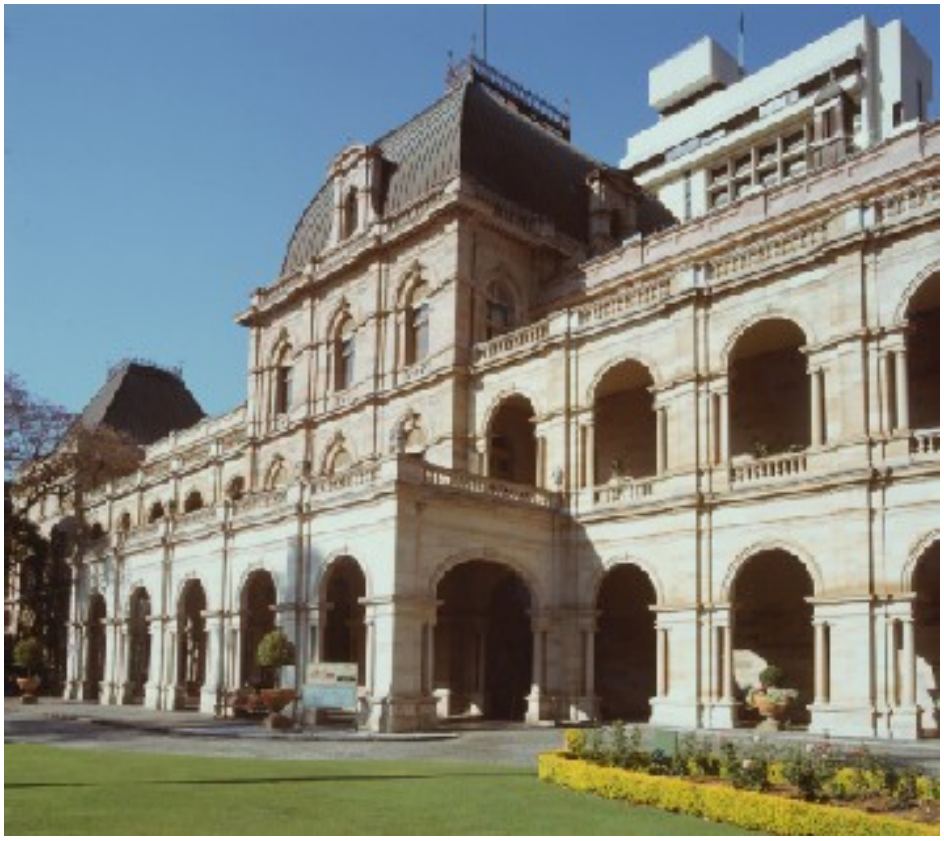
SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



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SCRUTINY OF LEGISLATION COMMITTEE
MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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

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

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

TERMS OF REFERENCE

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

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

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

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

by examining all Bills and subordinate legislation.

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

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

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

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

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

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

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

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. APPROPRIATION BILL (NO.2) 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for Infrastructure, introduced this bill into the Legislative Assembly on 11 October 2006.

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

> (to provide) *supplementary appropriation for 2005-2006 for unforeseen expenditure that occurred in that financial year.*
>
> *The supplementary appropriation sought is based on the consolidated fund financial report, noting unforeseen expenditure to be appropriated in 2005-06, which has been prepared by the Treasurer and reported upon by the Auditor-General in accordance with Section 38A of the Financial Administration and Audit Act 1977. Brief explanations of departmental unforeseen expenditure requirements have been provided as part of the consolidated fund financial report 2005-06.*

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

2. APPROPRIATION (PARLIAMENT) BILL (NO.2) 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for Infrastructure, introduced this bill into the Legislative Assembly on 11 October 2006.

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

> (to provide) *supplementary appropriation for Legislative Assembly and the parliamentary service for 2005-2006 for unforeseen expenditure that occurred in that financial year.*
>
> *The supplementary appropriation sought is based on the consolidated fund financial report, noting unforeseen expenditure to be appropriated in 2005-06, which has been prepared by the Treasurer and reported upon by the Auditor-General in accordance with Section 38A of the Financial Administration and Audit Act 1977. A brief explanation of departmental unforeseen expenditure requirements have been provided as part of the consolidated fund financial report 2005-06.*

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

3. BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION 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 11 October 2006.

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

> *to improve dispute resolution processes for community title schemes.*

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[3]

- **clause 10**

3. Clause 10 of the bill inserts into the *Body Corporate and Community Management Act 1997* ("the 1997 Act") new s.101A (Protection of committee members from liability). This section is in the following terms:

> *A committee member is not civilly liable for an act done or omission made in good faith and without negligence in performing the person's role as a committee member.*

4. The Explanatory Notes (at page 9) point out that a provision in similar terms already exists in the *Building Units and Group Titles Act 1980* ("the 1980 Act"), which Act was replaced by the 1997 Act but has a limited ongoing operation.[4]

5. In terms of whether cl.10's proposed conferral of immunity on body corporate committee members is appropriate, a number of matters require consideration.

6. Firstly, the immunity is framed in conditional terms (it requires both good faith and an absence of negligence by committee members), and is therefore limited in scope. Moreover, good faith and an absence of negligence would be a good defence to many legal proceedings quite apart from any statutory immunity. However, proposed s.101A is still likely to have significant practical application, for example in the area of defamation. Liability in defamation can arise even though the "publisher" of a defamatory statement acts in good faith and is not negligent (such as where the publisher does not know, and could not reasonably have been expected to know, that the material being published is in fact defamatory of another person).[5]

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3 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 See s.48A of the 1980 Act. The 1980 Act continues to apply to building unit plans and group title plans whose registration under the 1980 Act was for the purposes of another Act (see s.271(2) of the 1997 Act).

5 See Fleming, *The Law of Torts*, 9th Edition at pages 595-597.

7. Secondly, provisions similar to proposed s.101A are most commonly inserted in statutes in order to provide protection to individuals (such as enforcement officials and members of the boards of public authorities) who perform a public role.[6] Although bodies corporate for community titles schemes, in relation to whose members s.101A will operate, are constituted pursuant to statute, those bodies corporate are essentially private rather than public entities.[7] In some respects they can be likened to a company, or to an association incorporated under the *Associations Incorporation Act 1981*. So far as the committee is aware, there are much more limited precedents for conferring statutory immunity of this type upon members of the governing bodies of such "private" statute-based entities.[8]

8. Thirdly, there is the practical issue that community titles schemes are a very commonplace form of property holding. The Explanatory Notes (at page 1) state that there are currently over 33,000 community titles schemes in Queensland, with over 303,000 individual lots (units).

9. In relation to proposed s.101A, the Explanatory Notes (at pages 4-5) state:

> *One of the secondary objects of the BCCM Act is to balance the rights and responsibilities of individuals with the responsibility for self management as an inherent aspect of community titles schemes. The BCCM Act provides a framework for body corporate decisions to be made in general meetings and through a representative, volunteer committee. During drafting of the Bill, stakeholders raised concerns about possible civil liability deterring unit owners from agreeing to be members of their body corporate committee. This concern increased in light of a proposal to introduce a code of conduct for body corporate committees (section 101B of the Bill).*
>
> *It is proposed to provide committee members with a limited protection for acts done in good faith and without negligence. This is intended to provide some balance with the duties and obligations imposed on committee members, including as a result of the proposed code of conduct.*

10. Finally, if proposed s.101A is enacted and becomes part of the 1997 Act, an issue may arise as to a possible conflict between its terms and those of s.45(4) of the *Body Corporate and Community Management (Standard Module) Regulation 1997*, which is subordinate legislation made under the Act. Section 45(4) purports to confer absolute (rather than conditional) immunity on body corporate members in a specified set of circumstances. If s.101A is enacted, s.45(4) may need to be reviewed .

11. The committee notes that proposed s.101A of the *Body Corporate and Community Management Act 1997* (inserted by cl.10) confers a conditional immunity upon body corporate committee members.

12. The committee refers to Parliament the question of whether conferral of the proposed immunity is appropriate in the circumstances.

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6 In addition, statutes often confer court-like immunity on the members of statutory tribunals, given that such tribunals often perform functions similar to those of courts.

7 Their role is to manage privately-owned properties situated on a common piece of land.

8 So far as the committee is aware, no such statutory immunity applies to directors of companies incorporated under corporations law, nor to members of the management committee of associations incorporated under the *Associations Incorporation Act.* As a further example chosen at random, this is also the case with board members of grammar schools established under the *Grammar Schools Act 1975.*

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

♦ **clause 78**

13. Clause 78 of the bill inserts into the *Liquor Act 1992* new section 35.

14. Section 35(2) will enable the Commercial and Consumer Tribunal, when hearing an appeal against a decision of the chief executive, to grant a party leave to present new evidence in certain circumstances. These circumstances are essentially that:

- the party did not know, and could not reasonably have known, of the existence of the new evidence before the decision
- the new evidence is relevant and likely to have affected a decision, and
- it would be unfair not to allow it to be presented.

15. Section 35(3) provides that, in light of the admission of new evidence, the proceedings may be either adjourned or recommenced.

16. Clause 78 essentially replicates the content of the *Liquor (Evidence on Appeals) Amendment Bill 2006*, which was introduced by Mr P W Wellington MP, Member for Nicklin on 21 April 2006 as a private members bill. That bill, which lapsed upon dissolution of the Parliament prior to the recent State election, was reported on by the previous Scrutiny of Legislation Committee in Alert Digest No. 5 of 2006 at page 13-14.

17. The previous committee pointed out that the net effect of the Member's bill was to enhance the position of appellants, by broadening the range of materials which may be considered by the Tribunal which hears appeals against decisions of the chief executive. The previous committee stated that it did not object to that amendment.

18. The committee notes that cl.78 of the bill introduces into the *Liquor Act 1992* provisions enabling the tribunal hearing an appeal against a decision of the chief executive, to admit new evidence in certain circumstances.

19. The committee notes that, in relation to an earlier bill which was in essentially identical terms, the previous Scrutiny of Legislation Committee considered the provision enhanced the position of appellants by enabling a broader range of materials to be considered by the tribunal. The previous committee did not object to that amendment.

20. The current committee likewise does not object to the provisions of cl.78 of this bill.

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

4. CRIMINAL CODE (DRINK SPIKING) AND OTHER ACTS AMENDMENT BILL 2006[10]

Background

1. The Honourable L D Lavarch MP, Attorney-General and Minister for Justice and Women, introduced this bill into the Legislative Assembly on 12 October 2006.

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

> *Amend the Criminal Code by the insertion of a new offence of unlawful drink spiking;*
>
> *Amend the Corrective Services Act 2006 to restrict leave of absence for prisoners detained for sex offences contained in schedule 1 of the Act; and*
>
> *Amend the Dangerous Prisoners (Sexual Offences) Act 2003 to clarify that a judicial authority can order that a released prisoner be electronically monitored during the period of a supervision order.*

"DRINK SPIKING" PROVISIONS

Overview of the proposed offence of drink spiking

3. Although 'drink spiking', in one form or another, has always existed, the Second Reading Speech of the Minister highlights its emergence as a significant problem in Australian society in an era of easy access to an increasingly sophisticated array of drugs. The bill seeks to address this increasing problem.

4. According to the Explanatory Notes the reason for the bill is, *inter alia*, to implement a recommendation in a discussion paper by the Model Criminal Code Officers Committee (MCCOC) that all Australian jurisdictions enact an offence of drink spiking:

> *which would extend to any substance that would be likely to impair the consciousness or bodily function of the victim or which is intended to do so, whether or not the spiked drink is drunk wholly, partly or at all.* ***The proposed offence would not require any further intent*** [emphasis added].

5. Thus the recommended focus is on the likely effect on the victim of any substance administered OR the intention of the person administering the substance.

6. The Explanatory Notes then state that:

> *although Queensland's Criminal Code contains a number of relevant offences (ss.218 (c), 316, 322 and 323(b)),* ***all require some further intention either to commit an indictable offence or to further victimise the victim*** [emphasis added].

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

7. If this latter statement is intended only to refer back to the offence proposed by the MCCOC then it is accurate. Section 218(c) requires the proof of *an intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person.* Section 316 requires proof of *an intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission of an indictable offence*. Both ss.322 and 323(b) require proof *of an intent to injure or annoy*.

8. However, if the statement is intended to refer to the proposed new Queensland offence of drink spiking and its relationship to the existing Queensland *Criminal Code* provisions referred to, it is not completely accurate. This is because the new Queensland offence also requires proof of an intention which is arguably more difficult to prove then the intent required in existing ss.322 and 323(b) of the *Criminal Code* (Qld). Section 322 is otherwise more difficult to prove than the proposed drink spiking offence because it also requires proof of a further element, namely that in fact the person's life was endangered or that they were caused grievous bodily harm. However, no such further element is required to be proved under s.323(b).

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[11]

♦ clause 4 (proposed s.316A)

Elements of the offence

9. Clause 4 of the bill inserts into the *Criminal Code* proposed s.316A, which creates a crime punishable by 5 years imprisonment. The elements of the crime are as follows:

   (a) A person administering (or attempting to administer)

   (b) in drink a substance

   (c) to another person

   (d) without that other person's knowledge

   (e) **with intent to cause the other person to be stupefied AND overpowered.** [emphasis added]

10. The committee suggests that the section would be clearer if the words "a substance in a drink" were used rather than "in drink a substance" as at present.

11. This provision can be compared with s.323(b) of the *Criminal Code* which creates a misdemeanour, punishable by 7 years imprisonment, the elements of which are:

   (a) Any person who

   (b) unlawfully

   (c) **with intent to** injure or **annoy**

[11] Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

(d) causes any poison **or noxious** thing

(e) to be administered to or taken by a person. [emphasis added]

12. The committee questions why an amendment of s.323(b) of the *Code* could not have achieved the stated reason for the bill. It is difficult to envisage a substance (including alcohol) that would be caught by the new provision but would not be caught under s.323(b). Anything that is intended to cause a person to be *stupefied AND overpowered* under proposed s.316A would likely be a noxious thing under s.323(b).

13. In *R v LM*[12] the Queensland Court of Appeal did not question that the offence under s.323(b) of *causing a noxious thing to be taken with intent to annoy* would apply to a mother who administered laxatives to her very young children. In *R v Barton*[13] it was accepted that equine pills along with Beecham's pills and gin administered in sufficient quantity could become a noxious thing. To like effect is *R v Hannah*[14] where cantharides (Spanish Fly) were administered; *R v Cramp*[15] (juniper oil); *R v Turner*[16] (bitter apple). According to the authors of *Carter's Criminal Law of Queensland*[17] it "is a question of fact and degree in all the circumstances whether a thing is noxious". The authors cite *R v Marcus.*[18]

Intent

14. The Explanatory Notes suggest that the reason for the proposed offence is to implement the recommendations of the MCCOC. This recommendation, according to the Explanatory Notes, focuses on an offence that looks to the nature of the substance used and includes any substance "that would be likely to impair the consciousness or bodily function of the victim OR which is intended to do so, whether or not the spiked drink [was consumed]". Thus, according to the Explanatory Notes, the recommendation seems to be that the offence would be committed *without intent* if the substance is in fact likely to impair the consciousness or bodily function of the victim. The offence would also be committed if that *intention could be proved* regardless of whether in fact the substance was consumed.

15. The Explanatory Notes seem to accept and reinforce this recommendation by stating that the relevant existing *Criminal Code* provisions "all require some further intention either to commit an indictable offence or *to further victimise the victim"*.

16. However the proposed offence in s.316A requires *in all cases* that it be proved, in addition to administering the substance, that there was *an intention to stupefy and overpower*. This goes well beyond the recommendation of the MCCOC, and as discussed above probably goes beyond the requirements of the existing offence in s.323(b). The intention required to be proved under s.323(b) need only be to *annoy* any person. The intent necessary to be proved under the proposed s.316A would appear to be a more difficult element to prove than under s.323(b).

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12 [2004] QCA 192

13 (1931) QJPR 81

14 (1877) 12 Cox CC 547

15 (1880) 5 QBD 307

16 (1910) 4 Cr App R 203

17 15th Edn 2005 LexusNexis Butterworth Aust at [s224.15].

18 [1981] 2 All ER 833

Other significant comparisons between the existing and proposed provisions

17. **Unlawfulness:** By virtue of s.36 of the *Criminal Code* (Qld), the defences and excuses under the code apply to all offences in Queensland. Thus the Crown must prove unlawfulness under both the existing and proposed sections referred to above.

18. **Immaterial Matters under the Proposed Offence:** Under the bill it is immaterial that the victim's lack of knowledge of the substance is merely that they are unaware of the particular quantity of the substance. This would also be the case under s.323(b).

19. It is also immaterial that the substance is capable of having the effect intended. Therefore, whether or not the substance is capable of stupefying AND overpowering is irrelevant provided that result is intended by the accused. A thing may be "noxious" (the ordinary meaning of which is "harmful") without being capable of stupefying AND overpowering.

20. It is also immaterial whether a particular person is intended to be the person to whom the substance is administered. The same result is likely under s.323(b) which provides that it is a misdemeanour for any person "with intent to annoy *any* person"… to cause any noxious thing "to be administered to or taken by *any* person". If there is serious doubt about this issue it could be made clear by amendment of s.323(b).

Reference to "section 7"

21. Proposed s.316A(5) provides as follows:

> *In relation to an attempt to administer a substance, for this section and section 4, attempt includes adding a substance to drink in preparation for the administration of the substance."* [underlining added]

22. Section 316A(7) then provides:

> *(7) In this section –*
>
> ***adding a substance**, to drink, includes, without limiting section 7, the following-*
>
> *(a)…..*
>
> *(b)…..*
>
> *(c)….."* [emphasis and underlining added]

23. The committee presumes the reference to "and section 4" is a reference to the definition of Attempts to Commit Offences in s.4 of the *Criminal Code*. However, it is unclear to what the words "without limiting section 7" in (7) refer. Are they intended to refer to the complicity provision in s.7 of the *Criminal Code,* or to subsection (7) of the proposed s.316A, or perhaps subsection (5) of the proposed s.316A? The committee suggests that this should be made clear.

24. The committee draws to the attention of Parliament the various matters mentioned above, in relation to the drafting of proposed s.316A.

25. In addition, the committee seeks information from the Attorney as to the matters raised in paragraphs 10 and 12 above.

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

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

- **clause 4 (proposed s.316A)**

26. Proposed s.316A(6) provides that it is a defence for a person charged with an offence against the section to prove:

    (a) the substance that was administered, or attempted to be administered, was not a dangerous drug; and

    (b) the substance was administered, or attempted to be administered, as a **prank**. [emphasis added]

    "Prank" is defined as a trick of a playful nature and not a trick of a malicious nature (s.316A(7)).

27. The Explanatory Notes state that the definition of "prank" was included because the Macquarie Dictionary defines "prank" as a trick or practical joke, sometimes mischievous in nature, which includes both malicious and playfully annoying pranks.

28. The Explanatory Notes offer no explanation as to why such a defence is thought to be justified when the Crown has proved beyond reasonable doubt that a substance, other than a dangerous drug,[21] has been administered with intent to stupefy and overpower. No definition of "stupefy" or "overpower" is included in the bill, and therefore the ordinary meanings would apply. "Stupefy" is a commonly understood word. There is, however, the additional requirement that there be an intent to "overpower". According to the Collins Dictionary, "overpower" means to "conquer or subdue by superior force; to have such a strong effect on as to make helpless or ineffective". Therefore, before the defence can be raised, the Crown will have succeeded in proving that what was administered was done with the intention not only that it stupefy but also that it overpower the victim. If the Crown succeeds in proving this beyond reasonable doubt, it is difficult to envisage circumstances in which this could ever be just a playful prank.

29. The committee can see why the motivation of merely working a playful prank would be relevant to the question of the appropriate sentence to be imposed following conviction of the offence. However, the committee questions why it is thought that it should not be an offence at all to administer a substance with the relevant intent, simply because it was done

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

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

21 Defined by reference to s.4 of the *Drugs Misuse Act 1986.*

as a playful prank. Put another way, why is someone justifiably liable to 5 years imprisonment for doing precisely the same act with precisely the same intention and outcome as another but absent the motivation of a playful prank?

30. Consider the case of two 19 year old males, A and B, who at the same party each independently decide to spike two different 18 year old girls' drinks with the same substance. In each case the girl is known to the male. The intent in each case is that the substance will stupefy and overpower the girl. In each case the girls suffer the same detriment eg vomiting, diarrhoea and stupefaction. In each case the motivation is a prank but in the case of A it is a malicious prank to humiliate and disgrace the girl in the presence of her peers. In the case of B it is merely a stupid "playful" prank. Why should A be deprived of the right to raise the defence?

31. The Attorney-General made the following statement in the Second Reading Speech: "Given the potential for further victimisation and the physical and mental harm that may flow from falling victim to *malicious* drink spiking, it is appropriate that we introduce an innovative offence to address this conduct." The committee suggests that precisely the same dangers flow from a drink spiking motivated by a *playful* prank.

32. Under the *Criminal Code (Qld)* a distinction is drawn between excuses and defences. In the case of excuses the Crown must negative the excuse beyond reasonable doubt once it is fairly raised by the defence. In the case of defences, the onus of proof rests on the defence to prove the matters constituting the defence on the balance of probabilities. Most matters relieving a person from criminal responsibility under the *Criminal Code* are excuses, eg self defence (ss.271 and 272), provocation for an assault (s.269), honest claims of right (s.22), intoxication negativing intention (s.28), accident and acts occurring independent of the will (s.23), extraordinary emergencies (s.25), mistakes of fact (s.24), compulsion (s.31).

33. If it is thought to be fair to discriminate amongst persons who administer substances with the same intent and with the same outcome because one is motivated by a playful prank and the other by a malicious prank, the committee questions why the Crown should not be required, once the issue of a prank is fairly raised by the defence, to negative the circumstances beyond reasonable doubt as is the case with all excuses under the *Criminal Code*?

34. The Explanatory Notes do not give any reason why the exculpatory circumstance of playful prank should be a defence and not an excuse.

35. The committee notes that under proposed s.316A(6), it is a defence to charges brought under the section that the relevant substance was administered, or attempted to be administered, as a "prank". The term "prank" is defined as meaning a prank which is playful and not malicious.

36. The committee seeks information from the Attorney as to:

    (a) why it was thought appropriate that a playful prank should constitute a defence to s.316A charges; and

    (b) why the prank constitutes a "defence" under the *Criminal Code*, rather than an "excuse" under the *Code*.

OTHER PROVISIONS OF THE BILL

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

- **clause 10**

37. The *Dangerous Prisoners (Sexual Offences) Act 2003* enables the Attorney-General to seek court orders for the continued detention, or supervised release, of prisoners serving a term of imprisonment for a "serious sexual offence", during the period after their term of imprisonment is completed.

38. The committee reported on the various issues raised by that Act at the time when its originating bill was introduced.[23]

39. The Act enables a court to order that a relevant prisoner be released, after their term of imprisonment has expired, under a supervision order incorporating appropriate conditions (see ss.13, 15 and 16). Section 16(2) includes examples of discretionary conditions designed to "ensure adequate protection of the community". Currently, these are:

- *That the prisoner not knowingly reside with a convicted sex offender.*
- *That the prisoner must not, without reasonable excuse, be within 200m of a school.*

40. Clause 10 of the bill re-enacts those two examples, and adds the following example:

- An order that the prisoner must wear a device for monitoring the prisoner's location.

41. The bill therefore effectively broadens the range of restrictions which, under the Act's statutory regime, may be imposed upon a relevant prisoner. An electronic monitoring device, quite obviously, will have significant implications in terms of the prisoner's privacy.

42. In relation to cl.10, the Explanatory Notes (at page 3) state:

> *The wearing of a monitoring device is an intrusion into a person's privacy. However, it must be noted that the added level of supervision that electronic monitoring gives may facilitate the supervised release of a prisoner into the community. Prisoners released on supervision under the Dangerous Prisoners (Sexual Offenders) Act 2003 are prisoners the court has determined pose a serious danger to the community if they are not subject to appropriate levels of supervision. It will be a matter for the court to determine whether electronic monitoring is warranted in the circumstances in order to ensure the protection of the community.*

43. The committee notes that cl.10 of the bill adds to the range of conditions which may be imposed upon a prisoner subject to a supervised release order under the *Dangerous Prisoners (Sexual Offenders) Act 2003*, by adding an example which clarifies that a court can order a such prisoner to wear an electronic monitoring device.

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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 See *Alert Digest No. 8 of 200*3 at pages 1-12.

44. The committee refers to Parliament the question of whether conferring power to impose such a condition has sufficient regard to the rights of the released prisoner, as well as to those of the community.

♦ **clauses 7 and 8**

45. Section 82 of the *Corrective Services Act 2006* provides that four categories of prisoners may be granted only two types of leave, namely, compassionate leave or health leave. Those categories currently include prisoners detained under Part 3 of the *Criminal Law Amendment Act 1945* which deals with the indeterminate detention, in specified circumstances, of offenders convicted of sexual offences.

46. Clause 7 of the bill adds to the s.82 list other prisoners detained for a "sexual offence". This term is defined by reference to schedule 1 to the Act, which sets out a lengthy list of offences.

47. Transitional s.478A and 478B, inserted by cl.8 of the bill, contain provisions which effectively prevent a prisoner sentenced in relation to a sexual offence committed before commencement of the bill, whether or not actually sentenced before or after that commencement, from initiating or continuing any claim for leave other than compassionate or health leave.

48. Since the granting of leave to prisoners (see s.72 of the Act) can be regarded as a form of privilege, a provision restricting the types of leave for which particular categories of prisoners are eligible could perhaps be considered a relatively minor intrusion upon prisoners' rights.

49. The committee notes that cl.7 of the bill restricts the range of leave categories for which prisoners guilty of a "sexual offence" are eligible.

50. In the circumstances, the committee views any restriction upon prisoners' rights resulting from this clause to be relatively minor in nature.

5. ENERGY ASSETS (RESTRUCTURING AND DISPOSAL) BILL 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for Infrastructure, introduced this bill into the Legislative Assembly on 11 October 2006. It was subsequently passed as an urgent bill the next day following suspension of Standing Orders, and was assented to on 13 October 2006.

2. Upon receiving the Governor's assent, a 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 a bill though passed 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. As the bill has already been assented to, the committee has no jurisdiction to comment on it.

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

6. 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 11 October 2006.

2. The object of the bill, as indicated by 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.*

3. Subject to a number of inconsequential changes and to the insertion of additional clauses (cls.53-56) which do not raise any issues meriting comment, this bill is identical to the *Fire and Rescue Service Amendment Bill 2006* which was introduced on 21 April 2006 by the Minister during the life of the previous (51st) Parliament. That bill had not been debated by the time Parliament was dissolved in August 2006, and accordingly lapsed.

4. The Scrutiny of Legislation Committee of the 51st Parliament reported on the earlier bill (see Alert Digest No. 5 of 2006 at pages 7-10). The committee adopts and repeats the comments contained in its predecessor committee's report on the earlier bill. Those comments were as follows.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[24]

- **clauses 6, 8 and 42**

5. 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.

6. 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.

7. 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.

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[24] 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.

8. 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*.

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

Does the legislation have sufficient regard to the rights and liberties of individuals?[25]

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

10. 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)).

11. 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).

12. 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.

13. 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.

14. 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.

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

15. 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.

16. 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 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.*

17. 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.*

18. 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.

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

♦ **clause 27**

20. 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.

21. 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.

22. 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.

23. 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?[26]

♦ **clauses 11 and 12**

24. 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.

25. 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.

26. 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).

27. 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.[27]

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[26] 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.

[27] 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.

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

29. 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.

7. HEALTH LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable S Robertson MP, Minister for Health, introduced this bill into the Legislative Assembly on 11 October 2006.

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

> (to build) *on this government's efforts to improve the recruitment, assessment and registration of health professionals.*
>
> *It will also make a number of amendments to ensure consistency and improve processes across the Health portfolio.*

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

- **clause 121**

3. Chapter 3, part 3 of the *Mental Health Act* (ss.64-66) relates to a range of persons who are "in lawful custody without charge" and appear to be mentally ill. Section 65 of the Act authorises that person's "custodian" to authorise the person's assessment at an authorised mental health service.

4. Section 64 of the bill lists the categories of persons in lawful custody to whom the Act's provisions apply. They are essentially persons awaiting trial, or who are serving sentences of imprisonment.

5. Clause 121 of the bill provides that part 3 will now also apply to:

> *a person who is held in lawful custody, or lawfully detained, <u>without charge</u>* (underlining added) *under an Act of the State or the Commonwealth prescribed under a regulation.*

6. Clause 126 inserts into the Act new part 6A (ss.100A-100D), which sets out various procedures following the end of lawful custody without charge. Clause 124 also inserts provisions which effectively provide that upon ceasing to be a mental health patient, the relevant persons are to be returned to the custody of the person who is their "custodian" under the relevant prescribed Act.

7. It does not seem to the committee to be objectionable to extend the current mental health assessment powers to persons who are held in lawful custody, but who are not subject to the criminal law system. Neither the Minister's Speech nor the Explanatory Notes give any indication of the categories of persons at whom these changes are directed. However, it seems one obvious category would be persons (such as asylum seekers and visa over-stayers) who are held in immigration detention centres.

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[28] 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 notes that cl.121 of the bill extends the assessment processes of the *Mental Health Act 2000* to persons who are in lawful custody, or lawfully detained, without charge under a prescribed Act of the State or Commonwealth.

9. Whilst neither the Minister's Speech nor the Explanatory Notes provide any indication of the categories of persons in contemplation, the committee assumes they might include persons held in immigration detention centres.

10. This extension of the assessment provisions of the *Mental Health Act* does not appear to the committee to be objectionable.

♦ **clause 297**

11. Clause 297 of the bill inserts into the *Tobacco and Other Smoking Products Act 1998* a new s.26ZR (Supply of smokeless tobacco products). This section provides that a person must not, without lawful authority or excuse, supply a "smokeless tobacco product" to another person. A maximum penalty of 140 penalty units ($10,500) is provided for breach of this prohibition.

12. An amendment to the Dictionary to the Act, made by cl.300, inserts a definition of "smokeless tobacco product". The term is defined as meaning "tobacco, or something containing tobacco, prepared for consumption other than by being smoked". The definition includes as examples snuff and chewing tobacco.

13. In his Second Reading Speech, the Minister cites the addictiveness and high nicotine delivery capability of these products as reasons underlying the prohibition on their supply. He indicates that although there is little evidence that these products are presently being sold in Queensland, his department has received a number of inquiries from retailers interested in selling them.

14. Although the new section may have limited practical application it raises, at least in theory, the issue of its effects upon the rights of individuals to sell and buy the relevant tobacco products. The sale of cigarettes and smoking tobacco, whilst heavily regulated, is of course not prohibited (other than to children).

15. The committee notes that cl.297 of the bill inserts into the *Tobacco and Other Smoking Products Act 1998* new s.26ZR, which bans the supply of "smokeless tobacco products".

16. The committee refers to Parliament the question of whether this prohibition has sufficient regards to the rights of adults to sell and buy such products.

♦ **clause 303 (proposed s.21B)**

17. Part 20 of the bill (cls.301-309 inclusive) amends the *Transplantation and Anatomy Act 1979*. Among the amendments is proposed s.21B (inserted by cl.303), dealing with authorised donations of skeletal muscle tissue, oral tissue and perioral tissue for research purposes.

18. The process authorised by s.21B is only available where the research has been approved by a "human research ethics committee", and where the donor is an adult.

19. An extremely important issue in relation to the various matters dealt with in the *Transplantation and Anatomy Act* is that of consent to the relevant process.

20. The committee notes that whilst the consent requirements in relation to other forms of tissue donation are stipulated in the Act itself (see for example, ss.10, 11, 12B, 12C, 12D, 17 and 18), that for the s.21B process is stated to be consent:

> *given … in accordance with the requirements stated in the National Statement.*

21. "National Statement" is defined in proposed s.21A as:

> *the National Statement on Ethical Conduct in Research Involving Humans, issued by the NHMRC in 1999, as in force from time to time.*

22. The NHMRC is in turn defined as the Council established under a specified Commonwealth statute, and a note to the definition of "National Statement" states that a copy of the Statement is available on the NHMRC's website.

23. The committee has examined the "National Statement", and notes that it does indeed deal at length, and in what appears to be an appropriate manner, with the issue of consent, including consents in relation to the type of process dealt with by s.21B.

24. The committee further notes the following statements in the Minister's Speech:

> *…the requirements governing the taking of skeletal muscle or oral tissue for research purposes will be simplified. The legislation will continue to specify that tissue biopsies may only be taken from adult donors.*
>
> …
>
> *I have been advised that tissue biopsies are relatively simple and involve little risk for the person concerned.*

25. However, the fact remains that the "National Statement" is an external document, the contents of which are moreover subject to change from time to time.

26. In the circumstances the committee queries whether, in drafting this bill, consideration was given to incorporating the relevant consent requirements in the bill itself, rather than via reference an external document.

27. The committee notes that under proposed s.21B of the *Transplantation and Anatomy Act 1979* (inserted by cl.303), the consent required for removal of particular tissue from an adult person's body for research purposes is to be as stipulated in an external document, the National Statement on Ethical Conduct in Research Involving Humans.

28. The committee seeks information from the Minister as to whether consideration was given to incorporating the relevant consent requirements in the bill itself rather than by incorporating, by reference, an ambulatory external document.

8. NATURE CONSERVATION AMENDMENT BILL 2006

Background

1. The Honourable L H Nelson-Carr MP, Minister for Environment and Multiculturalism, introduced this bill into the Legislative Assembly on 11 October 2006.

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

> *to legislate a ban on recreational duck and quail hunting in Queensland.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[29]

♦ **clause 3**

3. Clause 3 of the bill inserts into the *Nature Conservation Act 1992* proposed s.97A. This section expressly prohibits any regulation or conservation plan made under the Act from authorising, directly or indirectly:

- the recreational hunting of native ducks or native quails
- the issuing of licences, permits or other authorities for such activities, and
- the entry into any agreement or other arrangement authorising such activities.

4. It appears that native duck and native quail have at all times been prescribed under the Act as "protected animals". Initially, it appears they fell within the category of "common wildlife", which was defined comprehensively in the *Nature Conservation (Wildlife) Regulation 1994* as covering all birds indigenous to Australia (other than "presumed extinct", "endangered", "vulnerable" or "rare" birds). Subsequently, following changes in the Act's categorisation of "protected animals", native duck and quail appear to have been classified, via a similarly comprehensive residual definition, as "least concern wildlife" (see schedule 6 of the *Nature Conservation (Wildlife) Regulation 2006*).

5. The Act has always provided (currently, via s.83) that subject to limited exceptions, all "protected animals" are the property of the State (see s.83(1)).

6. One such exception is that mentioned in s.83(2), under which a protected animal ceases to be the property of the State when taken under a licence, permit or other authority if, under a conservation plan, property the animal passes from the State on its being taken.

7. As the Explanatory Notes state, since 1995 the recreational hunting of duck and quail has been permitted through the provisions of the *Nature Conservation (Duck and Quail) Conservation Plan 1995*, made under the Act. Under the Plan, duck and quail hunting seasons could be officially declared by the chief executive annually.

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

8. In September 2005, subsequent to a policy announcement by the Premier, the conservation plan was not remade upon its expiry. This effectively ended the statutory authority for the conduct of recreational duck and quail hunting in Queensland, although a new conservation plan or an amendment to the regulations made under the Act could have re-authorised the practice.

9. The purpose of this bill is to prevent the mechanisms of the Act being utilised at any future time for that purpose.

10. The following matters appear to the committee to be relevant to any consideration of this bill:

- The bill is limited to recreational shooting of ducks and quail, and does not affect the capacity of primary producers to seek authorisations to shoot such birds for the purpose of crop protection.

- The relevant ducks and quail are wild animals (*ferae naturae*). At common law, *ferae naturae* were not owned by any person, although a landowner had what was sometimes called a "qualified property" in them, consisting of the exclusive right to catch, kill and appropriate the animals on his land.[30] Accordingly, except in the case of duck and quail taken on private land, either by the landowner or by shooters to whom the landowner had granted an appropriate licence or other contractual right, this bill would not appear to impact on any common law rights.

- In any event, under the *Nature Conservation Act 1992*, wild duck and quail have for many years been declared to be the property of the State.

11. In all the circumstances, the committee considers any issues raised by this bill are primarily policy-related, and are ultimately matters upon which Parliament must decide.

12. The committee notes that cl.3 of the bill effectively legislates a permanent ban on recreational shooting of native duck and quail in Queensland.

13. The committee refers to Parliament the question of whether the provisions of cl.3 have sufficient regard for the rights of duck and quail shooters and relevant property owners.

[30] Megarry and Wade, *The Law of Real Property*, 3rd edition, Stevens (1966) at page 73.

9. 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 11 October 2006.

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

> *to amend various Acts under the Primary Industries and Fisheries portfolio to remove redundant provisions, correct deficiencies or omissions (as well as clarify certain provisions) affecting the efficient and effective operation of the relevant legislation and the achievement of the related policy objectives.*

3. Subject to one inconsequential change, this bill is identical to the *Primary Industries Legislation Amendment Bill 2006* which was introduced on 6 June 2006 by the Minister during the life of the previous (51st) Parliament. That bill had not been debated by the time Parliament was dissolved in August 2006, and accordingly lapsed.

4. The Scrutiny of Legislation Committee of the 51st Parliament reported on the earlier bill (see Alert Digest No. 8 of 2006 at pages 8 and 9). The committee adopts and repeats the comments contained in its predecessor committee's report on the earlier bill. Those comments were as follows.

Does the legislation have sufficient regard to the rights and liberties of individuals?[31]

- **clause 32**

5. 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").

6. 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.

7. 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).

8. 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).

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

9. 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.

10. 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.

11. 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?[32]

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

12. 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.

13. 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).

14. 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.

15. 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.

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

[32] 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.

10. REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable A M Bligh MP, Deputy Premier, Treasurer and Minister for Infrastructure, introduced this bill into the Legislative Assembly on 11 October 2006.

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

> *To amend the Community Ambulance Cover Act 2003, the Duties Act 2001, the Fuel Subsidy Act 1997, the Land Tax Act 1915 and the Taxation Administration Act 2001 to give effect to revenue measures announced in the 2006-07 State Budget, the 2006 election and other revenue measures.*
>
> *To amend the Government Owned Corporations Act 1993 and the Financial Administration and Audit Act 1977 to extend the mandate of the Queensland Auditor-General to provide for an independent assessment of the relevance of the published measures used by public sector entities to assess their performance.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[33]

- **clauses 2(2), 2(7) and 15 (proposed s.570)**

3. The bill contains several provisions which have retrospective effect. They comprise:

   - clause 9, which inserts an amendment to the Dictionary to the *Community Ambulance Cover Act 2003* (definition of *primary production*), which extends an exclusion from liability under the Act to encompass certain categories of "amenity horticulture"

   - clause 86(3), which amends the Dictionary to the *Fuel Subsidy Act 1997* (definition of *diesel engine road vehicle*) so as to make eligible for fuel subsidy, diesel used for on-road operation of the relevant type of vehicle

   - clause 15 (proposed s.570), which extends the operation of first home purchase transfer duty concessions (inserted by cl.12), relating to first homes acquired for less than their unencumbered value, to purchase agreements entered into on or after 1 May 2004.

4. The retrospective effect, in the case of the first two provisions, is conferred by cls.2(2) and 2(7).

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

[33] 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.

adverse affects on rights and liberties or whether obligations retrospectively imposed are undue. In making its assessment on whether the legislation has "sufficient regard", the committee typically has regard to the following factors:

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

6. The effect of two of the above amendments is to extend the range of statutory exemptions from taxes, and that of the third is to extend the range of eligibility for a subsidy scheme. The statement at page 17 of the Explanatory Notes, that the various amendments are beneficial to individuals, seems clearly correct.

7. The committee notes that cls.9, 15 (proposed s.570) and 86(3) of the bill are retrospective in nature. Two of the clauses broaden the range of exemptions from taxes, and the third extends the eligibility for a subsidy scheme.

8. The various retrospective amendments are all therefore clearly beneficial to individuals, rather than adverse.

9. In the circumstances, the committee has no concerns in relation to these retrospective provisions.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[34]

♦ **clause 6 (proposed s.81A)**

10. Section 81 of the *Community Ambulance Cover Act 2003* imposes a requirement upon electricity retailers or authorised subcontractors to obtain the written approval of the commissioner for certain contracts. Proposed s.81A(1) (inserted by cl.6 of the bill) provides that despite s.81(3), approval is not required if the contract "relates only to the performance by an authorised subcontractor … of 1 or more matters prescribed under a regulation *(underlining added)*…" .

11. Section 81(A)(2) provides that the matters prescribed must be:

> *ancillary administrative processes related to an electricity retailer's functions under s.80(2), for example, mailing and printing services.*

12. As proposed s.81A(1) effectively enables the operation of a statutory provision to be partially excluded by the making of a regulation, it constitutes a "Henry VIII clause" within the definition of that term that has been adopted by the committee.[35] Moreover, it would not

[34] 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.

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

appear to fall within any of the four sets of circumstances in which the committee generally considers "Henry VIII clauses" may be justified.[36]

13. As is well known, the committee does not favour the inclusion in legislation of "Henry VIII clauses", although it accepts that in certain circumstances their use maybe justifiable.

14. In the present case, the committee notes that the provision in question relates only to "ancillary administrative processes" such as mailing and printing services. These are, by definition, not matters of great significance.

15. The committee notes that proposed s.81A of the *Community Ambulance Cover Act 2003* (inserted by cl.6) contains a "Henry VIII clause". As is well known, the committee generally disapproves of the use of such provisions in legislation.

16. In the present case, the committee notes that the operation of the "Henry VIII clause" is expressly limited to matters of relatively minor significance.

17. The committee makes no further comment in relation to this "Henry VIII clause".

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[37]

- **clause 28 (proposed s.93A(4))**

18. Clause 28 of the bill inserts into the *Duties Act 2001* new s.93A (Concession – mixed and multiple claims for individuals – vacant land). This adds an additional concession to those which the Act already confers in relation to first homes. Section 93A(3) provides that, for a residence to be treated as the first home of a relevant transferee, that transferee must be at least 18 years of age. Subsection (4) goes on to provide as follows:

> *The commissioner may exempt a relevant transferee from the requirement that the relevant transferee be at least 18 years of age if the commissioner is satisfied there is no avoidance scheme in relation to the dutiable transaction.*

19. As can be seen, this provision confers upon the commissioner a significant discretionary power, whilst not providing any objective criteria to which the commissioner must have regard in exercising that discretion.

20. The committee reported on a range of similar provisions when reviewing the *Duties Amendment Bill 2004*.[38] Those powers, and the one inserted by the current bill, replace statutory parameters which were previously defined in objective terms.

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36 See the committee's 1997 report at page 56.

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

38 See *Alert Digest No. 1 of 2004* at pages 7-8.

21. As the committee pointed out in its report on the 2004 bill, whilst the relevant statutory provisions confer significant discretionary powers upon the commissioner, the discretion is exercisable only in relation to one matter (whether an "avoidance scheme" exists).

22. The committee notes that cl.28 of the bill introduces into the *Duties Act 2001* a provision, identical to several already included in the Act, which confers upon the commissioner a significant discretionary power, namely, to determine whether an "avoidance scheme" exists in relation to a dutiable transaction the subject of a claim for first home duty concessions.

23. The committee refers to Parliament the question of whether those discretions are both appropriate and sufficiently defined.

11. YEPPOON HOSPITAL SITE ACQUISITION BILL 2006

Background

1. The Honourable K G Shine MP, Minister for Natural Resources and Water, introduced this bill into the Legislative Assembly on 11 October 2006. It was subsequently passed as an urgent bill the next day following suspension of Standing Orders, and was assented to on 13 October 2006.

2. Upon receiving the Governor's assent, a 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 a bill though passed 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. As the bill has already been assented to, the committee has no jurisdiction to comment on it.

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

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

12. 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. The committee notes that this bill had not been passed prior to the dissolution of the previous (51st) Parliament on 15 August 2006, and that it accordingly lapsed.

2. The Scrutiny of Legislation Committee of the previous Parliament commented on this bill in its Alert Digest No 8 of 2006 at pages 11 to 13. Mr Springborg's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest. Although the bill was introduced in the last Parliament, the Member's letter is reproduced in accordance with the committee's policy of placing all such correspondence received on the public record.

Does the legislation have sufficient regard to the rights and liberties of individuals?[39]

- **clauses 3-14**

3. The committee noted 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.

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

5. Mr Springborg commented as follows:

> *The Committee noted that the protections available under the Bill may potentially have adverse impacts upon the position of individuals against whom whistleblower allegations are made. While this is a possibility, it should be borne in mind that any individuals against whom whistleblower allegations are made, would in the first instance be subject to an investigation by the relevant agency or by the Ombudsman. Adverse consequences for an individual would normally only occur if the allegations were found to be substantiated following such investigation.*

6. The committee notes the Member's comments.

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

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

- **clause 15**

7. The committee noted 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.

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

9. Mr Springborg commented as follows:

> *On the matter of retrospective provisions in legislation, I also share the Committee's concerns, that as a general rule, such provisions should be treated with considerable caution. The retrospective operation of clause 15 of the Bill was proposed in response to the extraordinary circumstances surrounding the two Commissions of Inquiry into events at the Bundaberg Hospital. The proposed retrospective provision is very narrow in scope. It is limited exclusively to disclosures made in relation to matters raised at those Commissions of Inquiry and has been put forward in the public interest. It is not considered that the operation of this clause would negatively impact on the rights or liberties of individuals. On the contrary, the provisions are designed to protect the interests of individuals who have raised serious matters of public interest in good faith, but for whom the current legislation has been found to be deficient in terms of providing statutory protection against reprisals or other negative responses.*

10. The committee notes the Member's comments.

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

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[41]

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

[41] 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
154	Statutory Instruments Amendment Regulation (No.1) 2006	8/8/06
174	Transport Infrastructure (State-controlled Roads) Regulation 2006	31/10/06
184	Mineral Resources Amendment Regulation (No.1) 2006	31/10/06
192	Water Resource (Mary Basin) Plan 2006	31/10/06
200	Electricity Regulation 2006	31/10/06
214	Statutory Instruments Amendment Regulation (No.2) 2006	31/10/06
229	Marine Parks (Great Sandy) Zoning Plan 2006	31/10/06

* 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)*
118	**Forestry and Nature Conservation Legislation Amendment Regulation (No.1) 2006** • Letter to the Minister dated 11 August 2006 • Letter from Ross MacLeod, Senior Policy Advisor (Environment) dated 5 September 2006 • Letter to the Minister dated 30 October 2006	8/8/06
164	**Environmental Legislation Amendment Regulation (No.1) 2006** • Letter to the Minister dated 10 August 2006 • Letter from the Minister dated 3 October 2006 • Letter to the Minister dated 30 October 2006	8/8/06

(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 9th 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.

Carryn Sullivan MP
Chair

31 October 2006

APPENDIX

CORRESPONDENCE

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