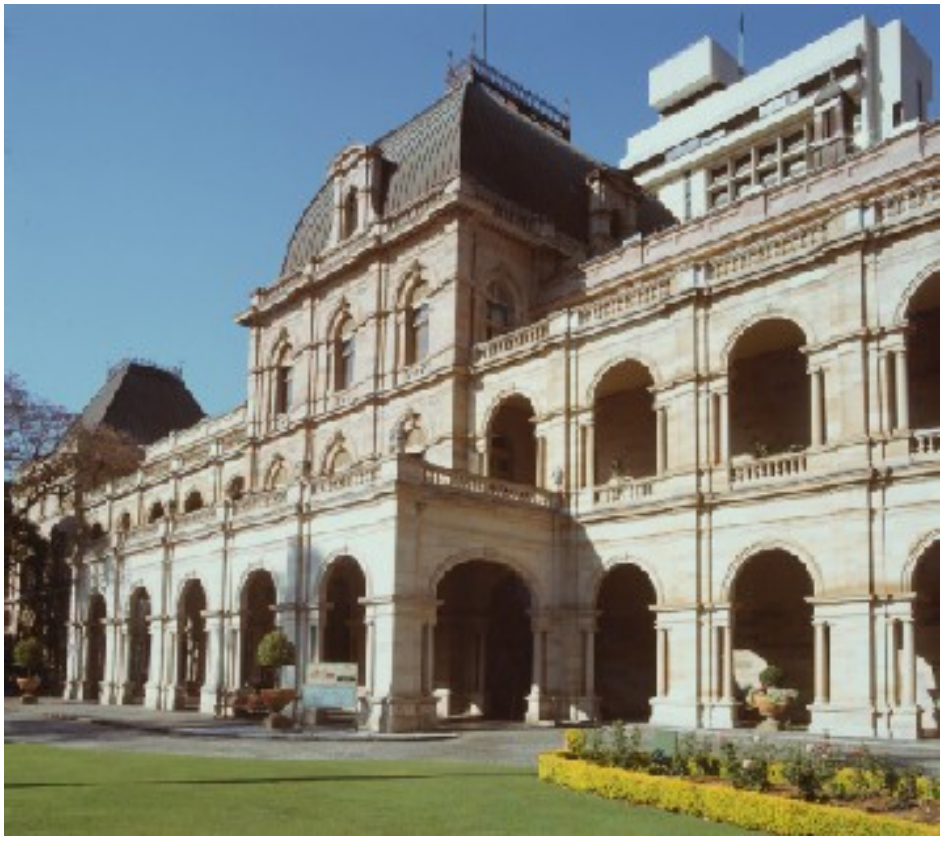
SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



Tabled 9 May 2006

Issue No 5 of 2006

SCRUTINY OF LEGISLATION COMMITTEE MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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

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

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

TERMS OF REFERENCE

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

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

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

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

by examining all Bills and subordinate legislation.

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

(a) the following provisions of the Legislative Standards Act 1992—

- *section 4 (Meaning of "fundamental legislative principles")*
- *part 4 (Explanatory notes); and*

(b) the following provisions of the Statutory Instruments Act 1992—

- *section 9 (Meaning of "subordinate legislation")*
- *part 5 (Guidelines for regulatory impact statements)*
- *part 6 (Procedures after making of subordinate legislation)*
- *part 7 (Staged automatic expiry of subordinate legislation)*
- *part 8 (Forms)*
- *part 10 (Transitional).*

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

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

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. BUILDING AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable D Boyle MP, Minister for Environment, Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 19 April 2006.

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

> (to) *provide a legislative framework for building that is up to date, clear, easy to understand and as user-friendly as possible. It results from revising and reshuffling provisions between the Building Act 1975 and the Integrated Planning Act 1997. Some matters best dealt with in primary legislation have been moved out of regulations into the Acts and vice versa. Provisions now fit together logically and effectively.*

Overview of the bill

3. As indicated in the Minister's Speech and the Explanatory Notes this bill's main function is not to create new law, but to reorganise and clarify existing legislation. This is achieved by moving current provisions between several Acts and regulations, so as to render the law governing building more logical and convenient in its organisation, location and expression, and to make it more user-friendly.

4. The committee commends this aspect of the bill, as it renders legislation more accessible to specialist users and to the public in general.

5. Although the provisions of the bill (including those drawn from the *Integrated Planning Act 1997*), no doubt impact in many ways upon the rights of individuals, the bill's provisions are generally speaking technical and process-oriented in nature.

6. The appropriateness of its provisions is ultimately a matter for Parliament to determine.

7. However, the following matter merits specific comment.

Does the legislation have sufficient regard to the institution of Parliament?[3]

- **clause 5 (proposed ss.5G, 5H, 9P and 11R).**

8. This bill places very significant reliance upon external documents, and upon government-generated documents which are not subordinate legislation.

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

Building Code of Australia (BCA)

9. Proposed s.5G effectively incorporates into the *Building Act 1975*, and gives legal effect to, the Building Code of Australia (BCA), in whatever form it may take from time to time. The BCA, as indicated in s.5G, is a document published by a body known as the Australian Building Codes Board.

Queensland Development Code (QDC)

10. Proposed s.5H likewise incorporates into the *Building Act*, and gives legal effect to, a document called the "Queensland Development Code". This is a document published by the Department of Local Government and Planning. This incorporation is subject to the additional control mechanism that any additions to, or replacements of, the Code or a part of it do not take effect until a regulation has approved that step (s.5H(3)).

11. Both the BCA and the QDC (particularly the former) are documents of great significance, in that they contain the detailed requirements in relation to building standards.[4]

Code of Conduct

12. Proposed s.9W(1) requires that a private building certifier must, in performing a private certifying function, always act in the public interest. A maximum penalty of 1665 penalty units ($124,875) is provided for breach of this obligation.

13. Section 9W(2) stipulates a number of circumstances in which a private certifier does not act in the public interest. One of these is when the certifier "contravenes the code of conduct".

14. Proposed s.9P defines the code of conduct as:

> *the document called 'Code of Conduct for Building Certifiers' made by the chief executive on 20 October 2003 and tabled in the Legislative Assembly on 14 November 2003, as amended or replaced from time to time under this section.*

15. Subsections (2) and (3) provide that the chief executive may amend or replace that document, but the amendment or replacement will not take effect until it is approved by a regulation. From the committee's standpoint, this document is similar in nature to the QDC.

National accreditation framework

16. Finally, proposed s.11R(1) provides that the function of an accreditation standards body is to issue accreditation to individuals proposing to apply to be building certifiers. Section 11R(2) requires the body to do various things, including to ensure that the educational and experiential standards set by the body, for each level of licensing, "comply with the national accreditation framework for building certifiers". Section 11R(3) defines "national accreditation framework" as meaning "the framework, as amended from time, approved by the body known as the Australian Building Codes Board". This is clearly another external document, generated by the same body as that which published the BCA.

17. The incorporation by reference of external documents, either in fixed form or in whatever form they may take from time to time, is a feature of a significant number of bills examined

[4] Clause 95 of the bill inserts into the *Integrated Planning Act 1997*, for the purposes of that Act, an identical definition of the BCA.

by the committee.[5] The committee considers the fixed form option is acceptable, provided the document concerned is readily accessible to readers of the legislation.

18. The incorporation of external documents in whatever form they may make from time to time raises an additional issue, namely, that this practice has the tendency to undermine the institution of Parliament by effectively delegating the making of Queensland law to outside bodies.

19. As the committee has previously stated,[6] it considers the incorporation of external documents by bills should be kept to the minimum reasonably achievable in the circumstances, and this is particularly so where a document is incorporated in whatever form it may take from time to time. Having said this, the committee recognises that there may be cases where there are pressing practical arguments in favour of the use of this drafting technique.

20. In relation to the BCA and the QDC, the committee concedes that there are a number of cogent arguments in favour of their incorporation. Most, if not all, of these grounds are extensively covered in the Explanatory Notes, and include:

- both documents are extremely detailed, technical and extensive. The BCA is a document of long standing which has for many years been used as a national source of technical building standards and has become the key element in maintaining uniform building standards across Australia
- the QDC, which is also a document of long standing, has also become a source of Queensland-specific variations on national uniform building standards
- both BCA and QDC may require rapid amendment
- Queensland is represented on the Australian Building Codes Board, which generates the BCA
- all States and territories incorporate the BCA in their building legislation
- given the complexity and constantly changing nature of the BCA and QDC, incorporation of this material by reference to external documents is more cost-effective than would be incorporating it in legislation.

21. In relation to the code of conduct referred to in s.9P, which is obviously a document of considerable significance given the magnitude of the maximum penalties for failure to comply with it, the committee notes that any amendments must be approved by regulation. This serves to at least significantly diminish concerns in relation to it not being itself included in subordinate legislation.

22. The committee notes that the bill places very significant reliance on external documents, and on government-generated documents which are not subordinate legislation.

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5 See, for example, the committee's recent report on the *Higher Education (General Provisions) Bill 2003*; Alert Digest No.7 of 2003 at pp.17-19.

6 See the committee's report on the *Higher Education (General Provisions) Bill 2003* mentioned above.

23. Given the nature of the subject dealt with by the two most significant documents (the BCA and the QDC) and the other circumstances outlined in the Explanatory Notes, the committee concedes that there are significant practical arguments in favour of their incorporation. These circumstances significantly lessen the concerns which the committee would otherwise have as to the incorporation of such an extensive and significant external document.

24. The committee makes no further comment in relation to the bill's incorporation of external documents.

2. CRIME AND MISCONDUCT AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable L D Lavarch MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 19 April 2006.

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

> *to implement the outstanding government endorsed recommendations made by the Parliamentary Crime and Misconduct Committee in its March 2004 report on its three year review of the Crime and Misconduct Commission.*
>
> …
>
> *to make a number of other amendments to the Crime and Misconduct Act 2001, the Misconduct Tribunals Act 1997 and the Witness Protection Act 1997 unrelated to the PCMC report.*
>
> …
>
> (to make) *amendments to the appointment provisions of the Misconduct Tribunals Act 1997 to address unnecessary administrative complexities and to better align them with the appointment provisions in the Crime and Misconduct Act 2001.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[7]

♦ **The bill generally**

3. The bill makes a significant number of amendments to the *Crime and Misconduct Act 2001* to implement various Government-endorsed changes recommended in the March 2004 Report of the Parliamentary Crime and Misconduct Committee on its *Three Year Review of the Crime and Misconduct Commission*. The opportunity has also been taken to make a number of other amendments to associated Acts such as the *Misconduct Tribunals Act 1997*, the *Police Powers and Responsibilities Act 2000*, the *Witness Protection Act 2000* and the *Whistleblowers Protection Act 1994*.

4. Certain other changes relate to issues raised, mainly by the Crime and Misconduct Commission, since the 2004 Report.

5. Given the nature of the subjects dealt with by this bill, it is inevitable that many of its provisions will impact in one way or another upon the rights of individuals. Whether those changes are appropriate is ultimately a matter for Parliament to determine.

6. The committee notes that the bill amends the *Crime and Misconduct Act 2001* and various

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

other related Acts, principally to implement Government-endorsed recommendations made by the Parliamentary Crime and Misconduct Committee in its report on its *Three Year Review of the Crime and Misconduct Commission*.

7. Given the nature of the subjects dealt with by the bill, many of its provisions will inevitably impact upon the rights and liberties of individuals.

8. The committee refers to Parliament the question of whether the various provisions of the bill have sufficient regard to the rights and liberties of individuals affected by them.

3. FIRE AND RESCUE SERVICE AMENDMENT BILL 2006

Background

1. The Honourable P D Purcell MP, Minister for Emergency Services, introduced this bill into the Legislative Assembly on 21 April 2006.

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

> (to incorporate amendments in relation to) *a number of areas where fire safety arrangements in Queensland* (can) *be improved.*

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[8]

- **clauses 6, 8 and 42**

3. Not surprisingly given the subject with which it deals, the *Fire and Rescue Service Act 1990* confers upon authorised fire officers a range of intrusive powers (see part 6 – ss.53-60). Included in these powers are extensive powers of entry (ss.53, 55 and 56). These powers are exercisable without the consent of the occupier and without obtaining a warrant.

4. Clauses 6 and 8 of the bill somewhat extend the range of powers exercisable by fire officers after entry has been effected, by expressly providing powers of search, inspection, analysis, copying and the like, and by providing powers of seizure.

5. Section 137 of the Act currently empowers persons authorised by the commissioner to enter any premises of a local government during ordinary business hours to examine, make copies of or take extracts from, any local government documents relevant in one way or another to fire safety. Clause 42 of the bill extends this entry power to include building certifiers. As building certifiers (who may now also be private operators who are not local government employees) carry out significant functions in relation to buildings, the extension of this power is perhaps not surprising.

6. The committee notes that cls.6, 8 and 42 of the bill extend, in various ways, the entry and post-entry powers currently conferred on officials acting under the provisions of the *Fire and Rescue Service Act*.

7. The committee draws these extended powers to the attention of Parliament.

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

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

♦ **clauses 19, 20, 22, 23, 24, 25 and 46**

8. The *Fire and Rescue Service Act* currently sets a general maximum penalty level of 50 penalty units ($3750) or 6 months imprisonment for offences against the Act (see s.149(1)). However, in relation to four offences, the Act sets a higher maximum penalty (see s.149(2)).

9. The bill, which relocates the penalty provisions from s.149 to each significant offence-creating section, also substantially increases the maximum penalties associated with breach of certain of these provisions. They include:

- s.104C (occupier of building to maintain means of escape from building)
- s.104D (occupier of building to maintain prescribed fire safety installations)
- s.104E (fire and evacuation plan)
- s.104FA (obligation to prepare fire safety management plan)
- cl.24 (proposed s.104FB) (other obligations about fire safety management plan).

10. In relation to each of these provisions, maximum penalties ranging from 2000 penalty units ($150,000) or 3 years imprisonment down to 750 penalty units ($56,250) or 1 years imprisonment, depending on the circumstances, are provided.

11. In addition, in relation to each to each of these offences cl.25 excludes the application of ss.23(1) and 24 of the *Criminal Code*. Section 23 provides that the commission of a crime normally requires the presence of intent, and s.24 provides a defence where a person holds an honest and reasonable, but mistaken, belief about a factual situation. Clause 25, however, partly balances this exclusion by providing (see proposed ss.104FGA(4) and (5)) two more limited forms of defence, based on the person having taken reasonable precautions and exercised proper diligence to prevent the contravention, and upon the contravention having being due to causes over which the person had no control.

12. Clause 46 of the bill also declares that where an offence against the Act carries a maximum penalty of 2 years imprisonment or more, the offence is an indictable offence that is a misdemeanour. Indictable offences are more serious offences which are normally tried before a judge and jury.

13. Proposed s.148F (inserted by cl.46) also empowers the court to order forfeiture to the State of anything used to commit an offence of which a person has been convicted.

14. In relation to the increased penalties, the Explanatory Notes (at page 7) state:

> *Sections 104C, 104D and 104E of the Fire and Rescue Service Act 1990 impose fire safety obligations on building occupiers to maintain adequate means of escape, fire safety equipment and evacuation plans and procedures to ensure the safety of building occupants*

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

> *in the event of fire. Sections 104FA and 104FB impose obligations on owners of budget accommodation buildings to prepare and update fire safety management plans for budget accommodation buildings. These provisions are critical to maintaining adequate standards of fire safety in buildings in Queensland. Contravention of these obligations could potentially result in very serious consequences, including loss of life, injury and property loss.*

15. In relation to the exclusion of ss.23(1) and 24 of the *Criminal Code*, the Notes (at page 7) state:

> *The removal of these protections is balanced by the inclusion of defences that the contravention was due to causes over which the person had no control and that a person took reasonable precautions and exercised proper diligence to avoid the contravention. The exclusion of ss23(1) and 24 of the Criminal Code is consistent with the approach taken by other public safety legislation, including the Workplace Health and Safety Act 1995, Dangerous Goods Safety Management Act 2001 and the Electrical Safety Act 2002.*

16. The committee notes that cls.19, 20, 22, 23 and 24 of the bill substantially increase maximum penalties associated with a number of serious offences against the Act. Clause 25 also largely excludes the operation of two pivotal provisions of the *Criminal Code*, whilst replacing them with more limited forms of defence.

17. The committee draws to the attention of Parliament these significant amendments in relation to offences against the Act.

♦ **clause 27**

18. Clause 27 inserts into the *Fire and Rescue Service Act* new part 9A division 3A (Occupancy limits for particular licensed buildings) (proposed ss.104KA-104KQ). The effect of these provisions is to authorise the commissioner to determine an "occupancy number" for certain licensed premises. The intention is to limit the number of people who may at any one time be in certain licensed premises, or parts of licensed premises, which are at risk of overcrowding, and from which all occupants may consequently not be able to safely evacuate if a fire or hazardous materials emergency happens.

19. These provisions could be construed as affecting the rights of proprietors of the licensed premises to conduct the relevant business in the manner which they desire. However, given the quite obvious public safety implications in relation to this matter, the imposition of this restriction does not appear to be objectionable.

20. The committee notes that cl.27 inserts various provisions empowering the commissioner to limit the number of persons at any time occupying particular licensed premises.

21. In the circumstances, the granting of this authority to impose restrictions on numbers does not appear to be objectionable.

Does the legislation provide appropriate protection against self-incrimination?[10]

♦ **clauses 11 and 12**

22. Clause 10 of the bill omits s.58 of the Act, which provides a general exclusion of the rule against self-incrimination where a person, under the provisions of part 6 of the Act, is required to answer a question or give information. Clause 11 of the bill amends s.58A of the Act (Reasonable assistance to be provided), principally to re-enact an existing exclusion of the self-incrimination rule where a person is required under s.58A to provide assistance to an authorised fire officer. However, cl.11 provides a form of "use" and "derivative use" immunity where the person required to provide assistance is an individual, and the requirement is to give information or produce a document.

23. Clause 12 of the bill introduces proposed s.58B (Power to inquire into fire or hazardous materials emergency). This section applies where an authorised fire officer inquires into the circumstances and probable causes of a fire or hazardous materials emergency. The officer may require a person to give reasonable help, and s.58B again provides that if that requirement is complied with by giving information or producing a document, the rule against self-incrimination shall not apply if the document is "a document required to be kept by the person under (the) Act". No form of "use" or "derivative use" immunity is provided in this case.

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

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

25. The committee notes that cl.11 provides individuals (but not corporations) with "use" and "derivative use" immunity. Further, although cl.12 does not provide such immunity, it applies only in relation to a document required to be kept under the provisions of the Act. The committee has previously conceded that denial of the self-incrimination rule in that context may be easier to justify than in other situations.[11]

26. The committee notes that cls.11 and 12 of the bill deny persons the benefit of the rule against self-incrimination.

27. The committee refers to Parliament the question of whether these denials of the benefit of the rule against self-incrimination are appropriate in the circumstances.

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[10] 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.

[11] 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.

4. LIQUOR AMENDMENT BILL 2006

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 19 April 2006.

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

> *to implement Stage One of the Statewide Safety Action Plan by amending the Liquor Act 1992 (Liquor Act) to impose a statutory 3am lockout condition on all licensed premises in Queensland.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[12]

- **clauses 4-6 inclusive**

3. The *Liquor Amendment Bill 2005* introduced "lockout" provisions which effectively prevented liquor licensees and permittees who were able to sell liquor on their premises between 3am and 7am, from allowing patrons to enter or re-enter their premises during that period. They were therefore only permitted to serve those patrons who were already on their premises at 3am and who remained there.

4. These provisions were aimed at reducing the incidence of anti-social behaviour associated with late-night drinking in hotels, nightclubs and the like.

5. Under the 2005 bill the lockout provisions were only to operate within the Brisbane City Council area.

6. In its report on the 2005 bill,[13] the committee noted that these provisions could be said to limit the freedom of persons to conduct commercial activities. The committee noted, however, that the commercial sale of liquor had long been an area heavily regulated by statute, due to the significant health, crime and other social issues associated with it. The lockout provisions, in the committee's view, merely added to an already extensive list of restrictions to which operators in the liquor industry are subject. The committee made no further comment in relation to the lockout provisions.

7. The current bill provides that the lockout provisions will now apply Statewide, not just within the Brisbane City Council area. The bill also provides authority for lockout provisions, more demanding than those imposed by the current bill, to be imposed as a condition of a liquor licence or permit in particular cases.

8. The committee notes that cls.4 to 6 inclusive of this bill extend the current lockout provisions imposed on liquor licensees and permittees from the Brisbane City Council area

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

[13] See Alert Digest No 4 of 2005 at pages 8-9.

to the entire State. They also authorise new lockout provisions, which may be stricter than the statutory lockout provisions, to be imposed as conditions of a liquor licence or permit.

9. The committee has previously commented that whilst lockout provisions in various ways limit the capacity of persons to conduct the business of selling liquor, this is an area of commercial activity which has long been heavily regulated by statute.

10. The committee makes no further comment in relation to cls.4-6 inclusive.

5. LIQUOR (EVIDENCE ON APPEALS) AMENDMENT BILL 2006

Background

1. Mr P W Wellington MP, Member for Nicklin, introduced this bill into the Legislative Assembly on 21 April 2006 as a private members bill.

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

> *to amend the Liquor Act 1992 so that when the Commercial and Consumer Tribunal is hearing an appeal against a decision of the chief executive it may hear evidence that should have been presented to, and considered by, the chief executive as well as the evidence that was actually before the chief executive.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[14]

♦ **clause 4**

3. Under the *Liquor Act 1992* persons adversely affected by various decisions of the chief executive may seek review of such decisions by the Commercial and Consumer Tribunal (see s.30).

4. Section 34 of the Act currently provides that an appeal to the tribunal "is by a rehearing on the evidence that was before the chief executive".

5. Clause 4 of the bill re-enacts this provision but provides that despite it, the tribunal may nevertheless permit "fresh, additional or substituted evidence (the *new evidence*)" to be adduced in the appeal if satisfied that:

- the new evidence should have been before the chief executive when he or she made their decision; or
- the party seeking to adduce this evidence did not know, and could not reasonably have known, the existence of the evidence at that time; or
- in the circumstances, it would be unfair not to allow the new evidence to be adduced.

6. Proposed s.35(4) enables the tribunal, if it decides to admit the new evidence, to either immediately continue with the appeal, or adjourn the proceeding to provide the chief executive with the opportunity to reconsider the previous decision in light of the new evidence.

7. The net effect of cl.4 of the bill is to enhance the position of appellants.

8. The committee notes that cl.4 of the bill inserts into the *Liquor Act 1992* a provision

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

potentially broadening the range of materials which may be considered by the tribunal which hears appeals against decisions of the chief executive. As such, it enhances the position of appellants.

9. The committee does not object to this amendment.

6. MARITIME AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable P T Lucas MP, Minister for Transport and Main Roads, introduced this bill into the Legislative Assembly on 21 April 2006.

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

> (to make) *Queensland's seas safer and cleaner.* … (to) *help tackle drink driving to improve safety on our roads* … (and) … (to) *make changes to clarify or improve existing legislation.*

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

- **clauses 32 (proposed s.117E), 87 (proposed s.183E) and 35**

3. Clause 32 amends the *Transport Operations (Marine Pollution) Act 1995* by inserting part 13A. This Part provides several measures aimed at ensuring compliance with the Act, including enforcement orders, directions and undertakings. Proposed s.117E provides that a person who contravenes an enforcement order or interim enforcement order commits an offence against the Act. The breach carries a maximum penalty of 1000 penalty units ($75,000) or 1 years imprisonment.

4. Clause 87 inserts into the *Transport Operations (Marine Safety) Act 1994* an analogous part 13A. Proposed s.183E of this Part imposes a maximum penalty of 500 penalty units ($37,500) or 1 years imprisonment for breach of an enforcement order or interim enforcement order made in relation to that Act.

5. Clause 35 amends the *Transport Operations (Marine Pollution) Act 1995* to provide that where a person is convicted of an offence against that Act, the court may make a wide range of orders. These include orders requiring action to rehabilitate or restore the damaged environment, to conduct a stated advertising or education campaign, to make a stated private apology or publish a stated public apology, to operate a stated ship in a particular way, to repair, modify or replace a stated ship, to start or stop a stated activity or not to own or operate any ship without consent.

6. Breach of these orders is an offence punishable by a maximum penalty of 3500 penalty units ($262,500) or 2 years imprisonment.

7. The reason for these heavy maximum penalties and wide-ranging orders is no doubt the serious effects of marine pollution, a matter canvassed at considerable length in the Minister's Second Reading Speech.

8. The committee notes that cls.32, 35 and 87 impose heavy maximum penalties for breach of the relevant provisions. The committee further notes that cl.35 enables a wide range of

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

orders to be made where a person is convicted of an offence against the relevant Act.

9. The committee draws to the attention of Parliament the presence of these heavy maximum penalties and wide-ranging post-conviction orders.

♦ **clause 92 (proposed s.203D)**

10. Clause 92 replaces current Part 16 (Appeals) of the *Transport Operations (Marine Safety) Act 1994* with a new part 16 (Review of and appeals against particular decisions).

11. Proposed s.203B states the general proposition that a person whose interests are affected by an "original decision" may seek review of that decision. Under s.203C, a person dissatisfied with the review may appeal to "the appropriate appeal court". The term "original decision" is defined in s.203 in objective terms.

12. Proposed s.203D lists a range of specific types of decisions which cannot be appealed against. However, paragraph (d) of that section also includes "a decision declared under a regulation to be a decision that cannot be appealed against".

13. The committee notes that under current s.203 of the Act a similar power exists to add, by regulation, to the range of matters which may be appealed (s.203(1)(e)), and also to add to the list of the range of decisions which cannot be appealed (s.203(3)(d)).

14. Whilst to an extent proposed s.203D follows the pattern established in the current sections of the Act, that Act was drafted prior to the committee's establishment and in terms which it considers are not compliant with fundamental legislative principles. Indeed, the provision of proposed s.203D(d) now reproduced from the original Act into this bill, is more objectionable than the part which is not reproduced. It is, in the opinion of the committee, more objectionable to provide a power to expand the range of decisions which are not subject to appeal, than a provision which enables the range of appellable decisions to be enlarged.

15. The committee notes that proposed s.203D (inserted by cl.92) provides power for the range of non-appellable decisions to be enlarged by regulation. In the opinion of the committee, such a provision is inconsistent with fundamental legislative principles.

16. The committee recommends that proposed s.203D(d) be deleted.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[16]

- **clauses 36 and 92**

17. Clause 36 inserts into the *Transport Operations (Marine Pollution) Act 1995* new part 14A (Protection for whistleblowers). Clause 92 inserts new part 15A, containing similar provisions, into the *Transport Operations (Marine Safety) Act 1994*.

18. In keeping with the general scheme of whistleblower provisions, both Parts declare that a person is not civilly or criminally liable for disclosing to an official, information about conduct the disclosing person honestly believes on reasonable grounds, contravenes the relevant Act. Specific protection is provided in relation to defamation proceedings and statutory confidentiality obligations. Further, reprisal action taken against the disclosing person is declared to be a tort, for which the person taking the reprisal is liable in damages. A disclosure by the disclosing person does not absolve him or her in relation to their own illegal conduct, but a court may have regard to the disclosure if the disclosing person is subsequently prosecuted for their conduct.

19. The Minister states that the introduction of these whistleblower protections is:

> *A vital tool to encourage persons to report illegal discharges and an important step towards ensuring that everybody can play a role in minimising the risk to the marine environment from pollution.*

20. The Explanatory Notes, in relation to both Parts, argue that the public interest involved is sufficient to justify the limited immunity provided to the whistleblower.

21. The committee notes that cls.36 and 92 provide limited legal immunity to whistleblowers.

22. The committee draws these provisions to the attention of Parliament.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[17]

- **clauses 13, 50, 58, 92 and 100**

23. The bill contains a number of provisions which are, or may be, "Henry VIII clauses" within the definition of that term adopted by the committee.[18] This is because the effect of regulations made under the provisions is to displace, in some respect, the operation of the bill's provisions.

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

17 Section 4(4)(c) 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 authorises the amendment of an Act only by another Act.

18 See the committee's report *The Use of "Henry VIII Clauses" in Queensland Legislation*, January 1997.

24. The provisions are:

- A provision enabling a regulation to exempt a ship from the general requirement to have an appropriate insurance policy (cl.13).
- A provision providing that a regulation "may provide for deciding" if a ship is used only for private recreation (cl.50).
- A provision that if a ship is registered as a recreational/commercial/fishing ship the owner or master must not operate it except as such a ship (or as otherwise provided for under a regulation).
- A provision providing that, as well as a stipulated range of decisions made under the *Transport Operations (Marine Safety) Act 1994* which cannot be appealed against or reviewed, there is also no appeal against "a decision declared under a regulation to be a decision that cannot be appealed against".
- A provision enabling a regulation to authorise the general manager "to provide, by gazette notice, for an aspect of a matter prescribed in (a) regulation". Whilst that in itself is unobjectionable, one of the examples given in the bill in respect of this power is stated to be "changing times prescribed in a regulation" (cl.100).

25. As mentioned earlier, some of these provisions are more obviously "Henry VIII clauses" than others. Further, the scope and importance of the matters to which they relate varies. The Explanatory Notes (at page 12) address in some detail the cl.13 provisions. Clause 92 is also addressed (at page 25 of the Notes), although in terms of its impact on appeals rather than the "Henry VIII" mechanism.

26. As is well known, the committee does not favour the inclusion of "Henry VIII clauses" in legislation. In particular, the capacity under cl.92 to limit by regulation the range of decisions subject to appeal is a matter of some significance.

27. The committee notes that cls.13, 50, 58, 92 and 100 contain provisions which are, or may be, "Henry VIII clauses" within the meaning of that term adopted by the committee. The committee does not favour the inclusion of "Henry VIII clauses" in legislation.

28. The committee refers Parliament the question of whether the provisions of cls.13, 50, 58, 92 and 100 have sufficient regard to institution of Parliament.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[19]

♦ **clause 97 (proposed s.215)**

29. Clause 97 replaces current s.215 of the *Transport Operations (Marine Safety) Act 1994* (pilotage fees and conservancy dues) with a new s.215 dealing with the same subject. Like

[19] 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.

its predecessor, the current s.215 enables a regulation to impose pilotage fees, fees for other services incidental or related to pilotage services, and conservancy dues in relation to ships.

30. The committee is pleased to note that the proposed section now explicitly requires the fees for pilotage services and other services to be set on a user pays basis. This is consistent with the committee's policy in relation to such matters.[20]

31. However, the provisions dealing with "conservancy dues" in relation to ships continue to state that these "may be a tax". The committee restates its reservations about tax-setting provisions which leave the essentials of the tax to be prescribed by regulation rather than by incorporation in primary legislation.[21]

32. The committee notes from the Explanatory Notes that the bill's express limitation of pilotage and other fees to "user pays" levels is primarily designed to protect them against possible characterisation as an excise, which it would be unconstitutional for the State to impose.

33. The committee notes that cl.97 of the bill basically re-enacts the provisions of the *Transport Operations (Marine Safety) Act 1994* dealing with the setting of fees by regulation. The committee notes that the proposed section explicitly states that pilotage and other fees are to be established on a user pays basis. However, conservancy dues may still be set in such a manner as to constitute a tax.

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

35. The committee recommends that consideration be given to amending the bill to incorporate appropriate parameters for the setting of conservancy dues, rather than leaving these matters to regulations.

[20] See the committee's report on the *Justice and Other Legislation Amendment Bill 2005* (Alert Digest No. 13 of 2005 at pages 12-13), and the committee's report on the *Recreation Areas Management Bill 2005* (Alert Digest No. 1 of 2006 at pages 24-26).

[21] See the committee's reports cited earlier.

7. POLICE POWERS AND RESPONSIBILITIES AND OTHER ACTS AMENDMENT BILL 2006

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 21 April 2006.

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

> *to amend the Police Powers and Responsibilities Act 2000 (PPRA) to ensure police officers continue to perform their duties effectively by utilising legislation that is well balanced and reflective of community requirements.*

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

♦ The bill generally

3. As is apparent from the Minister's Second Reading Speech and the Explanatory Notes, this bill is a result of a further review of the provisions of the *Police Powers and Responsibilities Act (PPR Act)*, which was first enacted in 1997 and re-enacted in 2000.[23]

4. Unsurprisingly in the context of the significant review of a large statute, this bill is itself a voluminous document of 165 pages, with Explanatory Notes totalling 83 pages. Moreover, it deals with a very large number of individual matters.

5. Some of the amendments made by the bill are as follows:

- the extension of police "move on" powers to all public places (cls.8-10)
- the empowering of police to obtain a warrant requiring a person to provide access information (eg, a password) necessary for the police to access and read data stored on a computer or other electronic storage device (cl.27)
- the conferral on watch-house keepers of various powers, including the power to take DNA samples (cl.61)
- provisions creating an "evasion offence" for drivers who fail to obey a police direction to stop (cl.79)
- provisions authorising the acquisition and use of an assumed identity by a person, to facilitate investigations and intelligence gathering by the Crime and Misconduct Commission in relation to misconduct offences (cl.92).

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

23 The committee reported at length on the contents of both bills: see *Alert Digest No. 12 of 1997* at pages 69-102, and *Alert Digest No. 3 of 2000* at pages 1 to 13.

6. Given the nature of the legislation, most of the provisions of the bill either actually or potentially impact on the rights and liberties of individuals, often quite substantially.

7. Whether the bill's provisions strike an appropriate balance between the rights of individuals and those of the community is ultimately a matter for Parliament to determine.

8. Given the large number of matters covered by the bill, it will not be possible for the committee to address all of them. However, the following issues merit individual consideration.

♦ **clauses 8, 9 and 10**

9. Chapter 1, Part 4 of the *PPR Act* (ss.36-41) currently authorises police officers to give persons or groups of persons, whose behaviour or presence at or near a "prescribed place" causes anxiety, interference with trade or business, disruption or other specified adverse effects, a "move on" direction. This is defined in broad terms in s.39 of the Act. It is essentially a direction to leave the place and not return within a specified period of not more than 24 hours.

10. The dictionary to the Act presently defines a "prescribed place" as any one of a range of specified types of places. All of these are either public places or places to which entry can normally be had by at least a category of persons. The definition also includes areas declared under s.41 of the Act to be a "notified area". Under s.40, a government entity or a local government may apply to the minister for a stated area as a notified area to be declared. The declaration is ultimately effected by means of a regulation.

11. Clauses 8, 9 and 10 of the bill, by replacing the current definitions of "prescribed area" and "notified area" with the new concept of "regulated places", effectively extend the application of "move on" laws to <u>all</u> public places. Previously, they only applied in relation to certain types of public places (albeit many of the most common types).

12. Statutory powers for police to give "move on" directions have long existed in Queensland statute law, although since the enactment of the *PPR Act 1997* they have essentially been consolidated in that statute.

13. In view of the effect which the exercise of "move on" powers can have upon the rights of persons to whom the "move on" directions are given, and also the necessary element of discretion associated with the exercise of such powers, their extension is a matter of some significance.

14. The committee notes that cls.8-10 inclusive of the bill extend the application of police "move on" powers to all public places.

15. The committee refers to Parliament the question of whether this extension of "move on" powers has sufficient regard to the rights of persons to whom "move on" directions may be given, as well as to the rights of the community as a whole.

♦ **clause 79 (proposed ss.443V-443ZZM inclusive)**

16. Clause 79 of the bill introduces into the *PPR Act* new chapter 11A (Provisions about evading police officers).

17. The purpose of the new chapter is to make it an offence for the driver of a motor vehicle to fail to stop when directed to do so by a police officer in a police service motor vehicle who reasonably believes someone in the other motor vehicle is committing, or has committed, an offence. The pivotal provision is s.443ZD(2), which provides that the driver of the motor vehicle must stop the motor vehicle as soon as reasonably practicable, if a reasonable person would stop the motor vehicle in the circumstances.

18. Breach of the statutory obligation to stop carries a substantial maximum penalty of 200 penalty units ($15,000) or three years imprisonment.

19. The committee notes that the obligation to stop is not qualified by any provision exempting the driver from the obligation on the basis that he or she has a reasonable excuse.

20. Various key terms are defined in proposed ss.443W, 443X and 443Y.

21. At least in theory, two issues would appear to arise. Firstly, s.443ZD basically makes the statutory obligation conditional upon the police officer giving the driver of the other vehicle a direction to stop. This direction can be given in a number of ways, which are elaborated on in ss.443X and 443Y. Section 443ZD does not appear to expressly require that the driver of the vehicle be aware of the fact that the direction has been given.

22. In some cases, it will be obvious that the driver has become aware of the direction. For example, as s.443ZD(4) envisages, if the other vehicle speeds away immediately after the direction has been given, that would clearly suggest the direction has been noted by driver. However, it appears theoretically possible that in some circumstances a driver might, at least for a relatively short period of time, remain unaware of the fact that a direction is being given. It would appear necessary that the direction be given for a sufficient period of time, or otherwise in such a manner that it would be difficult to conclude other than that the driver had become aware of it.

23. Secondly, as mentioned in a submission from the Vice-President of the Queensland Council for Civil Liberties to the Minister (a copy of which has been forwarded to the committee), the driver of a car may be given a direction to stop by another motor vehicle which is actually a police service motor vehicle, but in circumstances where the driver may have some legitimate grounds for doubt as to the authenticity of the supposed police vehicle. This issue might particularly arise if, for example, the vehicles were in a deserted location late at night.

24. The committee notes that proposed s.443ZD (inserted by cl.79) obliges the driver of a vehicle to stop, where a police officer using a police service motor vehicle gives the driver a direction to that effect.

25. Whilst the committee appreciates the mischief which this provision is designed to combat, the committee has identified at least two potential issues concerning the manner in which the provision would operate in practice (see above).

26. The committee seeks information from the Minister in relation to these operational issues.

♦ **clause 79 (proposed ss.443ZE and 443ZI)**

27. The new chapter 11A (provisions about evading police officers) incorporates a number of evidentiary and punitive provisions incorporated in legislation governing various other traffic-related offences.

28. Proposed ss.443ZE and 443ZF effectively provide that, if the identity of the driver cannot otherwise be established (including by the owner identifying to police the person who was in fact the driver), the registered owner of the motor vehicle used in connection with the evasion offence is taken to have been the driver at the relevant time.

29. In addition, part 3 of chapter 11A (proposed ss.443ZH-443ZP) provides for the making of impounding orders in relation to the vehicle. These provisions are similar to the forfeiture provisions associated with "road hooning" offences.

30. Moreover, a court may order the vehicle be forfeited to the State (s.443ZP). Where this occurs, the vehicle becomes the property of the State and the right of a registered security interest holder over the vehicle to enforce their security by taking possession of the vehicle is extinguished. However, the security holder remains entitled to be reimbursed from the proceeds of sale of any vehicle impounded or forfeited (proposed s.443ZZJ).

31. Finally, parents of a child convicted of an evasion offence may be ordered by a court to pay the cost of removing and keeping the motor vehicle impounded (proposed s.443ZR).

32. The committee notes that, in relation to evasion offences, the bill introduces a range of enforcement and punitive provisions, which are outlined above.

33. The committee draws the nature of these provisions to the attention of Parliament.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[24]

♦ **clause 78**

34. Clause 78 inserts into the *PPR Act* a new s.443AA, which confers evidentiary value upon a document described as a "running statement". A running statement is defined in the section as a document essentially containing factual information about a relevant thing, in the possession of the police service, that is evidence of the commission of an offence. These include matters such as where and when the thing was found, who found it, that it was subsequently kept secure from tampering, and how and by and to whom it was transported.

[24] 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.

35. Section 443AA(3) provides that if a certificate is signed by the commissioner of the police service, identifying a document as a "running statement", the copy of the "running statement" is evidence of what is stated in the running statement. Accordingly, a court can legitimately consider the contents of the "running statement", without persons with first hand knowledge of the matters stated in it being called to give evidence.

36. The committee does not object to "certificate" evidence being admissible where the matters in question are non-controversial. In the current case, it appears likely that at least some of the contents of a "running statement" could be contentious.

37. The effect of the certificate and the "running statement" will be to impose, in practical terms, a reversal of onus of proof upon the defendant.

38. The committee would normally have significant concerns about the provisions of s.443AA. It notes, however, that subsections (4) to (6) provide that a defendant may, upon being notified of the prosecuting authority's intention to rely on the certificate, give notice of his or her intention to challenge any matter stated in the certificate. In that event, the certificate "stops being evidence of the matter challenged" (subsection 6).

39. The presence of subsections (4), (5) and (6) in large part allays the concerns which the committee would otherwise have had in relation to this provision.

40. The committee notes that proposed s.443AA (inserted by cl.78) enables certain evidence to be introduced by means of a "running statement" certified by the commissioner of the police service.

41. The committee notes, however, that the proposed section also enables a defendant to challenge any matter stated in the running sheet, and that in that event the certificate stops being evidence of the matter challenged.

42. The committee makes no further comment in relation to this provision.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[25]

- **clause 85 (proposed ss.510 and 512)**

43. Section 510 (inserted by into the *PPR Act* by cl.85) declares that a specified regulation was effective to extend the expiry period for ss.371B-371E of the Act. It goes on to declare that the sections are taken never to have expired, and that the specified regulation is as valid and effective as if it had been notified before the end of the expiry period.

44. The Explanatory Notes (at page 6) indicate that s.510 is intended to correct a technical problem with respect to the declaration of "places of safety", and that its ultimate effect will be that the diversion of persons to a particular place of safety during the affected period for recovery from the effects of glue or petrol sniffing is valid.

[25] 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.

45. Proposed s.512 declares the validity of the declaration of certain "controlled activities" purportedly authorised under s.190 of the Act. It further declares that anything done because of a purported authorisation is taken to have been lawfully done.

46. In relation to this matter, the Explanatory Notes state:

> *The necessity for the amendment arises out of the two competing legal arguments as to whether the classes of offences for which controlled activities powers are currently available under s. 190 of the PPRA are to be read down by reference to s. 163, so as to limit those powers to serious indictable offences, misconduct offences and organised crime. To remove the uncertainty these amendments will provide that all past and present authorised controlled activities were validly authorised as if the offence, for which the controlled activity was authorised, was a serious indictable offence.*

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

48. It would not appear that validation of the actions mentioned in s.510 is adverse to any individuals. Further, the committee notes that in relation to s.512 the position appears to be one in which there are merely different views as to the current validity of the declarations, rather than it being a case of clear invalidity.

49. The committee notes that proposed ss.510 and 512 (inserted by cl.85) respectively declare valid the extension of certain provisions of the Act, and the declaration of certain activities as controlled activities. These provisions are either retrospective or potentially retrospective.

50. The Explanatory Notes provide background to the retrospective provisions.

51. The committee refers to Parliament the question of whether the retrospective provisions of ss.510 and 512 have sufficient regard to the rights of individuals.

8. WATER AMENDMENT BILL 2006

Background

1. The Honourable P D Beattie MP, Premier, introduced this bill into the Legislative Assembly on 21 April 2006.

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

> *to establish a Queensland Water Commission as an essential first step to delivering greater water security to South East Queensland.*

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[26]

- **clause 9 (proposed ss.341(1)(b) and 360D**

3. The bill establishes the Queensland Water Commission, and confers on it significant powers in relation to ensuring the delivery of sustainable and secure water supply and demand management for the South East Queensland (SEQ) region and for "designated regions".

4. The "SEQ region" is defined in proposed s.341 (inserted by cl.9) as consisting of 17 stipulated local government areas, plus any additional local government area or part thereof, adjacent to any of the 17 stipulated local government areas, which is designated by gazette notice. Proposed s.360D provides that the Minister may by gazette notice designate regions of the State other than the SEQ region in which the commission shall be authorised to operate.

5. Given the nature of the functions and powers conferred upon the commission by this bill, the designation of any area of land by gazette notice under either s.341 or s.360D will clearly be a matter of some significance. This raises the issue of whether or not it would be more appropriate for the additional areas to be brought under the bill's legislative scheme by amendment of the Act itself, rather than via the subsidiary process of a designation by gazette notice. Even if a subsidiary process were acceptable, an additional question would arise as to whether it should be achieved by means of a regulation or other subordinate legislation, thereby rendering it subject to the Parliamentary tabling and disallowance provisions of Part 5 of the *Statutory Instruments Act 1992*.

6. The committee has raised either or both of these issues in relation to numerous bills.

7. In relation to this matter, the Explanatory Notes (at page 4) state:

> *The new section 341 provides a definition of the SEQ region and provides for amendment of that definition by gazette. The jurisdiction of the Commission can also be extended beyond SEQ (to other regions of the state) by gazette. This is consistent with other bodies for which*

[26] 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.

terms of reference can be set by methods other than by primary legislation, for example by referral or Ministerial direction. The SEQ region has been specified in the Bill to provide greater clarity about the original focus of the Bill. This provides for greater transparency than if the SEQ region was designated through transitional provisions.

8. In relation to the current bill, and in connection with both this issue and a number of others dealt with later in this chapter, the committee is strongly influenced by the fact that the bill's direct impact appears to be entirely upon corporations, rather than upon individuals.

9. The obligations arising from actions of the Queensland Water Commission are essentially imposed upon water "service providers". Whilst it is theoretically possible for an individual to be registered as a service provider under the *Water Act* (see s.370(c)), it is the committee's understanding that all registered service providers are in fact either local governments (registered under s.370(a)) or water authorities (registered under s.370(b)). Although the operations of the commission will eventually impact upon the position of water consumers, the vast bulk of whom are individuals, that impact is indirect.

10. The committee notes that proposed ss.341(1)(b) and 360D (both inserted in the *Water Act* by cl.9 of the bill) enable additional areas of the State to be subjected to the bill's provisions via a gazette notice.

11. The committee is often concerned by provisions of bills which enable matters of significance to be dealt with via some subsidiary process rather than by incorporation in the bill itself. It has been further concerned on occasions that even where non-incorporation is considered acceptable, it occurs via a process other than subordinate legislation.

12. The committee notes, however, that the impact of this bill is almost entirely upon corporations (in particular, local governments), and that it does not impact directly upon individuals.

13. In the circumstances, the committee does not object to the provisions of proposed ss.341(1)(b) and 360D.

♦ **clause 9 (proposed s.360F)**

14. Proposed s.360F(1) (inserted by cl.9) provides that the Queensland Water Commission, and the performance of its functions, is to funded by an annual levy payable by each water service provider in the areas in respect of which the commission operates. Section 360F(2) provides that the levy "is to be in the amount and paid at the time and in the way prescribed under a regulation".

15. Although this levy is limited to an amount sufficient to fund the commission and its operations, it is possible that in the circumstances it could be technically characterised as a tax. It is the committee's long-standing general view that the imposition of a tax should be achieved by primary legislation rather than by regulation.

16. However, in this case the committee is again heavily influenced by the fact that the levy will not be directly payable by individuals, but by water service providers (all of whom, as previously mentioned, appear to be corporations).

17. The committee notes that under proposed s.360F (inserted by cl.9) a levy to offset the costs of the commission and the performance of its functions is to be imposed from time to time by regulation. It is the committee's view that imposts of this nature should be imposed in primary legislation, rather than by regulation.

18. However, the committee notes that the levy will be imposed upon corporations, not individuals.

19. In the circumstances, the committee makes no further comment in relation to this issue.

Does the legislation have sufficient regard to the rights and liberties of individuals?[27]

- **clause 9 (prosed ss.360ZA, 360ZB and 360ZG)**

20. Proposed s.360ZA (inserted by cl.9) provides that each water service provider must ensure the relevant system operating plan is complied with to the extent it applies to the provider. Breach of this obligation is an offence punishable by a maximum penalty of 1665 penalty units ($124,875).

21. Proposed s.360ZB provides that the commission may by notice require a water service provider to publish a notice about the extent to which the provider has complied with the relevant system operating plan. Failure to comply with this obligation is an offence again punishable by a maximum penalty of 1665 penalty units.

22. Proposed s.360ZG provides that the commission may delegate certain of its functions to a relevant water service provider. Section 360ZG(2) provides that the provider must make all reasonable efforts to ensure that the function is performed. Failure to comply with this obligation is an offence punishable by a maximum penalty of 1665 penalty units.

23. The Explanatory Notes justify the imposition of this heavy maximum penalty (in the case of s.360ZA) as follows:

> *Because a system operating plan is about ensuring efficient water use, it is considered that a failure to comply with the plan is analagous to the offences regarding the illegal taking of water. For this reason the quantum of the penalty is commensurate with the penalties for those offences.*

24. In relation to s.360ZB, the Notes justify the maximum penalty on the same basis.

25. Under the *Water Act* (see ss.808-815), maximum penalties of 1665 penalty units are imposed for a variety of offences.

26. Although, as mentioned earlier, all water service providers appear to be corporations, s.828 of the Act obliges the executive officers of corporations to ensure the corporation complies with the Act, and provides that if a corporation commits an offence against the Act, each of its "executive officers" also commits an offence. The section provides them with a defence

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

if they can prove they exercised reasonable diligence, or were not in a position to influence the corporation's conduct. It is therefore possible that the penalties mentioned above could be imposed upon individuals as well as corporations.

27. The committee notes that proposed ss.360ZA, 360ZB and 360ZG (inserted by cl.9) create offences carrying a maximum penalty of 1665 penalty units ($124,875).

28. The committee draws to the attention of Parliament the magnitude of these maximum penalties.

Does the legislation provide appropriate protection against self-incrimination?[28]

- **clause 9 (proposed s.360ZC)**

29. Proposed s.360ZB, as mentioned earlier, obliges a water service provider to publish a notice in relation to the provider's compliance with its system operating plan. Proposed s.360ZC(1) provides that it is not a defence to a proceeding for failing to meet that obligation, that complying with the requirement may intend to incriminate the water service provider. Section 360ZC(2) goes on to provide that, if the water service provider is an individual, evidence of, or directly or indirectly derived from, complying with the requirement to publish the notice, which might tend to incriminate the individual, is not generally admissible in any civil or criminal proceedings.

30. A provision denying the benefit of the self-incrimination rule would normally be of concern to the committee, which has a frequently-espoused policy in relation to the matter.

31. However, as mentioned earlier, it appears that all water service providers are corporations rather than individuals. Denying the benefit of the self-incrimination rule to a corporation is not a matter which strictly speaking relates to the rights of individuals.

32. The committee notes that proposed s.360ZC (inserted by cl.9) denies water service providers the benefit of the self-incrimination rule.

33. As all water service providers appear to be corporations, this denial does not directly engage the committee's terms of reference.

34. The committee makes no further comment in relation to this denial of the benefit of the self-incrimination rule.

[28] 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.

9. WORKPLACE HEALTH AND SAFETY AND OTHER ACTS AMENDMENT BILL 2006

Background

1. The Honourable T A Barton MP, Minister for Employment, Training and Industrial Relations and Minister for Sport, introduced this bill into the Legislative Assembly on 19 April 2006.

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

   - (to) *provide authorised representatives of employee organisations with the capacity to contribute to workplace health and safety in workplaces and relevant workplace areas under the Workplace Health and Safety Act 1995; and*
   - (to) *relocate provisions which protect an injured worker's employment following a work related injury to the Workers' Compensation and Rehabilitation Act 2003.*

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[29]

♦ **clause 4**

3. Clause 4 of the bill inserts into the *Workplace Health and Safety Act 1995* Part 7A ("Authorised representatives") (proposed ss.90A-90R inclusive).

4. Under the new provisions, an "authorised representative" of an employee organisation may enter a workplace or a "relevant workplace area" if the authorised representative "reasonably suspects" that a contravention of the Act involving workplace health and safety is happening or has happened at the place and affects employees who are eligible to be members of the relevant employee organisation. Neither the consent of the employer nor the obtaining of a warrant is required for this purpose (proposed s.90I(1)).

5. Once entry has been effected, the bill confers on authorised representatives a range of post-entry powers, including some which are of a coercive nature (see proposed s.90I(2)).

6. As the Minster's Speech and the Explanatory Notes both state, representatives of employee organisations currently have a right of entry under industrial relations legislation, in respect of matters which may include workplace health and safety issues. It is probably therefore the case that the provisions of this bill do not constitute a major extension of current entry powers.

7. The Notes and the Minister both state that the provisions are being introduced against the background of new Commonwealth legislation which overrides current Queensland industrial relations entry powers but preserves an employee organization's right of entry

[29] 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.

under State workplace health and safety laws. The bill, it is stated, is intended to expressly declare those powers, and to establish an appropriate system of procedures and safeguards in relation to them.

8. The committee notes that cl.4 of the bill inserts provisions conferring upon authorised representatives of employee organisations a power to enter workplaces in relation to workplace health and safety issues. Neither the consent of the employer nor the issue of a warrant is necessary for this purpose.

9. The bill confers upon authorised representatives an extensive range of post-entry powers.

10. It appears that, at least to a very significant extent, the new powers duplicate those which until recently have been available to employee organisation representatives under State industrial relations legislation.

11. The committee refers to Parliament the question of whether the entry and post-entry powers conferred by cl.4 are appropriate in the circumstances.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

10. INTEGRATED PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable D Boyle MP, Minister for Environment, Local Government, Planning and Women, introduced this bill into the Legislative Assembly on 7 March 2006. The committee notes that this bill was passed, with amendments, on 28 March 2006.

2. The committee commented on this bill in its Alert Digest No 3 of 2006 at pages 10 to 12. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[30]

- **clause 76**

3. The committee noted that proposed s.6.7.2 (inserted by cl.76) imposed upon current development approvals the bill's new provisions in relation to the currency periods of such approvals, and was therefore retrospective in nature.

4. The committee had difficulty in identifying any effects of this provision which might be adverse to individuals other than the State and/or local governments. The committee further noted that the Explanatory Notes stated no individual would be disadvantaged.

5. In the circumstances, the committee had no concerns in relation to this retrospective provision.

6. The Minister commented as follows:

> *Your Committee has drawn attention to two reforms in the Bill with retrospective effect. There are a series of changes reforming the arrangements for lapsing of approvals which will take effect at the commencement of the relevant provisions. These changes will apply for all development approvals in effect at the time of commencement. The changes will not apply, however, for development approvals which take effect by relying exclusively on previous transitional arrangements. I am able to confirm that although this amendment has retrospective effect on development approvals, it will positively impact some individuals by lengthening the currency of their existing approvals.*

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

7. The committee thanks the Minister for this information.

♦ **clause 107**

8. The committee noted that proposed s.30B (inserted by cl.107) validated previous amendments of the Townsville Planning Scheme, and was therefore retrospective in nature.

9. It appeared unlikely that the bill would have an adverse impact on any individuals, and it would undoubtedly benefit others including owners of the relevant lands.

10. In the circumstances, the committee had no concerns in relation to this retrospective provision.

11. The Minister commented as follows:

> *There have also been amendments made to the Townsville City Council (Douglas Land Development) Act 1993 validating previous amendments to the Townsville Planning Scheme. These procedural amendments are also retrospective and reflect predominantly residential development activity currently undertaken under the Townsville City Council (Douglas Land Development) Act 1993. I am able to confirm that these amendments will provide certainty to the area's land owners carrying out development activities that these activities are lawful. As a result, the amendments are entirely beneficial for individuals affected by these changes.*

12. The committee thanks the Minister for this information.

11. MAJOR SPORTS FACILITIES AMENDMENT BILL 2006

Background

1. The Honourable P D Beattie MP, Premier, introduced this bill into the Legislative Assembly on 30 March 2006. The committee notes that this bill was passed, with amendments, on 19 April 2006.

2. The committee commented on this bill in its Alert Digest No 4 of 2006 at pages 24 and 25. 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?[31]

- **clause 6**

3. The committee noted that proposed s.30A, inserted into the *Major Sports Facilities Act 2001* by cl.6, enables a "major sports facility" to be freed by regulation from the application of relevant town planning legislation and conditions, in respect of the "special event" referred to in the regulation.

4. The committee considered it possible that the holding of such events would impact adversely upon neighbouring residents and businesses.

5. The committee referred to Parliament the question of whether the provisions of proposed s.30A were appropriate in the circumstances.

6. The Premier commented as follows:

> *I note the concerns raised by the committee in Alert Digest no.4 of 2006 about the proposed amendments to the Major Sports Facilities Act 2001 that will enable special events to be held at major sports facilities and, specifically, enable a concert to be held at Suncorp Stadium despite the Integrated Planning Act 1997, the relevant planning scheme, the development approval for the facility and any conditions attached to the approval.*
>
> *The amendments provide that a regulation may allow a Major Sports Facility to be used for a special event and may also impose conditions on that special event.*
>
> *It is considered appropriate to place conditions on the use of a facility by way of regulation which would operate during the occasional use of the facility for special events. While the conditions of any development approval will not apply to the use of a facility for a special event, the impacts on neighbouring residents and businesses can be adequately ameliorated by conditions imposed by a regulation.*
>
> *In this regard, suitable conditions can be imposed by a regulation to mitigate the potential impacts associated with traffic, including parking and impacts of lighting from the facility and control the hours of operation associated with the use of the facility for special events.*

[31] 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 Premier's comments.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[32]

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

[32] On 13 May 2004, Parliament resolved as follows:

> *the House confers upon the Scrutiny of Legislation Committee the function and discretion to examine and report to the House, if it so wishes, on the application of the Fundamental Legislative Principles to amendments* (to bills)*, whether or not the bill to which the amendments relate has received Royal Assent.* (This resolution is identical to that passed by the previous Parliament on 7 November 2001.)

In accordance with established practice, the committee reports on amendments to bills on the following basis:

- *all proposed amendments of which prior notice has been given to the committee will be scrutinised and included in the report on the relevant bill in the Alert Digest, if time permits*
- *the committee will not normally attempt to scrutinise or report on amendments moved on the floor of the House, without reasonable prior notice, during debate on a bill*
- *the committee will ultimately scrutinise and report on all amendments, even where that cannot be done until after the bill has been passed by Parliament (or assented to), except where the amendment was defeated or the bill to which it relates was passed before the committee could report on the bill itself.*

APPENDIX

MINISTERIAL CORRESPONDENCE

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

PART II

SUBORDINATE LEGISLATION

PART II – SUBORDINATE LEGISLATION

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

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*

* 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)*
314	**Health (Drugs and Poisons) Amendment Regulation (No.3) 2005** • Letter to the Minister dated 30 March 2006 • Letter from the Minister dated 16 April 2006 • Letter to the Minister dated 8 May 2006	28/3/06

(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 5th 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

9 May 2006

APPENDIX

CORRESPONDENCE

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