SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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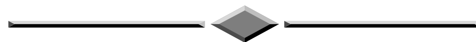

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NOTE:

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. CORRECTIVE SERVICES AMENDMENT BILL 2005

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 8 March 2005.

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

> *to remove any doubt that where a prisoner was released on parole and had it cancelled before 1 July 2001, then the time served on parole does not count as time served for the prisoner's sentence.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[3]

♦ **clause 3**

3. Clause 3 of the bill inserts into the *Corrective Services Act 2000* an additional transitional provision, proposed s.268C.

4. Under the previous legislation, a prisoner's "street time" (that is, the time between the date the prisoner was released on parole and the date upon which that parole was cancelled for whatever reason) was not counted as time served in respect of the period of imprisonment to which the prisoner had been sentenced.

5. Under the new *Corrective Services Act 2000*, street time is counted. This was apparently part of a legislative "trade-off" under which, whilst street time would be counted, remissions of up to one-third of a sentence would no longer be possible.[4]

6. The 2000 Act included various transitional provisions, none of which appear to have expressly dealt with the situation where some relevant events (such as the sentence of imprisonment, the release on parole, the cancellation of parole and the return to imprisonment) occurred under the old Act whilst others occurred under the new Act.

7. In *Psaila v Department of Corrective Services [2005] QCA 16*, a single Supreme Court judge ruled that a prisoner who had been sentenced, released on parole and had his parole cancelled under the old Act, but who was returned to prison under the new Act,[5] was entitled to the benefits of the new Act by virtue of certain transitional provisions in s.268.

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[3] 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.

[4] *Psaila v Chief Executive, Department of Corrective Services* [2005] QCA 16, per de Jersey CJ.

[5] The prisoner breached his parole conditions by not reporting as required, and by absconding to Victoria where he was not apprehended for some time.

This decision was reversed on appeal to the Court of Appeal in *Psaila v Chief Executive, Department of Corrective Services* [2005] QCA 16.

8. The same issue arose in *Swan v Chief Executive, Department of Corrective* Services [2005] QSC 3, though on somewhat different facts. In that case the decision of the single Supreme Court judge went against the prisoner, who is apparently now appealing to the Court of Appeal.

9. Against this background the bill introduces new transitional s.268C, which expressly declares that a person who was sentenced, released and had their parole cancelled under the previous legislation is not entitled to the benefit of the new statutory regime. Proposed s.268C, because it declares the law in relation to past events, is prima facie retrospective in nature.

10. 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.

11. There is no doubt that the provisions of this bill will adversely affect those prisoners to whom they relate. However, given the history outlined above, it is not at all clear to the committee that the bill will in fact change the pre-existing law. The Explanatory Notes indicate that its purpose is to clarify the situation by expressly providing for it. The committee notes that the only judicial decision on the basis of which it could be said this bill does change the law, was overturned on appeal.

12. Whilst the appeal in the *Swan* case is apparently still pending, the committee considers judicial authority to date points strongly to the conclusion that the bill is not changing the pre-existing law, but only stating it more clearly.

13. The committee notes that cl.3 of the bill expressly excludes certain prisoners from having their "street time" counted in calculations of the time they have served under their sentence of imprisonment.

14. The bill declares the law in relation to certain past events, and may therefore be retrospective in nature. While the bill's provisions are undoubtedly adverse to those prisoners affected by it the committee considers, for the reasons set out above, that it probably does not change the pre-existing law but simply states it more clearly. On that basis, it would not in fact have retrospective effect.

15. In the circumstances, the committee does not object to cl.3 of the bill.

2. 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.

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

> *to amend the Housing Act 2003 concerning: the transition from the State Housing Act 1945 and regulation of organizations funded by the Department of Housing to provide housing services; to repeal the Commonwealth State Housing Agreement (Service Personnel) Act 1991; and to amend the Building and Construction Industry Payments Act 2004 to correct an error in Schedule 1.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[6]

♦ **clauses 2, 7, 10 and 18**

3. Under the previous housing legislation (the *State Housing Act 1945,* which was repealed in 2003), land being purchased by clients from the State under shared equity or instalment contracts was liable to local government rates. Whilst the capacity to make such contracts was retained under the current legislation (the *Housing Act* 3002), it appears to contain no provision declaring contracts entered into (or renegotiated) under the new Act to be subject to local government rates.

4. Clause 7 of the bill amends s.95 of the current Act (which declares that relevant purchases under the repealed Act remain subject to rates) by adding a similar provision in relation to s.113 (the section of the current Act under which relevant contracts are now entered into). Clause 2(1) of the bill declares that cl.7 is taken to have commenced on 31 December 2003 (the day before commencement of the current Act).

5. The effect of these provisions will therefore be to render land purchased under the relevant contracts subject to local government rates, retrospective to dates as early as 1 January 2004.

6. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse affects 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

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6 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.

- whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.

7. The committee notes that cl.18 of the bill retrospectively validates any rates levied by local governments for periods since 1 January 2004, on contracts made under s.113. From this it appears that local governments may well have continued rating the relevant land, and that purchasers may have entered into s.113 contracts on the assumption that the land, as was the case under the previous Acts, was subject to rates.

8. The committee notes 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.

9. The committee seeks 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.

♦ **clause 11**

10. Clause 11 of the bill amends certain provisions of the *State Housing (Freeholding of Land) Act 1957*. Clause 2(1) provides that cl.11 is taken to have commenced on 31 December 2003.

11. The Explanatory Notes indicate that the cl.11 amendments are intended to rectify an inadvertent removal of the chief executive's power to provide concessions to purchasers on the freehold price, based on rental payments made by the lessee.

12. The Notes assert that these amendments, rather than impacting negatively on the rights and liberties of individuals, in fact provide benefits to departmental clients. This statement seems clearly correct.

13. The committee notes that cl.11 of the bill makes certain retrospective amendments to the *State Housing (Freeholding of Land) Act 1957.*

14. The committee is satisfied that these amendments are beneficial to departmental clients.

15. The committee accordingly has no concerns in relation to cl.11.

3. 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.

2. The objects of the bill, as indicated by the Minister in his Second Reading Speech, are:

> (to) *bring further refinements to the Act as a result of the changing demands of the modern workplace.*
>
> *The Industrial Relations and Other Acts Amendment Bill 2005 introduces provisions that benefit both employers and employees, particularly low-paid outworkers in the clothing industry.*
>
> *Among the benefits and technical and administrative changes outlined in the Bill are:*
>
> - *Support for outworkers to recover unpaid wages*
> - *Help for workers to achieve a better balance between their work and family lives*
> - *Better protection of workers from unlawful dismissal.*
>
> *Mr Speaker, outworkers generally are among the most exploited workers in the country.*

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[7]

♦ **clause 7**

3. Clause 7 of the bill inserts into the *Industrial Relations Act 1999* proposed s.40A. This provides that an employee may take up to 5 days unpaid cultural leave each year, unless the person's employer on reasonable grounds refuses the request. For the purposes of s.40A, "employee" is defined as a person required by Aboriginal tradition and Island custom to attend an Aboriginal or Torres Strait Islander ceremony.

4. The availability of this entitlement is subject to a number of other conditions set out in the section.

5. The committee notes that proposed s.40A (inserted by cl.7) confers a conditional entitlement to 5 days unpaid cultural leave upon employees required by Aboriginal tradition or Island custom to attend an Aboriginal or Torres Strait Islander ceremony.

6. The committee considers this provision has sufficient regard for, and indeed enhances, Aboriginal tradition and Island custom.

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[7] 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.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[8]

♦ **clause 13**

7. Clause 13 of the bill inserts into the *Industrial Relations Act 1999* proposed s.122A.

8. Part 2 of Chapter 4 of the Act ("Prohibited Conduct") prohibits various types of conduct by employers, principals, employees, independent contractors and industrial associations.

9. Section 117 of the Act provides that entities against whom "prohibited conduct" has been carried out or is proposed, or an industrial association of which such an entity is a member or eligible for membership, may apply to the Industrial Relations Commission for an order against the perpetrator. The remedies provided under s.120 include monetary penalties, reinstatement and compensation.

10. Section 122(2) currently provides that in such proceedings, evidence that "prohibited conduct" was engaged in by an industrial association's management committee, its officer or agent, a member or group of its members authorised by its rules or management committee, and a range of other stipulated persons, is evidence that the conduct was engaged in by the industrial association or corporation itself. Section 122(3) provides that evidence that the entity engaged in the conduct for a prohibited reason is evidence the industrial association or corporation engaged in the conduct for that reason.

11. These provisions effectively reverse the onus of proof.

12. Proposed s.122A, inserted by the bill, introduces a further reversal of onus by providing that if it is alleged in the proceedings that prohibited conduct was being carried out for particular reason or with a particular intent:

> *it is to be presumed … that the conduct was, or is being, carried out for that reason or with that intent, unless the entity proves otherwise.*

13. Effectively therefore, a mere allegation about a person's state of mind is *prima facie* to be accepted. Under the general law, it is the applicant's obligation to establish this.

14. As mentioned earlier, the committee notes that under the provisions of Part 2, Chapter 4, the commission may make orders including the imposition of monetary penalties.

15. The Minister in his Second Reading Speech states, in relation to this provision:

> *For breaches of the freedom of association provisions in the Act the onus will be reversed. This will strengthen the statutory protection of freedom of association and is consistent with the federal Act*

16. While the enactment of the provision may well have the effect the Minister asserts, the fact remains that cl.13 imposes a reversal of onus of proof in an environment in which monetary penalties may be imposed.

---

[8] 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.

17. The committee notes 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.

18. The committee refers to Parliament the question of whether this reversal of onus of proof is justifiable in the circumstances.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[9]

- **clause 37**

19. Section 353(1) of the *Industrial Relations Act 1999* confers power upon inspectors, without the occupier's consent, to enter a public place or a workplace (when the latter is open for business or is otherwise is open for entry). Clause 37 of the bill adds the following entry power:

> (power to) *enter that part of the place the inspector reasonably believes clothing outwork is being, has been, or is about to be carried on.*

20. Under this additional power, entry can clearly take place at any time.

21. In relation to this amendment, the Explanatory Notes (at page 11) state:

> *Departmental industrial inspectors have had a long-standing statutory right to enter any workplace which is "open for business", without a warrant and without the occupier's consent, to monitor and enforce compliance with the IR Act. For workplaces in domestic premises, inspectors may enter that part of the place where "members of the public are ordinarily allowed to enter". It is difficult to use these powers in connection with workplaces where clothing outworkers are employed. Premises used for clothing outwork are often "sweatshops" deliberately concealed from public scrutiny. They do not "open for business" and members of the public are not "ordinarily allowed to enter". Inspectors would not have the power to enter them under the IR Act as currently drafted and would therefore not be able to effectively enforce the IR Act in relation to clothing outworkers.*

22. The committee notes 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.

23. The committee draws to the attention of Parliament this expansion of the entry powers of inspectors.

[9] 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 have sufficient regard to the rights and liberties of individuals?[10]

♦ **clause 43**

24. Clause 43 of the bill inserts into the *Industrial Relations Act* division 3A of Part 2, Chapter 11 (proposed ss.400A to 400I). These provisions provide a specific process for recovery of wages by clothing "outworkers".

25. The principal feature of the provisions is the capacity of an outworker to make a claim for wages or superannuation contributions against "a person who the outworker believes is his or her employer (the "apparent employer")" (proposed s.400B(2)). That "apparent employer" may within 14 days refer the claim to another person (the "referred employer") who the "apparent employer" reasonably believes is the person for whom the work was done (proposed s.400C(2)). The "apparent employer" is not liable for any part of an amount for which the "referred employer" accepts liability (proposed s.400C(5)).

26. The Industrial Relations Commission or a Magistrate may be requested to make an order that the (actual) employer of the outworker reimburse the apparent or referred employers for the amounts those latter persons paid to the outworker or an approved superannuation fund for the outworker (proposed s.400E).

27. Provisions enabling a person to successfully establish a legal claim against another who he or she believes to be the person indebted to them, even if that is not in fact the case, are highly unusual to say the least. In relation to this aspect of the provisions, the Explanatory Notes (at page 12) state:

> *Another aspect of the clothing outworker provisions which raises fundamental legislative principles is that the onus of identifying an outworker's employer has effectively been shifted from the outworker to participants in the contracting chain. It is considered that the unique nature of the industry justifies such an approach. The complex webs of contracting that occur in the industry can easily be used to disguise the identities of persons with legal liabilities, such as employers. Outworkers will usually only know the identity of the person who hired them or who gives them work. This person may or may not be the legal employer.*
>
> *The participants in the contracting chain are in a better position to know who is intended to be responsible for wages and they can also insulate themselves from liability through their commercial arrangements with one another. It is considered that an expectation that the parties in the contracting chain sort out who is responsible for outworkers' wages is not unreasonable or unduly unfair in these circumstances. Contractors and subcontractors also have recourse under the Bill to an inexpensive and efficient forum (the QIRC) to claim reimbursement from the legal employer of any amounts paid.*

28. The committee notes 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 or her employer (whether or not that is in fact the case).

29. The Explanatory Notes address this issue in some detail.

30. The committee refers to Parliament the question of whether the provisions of cl.43 have

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

sufficient regard to the rights of persons (other than the outworker's actual employer) against whom such claims may be made.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

4. CRIMINAL CODE (CHILD PORNOGRAPHY AND ABUSE) AMENDMENT BILL 2004

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 24 November 2004. The committee notes that the bill was passed, with amendments, on 10 March 2005.

2. The committee commented on this bill in its Alert Digest No 1 of 2005 at pages 1 to 12. The Attorney's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest

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

♦ **clauses 5, 6, 9, 11 and 12**

THE PROPOSED CHILD ABUSE OFFENCE REGIME

3. Clause 6 of the bill inserted in the *Criminal Code* new ss.228A to 228H. Proposed ss.228A to 228D created offences. The Explanatory Notes stated that the new offences were intended to complement, not replace, existing offences and that where a more serious offence involving abuse of a child occurred, that offence should be charged.

4. The committee raised no objection in principle to the proposed offences introduced by cl.6 of the bill.

5. The committee observed that the proposed amendments to the *Criminal Code* cannot have retrospective effect. In the circumstances, the committee sought information from the Attorney as to why it was not thought better to consolidate and update the existing offences, in a comprehensive way, in one Act dealing with the classification of all forms of media in accordance with the Commonwealth/State co-operative scheme (as the Commonwealth has done in the *Classification (Publications, Films and Computer Games) Act 1995*.

6. The Attorney provided the following information:

> *In paragraph 48, the Committee seeks information from me as to why it was not thought better to consolidate and update existing offences in one Classification Act, dealing with all forms of media.*

---

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

As is set out in the Explanatory Notes, the Government considers that legislation designed to classify material to determine who can access it, if at all, does not recognise the nature of the conduct involved in the making of child exploitation material. The Classification Acts are largely directed at material produced for a commercial purpose and for public distribution. For example, for films, the determination is about whether the film should be rated G, PG, M, R or X, or whether classification should be refused. The material that is restricted is also limited by the nature of the legislation regulating it — films, publications or computer games. This regime is inappropriate and inadequate for child pornography offences.

Given the serious criminal and exploitative nature of this activity, the Government considers it to be more appropriate for there to be specific offences (with appropriate penalties) in the Criminal Code dealing with involving a child in, and making, distributing and possessing child exploitation material.

This move away from addressing child pornography through classification offences is also consistent with the approach taken in other Australian jurisdictions, including the Commonwealth in recent amendments to the Criminal Code Act 1995.

7. The committee thanks the Attorney for this information.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[12]

♦ **clause 6**

8. The committee noted that under the bill it will always be a defence to prove that the material alleged to be child exploitation material has been classified other than RC (1)(b) under the *Classification Acts*.

9. The committee sought information from the Attorney as to why it was considered desirable to define the new offence-creating provision in terms different to that which will be applied by the Classification Board in determining whether a classification will be refused, thereby removing any defence available on that basis. Put another way, why was it desirable to define the new offence in terms different to that which will be applied by the Classification Board in determining whether a classification will granted [or even refused on a basis other than RC (1)(b)], in which case no offence will be committed even if the magistrate or jury are satisfied beyond reasonable doubt that the elements of the new offence have been made out.

10. The Attorney responded as follows:

In paragraph 55, the Committee seeks information from me as to why it was considered desirable to define the offences differently to the test applied by the Classification Board in determining classification refusal.

Again, it should be noted that these new offences are directed at the serious and exploitative nature of this type of material. The Bill quite deliberately extends the offences to a broader

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[12] 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.

range of material and to depictions of other forms of abuse of children, than is addressed through the classification system.

At the same time, however, it is recognised that a person should not be found guilty of a serious criminal offence in relation to material that has been approved by the Classification Board. Thus, even if a jury could be satisfied that material is child exploitation material, no offence is committed if the material has been classified other that "RC".

11. The committee notes the Attorney's response.

♦ **clause 5 (proposed s.207A)**

12. The committee drew to the attention of Parliament the apparent breadth of the words "offensive or demeaning context" in the definition of "child exploitation material" inserted by cl.5.

13. The committee recommended that the Attorney consider amending the bill to incorporate in the definition other familiar concepts such as *indecent, obscene* or *tending to corrupt,* which appear in the existing offence-creating provisions in the *Criminal Code*.

14. The Attorney responded as follows:

In paragraphs 64 and 65, the Committee recommends that I consider amending the Bill to replace the words "offensive or demeaning context" in the definition of child exploitation material, with concepts such as "indecent", "obscene" or "tending to corrupt". I understand the Committee's recommendations on this point are directed at the apparent breadth of the words "offensive or demeaning context".

In developing this Bill, the Government was conscious of the need to strive for consistency with other jurisdictions, particularly given the cross border nature of this crime. At the time this Bill was introduced, a number of other jurisdictions (the Northern Territory, South Australia and New South Wales, as well as the Australian Government) had recently amended or were amending their legislation in this area.

The definition of child exploitation material is broadly consistent with that applying in other jurisdictions, in particular with the definition of "child abuse material" in section 125A of the Northern Territory Criminal Code.

15. The committee notes the Attorney's response.

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

♦ **clause 6 (proposed s.228E(2))**

16. Proposed s.228E (inserted by cl.6 of the bill) provided for various defences to be available to persons charged with the offences created by proposed ss.228A-228D. These will

[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.

effectively require the accused person to prove, on the balance of probabilities, the matters of defence. Often this will be not be possible until close to, or during, the trial of the accused person.

17. Proposed s.228E(2) allowed the defence to prove that the accused person engaged in the conduct for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and that the conduct was in the circumstances reasonable for that purpose. The Explanatory Notes provided no guidance as to why the prosecution should not have to negative these matters as part of proving this serious criminal offence. These possible exculpatory matters were not peculiarly within the accused person's knowledge, unlike say the defence of honest and reasonable belief by an accused person in the age of a minor.

18. The committee sought information from the Attorney as to why it was thought necessary to, in effect, reverse the onus of proof in these cases.

19. The Attorney responded as follows:

> *In paragraph 69, the Committee seeks information from me as to why it was thought necessary to reverse the onus of proof in relation to the defence in section 228E(2).*
>
> *In order to convict a person of any of these new offences, the prosecution must prove beyond reasonable doubt that the material in question satisfies the definition of child exploitation material, in other words, the prosecution must prove that the material is an objectively offensive depiction of a child. Providing a defence that the material was classified other than "RC" or was subject to a classification exemption provides an additional safeguard for an accused even if the material is prima facie offensive. Where the material is classified "RC" or where it is not capable of being classified (for example, it is an object) it is appropriate to allow the defence to establish some other public benefit purpose to the material.*
>
> *Whether material clearly established to be child exploitation material was nevertheless created or used for a genuine artistic, educational, legal, medical, scientific or public benefit purpose is a matter peculiarly within the accused's knowledge.*
>
> *Providing a defence in these terms (rather than requiring the prosecution to prove, for example, that the material had no genuine artistic purpose) is consistent with the approach taken in other jurisdictions, such as New South Wales (section 91 H(4) Crimes Act 1900), Victoria (section 70(2) Crimes Act 1958), and the Northern Territory (section 125B(4) Criminal Code).*

20. The committee notes the Attorney's response.

♦ **clause 6 (proposed s.228E(3))**

21. Proposed s.228E(3) provided a defence in the case where a classification exemption has been given under the *Classification Acts* and the conduct is engaged in for that purpose in a way consistent with the exemption including any conditions imposed.

22. The Explanatory Notes provided no guidance as to why the prosecution should not have to prove the absence of these matters. They will have resulted from exemptions given pursuant to the Queensland *Classification Acts*, and should therefore be the subject of easily accessible records within a Government Department.

23. The committee sought information from the Attorney as to why it was thought necessary to reverse the onus of proof in these cases.

24. The Attorney responded as follows:

> *In paragraph 69, the Committee seeks information from me as to why it was thought necessary to reverse the onus of proof in relation to the defence in section 228E(3).*
>
> *This defence requires the accused to establish that an entity (not necessarily the accused) had been given a classification exemption in relation to the material and that the accused's conduct in relation to that material was consistent with the purpose for which the exemption was given and any conditions imposed on the exemption. Given that the exemption may have been given to an entity or person other than the accused, the appropriateness of the accused's conduct in relation to that material may not be within the knowledge of the prosecution.*
>
> *In any event, I understand this form of exemption is unique to the Queensland classification regime, and it is my understanding that no exemptions have ever been issued. However, because there is a capacity for such an exemption to be given, I considered it necessary to provide this defence.*

25. The committee notes the Attorney’s response.

♦ **clause 6 (proposed s.228E(5))**

26. The committee noted that material can be classified as RC without meeting the criteria in RC (1)(b) [that it involves a child] in which case no offence will be committed.

27. However, the committee sought information from the Attorney as to why the State Classifications Officer cannot view the material and issue a classification that is *prima facie* evidence that the material has not and will not be classified other than RC because it meets the description in RC (1)(b). The Explanatory Notes outlined that this is presently the case in Queensland. The presumption raised by the State Classifications Officer’s certificate could, in the unlikely case that the classification officer is wrong, be rebutted by the defence.

28. Since the classification by the board may be made after the offence is committed and even after the accused person is charged and proceeded against, the committee sought information from the Attorney as to how it would be ensured that an accused will not be dealt with before an application for post-offence classification was sought.

29. The Attorney responded as follows:

> *In paragraphs 77 and 78, the Committee seeks information from me as to the operation of the defence in section 228E(5).*
>
> *The purpose of this defence is to ensure that a person cannot be convicted of one of these serious offences in relation to material that has been approved by the classification system. The defence also allows the person to seek to have the item classified after being charged, if it was not classified at the time of the alleged offence.*
>
> *The Explanatory Notes set out why it was decided to require the defendant to establish that the material was classified (other than RC), rather than oblige the prosecution in every case*

to establish that the material was not classified, or was not capable of being classified (other than RC) prior to charging or prior to trial.

The vast majority of material seized by police is computer images, sometimes numbering in the thousands, and of that material, the vast majority will never be capable of being classified. Requiring the prosecution to prove in every case that the material was either not classified or not capable of being classified will be extremely costly (potentially in the millions) and time consuming. Therefore, it is a better balance in those rare cases to allow a defendant who genuinely believes that the material has already been classified, or is capable of being classified (other than RC), to seek to prove this.

This approach is again consistent with that taken in other jurisdictions, such as New South Wales (section 91 H(4) Crimes Act 1900) and Victoria (section 70(2) Crimes Act 1958). It should be noted that the Victorian defence only applies if the material is classified at the time of the offence, thereby leaving no option for the accused to seek to have the material classified after charge. I believe the Queensland provision, which also allows the accused to establish classification after the offence, is much fairer to the accused.

I note that the New South Wales provisions were recently restructured to remove the requirement for the prosecution to prove, in every case, that the material was or would be classified "RC", and instead provided the fact of classification as a defence.

30. The committee notes the Attorney’s response.

5. GAMBLING LEGISLATION AMENDMENT BILL 2005

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 23 February 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 2 of 2005 at pages 1 and 2. The Treasurer'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?[14]

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?[15]

♦ **The bill generally**

3. The committee noted that the bill amends the extensive statutory regimes governing various forms of gambling in Queensland. The committee further noted that while many of the bill's provisions impact upon the rights and liberties of individuals, they do so within the context of what has historically been an extensively-regulated industry.

4. The committee referred to Parliament the question of whether the various amendments made by the bill had sufficient regard to the rights of the individuals affected by them.

5. The Treasurer commented as follows:

> *While many of the provisions of the Bill impact on the rights and liberties of individuals, it is considered this is appropriate and necessary for the regulation of gambling. The extensive regulation of the gambling industry is justified by the potential for poorly controlled gambling operations to create significant financial and social harm to individuals and the community. This level of regulation has ensured that gambling operations in Queensland maintain a very high standard of integrity and player protection.*

6. The committee notes the Treasurer's response.

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

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

6. POLICE AND OTHER LEGISLATION AMENDMENT BILL 2004

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 23 November 2004. 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 1 of 2005 at pages 24 to 26. 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?[16]

♦ **clause 4**

3. The committee noted that cl.4 of the bill extends the power of police to obtain covert search warrants beyond situations involving organised crime and terrorism, so as to include "designated offences". The provisions of cl.4 had an obvious impact upon the rights and liberties of individuals.

4. The committee referred to Parliament the question whether the provisions of cl.4 had sufficient regard to the rights of persons against whom they may be used, as well as to the interests of the community as a whole.

5. The Minister commented as follows:

> *I acknowledge that the extension of power to police for covert search warrants to include "designated offences" may have an impact upon the rights and liberties of individuals. In view of the seriousness of the offences included in the definition of "designated offences", I consider there is an overriding public interest in police having this power to assist in bringing the offenders to justice.*
>
> *The use of this power would be subject to appropriate safeguards contained in chapter 4 of the Police Powers and Responsibilities Act 2000. As covert evidence gathering powers are exercisable only under a covert search warrant, which must be issued by a Supreme Court judge, existing requirements for covert search warrants would also apply to the extended category of investigations.*
>
> *The Public Interest Monitor would continue to perform an independent role and would be able to overview applications for the warrants. This overviewing function includes the authority to ask the applicant police officer questions and make submissions to the judge with respect to the application.*

6. The committee notes the Minister's response.

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

7. PRIVATE EMPLOYMENT AGENTS 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 23 February 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 2 of 2005 at pages 3 to 6. 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 bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[17]

♦ **clause 6**

3. The committee noted that cl.6(2)(f) of the bill provides that the code of conduct made under cl.6(1) may include provisions in relation to the discipline of private employment agents who contravene its provisions.

4. The committee sought information from the Minister as to the nature of the provisions likely to be incorporated in the code of conduct under cl.6(2)(f), and in particular whether they will stipulate additional forms of discipline.

5. The Minister responded as follows:

> *Clause 6 provides for a regulation to include a code of conduct for private employment agents and specifies those matters that may be contained in the code. Clause 6(3)(f) provides that the code may provide for disciplining private employment agents who contravene the code and clause 6(3)(h) provides that the code may provide penalties for contraventions.*
>
> *The disciplinary provisions consist of prosecution for offences before an industrial magistrate (clause 46) and applications to the District Court for injunctions restraining an agent from engaging in stated conduct or from acting as a private employment agent (clauses 36-42). Given the structure of the Bill and content of the proposed code, it has been considered more appropriate for the procedural requirements for such provisions to be set out in the principal legislation. Offence provisions related to the conduct of private employment agents (e.g. failure to provide an information statement to a work seeker, failure to keep the prescribed registers, publishing false information, etc) will be set out in the proposed code. It is not intended that the proposed code will stipulate any other additional procedural requirements in relation to disciplining of private employment agents.*

6. The committee thanks the Minister for this information.

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

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[18]

♦ **clauses 26 to 35**

7. The committee noted that the bill confers upon inspectors powers of entry which extend beyond situations where the occupier consents or a warrant has been obtained. The committee further noted that once entry has been effected, the bill confers on investigators a wide range of additional powers.

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

9. The Minister provided the following comments:

> *Clauses 26-35 set out the powers of inspectors to enter places and the general and specific powers that may be exercised by inspectors for the enforcement of the Bill. These powers reflect the powers given to inspectors under the Industrial Relations Act 1999. The reflection of such powers in the Bill is considered appropriate given that the private employment agent industry is also subject to the Industrial Relations Act in respect of fee charging restrictions on agents. Complaints of sub standard service by agents (to be subject to the provisions of the Bill) almost invariably accompany complaints of fee overcharging (subject to the provisions of the Industrial Relations Act) and so powers of enforcement should be the same to facilitate the investigation of such matters by the one investigator under the same procedures.*
>
> *Powers to seize evidence have been inserted into the Bill as part of a general suite of enforcement powers routinely made available to inspectors.*
>
> *The right of entry provisions do permit inspectors to enter a place without the consent of an occupier and without a warrant but only in the circumstances where there is a reasonable belief that the place is used as a workplace of a private employment agent and only when that workplace is open for business or open for entry. The practice of inspectors is to arrange appointments to visit business operators whenever possible. However, experience under this and other legislation has confirmed the need for the ability to visit unscrupulous operators without prior warning so as to preserve the integrity of evidence gathered during a visit.*
>
> *The enforcement provisions in the Bill have been drafted in consultation with the Office of the Parliamentary Counsel to take account of fundamental legislative principles.*

10. The committee notes the Minister’s response.

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

♦ **Part 6 (cls.36 to 42)**

11. The committee noted that Part 6 of the bill provides an additional enforcement measure against private employment agents, via the granting of injunctions.

12. The committee drew this enforcement process to the attention of Parliament.

13. The Minister commented as follows:

> *Clauses 36-42 of the Bill provide that applications may be made to the District Court for an injunction ordering that an agent be restrained from disreputable conduct or from acting as an agent.*
>
> *The grounds for an injunction generally reflect the grounds under the current Act upon which an agent may be refused issue of a license or for cancellation of a license. Under the current Act it is an offence to operate as an agent without a licence.*
>
> *The grounds for injunctions in the Bill include:*
>
> - *Contraventions of certain declared provisions of the Bill or proposed code. The declared provisions will be set out in the proposed code and will be limited to those seen as serious offences and offences against the fundamental issues of the Bill or proposed code;*
> - *Contraventions or failure to comply with orders made under those provisions of the Industrial Relations Act 1999 that deal with fee charging restrictions affecting private employment agents; and*
> - *Having been found guilty of a serious offence as defined (e.g. sexual or violent offences, drug trafficking, fraud etc punishable by more than three years imprisonment).*
>
> *The Act provides an important check-and-balance to the process by prescribing that the District Court may only grant the injunction if satisfied it should be granted having regard to the nature of the conduct complained of or the circumstances of any serious offence or contravention of a declared provision.*
>
> *Precedents exist for the use of injunctions to encourage compliance in industries governed by an Act and statutory Regulation/Code of Conduct model (e.g. the Fair Trading (Code of Practice - Fitness Industry) Regulation 2003 under the Fair Trading Act 1989 and the Code of Conduct Regulations for Property Developers, Motor Dealers, Auctioneers, Commercial Agents and Real Estate Agents under the Property Agents and Motor Dealers Act 2000). Grounds for seeking injunctions under those Acts also include having contravened any provision of the Act or code. In this regard their grounds are not as limited as those in the Bill and proposed code which will use as grounds only certain declared provisions.*
>
> *The private employment agents industry is an industry where work seekers need to be able to trust in the character and abilities – morally, and financially and otherwise - of their personal representatives. The proposed clauses are considered justifiable and necessary to effectively prevent persons from engaging in disreputable conduct or from operating as*

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

private employment agents based on their legal history. It is considered that the provisions will prevent such persons from doing further significant harm to work seekers and to the reputation of the industry.

The injunction provisions in the Bill have been drafted in consultation with the Office of the Parliamentary Counsel to include standard arrangements in provisions of this type and to reflect modern drafting practice and fundamental legislative principles.

14. The committee notes the Minister’s response.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[20]

♦ **clauses 44 and 45**

15. The committee noted that cls.44 and 45 of the bill effectively reverse the onus of proof. The committee referred to Parliament the question of whether, in the circumstances, this reversal of onus was justified.

16. The Minister commented as follows:

Clauses 44 and 45 of the Bill relate to the responsibility of persons, including corporations, for acts or omissions of representatives and the obligations on executive officers of corporations to ensure compliance by the corporation.

Defences exist if the person took reasonable steps to prevent the offending act or omission or to ensure compliance or if the person was not in a position to influence the conduct of the relevant person or if the person could not by the exercise of reasonable diligence, have prevented the offending act or omission.

The proposed clauses continue the effect of provisions contained in the current Act and are considered justifiable and necessary for the effective enforcement of the legislation and to prevent unscrupulous private employment agents sheltering behind their employees or their status as corporations.

17. The committee notes the Minister’s response.

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

8. TRANSPORT INFRASTRUCTURE AMENDMENT BILL 2004

Background

1. The Honourable P T Lucas MP, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 23 November 2004. It was subsequently passed, without amendment, on 25 November 2004.

2. The committee commented on this bill in its Alert Digest No 1 of 2005 at pages 27 to 32. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

3. In his letter the Minister, before dealing with the specific matters raised by the committee, provided the following background information in relation to the bill:

> *The primary aim of rail investigations conducted under the Transport Infrastructure Act 1994 (the principal Act) is to determine the factors which led to an accident or safety incident so that lessons can be learned and rail safety improved in the future.*
>
> *It is only through accurately identifying the true cause or causes of any rail incident that the appropriate remedial action can be taken and the broader community protected from the risk of a similar incident occurring in the future.*
>
> *The aim of the Transport Infrastructure Amendment Act 2004 (the amendment Act) was to ensure that investigators had the necessary powers to determine the true cause of any rail incident while at the same time providing appropriate protections for individuals assisting the investigation.*
>
> *I believe the principal Act (as amended) now strikes the appropriate balance in this regard and will facilitate the free-flow of rail safety information.*

Does the legislation provide appropriate protection against self-incrimination?[21]

♦ **clauses 5 and 7**

4. The committee noted that cls.5 and 7 of the bill inserted provisions which exclude the operation of the self-incrimination rule, or broaden the scope of existing exclusions. The committee further noted that the bill provided a detailed and comprehensive list of prohibitions upon the use which may be made of information obtained in consequence of these amendments, and imposed strict confidentiality obligations.

5. The appropriateness or otherwise of these provisions was ultimately a matter for Parliament to determine. The committee noted that Parliament passed the bill without amendment.

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[21] 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.

6. The Minister provided the following comment:

Under s217 of the principal Act, a rail safety officer (RSO) had the power to require certain persons to provide specific assistance to the officer. For example, s217(4) allowed the RSO to require certain persons to answer questions or produce documents relevant to the incident.

Failure to comply with a requirement given by an RSO under s217 was an offence unless the person had a reasonable excuse. As noted in the Committee's report (at clause 10), it is likely that a 'reasonable excuse' for refusing to comply with a requirement to answer questions was that the answer may incriminate the person.

The amendment Act specifically provides that self-incrimination is not a reasonable excuse for failing to comply with a requirement made of the person by an RSO under s217.

At clause 14 of its report the Committee sets out the circumstances in which it believes the removal of the protection against self-incrimination may be potentially justifiable.

Having regard to those circumstances, I make the following comments:

- *it may often be the case that information that would greatly assist a rail investigation is, in fact, 'peculiarly within the knowledge' of certain persons and that knowledge 'would be difficult or impossible to establish by any alternative evidentiary means';*
- *for example, it is likely that persons directly involved in the operation and maintenance of a train involved in a rail incident will possess information about that train and/or the incident which may not be readily obtained from any other source;*
- *the principal Act now provides (at s217(9C)(a)) that any evidence obtained from a person as a result of a requirement given by an RSO under s217 is not admissible against the person in civil or criminal proceedings;*
- *in addition, the principal Act provides (at s217(9C)(b)) that any further evidence obtained as a direct or indirect result of that initial evidence is also inadmissible;*
- *there are very tight restrictions on the disclosure of information collected by rail investigators in the course of an investigation and significant penalties for unlawful disclosure of that information;*
- *there is no obligation on a witness providing evidence to an RSO to fulfil any condition to be entitled to the protection against admissibility of evidence – the only pre-condition is that the evidence is given in response to a requirement by the RSO made under s217;*
- *the Act requires (at s217(10)) that when making a requirement of a person under s217 an RSO must:*
    - *warn the person it is an offence to fail to comply with the requirement unless they have a reasonable excuse;*
    - *advise them that it is not a reasonable excuse that complying with the requirement might tend to incriminate the person or make them liable to a penalty; and*
    - *advise them that anything obtained under the requirement, or any evidence derived either directly or indirectly from it, is not admissible against them in civil or criminal proceedings.*

On this basis, I would argue that the removal of the protection against self-incrimination is justified and is accompanied by appropriate protections for those assisting rail investigators. This approach will benefit Queensland by making our rail system as safe as possible.

It is important to note that these provisions only relate to investigations under the principal Act. These provisions do not prevent the Queensland Police Service from conducting investigations to determine negligence or criminal responsibility. Nor do they prevent the direct subpoenaing of witnesses or evidence in criminal or civil proceedings.

Additional comment

In Clause 11 of the Committee's Report it is stated that s235 of the Transport Infrastructure Act 1994, prior to its amendment by this Act, provided:

> *a general prohibition on use of the answer or the fact of production (or of any evidence derived therefrom) against the person in criminal proceedings (my emphasis)*

For completeness, I note that prior to the amendment s235 provided only that an answer given or document produced was inadmissible in criminal proceedings. Evidence derived from that answer or document was not precluded from admissibility by s235 in its earlier form.

Amendments contained in the Transport Infrastructure Amendment Act 2004 have now extended that protection to cover 'derived' evidence.

7. The committee notes the Minister's response.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[22]

♦ **clauses 9**

8. The committee noted that cl.9 of the bill inserted a retrospective provision. The committee noted, however, that the provision appeared to be beneficial, rather than adverse, to the individuals to whom it relates.

9. The committee accordingly had no concerns in relation to this retrospective provision.

10. The Minister provided the following comment:

> *Clause 9 of the amendment Act deals with statements made about the tilt train derailment on 16 November 2004 by a relevant railway employee prior to the commencement of the amendment Act. In particular, it provides that those statements, or any further evidence derived from those statements, are inadmissible against the employee in any civil or criminal proceeding (other than a criminal proceeding about the falsity of the statement).*

[22] 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.

The clause also provided that the statement, or any evidence derived from it, would be subject to the same limitations on disclosure as material collected by rail investigators after the commencement of the amendments.

This ensures that the protections provided to witnesses by the legislation applied whether or not those witnesses had provided evidence before or after the commencement of the amendments. This ensures consistency of treatment for witnesses and the evidence they provided.

As noted in the Committee's report the provision was beneficial to those employees who may have provided relevant statements.

I note the Committee states, at clause 27, that it has no concerns in relation to this retrospective provision and, as such, I make no further comment on it.

11. The committee notes the Minister's response.

♦ **clause 14**

12. The committee noted that cl.14 inserted into the *Freedom of Information Act* a transitional section which appeared to be retrospective in nature. The effect of that provision is to deny persons access to any existing statements obtained by rail safety officers in relation to the November 2004 derailment.

13. Clause 14 appeared to the committee to at least have the potential to adversely affect some individuals, although the extent and significance of its impact in the current situation is difficult to assess.

14. The committee made no further comment in relation this retrospective provision.

15. The Minister provided the following comment:

To encourage witnesses to fully co-operate with rail investigators, the legislation provides that certain evidence provided by witnesses will not be admissible against them in civil or criminal proceedings. It also establishes tight limitations on the disclosure of information collected by rail investigators.

In essence, the legislation seeks to ensure that material gathered during a rail investigation will only be used for the purposes of that investigation and not for any other purpose.

In line with this objective, it is appropriate that information collected during the investigation is only disclosable under the Freedom of Information Act 1992 (FOI Act) in circumstances that justify that disclosure – that is, in the terms of s48 of the FOI Act, where there is a 'compelling reason in the public interest'.

To ensure consistency of treatment of witnesses and evidence, it was necessary to extend that protection to documents obtained, received or brought into existence by an RSO before the commencement of the amendments.

The Committee notes (at clause 33) that the:

> *most obvious potential applicants for access to materials covered by c1.14 might be the media, or persons who were injured in the derailment.*

The protection afforded by the FOI Act is not absolute and it is open to any applicant, including the media or an injured party, to establish that a 'compelling reason in the public interest' exists to justify disclosure.

In addition, restricted information may be disclosed to a court in a civil proceeding (for example, in an action for damages for personal injuries) in circumstances set out in s217(4)(d) of the Act.

Importantly, the amendments in no way inhibit the ability of a potential plaintiff in a personal injuries action to seek access to material directly from the primary source (not the RSO) of that material either through the FOI Act or the normal court processes of disclosure or subpoena.

Finally, the legislation (see s216(6)) requires the Minister to table in the Legislative Assembly the report of the investigation prepared by the RSO.

16. The committee notes the Minister’s response.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[23]

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

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[23] 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

* 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

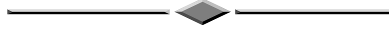
SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES[**]

(INCLUDING LIST OF CORRESPONDENCE)

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*
219	**Mining Legislation Amendment Regulation (No.1) 2004** ▪ Letter to the Minister dated 23 February 2005 ▪ Letter from the Minister dated 14 March 2005 ▪ Letter to the Minister dated 21 March 2005	22/2/05
238	**Marine Parks and Other Legislation Amendment and Repeal Regulation (No.1) 2004** ▪ Letter to the Minister dated 23 February 2005 ▪ Letter from the Minister dated 11 March 2005 ▪ Letter to the Minister dated 21 March 2005	22/2/05
240	**Marine Parks (Great Barrier Reef Coast) Zoning Plan 2004** ▪ Letter to the Minister dated 23 February 2005 ▪ Letter from the Minister dated 11 March 2005 ▪ Letter to the Minister dated 21 March 2005	22/2/05

(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 3rd 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

22 March 2005

APPENDIX

CORRESPONDENCE

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