SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

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SCRUTINY OF LEGISLATION COMMITTEE
MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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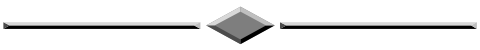

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NOTE:
Details of all bills considered by the committee since its inception in 1995 can be found in the Committee's Bills Register. Information about particular bills (including references to the Alert Digests in which they were reported on) can be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

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

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

TERMS OF REFERENCE

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

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

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

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

by examining all Bills and subordinate legislation.

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

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

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

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

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

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

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

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. APPROPRIATION BILL 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for State Development, Trade and Innovation, introduced this bill into the Legislative Assembly on 6 June 2006.

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

- *Appropriation for 2006-07 to fund the cost of delivering departmental outputs, administered items and equity adjustment in that year and certain outputs, administered items and equity adjustment delivered in the previous year but not previously funded; and*
- *Supply for 2007-08 to allow the normal operations of government to continue until the Appropriation Bill for 2007-08 receives assent.*

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

2. APPROPRIATION (PARLIAMENT) BILL 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for State Development, Trade and Innovation, introduced this bill into the Legislative Assembly on 6 June 2006.

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

- *Appropriation for 2006-07 to fund the cost of providing the outputs, equity adjustment and administered items of the Legislative Assembly and parliamentary service in that year and certain outputs, equity adjustment and administered items delivered in the previous year, not previously funded; and*
- *Supply for 2007-08 to allow the normal operations of the Legislative Assembly and parliamentary service to continue until the Appropriation (Parliament) Bill for 2007-08 receives assent.*

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

3. COMMUNITY SERVICES BILL 2006

Background

1. The Honourable F W Pitt MP, Minister for Communities, Disability Services and Seniors, introduced this bill into the Legislative Assembly on 6 June 2006.

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

> *to help build sustainable communities by facilitating access by Queenslanders to community services.*

3. The Minister, in his Second Reading Speech, also describes the bill as providing:

> *a contemporary legal foundation for providing the best possible community services by giving greater transparency and certainty about how the Department of Communities gives funding and other assistance to community organisations.*

Overview of the bill

4. As indicated in the Minister's Speech and the Explanatory Notes, this bill provides a contemporary framework for the Department of Communities' function of funding non-State service providers,[3] to enable these entities to provide "community services". This quite broad term is (presumably intentionally) not defined in the bill.

5. Until now, community service providers have received State government funding under the *Family Services Act 1987*.

6. As the Minister and the Explanatory Notes also indicate, this bill is designed to be consistent with other contemporary human services legislation, in particular the *Disability Services Act 2006* and the *Housing Act 2003*. Both those Acts, whilst stipulating the manner in which the relevant services are to be delivered, also authorise the State to fund the provision of such services by non-State entities. The current bill is more restricted, in that it deals only with the State funding aspect.

7. Perhaps not surprisingly, the current bill raises a number of issues which the committee also considered in relation to the *Disability Services Bill.*[4]

Does the legislation have sufficient regard to the rights and liberties of individuals?[5]

- **clauses 97-110 inclusive**

8. A significant feature of the bill is the provisions of Part 9 (cls.97-110), dealing with the screening of persons working in, or intending to work in, the Department of Communities.

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3 These must be corporations, but may include local governments (cl.7).

4 See the committee's report on that bill: Alert Digest No.1 of 2006 at pages 7-14.

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

9. In essence, persons seeking to be "engaged by the department"[6] must disclose any criminal history they may have (cl.102). 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.103).

10. 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.106). 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 (cl.107).

11. 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 cl.99).

12. 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 (cls.106(2)(c) and 106(5)).

13. The provisions of Part 9 impact in two ways on the rights of persons engaged, or intending to be engaged, by the department. 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, although it will not necessarily, prevent them from being employed or result in termination of their employment.

14. The Explanatory Notes (at page 4) argue in favour of these provisions on the basis that information about an applicant's criminal history may indicate a pattern of behaviour which could compromise that person's ability to undertake departmental duties safely and competently. The Notes argue it is necessary to protect the safety of vulnerable clients, as departmental employees may work in, for example, youth justice or child care licensing settings, or manage the performance of service providers.

15. The Notes also point out that the possession of a criminal history does not render an applicant ineligible for employment, but is simply a factor which must be taken into account.

16. The committee notes that cls.97-110 of the bill provide in some detail for the screening of criminal histories of persons engaged in, or applying to be engaged in, the Department of Communities. The term "criminal history" is broadly defined and possession of such a history may, although it will not necessarily, disqualify a person from working in the department.

17. These provisions have an obvious impact in terms of the privacy of the persons concerned,

[6] This term is broadly defined in cl.98 of the bill as including public service employees in the department, contractors working in the department in the administration of an Act administered by the Minister, and persons working in the department as volunteers or students on work experience.

and in terms of their obtaining or continuing in employment in relevant areas.

18. The committee refers to Parliament the question of whether the provisions of cls.97-110 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 vulnerable clients with whom they may come in contact.

♦ **clause 67**

19. Clause 67 provides that the chief executive may appoint a person as interim manager for a funded service provider receiving assistance (other than "one off" funding). The function of an interim manager (cl.77) is to ensure the proper and efficient use of assistance under the service agreement with the funded service provider, and to provide community services that the funded service provider has agreed to provide under the service agreement.

20. 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 3-4) 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.

21. However, as the Notes point out, an interim manager would probably be appointed only in extreme situations. Moreover the service provider will be at least in part (and perhaps in large part) funded by government monies.

22. The committee notes that cl.67 of the bill 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.

23. 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?[7]

♦ **clauses 48-59 inclusive**

24. The bill confers a range of monitoring and enforcement powers on "authorised officers".

25. Clause 48 confers power to enter places which extend somewhat beyond situations where the occupier consents or a warrant is obtained, as entry is authorised to a public place when open to the public, and to a non-residential place when open for carrying on business or otherwise open for entry.

[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.

26. Overall, these entry powers are relatively modest.

27. Once entry has been effected, the bill confers a wide range of post-entry powers (cls.55-59 inclusive).

28. It should also be noted that, not surprisingly, an interim manager appointed under cl.67 has power to enter any part of the service provider's premises (cl.78).

29. The committee notes that cls.48-59 of the bill confer on authorised officers powers of entry which extend somewhat beyond situations where the occupier consents or a warrant is obtained. The bill also confers a wide range of post-entry powers.

30. 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?[8]

- **clauses 120 and 121**

31. Clause 120 of the bill 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).

32. Clause 121 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.

33. 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.

34. Clauses 120 and 121 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.

35. The Explanatory Notes (at page 5) address this issue as follows:

> *The provision is proposed to act as a general deterrent and sanction for corporations in a worst case scenario. Otherwise, the department 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 vulnerable nature of many service users and the use of public funds, it is important to emphasise this responsibility. Reasonable defences are included to protect executive officers and prevent the misapplication of the provision.*

[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.

36. The committee notes that cls.120 and 121 of the bill effectively reverse the onus of proof.

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

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[9]

- **clause 127**

38. Clause 127(1) of the bill empowers the chief executive to give an approved service provider a notice requiring the provider to give the chief executive, within a stated reasonable time, information or a document relating to certain matters. These are matters relevant to the provider's suitability to continue in that capacity, and as to its provision of community services. The service provider is obliged to comply with the notice (cl.127(4)).

39. Clause 128 provides that a person who gives such information to the chief executive, provided they act honestly and on reasonable grounds, is not liable civilly, criminally, or under an administrative process for so doing (cl.128(3)). Clause 128 incorporates a range of additional protections and immunities.

40. The committee notes that cl.127 of the bill obliges service providers to provide the chief executive with certain information, pursuant to a notice issued under that clause. Clause 128 provides a comprehensive range of immunities and protections for persons giving such information.

41. Given the nature of the obligations imposed on providers under cl.127, the conferral of these protections and immunities appears appropriate.

[9] 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.

4. PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable T S Mulherin MP, Minister for Primary Industries and Fisheries, introduced this bill into the Legislative Assembly on 6 June 2006.

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

> [to amend] *a number of Acts within the primary industries portfolio and* [to repeal] *another Act which is no longer relevant.*
>
> *These amendments have become necessary as a result of the ongoing process of assessing the operational effectiveness of primary industries legislation.*

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

- **clause 32**

3. Clause 32 of the bill contains a number of provisions relating to dissolution of the Grain Research Foundation established under the *Grain Research Foundation Act 1976* ("the Act").

4. The aim of the provisions, as with several earlier bills dealing with statutory corporations performing functions related to primary industries, is to dissolve the corporation and transfer its assets and role to a company limited by guarantee. The foundation has the capacity to select the relevant company.

5. Upon the completion of those events, the persons constituting the membership of the foundation go out of office, and no compensation is payable to them in relation thereto (proposed s.41).

6. The current seven members of the foundation were appointed by the Governor in Council, after consultation and nomination by the chief executive and the peak industry body respectively, for terms not exceeding 3 years (ss.7 and 8 of the Act). They are entitled to be paid by the foundation such fees and allowances, if any, as the Governor in Council from time to time determines (s.13 of the Act).

7. It is not apparent from the Explanatory Notes or the Minister's Speech whether termination of the member's offices by the bill, without any right to compensation, will result in current members incurring any significant financial loss.

8. The committee notes that, once the processes initiated by cl.32 of the bill are completed, the members of the Grain Research Foundation will go out of office, without any entitlement to compensation.

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

9. The committee seeks information from the Minister as to whether any such member is likely to suffer significant financial detriment as a result.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[11]

- **clause 37 (proposed s.15S)**

10. Part 8 of the bill (cls.33-46) amends the *Veterinary Surgeons Act 1936*. Clause 37 inserts a number of proposed sections dealing with proceedings of the Veterinary Tribunal of Queensland.

11. Under s.15E of the Act, the Tribunal has jurisdiction to hear a range of disciplinary charges, applications, appeals and other proceedings in relation to disciplinary matters. The Tribunal has significant powers, including power to compel the attendance of witnesses and the production of documents (proposed ss.15I and 15J).

12. Proposed s.15S provides that members of the Tribunal have, in performing their functions for the Tribunal, the same protection and immunity as a District Court judge. Parties appearing before the Tribunal, and their lawyers and agents, have the same protection and immunity as if the proceedings of the Tribunal were those of the District Court. Finally, witnesses appearing before the Tribunal have the same protection and immunity as witnesses in District Court proceedings.

13. The committee notes that proposed s.15S of the bill (inserted by cl.37) confers court-like immunity upon members of the Veterinary Tribunal of Queensland, and upon parties, lawyers and witnesses appearing at Tribunal hearings.

14. Given the nature and functions of the Tribunal, the conferral of this immunity appears to be appropriate.

[11] 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.

5. REVENUE LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for State Development, Trade and Innovation, introduced this bill into the Legislative Assembly on 6 June 2006. It was subsequently passed as an urgent bill on 7 June 2006 following suspension of Standing Orders, and was assented to on 16 June 2006.

2. Upon receiving the Governor's assent, the bill becomes an Act. The committee only has jurisdiction to comment on bills, and once assent has been given the committee has no jurisdiction to comment upon it.

3. Even if the bill has not yet been assented to, there is in practice no scope for it to come back before Parliament once it has passed the third reading stage. Accordingly, it would be futile for the committee to attempt to comment on the bill's contents.

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, a report by the committee at this stage would be of limited value.

5. The committee accordingly makes no comment in respect of this bill.

6. WHISTLEBLOWERS PROTECTION AMENDMENT BILL 2006

Background

1. Mr L J Springborg MP, Leader of the Opposition and Member for Southern Downs, introduced this bill into the Legislative Assembly on 7 June 2006 as a private member's bill.

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

> *to amend the Whistleblowers Protection Act 1994 in order to give effect to recommendations of the Queensland Public Hospitals Commission of Inquiry Report which relate to the need to reform the scheme for protection of whistleblowers in Queensland.*

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

- **clauses 3-14**

3. The bill amends the *Whistleblowers Protection Act 1994* in various ways, intended (according to the Member's Second Reading Speech) to give effect to recommendations made in the Report of the Queensland Public Hospital Commission of Inquiry.

4. The purpose of "whistleblower" legislation is, of course, to protect from criminal or civil legal liability, and from liability under administrative process (such as disciplinary proceedings), persons who in the public interest make disclosures of various types of negligence, maladministration or misconduct.

5. The protection conferred by the Queensland *Whistleblowers Act* is limited in a number of ways. Firstly, disclosures must be about improper conduct in the public sector, or about certain other specified subjects including dangers to public health or safety and the environment. Secondly, many disclosures may be made only by "public officers". Thirdly, there are significant restrictions on whom disclosures may be made to.

6. The bill proposes to amend the Act to provide for oversight by the Queensland Ombudsman of all "public interest" disclosures made to public sector entities, except for those involving official misconduct (cl.13).

7. More importantly for present purposes, the bill also proposes to broaden the categories of persons who may make certain public interest disclosures. In particular, disclosures about negligent or improper management affecting public funds, which can presently only be made by "public officers", will be able to be made by any person or body (cl.10).

8. Further, although disclosures will still have to be initially made to an "appropriate entity", the bill provides that if within 30 days after referral to a public sector entity the ombudsman has not advised that the matter has been resolved to the ombudsman's satisfaction, the whistleblower may then disclose the matter to a member of the Legislative Assembly. If within a further 30 days the ombudsman has not advised that the matter has been resolved

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

to the ombudsman's satisfaction, the matter may be disclosed to a "representative of mass media" (proposed s.26A).

9. The purpose of the immunities conferred by whistleblower legislation is to encourage persons with knowledge of misconduct, negligence and maladministration (particularly in public sector institutions), and of certain other matters, to reveal what they know to appropriate bodies, so that the allegations can be investigated in the public interest. Where there is substance in the allegations whistleblower protection is clearly beneficial, as it assists in combating undesirable practices. On the other hand, whistleblower protection potentially deprives individuals against whom unjustified allegations are made of the legal redress which might otherwise be available to them (for example, the right to sue for defamation). It is of course always possible that some allegations made will prove to be either partly or completely without foundation, or even to have been made maliciously.

10. By expanding the scope of the protection offered by the *Whistleblowers Protection Act* the bill benefits potential whistleblowers, whilst having corresponding negative implications for individuals against whom allegations are made.

11. Whether the changes made by the bill represent an appropriate balance between these two competing interests is a matter for Parliament to determine.

12. The committee notes that the bill broadens in various respects the scope of the protection from legal and administrative liability provided by the *Whistleblower Protection Act 1994*. Statutory whistleblower protection, whilst benefiting whistleblowers, may potentially have adverse impacts upon the position of individuals against whom whistleblower allegations are made.

13. The committee refers to Parliament the question of whether, taking into account these matters and the public interest, the provisions of cls.3-14 are appropriate.

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

- **clause 15**

14. Clause 15 of the bill inserts into the *Whistleblowers Protection Act* proposed s.62. This declares that disclosures made prior to the bill's commencement by any person, to entities other than an "appropriate entity", concerning matters raised at the recent Commission of Inquiry into the Bundaberg Hospital, are taken to be public interest disclosures under the provisions inserted by the bill.

15. Accordingly, certain disclosures which may not previously have had the benefit of whistleblower protection will now do so. The bill is therefore, in this regard retrospective in nature.

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

16. The committee always takes care when examining legislation that commences retrospectively or could have effect retrospectively, to evaluate whether there are any adverse effects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has "sufficient regard", the committee typically has regard to the following factors:

- whether the retrospective application is adverse to persons other than the government; and
- whether individuals have relied on the legislation and have legitimate expectations under the legislation prior to the retrospective clause commencing.

17. As mentioned earlier, the conferral of whistleblower protection upon any person making allegations is beneficial to that person. At the same time, however, it has at least the potential to impact adversely upon persons against whom allegations are made. As also mentioned earlier, the justification for this is the deemed overall public benefit derived from measures which encourage the whistleblower process.

18. It seems reasonable to imply from the Member's Speech that he would argue in favour of cl.15, at least in part, on the basis that the Commission of Inquiry found many of the allegations about Bundaberg Hospital to be substantiated.

19. The committee notes that cl.15 of the bill inserts a provision retrospectively conferring whistleblower protection upon certain disclosures made in relation to matters canvassed at the recent Commission of Inquiry into the Bundaberg Hospital.

20. The committee refers to Parliament the question of whether, in the circumstances, the retrospective conferral of this protection has sufficient regard to the rights of persons against whom relevant allegations may have been made.

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

7. 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. 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 5 of 2006 at pages 1 to 4. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation have sufficient regard to the institution of Parliament?[14]

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

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

4. Given the nature of the subjects dealt with by the two most significant documents (the BCA and the QDC) and the other circumstances outlined in the Explanatory Notes, the committee conceded that there were significant practical arguments in favour of their incorporation. These circumstances significantly lessened the concerns which the committee would otherwise have had as to the incorporation of such extensive and significant external documents.

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

6. The Minister commented as follows:

> *The comments of the Committee praising the effect of the Bill in reorganising and clarifying the existing building legislation are appreciated.*
>
> *I also note the Committee drew attention to the extent to which the Bill relies on external documents such as the Building Code of Australia (BCA), the Queensland Development Code (QDC), the Code of Conduct for building certifiers and the national accreditation framework approved by the Australian Building Codes Board (ABCB).*
>
> *In accordance with previous directions by the Committee, the incorporation of external documents has been kept to the minimum reasonably achievable in the circumstances, and only where there are pressing arguments for using this drafting technique. As noted in the*

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

Explanatory Notes to the Bill, the BCA is developed by ABCB as the national source of technical building standards containing extremely detailed, technical and extensive provisions that can require rapid amendment. All States and Territories incorporate the BCA in their building legislation.

Like the BCA, the national accreditation framework is developed by ABCB to guide all Australian States and Territories. As a representative of the ABCB, Queensland contributes to development of both documents.

The QDC is a long standing source of Queensland specific building standards that is developed by the Department of Local Government, Planning, Sport and Recreation. Like the BCA, the QDC is extremely detailed, technical and extensive and can require rapid amendment. My Department publishes the QDC and the code of conduct on its website and these are readily accessible to all readers. Any changes to the QDC and the code of conduct must be approved by regulation.

I note the comments of the Committee that there are cogent arguments in favour of the incorporation of the BCA and the QDC, and that they are amply outlined in the Explanatory Notes. The practical arguments expressed have significantly lessened the concerns that the Committee would otherwise have to incorporating such external documents.

The Committee's reservations about unrestricted incorporation of external documents into Bills and the need to comply with the fundamental legislative principles as espoused in the Legislative Standards Act 1992 have been noted.

7. The committee notes the Minister’s comments.

8. 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. 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 5 of 2006 at pages 5 to 6. The Attorney's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

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

♦ The bill generally

3. The committee noted that the bill amends the *Crime and Misconduct Act 2001* and various 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*.

4. Given the nature of the subjects dealt with by the bill, the committee considered many of its provisions would inevitably impact upon the rights and liberties of individuals.

5. The committee referred to Parliament the question of whether the various provisions of the bill had sufficient regard to the rights and liberties of individuals affected by them.

6. The Attorney commented as follows:

> *I note the Committee has referred to Parliament the question of whether various provisions have sufficient regard to the rights and liberties of individuals.*
>
> *I have no comments to make in respect of the Committee's response to the Bill.*

7. The committee notes the Attorney's comments.

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

9. 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. 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 5 of 2006 at pages 7 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 confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[16]

♦ **clauses 6, 8 and 42**

3. The committee noted 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*.

4. The committee drew these extended powers to the attention of Parliament.

5. The Minister commented as follows:

> • ***Clauses 6 and 8***
>
> *The extensive powers currently held by fire officers are required in order to deal adequately with the risks to life, property and the environment presented by fires and hazardous materials emergencies.*
>
> *The amendments made by clauses 6 and 8 relate to the investigation and prevention powers vested in fire officers. Currently, these powers are conferred in general and broad terms; giving power to "investigate", "prevent" and "ascertain the cause of" fires and hazardous materials emergencies. The proper utilisation of these investigation and prevention powers requires fire officers to undertake specific tasks such as searching and inspecting premises, taking samples of materials at premises for testing purposes, taking photographs and films and bringing relevant experts and equipment onto premises to investigate the causes of fires. The amendment made by clause 6 clearly specifies that the general powers of fire officers extend to these specific tasks and provides a more secure basis for the exercise of these powers. The powers are in line with powers provided for prevention and investigation purposes by other public safety legislation such as the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002.*
>
> *The Fire and Rescue Service Act 1990 (the Act) does not clearly provide powers of seizure to authorised fire officers. It is probable that the existing general powers include a power to*

[16] 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.

seize things; however, clause 8 puts this beyond doubt and also, importantly, includes appropriate safeguards concerning the forfeiture, receipt, return, access and disposal of things that are seized.

• ***Clause 42***

Clause 42 confers a power on authorised fire officers to enter a building certifier's premises to examine, make copies of or take extracts from documents or records kept by the certifier that relate to the certifier's functions under the building approval system. As you indicate, this power is not surprising having regard to the role that building certifier's play in the building approval system. I note that this power can only be used where the documents or records required are not available from a local government.

Under section 5.3.5 (6) of the Integrated Planning Act 1997, a private certifier that approves an application is required to provide a copy of the application and associated documents to the local government that is the assessment manager for the application. The documents that must be provided include:

- *A copy of the plans, drawings and specifications lodged by the applicant;*
- *A list of required fire safety installations and required special fire services applying to the building work;*
- *Copies of certified information given by competent persons and relied on by the private certifier;*
- *A list, in the approved form, of development information relied on by the private certifier to decide the building development application; and*
- *If the application relates to building work that uses a performance based solution-a notice of reasons.*

If a building certifier complies with these obligations and provides the relevant documents to the local government, then, provided that the local government can locate the documents, there will be no need to access the documents from the certifier. The circumstances where a fire officer will need to access documents direct from a certifier will be restricted to cases where the certifier has not provided those documents to the local government as required or the local government cannot locate the documents. This means that the reach of the power is restricted only to what is strictly necessary, and the interference with the rights and liberties of certifiers kept to a minimum.

6. The committee notes the Minister's comments.

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

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

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

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

9. The Minister commented as follows:

> *As you note in paragraph 16 of the Alert Digest, the above provisions of the Bill substantially increase the maximum penalties associated with certain offences against the Act. The increased penalties apply where the breach of specified building fire safety obligations causes multiple deaths, death, injury or property damage.*
>
> *Queensland has experienced a number of serious fire safety tragedies in recent times, including the death of 15 persons in the Childers Palace Hotel backpacker fire in 2000, and the loss of three persons in the Sandgate Boarding House fire in 2002. The level of the penalties outlined in the Bill is a reflection of the serious nature of the risk against which the penalties are directed. In order for the penalties to be available the breach of the relevant fire safety obligation must cause the specified adverse outcome. Where this causal link can be proved to the relevant standard it is considered appropriate that the level of penalty realistically reflect the nature of the adverse outcome. The new penalties more adequately reflect the very real risk of serious adverse consequences that may flow from a failure to ensure fire safety standards are maintained.*
>
> *The reality is that complacency is a significant risk in relation to building fire safety obligations. Most buildings will not experience a serious fire event in which there is loss of life, injury or serious property loss. However, whilst the risk of a serious incident is low, the adverse consequences, should such an event occur, can be severe. In order to maintain an adequate level of fire safety awareness, the Queensland Fire and Rescue Service (QFRS) maintains a comprehensive building inspection and communication and awareness strategy.*
>
> *Whilst more than one view is possible, I am inclined to the view that while the provision of education and information is critical in understanding and complying with building fire safety obligations, there must also be a strong focus on enforcement of those responsibilities which includes effective deterrents and penalties (see Queensland Parliamentary Library, Research Brief No 2006/03- Industrial Manslaughter, page 7, where similar comments are made about offences and penalties in the context of workplace safety requirements). The new penalties will reinforce and contribute to the existing awareness and education strategy. As indicated in the explanatory notes to the Bill, the levels of penalty and the structure of the offences created by the Bill, including the exclusion of s 23(1) and 24 of the Criminal Code, are in line with similar provisions in other public safety legislation. The defences included in the Bill, as noted in the Alert Digest, provide an adequate balance of the rights and liberties of individuals as against the public interest in ensuring that there is an appropriate penalty provided for offences that result in serious adverse consequences, including loss of life.*

10. The committee notes the Minister's comments.

Does the legislation provide appropriate protection against self-incrimination?[18]

- **clauses 11 and 12**

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

[18] Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

12. The committee referred to Parliament the question of whether these denials of the benefit of the rule against self-incrimination were appropriate in the circumstances.

13. The Minister responded as follows:

> *Clause 11 (sections 58A (4)) provides protection against self incrimination to individuals that provide information or produce documents in accordance with a request made under the provisions. The documents or information cannot be used in subsequent proceedings against the individual except proceedings for an offence about the false or misleading nature of the information provided. It is noted that the protection extends only to individuals and not to companies as the privilege is not available to companies. The overall effect is to provide a significant level of protection of the rights of affected individuals whilst still requiring the provision of information and documents to authorised fire officers.*
>
> *Clause 12 provides that an individual can refuse to produce information or documents to a fire officer conducting an inquiry into a fire or hazardous materials emergency if production may tend to incriminate the person. This reflects the protections generally available at common law. The protection does not extend to documents required to be kept under the Act, which does not unduly limit the scope of the protection.*
>
> *There is a substantial public interest in ensuring that fire officers in emergency situations are able to require necessary information and also that emergency incidents are properly investigated. The provision of such information may save lives and prevent injury in an emergency situation. In an investigation situation, it may provide important guidance about how best to avoid similar events in the future.*

14. The committee notes the Minister's response.

10. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2006

Background

1. The Honourable R E Schwarten MP, Minister for Public Works, Housing and Racing and Leader of the House, introduced this bill into the Legislative Assembly on 23 May 2006. 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 7 of 2006 at pages 1 to 2. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

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

♦ **Schedule, amendments to *Survey and Mapping Infrastructure Act 2003*, items 1-3**

3. The committee noted that items 1 and 3 of amendments to the *Survey and Mapping Infrastructure Act 2003* made in the Schedule to the bill, provide that in future survey standards will be commenced merely by the publication of a "notice", rather than (as at present) by the publication of a notice in the government gazette.

4. The committee was concerned that this process may decrease accountability and accessibility, and might increase the likelihood that a subsequent failure to table the relevant notice in Parliament in accordance with the requirements of Part 6 of the *Statutory Instruments Act 1992* will go undetected.

5. The committee therefore sought information from the Minister as to the following:

- how and where was it anticipated the relevant notice will be published?
- why was it thought appropriate to discontinue the current obligation to publish the notice in the government gazette, given that this is a simple and economical process which can occur concurrently with the publication of appropriate information in other publications such as industry and trade journals and newspapers?

6. The Minister responded as follows:

> *I refer to Alert Digest No 7 regarding the Statute Law (Miscellaneous Provisions) Bill 2006 and in particular comments about Section 9 of the Survey and Mapping Infrastructure Act 2003 (the SMIA). As you would be aware I introduced the Bill in my capacity as Leader of the House as it contains amendments from across the statute book, however the SMIA is administered by the Minister for Natural Resources, Mines and Water.*
>
> *Under current section 9(1) of the SMIA the Minister must notify the making of a survey standard by gazette notice. A gazette notice is defined in section 36 of the Acts Interpretation Act 1954 as a notice published in the gazette.*

[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.

To put it simply, the purpose of the amendment to Section 9 (1) is to avoid unnecessary duplication of dealing with the relevant instrument both as a gazette notice and as subordinate legislation.

Under amended section 9(1) of the SMIA the Minister must give the notification by 'notice under this section'. That notice, under amended section 9(3) is subordinate legislation and therefore subject to section 47 of the Statutory Instruments Act 1992 (the SIA). Section 47(1) of the SIA requires that subordinate legislation be notified in the gazette.

As is case with all subordinate legislation, other than exempt subordinate legislation, the Minister's notice will be drafted by the Office of the Queensland Parliamentary Counsel and notified in the gazette under section 47(2)(a) of the SIA. The notice under section 47(2)(a) must notify where copies of the Minister's notice are available. Section 48 of the SIA deals with the availability of subordinate legislation notified under section 47(2)(a).

The above mentioned amendments merely bring the notification process for the Minister's notice into line with that normally used for subordinate legislation, other than exempt subordinate legislation. Accordingly, the practical effect of the amendments is to allow the Minister's notice to be dealt with as subordinate legislation in the usual way, without the unusual additional requirement that it be published in full in the gazette.

In particular I confirm that the notice, being subordinate legislation, will be laid before the Legislative Assembly as normal, and be subject to possible disallowance motion.

The Minister may also use other means to inform surveyors about the making of a survey standard.

I trust this information clarifies the situation.

7. The committee notes the Minister’s response.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[20]

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

[20] 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)*
87	Superannuation (State Public Sector) Amendment of Deed Regulation (No.1) 2006	8/8/06
118	Forestry and Nature Conservation Legislation Amendment Regulation (No.1) 2006	8/8/06
154	Statutory Instruments Amendment Regulation (No.1) 2006	8/8/06
164	Environmental Legislation Amendment Regulation (No.1) 2006	8/8/06

* 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)*
8	**Fair Trading Amendment Regulation (No.1) 2006** ➢ Letter to the Minister dated 5 June 2006. ➢ Letter from the Minister dated 3 July 2006. ➢ Letter to the Minister dated 7 August 2006.	6/6/06

(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 8th 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

8 August 2006

APPENDIX

CORRESPONDENCE

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