a victim of the offence and other concerned persons to consider or deal with the offence in a way benefiting all concerned.*

36. The conference is intended, if possible, to produce a "conference agreement" entered into by all parties. Proposed s.30F(4) provides that, amongst other things, an agreement may contain provisions about restitution or compensation, voluntary work by the child, an apology to a victim, the child's future conduct, or a program similar to a community service order or probation order.

37. Particular conferences are convened by a "convenor", whilst the youth justice conference process is under the overall management of a "coordinator". Both these persons are appointed under proposed s. 30.

38. Proposed s.30A provides as follows:

> ***Protection against liability for convenor or coordinator***
>
> *A convenor or coordinator does not incur civil liability for an act done, or omission made, honestly by the convenor or coordinator with the intention of performing functions or exercising powers as convenor or coordinator.*

[95] 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.

39. The committee can envisage a range of situations in which persons might sustain personal injury, or loss or damage to property, which can in some way be linked to the performance of the terms of a youth justice conference agreement. It may be that only a small number of such cases, if any, would give rise to civil legal liability on the part of a convenor or coordinator under the general law.

40. The committee notes that the protection conferred by proposed s.30A is broader than that generally conferred by current statutes, in that it requires only that the convenor or coordinator act "honestly" and "with the intention of performing functions or exercising powers as convenor or coordinator". It does not also require that he or she act "without negligence".

41. The convenor, and perhaps to a lesser extent the coordinator, of youth justice conferences might in some ways be likened to members of a tribunal or other body which is empowered to engage in "alternative dispute resolution" processes. A qualified immunity from liability is often conferred upon these latter persons. Moreover, statutes often simply confer on members of tribunals a general immunity from liability similar to that of a judge performing judicial duties.

42. The committee also notes that s.30A does not provide, as is often done, that if the section prevents liability from attaching to a convenor or coordinator, that liability attaches instead to the State. In other words, it appears that the legislative intent is that neither the convenor or coordinator, nor the State itself, is to be liable in the circumstances specified in the section.

43. The committee notes that proposed s.30A (inserted by cl.7) confers immunity from civil liability upon convenors and coordinators of youth justice conferences, subject to certain conditions.

44. The committee does not consider this immunity to be unreasonable.

7. LAND TAX 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 19 June 2002.

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

> *to amend the Land Tax Act 1915 to implement measures announced in the 2002-2003 State Budget.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[96]

♦ **Clauses 2 and 7**

3. Clause 2 of the bill declares that it "is taken to have commenced on 1 July 2002". As Parliament does not sit again until 30 July 2002 the bill cannot, of course, be passed and assented to prior to 1 July.[97]

4. Clause 2 might not of itself cause the bill to have retrospective effect. Land tax is charged on land "as owned at midnight on 30 June immediately preceding the financial year in and for which the tax is levied" (s.12, *Land Tax Act 1915*).

5. However, cl.7 makes it clear that the bill is to operate retrospectively, by providing that:

> *the Act as amended by this bill applies to Land Tax levied for the financial year beginning on 1 July 2002 and each later financial year.*

6. 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.*

7. As to the first matter, the committee notes that the changes made by cls.5 and 6 of the bill appear to be beneficial to taxpayers, and accordingly raise no concerns.

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96 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.

97 This bill, which is a budget-related initiative, was introduced into the Legislative Assembly on 19 June 2002, only one day after the 2002 – 2003 Budget was handed down and the relevant Appropriation Bills introduced.

8. However, cl.4 replaces current ss.9AA to 9AB inclusive with a new s.9A, which introduces a new system in relation to rebates of tax. The new provisions, like their predecessors, deal separately with the position of trustees, companies and absentee landowners on the one hand, and other taxpayers on the other hand. However, the provisions about tax thresholds, maximum taxable values, rates of rebate and absenteeism, in relation to the first group of taxpayers (who are described in new s.9A as "prescribed taxpayers"), differ from the current provisions. The extent and complexity of the changes which have been made render it extremely difficult to compare the old and new regimes.

9. The Minister in his Second Reading Speech states:

> *as a result of* (the enactment of this bill)*, 7,816 taxpayers will no longer pay land tax*
>
> and
>
> *the adjustment to the phasing-in rebate will mean that 4,152 taxpayers will pay less tax.*

10. The committee nevertheless presumes that at least some other taxpayers will be disadvantaged by the bill, by becoming liable to higher taxation assessments than at present. The number of these persons, and the extent of their additional liability, are impossible for the committee to assess.

11. The committee notes that the changes made by this bill were announced in the 2002 – 2003 State Budget, which was handed down on 18 June 2002.

12. Although the committee does not promote the practice of "legislation by press release", the practice of publicly announcing a change in legislation prior to making the change serves to forewarn affected individuals and to decrease reliance on the existing legislation. That having been said, the committee notes that the period of notice provided to taxpayers in this case was only 12 days. Also, the changes made by this bill need to be considered against the background of the land tax scheme, under which liability is assessed, not on an ongoing basis over an entire financial year, but upon the value of land owned at a particular point in time (midnight on 30 June immediately proceeding the financial year for which the tax is assessed).

13. The committee notes that cl.4 of the bill makes changes to the rebates provisions of *the Land Tax Act* which, whilst advantaging some taxpayers, presumably disadvantage others. The changes will take effect retrospectively from 1 July 2002.

14. The committee seeks information from the Minister as to whether any taxpayers are likely to be disadvantaged by the changes.

8. LOCAL GOVERNMENT AMENDMENT BILL 2002

Background

1. The Honourable J I Cunningham MP, Minister for Local Government and Planning, introduced this bill into the Legislative Assembly on 19 June 2002.

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

amendments to the Local Government Act 1993 (LGA) to:

- *establish a new procedure for initiating the review of internal local government electoral boundaries; and*
- *change the local government electoral procedures to facilitate the effective conduct of local government elections.*

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

9. PARLIAMENTARY SERVICE AMENDMENT BILL 2002

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 18 June 2002.

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

> *to provide for the establishment of parliamentary precincts for the conduct of sittings of the Parliament in locations other than Parliament House, George Street, Brisbane.*

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

10. PERSONAL INJURIES PROCEEDINGS BILL 2002

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 18 June 2002. It was subsequently passed as an urgent bill on 19 June 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.

11. POLICE POWERS AND RESPONSIBILITIES (DNA) AMENDMENT BILL 2002

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 19 June 2002. It was subsequently passed as an urgent bill on 19 June 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.

12. TOURISM, RACING AND FAIR TRADING (NATIONAL COMPETITION POLICY) AMENDMENT 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 19 June 2002.

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

> *to implement a number of National Competition Policy (NCP) reforms by:*
>
> - *Amending the Business Names Act 1962, the Hire Purchase Act 1959 and the Credit (Rural Finance) Act 1996; and*
> - *Repealing the Profiteering Prevention Act 1948.*

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

13. TRANSPORT OPERATIONS (ROAD USE MANAGEMENT) AMENDMENT BILL (NO. 2) 2002

Background

1. The Honourable S D Bredhauer MP, Minister for Transport and Minister for Main Roads, introduced this bill into the Legislative Assembly on 18 June 2002.

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

> *to introduce provisions relating to the taking of blood from drivers who are, or appear to be, unconscious or unable to communicate when they attend hospital as a result of a road crash, for the purposes of blood alcohol content testing.*

Overview of the bill

3. The subject matter of this bill is similar to that dealt with in the *Transport (Compulsory BAC Testing) Amendment Bill 2002*, a private member's bill introduced into the Legisative Assembly on 18 April 2002 by Mr V P Johnson MP, Shadow Minister for the State Development and Small Business, Shadow Minister for Transport and Main Roads and Shadow Minister for Aboriginal and Islander Policy and Member for Gregory. The committee reported on that bill in Alert Digest No. 4 of 2002 at pages 22 to 25.[98]

4. From the committee's standpoint the bill raise similar issues, and readers are accordingly referred to the committee's report on the earlier bill. However, there are sufficient differences between the two bills to warrant the committee preparing a separate set of comments on the provisions of the current bill. Many of these, of course, replicate comments contained in the committee's earlier report.

Does the legislation have sufficient regard to the rights and liberties of individuals?[99]

- **Clause 3**

5. Clause 3 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.

6. 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

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98 As at the date of publication of this Alert Digest, the private member's bill had not been passed.

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

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.

7. Under s.80(8C), a police officer may require a suspected drink driver brought from an accident site to a hospital to provide a breath or blood specimen for analysis. Under s.80(8K)the person complies with this requirement by permitting the specimen to be taken by a doctor indicated by the police officer, which doctor is authorised to take the specimen whether or not the person consents. Section 80(11) provides that the person commits an offence if they fail to provide the specimen.

8. However, these last mentioned provisions all assume that the person is conscious and capable of obeying the police officer's directive. They do not address the situation where the person is, or appears to be, unconscious or is otherwise unable to give consent.

9. Clause 3 of the bill attempts to address this situation by amending s.80 of the Act. Proposed s.80(10) empowers a police officer to require a doctor or nurse attending a person at a hospital for treatment to obtain a specimen of the person's blood for a laboratory test. The person must be a person whom the officer could require under s.80(2) or 80(2A) to provide a specimen of breath for a breath test, and the person must be or appear to be unable to consent because the person is, or appears to be, unconscious or otherwise unable to communicate. A "qualified assistant" may take the specimen if directed to do so by the doctor or nurse (proposed s.10B). The doctor or nurse need not take the specimen, or ensure a qualified assistant does so, if they reasonably believe this would be prejudicial to the person's treatment, or have another reasonable excuse (proposed s.10B). Proposed s.80(10G) declares that it is lawful for any of the relevant health professionals to take the specimen of blood under the provisions mentioned above, even though the person has not consented.

10. The new provisions are supported by proposed s.80A (inserted by cl.4), which declares that a person must not obstruct a health care professional taking a specimen of blood under s.80 without reasonable excuse. Further support is provided by amendments which cl.5 of the bill makes to s.167 of the Act. These add health care professionals (doctors, nurses and "qualified assistants") acting under s.80 to the classes of persons upon whom conditional protection against civil liability is conferred.

11. At this point it is worth noting two fairly significant respects in which this bill differs from the earlier private member's bill. Firstly, a doctor or nurse is only obliged to obtain a specimen of the relevant person's blood if a police officer directs them to do so. Under the earlier bill, doctors and nurses were subject to an automatic obligation to take a blood sample from relevant patients. Secondly, proposed s.80(10F) expressly declares that doctors and nurses who fail to comply with the police officer's direction to take a specimen (and to subsequently take a second specimen to be given to the person (s.80(10C)) do not commit an offence against the Act.

12. The abovementioned provisions of this bill clearly impact upon the rights and liberties of the person from whom the blood is taken, because in most cases that will occur in circumstances where the person is unable to consent. The blood specimen may, of course, be used in evidence against the patient if it reveals a blood alcohol level above the legal limit.

13. In relation to this issue, the Explanatory Notes state:

> *It will be lawful to take a specimen of blood from these persons without consent, the results of which may be used as evidence against them, possibly contravening their civil rights and liberties. However, the Parliamentary Travelsafe Committee has reported that the general public believe that legislation aimed at protecting the public from the drinking driver more than counterbalances any loss of individual freedom. In order to protect the driving public from drink drivers, it is believed that the benefits for the community far outweigh the costs to individual rights, a view supported by the Parliamentary Travelsafe Committee.*

14. The committee notes that cl.3 of the bill introduces a number of provisions designed to ensure that, where a person involved in a road incident is admitted to a hospital for treatment, a blood specimen is taken where the person is, or appears to be, unable to consent because of real or apparent unconsciousness or inability to communicate.

15. The committee refers to Parliament the question of whether the impact of the bill upon the rights and liberties of the persons whose blood is taken in this manner is justifiable.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[100]

- **Clause 3 (proposed ss.80 (28), (29), and (30))**

16. Section 80 currently provides (see s.80 (16B)) that a certificate purporting to be signed by an analyst stating that a blood specimen was tested and that the concentration of alcohol or the presence of a specified drug was as stated in the certificate:

> *shall be evidence of those matters and until the contrary is proved shall be conclusive such evidence.*

17. Current s.80 (26B) enables a defendant to lead evidence that the stated result of the test is incorrect, provided that notice of the challenge is given. Proposed s.80(28) provides that such a defendant may require "a person who is involved in the taking, receipt, storage or testing of the specimen of blood" to attend the hearing to give evidence only by leave of the court. Proposed s.80(29) provides that the court may grant such leave only if satisfied of certain matters. Proposed s.80(30) provides that in relation to drink driving offences, equipment used in a laboratory test of a blood specimen is taken to have given accurate results unless the contrary is proved.

18. Not only does proposed s.80(30) reverse the onus of proof, but proposed ss.80(28) and (29) limit the capacity of defendants to displace the *prima facie* conclusive presumption of correctness of the analyst's certificate by requiring the analyst and associated persons to attend court to be cross-examined.

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

> *The amendment provides that a qualified assistant who takes a specimen of blood from a person for a laboratory test, is to be taken to have been directed by a doctor or nurse to take*

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

> *the specimen. The amendment also provides that any equipment used in a laboratory test of a specimen of blood is to be taken to have given accurate results. While this effectively reverses the onus of proof in relation to the authority of a qualified assistant to take a blood specimen, as well as in relation to the accuracy of the equipment, this new provision will join other provisions of s.80 directed at facilitating the operation of the section, such as providing for the conclusiveness of particular certificates in the absence of proof to the contrary. This amendment will add to the comprehensiveness of these evidentiary provisions which have been found to be necessary for the effective operation of the section. Without providing for a reversal of the onus in these circumstances, the scheme would be particularly difficult to administer.*

20. In relation to the limitations upon defendant's capacity to challenge an analyst's certificate by requiring relevant persons to be called to give evidence, the Minister in his Second Reading Speech states:

> *The bill also seeks to limit the occurrences when analysts, health care professionals and others involved in the blood testing process may be required to appear in court to give evidence regarding the taking or analysis of a blood sample. This acknowledges that hospitals and laboratories are busy places with finite human resources available for court appearances, while providing a legislative avenue for defendants who have a genuine complaint in relation to the taking or testing of blood. Defendants will be required to substantiate their application before the court will grant leave to require a person involved in the blood taking, receipt, storage or testing to attend a hearing and given such evidence.*

21. The current provisions of s.80 clearly enable certificates to constitute evidence of matters which are not non-contentious (in particular, the concentration of alcohol in a person's blood). Further, the provisions of the bill, taken in conjunction with its current provisions, impose significant restrictions upon the capacity of a defendant to have the analyst and other relevant persons attend court to give evidence about these and associated matters. In the opinion of the committee the various provisions, taken in conjunction, constitute a reversal of onus of proof.

22. The committee notes that these provisions are consistent with other provisions of the *Transport Operations (Road Use Management) Act 1995* relating to results obtained from blood, breath and urine tests.

23. The committee notes that the *Transport Operations (Road Use Management) Act* currently enables significant matters to be put in evidence by means of certificates, and that the bill restricts the capacity of defendants to have analysts and other relevant persons attend court to be cross-examined upon the contents of such certificates and other matters. The committee further notes that the bill incorporates a reversal of onus of proof in relation to the accuracy of equipment used in laboratory tests of blood specimens.

24. The committee refers to Parliament the question of whether the relevant provisions of the bill have sufficient regard to the rights of persons against whom evidence of blood test results may be led.

14. TRIBUNALS PROVISIONS AMENDMENT 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 19 June 2002.

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

> *to introduce amendments to support reforms to the tribunals within the Tourism, Racing and Fair Trading portfolio:*
>
> - *clarify and consolidate the role of the chairperson in each tribunal articulating responsibility for adjudicative functions;*
> - *create a central tribunals registry and clarify and consolidate the director as the registrar/secretary across all the tribunals. The director also is given clear responsibility for the financial and administrative functions of the tribunals:*
> - *create the position of presiding case manager to provide a more efficient and effective case management system which includes undertaking procedural directions hearings; and*
> - *undertake other miscellaneous amendments to improve general tribunal efficiency.*

Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?[101]

♦ **Clause 9 (proposed s.20F(3)), cl.24 (proposed s.461(3)), cl.49 (proposed s.14(3)), cl.76 (proposed s.115HD(3)), and cl.94 (proposed s.206D(3))**

3. The bill amends several Acts under which tribunals are constituted. It inserts into each Act a number of common provisions in relation to the operation of these tribunals.

4. Amongst these is a provision enabling the chairperson of each tribunal to delegate his or her powers to another member of the tribunal and, in the case of the chairperson's power to select which members shall constitute the tribunal for particular hearings, to delegate that power to "the registrar". The registrar is the director of the "central tribunals registry", established under the bill, which will provide administrative support to all of the relevant tribunals.

5. The common delegation provision then goes on to provide that the registrar:

> *may subdelegate the delegated power to another appropriately qualified officer of the staff of the registry.*

[101] Section 4(3)(c) 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 allows the delegation of administrative power only in appropriate cases and to appropriate persons.

6. Whilst the committee does not necessarily object to the inclusion of a power to subdelegate a delegated power, a subdelegation power might be inappropriate in particular circumstances.[102]

7. In the present case, it appears to the committee that the choice of tribunal members to constitute the tribunal for the hearing of particular matters is a process of some importance, which may on occasions require an appropriate exercise of discretionary powers. Whilst the delegation of this power to the registrar is probably not objectionable, the committee queries whether it is appropriate that it should be able to be further delegated to another officer of the registry staff.

8. In relation to this issue, the Explanatory Notes state (with respect to proposed s.20F):

> *section 20F provides for the chairperson to delegate their powers to another member, or to the registrar in relation to the composition of the tribunal. The ability to delegate to the registrar is important where the chairperson is part time and requires the registrar to manage most procedural aspects of the tribunal operations. The section also provides for the registrar to sub-delegate to an appropriately qualified member of the registry staff to enable efficient operations across five tribunals.*

9. The comments in relation to proposed s.20F appear equally applicable to all of the provisions mentioned above.

10. Whilst, as the Explanatory Notes indicate, the fact that the registry will administer five tribunals may create a need for consultation with various staff officers familiar with the operations of individual tribunals, this would not prevent the relevant powers ultimately being exercised by the registrar in person.

11. The committee notes that a number of provisions of the bill, which enable the chairperson of various tribunals to delegate to the registrar their power to choose the membership of the tribunal for particular hearings, enable this power to be further delegated by the registrar to another appropriately qualified officer of the registry.

12. The committee is concerned that, given the nature of the power in question, the power to subdelegate may not be appropriate.

13. The committee seeks information from the Minister as to why it is considered necessary and appropriate that this apparently significant power be able to be subdelegated.

Does the legislation provide appropriate protection against self-incrimination?[103]

- **Clause 38 (proposed s.528BA)**

14. Under current s.528A of the *Property Agents and Motor Dealers Act 2000*, the Property Agents and Motor Dealers Tribunal may conduct a public examination that investigates whether the conduct of a marketeer has contravened certain sections of the Act.

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102 See the committee's report on the *Radiation Safety Bill 1999*: Alert Digest No 3 of 1999 at pages 37-38.

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

15. The bill inserts new s.528BA, which provides that a person being examined at a public examination can be required to answer a question put to them, even though the answer might tend to incriminate the person. If the person refuses to answer, he or she is subject to a maximum penalty of 200 penalty units ($15,000).

16. The committee has frequently reported on provisions which deny persons the benefit of the rule against self-incrimination.[104] The committee's general view is that this denial is only potentially justifiable if:

- the questions posed concern matters which are particularly within the knowledge of the persons to whom they are directed and which it would be difficult or impossible to establish by any alternative means; and
- the bill prohibits the use of the information obtained in prosecutions against the person; and
- in order to secure the restriction on the use of information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).

17. Proposed s.528BA(6) provides that the answer given by the person "is not admissible in any criminal or civil proceeding against the person, other than a proceeding in which the falsity or misleading nature is relevant". The committee notes that this safeguard extends to both criminal and civil proceedings. However, the immunity provided by subsection (6) only applies to the answer itself ("use immunity"), and does not prevent evidence obtained by using the answer as a basis of investigation from subsequently being used against the person in proceedings ("derivative use immunity").

18. Further, the protection provided by proposed s.528BA is only available if the person claims that right before giving the answer (see subsection (5)).

19. The committee notes that the bill also provides for the establishment of a "reference committee", including community representatives with demonstrated interests in civil liberties and fair trading issues, which will decide whether a public examination should take place.

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

> *The need to afford protection to persons answering questions which tend to incriminate is acknowledged. Such a power should only be conferred in circumstances where its absence will demonstrably lead to a greater harm than is done by its use. In this instance the harm the power seeks to avoid is that caused by marketeering offences.*
>
> *These are serious offences which may involve the loss of considerable sums of money by vulnerable people such as the elderly, retired or people who do not have local market knowledge, such as those from interstate or overseas. Due to the position of power of some marketeers and the vulnerable position of their victims, the mischief wrought by wrongdoers is all the more devastating.*

[104] See, for example, Alert Digest No. 1 of 2000 at pp7-8 (Guardianship and Administration Bill 1999).

Under Division 6A of Chapter 14 of the PAMDA, the PAMDT has the power to conduct public examinations that investigate the conduct of a marketeer in order to find out whether the marketeer has engaged in misleading or unconscionable conduct, or in making false representations or engaging in misleading conduct in relation to residential property.

A public examination of marketeers suspected of having contravened the marketeering offence provisions is regarded as a vital part of the strategy to deter unconscionable behaviour of marketeers and to discover information, which will be pivotal in prosecutions and in future protection of consumers in this context.

However, the existence of a right to silence in a public examination renders the public examination power ineffective.

The practical operation of the right to silence in the context of public examinations will invariably mean that the public examination will illicit no evidence from potentially serious offenders of the chain of misleading activities that characterise marketeering activities. The power to compel answers to questions is fundamental to the effectiveness of the public examination power.

If questions put to a witness before a public examination concern matters that are peculiarly within the knowledge of the witness and would be difficult or impossible to establish by any alternative evidentiary means, it is in the interests of the public that the uncooperative witness be obliged to answer questions. The interests of the parties injured or who could be injured in the future by the conduct of the witness or of other persons to whom the information being sought relates, must be weighed against the possible detriment to the witness.

21. The committee notes that cl.38 removes the protection of the rule against self-incrimination, in relation to public examinations of marketeers. The committee further notes that the bill prevents use of the answer itself in other proceedings, but does not prevent the answer being used as the basis for further investigations.

22. The committee does not generally endorse provisions which deny persons the benefit of the rule against self-incrimination.

23. The committee notes that this issue is dealt with at length in the Minister's Speech and the Explanatory Notes.

24. The committee refers to Parliament the question of whether the removal of the benefit of the self-incrimination rule, brought about by cl.38, is justifiable in the circumstances.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[105]

- **Clause 51 (proposed s.26H) and cl.77 (proposed s.115IA)**

25. Clause 51 of the bill (proposed ss.26B-26I) introduces into the *Queensland Building Tribunal Act 2000* provisions establishing the position of "presiding case manager", and dealing with his or her powers and other relevant matters.

26. The presiding case manager is empowered to hear particular applications, which would otherwise need to be heard and decided by one of the tribunals referred to in the bill, if a regulation prescribes the particular application or matter as a "prescribed application or matter" (proposed s.26C).

27. Proposed s.26H confers upon the presiding case manager, when constituting a tribunal or exercising prescribed incidental powers, "the same protection and immunity as a district court judge has in the performance of the judge's duties".

28. Given the nature of the relevant tribunals and the role of the presiding case manager, this immunity does not appear unreasonable.

29. Clause 77 inserts into the *Racing and Betting Act 1980* proposed s.115IA. This section provides that a member of the Racing Appeals Authority "has, in the performance of the member's duties as a member, the same protection and immunity as a District Court judge has in the performance of the judge's duties". Again, given the apparent nature of the tribunal in question, this immunity does not seem unreasonable.

30. The committee notes that cls.51 and 77 of the bill confer an immunity, equivalent to that of a District Court judge exercising judicial functions, upon members of the Racing Appeals Authority and the "presiding case manager".

31. The committee does not consider these conferrals of immunity to be unreasonable.

[105] 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.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

15. MARITIME SAFETY QUEENSLAND 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 8 May 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 5 of 2002 at pages 10 to 12. 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?[106]

3. The main object of the bill is to establish a separate agency, the Maritime Safety Agency, (MSQ) attached to the Department of Transport with the intention of centralising the performance of a range of essential services, in particular, pilotage services and marine pollution response. Certain functions presently being performed by a port authority would be undertaken by the MSQ. Clause 15 of the bill contains a number of transitional provisions relating to the performance of pilotage services.

4. The clause provides that all contracts for services (previously with the department or port authority) are deemed to be with the MSQ and MSQ becomes the employer of employees under an employment contract without loss of accrued rights and entitlements. Clause 15(5) provides that no compensation is recoverable as a result of a contract for services or employment contract having been transferred from a port authority to the MSQ. The Committee noted that cl.15(5) applied specifically to the performance of pilotage services and that it was unable to identify any significant adverse effect upon any person.

5. The Minister commented as follows:

> *I note the Committee accepts that there is no significant adverse effect of this provision upon any person.*

6. The committee notes the Minister's response.

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

♦ **Clause 15(6)**

7. Clause 15(6) of the bill specifically excludes the benefits conferred by cl.15 as stated above where such service contracts relate to the transfer of a pilot onto or off a ship. Apart from the committee's view that the sub-clause constitutes a "Henry VII Clause", and the broader issue of whether it constitutes an inappropriate delegation of legislative power, the predominant issue related to the question whether the provision had sufficient regard to the rights of contractors and employees. The committee noted that sub-clause 15(6) excluded the benefits conferred by cl.15 in relation to the transfer of pilots onto or off ships. The committee sought information from the Minister as to the circumstances in which the provision was likely to be utilised, and the likely effects upon the rights of contractors and employees.

8. The Minister commented as follows:

> *The Committee has raised concerns regarding the ability to exempt certain pilot contracts from transferring to MSQ as a matter of course under clause 15. This clause will enable MSQ to declare certain contracts as being contracts to which clause 15 does not apply.*
>
> *The definition of pilotage services contained in the dictionary includes both the piloted movement of ships and the transfer of a pilot onto or off a ship. While MSQ will be responsible for all pilotage movements, in most cases port authorities will retain responsibility for delivering pilot transfer services under new contractual arrangements with MSQ. In the case where a port authority directly employs its pilot transfer crew, and intends to continue doing so, it will be necessary to declare the employment agreement as being a contract to which section 15 does not apply.*
>
> *Another example of a commercial contract that will not be transferred to MSQ is the existing pilot transfer crewing contract between Ports Corporation of Queensland (PCQ) and Australian Reef Pilots (ARP). In this case MSQ will contract with PCQ to provide pilot transfer vessels and crew. PCQ will maintain its existing contract with ARP to crew these vessels.*
>
> *If a contract is declared by regulation to be a contract to which section 15 does not apply, it is because it is not intended to change the principal in the contract to MSQ. In all of these cases the port authority will continue as the principal and the contract will continue for its term.*

9. The committee thanks the Minister for this information.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[107]

♦ **Clause 2(1)**

10. With the exception of those provisions referred to in cl.2(1), the other provisions in the bill had a commencement date of 1 July 2002. The committee noted that most provisions of the

[107] 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.

bill would commence on 1 July 2002 and if the bill were not passed during the sitting week commencing 18 June 2002 it would have retrospective effect.

11. The Minister commented as follows:

> *As noted by the Committee, the Bill as tabled has a commencement date of 1 July 2002. It is intended that an amendment be made in Committee to change the commencement date to be a date to be fixed by proclamation.*

12. The committee notes the Minister's response.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[108]

- **Clause 2(1)**

13. Clause 2(1) of the bill refers specifically to schedule 1, part 2. The committee noted that the bill did not reveal any clearly marked "parts" and expressed the view that the bill's clarity would be enhanced if the "parts" of schedule 1 were clearly marked. The committee drew the drafting issue to the attention of the Minister.

14. The Minister commented as follows:

> *I note the Committee's comments with respect to this clause. An amendment will be made in Committee to remove the reference to Schedule 1, Part 2. As indicated above, it is proposed that all of the provisions of the Bill commence on a date to be fixed by proclamation.*

15. The committee notes the Minister's response. The committee notes that, the bill will be amended to address the committee's concerns.

[108] 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.

16. POLICE POWERS AND RESPONSIBILITIES AND ANOTHER ACT AMENDMENT BILL 2002

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 8 May 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 5 of 2002 at pages 13 to 18. 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 immunity from proceeding or prosecution without adequate justification?[109]

♦ **Clause 6 (proposed s.59W(3))**

3. Proposed s.59W describes the manner in which, the persons to whom and the order of priority the proceeds of the sale of an impounded or forfeited motor vehicle are to be distributed. Compensation is not recoverable from the State in relation to payments made under the section by virtue of section 59W(3). The committee noted that s.59W provides that compensation is not recoverable against the State in relation to payments made under the section. The committee sought confirmation from the Minister that aggrieved persons would not be deprived of their right to institute legal action against the State for, inter alia, negligence or misconduct resulting from an incorrect distribution of the proceeds of a particular sale.

4. The Minister provided the following response:

> *In response to the Committee's request in paragraph 35 of the Digest, I now confirm that section 59W(3) of the Bill does not prevent a person from commencing an action against the State for negligence or misconduct arising from the distribution of the proceeds of the sale of a vehicle in accordance with section 59T or section 59V of the Bill.*

5. The committee thanks the Minister for this information.

[109] 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.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[110]

- **Clause 6 (proposed s.59H)**

6. The proposed s.59H refers to the "driver" while most provisions of the bill dealing with "prescribed offences" refer to the "person in control" of the motor vehicle. The committee noted a discrepancy between terminology employed in the proposed s.59H and that used elsewhere in the bill and the committee sought information from the Minister as to the reasons for the discrepancy.

7. The Minister provided the following response:

> *With respect to the Committee's comments in paragraphs 45 and 46 of the Digest, the term 'person in control' as defined in the Police Powers and Responsibilities Act 2000 refers to the meaning of 'person in control' in the Transport Operations (Road Use Management) Act 1995. The scope of this definition is substantially broader than the scope of the definition of 'driver' which is also defined in the Police Powers and Responsibilities Act.*
>
> *The purpose of using the term 'driver' in section 59H of the Bill is to narrow the application of the section to apply only to the person who is the driver of the vehicle. The use of 'driver' therefore excludes persons who may fall into subsections (b) and (c) of the definition of 'person in control'. Limiting the scope of this section was necessary to ensure that only those persons who actually commit a prescribed offence would be caught by the provisions of the section.*

8. The committee thanks the Minister for this information.

[110] 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.

17. 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**.** The committee notes that this bill was passed, without amendments, on 9 May 2002.

2. The committee commented on this bill in its Alert Digest No 4 of 2002 at pages 26 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 provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[111]

- **Clauses 47, 48 and 50**

3. Proposed ss.47, 48 and 50 of the new Part 7 of the *Transport Operations (Marine Pollution) Act 1995* (inserted by cl.36) creates offences in relation to the discharge of sewerage from a ship in specified waters. The discharge attaches strict liability unless the offender establishes a defence under the proposed s.51A. The committee noted that that proposed ss.47, 48 and 50 effectively reverses 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.

4. The committee referred 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.

5. The Minister commented as follows:

> *A number of members raised Scrutiny's concerns in this matter during the second reading debate. Parliament then passed the provisions in question without amendment.*

6. The committee notes the Minister's response.

[111] 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 have sufficient regard to the rights and liberties of individuals?[112]

- **Clause 43**

7. A new s.107A (inserted by cl.43) of the *Transport Operations (Marine Safety) Act 1994* introduces joint and several liability on the part of the master or owner of the ship for damage or destruction to a maritime navigational aid. The civil debt is a debt due to the State and recoverable by action in a court of competent jurisdiction. The committee noted that proposed s.107A (inserted by cl.43) appears to impose strict liability upon the master and owner of a ship which damages a navigational aid for the expense of repairing or reinstating that navigational aid. The committee sought confirmation from the Minister that the provision is intended to impose strict liability and, if so, sought information as to why that form of liability was considered appropriate in the circumstances.

8. The Minister commented as follows:

> *The amendment assigning responsibility for damage to navigation aids is designed to clarify whom the state may sue for these damages. It does not impose strict liability as the state still has to establish responsibility for an incident causing damage in a court.*

9. The committee notes the Minister's response.

Is the legislation consistent with the principles of natural justice?[113]

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

10. Clause 51 of the bill amends s.47(1) and inserts proposed ss.(3) to (8) which permits the chief executive to immediately amend, suspend or cancel a holder's service contract based on a reasonable belief that the holder is unable to fulfil the contract. Proposed ss.(4) to (7) permit the contract holder to claim compensation from the State for consequential loss, provided the court is satisfied that no reasonable grounds exist to substantiate the belief that the holder was unable to provide the services. Proposed sub section (8) denies the holder any other form of legal remedy.

11. The committee noted that under cl.51 the contract holder would not have an opportunity to make any submissions prior to the amendment, suspension or cancellation of the service contract. The bill incorporates a compensation regime which appears to incorporate significant limitations. The committee referred to Parliament the question of whether, in the circumstances, the denial of natural justice to the service contract holder under s.43(3) procedure is acceptable.

12. The Minister commented as follows:

> *If an operator of a public passenger service stops or is about to stop the provision of any of its contracted services, the public needs Queensland Transport to be able to act quickly to*

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

[113] 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.

install an alternate service provider. This is especially so when the contracted services is, for example, a school bus service or an air service servicing remote communities.

Because many service contracts give the contract-holder an exclusive right to provide a particular public passenger service, it is usually necessary to amend or cancel the holder's contract before an operator can be used to provide the affected service.

The purpose of the amendment in clause 51 of the bill is to enable Queensland Transport to act immediately in these circumstances. If non-operating contract holders must be given the opportunity to make submissions before action can be taken then this will prevent alternate public passenger services from being provided to the public in the meantime. This disadvantage to the public is not acceptable and should not be necessary.

The proposed amendment cannot be used lightly. It requires that the chief executive of Queensland Transport must have a reasonable belief that contracted services are or will not be provided. Furthermore, the bill allows that this decision of the chief executive can be reviewed by a Magistrates Court. Consequently, immediate action to cancel or amend a service contract will only occur when Queensland Transport has knowledge that services have actually stopped or when it has very strong grounds for believing that the services are about to stop. Grounds for believing that services are about to stop to include direct notification from the contracted operator about an imminent cessation of services.

Despite the extreme unlikelihood of an erroneous decision, the proposed legislation allows that a court can order just compensation. The compensation regime was devised by the Office of the Queensland Parliamentary Counsel and is considered to be an appropriate mechanism.

13. The committee notes the Minister's response.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[114]

NO AMENDMENTS TO BILLS ARE REPORTED ON IN THIS ALERT DIGEST

[114] 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.*

APPENDIX

MINISTERIAL CORRESPONDENCE

PART II

SUBORDINATE LEGISLATION

PART II – SUBORDINATE LEGISLATION

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

Sub-Leg No.	Name	Date concerns first notified
122	Natural Resources and Mines Legislation Amendment and Repeal Regulation (No.1) 2002	30 July 2002
136	Community Services (Aboriginal Council) Accounting Standard 2002	30 July 2002
137	Community Services (Island Council) Accounting Standard 2002	30 July 2002
144	Building and Construction Industry (Portable Long Service Leave) Regulation 2002	30 July 2002
160	Environmental Protection Amendment Regulation (No. 1) 2002	30 July 2002
162	State Buildings Protective Security Amendment Regulation (No. 1) 2002	30 July 2002

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

PART II – SUBORDINATE LEGISLATION

SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES**

(INCLUDING LIST OF CORRESPONDENCE)

Sub-Leg No.	Name	Date concerns first notified

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

This concludes the Scrutiny of Legislation Committee's 6th report to Parliament in 2002.

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

Warren Pitt MP
Chair

30 July 2002

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

APPENDIX

CORRESPONDENCE