SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE
MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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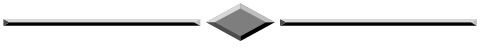

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NOTE:

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]

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. CHILD EMPLOYMENT 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 29 November 2005.

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

> *... to safeguard children working in Queensland*
>
> (and)
>
> *... to ensure that Queensland employees continue to enjoy a fair and balanced industrial relations system regardless of developments at the federal level by providing extended family provisions as minimum entitlements and to provide for some technical amendments.*

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

- **clause 9**

3. The primary object of the bill is to impose a range of restrictions in relation to the employment of children (that is, individuals under the age of 18 years) in the workforce.

4. The pivotal provision of the bill is cl.9, under which restrictions are to be placed on employers in relation to the type of work a child can do, the minimum age the child must be for each type of work, the way in which the child can do work, and the times when a child may work.

5. Insofar as it deals with child employment, the current bill bears significant similarities to the *Industrial Relations (Minimum Employment Age) Amendment Bill 2004*, a private member's bill introduced by the Member for Moggill, Dr B Flegg MP on 24 November 2004 on which the committee reported in Alert Digest No. 1 of 2005 at pages 16 to 18.[4]

6. The two bills differ in that whilst the earlier bill incorporated most of the detail about the employment restrictions in the bill itself, cl.9 of the current bill essentially leaves that process to regulations.

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

4 That bill failed at the Second Reading Stage on 11 March 2005.

7. The restrictions which will actually be imposed are of course pivotal to the operation of this bill, and the committee's general preference would be that, so far as practicable, they should be incorporated into the bill itself. In relation to this issue, the Explanatory Notes state:

> *The Bill is structured in a way that provides for breaches of a regulation made under it to be offences against the Act. It is presented in this way for a number of reasons. The department wants, so far as possible, to keep the prohibition or regulation of work practices in 1 document. It also requires flexibility and speed to respond to work issues that may arise in relation to children. This is best achieved by providing for prohibition or regulation of work practices in the regulation. However, the level of penalty that will attach to a breach of prohibited or regulated work practices has been set at 100 penalty units in the Bill. In the circumstances, it is considered that the approach adopted is the one best suited to meet the competing demands of flexibility and sufficient regard for the institution of Parliament.*

8. The committee notes that cl.9 of the bill, which imposes on employers a range of restrictions in relation to the employment of children, essentially provides that most of the detail of the restrictions will be set by regulations, rather than being stipulated in the bill itself.

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

10. The committee refers to Parliament the question of whether committing such a large part of the operative provisions of cl.9 to regulations is, in all the circumstances, an appropriate delegation of legislative power.

♦ **clause 39(2)(e)**

11. Clause 39(1) of the bill provides that the Governor in Council may make regulations for the purposes of the bill. Clause 39(2) sets out a number of examples of matters about which regulations may be made. Paragraph (2)(e) provides that a regulation may "impose a penalty of not more than 40 penalty units for a contravention of a provision of the regulation".

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

13. 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.*[5]

14. The committee observes that the permissible penalty under cl.39(2)(e) is twice that favoured by the committee as a maximum figure for penalties created in regulations.

15. The Explanatory Notes do not address this issue.

[5] Alert Digest No. 4 of 1996 at pp.6–7, Alert Digest No. 6 of 1997 at p.11, Alert Digest No. 10 of 1997 at pp.6–7

16. The committee's current policy was formulated in 1996. Since that time, the amount prescribed under s.5 of the *Penalties and Sentences Act 1992* as a general "penalty unit" ($75) has not been amended, whereas as the currency has devalued somewhat over that period.[6] Although the committee remains of the view that the maximum penalty should be lower than the 40 penalty units stipulated in the bill, the factors mentioned above make the excess less significant than is often the case.

17. Clause 39(2)(e)provides for regulations to create offences and impose penalties of not more than 40 penalty units. Historically, the committee has generally been concerned by the delegation of legislative power to impose penalties exceeding 20 penalty units.

18. The committee draws to the attention of Parliament the fact that the maximum level of penalty provided exceeds that favoured by the committee.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[7]

- **clauses 17-24 inclusive**

19. Clause 17 of the bill provides that when performing functions under its provisions, an inspector is invested with all the powers of an inspector under the *Industrial Relations Act 1999*. Inspectors will accordingly have the powers of entry conferred under that Act.

20. Clause 17(2) of the bill provides that an inspector also has the powers stated in division 2 of part 3 of the bill (cls.17-24 inclusive).

21. These additional powers, which are amongst those routinely inserted in the enforcement and monitoring provisions of regulatory bills, essentially relate to the seizure of evidence, and associated matters.

22. The committee notes that cls.17-24 of the bill confer on inspectors a range of post-entry powers in relation to the seizure of evidence.

23. The committee does not consider these powers, which are identical to those routinely included in enforcement and monitoring provisions of bills, to be objectionable.

6 For example, the *CPI All Groups, Weighted Average Capital Cities* has risen over that period by 28.6%.

7 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?[8]

- **clauses 33 and 34**

24. Clause 34 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).

25. Clause 33 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.

26. 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.

27. Clauses 34 and 33 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.

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

> *Such provisions are commonly included in contemporary legislation and are considered necessary for the effective enforcement of the legislation by preventing unscrupulous employers from hiding behind their employees or their status as a corporation. Having regard to the purpose and nature of the Bill, the provisions are not considered to be inappropriate.*

29. The committee notes that cls.34 and 33 of the bill effectively reverse the onus of proof.

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

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

- **The bill generally**

31. As mentioned earlier, this bill bears significant similarities to the *Industrial Relations (Minimum Employment Age) Amendment Bill 2004*, which the committee has previously reported on.

32. The committee's general comments in relation to the employment of children, made in relation to the earlier bill, are equally applicable to this bill and can be repeated.

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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.

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

33. There are two potentially detrimental aspects of the employment of children. Firstly, their age renders them vulnerable to various forms of exploitation. Secondly, demands imposed on their time and energy by work may detract from their capacity to focus on completing their education. As Dr Flegg MP stated when introducing the earlier bill, education should be the primary activity of children under the age of 15 years.

34. On the other hand, exposure to the workplace through part-time work is undoubtedly a beneficial learning activity for older children. A significant percentage of children, of course, will ultimately enter full-time employment before attaining adulthood. Appropriate part-time employment also provides a child with a source of income, however modest.

35. In principle the committee has no objection to legislative restrictions which are aimed at preventing the exploitation of children in the workforce and at minimising any interference by work activities with their education. However, subject to those overriding concerns, such legislation should permit children to take advantage of reasonable and appropriate opportunities to engage in employment, as this can obviously be to their benefit.

36. There will of course always be room for disagreement as to the precise level of regulation which should be imposed in relation to child employment. In relation to the earlier bill, the committee was satisfied that it addressed the subject in an appropriate manner. To the extent to which it actually governs the subject, the same can be said for the current bill. However, that is subject to the significant caveat that until the details of the restrictions envisaged in the bill are actually determined by regulation, no final assessment can be made in that regard.[10]

37. The committee notes that the bill imposes various restrictions in relation to the employment of children, although the detail of those restrictions is to be established via a regulation to be made under the bill.

38. The contents of that regulation will need to be examined before a final view can be reached on the appropriateness of the overall legislative scheme introduced by the bill. However, the committee does not consider the provisions of the bill itself to be unreasonable, and is generally supportive of its underlying legislative policy.

- **clause 49 (proposed ss.29-29D inclusive), cl.51 (proposed s.38A), and cl.52 (proposed s.39-39C inclusive)**

39. In addition to its provisions dealing with child employment, the bill contains provisions (cls.45-59 inclusive) which amend the *Industrial Relations Act 1999*.

40. Amongst these provisions are cls.49, 51 and 52, which generally extend the scope of minimum entitlements in relation to "family provisions". Clause 49 deals with parental leave, and cl.52 with carers leave.

41. These provisions, which essentially impose obligations upon employers, self-evidently have the capacity to impact adversely on employers although certain countervailing benefits may

[10] The committee notes that the Minister's Second Reading Speech contains details of the proposed contents of the regulation. However, apart from the necessity to ensure that the contents of the regulation actually replicate these proposals, the committee has no jurisdiction in relation to subordinate legislation until it has actually been made.

also flow from them. The potential negative impact on employers is recognised in proposed s.38C(3)(b), which requires the Full Bench of the Queensland Industrial Relations Commission to review the parental leave provisions within 3 years from the bill's commencement.

42. The appropriateness or otherwise of all these provisions is of course a matter for Parliament to determine.

43. The committee notes that cls.49, 51 and 52 establish extended family leave obligations, which may have the capacity to impact adversely on the position of employers.

44. The committee refers to Parliament the question of whether these provisions have appropriate regard to the rights of both employers and employees.

2. DISABILITY SERVICES BILL 2005

Background

1. The Honourable F W Pitt MP, Minister for Communities, Disability Services and Seniors, introduced this bill into the Legislative Assembly on 1 December 2005.

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

> *to protect and promote the rights of people with a disability. In particular, the Bill aims to do the following:*
>
> - *acknowledge the rights of people with a disability, including promoting their inclusion into community life generally;*
> - *provide a contemporary regulatory framework for services that are funded or provided by DSQ;*
> - *ensure DSQ provided and funded services are safe, accountable and responsive to the needs of people with a disability, including improving safeguards for people with a disability from abuse, neglect and exploitation; and*
> - *provide greater clarity around the coverage of the Bill – what activities are covered and who is covered.*

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

♦ **clauses 58-120 inclusive**

3. A prominent feature of the bill is the provisions of Part 8 (cls.58-71) and Part 9 (cls.72-120), in relation to obtaining the criminal history of persons working in Disability Services Queensland and funded non-government service providers respectively.

4. In essence, persons seeking to be "engaged by the department"[12] must disclose any criminal history they may have (cl.63). Persons already engaged by the department must immediately notify the chief executive if there is any change in their criminal history: acquiring a criminal history is a "change" (cl.64).

5. In relation to any person already engaged by the department, and persons seeking to be engaged, the chief executive may require the commissioner of the police service to provide him or her with a written report about the person's criminal history (cl.67). Prosecuting authorities are obliged to inform the chief executive if a relevant person is charged with an indictable offence, is convicted of such an offence or is not convicted after being charged.

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

[12] This term is broadly defined in cl.60 of the bill as including public service employees in the department, persons contracted to provide disability services for the department, members of committees established under cl.216 of the bill and persons working in the department as volunteers or students on work experience.

6. Part 9 of the bill contains generally similar provisions with respect to persons engaged, or to be engaged, by non-government service providers. Divisions 4-6 (cls.80-104) contain detailed provisions requiring persons who are engaged, or are to be engaged, by funded non-government service providers to be assessed by the chief executive for suitability, and issued with either a positive or a negative notice. A person is generally unable to work in these capacities without a positive notice. The bill provides heavy penalties for persons who work, or continue working, for funded non-government service providers without such a notice (cl.89). Indeed, working without holding a positive notice is an indictable offence (cl.194).

7. The pivotal term "criminal history" is broadly defined in the Dictionary to the bill as including not just convictions, but charges which did not result in convictions. Moreover, it encompasses "old" convictions which would otherwise have had the benefit of the rehabilitation period provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (see cls.61 and 74).

8. In some cases, information about investigations which did not lead to a charge being laid, let alone a conviction being recorded, may also be required to be disclosed to the chief executive, or be able to be obtained by the chief executive.

9. The provisions of Parts 8 and 9 impact in two ways on the rights of persons engaged, or intending to be engaged, by the department or by funded non-government service providers. Firstly, disclosure of criminal histories to the chief executive and others involved in the statutory process impacts on the person's right to privacy. Secondly, possession of a criminal history (which, as mentioned, is broadly defined) may, and in the case of a "disqualifying" conviction invariably will, prevent them from being employed or will result in termination of their employment.

10. Recognising these impacts of the bill, the Explanatory Notes (at pages 7-9) address them in some detail. In short, the Notes argue in favour of the provisions on the basis of the need to protect people with disabilities, who are obviously in a vulnerable situation. The Notes also point out that the provisions of the bill are similar to those already imposed by statute in a variety of other contexts which involve dealings with vulnerable persons, and that they promote consistency of approach.

11. The committee notes that the bill provides in some detail for the screening for criminal histories of persons engaged in, or applying to be engaged in, provision of services to persons with a disability within both the department and funded non-government service providers. The term "criminal history" is broadly defined and possession of a criminal history can, and in some cases will, disqualify the person from working in the relevant areas.

12. These provisions have an obvious impact in terms of the privacy of the persons concerned, and in terms of their obtaining or continuing in employment in relevant areas.

13. The Explanatory Notes address these issues in some detail.

14. The committee refers to Parliament the question of whether the provisions of Parts 8 and 9 of the bill, in relation to screening of persons for criminal histories, have sufficient regard on the one hand to the rights of those persons, and on the other to the rights of persons with a disability.

♦ **clause 166**

15. Clause 166 provides that the chief executive may appoint a person as interim manager of a funded non-government service provider receiving recurrent funding. The function of an interim manager (cl.176) is to protect consumers of the service provider from abuse, neglect or exploitation, to ensure the proper and efficient use of government funds under the provider's funding agreement, and to provide disability services to consumers that the service provider has agreed under its funding agreement to provide.

16. Accordingly an interim manager can, and probably will, manage the service provider in a manner different from that which previously occurred. As the Explanatory Notes (at pages 11-12) point out, this may have implications for the position of employees, officers of the service provider and third parties such as creditors. The service provider itself is a corporation, and adverse impacts which it suffers in its own right fall outside the committee's terms of reference.

17. However, as the Notes point out, an interim manager will probably be appointed only in extreme situations, and will aim to continue provision of the service to consumers. Moreover, the service provider will be at least in part (and perhaps in large part) funded by government monies.

18. The committee notes that cl.166 empowers the chief executive to appoint a person as interim manager for a funded non-government service provider, in certain situations where there is a serious deficiency in the provider's operations.

19. In all the circumstances, the committee does not consider the conferral of this power to be objectionable.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[13]

♦ **clauses 130-165 inclusive**

20. Another feature of the bill is the monitoring and enforcement powers which it confers on "authorised officers".

21. Clause 130 confers power to enter places which extends beyond situations where the occupier consents or a warrant is obtained, as entry is authorised to a public place when open to the public. Clause 131 confers an additional power of entry to places where funded non-government service providers provide disability services, in situations where there is a suspected immediate risk of harm to a person with a disability, or a risk that evidence of a misuse of funds will be destroyed or removed, or to check whether the service provider has taken steps required under a compliance notice. This provision applies whether or not the place is used for residential purposes. Clause 131 also confers a general power to enter a

[13] 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.

relevant place which is not a home if open for carrying on business or otherwise open for entry.

22. Once entry has been effected, the bill confers a wide range of post-entry powers (cls.139-152).

23. The committee notes that cls.130-165 of the bill confer on authorised officers powers of entry which extend beyond situations where the occupier consents or a warrant is obtained. The bill also confers a wide range of post-entry powers.

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

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[14]

- **clauses 202 and 203**

25. Clause 202 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).

26. Clause 203 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.

27. 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.

28. Clauses 202 and 203 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.

29. In relation to this issue, the Explanatory Notes (at page 13) address this issue as follows:

> *The section is proposed to act as a general deterrent and sanction for corporations in a worst case scenario. Otherwise, DSQ has no mechanism to safeguard a person in circumstances where the corporation (and not the individual) has committed an offence. The section is not imposing any additional obligations on executive officers. Given the profile of the consumer group, it is important to emphasise this responsibility. Reasonable defences are included to protect executive officers and prevent the misapplication of the provision. In these circumstances, the provision is considered reasonable in recognition of the profile of the consumer group.*

30. The committee notes that cls.202 and 203 of the bill effectively reverse the onus of proof.

[14] 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.

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

Does the legislation provide appropriate protection against self-incrimination?[15]

- **clause 156(2)**

32. Clause 155(1) 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 156(1) provides that a person to whom such a requirement is made must comply, unless they have a reasonable excuse. Clause 156(2) provides that it is not a reasonable excuse if complying might tend to incriminate the person.

33. 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
- 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).

34. The committee notes that cl.156 does not provide any form of "use" or "derivative use" protection in relation to production of the relevant documents. However, it only applies to specific categories of documents, namely, those issued or required to be kept under the bill's provisions. As the committee has recently acknowledged,[16] denying the benefit of the self-incrimination rule in relation to documents of this type may be less problematical than in other contexts.[17]

35. In relation to cl.156(2), the Explanatory Notes state:

> *For proper monitoring and enforcement of the Bill, it is essential that authorised officers have the ability to quickly access these documents.*

36. The committee notes that cl.156(2) denies persons the benefit of the rule against self-incrimination.

37. The committee refers to Parliament the question of whether this denial of the benefit of the

15 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.

16 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.

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

rule against self-incrimination is justifiable in the circumstances.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[18]

- **clauses 105, 108 and 204, and Schedule 2**

38. The bill provides for merits-based review of certain decisions made by the chief executive.

39. Clause 105(1) provides that a person may apply to the Commercial and Consumer Tribunal for review of certain adverse decisions of the chief executive under cls.82(4), 82(7), 100(2) or 100(3), about "negative notices".

40. Clause 105(2) further provides a right of review where a person alleges, contrary to a finding of the chief executive, that they have not been charged with an "excluding offence".

41. Clause 105(4) expressly declares that, apart from these cases, there is no right of appeal or review against a decision of the chief executive in relation to his or her issue or refusal to cancel a "negative notice".

42. As mentioned earlier, the lack of a "positive notice" prevents a person from being engaged by funded non-government service providers providing disability services.

43. Clause 108 provides a person with a right to appeal against decisions of the chief executive based on classification of certain information by the police commissioner as "investigative information". The original decision of the police commissioner on this matter is not itself subject to any appeal: the right of appeal is limited to actions taken by the chief executive in reliance upon that classification.

44. Finally, cl.204 provides that a range of decisions of the chief executive in relation to non-government service providers, stipulated in schedule 2 to the bill, are subject to internal review and then, if necessary, review by the Commercial and Consumer Tribunal. These include decisions to refuse approval of the organisation as an approved non-government service provider (under cl.43), to refuse to cancel its approval when requested (under cl.45), to cancel its approval (under cl.46), to cancel or suspend its funding for not complying with a compliance order (cl.158), and to appoint an interim manager (cl.166).

45. The matters in relation to which merits-based review and appeals are provided under cl.204 appear to comprise most of the significant decisions which may be made in relation to service providers.

46. The matters listed in cl.105, which relate to the screening process, are much more limited and are subject to the express denial in cl.105(4) of any additional appeal or review rights under the bill in relation to the screening process. However, the committee notes that the provisions of Part 9 of the bill, which govern screening, are quite prescriptive in nature and leave the chief executive with a relatively narrow range of discretions. Decisions as to

[18] 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.

whether or not an "exceptional case" exists in terms of cls.84, 100 and 102 may in practice represent a very substantial proportion of matters in which the chief executive has a significant discretion.

47. The committee notes that various matters listed in cls.105, 108 and 204 are subject to merits-based review and appeal, that there is otherwise no general access to merits-based review under the bill, and that cl.105(4) expressly denies any such right in relation to other decisions of the chief executive under the screening provisions of the bill.

48. The committee refers to Parliament the question of whether, in the circumstances, the extent of access to merits-based review and appeals concerning decisions of the chief executive under the bill, is adequate.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[19]

- **clause 34**

49. Clause 34 of the bill authorises the Minister to make disability service standards for improving the quality of disability services provided by funded service providers. The standards are to provide details of the way in which disability services are to be provided, and must include indicators to measure whether the standards have been met.

50. Although the standards are statutory instruments within the meaning of the *Statutory Instruments Act 1992* (cl.34(4)), they are not subordinate legislation. However, cl.35 provides that a service standard does not take effect until a notice of the making of the service standard is published in the government gazette (cl.35(2)). The notice is subordinate legislation (cl.35(3)).

51. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means which does not constitute subordinate legislation.[20]

52. The significance of providing for matters to be dealt with by 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*.

53. As the gazette notice, which is a prerequisite to the effective operation of these standards, is subordinate legislation, it will be subject to parliamentary tabling and disallowance. This process would ensure that the content of standards ultimately came to the attention of Parliament, and cl.36 moreover requires that the chief executive keep a copy of the standards available for inspection by members of the public free of charge, and publish them on the department's website.

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[19] 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.

[20] See, for example, Alert Digest No. 8 of 1998 at pages 9-10.

54. There are nevertheless still some negatives associated with the fact that the standards themselves do not constitute subordinate legislation. Amongst these is fact that they will not necessarily be drafted by the Office of Parliamentary Counsel.

55. In considering whether it is appropriate that matters be dealt with through an alternative process to regulations, the committee takes into account the importance of the subjects dealt with, and the practicality or otherwise of including those matters in subordinate legislation.

56. It seems that the standards will deal with a subject of some significance, although perhaps primarily directed to matters of detail. The issue of the practicality of drafting them in legislative form is not addressed in the Explanatory Notes.

57. The committee notes that the disability service standards made under cl.34 of the bill will not be subordinate legislation, although the gazette notice which is a prerequisite to their taking effect will be (cl.35(3)).

58. The committee seeks information from the Minister as to why it is considered appropriate that the standards themselves should not constitute subordinate legislation.

3. DRUG LEGISLATION AMENDMENT BILL 2005

Background

1. The Honourable L D Lavarch MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 30 November 2005.

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

> *... to change the status of the Drug Court from pilot to permanent, and to introduce measures which will streamline the processes and procedures in the court and make the court available to a wider range of offenders.*
>
> *The Bill amends the DMA to introduce measures that will reduce the amount of forensic testing that is required when a clandestine drug laboratory for the production of methylamphetamine is detected.*

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[21]

- **clause 18 (proposed s.12D) and cl.23 (proposed s.16B)**

3. Clause 18 of the bill amends the *Drug Rehabilitation (Court Diversion) Act 2000* by inserting Part 3A (proposed ss.12A-12D). This enables a magistrate to refer a person to the Health Department for an "indicative assessment" of whether they are drug dependent (proposed s.12B). The report must be given to the drug court magistrate, the prosecuting authority and the person's legal representatives (proposed s.12C). The report may then be utilised by the magistrate when the person is dealt with by the court. Proposed s.12D states:

> *(2) A report purporting to be an indicative assessment report made by an appropriately qualified health professional is evidence of the matters contained in it.*
>
> *(3) An objection must not be taken or allowed to the evidence on the ground that it is hearsay.*

4. Clause 23 of the bill inserts proposed ss.16A and 16B which provide, in an analogous manner, for the preparation of assessment reports. Proposed s.16B contains provisions identical to proposed ss.12D(2) and (3).

5. Proposed ss.12D and 16B effectively reverse the onus of proof, since the reports may be accepted and acted upon by the magistrate without the author or other contributors being called to give evidence. The accused person can, however, adduce evidence contradicting some or all of the content of the report.

6. The proposed sections also modify the normal rules of evidence, in that they rule out any objection to the content of the reports based on the hearsay rule.

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[21] 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.

7. Moreover, proposed ss.12D(1) and 16B(1) both provide that the magistrate may order that the report or part of it not be shown to the accused person, although their legal representatives must be provided with a copy.

8. Provisions such as those referred to above would normally be of concern to the committee. However, these provisions need to be looked at in the context in which they operate. They apply where a person has pleaded guilty to a drug-related charge or indicated they intend to plead guilty (proposed s.12A), and operate in relation to a procedure whose overall purpose is to offer such persons an opportunity to access a rehabilitation-oriented alternative to the traditional penalties of fines and imprisonment.

9. In this context, the relevant provisions are of significantly less concern.

10. The committee notes that proposed s.12D (inserted by cl.18) and s.16B (inserted by cl.23) both contain reversals of the onus of proof and exclude the application of the hearsay evidence rule.

11. Given the context within which these provisions will operate the committee considers that, on balance, they are probably not objectionable.

♦ **clause 65 (proposed ss.131 and 131A)**

12. Section 130 of the *Drugs Misuse Act 1986* currently provides that in a proceeding for an offence against that Act, where it is relevant to prove that a substance owned, supplied or possessed by a person was a "prescribed substance", the substance is taken to be a prescribed substance if there is evidence it was contained in a container which had a label indicating that it was a prescribed substance, and if a police officer or other specified prosecution witness gives evidence that they believed that the container did contain a prescribed substance.

13. Clause 65 of the bill adds analogous provisions in relation to proceedings where it is relevant to prove that particular equipment was used in the production of a relevant "dangerous drug" (proposed s.131) or that a substance owned, supplied or possessed by a person was a medicinal poison or a veterinary chemical product (proposed s.131A).

14. Both the current and proposed provisions are declared to apply in the absence of evidence to the contrary.

15. Proposed ss.131 and 131A (like current s.130) appear to reverse the onus of proof, as they concern matters which it might normally be thought would be required to be positively proved by the prosecution.

16. However, all provisions are made subject to the condition that the person charged can give notice prior to trial of his or her intention to challenge these matters, in this case the statutory presumption of proof in favour of the prosecution does not apply (proposed s.131B).

17. Provisions such as these would normally be of concern to the committee. However, the capacity of the defendant to displace the presumption by serving the prosecution with a "challenge notice" under proposed s.131B largely allays that concern.

18. The committee notes that proposed cl.65 of the bill inserts provisions (proposed ss.131 and 131A) which establish a prima facie reversal of onus of proof in relation to certain matters in prosecutions under the *Drugs Misuse Act 1986*.

19. However, the defendant has the capacity to displace this reversal of onus by serving a "challenge notice".

20. In the circumstances, the committee does not consider the prima facie reversal of onus created by these provisions to be objectionable.

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

- **clauses 60 and 61**

21. The *Drugs Misuse Act 1986* already creates a number of offences in relation to dangerous drugs, all of which are punishable by imprisonment, in some cases up to a maximum of 25 years (see ss.5-11).

22. The bill adds two new offences.

23. These are proposed s.9A ("possessing relevant substances or things")(inserted by cl.60), and proposed s.10B ("possession of a prohibited combination of items")(inserted by cl.61). The maximum terms of imprisonment in relation to these offences are 15 and 25 years respectively.

24. In her Second Reading Speech, the Attorney attributes the creation of the new offences to an increase in the number of clandestine drug manufacturing laboratories. The offence provisions attempt to reduce the amount of forensic testing required in order to prosecute the operators of such laboratories, by focusing on the gross weight of substances possessed rather than the weight of the pure product derived from them (proposed s.9A) and by outlawing possession of a prescribed combination of items typically associated with drug production, rather than the final product (proposed s.10B).

25. The committee notes that cls.60 and 61 of the bill introduce additional offence provisions in relation to dangerous drugs.

26. The *Drugs Misuse Act 1986* already contains a significant number of offence provisions, all of which (like those inserted by this bill) carry heavy maximum imprisonment penalties.

27. The committee refers to Parliament the question of whether the offence provisions inserted by cls.60 and 61 have sufficient regard to the rights and liberties of individuals.

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

4. PROPERTY AGENTS AND MOTOR DEALERS AND OTHER ACTS AMENDMENT BILL 2005

Background

1. The Honourable M M Keech MP, Minister for Tourism, Fair Trading and Wine Industry Development, introduced this bill into the Legislative Assembly on 29 November 2005.

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

> *to amend the Property Agents and Motor Dealers Act 2000 (the Act) to address a number of issues arising from the report on the outcome of the review of the Act tabled in the Legislative Assembly on 24 November 2004; to amend the Body Corporate and Community Management Act 1997 to complement an amendment to the Act; and to make a number of minor and technical amendments to the Act and the following Acts also administered by the Department of Tourism, Fair Trading and Wine Industry Development (the Department):*
>
> - *Business Names Act 1962;*
> - *Collections Act 1966;*
> - *Introduction Agents Act 2001;*
> - *Land Sales Act 1984;*
> - *Partnership Act 1891;*
> - *Security Providers Act 1993;*
> - *Second-hand Dealers and Pawnbrokers Act 2003; and*
> - *Travel Agents Act 1988.*

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

5. RECREATION AREAS MANAGEMENT BILL 2005

Background

1. The Honourable D Boyle MP, Minister for Environment, Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 29 November 2005.

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

> *... (to) help ensure that the opportunities and experiences that Queenslanders enjoy in some of their favourite holiday destinations are maintained and properly managed.*
>
> *It will also maintain tourism opportunities, and help ensure that our important tourism industry has the security and flexibility it needs to operate effectively in a competitive environment.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[23]

♦ The bill generally

3. The bill establishes a comprehensive system of regulation of access to, and of activities within, "recreation areas". These provisions impinge in many ways upon the rights and liberties of individuals who enter, or wish to enter, such areas.

4. For example, the bill stipulates that a range of activities (such as camping, vehicle access and group activities) can only be carried out after obtaining a permit (cl.34), and provides authorised officers with powers to give directions to persons to leave certain areas or perform certain actions (see cls.159-170).

5. Any land may be included in a recreation area declared under cl.7 of the bill (see cl.6), but land other than "State land" can only be included if the landholder enters into an appropriate written agreement with the State for its inclusion (cl.6(2)). In other words, land in a recreation area will be either State land[24], or private land which the owner has agreed should be included. It will also obviously be land which, because of its special attributes and its attractiveness to the public, needs to be appropriately protected from overuse or inappropriate use.

6. In the circumstances, therefore, the establishment of a regulatory regime in relation to recreation areas does not appear objectionable, and indeed would seem appropriate.

7. The committee notes that the provisions of the of the bill establish a regulatory regime which impacts in various ways on the rights and liberties of individuals who enter and carry out activities in recreation areas.

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

24 "State land" is defined in the Dictionary to the bill as meaning land which is not freehold land, or land which is subject to a lease or licence under the *Land Act 1994,* or land subject to a mining interest, amongst other things.

8. Given the circumstances, the committee does not object to the establishment of this regulatory system.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[25]

- **clauses 150-181**

9. Clause 150 of the bill confers on authorised officers power to enter "places". "Place" is defined in the Dictionary to the bill as including vacant land or premises.

10. Whilst "places" elsewhere could theoretically be subject to entry, that power will clearly be exercised most commonly in relation to "places" which are located in recreation areas.

11. The power of entry conferred by cl.150 extends somewhat beyond situations where the occupier consents or the entry is authorised by warrant, as it applies to public places when they are open to the public and to places of business of a commercial activity permit holder or a party to a commercial activity agreement, which is open for carrying on business, otherwise open for entry, or required to open for inspection under the permit or agreement.

12. In the circumstances, these entry powers are relatively modest in nature.

13. Clause 168 confers power on authorised officers to stop and enter or board a vehicle, vessel, aircraft or recreational craft. This power can be exercised both inside and outside recreation areas.

14. Clauses 157-181 confer an extensive range of post-entry powers. As on previous occasions, the committee recognises the significant efforts which have been made in drafting many of these provisions to take account of fundamental legislative principles. In addition, as mentioned earlier, the powers will most commonly be exercised within recreation areas, which are primarily on public land.

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

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

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

- **clauses 206-215**

17. The bill provides (in divisions 3 and 4 of part 9 (cls.206-215)) a system of merits-based internal review and ultimate appeal to the Magistrates Court in relation to "appellable decisions".

18. As defined, these include most decisions in relation to the granting, amendment, cancellation and suspension of permits under the bill. The only categories in relation to which review and appeal provisions have not been provided appear to be vehicle access permits and camping permits.

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

> *Clauses 206 to 215 of the Bill introduce provisions allowing for internal Departmental review of permit decisions, with the option of further appeal to a Magistrate if the person is dissatisfied with the outcome of the Departmental review. These review and appeal opportunities apply to commercial activity permits and group activity permits.*
>
> *Review and appeal provisions have not been included for vehicle access permits and camping permits. Such provisions are considered unwarranted because:*
>
> - *some 50,000 vehicle access permits and 40,000 camping permits are issued for recreation areas each year, and applications for these permits are only refused if an area is fully booked; and*
> - *few, if any, conditions are imposed on vehicle access permits and camping permits, and these are simple requirements relating to safety and environmental protection.*

20. The committee notes that cls.206-215 of the bill provide for a system of merits-based review by means of internal review and appeals to the Magistrates Court, in relation to all significant decisions made under the bill except those concerning vehicle access permits and camping permits.

21. In all the circumstances, the committee does not object to the bill's review and appeal provisions.

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

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[27]

- **clauses 202-205 inclusive**

22. Clause 202 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).

23. Clause 203 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.

24. 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.

25. Clauses 202 and 203 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.

26. Clause 204 contains an analogous provision requiring that the holder of an authority issued under the bill must ensure that everyone acting under it complies with the authority and with the requirements of the bill. It goes on to provide that if another person acting under the authority does not so comply, the holder also commits an offence. Clause 204 provides defences to the holder generally comparable to those under cls.202 and 203.

27. Clause 205 again provides generally analogous provisions requiring each "responsible person" (that is, the owner, person in control, or person authorised to decide activities) to ensure a vehicle, vessel, aircraft or recreational craft is not used to commit an offence against the bill's provisions. It goes on to provide that if another person uses the vehicle, etc in committing an offence, the responsible person also commits an offence. Similar defences are again provided.

28. In relation to all these provisions, the Explanatory Notes (at page 5) state:

> *The provisions place an obligation on permit holders, vehicle and vessel owners and executives to take responsibility for offences committed by their employees. The Bill provides for a defence that the person charged with the associated offence exercised reasonable diligence or was not in a position to influence the conduct of their subordinates.*
>
> *This provision might be considered to breach fundamental legislative principles that a law should not reverse the onus of proof in criminal proceedings without adequate justification.*
>
> *Such requirements are now reflected in most natural resource legislation (such as the Nature Conservation Act 1992, the Fisheries Act 1994, the Transport Operations (Marine Pollution) Act 1995, the Transport Operations (Marine Safety) Act 1994, the Integrated Planning Act 1997, the Water Act 2000, the Vegetation Management Act 1999, and the Environmental Protection Act 1994) as well as national and international standards for*

[27] 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.

environmental management (for example AS/NZS ISO14000: Environmental Management Systems, Standards Australia).

In the absence of such provisions, the persons who have the primary control of an operation, and who may in fact be directing the actions of employees which result in offences being committed, can frequently evade prosecution owing to the necessity in law to prove direct complicity in a specific offence. The provisions are considered essential to ensure that there is effective accountability at the top management level.

29. The committee notes that cls.202-205 inclusive of the bill effectively reverse the onus of proof.

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

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[28]

- **clause 22**

31. Clause 7 of the bill provides that a recreation area shall be declared by means of a regulation. Amongst other things, the regulation must state the "management intent" for the recreation area.

32. Clause 18 provides that as soon as practicable after a recreation area is established, the Minister must prepare a draft management plan for the area. After completion of the statutory public consultation process detailed in cls.19 and 21, the Minister must prepare a final management plan which the Governor in Council, if satisfied with its contents, may approve by gazette notice. Under cl.23, the plan has effect from the date of the gazette notice or the later commencement date stated in the plan.

33. Neither the management plan nor the gazette notice constitutes subordinate legislation. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means which does not constitute subordinate legislation.[29] The significance of providing for matters to be dealt with by 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*.

34. Certain matters required to be included in management plans are stated in cl.20(1), although additional matters may also be included (cl.20(2)). Given these provisions, it is difficult for the committee to assess the significance of the matters which might be included in such plans. In considering whether it is appropriate that matters be dealt with through a process alternative to regulations, the committee takes into account the importance of the subjects dealt with, and the practicality or otherwise of including those matters in subordinate

[28] 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.

[29] See, for example, Alert Digest No. 8 of 1998 at pages 9-10.

legislation. The committee notes that this issue does not appear to be dealt with in the Explanatory Notes or the Minister's Speech.

35. The bill provides an analogous process for amending management plans, and under cl.29 final amendments approved by the Governor in Council are given effect by means of a gazette notice. Clause 29(2), by contrast with cl.22, expressly declares that the gazette notice is not subordinate legislation.

36. The committee notes that, although recreation areas are declared by means of regulation, the management plans subsequently made for them do not constitute subordinate legislation.

37. The committee seeks information from the Minister as to the nature of the matters likely to be included in management plans, and as to why it is considered appropriate that management plans should not be declared to be subordinate legislation.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[30]

- **clause 232(2)(d) and Schedule, definition of "fee"**

38. Various provisions of the bill (for example, cls.41(2), 49(1)(c) and 62(2)(a)) provide for the payment of fees by applicants and others. These fees, by virtue of either express provisions in the bill or definitions contained in the schedule, are to be set by regulation. The relevant regulation-making power is set out in cl.232(2)(d).[31]

39. In the absence of any additional statutory provision, a power to set "fees" would allow the department a significant amount of latitude, but would normally be subject to an implied requirement that the amounts set bear at least some relationship to the cost of providing the relevant service or of performing the relevant administrative activity.

40. The committee notes that the term "fee" is defined in the dictionary to the bill in the following terms:

> *Fee includes tax.*

41. The Explanatory Notes do not elaborate on the reasons for defining the term "fee" in this manner. However, it seems to the committee that there are three principal possibilities.

42. Firstly, it might be intended to enable fees to be imposed in relation to certain aspects of the administration of the bill, perhaps not foreseeable at this stage, which do not in strict terms involve provision of a service and might not otherwise be able to be charged for. As the bill sets out a large number of situations in which fees are payable, this is probably unlikely.

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30 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.

31 Clause 232(2)(d) incorporates an example referring to the setting of fees in relation to conducting activities, or using services and facilities provided by the chief executive, in a recreation area.

43. Secondly, the intention might be to enable fees to be set at a level which, overall, will enable the entire administration of the bill[32] to be conducted on a self-funded basis. The committee recently considered an identical definition of "fee" in another bill[33], where it was apparent from the Explanatory Notes that that was the case[34]. It may also be the case in relation to this bill.

44. The third possibility is that the intention is to enable fees to be set at a level which goes beyond self-funding, and includes an effective levy on persons for the privilege of accessing, and enjoying the benefits of, a desirable and attractive natural resource of the State. It is again possible that this is the case.

45. The committee does not take issue with any of the above imperatives, which are essentially policy-related. However, as it stated definitively in its recent report mentioned above, the committee does not consider that it is consistent with modern legislative drafting standards for those aims to be achieved by simply defining "fee" as including "tax".

46. 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.[35]

47. 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.[36]

48. Under the bill's proposed definition of "fee", there would be no limit to the level at which fees may be set.

49. If the policy imperative is to ensure administration of the bill is entirely self-funded then, as in relation to the earlier bill mentioned above, the committee considers in the interests of transparency that process should be spelt out in the bill itself.[37]. If there is an additional desire to impose a general levy on users of recreational areas then, again in the interests of transparency, the committee considers that those levies should be expressly provided for in the bill.

50. The committee notes that "fee" is defined in the schedule to the bill as including "tax". This will enable taxes to be imposed by means of regulations made under the bill, rather than via the bill itself.

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

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32 Not just those aspects of it which involve the provision of services.

33 *Justice and Other Legislation Amendment Bill 2005*: Alert Digest No 13 of 2005 at pages 12-13.

34 Rather than a department, the administration of that bill was to be carried out by a statutory authority, the Professional Standards Council.

35 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.

36 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.

37 The Attorney-General, who introduced the earlier bill, subsequently introduced amendments to accommodate the committee's concerns about this matter.

52. The committee recommends that the bill be amended to address the concerns mentioned above.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

6. FOOD BILL 2005

Background

1. The Honourable S Robertson MP, Minister for Health, introduced this bill into the Legislative Assembly on 8 November 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 13 of 2005 at pages 2 to 8. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

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

- **clause 3(2)**

3. The committee noted 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.

4. The committee sought 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.

5. The Minister responded as follows:

> *In paragraph 13 of its report, the Committee has sought information as to why the State and Government owned corporations should not be made subject to the legal obligations imposed by the Bill. The Committee noted that the recently enacted Public Health Act 2005 deals with similar public health issues but, unlike the Food Bill, the Act expressly binds the State.*
>
> *The Food Bill continues the approach under the current Food Act 1981 to not bind the Crown. The continuation of these arrangements is based on Crown Law advice that as a general principle, the Crown cannot be prosecuted criminally because the prosecutor in these matters is the Crown. This is of particular importance in this instance, as local Government has the primary responsibility for enforcing the legislation.*
>
> *This approach is consistent with that in the Public Health Act, where the areas of the Act that are enforced by local Government do not bind the State (see section 3(2)). The effect of this is that local Governments cannot issue public health orders or seek warrants against the State. Additionally, section 3(3) of the Public Health Act provides that the Crown is not*

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

liable to be prosecuted for an offence. The effect of this provision is that whilst the State is bound by those parts of the Act not specifically excluded under section 3(2), a failure to discharge any remaining obligation will not give rise to a criminal prosecution.

As the Committee has noted, administrative arrangements will be put in place to ensure that State-owned food businesses will supply safe and suitable food.

6. The committee notes the Minister's response.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[39]

- **clause 278**

7. 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.

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

9. The Minister responded as follows:

In paragraphs 47-48, the Committee raised concerns about the size of penalties that may be prescribed by regulation. The regulation will prescribe, for example, additional matters about the content of food safety programs and food safety auditors' reports. Food safety programs are mandatory for higher-risk food businesses and there are significant consequences to the community and for the individual food business in not adhering to the requirements of a food safety program. Therefore, to protect public health, it is essential that the penalties imposed reflect the significant nature of a breach and also pose an effective deterrent.

The ability to impose penalties of more than 20 penalty units in regulation for breaches of provisions relevant to the safety and health of the public is consistent with approaches taken in other Acts dealing with issues of public health and safety (e.g. the Coal Mining Safety and Health Act 1999, the Dangerous Goods Safety Management Act 2001, the Food Production (Safety) Act 2000, the Mining and Quarrying Safety and Health Act 1999, the Public Health Act 2005, and the Workplace Health and Safety Act 1995).

I trust the above addresses the Committee's concerns and note that the other issues raised by the Committee have been referred to Parliament.

10. The committee notes the Minister's response.

[39] 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.

7. JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2005

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. The committee notes that this bill was passed, with amendments, on 30 November 2005.

2. The committee commented on this bill in its Alert Digest No 13 of 2005 at pages 9 to 13. The Attorney's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[40]

- **clauses 44, 95 and 152**

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

4. The circumstances dealt with by the various clauses differed considerably. All were canvassed in the Explanatory Notes and the Attorney's Speech.

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

6. The Attorney commented as follows:

> *Clause 44 – Insertion of new chapter 5, part 4 in the Civil Liability Act 2003*
>
> *As indicated in paragraph 6 of the Committee's response, it is the fact the commencement date "may well have been" the 1st of March 2005 that necessitates the amendment of the Civil Liability Act 2003. It is appropriate that the ambiguity as to commencement be removed for such a fundamental change to the rules of liability.*
>
> *Clause 95 – Insertion of new part 9, division 4 in the Evidence Act 1977*
>
> *Clause 95 inserts a new section 144 into the Evidence Act 1977, the transitional provision for the amendments to section 93A. In paragraph 12, the Committee acknowledges that, although significant, the amendment to section 93A relates to procedure rather than the substantive law. Nevertheless, the Committee refers this issue to Parliament.*
>
> *The transitional provision contained in clause 95 confirms that the amended provision is to apply to any proceeding commenced after the amendment comes into effect.*

[40] 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.

*In the absence of any indication to the contrary, a "procedural" statute is to be construed as retrospective, that is, it can apply to past events (see **Rodway** and **Truong** below). This Bill will effect a procedural change rather than a substantive alteration in rights.*

*The High Court considered the issue of "procedural" statutes in **Rodway v The Queen** (1990) 169 CLR 515, where it held (emphasis added) –*

> *... ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in Maxwell v Murphy, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years ...*

*In **Rodway**, the High Court considered the abolition of the corroboration warning, and held that the abolition applied regardless of the fact that the rule was in place at the time the offence was committed. In other words, despite in the fact that the warning was required to be given at the time the offence was committed, it did not have to be given at the trial and the accused had not been deprived of a substantive right.*

*Similarly, in **R v Truong** [1999] QCA 21 (19 February 1999), the Queensland Court of Appeal held that changes to the sentencing principles contained in section 9 of the Penalties and Sentences Act 1992 which imposed stricter sentencing guidelines (imprisonment no longer a last resort for an offence of violence) were procedural provisions only, in that they set out the way in which a judge is to approach the facts and the manner to proceed when passing sentence.*

Consistently with this general principle, new section 144(1) provides that the amendment of section 93A applies to any proceeding (including a committal, a preliminary hearing a trial and any rehearing, retrial or appeal) that stats after the amendment commences. New section 144(2) provides that any statement that was admitted into evidence in a proceeding before the amendment commenced, that is admissible under the amended section 93A, is taken to always have been admissible. The purpose of this subsection is to ensure that statements admitted into evidence before the decision in R v GR, can no longer be challenged on the basis of that decision.

In the absence of new section 144, under the general principles discussed above, the amendment will take effect from the date it commences. This means that any proceeding started after commencement (including an appeal or a re-trial ordered because of the GR decision) will operate under the amended provisions. The purpose of the transitional provision is to remove any doubt that this is the intention.

Clause 152 – Insertion of new section 174 in the State Penalties Enforcement Act 1999

The objective of the amendments contained in clauses 149-152 of the Bill is to clarify that sections 24 & 25 of the Statutory Instruments Act 1992 apply, and have always applied, to infringement notice offences prescribed under the State Penalties Enforcement Act, thereby enabling differential penalties to be prescribed for individuals and corporations for infringement notice offences. As outlined in the Explanatory Notes, the effect of these amendments is to clarify the accepted interpretation as to the effect of section 165(4) of the

State Penalties Enforcement Act 1999 i.e. that it was confined to camera detected offences and did not indicate a contrary intention under ss.24 & 25 of the Statutory Instruments Act. I note the Committee's acknowledgement that any potential adverse impact of the retrospectivity, if any, of these amendments is limited to corporations. These amendments do not adversely affect the rights and liberties of individuals.

7. The committee notes the Attorney's comments.

Does the legislation have sufficient regard to the rights and liberties of individuals?[41]

- **clauses 53-55**

8. The committee noted that cl.55 of the bill created several offences in relation to "voyeuristic" observations and visual recordings of persons.

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

10. The Attorney commented as follows:

Clauses 53 to 55 of the Bill amend the Criminal Code by inserting new "voyeurism offences". The Committee notes in paragraph 18 that the obvious imperative in legislating for this subject is to create provisions which, whilst appropriately protecting people's right to privacy, do not render another person liable to prosecution for an indictable offence. The Committee points to the offence in section 227(1)(b)(i) of observing or visually recording another person in a private place, without their consent, and in circumstances where a reasonable adult would expect to be afforded privacy. The Committee refers to Parliament the question of whether these provisions, while protecting a right to privacy, have sufficient regard to the rights of people who conduct the relevant practices.

As is noted in the Explanatory Notes, the objective test – that in the circumstances, a reasonable adult would expect to be afforded privacy – ensures that the offences are directed at conduct which any reasonable person would find breaches accepted notions of privacy and where a person would rightly expect their privacy to be protected by the criminal law.

As is also noted in the Explanatory Notes, the offence is section 227(1)(b)(i) does not require the person under observation to be engaging in a private act at the time of the observation. It is the Government's view that a person who is in a private place such as a bathroom, bedroom, or toilet expects that they will not be under observation without their consent, regardless of whether they are in the process of engaging in a private act. These places by their very nature attract an expectation of privacy because they are places where private acts are likely to occur. The Government does not believe that a person in such a place should have to be engaging in a private act before the protection of the law is triggered.

The offences in section 227(1) are consistent with those contained in section 162 of the Canadian Criminal Code.

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

I am satisfied that these provisions have sufficient regard to the rights and liberties of persons undertaking this type of conduct.

11. The committee notes the Attorney's comments.

♦ **clause 109**

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

13. 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 did not consider the increases in penalties to be objectionable.

14. The Attorney responded as follows:

The objective of increasing the maximum penalty of contempt of criminal proceedings under the Justices Act 1886 is to achieve parity of penalty for contemptuous conduct committed in the civil and criminal jurisdictions. I note that, having regard to this objective, the Committee does not consider the penalty increase to be objectionable. The maximum penalty (84 penalty units or $6300) is an appropriate deterrent to disruptive conduct that ultimately results in delay and increased costs of proceedings under the Justices Act 1886.

15. The committee notes the Attorney's response.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[42]

♦ **clause 136(1)**

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

17. The committee restated its long-standing view that taxes should be imposed in primary legislation rather than by regulation.

18. The committee recommended that the bill be appropriately amended.

19. The Attorney responded as follows:

In view of the Committee's concerns about the proposed definition of "fee" in the Professional Standards Act 2004, I intend to move an amendment during consideration in detail of the Bill in accordance with the Committee's suggestion. The amendment will clarify that fees payable under the Act are able to be set at levels which cover the costs of processing an application and enforcement or audit of a scheme, as well as covering the

[42] 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.

costs of the Professional Standards Council conducting its ancillary functions and objectives under the Act. I thank the Committee for bringing this issue to my attention.

20. The committee thanks the Attorney for this information. The committee notes that the Attorney subsequently moved an amendment to the bill to address the committee's concerns.

8. 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. The committee notes that this bill was passed, with amendments, on 30 November 2005.

2. The committee commented on this bill in its Alert Digest No 13 of 2005 at pages 14 to 19. 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?[43]

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

3. The committee noted 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.

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

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

6. The Minister commented as follows:

> ***Clause 23*** *– amends the Land Act 1994 to allow correction of the leasehold land register to include particulars of an easement that has been omitted or misdescribed.*
>
> *This amendment has been inserted for consistency with the provisions of the Land Title Act 1994 as it is desirable for the registration provisions for leasehold and freehold land to be aligned to the greatest possible extent. This is because the registers are kept in the same electronic database and the powers of the chief executive relating to leasehold land under the Land Act 1994 have been delegated to the Registrar of Titles.*
>
> *There is no indefeasibility of title under the Land Act 1994 – the proposed amendment does not diminish the rights of a holder of a leasehold interest (who does not necessarily hold their interest free of all 'other' i.e. unregistered interests). The amendment is complementary to section 291 of the Land Act 1994 which gives power to the chief executive to correct a register and is intended to guide the Registrar of Titles, as delegate of the chief executive, as to when a correction may be made to the leasehold land register to record the particulars of an omitted easement.*

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

This amendment does have sufficient regard to the rights of lessees of land affected by such an easement.

***Clause 37** – inserts new sections 358A and 358B of the Land Act 1994 and deals with easements which are not omitted easements that come within the Registrar of Titles' power of correction under section 15 of the Land Title Act 1994.*

Property rights will not be infringed by introduction of this clause. The introduced provisions will allow the particulars of acquired easements to be recorded in the leasehold or freehold land register in order to ensure each register is an accurate, comprehensive and usable record of the relevant land and dealings.

The amendments do not allow an omitted easement to be acquired but are introduced to correct an administrative oversight. The decision to amend the leasehold or freehold land register under section 358A will not be discretionary.

Before the leasehold or freehold land register may be amended to record an omitted acquired easement, I must first be satisfied that:

- *action was taken to acquire the easement before commencement of section 358A;*
- *with regards to the acquisition, there is no outstanding issue of substance in relation to the payment of compensation under the Acquisition of Land Act 1967;*
- *the particulars of the acquisition have never been recorded in the appropriate register for the relevant land;*
- *the rights acquired under the acquisition have never been extinguished; and*
- *the entity currently entitled to the rights acquired under the acquisition is a public utility provider.*

It will be the responsibility of officers of the Department and the acquiring authority to provide to me, any documentary evidence required under section 358A(1)(a) to (e).

If the documentary evidence cannot be provided and I cannot be satisfied to the greatest practicable extent that the matters mentioned in paragraphs (a) to (e) are true, then I will not recommend to the Governor in Council that the current particulars about the relevant land in the leasehold or freehold land register be amended.

In most cases the landowner, whether or not that person was the owner when the easement was compulsorily acquired, will be aware of the presence of public utility infrastructure on the land. It is anticipated there will be few, if any, cases where a new landowner is not aware of the easement and it is considered that any impact on such an owner is justified by the public benefit in putting beyond doubt the status of these public utility easements. It will also benefit landowners to have certainty as to the interest held by a public utility provider in their land.

Furthermore, there is a 'sunset' clause for this amendment – the power to correct a register to include an easement will cease after 10 years. It is being introduced to deal with a particular problem that has come to light and not to try to deal with omissions that may happen in the future.

These amendments do have sufficient regard to the rights of lessees and owners of land affected by the easement.

Clauses 101(2) and 107(2) *deal with an omitted easement which is, and always has been, a statutory exception to indefeasibility of title in the Torrens system in Queensland. An 'omitted easement' is an easement which was in existence when the burdened lot was first registered but the easement was never recorded in the register, OR an easement which was at some time recorded in the register but is no longer recorded. The registered owner of the burdened lot is bound by such an easement notwithstanding its omission from the register.*

The amendment merely clarifies that the Registrar of Titles' power of correction under section 15 of the Land Title Act 1994 extends to including such omitted easements in the freehold land register and makes no change in substance to the power of correction. Case law confirms that this already includes a power to correct the freehold land register to include an omitted easement, and that this power exists whether or not ownership of the burdened land has changed (James v Registrar-General (1967) 69 SR NSW 361; Rock v Todeschino [1983] 1 Qd R.)

There is a right to compensation under the Land Title Act 1994 where a person is deprived of an interest or suffers loss or damage in certain circumstances.

As a registered interest is always subject to an omitted easement (this being a statutory exception to indefeasibility), no person can be deprived of an interest in respect of the omission or misdescription of such an easement, or in respect of the correction of the register to include such an easement. The amendment to section 189(1) made by clause 107(2) providing that no compensation is payable for deprivation, loss or damage because the particulars of an easement have been omitted or misdescribed, is merely for clarification.

Section 188A of the Land Title Act 1994 already provides that no compensation is payable under that section for loss or damage caused by the incorrectness of a register if the registrar may correct the register.

These amendments do have sufficient regard to the rights of owners of land. No rights are affected by the amendments, which merely clarify the correction power of the registrar of titles and specifically state a disentitlement to compensation which was previously partly expressed in the Act and partly implied by other provisions of the Act.

7. The committee thanks the Minister for this information.

♦ **clauses 48 and 110**

8. The committee noted 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.

9. It appeared from the Minister's speech that, in particular, this was 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.

10. The committee referred to Parliament the question of whether the provisions of cls.48 and 110 had sufficient regard to the rights of owners or lessees of the relevant lands.

11. The Minister commented as follows:

> *I note the committee's reference to the stay as a "three year restriction on subdivisions". However, this is not entirely correct and I take this opportunity to clarify the operation of these clauses.*
>
> *It is not the intention of the stay to affect all subdivisions with tidal boundaries. Landowners can still register a plan of resurvey or subdivision, provided there is no change to the position of the depicted tidal boundary. The stay will not change the current position of landowners' boundaries and does not take away anything that is already depicted on a registered plan (see diagrams in Attachment A).*
>
> *In addition, to ensure the stay does not catch landowners unnecessarily, there are a number of exemptions.*
>
> *Firstly, where plans are approved for registration under section 3.7.6 of the Integrated Planning Act 1997 before 8 November 2005, the amendment will allow registration of plans.*
>
> *Secondly, if there is incorrect identification or misdescription, including an earlier survey that did not comply with directions, I may approve registration of the plan if I am satisfied that the use of the foreshore for public purposes will not be compromised by the registration of the plan. I may also approve if there are sufficient conditions under the Integrated Planning Act 1997 to adequately protect the use of the foreshore for public purposes.*
>
> *Thirdly, the amendment allows for the registration of plans where there has been slow and imperceptible movement of the boundary. I may approve the plan if satisfied that the difference is due to natural accretion or erosion and either the foreshore will not be compromised by the registration of the plan or there are Integrated Planning Act 1997 conditions to protect the foreshore for public purposes.*
>
> *I am satisfied that the clauses 48 and 110 do have sufficient regard to the rights of owners or lessees of the relevant lands.*

12. The committee notes the Minister's comments.

♦ **clause 107(1)**

13. The committee noted that cl.101(1) of the bill deprives a mortgagee 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.

14. The committee referred to Parliament the question of whether the provision of cls.101(1) and 107(1) had sufficient regard to the rights of the relevant mortgagees.

15. The Minister commented as follows:

> *Mortgagees are in the unique position of having power to sell the property in which they have an interest as mortgagee to recover their secured debt. The consequences of such a sale for a registered owner are very serious and justify safeguards in the taking and registering of mortgages that may not apply to persons acquiring other types of interests in land.*

It is also inappropriate for mortgagees to shift commercial risks that they have willingly taken (i.e. the risk that a borrower will not repay the loan and the risk that a borrower is committing an identity fraud) onto the State which, under the Torrens system of registered title, provides for compensation for a defrauded owner.

The risk that a person is committing an identity fraud can be easily guarded against (although not completely eliminated) by taking steps to confirm identity, as is done by most banks, credit unions and other reputable lenders. The risk that the loan will not be repaid is reflected in the terms of the loan, especially in the charging of high interest rates – again this risk should be borne by the mortgagee and not passed on to the registered owner and the State.

The amendments are directed at stopping lending practices which, although not amounting to 'fraud' under the Land Title Act 1994, involve negligence and even reckless indifference as to whether a borrower is acting fraudulently. The amendments have sufficient regard to the rights of mortgagees as is demonstrated by the following:

- *the obligations imposed on mortgagees will be no more than is prudent lending practice. Clear guidelines will be given as to what reasonable steps need to be taken to confirm identity – these steps are not onerous and reflect current best practice in the lending industry;*
- *the amendments do not restrict in any way the terms of a contract (e.g. interest rate) a lender can enter into;*
- *the amendments do not limit in any way the contractual rights of the mortgagee, but only regulate the taking of security over real property. Therefore, a mortgagee is free to pursue the person they contracted with to recover the full amount owing under the terms of the loan; and*
- *the obligations and the consequences of not complying with them apply to **all** mortgagees, not just a particular section of the lending industry.*

These amendments are aimed at safeguarding the rights of all persons who own land in Queensland, and I am satisfied that they have sufficient regard to the rights of mortgagees.

*I also note with reference to section 4(3) of the Legislative Standards Act 1992, that most mortgages registered in Queensland are given to **corporate** entities – very few mortgagees are individuals.*

16. The committee thanks the Minister for this information.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[44]

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

17. The committee noted 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

[44] 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.

will clearly be adverse to such persons. The Explanatory Notes detail the government's reasons for imposing these restrictions.

18. The committee also noted 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 position.

19. The committee referred to Parliament the question of whether the retrospective aspects of cls.48 and 110 had sufficient regard to the rights of individuals affected by them.

20. The Minister commented as follows:

> *The amendment does have regard to the expectations of individual landowners with the current legislation. Where plans are approved for registration under section 3.7.6 of the Integrated Planning Act 1997 before 8 November 2005, the amendment will allow registration of plans.*
>
> *The only individuals adversely affected by this amendment are those landowners who wish to resurvey their land to include a significantly greater land area than shown on the original survey.*
>
> *I note the committee's comments relating to the retrospective aspects of clauses 48 and 110. The Government decided it was necessary to take the urgent action of introducing the stay to immediately halt plans of resurvey that depict significantly greater land areas from being registered. This was to ensure that the issue was not exacerbated while the Government considered solutions to the wider complex issue of surveying tidal land, which impacts directly on public access to beaches and other matters in the public interest.*
>
> *With regard to the retrospectivity of the stay, it avoids the inequities that might have arisen from a clamour to resurvey land and approve developments, which might have resulted were the stay not made retrospective to the date of introduction of the Bill.*
>
> *I am satisfied that these amendments have sufficient regard to 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 commencement of the retrospective clause.*

21. The committee notes the Minister's comments.

9. POLICE POWERS AND RESPONSIBILITIES (DRUG DETECTION DOGS) 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 30 September 2005. The committee notes that this bill was passed, without amendment, on 24 November 2005.

2. The committee commented on this bill in its Alert Digest No 11 of 2005 at pages 6 to 8. 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?[45]

♦ **clause 4 (proposed s.31B)**

3. The committee noted that cl.4 of the bill inserted into the *Police Powers and Responsibilities Act 2000* new chapter 2, part 2A, which authorises the use without warrant of drug detection dogs in a range of public and semi-public places. The Minister attributed the introduction of these provisions to a desire to reduce drug-induced violence in nightclubs and other such places.

4. The committee considered that, whilst less intrusive than the exercise of many other police powers conferred by the Act, the activities authorised by Part 2A do involve some intrusion upon the "personal space" of individuals in these places. The committee referred to Parliament the question of whether the powers conferred by Part 2A had sufficient regard on the one hand to the rights of the individuals against whom they may be employed, and on the other hand to the rights of the community as a whole.

5. The Minister commented as follows:

> *The committee's comments with respect to the use of the powers under the Bill involving some intrusion upon the 'personal space' of individuals in particular places are noted.*
>
> *I am of the view that the level of intrusion upon a person's personal space when a drug detection dog is used will be minimal. In effect, drug detection dogs will only be "walked" past persons in particular places and not generally interfere with people at those places unless an unlawful dangerous drug is detected on a person. In reality this will mean that a drug detection dog will only be in the immediate vicinity of a person for a matter of seconds.*
>
> *Given the desirability of reducing drug-induced violence in the likes of licensed premises and public places and therefore creating a safer environment, the benefits which will arise from the Bill clearly outweigh any minor inconvenience that may be experienced.*

6. The committee notes the Minister's comments.

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

10. POLICE POWERS AND RESPONSIBILITIES (MOTORBIKE NOISE) AMENDMENT BILL 2005

Background

1. The Honourable J C Spence, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 4 October 2005. The committee notes that this bill was passed, with amendments, on 24 November 2005.

2. The committee commented on this bill in its Alert Digest No 11 of 2005 at pages 9 to 10. 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?[46]

♦ The bill generally

3. The committee noted that the bill broadened the current "road hooning" provisions of the *Police Powers and Responsibilities Act 2000*, which ultimately authorise the impoundment and forfeiture of motor vehicles used in relation to certain offences, to cover the off-road operation of noisy motorbikes.

4. The committee considered these provisions of the bill would obviously impact adversely on the rights of certain motorbike riders and others associated with them. However, the activities of the riders concerned also had an obvious impact on the rights of residents and the general public.

5. The committee referred to Parliament the question of whether the provisions of the bill had sufficient regard on the one hand to the rights and liberties of motorbike riders and others affected by its provisions, and on the other to the rights of residents and the general public.

6. The Minister commented as follows:

> *The Committee's comments with respect to the Bill as a re-enactment and extension of the current 'hooning' provisions and sections 59G(1)(e) and 59LW are noted.*
>
> *I am of the view that the powers within this Bill are reasonable, legitimate, and provide a balanced extension of the law to an area of growing community concern. These powers enable police officers to investigate, enter a place and take appropriate enforcement action against a person who creates excessive noise when using a motorbike on a place other than a road.*
>
> *The Bill, in extending the liability for the payment of costs to the parent or guardian of a child, who has committed a prescribed offence, through a show cause process is reasonable and reflects the nature, seriousness and implications including the liability for costs associated with the prescribed offence.*

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

7. The committee notes the Minister's comments.

11. REVENUE LEGISLATION AMENDMENT BILL 2005

Background

1. The Honourable A M Bligh MP, Deputy Premier and Minister for Finance, Minister for State Development, Trade and Innovation, introduced this bill into the Legislative Assembly on 25 October 2005. The committee notes that this bill was passed, without amendment, on 23 November 2005.

2. The committee commented on this bill in its Alert Digest No 12 of 2005 at pages 11 to 12. The Deputy 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 adversely affect rights and liberties, or impose obligations, retrospectively?[47]

- **clause 34 and Schedule 1 (amendments of *Parliamentary Contributory Superannuation Act 1970* (proposed s.30H), and *Superannuation (State Public Sector Act) 1990* (proposed s.35))**

3. The committee noted that cl.34, and certain of the amendments made in Schedule 1, of the bill were retrospective in nature. However, the committee considered their effect was clearly beneficial to the individuals to whom they relate.

4. The committee accordingly had no concerns about the retrospective nature of these provisions.

5. The Deputy Premier responded as follows:

> *The committee notes that whilst the Bill has retrospective effect, the changes which it makes are in fact beneficial to taxpayers. Accordingly, the committee has no concerns in relation to the retrospective operation of the Bill.*
>
> *I confirm the beneficial nature of the changes in this Bill.*

6. The committee notes the Deputy Premier's response.

[47] 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.

12. TERRORISM (PREVENTATIVE DETENTION) BILL 2005

Background

1. The Honourable P D Beattie MP, Premier and Treasurer, introduced this bill into the Legislative Assembly on 22 November 2005. The committee notes that this bill was passed, with amendments, on 2 December 2005.

2. The committee commented on this bill in its Alert Digest No 14 of 2005 at pages 1 to 7. 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 have sufficient regard to the rights and liberties of individuals?[48]

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[49]

- **clause 12 (preventative detention orders for up to 14 days)**

3. The committee noted that cl.12 of the bill provided a maximum period of detention without charge or trial under a final preventative order of 14 days. The committee noted that under the corresponding Commonwealth provision, the maximum detention period was 48 hours.

4. The committee sought information from the Premier as to why provision of the much longer period in the Queensland bill was considered appropriate.

5. The Premier responded as follows:

> *The committee seeks information as to why the provision of the much longer maximum period of detention under the Queensland Bill (14 days) than under the Anti-Terrorism Bill (No 2) 2005 (Cth) (48 hours) is considered appropriate.*
>
> *The difference arises from limitations on Commonwealth legislative power. The overall structure of the complementary legislation is as described in the Committee's report (pages 1-3). As the Committee notes, the Council of Australian Governments' (COAG's) 27 September 2005 agreement on counter-terrorism laws commits to a preventative detention regime allowing detention for a maximum of 14 days. However, the Commonwealth's legal advice is that, for constitutional reasons relating to the separation of powers under Chapter 3 of the Commonwealth Constitution, Commonwealth legislation cannot authorise preventative (that is, non-punitive) detention for longer than 48 hours. The COAG agreement is therefore that the Commonwealth will legislate to enable preventative detention for up to 48 hours, and the States and Territories will legislate to enable preventative detention for up to 14 days.*
>
> *Fourteen days is considered to be an appropriate length of time. It is consistent with the requirement under sub-clause 8(4) that the terrorist act to be prevented must be imminent*

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

[49] 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.

and, in any event, be expected to occur in the next 14 days. It is the duration that, until recently, was authorised under the Terrorism Act 2000 (UK). The Government believes that any longer period of detention is excessive. Despite the recent extension of the maximum duration under the Terrorism Act 2000 (UK), I stated clearly in my second reading speech my opposition to any thought that the period might be extended in future (Hansard, 22 November 2005, page 4066).

6. The committee notes the Premier's response.

- **clause 8 (the standard of proof required before an issuing authority can order preventative detention)**

7. The committee sought information from the Premier as to what standard of proof must be satisfied before the issuing authority can make a PDO, and what standard of proof should be applied by the Supreme Court when considering an application to revoke or vary a final PDO.

8. The committee recommended that the bill be amended to expressly state what standard of proof shall apply in such cases.

9. The Premier responded as follows:

The Committee's analysis refers to Briginshaw v Briginshaw (1938) 60 CLR 366 (HCA), which establishes that the civil standard of proof on the balance of probabilities is a sliding standard, depending on the gravity of the consequences of establishing the relevant fact or matter. On the basis of the authorities the Committee cites (page 5), it is envisaged that the standard of proof in applications for the exercise of executive discretion to interfere with liberty will be at the high end of that sliding scale. The Government considers it preferable to rely on these principles of common law, rather than seek to prescribe an untested legislative formula.

The Government considers that the sliding Briginshaw standard of proof (which should apply in the way set out above) is a distinct issue from the pre-requisites for the exercise of the discretions that are predicated on subsections 8(3) and (5).

In the case of prospective terrorist acts, the threshold is satisfaction (on the balance of probabilities at the high end of the scale, for reasons given above) of the matters in paragraphs 8(3)(a)-(c). Only paragraph (a) includes a suspicion test (albeit that the suspicion must be formed on reasonable grounds). A 'suspicion' test, rather than a 'belief' test, is used because of a general analogy between the general application (bearing in mind that this is a national cooperative scheme) of those tests to warrants and arrests. The 'belief' (arrest) test is not applicable, because PDOs are intended to cover situations where sufficient evidence to arrest for an offence is not available. Consequently, the 'suspicion' test is applied.

Similarly, in the case of preventing the destruction of evidence, the threshold is satisfaction (on the balance of probabilities at the high end of the scale, for reasons given above) on reasonable grounds of the matters in paragraphs 8(3)(a)-(c).

For these reasons, the Government does not consider that the Bill requires amendment in the way the Committee recommends.

10. The committee notes the Premier's response.

♦ **clauses 15 and 22 (the material supporting the applications)**

11. The committee questioned why an application for an interim control order, which has arguably less draconian effects, must be sworn (or affirmed) whereas an initial preventative detention order under the bill need not be sworn or declared. The committee noted that this requirement would help to ensure a more rigorous process at the initial stage given that under s.193 of the *Criminal Code* it is a crime carrying 7 years imprisonment for anyone to make a materially false statement in a sworn statement and under s.194 it is a misdemeanour to make a declaration that is false in a material particular.

12. The committee sought information from the Premier in relation to this matter.

13. The Premier responded as follows:

> *The Committee seeks information about why applications for initial PDOs need not be sworn, whereas applications for interim control orders under the Anti-Terrorism Bill (No 2) 2005 (Cth) are required to be sworn.*
>
> *The absence of a requirement to swear interim applications reflects proposed s.105.7 under the Commonwealth Bill. Moreover, initial PDOs may well be required to be issued on a highly urgent basis, whereas that will less often be so for interim control orders. In any event, a police officer who gave misleading information to an issuing authority for an initial order would be guilty of misconduct under the Police Service Administration Act 1990 and possibly of an offence under section 194 of the Criminal Code.*

14. The committee notes the Premier's response.

♦ **clauses 11 and 17 (the power to make applications in respect of Queensland residents without the Queensland safeguards applying)**

15. The committee was concerned that there appeared to be no prohibition in either the Commonwealth or Queensland bill on the AFP making an application in Queensland in respect of a Queensland resident under the Commonwealth legislation, provided no application had already been made and the person taken into custody in respect of that terrorist act or suspected terrorist act under the Queensland legislation. Equally, there appeared to be no reason why the AFP cannot make a further application under the Commonwealth legislation in respect of a different terrorist act or suspected terrorist act even where an application had been made under the Queensland legislation in respect of the same person, provided the AFP application was based on information that became available after the State order was made.

16. The committee noted that if this occurred the Queensland resident may be deprived of the important additional safeguards provided for under the Queensland legislation, such as the involvement of the PIM, the right of legal representation at final detention order applications, the right to apply to the Supreme Court to revoke or vary the order and the like.

17. The committee sought information from the Premier as to how it was intended to ensure that the additional safeguards provided under the Queensland legislation would be applied to all applications for PDOs in respect of Queensland residents.

18. The Premier responded as follows:

> *It is intended that Queensland safeguards will apply to applications made under the Queensland Bill, but the COAG agreement does not contemplate those safeguards applying to applications made under the Commonwealth Bill. In any event, such a result could not follow in light of section 109 of the Commonwealth Constitution unless the Commonwealth Bill expressly contemplated it. Accordingly, it is intended that an Australian Federal Police officer will be able to apply under the Commonwealth Bill to a Commonwealth issuing authority for a Commonwealth order in respect of a Queensland resident. If law enforcement authorities seek detention beyond the 48-hour maximum permitted under the Commonwealth Bill, a Queensland police officer will have to apply to a Queensland issuing authority for a Queensland PDO, and only then would the additional Queensland safeguards apply.*

19. The committee notes the Premier's response.

- **clause 83**

20. Clause 83 provides that, if the bill is enacted, its provisions will expire 10 years after commencement.

21. Given the nature of the bill's provisions, the committee sought information from the Premier as to why a 10 year sunset period is appropriate.

22. The Premier responded as follows:

> *The COAG agreement was that there would be a sunset clause. There was discussion at the COAG meeting about the appropriate length of the sunset period. The Government is only proposing these laws reluctantly, and does not see them as a permanent part of our legal landscape. However, the threat from terrorism is unfortunately not going to disappear in the foreseeable future. COAG therefore settled on ten years as an appropriate sunset period.*

23. The committee notes the Premier's response.

13. 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. The committee notes that this bill was passed, with amendments, on 29 November 2005.

2. The committee commented on this bill in its Alert Digest No 13 of 2005 at pages 21 to 23. 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 institution of Parliament?[50]

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

3. The committee noted 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.

4. The committee noted that this would 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.

5. The Minister commented as follows:

> *The Bill as introduced proposes that summary franchise agreements be publicly disclosed.*
>
> *The Bill as introduced would allow for a summary of a road franchise agreement to be published after it was endorsed by the Auditor-General. This would have provided a high degree of transparency and accountability.*
>
> *I note the contents of your feedback on the Bill and in this regard, I believe there is merit in further increasing the requirement for public disclosure of road franchise agreements.*
>
> *Accordingly, I propose to amend the Bill to require that an entire road franchise agreement be tabled in Parliament for state toll roads and in council for local government tollways.*

6. The committee thanks the Minister for this information. The committee notes that the Minister subsequently moved an amendment to the bill to address the committee's concerns.

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

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[51]

- **clause 26**

7. The committee noted 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*.

8. The committee noted 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.

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

10. The Minister responded as follows:

> *The Bill recognizes the need to balance accountability and transparency in the approval process with the commercial nature of contractual arrangements relating to toll road infrastructure. There is an increasing likelihood of private sector participation in the delivery, management and operation of toll road infrastructure. In this regard, it is quite feasible to expect the private sector to require a minimum level of certainty that its investment will not be placed at risk as a result of government processes. In order to attract public investment for major toll infrastructure, proponents will require some certainty when entering into commercial agreements.*
>
> *I believe it would be inappropriate for declaration to be made in regulation and subject to the disallowance provisions fo the Statutory Instruments Acts 1992 as this would introduce an unacceptable degree of uncertainty for proponents. The gazettal process is a practical approach to support decisions that underpin road infrastructure investment agreements.*
>
> *Furthermore, the gazettal process that has been proposed provides a high level of transparency. The process by which a toll road can be declared will be embedded in the primary legislation and is generally consistent with the approach taken in the Transport Infrastructure Act 1994 which provides for a number of decisions or declarations to be made by the Minister by gazette notice.*
>
> *I am advised that the gazettal approach balances the community's expectation for transparency and private proponents' requirement for an acceptable level of certainty.*

11. The committee notes the Minister's response.

[51] 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.

14. WATER EFFICIENCY LABELLING AND STANDARDS BILL 2005

Background

1. The Honourable R J Mickel MP, Acting Minister for Environment, Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 25 October 2005. The committee notes that this bill was passed, without amendment, on 30 November 2005.

2. The committee commented on this bill in its Alert Digest No 12 of 2005 at pages 19 to 20. The response of the Honourable D Boyle MP, Minister for Environment, Local Government, Planning and Women, 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 institution of Parliament?[52]

♦ **The bill generally**

3. This bill forms part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.

4. The committee noted, however, that despite the layout and clause numbering of the bill closely following that of the relevant Commonwealth Act, the bill was not identical to the Commonwealth legislation and appeared to incorporate Queensland drafting practices as well as modifications addressing various Queensland-specific issues.

5. The committee referred to Parliament the question of whether the bill had sufficient regard to the institution of Parliament.

6. The Minister commented as follows:

> *The Bill does form part of national scheme legislation to support the Water Efficiency Labelling and Standards scheme. However, as the Committee has observed, the Bill has been carefully drafted to incorporate Queensland drafting practices and comply with Queensland legislative principles.*

7. The committee notes the Minister's comments.

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

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[53]

HEALTH SERVICES AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2005 at page 3. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable S Robertson MP, Minister for Health. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 23 November 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 13 of 2005 at pages 9 to 13. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable L D Lavarch MP, Attorney-General and Minister for Justice. The bill was subsequently passed, with the amendments proposed by the Attorney incorporated in it, on 30 November 2005.

2. One of the amendments proposed by the Attorney in fact addressed a concern raised by the committee in its report on the bill. The Attorney's amendment limited fees set by regulation to a level which enabled full cost recovery for the operations of the Professional Standards Council, and omitted the broader original provision which authorised fees to be set at a level which constituted a tax. Elsewhere in this Alert Digest, the committee has commended the Attorney on moving this amendment.

3. The other amendments proposed by the Attorney raised no issues within the committee's terms of reference.

LIQUOR AND OTHER ACTS AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2005 at page 4. During consideration in detail, Parliament agreed to amendments proposed

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[53] 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.*

by the Minister sponsoring the bill, the Honourable M M Keech MP, Minister for Tourism, Fair Trading and Wine Industry. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 23 November 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

NATURAL RESOURCES AND OTHER LEGISLATION AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 13 of 2005 at pages 14 to 19. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable H Palaszczuk MP, Minister for Minister for Natural Resources and Mines. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 30 November 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

POLICE POWERS AND RESPONSIBILITIES (MOTORBIKE NOISE) AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2005 at pages 9 and 10. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable J C Spence MP, Minister for Police and Corrective Services. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 24 November 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

PUBLIC HEALTH BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 4 of 2005 at pages 11 to 23. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable S Robertson MP, Minister for Health. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 26 October 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

STATE DEVELOPMENT AND PUBLIC WORKS ORGANISATION AND OTHER LEGISLATION BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2005 at page 14. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable P D Beattie MP, Premier and Treasurer. The bill was subsequently passed, with the amendments proposed by the Premier incorporated in it, on 22 November 2005.

2. The amendments proposed by the Premier included two declaratory provisions which were retrospective in nature. One provision appeared to be purely technical in nature, and the entities primarily affected by the second provision were stated in the accompanying Explanatory Notes tabled to support its contents.

3. In the circumstances, the committee whilst commenting on the presence of these provisions would not have objected to them.

TERRORISM (PREVENTATIVE DETENTION) BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 14 of 2005 at pages 1 to 7. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable P D Beattie MP, Premier and Treasurer. The bill was subsequently passed, with the amendments proposed by the Premier incorporated in it, on 2 December 2005.

2. The amendments proposed by the Premier raised no issues within the committee's terms of reference.

TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 13 of 2005 at pages 21 to 23. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable P T Lucas MP, Minister for Transport and Main Roads. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 29 November 2005.

2. One of the amendments proposed by the Minister in fact addressed an issue raised by the committee in its report. The amendment required that an entire tollway franchise agreement, rather than a summary of it, must be tabled. Elsewhere in this alert Digest, the committee has commended the Minister on moving this amendment.

3. The other amendments proposed by the Minister raised no issues within the committee's terms of reference.

WORKERS' COMPENSATION AND REHABILITATION AND OTHER ACTS AMENDMENT BILL 2005

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2005 at pages 15 to 16. During consideration in detail, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable T A Barton MP, Minister for Employment, Training and Industrial Relations. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 27 October 2005.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

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 1st report to Parliament in 2006.

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

14 February 2006

APPENDIX

CORRESPONDENCE

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