SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

Tabled 19 April 2005

Issue No 4 of 2005

SCRUTINY OF LEGISLATION COMMITTEE
MEMBERSHIP

51ST 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.

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

HTTP://WWW.PARLIAMENT.QLD.GOV.AU/COMMITTEES/SLC/SLCBILLSREGISTER.HTM

TERMS OF REFERENCE

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

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

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

(a) the application of fundamental legislative principles[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]

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. CONTRACT CLEANING INDUSTRY (PORTABLE LONG SERVICE LEAVE) BILL 2005

Background

1. The Honourable T A Barton MP, Minister for Employment, Training and Industrial Relations, introduced this bill into the Legislative Assembly on 22 March 2005.

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

> *to provide a portable long service leave scheme for eligible workers in the contract cleaning industry in Queensland. The scheme will operate in a similar manner to the existing portable long service leave scheme for the building and construction industry, which has been operating in Queensland since 1992, and is administered by QLeave.*

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[3]

- **clauses 42 and 83**

3. This bill imposes a long service leave levy on the ordinary wages of each worker in the contract cleaning industry (cl.82). The purpose of the levy is to fund a long service leave scheme for workers in that industry.

4. Clause 83 provides that the amount of the levy is to be the percentage prescribed under a regulation, of the ordinary wages paid to the worker. Clause 42 requires that at least every two years the authority administering the bill must investigate the adequacy of its funds and the adequacy of the percentage prescribed by regulation as the rate of the levy.

5. The committee notes that neither the rate of the initial levy, nor that of any future levies, is stated in the bill itself but will be determined by regulation.

6. The committee has long taken the view that the prescription of a tax is a matter which should be achieved through primary rather than delegated legislation.[4] It has endorsed the view of the Senate's Standing Committee for the Scrutiny of Bills, that if the rate of a tax is permitted to be set by regulation then the bill should provide either a maximum rate of tax or a method of calculating such a maximum rate.[5]

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3 Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

4 See, for example, the committee's report on the *Interactive Gambling (Player Protection) Bill 1998*, Alert Digest No. 2 of 1998 at pages 30-31.

5 Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament May 1996-August 1998*, at pages 64-67.

7. However, the committee has concluded that the levy imposed by this bill is probably not in legal terms a tax. One of the distinguishing features of a tax is that it is applied for "public purposes"[6]. That was the case with the levy recently imposed under the *Community Ambulance Cover Bill 2003*[7], which funds Queensland's ambulance services, and the committee accordingly questioned a power to set that levy by regulation. The levy under the current bill, on the other hand, is to be applied towards funding a leave scheme benefiting a specific group of persons, namely, workers in the contract cleaning industry who are registered under the bill's provisions.

8. The setting of levy rates by regulation, in the case of this bill, is therefore probably not objectionable.

9. The committee notes that the rates of the initial and future levies under this bill are to be set by regulation. Whilst the committee considers the rates of taxes should be set in primary rather than subordinate legislation, it has concluded that the levy struck under this bill is probably not in technical terms a tax.

10. The committee therefore considers that the setting of the rate of this levy by regulation is probably not objectionable.

Does the legislation have sufficient regard to the rights and liberties of individuals?[8]

- **clause 65**

11. Clause 62(1) of the bill requires each employer to give to the authority a return within fourteen days of the end of each "return period".

12. Clause 65(1) provides that if a person does not give such a return, that person is liable to pay to the authority a civil penalty. Clause 65(2) states that the amount of that penalty is an amount equivalent to one penalty unit ($75) for each month or part of a month from the day the return should have been given until it is in fact given.

13. Clause 63(2) provides that within fourteen days after the end of each "return period", the employer must pay to the authority the amount of the levy payable for each worker for the relevant return period. Defaulting employers are again liable to a civil penalty (cl.65(3)), in an amount equivalent to one penalty unit for each month the amount remains unpaid (cl.65(4)).

14. Clause 65(5) provides that the amount of the civil penalties mentioned above cannot be more than the monetary value of 40 penalty units ($3,000).

15. The civil penalties may be imposed if the court which convicts a person so orders. They are additional to the normal lump sum penalty associated with the offence, compound interest (at a rate prescribed by regulation) on the amount of outstanding levy (cl.87), and of course the obligation to pay the amount of outstanding levy itself.

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6 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263.

7 See Alert Digest No 6 of 2003 at pages 1-3.

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

16. The capacity of the continuing "civil penalties" to escalate is of some concern to the committee, although those concerns are in part alleviated by the "capping" of such penalties at 40 penalty units ($3,000).

17. The committee notes that cl.65 of the bill renders defaulting employers liable, in addition to lump sum penalties and compound interest, to a system of continuing "civil penalties". These accumulate at the rate of one penalty unit per month during the period in which the breach of statutory obligation continues, although the bill "caps" their amount at 40 penalty units ($3,000).

18. The committee draws to the attention of Parliament the presence of these penalty provisions in the bill.

♦ **clause 133**

19. Clause 133 provides that if a corporation is convicted of an offence against the bill and a penalty is imposed, the corporation's directors are liable to pay the penalty if it remains unpaid by the due date for payment. This obligation is unconditional.

20. The Explanatory Notes, in relation to this matter, state:

> (cl.133) *is considered necessary for the effective enforcement of penalties and to prevent unscrupulous business operators from hiding behind the status of a corporation and therefore avoiding any personal responsibility and making collection of the levy and worker information impossible.*

21. The committee notes that cl.133 renders directors of a corporation convicted of an offence liable to pay any outstanding penalty imposed on the corporation.

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

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[9]

♦ **clause 69**

23. Clause 69 provides that a registered worker, or an applicant for registration, may be credited for service in the cleaning industry during any part of the five year period immediately before the commencement of the bill's provisions.

24. This crediting will obviously bring forward the date upon which many registered workers will become entitled to long service leave under the scheme, payable out of the levy imposed on their wages.

[9] 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.

25. Depending upon how it is characterised, this provision might be regarded as having retrospective effect. Whilst the committee always pays close attention to retrospective provisions, to ascertain whether they have any adverse effect on individuals, it is not clear whether that would be the case in respect of cl.69. The committee notes from the Minister's Speech that there is both employer and union support for the cl.69 provisions.

26. The committee notes that cl.69 contains provisions in relation to recognition of earlier service which may possibly have retrospective effect.

27. It is not clear to the committee that these provisions have, in any meaningful sense, an adverse effect on individuals.

28. The committee makes no further comment in respect of cl.69.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[10]

- **clauses 107 to 124**

29. Clause 107 of the bill empowers authorised officers to enter a place in circumstances which extend somewhat beyond situations where the occupier consents or a warrant is obtained. Clause 107 also permits entry to a public place when it is open to the public, and to an employer's place of business when it is open for business or otherwise open for entry.

30. Once entry has been effected, cls.114 to 124 confer an extensive range of post-entry powers.

31. The various powers mentioned above are similar to those which the committee has examined in a range of regulatory bills. Whilst they intrude in various ways upon the rights of individuals, the committee recognises the significant efforts which have been made in drafting these provisions to maximise their level of compliance with fundamental legislative principles.

32. The committee notes that cls.107 to 125 confer upon authorised officers powers of entry which extend beyond situations where the occupier consents or a warrant has been obtained. Once entry has been effected, cls.114 to 115 confer an extensive range of post-entry powers.

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

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

Does the legislation provide appropriate protection against self-incrimination?[11]

- **clause 125(5)**

34. Clause 125(1) provides that an authorised officer may, by notice given to an employer, require the employer to produce the employer's records for each worker which are required to be kept under cl.66. Clause 125(4) provides that the employer cannot refuse to produce these on the basis that doing so might tend to incriminate the employer.

35. The committee's general view is that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if:

- The questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and which would be difficult or impossible for the Crown to establish by any alternative evidentiary means; and
- The bill prohibits use of the information obtained in prosecutions against the person; and
- The "use indemnity" should not require the person to fulfil any conditions before being entitled to it (such as formally claiming the right).

36. The committee notes that cl.125 does not provide any form of "use" or "derivative use" protection in relation to the production of the records. However, cl.125 only applies to a specific category of documents, namely, records which are required to be kept under the bill's provisions.

37. In its report No. 59 on *The Abrogation of the Privilege of Self-Incrimination*, December 2004 at page 37, the Queensland Law Reform Commission argues that denying the benefit of the self-incrimination rule in relation to documents required to be kept under a statute may be less problematical than in other contexts. The commission considers it can be argued that where a person obtains a licence or other form of registration in order to engage in an activity regulated by statute, this is essentially conditional on their accepting the enforcement regime incorporated in the statute (which in this case includes an unconditional obligation to produce certain types of document). On this basis, it can be argued that they have waived the benefit of the self-incrimination rule.

38. The committee concedes this argument has some merit.[12]

39. The committee notes that cl.125(4) of the bill denies employers who are required to produce worker records kept under the bill's provisions the benefit of the rule against self-incrimination.

40. The committee concedes that exclusion of the self-incrimination rule in relation to documents issued, or required to be kept, under a regulatory statute may be easier to justify than in other contexts.

[11] 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.

[12] The position would be otherwise if the exclusion of the self-incrimination rule, in relation to the relevant types of documents, were introduced after a person had become licensed or registered.

41. The committee refers to Parliament the question of whether this denial of the benefit of the rule against self-incrimination is appropriate in the circumstances.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[13]

- **clause 132**

42. Clause 132 obliges executive officers of a corporation to ensure that the corporation complies with the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

43. This provision effectively reverses the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

44. The committee notes that cl.132 provides grounds upon which the liability imposed by the clause may be avoided. These are essentially that the person concerned took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant corporation.

45. The committee notes that cl.132 effectively reverses the onus of proof in relation to executive officers of corporations.

46. The committee refers to Parliament the question of whether this reversal of onus has sufficient regard to the rights and liberties of the relevant executive officers.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[14]

- **clause 148**

47. Clause 148 provides that the authority may indemnify a person, engaged in giving effect to the bill's provisions, for the reasonable costs associated with defending a criminal proceeding, if the person is found not guilty of the offence to which the proceeding relates.

48. A specific provision of this nature is somewhat unusual in Queensland legislation. Neither the Explanatory Notes nor the Minister's Speech provide any indication as to why it was considered necessary to insert this provision.

49. The committee notes that cl.148 of the bill empowers the authority to indemnify persons administering its provisions against the reasonable costs of defending a criminal proceeding, provided they are found not guilty.

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

[14] 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.

50. The committee seeks information from the Minister as to the reasons for insertion of this quite specific provision.

2. LIQUOR AMENDMENT BILL 2005

Background

1. The Honourable M M Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development, introduced this bill into the Legislative Assembly on 22 March 2005.

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

> *to amend the Liquor Act 1992 (the Liquor Act) to impose a 3.00 am lock out on all licensed premises in the Brisbane City Council area and to prohibit advertising of free drinks, multiple drinks and/or discounted liquor State-wide.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[15]

- **clauses 5 and 6**

3. Clause 5 of the bill inserts into the *Liquor Act 1992* a new Part 5, Division 5 (proposed ss.142AA to 142AC).

4. These provisions will effectively prevent those liquor licensees and permittees who are able to sell liquor on their premises between 3.00 am and 7.00 am, from allowing patrons to enter or re-enter their premises during that period. They will therefore only be able to serve patrons who are already on their premises at 3.00am.

5. These provisions are aimed at reducing the incidence of anti-social behaviour associated with late-night drinking.

6. The bill imposes the relevant obligation by declaring the "lock out" rule to be a condition of the licensee's or permittee's licence or permit. Breach of the statutory condition will expose the licensee or permittee to a maximum penalty of 100 penalty units ($7,500), and to possible loss of their licence or permit.

7. Clause 6 of the bill inserts in the Act proposed s.148B, which imposes further statutory restrictions upon licensees and permittees by prohibiting certain forms of advertisements about the availability and sale price of liquor for consumption on their premises.

8. Both cls.5 and 6 could be said to limit the freedom of persons to conduct commercial activities. However, the commercial sale of liquor has long been an area heavily regulated by statute, due to the significant health, crime and other social issues associated with it.

9. Participation in this form of business is conditional upon the operator holding an appropriate licence or permit under the relevant legislation, and cls.5 and 6 merely add to an already extensive list of restrictions to which operators are subject.

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

10. The committee notes that cls.5 and 6 insert statutory restrictions in relation to the entry of patrons into licensed premises in the Brisbane City Council area during certain hours, and in relation to certain advertisements about liquor. Whilst these in various ways limit the capacity of persons to conduct the business of selling liquor, they concern an area of business activity which has long been heavily regulated by statute.

11. The committee makes no further comment in relation to cls.5 and 6.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[16]

- **clause 2(1)**

12. Clause 2(1) provides that the bill, other than cl.8, commences on 29 April 2005.

13. Accordingly, if the bill as presently drafted is not passed by the Parliament and assented to by that date, it will have effect retrospectively.

14. The committee notes that Parliament is only scheduled to sit during one week between now and 29 April, namely from 19-21 April.

15. The committee assumes it is the Minister's intention to have this legislation debated and passed during that sitting week.

16. The committee notes that the bill, if not enacted by 29 April 2005, will have retrospective effect.

[16] 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.

3. LOCAL GOVERNMENT (APPROVED PENSIONERS RATE SUBSIDY) AMENDMENT BILL 2005

Background

1. The Honourable K R Lingard MP, Member for Beaudesert, introduced this bill into the Legislative Assembly on 23 March 2005, as a private members bill.

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

> *to ensure that pensioners who live in Leasehold Retirement Villages receive the same Pensioners Rate Rebate as do those who own their own home or who live in a Freehold Retirement Village.*

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

4. PUBLIC HEALTH BILL 2005

Background

1. The Honourable G R Nuttall MP, Minister for Health, introduced this bill into the Legislative Assembly on 22 March 2005.

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

> *to protect and promote the health of the Queensland public by providing the basic safeguards necessary to protect public health through cooperation between the State Government, local governments, health care providers and the community.*

Overview of the bill

3. This bill basically replaces the *Health Act 1937* ("the 1937 Act"), which is to be repealed apart from certain provisions dealing with drugs and poisons issues. The bill will provide the statutory framework for the management of the vast majority of public health issues.

4. The presentation of this bill represents a major advance, from at least two standpoints.

5. Firstly, whilst the bulk of its provisions appear to deal with matters already covered in the 1937 Act, an updating of the latter's drafting and a rationalisation of its contents has been long overdue. The 1937 Act is one of the oldest Queensland statutes dealing with a subject of major public importance.

6. Secondly, the bill's subject-matter inevitably gives rise to many provisions which impact upon the rights and liberties of individuals. The 1937 Act, in implementing similar statutory objectives, employed many provisions which breached fundamental legislative principles. As the Explanatory Notes indicate this bill, like modern Queensland statutes generally, has been drafted with a much greater awareness of these principles.

7. As mentioned, the bill contains numerous provisions which impact upon the rights and liberties of individuals. These overwhelmingly fall into the following general categories:

- provisions subjecting individuals to a range of intrusive or restrictive measures, such as detention and the obligation to submit to medical or related treatment

- provisions which impact on privacy and professional confidentiality, by obliging a range of individuals to supply the State with sensitive personal information (particularly of a medical nature) about themselves, their patients or other persons, which the State may then disseminate to others in a range of circumstances.

- provisions conferring extensive entry, post-entry and investigative and monitoring powers upon officials .

8. The Minister in his Second Reading Speech readily concedes the major impact of the bill upon individuals' rights and liberties. He states:

> *Mr Speaker, it is inevitable in legislation of this type that fundamental legislative principle issues will be raised in relation to individual rights. My department has thoroughly examined these issues to ensure that they are adequately justified. I would draw members' attention to the explanatory notes accompanying this Bill which provide a detailed explanation of these issues.*

9. As indicated by the Minister, the Explanatory Notes (see pages 6 to 21) deal at great length with the numerous fundamental legislative principle issues raised by the bill. **Given the amount of detail in the Explanatory Notes, the committee will not quote extensively from them but refers readers to them in relation to the various issues dealt with in this Chapter.**

10. The ultimate question for Parliament in considering this bill is of course whether it strikes an acceptable balance between the obvious need to adequately protect and promote the health of the public on the one hand, and the rights and liberties of individuals on the other.

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

- **clauses 70-73, 99-101, 113, 115, 125, 129, 130, 191, 193, 197, 234, 217, 255, 259, 349 and 350**

11. The bill contains numerous provisions which impose obligations of a personally intrusive or restrictive nature upon individuals. The following is a summary of the major categories.

Obligations to provide information

12. Clause 70 of the bill obliges a doctor to notify the chief executive if their examination of a person indicates the person has or had a "clinical diagnosis notifiable condition". Similar obligations are imposed on persons in charge of hospitals (cl.71) and directors of pathology laboratories (cls.72 and 73).

13. Clause 99 authorises a "contact tracing officer" who reasonably suspects that a person has a "notifiable condition" or has been in contact with a person who has such a condition, to ask the person to give information about a range of matters (cl.99). Failure to provide the information requested is an offence (cl.100). When it is reasonably suspected that a person contracted a "'notifiable condition" while providing or receiving goods and services to or from a business, a contact tracing officer may make similar demands for information upon the person in charge of the business (cl.101).

14. Clause 191 imposes on "professionals" an obligation, analogous to that imposed by cl.70, to report harm (or suspected harm) to a child. Failure to give such a report is an offence (cl.193).

15. Clause 234 obliges the director of a pathology laboratory which has undertaken an examination of a human specimen which indicates cancer, to notify the chief executive. This information is then included in the Queensland Cancer Register.

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

16. Clause 217 obliges a "designated person", after the delivery of a baby, to notify the chief executive of certain information in relation to the baby, whether it was born alive or not alive. This information is then included the Perinatal Statistics Collection.

17. Clause 259 provides that the director of a pathology laboratory who has tested a Pap smear or histological sample obtained from a woman, must generally give certain information to the chief executive. This information is included in the Pap Smear Register. However, the woman to whom the information relates may elect that it not be provided (cl.255).

18. Although some of the information dealt with in the above examples (such as information about the birth of a baby) is less controversial, most other information concerns matters which those affected would consider highly personal and confidential and might well not provide voluntarily. The provisions therefore clearly impact on the privacy of those individuals. Those which impose reporting obligations on health professionals are also inconsistent with the traditional confidentiality obligations which doctors and other such professionals have to their patients or clients.[18]

19. Privacy concerns are heightened by the fact that the bill empowers the State, once it has obtained information pursuant to the various statutory obligations, to disseminate it for various (principally research-related) purposes.[19]

Powers to detain

20. Clause 113 of the bill provides that if a person has presented to a public sector health service, and is reasonably suspected of having a "controlled notifiable condition", that person may, if it is reasonably suspected that the condition and likely behaviour constitute an immediate risk to public health, be detained at the public sector health service by order of the chief executive. The detention order lasts for a maximum of 24 hours (cl.115).

21. Clause 197 provides that a "designated medical officer" may order that a child at a health service facility, who has been harmed or is at risk of harm if taken from the facility, may be held at the facility under a "care and treatment order".

22. Clause 349 provides that if an emergency officer (medical) reasonably suspects that a person in a public health emergency area has or may have a serious disease or illness and that this, or their likely behaviour, constitutes an immediate risk to public health, the emergency officer (medical) may order that they be detained. A detention order lasts for a maximum of 96 hours (cl.350).

23. Clause 125 provides that a magistrate, in relation to person who has a "controlled notifiable condition", may make a "behavioural order" requiring that the person, amongst other things, refrain from stated conduct or from visiting stated places, and submit to supervision and monitoring by another person.

24. Clause 129 provides that a magistrate may make a "detention order" in relation to a person who has a controlled notifiable condition, if the magistrate considers the person's condition,

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[18] This is despite the fact that the bill, quite appropriately, provides comprehensive legal protection to health professionals who comply with the statutory reporting obligations.

[19] The committee notes that certain provisions of the bill enable the State to block access to such information in particular cases, even where a court has ordered disclosure (cls.57, 87, 111 and 292), thus potentially ameliorating the impact of the general power to disseminate information.

or the condition and the likely behaviour, may constitute an immediate risk to public health. The order operates for a maximum of 28 days (cl.130).

25. The above powers, which authorise the detention of individuals and in various cases require their submission to medical or other related treatment, all obviously impact on the rights and liberties of the individuals affected by them (in the case of a child, they may also impact on the common law rights of parents).

♦ **clause 143**

26. Clause 143(1) provides that a person must not recklessly put someone else at risk of contracting a "controlled notifiable condition". A maximum penalty of 200 penalty units ($15,000) or 18 months imprisonment is provided. Clause 143(2) provides that a person must not recklessly transit such a condition to someone else, and a maximum penalty of 400 penalty units ($30,000) or 2 years imprisonment is provided. Clauses 143(3) and (4) provide exceptions where the other person knew of the condition and voluntarily accepted the risk.

27. The term "controlled notifiable condition" is to be prescribed by regulation (cl.63(1)). It is apparent from cl.63(2) that the term is intended to encompass transmissible diseases with serious health consequences.

28. A note to the clause points out that s.317 of the *Criminal Code* creates the crime of intentionally transmitting a serious disease to a person.

29. The committee notes that cl.143 creates offences relating to the reckless transmission of "controlled notifiable conditions", and putting persons at risk of such transmission.

30. The committee draws this provision to the attention of Parliament.

Does the legislation provide appropriate protection against self-incrimination?[20]

♦ **clauses 100(2), 102(2), 308(3), 346(2) and 419(2)**

31. The bill includes a number of provisions which exclude the rule against self-incrimination. They are:

- clause 100(2), in relation to the obligation under cl.100(1) upon a person who has a "notifiable condition", or who has been in contact with a person who may have such a condition, to supply "contact information" when requested by a tracing officer
- clause 102(2), in relation to the requirement of a person conducting a business *via* which another person may have contracted a "notifiable condition" to provide information to a contact tracing officer
- clause 308(3), in relation to the obligation of persons required to give evidence before a public health inquiry

[20] 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.

- clause 346(2), in relation to a requirement of an emergency officer in a "public health emergency" declared under cl.319(2), that another person supply information or a document

- clause 419(2), in relation to a requirement by an authorised person to another person to produce a document issued under the bill's provisions or required to be kept under those provisions.

32. The committee has reported on provisions of this general type on previous occasions. The committee's general view is that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if:

- The questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and which it would be difficult or impossible to establish by any alternative evidentiary means;

- The bill prohibits the use of the information obtained in prosecutions against the person; and

- In order to secure this restriction of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).

33. The committee notes that, with the exception of cl.419, all relevant provisions provide both a "use" and "derivative use" immunity in relation to the incriminating answers or documents. The immunity under cls.100 and 102 is further restricted in relation to proceedings for obtaining "controlled notifiable condition orders", and in relation to criminal proceedings about such conditions.

34. The committee notes that cls.100(2), 102(2), 308(3), 346(2) and 419(2) remove the protection of the rule against self-incrimination in the circumstances to which they respectively apply. The committee further notes that (with one exception) the relevant provisions provide both a "use" and a "derivative use" immunity in relation to the incriminating answers and documents.

35. The committee refers to Parliament the question of whether, in the circumstances, these removals of the protection of the rule against self-incrimination are justifiable.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[21]

♦ **clauses 343-355 and 385-420 inclusive**

36. As mentioned earlier, a characteristic of this bill is the extensive range of entry and post-entry powers conferred upon officials. This is perhaps not surprising, given the intrusive and/or restrictive nature of many of the principal powers in the bill, which the entry and post-entry powers support.

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

Clauses 343-355

37. Chapter 8 of the bill (cls.314-375) operates in relation to "public health emergencies". The latter may be declared by the Minister under cl.319 if satisfied there is public health emergency, and that the chapter powers must be exercised to prevent or minimise serious adverse effects on human health.

38. Clause 343 confers on "emergency officers", appointed in relation to declared public health emergencies, power to enter a place in the declared area if he or she reasonably believes it is urgent in order to save human life, prevent or minimise serious adverse effects on human health, or do anything else to relieve suffering or distress. The power is exercisable at any time and without notice (subject to the pre-entry procedures prescribed in cl.344). Neither a warrant nor the consent of the occupier is required.

39. Clause 345 confers on emergency officers a range of powers, including powers which may be exercised after entry has been effected. Clause 347 contains powers specifically exercisable after entry. Clause 349 provides specific power for an emergency officer (medical) to order the detention of a person for a period not exceeding 96 hours.

Clauses 385-420

40. Clause 385 of the bill confers on "authorised persons" a range of entry powers, which extend beyond situations where a warrant is obtained or the occupier consents. The power extends to entry of a public place when it is open to the public, and (much more significantly) cl.385 expressly authorises entry under cls.386, 387, 388, 389 and 390. The first four of these latter clauses enable entry to be effected "at reasonable times" for a series of stipulated public health-related purposes. Clause 390 provides power to enter a health care facility for compliance monitoring purposes, although in that case at least 24 hours notice must be given.

41. Clause 399 provides an extensive range of post-entry powers. Various other relevant powers are provided, namely, power to stop motor vehicles (cl.402), power to seize evidence (cls.403-404), power to remove or reduce public health risks (cl.405), power to obtain information (cl.416) and power to require production of documents (cl.418).

42. The committee notes that cls.343-355 and cls.385-420 inclusive of the bill confer on officials an extensive range of entry and post-entry powers.

43. The committee draws the nature and extent of these powers to the attention of Parliament.

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

- **clause 179**

44. Part 2 of Chapter 5 of the bill (cls.161-184) concerns "contagious conditions". Clause 161 requires a parent not to send their child to a school or child care service, if the parent knows or ought reasonably to know that the child has a contagious condition. Clause 164 empowers the person in charge of a school or child care service to direct such a parent to remove their child from the school or child care service, and not to send it to those places during the prescribed period. The chief executive may authorise the medical examination of children attending a school or child care service who are suspected of having a contagious condition (cl.167).

45. Clause 172 empowers the chief executive to require information about such children, and cl.173 authorises that information to be given to other persons in prescribed circumstances. Clause 175 imposes a general obligation of confidentiality in relation to such information, although subject to various exceptions set out in cls.176-178.

46. Clause 179 provides that a person giving information or doing something else in relation to the Part 2 provisions is not liable civilly, criminally or under an administrative process, if in doing so they have acted honestly. There is no requirement of an absence of negligence, as is usually required under Queensland legislation.

47. The committee notes that cl.179 confers immunity upon persons who give information or do things under the provisions of the bill relating to contagious conditions of children, provided they act honestly.

48. The committee refers to Parliament the question of whether this immunity is appropriate in the circumstances.

- **clause 195**

49. Clause 195 provides that a person who gives information to a "professional" that the person is aware of or suspects that a child has been, is being, or is likely to be harmed, is not liable civilly, criminally or under an administrative process for giving that information. The only requirement is the person act honestly. There is no requirement of an absence of negligence, as is usually required in Queensland legislation.

50. The committee notes that cl.195 of the bill confers immunity upon persons who provide "professionals" with information relating to harm to children, provided that they act honestly.

51. The committee refers to Parliament the question of whether this immunity is appropriate in the circumstances.

[22] Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

♦ **clause 301**

52. Clause 301(1) of the bill confers upon members of a panel of inquiry established under Chapter 7 of the bill ("public health inquiries"), in the performance of their duties, the same protection and immunity as a Supreme Court judge performing judicial functions. Clause 301(2) confers upon lawyers appearing before the panel, and 301(3) confers upon witnesses giving evidence before it, similar protection to that available in Supreme Court proceedings.

53. Given the nature of "public health inquiries", the committee considers this conferral of immunity to be reasonable.

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

♦ **clauses 184, 447 and 448**

54. Clause 447 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes its executive officers).

55. Clause 448 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

56. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.

57. Clauses 447 and 448 both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

58. Clause 184 of the bill relates to the obligation of licensees of child care centres to ensure compliance with the Part 2 "contagious conditions" provisions mentioned earlier. Clause 184 effectively declares licensees to be guilty of offences committed by the person in charge of the child care service, who is their representative. The clause again provides a ground upon which liability may be avoided, namely, that the licensee exercised reasonable diligence to ensure the person in charge complied with the relevant provisions.

59. Clause 184, like clauses 447 and 448, effectively reverses the onus of proof.

60. The committee notes that cls.184, 447 and 448 of the bill effectively reverse the onus of proof.

61. The committee refers to Parliament the question of whether, in the circumstances, these

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

reversals of onus are justified.

♦ **clause 440(2)(e)**

62. Clause 440(1) provides that a certificate signed by the chief executive or a chief executive officer "is evidence" in relation to certain matters listed in the clause. Accordingly, the person signing the certificate need not necessarily be called to give evidence in the relevant proceedings. This provision effectively creates a reversal of the onus of proof, since in the absence of any evidence to the contrary the court may choose to accept the matters stated in the certificates as proven.

63. As the committee has stated on several previous occasions, it does not object to provisions enabling evidence to be introduced in legal proceedings by means of certificates or of officials, provided that the matters dealt with in those certificates are essentially non-controversial. The provisions of cl.440(1) all appear to fall within this category.

64. However, cl.440(2) goes on to provide that a certificate of analysis for a thing is evidence of certain matters. The committee considers that at least one of the listed matters ("the results of the analysis" (cl.440(2)(e)), may deal with a potentially controversial subject.

65. As the committee has previously stated,[24] the committee is aware that certificates as to the results of breath and other tests are admissible under the provisions of the *Transport Operations (Road Use Management) Act 1995* in relation to drink driving offences. However, as the committee has also stated, it does not automatically accept the presence of provisions of this nature in a current Act as justifying their replication in the bill under consideration.

66. The committee notes that cl.440(2)(e) enables the results of an analysis to be introduced in evidence by means of a certificate signed by the analyst. The provision in effect creates a reversal of the onus of proof, in respect of a subject which the committee considers could be controversial.

67. The committee refers to Parliament the question of whether this reversal of onus is appropriate in the circumstances.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[25]

♦ **clauses 62-64**

68. Chapter 3 of the bill (cls.62-146) contains detailed provisions relating to "notifiable conditions". Under these, various persons are obliged to notify the fact that they or other persons have such conditions, and orders may be made requiring persons with such

[24] See the committee's report on the *Police Service Administration (Alcohol and Drug Testing) Amendment Bill 2003:* Alert Digest No.10 of 2003 at pages 17-18.

[25] Section 4(4)(a) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

conditions to be detained and to submit to medical treatment. In short, chapter 3 contains many provisions which impact substantially on the rights and liberties of individuals.

69. The definitions applicable to the chapter are set out in cl.62. A number of pivotal definitions ("clinical diagnosis notifiable condition", "pathological diagnosis notifiable condition", "pathology request notifiable condition" and "provisional diagnosis notifiable condition"), whilst required to conform to certain listed criteria, are ultimately prescribed by regulation.

70. Clauses 63 and 64 contain definitions of "controlled notifiable condition" and "notifiable condition", which are both also prescribed by regulation.

71. Given the importance of these definitions, a question arises as to whether it would be possible for at least the major types of the relevant conditions to be listed in the bill itself, with a residual power to add additional conditions by regulation.

72. The committee notes that cls.62-64 contain definitions of a number of pivotal terms relative to the "notifiable conditions" provisions of the bill, and that these terms are ultimately to be determined by regulation.

73. Given the importance of these terms the committee queries why it is not possible for at least the major types of such conditions to be stipulated in the bill itself.

74. The committee seeks information from the Minister in relation to this matter.

♦ **clause 462**

75. Clause 462 authorises the making of regulations under the bill. Clause 462(3)(a) effectively provides that a regulation may create offences and may impose penalties, not exceeding 100 penalty units ($7,500), for breaches of its provisions.

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

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

- rights and liberties of individuals should not be affected and the obligations imposed on persons by such delegated legislation should be limited and;
- the maximum penalty should be limited, generally to 20 penalty units.

78. The committee observes that the permissible penalty under cl.462 is 5 times that favoured by the committee as a maximum figure for penalties created in regulations.

79. The committee has not been able to locate any arguments in the Explanatory Notes justifying this provision.

80. The committee notes that cl.462(3)(a) provides for regulations to create offences and impose

penalties of not more than 100 penalty units. The committee is generally concerned by the delegation of legislative power to impose penalties exceeding 20 penalty units.

81. The committee opposes delegation of power to impose penalties of this magnitude.

82. The committee recommends that the bill be amended accordingly.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[26]

- **clauses 113, 197 and 349**

83. As mentioned earlier, this bill contains many provisions which authorise the Minister and officials to make decisions impacting very substantially on the rights and liberties of individuals.

84. While the bill confers rights of appeal in respect of a number of specific matters (see, for example, cls.142, 182 and 450), there appears to be no general entitlement to merits review of administrative decisions made under the bill. The Minister would no doubt attribute this to the fact that most decisions under the bill concern important matters affecting the health of the public, and are in many cases made in situations of considerable urgency.

85. The committee notes that in respect of many of the more intrusive powers, such as:

- the chief executive's power to order the detention of persons presenting to a public sector health service, who have or may have a controlled notifiable condition (cl.113)
- a designated medical officer's power to hold a child at a health service facility if it is suspected the child has been harmed or is at risk of harm (cl.197); and
- the power of an emergency officer (medical) to order the detention of a person in a public health emergency area who is suspected or having a serious disease or illness(cl.349)

the bill takes the approach of providing that the administrative order applies for only a limited period, and that any extension of it must be ordered by a court.

86. The committee notes that there are only limited rights to merits review of administrative decisions made under the bill. This perhaps reflects the nature of many of these decisions, and the context within which they are made.

87. The committee makes no further comment in relation to this matter.

[26] Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

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

♦ **clause 298(4)**

88. Clause 298 provides that a panel of inquiry conducting a public health inquiry under Chapter 7 of the bill may, when conducting its inquiry, "allow or refuse to allow a person, including a lawyer, to represent someone else at the inquiry".

89. The question of whether legal representation should be allowed during proceedings before a tribunal has been considered by the committee on a number of previous occasions. Whilst the committee generally considers capacity to be represented by a lawyer enhances a person's right to natural justice, it has previously conceded that, depending on the nature of the tribunal and other relevant matters, restrictions upon the capacity to obtain legal representation may be unobjectionable.[28]

90. The committee has some concerns that the wide discretion apparently conferred upon panels of inquiry by cl.298(4) could be exercised in a manner advantageous to some parties and detrimental to others. For example, it would normally appear inequitable for one party appearing before an inquiry to be permitted legal representation, whilst another party is denied it.

91. The committee notes that cl.298(4) provides panels of inquiry conducting public health inquiries with a wide discretion in relation to allowing or refusing representation, including particularly legal representation.

92. The committee seeks information from the Minister as to how it is envisaged this discretion will be exercised, and how the rights to natural justice of all persons appearing before inquiries will be safeguarded.

♦ **clause 356(5)**

93. Clause 349 of the bill empowers an emergency officer (medical), in relation to a public health emergency, to order the detention of a person suspected of having a serious disease or illness. Clause 356 enables the emergency officer to apply to a magistrate to extend the detention order. Clause 356(5) provides that:

> *The person detained must not attend the hearing of the application but may nominate a person to represent the person detained at the hearing.*

94. Although a representative can be nominated to attend the hearing on behalf of the detainee, it could be argued that the detainee's right to natural justice is to some extent undermined by the blanket prohibition on their also attending.

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

[28] See, for example, *Industrial Relations Amendment Bill 2001*: Alert Digest No 8 of 2001 at pages18-19.

95. The Explanatory Notes state, in relation to this matter:

> *To minimise the risk of transmission of the condition the detained person is suspected of having, the detained person may not attend the hearing. However, the detained person may nominate a representative to appear on his or her behalf.*

96. The committee notes that cl.356(5) prevents a person detained by an emergency officer (medical) in relation to a public health emergency from personally attending a Magistrates Court in which a continuation of the detention is sought. The person detained may however nominate a representative to attend on their behalf.

97. The Explanatory Notes relate this prohibition to the necessity to prevent transmission of disease.

98. The committee refers to Parliament the question of whether, in the circumstances, this prohibition on the detained person attending the hearing is appropriate.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

5. ENVIRONMENTAL PROTECTION AND OTHER LEGISLATION AMENDMENT BILL 2004

Background

1. The Honourable D Boyle MP, Minister for Environment, Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 19 October 2004. The committee notes that this bill was passed, with amendments, on 11 November 2004.

2. The committee commented on this bill in its Alert Digest No 8 of 2004 at pages 9 and 10. The Minister's response to those comments was incorporated in Alert Digest No 1 of 2005 at pages 38 and 39. The Minister has subsequently provided additional information which 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?[29]

- **clause 176 (proposed s.100F)**

3. The committee noted that proposed s.100F of the bill (inserted by cl.176) provided that a regulation may terminate a captive breeding agreement. The committee sought information from the Minister as to the likely grounds upon which an agreement would be terminated via the making of such a regulation.

4. In response, the Minister provided the information incorporated in Alert Digest No 1 of 2005. However, the committee was not entirely clear as to the nature of the matters which would be covered in an example given by the Minister. The committee sought further information in that regard.

5. The Minister has now provided the following additional information:

> *I note that the Committee has sought further information about the nature of the matters which would be covered by the example regarding termination of Captive Breeding Agreements. The example referred to:*
>
> > *"… where the party to the agreement with the State refuses to adopt new and critical science with respect to ensuring the survivability of the species in captivity, and subsequently in the wild, due to disease or other disorder."*
>
> *A specific hypothetical example might be a situation in which new research has found that a certain type of disease was spreading in the wild in a population of a common species of protected animal. Unfortunately, the disease is also fatal to a related species which is*

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

critically endangered, individuals of which are currently kept under a Captive Breeding Agreement in the same area of the disease outbreak. It is realised that this disease would be likely to result in the death of the endangered animals subject to the Agreement, but urgent negotiations with the Agreement partner have failed to reach a consensus on the need to immediately remove them from the location.

In this circumstance, the State may have to terminate the Agreement by regulation to ensure the endangered animals may be relocated away from the threat posed by the disease.

While this is one hypothetical scenario which might be advanced, it is not possible to anticipate all circumstances that might prompt the termination of an Agreement. Some matters can be reasonably predicted, and those matters have been specifically incorporated into the Act (for example, where a person with whom an Agreement is made ceases to be an appropriate person due to their conviction for a serious wildlife offence).

Failure to anticipate a new or novel threat to the integrity of a Captive Breeding Agreement may pose a serious threat to the subject species.

The ability of the Governor-in-Council to terminate an Agreement by way of regulation is designed to allow the State to actively manage Captive Breeding Agreements for a particular purpose and to intervene where the Agreement partner fails to adjust their procedures following negotiations with the chief executive.

The alternative, to insert a clause in a Captive Breeding Agreement to allow the Minister to terminate the Agreement if the Minister sees fit, could be viewed to be a less transparent process.

Thank you for bringing this matter to my attention.

6. The committee notes the Minister's response.

6. HOUSING AND OTHER ACTS AMENDMENT BILL 2005

Background

1. The Honourable R E Schwarten MP, Minister for Public Works, Housing and Racing, introduced this bill into the Legislative Assembly on 8 March 2005. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 3 of 2005 at pages 3 and 4. 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 adversely affect rights and liberties, or impose obligations, retrospectively?[30]

- **clauses 2, 7, 10 and 18**

3. The committee noted that cls.7 and 18 retrospectively declare land being purchased from the State under instalment and shared equity contracts, entered into or renegotiated since 1 January 2004, to be liable to local government rates.

4. The committee sought information from the Minister as to whether it was commonly assumed by local governments and relevant purchasers, since 1 January 2004, that such lands were rateable.

5. The Minister provided the following information.

> *The Committee has noted that clauses 7 and 18 of the Bill retrospectively declare land being purchased from the State under instalment and shared equity contracts, entered into or renegotiated since 1 January 2004, to be liable for local government rating. The Committee seeks further information as to whether since 1 January 2004, it was commonly assumed by local governments and relevant purchasers, that such lands were rateable.*
>
> *Section 95 of the Housing Act 2003 provides that land which is the subject of instalment or shared equity contracts entered into under section 24 of the repealed State Housing Act 1945 is rateable under the Local Government Act 1993. However, no provision was made in the Housing Act 2003 to make rateable land the subject of shared equity or instalment contracts entered into since commencement of that Act on 1 January 2004. The amendments in the Bill are intended to ensure that a consistent approach is applied to instalment and shared equity contracts, irrespective of when they were entered into.*
>
> *All instalment and shared equity contracts, whether entered into before or after 1 January 2004, oblige purchasers to pay rates to the relevant local government. Local government officers have reported that rates advices are being issued in the name of the instalment and shared equity clients, including those who have entered into agreements with the Department of Housing since 1 January 2004.*

[30] Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

Accordingly, it is considered that local governments and all relevant purchasers who have entered instalment and shared equity contracts after 1 January 2004 would commonly assume that such lands are rateable.

I have no comments in relation to clauses 2 and 10 of the Bill.

6. The committee thanks the Minister for this information.

♦ **clause 11**

7. The committee noted that cl.11 of the bill makes certain retrospective amendments to the *State Housing (Freeholding of Land) Act 1957*. The committee was satisfied that these amendments are beneficial to departmental clients.

8. The committee accordingly had no concerns in relation to cl.11.

9. The Minister commented as follows:

I note that the Committee has made reference to clause 11 of the Bill which makes certain retrospective amendments to the State Housing (Freeholding of Land) Act 1957 and to the explanation of this clause in the Explanatory Notes.

I respectfully draw to the attention of the Committee that on 6 April 2005, and subsequent to the Committee's consideration of the Bill, I wrote to the Clerk of the Parliament and arranged for the tabling, on 7 April 2005, of an Erratum to the Explanatory Notes. This Erratum replaces the reference to clause 11 of the Bill and is in the following terms:

"Clause 11 provides for the omission of provisions in schedule 2 to the Housing Act which amended the State Housing (Freeholding of Land) Act 1957. Paragraphs 5–31 of these amendments are omitted and replaced with paragraphs 5-33. These provisions:

- *replace references to the repealed State Housing Act 1945 with references to the Housing Act 2003 and replace references to the Queensland Housing Commission with references to the chief executive;*
- *clarify that the Land Act 1994 applies to a freeholding lease issued under the State Housing (Freeholding of Land) Act 1957;*
- *reinstate the right of holders of perpetual town leases to apply to have their leases deemed freeholding leases; and*
- *restore the chief executive's power to provide concessions on the freehold price for residential perpetual town leases."*

The Erratum provides a better explanation of the provisions of clause 11 of the Bill.

10. The committee thanks the Minister for this information.

7. INDUSTRIAL RELATIONS AND OTHER ACTS AMENDMENT BILL 2005

Background

1. The Honourable T A Barton MP, Minister for Employment, Training and Industrial Relations, introduced this bill into the Legislative Assembly on 8 March 2005. As at the date of publication of this digest the bill had not been passed.

2. The committee commented on this bill in its Alert Digest No 3 of 2005 at pages 5 to 9. 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?[31]

- **clause 13**

3. The committee noted that cl.13 of the bill creates a reversal of onus of proof where, in applications concerning "prohibited conduct", allegations are made about the reasons or intent for which conduct is carried out.

4. The committee referred to Parliament the question of whether this reversal of onus of proof was justifiable in the circumstances.

5. The Minister responded as follows:

> *Freedom of association is one of the core labour principles of all democratic industrialised societies. The Industrial Relations Act 1999 (IR Act) enshrines this principle by guaranteeing every employee the freedom to join, or to not join, an industrial organisation, without fear of recrimination. The Act protects the freedom of association of both employers and employees.*
>
> *In proceedings for a breach of these provisions, it is difficult for employees to prove the improper motives of an employer as required by the current Act. Proving the motives of the employer is often more difficult in an employment context than in other contexts arising under the general law, because of the power imbalance in the employment relationship. For example, an unscrupulous employer who wanted to penalise an employee for their union involvement could easily allege a variety of reasons for disadvantaging the employee, such as alleging that the employee is not doing their job satisfactorily. Under the current Act, the employee would have to prove that the employer took the conduct, not for their job performance, but because of their union involvement. Even if the tribunal found insufficient evidence of poor job performance, it would still require the employee to discharge the burden of proof and show what motivated the employer's behaviour. This information is peculiarly within the employer's knowledge.*

[31] 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 amendment will, in proceedings where the applicant alleges breach of the freedom of association provisions, require the employer to prove that he or she was not motivated by reasons prohibited by the Act. In the example given above, this onus could be discharged by the employer simply giving evidence that the employee did not perform their job satisfactorily.

It is considered that requiring the employer to give such evidence is not onerous and is justified in order to give full effect to the freedom of association protections in the Act. The onus of proof is similarly reversed in the federal jurisdiction (section 298V of the Workplace Relations Act 1996) and in New South Wales (section 210(2) of the Industrial Relations Act 1996).

6. The committee thanks the Minister for this information.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[32]

- **clause 37**

7. The committee noted that cl.37 of the bill expands the entry powers of inspectors to include power to enter, without the occupier's consent, premises where clothing outwork is being carried on.

8. The committee drew to the attention of Parliament this expansion of the entry powers of inspectors.

9. The Minister responded as follows:

As noted in the Explanatory Notes, Departmental inspectors already have the power to enter any workplace which is open for business, during business hours, without a warrant and without the occupier's permission. However, because "sweatshops" often operate outside the mainstream of business because operators are attempting to ignore government regulations, they do not usually open for business or operate during ordinary business hours. The amendment will prevent such operators from avoiding the Departmental inspections that occur in other workplaces.

10. The committee notes the Minister's response.

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

- **clause 43**

11. The committee noted that cl.43 confers upon clothing "outworkers" power to recover unpaid wages or superannuation contributions from a person who the outworker believes to be his

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

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

or her employer (whether or not that is in fact the case). The committee noted that the Explanatory Notes addressed this issue in some detail.

12. The committee referred to Parliament the question of whether the provisions of cl.43 have sufficient regard to the rights of persons (other than the outworker's actual employer) against whom such claims may be made.

13. The Minister responded as follows:

> *The Explanatory Notes provide some background on the peculiar disadvantages suffered by clothing outworkers in Queensland. In particular, the Notes explain that the majority of clothing outworkers in Queensland are of Vietnamese origin and have very little understanding of their rights as employees. The Notes also explain that employers of clothing outworkers frequently hide behind complex contracting chains specifically designed to allow participants to evade their legal responsibilities, including their legal responsibilities and liabilities as employers.*
>
> *A Senate Economics Committee which conducted an inquiry into outworkers in the clothing industry noted that these workers are "isolated, unseen, unorganised, non-unionised, ignorant of their employment rights and have poor language skills" and therefore require special consideration.*
>
> *New South Wales, Victoria and Queensland have all implemented strategies to increase the protection of these marginalised workers. In Queensland, campaigns have been undertaken to identify award compliance in the industry, a code of practice has been implemented and a Vietnamese Liaison Officer has been appointed to raise the profile of the Department of Industrial Relations within the Vietnamese community and provide advisory and consultancy services on the Department's behalf to Vietnamese workers.*
>
> *The implementation of the provisions in the Bill forms a vital part of the Government's outworkers' strategy. That strategy includes working with New South Wales and Victoria to create a uniform regulatory regime across the three eastern seaboard States, where most clothing outworkers live and work. Without regulatory consistency in the three States, unscrupulous manufacturers will simply move to the weakest regulatory link in the chain to continue their unlawful activities. Another benefit of consistency is that manufacturers and retailers who operate nationally will have a consistent cross-border regime and this will facilitate their understanding of and compliance with the law.*
>
> *The strict liability imposed on apparent employers under the Bill is the keystone of the legislation. It is necessary because of the multiple layers of subcontracting endemic in this part of the clothing industry and was recognised as necessary in New South Wales and Victoria.*
>
> *In formulating this proposal, consideration was given to allowing apparent employers the defence that they are not the actual employer. This option was rejected because it would have left the employers of outworkers in exactly the same position as they are now, i.e. an employer who was served with an unpaid wages claim as an "apparent employer" would simply ignore the claim, force the outworker to institute legal proceedings and then defeat the outworker's claim by relying on the complexity of the contracting chain to deny their responsibilities as employers.*
>
> *It was also considered that the mere existence of the legislation would force participants in the industry to regulate their own practices so that only actual employers are liable for outworkers' remuneration. This will have the desired legislative outcome of ensuring that actual employers fulfil their responsibilities to their employees.*

It is expected that the apparent employer will, in almost all instances, be the outworker's employer or the person who allocated the work to the outworker (if these are not one and the same). It cannot be someone whom the outworker has no reason to believe is the outworker's employer, because the claim can only be served on a person whom the outworker believes to be the employer, a belief supported by statutory declaration. It is an offence punishable by imprisonment for a person to knowingly make a false statutory declaration (see section 193 of the Criminal Code Act 1899) and this provides a safeguard from outworkers making spurious claims with no reasonable belief that the person served with a claim is the employer.

14. The committee thanks the Minister for this information.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[34]

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

[34] On 13 May 2004, 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.* (This resolution is identical to that passed by the previous Parliament on 7 November 2001.)

In accordance with established practice, the committee reports 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

(in the electronic version of the Alert Digest, this correspondence is contained in a separate document)

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 *(dates are approximate)*
228	Weapons Amendment Regulation (No.1) 2004	22/3/05
316	Environmental Protection and Other Legislation Amendment Regulation (No.1) 2004	22/3/05
324	Nature Conservation (Macropod Harvest Period) Notice 2004	19/4/05

* Where the committee has concerns about a particular piece of subordinate legislation, or wishes to comment on a matter within its jurisdiction raised by that subordinate legislation, it conveys its concerns or views 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** ***(dates are approximate)***

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

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

This concludes the Scrutiny of Legislation Committee's 4th report to Parliament in 2005.

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.

Ken Hayward MP
Chair

19 April 2005

APPENDIX

CORRESPONDENCE

(in the electronic version of the Alert Digest, this correspondence is contained in a separate document)