SCRUTINY OF LEGISLATION COMMITTEE

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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. FINANCIAL ADMINISTRATION AND AUDIT AMENDMENT BILL 2005

Background

1. The Honourable P D Beattie MP, Premier and Treasurer, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *to improve the efficiency in the preparation, transparency and user-understanding of the reports of the consolidated fund and the financial reports of departments. Another objective is to improve the accountability processes under the Act.*

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

2. FOOD BILL 2005

Background

1. The Honourable S Robertson MP, Minister for Health, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *to ensure food for sale is safe and suitable for human consumption, to prevent misleading conduct relating to the sale of food and to apply the Food Standards Code.*

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

♦ **clauses 32-39 inclusive, 49-51 inclusive, 99 and 123**

3. The bill contains a significant number of provisions which create offences for breach of statutory obligations. Many of these offences carry substantial maximum penalties. Amongst these are the following:

- handling food intended for sale in a way that the handler knows, or ought reasonably to know, will make or is likely to make the food unsafe (cl.32) (maximum penalty 1,350 penalty units ($101,250) or 2 years imprisonment)
- sale of food that the seller knows or ought reasonably to know is unsafe (cl.33) (1,350 penalty units or 2 years imprisonment)
- falsely describing food intended for sale if the seller knows or ought reasonably to know that a consumer relying on the description will or is likely to suffer physical harm (cl.34) (maximum penalty 1,350 penalty units or 2 years imprisonment)
- handling food intended for sale in a way that will make or is likely to make the food unsafe, or selling food that is unsafe (cl.35) (maximum penalty 700 penalty units)
- misleading conduct relating to sale of food (cl.37) (maximum penalty 700 penalty units)
- failure to comply with the Food Standards Code in various respects (cl.39) (maximum penalty 700 penalty units)
- failure to have an accredited food safety program for a licensed food business, where one is required (cl.99) (maximum penalty 1,000 penalty units)
- failure to comply with that food safety program, where one is required (cl.123) (maximum penalty 500 penalty units).

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

4. The cl.32-34 offences, which carry the highest maximum penalties, require that offenders either know, or should reasonably know, the likely results of their actions. Negligent, as well as intentional, actions will therefore render a person liable to prosecution. Other offences (for example cls.35-40), carrying somewhat lower maximum penalties, appear to impose a form of strict liability. Indeed, cl.45 of the bill expressly excludes the operation of ss.23 and 24 of the *Criminal Code* (which respectively provide defences based on absence of intention and mistake of fact), although cls.42-47 of the bill specifically provide a range of defences.

5. The magnitude of the various maximum penalties mentioned above no doubt reflects the fact that the bill regulates a subject with obvious public health ramifications.

6. The committee notes that various clauses of the bill create offences, many of which carry very substantial maximum penalties including imprisonment. A number of offences apply to negligent, as well as intentional, behaviour whilst others (which carry generally lower maximum penalties) appear to impose a form of strict liability.

7. The committee refers to Parliament the question of whether the nature of the offences created by the bill, and the extent of the maximum penalties imposed for breach, are appropriate in the circumstances.

♦ **clause 3(2)**

8. The committee has long promoted the principle that, so far as is possible, persons should enjoy equality before the law. One aspect of this principle is that, again so far as possible, obligations imposed by statutes on citizens should also apply to government officials.

9. The committee notes that cl.3(2) expressly provides that the bill does not bind the State or a government owned corporation. The committee notes that by way of contrast, statutes such as the *Workplace Health and Safety Act 1995* (s.4), and the recently enacted *Public Health Act 2005* (s.3), expressly bind the State. These statutes deal with subjects comparable in many ways to that covered by this bill.

10. In relation to this matter, the Minister in his Second Reading Speech states:

> *The bill will not apply to state food businesses…*
>
> …
>
> *To ensure that food sold by government entities is safe and suitable, equivalent administrative arrangements will be put in place.*
>
> *These arrangements will mirror the obligations imposed on private sector food businesses under the Bill.*
>
> *State food businesses that require inspections or audits to demonstrate their compliance with these equivalent administrative arrangements may elect to have this undertaken by Queensland Health or local government officers.*

11. Whilst administrative arrangements may be put in place, the bill will nevertheless not impose any legal obligations upon the State or government owned corporations.

12. The committee notes that under cl.3(2), the State and government owned corporations are exempted from the operation of the bill. This contrasts with the position under various other statutes which deal with analogous subjects.

13. The committee seeks information from the Minister as to why it was considered appropriate that the State and government owned corporations should not be made subject to the legal obligations imposed by the bill.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[4]

- **clauses 175-208 inclusive**

14. As the Minister states in his Second Reading Speech, the bill contains "a comprehensive set of monitoring, investigative and enforcement powers". Given the obvious public health implications of the subject with which it deals, that is perhaps not surprising.

15. Clause 175 of the bill confers on "authorised persons" powers of entry which extend somewhat beyond situations where the occupier consents or a warrant has been obtained, in that it applies to public places when open for entry, and to premises at which a food business is carried on, whilst those premises are open for business or otherwise open for entry. In addition, cl.204 of the bill empowers an authorised person to enter any non-residential premises where a food business is being carried on, without warrant or consent, where the authorised person is satisfied on reasonable grounds this is necessary to avoid an imminent risk of death or serious injury to any person from food related to the food business.

16. Clause 185 provides an additional power to stop vehicles.

17. The bill provides an extensive range post-entry powers (see particularly cl.182).

18. The bill confers a range of powers additional to those usually included in regulatory bills. For example, cls.209-211 empower an authorised person to give a person carrying on a food business an "improvement notice". Clauses 216-221 empower the chief executive, in situations of perceived serious danger to public health, to issue any of a series of orders listed in cl.217. These may require the publication of warnings that particular food is unsafe, prohibit the cultivation, taking or obtaining of particular food from a stated area, direct that particular food sold be recalled, and impounding or destroying particular food. Again, the nature of these powers can be related to the subject matter of the bill.

19. The committee notes that the bill confers on authorised persons an extensive range of entry and post-entry powers.

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

[4] 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 for the reversal of the onus of proof in criminal proceedings without adequate justification?[5]

- **clauses 259 and 260**

21. Clause 259 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).

22. Clause 260 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.

23. 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.

24. Clauses 259 and 260 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.

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

> *While these provisions effectively provide for the reversal of the onus of proof, it is important to note that the offences provided for under the legislation deal with major public health issues (eg. selling unsafe food). Having regard to the object of the legislation, it is appropriate that:*
>
> - *a person be required to oversee the conduct of his or her representatives and, in doing so, make reasonable efforts to ensure that his or her employees or agents comply with the requirements of the legislation;*
> - *an executive officer who is in a position to influence the conduct of a corporation be required to ensure the corporation complies with the legislation; and*
> - *an executive officer who is responsible for a contravention of the legislation, be accountable for his or her actions and not be able to 'hide' behind the corporation.*
>
> *The provisions are therefore warranted to ensure that there is effective accountability at a corporate level.*

26. The committee notes that cls.259 and 260 of the bill effectively reverse the onus of proof.

27. The committee refers to Parliament the question of whether, in the circumstances, this reversal of onus is justified.

[5] 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.

♦ **clause 250(2)(e)**

28. Clause 250 of the bill provides that in legal proceedings, including proceedings for an offence, various matters may be put into evidence before the court by means of a certificate signed by the chief executive or a chief executive officer. Most of these matters are non-controversial, and the committee has no concerns in relation to them.

29. However, cl.250(2)(e) provides that a certificate of analysis in relation to a thing analysed under the bill is evidence of, amongst other things, "the results of the analysis".

30. The committee has previously queried the insertion in bills of similar provisions.[6]

31. As mentioned on those occasions, the committee's concern is that this provision may go beyond the range of non-controversial matters. Whilst the court is not obliged to accept the results stated in the certificate of analysis, it may (particularly in the absence of contradictory evidence) do so.

32. As mentioned earlier in this chapter, various offences created by the bill carry very substantial maximum penalties, including imprisonment.

33. The committee notes that cl.250(2)(e) provides that a certificate of analysis is evidence of the results of the analysis in legal proceedings, including proceedings for offences. Whilst contrary evidence can displace the evidence provided by the certificate, cl.250(2)(e) effectively reverses the onus of proof.

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

Does the legislation provide appropriate protection against self-incrimination?[7]

♦ **clauses 200 and 270**

35. Clause 199 of the bill provides that an authorised officer may require a person to make available for inspection at a nominated reasonable time and place a document issued to the person under the bill, or a document required to be kept by the person under the bill. Clause 200(1) provides that a person to whom such a requirement is made must comply unless they have a reasonable excuse. Clause 200(2) provides that it is not a reasonable excuse if complying might tend to incriminate the person.

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

- the matter involved is a matter peculiarly within the knowledge of the person to whom the requirement or question is directed, and which would be difficult or impossible to establish by any alternative evidentiary means; and

6 *Transport Operations (Road Use Management) Amendment Bill (No 2) 2002:* Alert Digest No 6 of 2002 at pages 42-43.

7 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.

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

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

37. The committee notes that cl.200 does not provide any form of "use" or "derivative use" protection in relation to production of the relevant documents. However, it only applies to a specific category of documents, namely those issued or required to be kept under the bill's provisions. As the committee has recently acknowledged,[8] denying the benefit of the self-incrimination rule in relation to documents of this type may be less problematical than in other contexts.[9]

38. Clause 270(1) provides that a person who carries on a food business must, if a prescribed food has been tested and a prescribed contaminate in it has been isolated, immediately orally notify the chief executive about the isolation, and follow that up with written notice within 24 hours. Clause 270(3) provides that it is not a reasonable excuse that complying with this requirement might tend to incriminate the person.

39. The committee notes that cl.270(4) provides a "use" and "derivative use" immunity for the person, in both civil and criminal proceedings.

40. In relation to cl.270(3), the Explanatory Notes state:

> *Contaminates in food for sale can lead to serious health risks to the public. The serious nature of the risks warrants removing the right to protect oneself against self-incrimination.*

41. The committee notes that cls.200 and 270 both deny persons the benefit of the rule against self-incrimination.

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

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[10]

♦ **clause 278**

43. Clause 278 of the bill authorises the making of regulations under the bill. Clause 278(2)(e) provides that a regulation may impose a penalty of not more than 50 penalty units for contravention of a regulation.

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

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8 See the committee's report on the *Contract Cleaning Industry (Portable Long Service Leave) Bill 2005*: Alert Digest No. 4 of 2005 at pages 5-6.

9 The reasons for this are set out in Alert Digest No. 4 of 2005 at page 5.

10 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.

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

- rights and liberties of individuals should not be affected and the obligations imposed on persons by such delegated legislation should be limited; and
- the maximum penalty should be limited, generally to 20 penalty units.[11]

46. The committee observes that the permissible maximum penalty under cl.278(2)(e) is 2.5 times that favoured by the committee. This issue does not appear to be addressed in either in the Explanatory Notes or the Minister's Speech.

47. Clause 278(2)(e) provides for regulations to impose penalties of no more than 50 penalty units for contravention of a regulation. The committee is generally concerned by the delegation of legislative power to impose penalties exceeding 20 penalty units.

48. The committee recommends that the Minister consider amending the bill to reduce the permissible maximum penalty provided in cl.278(2)(e).

[11] See, for example, Alert Digest No. 10 of 1997 at pages 6-7.

3. JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2005[12]

Background

1. The Honourable L D Lavarch MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *to progress minor, technical and miscellaneous amendments to justice portfolio legislation under a single statute.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[13]

- **clauses 44, 95 and 152**

3. This bill, which amends a large number of statutes, includes several provisions which are, or may be, retrospective in effect.

4. Clause 44 of the bill inserts a provision declaring that chapter 2 part 2 of the *Civil Liability Act 2003* ("Proportionate liability") commenced and had effect from 1 March 2005.

5. The chapter 2, part 2 provisions were repealed and replaced after the Act had been assented to, but before the relevant provisions commenced. However, the Act at all times provided they were to commence on a date to be fixed by proclamation. A proclamation made under the *Professional Standards Act 2004* (which repealed and replaced the provisions), and then one made under the *Civil Liability Act*, declared the commencement of the relevant provisions. However, the first proclamation nominated 1 March 2005 and the second 11 March 2005. The purpose of the bill is to resolve any ambiguity in favour of the earlier date.

6. In the committee's view, that may well have been the effective commencement date, even without the express declaration of the position by cl.44.

7. Clause 93 of the bill amends s.93A of the *Evidence Act 1977* in various respects, principally by providing that where a statement admissible under that section is made by a child, the child need only be a child when the statement is made, not when the court proceedings take place. The effect of proposed s.144 (inserted by cl.95) is to declare that the amended provisions apply in relation to any proceedings starting after the section commences, regardless of when the conduct giving rise to the proceeding happened. The section goes on to provide that statements previously admitted as proposed by amended s.93 are taken to have always been admissible under that section.

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[12] The committee thanks Mr Robert Sibley, Senior Lecturer in Law, Queensland University of Technology, for his valued advice in relation to the scrutiny of this bill.

[13] 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.

8. It appears that a recent Court of Appeal decision has determined that under the current section, the witness has to be a child both at the time of making the statement and at the time of the proceedings. The Explanatory Notes assert that this is contrary to the previous general understanding as to the meaning of the section.

9. Clause 149 amends s.165(4) of the *State Penalties Enforcement Act 1999*, which limits to camera-detected offences the capacity to create differential penalties for individuals and corporations committing the same offence. Clause 152 inserts new s.174, which effectively declares that previous wording of s.164(4) is taken not to have restricted the normal capacity to make regulations providing differential penalties for all types offences dealt with by the Act.

10. The background to each of the retrospective or potentially retrospective provisions mentioned above is set out in the Explanatory Notes, and in the Attorney's Speech.

11. The practice of making retrospectively validating legislation is not one which the committee endorses because such law could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. The committee does, however, recognise that there are occasions on which curative retrospective legislation, without significant effect on rights and liberties of individuals, is justified to correct unintended legislative consequences.

12. The various retrospective provisions mentioned above differ in nature in content. As mentioned, the committee considers cl.44 may well not amend the existing law. While cl.152 may well be inconsistent with the current law, its impact appears to be on corporations rather than individuals.[14] In relation to cl.95 (proposed s.144), however, the bill clearly amends the current law as decided by the Court of Appeal, but it is arguable that, as the Explanatory Notes assert, the matter although significant relates to procedure rather than substantive law.

13. The committee notes that cls.44, 95 and 152 are declaratory in nature, and therefore potentially retrospective in effect.

14. The circumstances dealt with by the various clauses differ considerably. All are canvassed in the Explanatory Notes and the Attorney's Speech.

15. The committee refers to Parliament the question of whether the retrospective provisions of cls.44, 95 and 152 have sufficient regard to the rights of individuals affected by them.

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

- **clauses 53 to 55**

16. Clause 55 of the bill (proposed ss.227A-227C) amends the *Criminal Code*. Proposed s.227A makes "voyeuristic" observations or visual recordings of other persons an offence, while proposed s.2278B prohibits the distribution of such recordings.

[14] The committee's statutory charter concerns the rights and liberties of individuals. Corporations are not "individuals".

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

17. Both offences are misdemeanours carrying a maximum penalty of 2 years imprisonment.

18. Proposed s.227A is quite broadly framed. The obvious imperative in legislating for this subject is to create provisions which, whilst appropriately protecting persons' right to privacy, do not render others liable to prosecution for an indictable offence over a relatively minor infringement of that right.

19. Section 227A(1)(b)(ii) makes it an indictable offence carrying 2 years imprisonment for anyone to observe by any means or visually record another person, without their consent and in circumstances where a reasonable adult would expect to be afforded privacy, when the other person *is engaging in a private act* and the observation or visual recording *is made for the purpose of observing or visually recording* a private act.

20. A *private act* means –

(a) showering or bathing; or

(b) using a toilet; or

(c) another activity where a person is in a state of undress; or

(d) intimate sexual activity that is not ordinarily done in public (cl.54).

21. *State of undress* is widely defined, and extends to the case where some of the person's underwear is not covered by an outer garment (cl.54).

22. However, s.227A(1)(b)(i) also makes it an indictable offence carrying 2 years imprisonment for anyone to observe by any means another person without their consent and in circumstances where a reasonable adult would expect to be afforded privacy when the other person *is in* a private place.

23. A private place is defined by cl.54 to mean a place where a person might reasonably be expected to be engaging in a *private act.* This would include, for example, any bedroom in a private house.

24. Thus it would seem to be an offence if a person looks at another person in the bedroom of a house without their consent and in circumstances where a reasonable person would expect to be afforded privacy even if they are not actually engaged in a private act.

25. The committee notes that cl.55 of the bill creates several offences in relation to "voyeuristic" observations and visual recordings of persons.

26. The committee refers to Parliament the question of whether the cl.55 provisions, whilst protecting persons' right to privacy, have sufficient regard to the rights of persons who conduct the relevant practices.

♦ **clause 109**

27. Clause 109 of the bill amends s.40 of the *Justices Act 1886*, which presently provides a maximum penalty for contempt of a Court sitting under that Act, of 2 penalty units ($150) or imprisonment for 14 days.

28. Clause 109 inserts new maximum penalties of 84 penalty units ($6,300) or imprisonment for 1 year.

29. The Explanatory Notes state that this brings the contempt provisions of the *Justices Act* into line with those applying to civil proceedings of Magistrates Courts sitting under the *Magistrates Court Act*.

30. The committee notes that cl.109 of the bill substantially increases the maximum penalties in relation to contempt of courts sitting under the *Justices Act*.

31. However, as cl.109 aligns the contempt provisions of the *Justices Act* with those applying to the same Courts when sitting under the *Magistrates Court Act*, the committee does not consider the increases in penalties to be objectionable.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[16]

- **clause 136(1)**

32. Section 71(2)(b) of the *Professional Standards Act 2004* currently authorises regulations to be made prescribing "fees payable under this Act".

33. Clause 135 of the bill deletes current s.71(2)(b) and, in its place, stipulates two types of fees which regulations may impose, namely:

- fees imposed on applications to the Professional Standards Council (proposed s.71(2)(b)(i)); and
- an annual fee, in relation to a scheme which has been approved by the Council under the Act, imposed during each year the scheme remains in force (proposed s.71(2)(b)(ii)).

34. A major purpose of the Council is to approve schemes limiting the legal liability of members of specific occupational associations. For this purpose, occupational associations may prepare a scheme themselves (s.8(1)), or apply to the Council for it to prepare a scheme (s.8(2)). The association may then apply to the Council for it to approve the scheme (s.8(3)). During the life of a scheme, similar processes (including applications) are stipulated for amendments to, and revocation of, a scheme (s.18). The applications mentioned in ss.8 and 18 of the Act will be subject to fees mentioned in proposed s.71(2)(b)(i).

35. Clause 136(1) of the bill also inserts into the Dictionary to the Act a definition of "fee", in the following terms:

Fee includes tax.

[16] 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.

36. In relation to the latter amendment, the Explanatory Notes state (at page 35):

> *Clause 136 amends Schedule 2 of the Act by inserting a definition of 'fee' that allows for setting of fees by the Governor in Council at levels that ensure cost recovery for the Professional Standards Council's activities in approving a scheme during the life of the scheme, as well as providing for the further functions of the Council under the Act.*

37. It would appear from this passage, and from the fact that the regulations may now prescribe an "annual fee" during the life of each scheme (proposed s.71(2)(b)(ii)), that it is intended revenue generated by application fees and annual fees will be set at a level sufficient to fund the Council's overall operating costs (in other words, that the Council should be entirely self-funded).

38. This is a policy decision, with which the committee does not take issue. It may also be necessary, to enable that policy to be implemented, for the Act to confer some specific authority beyond a mere power to impose "fees", as there could be some doubt as to whether all of the Council's activities involve the provision of a "service".[17]

39. However, the committee is concerned that the policy is to be facilitated by defining "fee" so as to include a tax.

40. 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.[18]

41. Even where the tax is primarily prescribed in primary legislation but certain significant matters, such as the rate of the tax, are permitted to be set by regulation, the committee has endorsed the view that either a maximum rate of tax or method of calculating such a maximum rate should be incorporated in the primary legislation.[19]

42. Under the bill's proposed definition of "fee", there would be no limit to the level at which application and annual fees may be set. If, as it appears, the intent is simply to ensure full cost-recovery for all the Council's operations, the committee considers the appropriate mechanism would be for "fee" to remain undefined, and for provisions to be inserted in the Act (in s.71 or elsewhere) expressly authorising the setting of s.71(2)(b) fees at levels sufficient to fund the Council's overall operations.

43. The committee notes that cl.136(1) inserts into the *Professional Standards Act 2004* a definition of "fee" which includes taxes. This will enable taxes to be imposed by means of regulations made under the Act, rather than via the Act itself.

44. It is the committee's long-standing view that taxes should be imposed in primary legislation rather than by regulation.

45. The committee recommends that the bill be amended in the manner proposed above.

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17 See, for example, *Air Caledonie International v Commonwealth (1988) 195 CLR 462.*

18 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, and its report on the *Community Ambulance Cover Bill 2003:* Alert Digest No. 6 of 2003 at pages 2-3.

19 This has long been the view of the Senate Standing Committee for the Scrutiny of Bills: see its report *The Work of the Committee during the 38th Parliament May 1996 – August 1998*, at pages 64-67.

4. NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 2005

Background

1. The Honourable H Palaszczuk MP, Minister for Natural Resources and Mines, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *(to amend) five pieces of Department of Natural Resources and Mines legislation as well as minor amendments to nine other Acts.*
>
> *Amendments are also proposed to legislation from other portfolios, including Local Government and Transport, as it is relevant to amendments being proposed in this portfolio.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[20]

- **clauses 23, 37, 101(2) and 107(2)**

3. Clause 37 of the bill inserts into the *Land Act 1994* proposed ss.358A and 358B. Section 358A enables the Governor in Council, by gazette notice, to direct the chief executive or registrar of titles to amend the current registered particulars about specific land to record the existence of an easement which was previously acquired under an acquisition Act but not registered. This will apply both to the leasehold land register and, if the land has subsequently been freeholded, to the register of freehold land.

4. The relevant easements, as explained by the Minister in his Second Reading Speech, were acquired for, and mostly continue to be used for, their intended purpose of carrying public utilities (water pipelines, rail lines and the like).

5. Section 358B provides that no compensation is payable in relation to a registration carried out under s.358A.

6. Section 358A provides that all compensation issues under an acquisition Act in relation to the original acquisition must have been disposed of. However, it seems at least possible that some lessees or owners, who have acquired their land subsequent to creation of the relevant easement, may at the time of acquisition have been unaware of the existence of this easement, and of its potentially detrimental effect on the value and amenity of their land. At the same time, as the Explanatory Notes point out, registered titleholders of freehold land, whilst generally subject only to registered interests, have always been bound by unregistered easements (s.185(1)(c), *Land Title Act 1994*).

7. Clause 23 inserts into the *Land Act* proposed s.291A, and cl.101(2) inserts into the *Land Titles Act* proposed s.185(3), which enable the relevant registers to be amended to record the existence of easements other than "acquisition easements". Again, it is relevant to note that

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

indefeasibility of title under the *Land Title Act* has never extended to easements, which are still capable of being binding though unregistered.

8. In relation to the cl. 37 amendments, the Explanatory Notes state:

> *The easements were properly compulsorily acquired under legislation for public utility infrastructure and the interest in the land vested at law in the then appropriate constructing authority, and in most cases have continued to be used for their intended purpose. As it was through administrative oversight that the easements were not registered, it is considered that property rights are not infringed by the amendment.*
>
> *As the required compensation processes for the acquisition were followed, there is no breach of fundamental legislative principles in this respect. Governor in Council approval must be given, thereby ensuring that the appropriate level of consideration is given to any proposed correction to a register under this amendment. An adequate review mechanism of a decision to correct a register is provided under the Judicial Review Act 1991.*

9. In relation to the cls.23 and 101(2) amendments, the Notes state:

> *An amendment clarifies that the registrar's power to correct the freehold land register includes power to record that a lot is burdened by an easement the particulars of which have been omitted from, or misdescribed in, the register. Such an easement is, and always has been, a statutory exception to indefeasibility of title and therefore no property rights are affected.*

10. The committee notes that cls.23, 37, 101(2) and 107(2) amend the *Land Act* and the *Land Titles Act* to enable easements which were previously in existence, but not registered, to be noted in the relevant land register. No compensation is payable in relation to this action.

11. Unregistered easements have always had the capacity to bind registered proprietors of leasehold and freehold land.

12. The committee refers to Parliament the question of whether the provisions of cls.23, 37, 101(2) and 107(2) have sufficient regard to the rights of lessees and owners of land affected by the relevant easements.

♦ **clauses 48 and 110**

13. Clauses 48 and 110 of the bill insert into the *Land Act* and the *Land Titles Act* respectively provisions dealing with "tidal boundary plans of subdivision".

14. The effect of the provisions is to place severe restrictions upon the capacity of certain lessees of leasehold land, and registered owners of freehold land, to subdivide their land during the next three years.

15. The new provisions will apply where the land sought to be subdivided has at least one boundary formed by a body of tidal water (whether the ocean, a river or estuary), and the tidal boundary as shown on the new plan of subdivision differs from that on the current plan.

16. In such cases, even if the earlier survey appears to have been carried out in accordance with technical standards prevailing at the time, and even if the discrepancy in the tidal boundary appears due to natural accretion or erosion, the new plan of subdivision will only be able to

be registered with Ministerial approval. Such approval can only be granted if the Minister is satisfied registration of the plan of subdivision "will not, in practical terms, be contrary to the public interest" (proposed ss.431ND and 191D).

17. Both proposed ss.431NG and 191F provide that no compensation is payable to any person because of the prohibition on registration of the plan of subdivision.

18. The boundary of land which adjoins a body of tidal water (whether a river, estuary, or the ocean) can be surveyed by means of a series of connected straight line segments which generally follow the edge of the body of water. This boundary, whilst mimicking the shape of the body of water, is fixed. Alternatively, the boundary can be surveyed by reference to the body of water itself, in which case the actual boundary line is the high-water mark. This is known as an ambulatory boundary, since over time it may move imperceptibly either outwards (accretion) or inwards (erosion) in accordance with natural changes in the position of the edge of the body of water. Rapid change caused by a catastrophic event such as a flood or cyclone does not alter the boundary.

19. The bill's provisions apply to land with the second type of boundary.

20. The lengthy explanation in the Minister's Speech suggests his primary concern is that certain blocks of land (particularly in central Queensland) have an ambulatory boundary which runs along by a beach, which in practice has always been accessed by the public. The Minister states:

> *Mr Speaker, it was recently brought to my attention that a number of freehold lots along coastal areas, particularly along the central coast, were being resurveyed and new survey plans registered in the Land Registry operated by the Department. The concern I have is that some of these survey plans depict a significantly greater land area in private ownership than intended in the original survey. In some cases the boundaries of freehold land have extended on to what were previously thought to be public beaches.*
>
> *This raises a potential threat to public ownership of and access to beaches and other tidal areas. There is the possibility that owners of the re-surveyed blocks may, now or at some time in the future, use their position as freehold owners, of this tidal land to impose restrictions on the community's access to what has always been understood to be public areas. I believe that the community would be very concerned if this occurred, because beaches are part of the Australian way of life and it is important we all have access to them.*

21. The purpose of the current three year restriction on subdivision is, in the words of the Minister:

> *(to) allow for the development of a long-term policy and legislative response to what is a complex situation.*
>
> *This process will involve further government deliberation, technical surveying advice and consultation with key stakeholders to ensure the best outcome for Queenslanders.*

22. It may be, of course, that many of the recent plans of subdivision to which the bill relates accurately depict the current tidal boundary of the respective properties, which could have moved significantly since the previous surveys, undertaken as long as 100 or more years ago.

23. The committee notes that cls.48 and 110 impose major restrictions, for the next three years, on the subdivision of land which has a boundary constituted by a body of tidal water.

24. It appears from the Minister's speech that, in particular, this is designed to provide government with time to consider policy options for addressing situations where the relevant land boundaries are located within beaches, to which the public has traditionally enjoyed access.

25. It may be that many of the relevant plans of subdivision will accurately depict what, in legal terms, is the current boundary of the land. No compensation is to be payable for any adverse effects of the proposed restrictions.

26. The committee refers to Parliament the question of whether the provisions of cls.48 and 110 have sufficient regard to the rights of owners or lessees of the relevant lands.

♦ **clause 107(1)**

27. Clause 20 of the bill inserts into the *Land Act 1994* proposed s.288A, which requires a mortgagee of a lease or sublease under that Act to take reasonable steps to ensure the identity of the purported mortgagor (the lessee or sublessee) when that person requests the loan. Proposed s.288B imposes similar obligations where the mortgage of a lease or sublease is to be transferred. Clause 53 (proposed ss.11A and 11B) imposes a similar obligation upon mortgagees of freehold land registered under the *Land Titles Act 1994*.

28. Clause 101(1) provides that a mortgagee whose mortgage is recorded in the freehold land register, but who has not complied with the obligations mentioned above, does not obtain the benefit of the indefeasibility provisions usually associated with registration under the *Land Titles Act*. Clause 107, which amends s.189 of the Act, provides that the mortgagee is not eligible to obtain compensation for any losses it may suffer as a result.

29. Whilst indefeasibility of title currently does not apply where there has been fraud on the part of the registered proprietor (s.184(3)(b)) the provisions of cl.101(1), for what appears to be the first time, make indefeasibility dependent upon the exercise of a reasonable standard of care by the person claiming it.

30. The Minister deals with issue at considerable length in his Speech. The Minister attributes the singling out of mortgagees for this additional set of requirements to the fact that mortgagor identity is an area where fraud is growing. As it does not usually involve the registered proprietor, the mortgagee currently obtains the benefit of indefeasibility. However, the Minister states, many "lenders of last resort", who lend money on mortgage at excessively high interest rates, do not carry out an acceptable level of identity verification.

31. As a related measure, the bill limits the amount of compensation which a defrauded mortgagee can obtain, even if it complies the bill's new requirements (proposed 189A, inserted by cl.108). Compensation for the interest and costs lost by the mortgagee will be limited to amounts more modest than those usually charged by such mortgagees.

32. The committee notes that cl.101(1) of the bill deprives mortgagees of the benefit of indefeasibility of title in relation to its mortgage, if it fails to exercise reasonable care in

identifying the purported mortgagor. Clause 107 provides that a mortgagee who fails to comply with these requirements is ineligible to obtain compensation for its loss.

33. The committee refers to Parliament the question of whether the provision of cls.101(1) and 107(1) have sufficient regard to the rights of the relevant mortgagees.

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

♦ **clauses 48 (proposed s.431NC) and 110 (proposed s.191C)**

34. The amendments of the *Land Act* and the *Land Title Act,* which generally prohibit the subdivision of land with a tidal boundary for a three-year period, take effect from 8 November 2005 (proposed ss.431NB and 191B). The bill is therefore retrospective in effect. 8 November 2005 was the date on which the bill was introduced into Parliament.

35. Proposed ss.431NC and 191C provide that the chief executive and registrar respectively must not, without approval of the Minister, register any relevant plan of subdivision. Subsection (2) of both sections then provides:

> *The [chief executive/registrar's] refusal, on or after 8 November 2005, and before the commencement of this section, to register a plan of subdivision is taken to have been a valid refusal under this part if, on the commencement of this section, this part commences to apply in relation to the plan of subdivision.*

36. 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.

37. As mentioned earlier, the provisions of cls.48 and 110 may well be adverse to certain lessees and owners of leasehold and freehold land.

38. This bill may well be passed and assented to within the next several weeks. Alternatively, it may not be enacted until parliamentary sittings resume in 2006. The nature of the relevant provisions of the bill is such that during the period from 8 November 2005 until the bill is enacted, departmental officers who receive any of the relevant plans of subdivision for registration will, the committee assumes, refuse to deal with such applications in the normal manner, and will instead proceed in the manner required by the bill. Proposed ss.431NC and 191C clearly contemplate that this will occur.

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

39. The committee has previously commented adversely upon provisions of this nature.[22] Apart from the fact that it pre-empts the Legislative Assembly's ultimate approval of the bill, such an approach will place departmental officers in the invidious position of refusing to take administrative steps which, under the current legislation, are normally both necessary and appropriate, on the basis that their behaviour will later be retrospectively legitimised.

40. The committee notes that cls.48 and 110 give retrospective effect to the general prohibition on certain land owners and lessees registering plans of subdivision. The relevant provisions will clearly be adverse to such persons. The Explanatory Notes detail the government's reasons for imposing these restrictions.

41. The committee also notes that until the bill is enacted, departmental officers will presumably decline to process relevant plans of subdivision lodged with them in the manner presently required, on the assumption that the bill will subsequently be passed and their behaviour legitimised. The committee generally disapproves of provisions which place public officials in this invidious position.

42. The committee refers to Parliament the question of whether the retrospective aspects of cls.48 and 110 have sufficient regard to the rights of individuals affected by them.

[22] See the committee's report on the *Primary Industry Bodies Reform Bill 1999*: Alert Digest No 13 of 1999 at pages 12-15.

5. SUGAR INDUSTRY AMENDMENT BILL 2005

Background

1. The Honourable G R Nuttall MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *to remove statutory vesting and to provide transitional arrangements to facilitate the orderly marketing of the Queensland sugar crop.*

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

6. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2005

Background

1. The Honourable P T Lucas MP, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 8 November 2005.

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

> *to progress legislative amendments to establish a framework for toll roads and associated infrastructure which may incorporate State, local government or private sector involvement.*

Does the legislation have sufficient regard to the institution of Parliament?[23]

- **clauses 24 and 32 (proposed s.105Z)**

3. Amongst other things, this bill amends the current provisions of the *Transport Infrastructure Act 1994* in relation to franchising of roads by the State, and introduces new provisions enabling local governments to franchise local government tollways.

4. Section 85 of the Act currently provides that the Minister may, for the State, enter into a road franchise agreement with a person under which, or as part of which, the person is to invest in the construction, maintenance or operation of road transport infrastructure. Section 86 currently provides:

> *The Minister must table each road franchise agreement, and each amendment of a road franchise agreement, in the Legislative Assembly as soon as practicable after it is entered into.*

5. Clause 24 of the bill amends s.86 to provide that the Minister need now table only "a document containing a summary of " the relevant agreement. The bill also inserts into s.86 a new subsection (2), which provides:

> *(2) Before the document is tabled, it must be certified by the auditor-general as being an accurate summary of the road franchise agreement or amendment.*

6. The new provisions in relation to local government tollways (inserted by cl.32) provide that where a local government enters into a local government tollway franchise agreement or an amendment of such agreement the Mayor must, as soon as practicable afterwards, table a "a document containing a summary of the agreement or amendment" at a meeting of the local government (proposed s.105Z(1)). Section 105Z(2) lists a number of matters which must be contained in the summary. Section 105Z(3) again provides that before the document is tabled, it must be certified by the auditor-general as being an accurate summary of the relevant agreement or amendment.

7. Many statutes contain provisions which, like s.86, require the tabling by Ministers in the Legislative Assembly of specific documents. This process is designed to inform the

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

Parliament and the public of activities of the Executive government, which is ultimately accountable to Parliament.

8. It is apparent from the Explanatory Notes, and in particular from the Minister's Second Reading Speech (which deals with the matter at some length) that the replacement of the current s.86 requirement to table a complete copy of the relevant agreement with a requirement to table only a summary, is due to a desire to exclude commercially sensitive information contained in the agreements. There is an inherent tension between this imperative and, on the other hand, the accountability of the Executive government to Parliament and the people.[24]

9. The committee notes that cl.24 of the bill amends current provisions of the *Transport Infrastructure Act 1994* to provide that the Minister need only table a document containing a summary of a road franchise agreement, rather than the agreement itself.

10. The committee notes that this will have the effect of reducing the amount of information currently provided to Parliament and the people in relation to the relevant activities of the executive government.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[25]

- **clause 26**

11. Section 93 of the *Transport Infrastructure Act 1994* presently provides for State-controlled roads or franchised roads, or parts thereof, to be declared as toll roads by means of a regulation. The regulation must also state a number of matters, including when tolls become payable for use of the road, the types of vehicles liable for tolls, and the amount of toll payable.

12. Clause 26 of the bill replaces the current s.93 with a new section dealing with these matters. Notably, the new section provides that toll roads may be declared, and the other matters may be dealt with, by means of a gazette notice made by the Minister, rather than a regulation.

13. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated will be dealt with by regulation, to be processed through an alternative means which does not constitute subordinate legislation. A gazette notice is of course not subordinate legislation.

14. The significance of providing for matters to be dealt with via such alternative processes is that the relevant instruments, not being "subordinate legislation", are not subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*.

[24] See the Queensland Parliament's Public Accounts Committee's Report No 61, *Commercial-in-confidence Arrangements*, tabled on 29 November 2002.

[25] Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

15. In considering whether it is appropriate that matters be dealt with through an alternative process, the committee takes into account the importance of the subjects dealt with and the practicality or otherwise of including those matters in subordinate legislation. It would appear to the committee that the initiation of a toll road project is a matter of some significance, and that moreover the number of such projects in the State is unlikely to be large in absolute terms.

16. The committee notes that cl.26 of the bill replaces the current requirement of s.93 of the *Transport Infrastructure Act 1994* that toll roads be declared by means of regulation, with a requirement that this be effected by means of a gazette notice. Unlike a regulation, a gazette notice is not subordinate legislation and will not therefore be subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992*.

17. The committee notes that the declaration of a toll road is a matter of some significance, and that the number of toll roads in the State is unlikely to be large in absolute terms.

18. In the circumstances, the committee seeks information from the Minister as to why the proposed amendment is considered appropriate.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

7. SERVICE DELIVERY AND PERFORMANCE COMMISSION BILL 2005

Background

1. The Honourable P D Beattie MP, Premier and Treasurer, introduced this bill into the Legislative Assembly on 25 October 2005. The committee notes that this bill was passed, without amendment, on 8 November 2005.

2. The committee commented on this bill in its Alert Digest No 12 of 2005 at pages 13 to 14. The Premier's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[26]

- **clauses 18 and 60**

3. The committee noted that cl.18 confers immunity from legal liability upon persons complying with the cl.16 and 17 obligations to give information to the commission. The immunity is subject only to the person acting honestly, and does not include an additional requirement of absence of negligence. Clause 60 provides in generally similar terms with respect to the publication of defamatory statements to the commission or in reports of the commission.

4. The committee sought information from the Premier as to the reasons for not including an additional requirement of absence of negligence, in contrast to most immunity provisions appearing in current Queensland legislation.

5. The Premier responded as follows:

> *Clause 18 of the Bill provides immunity from liability to a person who provides information in compliance with a requirement under clauses 16 and 17, if the person has acted honestly. The Committee is concerned that the provision does not also include a requirement that there be an absence of negligence for immunity to be conferred on a person.*
>
> *Clause 60 of the Bill provides that no liability for defamation arises in relation to the publication of material in a statement made to the commission or in a report of the commission, if the publication is made in good faith. Again, the Committee is concerned that there is no additional requirement of an absence of negligence.*

[26] 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.

The Committee notes that a requirement of absence of negligence is contained in most similar provisions appearing in recent Queensland bills.

Although similar provisions in other Bills often contain a requirement that a person act both honestly and without negligence if they are to be given a protection from liability, these provisions generally apply to a person who has acted in the performance of functions under an Act (i.e. the person has a discretion as to how they behave in administering the Act). Clause 61 of the Bill is such a provision and requires that a person act both honestly and without negligence if they are to have protection from liability.

Clause 18 is distinguished from the general provisions referred to in the last paragraph, in that it provides immunity to persons who must provide information to the Commission in compliance with a requirement under clause 16 or 17. Within this context, it is considered appropriate to minimise the hurdles that a person will have to face in ensuring that they provide the required information in a way that does not jeopardise their right to protection under clause 18.

The intention is that persons be required to act honestly in giving information to the Commission (that is, they honestly believe the information is correct or they honestly believe that they are required to give the information to the Commission). It is not considered necessary to impose an additional requirement that the person must also ensure that they will not be found to be legally negligent (including possibly having to seek legal advice) for providing the information. Clause 18 is consistent with clauses of other analogous bodies, for example, section 31EA(3) of the Commission for Children and Young People and Child Guardian Act 2000.

Clause 60 also provides protection to persons and the Commission for defamation where they have acted in good faith. A review of similar clauses in other Queensland Bills did not reveal any clauses that imposed an additional requirement that there be an absence of negligence in order for a person to be protected from liability for defamation. Rather, clause 60 closely reflects the wording other similar provisions. For example, sections 148(4), 164(6) and 300(2) of the Legal Profession Act 2004 only refer to acts done in good faith. Similarly, sections 59 and 89Y of the Commission of Children and Young People and Child Guardian Act 2000 give protection from liability for defamation if a report is made in good faith. The clause also reflects the defamation law set out in section 13 of the Defamation Act 1889 and clauses 29 and 30 of the Defamation Bill 2005.

6. The committee notes the Premier's response.

8. WATER AMENDMENT BILL 2005

Background

1. The Honourable H Palaszczuk MP, Minister for Natural Resources and Mines, introduced this bill into the Legislative Assembly on 25 October 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 12 of 2005 at pages 15 to 18. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[27]

♦ **clause 16 (proposed s.1137)**

3. The committee noted that proposed s.1137 (inserted by cl.16) declares valid the pricing arrangements imposed under a notice issued by the Minister and Treasurer to SunWater. It appeared that there may be a question as to the validity of these notices, as the Act provided that the relevant rates and charges would be those stipulated in a 1992 regulation. Proposed s.1137 may therefore be retrospective in nature.

4. It appeared possible that the validation would adversely affect a number of consumers, as the rates and charges set in the regulation may have been lower than those in the notice. The Explanatory Notes justified this validation on the basis of a need to preserve the State-wide rural water pricing framework.

5. The committee referred to Parliament the question of whether the validation effected by proposed s.1137 had sufficient regard to the rights of water consumers affected by it.

6. The Minister commented as follows:

> *I do not consider that the rights of the relevant water users will be adversely affected by the validation effected by the proposed s.1137 because the rates and charges set out in the regulations are lower that those specified in the notice issued by the Minister and the Treasurer to SunWater.*
>
> *The validation of the rural water pricing direction notices (pricing notices) is necessary to remove any doubt about the operation of the pricing notices and the pricing of the supply of rural water by SunWater. The pricing notices deal with the pricing arrangements for the supply of rural irrigation water by SunWater for the 26 water supply schemes it manages.*
>
> *The pricing notices were developed to establish a new pricing framework, including water pricing increases and adjustments for rural water supply, in accordance with the*

[27] 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.

Queensland Government's commitments under the Council of Australian Governments Water Resources Reform framework.

The pricing notices underpin the water pricing framework put in place following the establishment of SunWater in October 2000. The framework under the Water Act 2000 at the time of establishing SunWater, was to give effect to the pricing notices through a supply contract, deemed under the Water Act 2000, as between SunWater and its customers. In that way, and in accordance with section 1118(3) of the Water Act 2000, new pricing arrangements were set in lieu of any statutory rates and charges under the Water Act 2000.

The validation of the pricing notices therefore remove any doubt for both SunWater and its customers about the existing pricing arrangements and provides certainty on how the pricing arrangements applied in the past and will continue to apply in the future.

7. The committee notes the Minister's comments.

Does the legislation have sufficient regard to the rights and liberties of individuals?[28]

- **clause 4 (proposed ss.25E(1), 25H(1), 25I(1) and 25M(3)**

8. The committee noted that several provisions inserted by cl.4 of the bill impose substantial maximum penalties of 1,665 penalty units ($124,875). However, this is similar to maximum penalties already provided for elsewhere in the *Water Act 2000*.

9. The committee drew to the attention of Parliament the magnitude of these maximum penalties.

10. The Minister commented as follows:

The purpose of the Bill is to introduce a framework and mechanisms for responding to water supply emergency situations and to protect the security of the State's essential water supply needs. The obligation of a service provider to comply with a direction and response is paramount to the operation of the proposed legislation and it is appropriate for there to be a serious financial consequence for the relevant person in failing to comply in each of the circumstances. The magnitude of the maximum penalties is directly reflective of the critical nature of the emergency situations that the legislation is designed to address.

Further, the maximum penalty imposed is consistent with existing penalty provisions in the Water Act 2000.

11. The committee notes the Minister's comments.

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

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[29]

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

[29] 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)*
81	Local Government Regulation 2005	23/8/05
98	Land Title Regulation 2005	9/8/05
188	Transport Operations (Road Use Management – Mass, Dimensions and Loading) Regulation 2005	8/11/05
195	Motor Vehicles and Boats Securities Regulation 2005	25/10/05
208	Residential Tenancies Regulation 2005	22/11/05
224	Rural and Regional Adjustment Amendment Regulation (No.9) 2005	22/11/05
227	Education (Overseas Students) Amendment Regulation (No.1) 2005	22/11/05

* 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 13th 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 November 2005

APPENDIX

CORRESPONDENCE

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