SCRUTINY OF LEGISLATION COMMITTEE

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SCRUTINY OF LEGISLATION COMMITTEE MEMBERSHIP

51ST PARLIAMENT, 1ST SESSION

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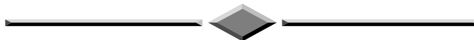

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NOTE:

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

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

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

TERMS OF REFERENCE

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

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

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

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

by examining all Bills and subordinate legislation.

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

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

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

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

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

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

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

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. EDUCATION LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable R J Welford MP, Minister for Education and Training and Minister for the Arts, introduced this bill into the Legislative Assembly on 31 October 2006.

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

> *to facilitate the introduction of new certification arrangements in Queensland and the administration of student accounts that support the certification arrangements.*
>
> *The Bill also amends the Education (Queensland College of Teachers) Act 2005 (the QCT Act) to preclude a person from becoming, or continuing as, a member of the Teachers Disciplinary Committee if the person is, or has been, convicted of an indictable offence and the conviction is not a spent conviction.*
>
> *The Bill also amends the Higher Education (General Provisions) Act 2003 to align the procedure for the collection and provision of course survey data to the Minister, by a non-university provider offering an accredited course, with national practice.*

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

♦ **clause 50 (proposed s.95)**

3. One of the major purposes of the bill is to repeal the student account provisions of Chapter 11 of the *Education (General Provisions) Act 2006*, and to re-enact them in the *Education (Queensland Studies Authority) Act 2002*.

4. Clause 50 of the bill inserts into the latter Act proposed s.95, which confers power to make transitional regulations to facilitate the transition from the operation of repealed Chapter 11 to that of the current bill, in relation to matters for which the bill "does not make provision or sufficient provision".

5. The committee has found that transitional regulation-making provisions can give rise to a range of issues, and has commented adversely on many such provisions. The committee notes that the s.95 regulation-making power is broadly framed, and authorises the making of regulations which are retrospective. However, the committee also notes that any transitional regulations made under s.95 expire, together with s.95 itself, 1 year after commencement of the bill's provisions.

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

6. The Explanatory Notes (at page 7) argue that these transitional regulation-making powers are necessary “in view of the complexity of the matters dealt with in the bill”, and that “it is in the public interest that there be no gaps in the legislative scheme”.

7. The committee notes that proposed s.95 (inserted by cl.50) confers broad transitional regulation–making powers, and that regulations made under the clause may be retrospective. However, the committee also notes that it does not constitute a “Henry VIII clause”, and further notes that express “sunsetting” provisions are included in it.

8. The committee refers to Parliament the question of whether the provisions of proposed s.95, in the circumstances, are appropriate.

2. ELECTRICITY AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable G J Wilson MP, Minister for Mines and Energy, introduced this bill into the Legislative Assembly on 31 October 2006.

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

> (to amend) *the Electricity Act 1994 and the Gas Supply Act 2003 and* (to make) *consequential amendments to other legislation to facilitate the introduction of Full Retail Competition (FRC) in electricity and gas markets in Queensland from 1 July 2007.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[4]

♦ **The bill generally**

3. As mentioned above, the purpose of this bill is to facilitate the introduction of Full Retail Competition (FRC) in the Queensland electricity and gas markets. As indicated in the Minister's Second Reading Speech, this process is being coordinated with the other part of the government's retail electricity and gas reform process, namely, the sale of Sun Retail (formerly Energex), Powerdirect, and the Allgas distribution network.

4. A notable feature of this bill is that, whilst providing a wider range of choice, it continues to provide a very substantial degree of regulation of the electricity and gas supply industries. Notably, the bill continues to incorporate a wide range of restrictions and processes clearly designed to protect the interests of consumers. These include measures such as:

   - standard contracts
   - arbitration and mediation of energy disputes by the energy ombudsman, where such disputes are between small customers and energy entities
   - cooling off periods for small customers entering into supply contracts
   - substantial civil penalties for distributors and retailers in the event of their breaching provisions of the relevant industry codes
   - the imposition of community service obligations on Ergon Energy
   - standard tariffs.

5. Consumer protection legislation, of course, restricts the common law capacity of citizens to freely negotiate commercial agreements. However, as is usually also the case, the Minister

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

would no doubt cite an imbalance in the bargaining power of consumers and suppliers, and the importance of electricity and gas supply to the community, as factors justifying the introduction of the provisions.

6. Whether the balance struck by the bill between these competing interests is appropriate, is ultimately a matter for Parliament to determine.

7. The committee notes that numerous provisions of the bill regulate the relationships between electricity and gas suppliers and consumers.

8. The committee refers to Parliament the question of whether, in the circumstances, the provisions of the bill have sufficient regard to the rights of both suppliers and consumers.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[5]

♦ **clause 30 (proposed s.120B) and cl.145 (proposed s.270A)**

9. Proposed s.120B (inserted in the *Electricity Act* by cl.30) authorises the Minister to make "initial industry codes" to apply to distribution entities, retail entities and special approval holders, and to their customers. Proposed s.120C lists a range of subjects which may be provided for in such codes. These include important matters such as:

- the rights and obligations of entities and customers about customer connection services and customer retail services
- minimum service standards and service levels
- the terms of standard connection contracts, standard retail contracts and standard coordination agreements
- minimum requirements for dealing with customer complaints
- minimum terms for negotiated retail contracts for small customers
- protection for small customers, including imposing cooling off periods
- marketing conduct of retail entities to small customers.

10. Section 120B(3) provides that a code is not subordinate legislation.

11. Proposed s.270E (also inserted by cl.145) provides that the Queensland Competition Authority (QCA) may make industry codes, subject to approval by the Minister. Such codes are again declared not to be subordinate legislation.

12. Proposed s.270A (inserted in the *Gas Supply Act* by cl.145) provides to similar effect in relation to the gas supply industry.

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5 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.

13. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means which does not constitute subordinate legislation.[6]

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

15. In determining whether in a particular case the use of such alternative processes is acceptable, the committee has regard to a number of factors. These include the significance of the subject matter, whether it is technical in nature or is otherwise not suitable for incorporation in regulations, and whether it needs to be capable of amendment at short notice.

16. In relation to the codes mentioned above, and others provided for in the bill, the Explanatory Notes (at pages 5-6) state:

> *The electricity and gas industries necessarily involve a high degree of technical subject matter which is not appropriate to address in legislation or regulation. The permitted subject matter of the codes is enumerated in the legislation, and objectives are prescribed within which the codes must operate. Codes facilitate independent regulation, and give regulators a flexible and timely mechanism to deal with issues. The use of codes is also broadly supported by industry and consumers (the latter because codes are more accessible than legislation or regulations). The use of codes in energy regulation is also consistent with most other Australian states and territories.*

17. The committee notes that cls.30 and 145 of the bill provide for the making of industry codes by the Minister and the Queensland Competition Authority. In all cases the relevant codes are declared not be subordinate legislation.

18. The committee refers to Parliament the question of whether, in the circumstances, these provisions of the bill sufficiently subject to the scrutiny of Parliament the delegated legislative powers conferred by proposed ss.120B, 270A and 270E.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[7]

♦ **clause 91(6) and cl.114 (proposed s.203)**

19. Clause 91(6) inserts into s.109 of the *Gas Supply Act* subsection (3). Section 109 stipulates various circumstances in which an obligation to supply customer connection services does not apply. Subsection (3) states:

> *(3) Also, the obligation does not apply if a regulation states the obligation does not apply.*

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6 See, for example, *Alert Digest No. 8 of 1998* at pages 9-10.

7 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.

20. Section 203 (inserted in the *Gas Supply Act* by cl.114) likewise sets out a number of circumstances in which an "area retailer obligation" does not apply. Section 203(2) then inserts a provision in identical terms to that inserted by cl.91(6).

21. The effect of these provisions is to enable provisions of the Act to be displaced by the making of a regulation. The relevant clauses are therefore "Henry VIII clauses" within the definition of that term that has been adopted by the committee.[8]

22. The clauses do not fall within any of the categories which the committee regards as potentially acceptable uses of "Henry VIII clauses".[9]

23. The committee notes that proposed s.109(3) (inserted by cl.91) and proposed s.203(2) (inserted by cl.114) are "Henry VIII clauses". As is well known, the committee does not favour the inclusion of such provisions in legislation.

24. The committee seeks information from the Minister as to why it thought necessary to include these "Henry VIII clauses" in the bill.

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

[9] See the committee's 1997 report.

3. ENERGY OMBUDSMAN BILL 2006

Background

1. The Honourable G J Wilson MP, Minister for Mines and Energy, introduced this bill into the Legislative Assembly on 31 October 2006.

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

   1. To provide for the establishment of the Energy Ombudsman office to give small electricity and gas customers in Queensland a timely, effective, independent and just way of having their disputes with energy sector entities investigated and resolved.

   2. To establish dispute resolution processes and the functions and powers, including determination powers of the Energy Ombudsman to make binding orders against energy sector entities.

   3. To establish an Advisory Council to provide advice to the Energy Ombudsman on policy and procedural issues and to the Minister for Mines and Energy on issues relating to the funding of the Energy Ombudsman office.

   4. To provide for the fees to be paid by scheme members to fund the operations of the Energy Ombudsman office.

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

♦ **clause 29(4)(a)**

3. Clause 29(1) of the bill provides that if an investigation into a dispute referral has started, the energy ombudsman may by written notice require the "relevant entity" to give the ombudsman stated documents or information, or types of documents or information. Subclause 29(4) effectively provides that the entity cannot fail to comply with the energy ombudsman's demand on the basis that the relevant material is confidential or might be to the detriment of its commercial or other interests, or that the giving of the relevant material might tend to incriminate the relevant entity.

4. The committee's view on denial of the protection afforded by the self-incrimination rule is well known, and has been restated in many previous reports.[11]

5. However, the "relevant entities" to whom the ombudsman may direct requirements under cl.29 are "energy entities". These are defined, via references in cl.7 and in the Dictionary to the bill, as distribution entities under the *Electricity Act 1994*, distributors under the *Gas Supply Act 2003*, retail entities under the *Electricity Act*, retailers under the *Gas Supply Act* and special approval holders under the *Electricity Act*. The committee has examined both of these statutes, and notes that both individuals and corporations are eligible to become

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

[11] See for example, *Contract Cleaning Industry (Portable Long Service Leave) 2005:* Alert Digest No. 4 of 2005 at pages 5-6.

"energy entities". However, it is the committee's understanding, confirmed by the Explanatory Notes (at page 3) that all current energy entities are in fact corporations. Indeed, it would seem surprising if an individual were ever in practice to attain that status.

6. The committee's role is essentially in relation to the rights of individuals, rather than those of corporations. In addition, as a corporation cannot be imprisoned, a denial to it of the benefit of the self-incrimination rule assumes a different aspect from its denial to individuals.

7. The committee notes that cl.29(4)(a) of the bill denies to various "energy entities" the benefit of the self-incrimination rule. However, whilst individuals are eligible to hold the authorities which confer this status all current holders, and in all probability all future holders, are or will be corporations.

8. As the provision effectively operates in relation to corporations rather than individuals, the committee does not object to its insertion.

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

♦ **clauses 40 and 41**

9. Clause 34 of the bill provides that after finishing an investigation, the energy ombudsman may make a final order in favour of the "non-entity party" (ie, the consumer). Clause 40 provides that the non-entity party may, by written notice, elect within 21 days to accept or not accept the final order. Clause 41 provides that if the order is accepted, it is final and conclusive and binds the parties. Subject to the *Judicial Review Act 1991* continuing to apply, the order cannot be challenged, appealed against or set aside, and the parties cannot start a proceeding about any of the matters. These provisions are generally similar in effect to those previously inserted in the *Electricity Act* by the *Electricity Amendment Bill 2000* (with respect to energy arbitrators).[13]

10. As can been seen, the above provisions of the bill impose restrictions upon the access of parties to the courts. However, the committee notes that the only party upon whom such restrictions are automatically imposed is the "energy entity", and that other parties (ie, consumers) are not subject to those restrictions unless they choose to accept the energy ombudsman's final order.

11. The committee notes that cls.40 and 41 of the bill restrict the access of persons to the courts. However, the committee further notes that such restrictions are, subject to certain conditions, imposed only upon the "energy entity" and not upon consumers.

12. In the circumstances, the committee does not consider these provisions to be objectionable.

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

[13] See the committee's report: *Alert Digest No. 5 of 2000* at page 9.

♦ **The bill generally**

13. The purpose of the bill, as apparent from cl.3, is to provide a statutory avenue for small customers and relevant occupiers of land to resolve disputes between them and energy entities in “a timely, effective, independent and just way”. It is not unfair to say that, overall, the bill’s provisions are favourable to small customers and relevant land occupiers rather than to energy entities.[14] The bill can therefore be categorised as consumer protection legislation.

14. In relation to such legislation, the point can always be made that it regulates or otherwise interferes with the normal capacity of citizens (in this case electricity and gas suppliers and consumers) to contract freely. However, as is also usually the case, the Minister would no doubt justify the introduction of the current bill’s provisions on the basis of, in particular, the relative inequality of the parties in terms of bargaining power.

15. The committee notes that the bill extensively regulates the contractual dealings between electricity and gas suppliers and small consumers. As such, this bill can appropriately be categorised as consumer protection legislation.

16. The committee refers to Parliament the question of whether, in the circumstances, the provisions of the bill have sufficient regard to the rights of both suppliers and consumers.

[14] Moreover, the bill requires energy entities to fund the performance of the energy ombudsman’s functions.

4. GOVERNMENT OWNED CORPORATIONS 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 31 October 2006.

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

> *To amend the Government Owned Corporations Act 1993 (the GOC Act) to improve and contemporise the corporate governance framework for the State's government owned corporations (GOC), streamline administrative processes set out in the GOC Act and to make consequential amendments to … a range of statutes.*

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

♦ **schedule, *Whistleblowers Protection Act 1994***

3. Under the *Government Owned Corporations Act 1993*, two basic types of entities are established, namely, statutory GOCs (which are established as bodies corporate under an Act, and are not registered under the *Corporations Act 2001* (C'wealth)), and company GOCs (which are incorporated or registered under the *Corporations Act*).

4. The Explanatory Notes state that, due particularly to changes in corporations law during the period since 1993, there are now significant differences between the governing regimes for statutory GOCs and company GOCs. This bill therefore abolishes the concept of statutory GOCs, and converts all existing statutory GOCs to company GOCs. The purpose of this, according to the Notes, is to align the regulatory regimes for statutory and company GOCs.

5. The Notes (at page 3) describes the process used to achieve this objective as follows:

> *The Bill achieves this main policy objective by effecting the amendments in two stages to provide for a transition to company GOC status. The first stage of amendments (Part 2 of the Bill) provides a mechanism for conversion of existing statutory GOCs to company GOCs. It nominates all existing statutory GOCs as candidate GOCs to become company GOCs and prevents further statutory GOCs being created. Part 2 will commence on assent of the Act.*
>
> *The second stage of the amendments (in Part 3 and the Schedule) will amend the GOC Act by removing all provisions relating to statutory GOCs. These amendments will take effect on a date to be fixed by proclamation, after all statutory GOCs have converted to company GOCs. Other legislation will also be amended to ensure consistency with the above amendments.*

6. The committee notes that one consequence of this is that the *Whistleblowers Protection Act 1994* will cease to apply to statutory GOCs (the Act has never applied to company GOCs).[16] The Act presently contains a specific set of provisions (division 5 of part 4) detailing the

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

[16] See s.37(6), *Whistleblowers Protection Act.*

manner in which the Act applies to statutory GOCs. These will be repealed by Amendment 7 in the relevant part of the Schedule to this bill.

7. The committee has raised on a number of previous occasions the issue of the level of accountability which accompanies the "contracting out" of government functions, as that process can circumvent the traditional means of accountability applicable to the public sector.[17] While the process effected by this bill (at least at this stage) is a "corporatising" of functions rather than a privatisation of them, it nevertheless can likewise result in loss of access by citizens to traditional accountability mechanisms such as the *Whistleblowers Protection Act.*

8. The committee notes that, consequent upon this bill's abolition of the category of statutory GOCs, the *Whistleblowers Protection Act* will cease to apply to any GOCs.

9. The committee draws this matter to the attention of Parliament.

[17] See, for example, *Health and Other Legislation Amendment Bill*: Alert Digest No 9 of 1998 at pages 1-2.

5. HEALTH SERVICES AMENDMENT BILL 2006

Background

1. The Honourable S Robertson MP, Minister for Health, introduced this bill into the Legislative Assembly on 31 October 2006.

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

> *to amend the Health Services Act 1991 to support the continued implementation of the current health reform agenda.*

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

6. MAJOR SPORTS FACILITIES AMENDMENT BILL 2006

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 31 October 2006.

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

> … (to address) *the issue of ticket scalping by creating offences and penalties for reselling or purchasing tickets at a price greater than 10% above the original ticket price for events held at major sports facilities.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[18]

♦ **clause 3 (proposed s.30C)**

3. The *Major Sports Facilities Act 2001* governs the operations of "major sports facilities". These comprise a limited number of publicly-owned Queensland venues (such as Suncorp Stadium and the Gabba Cricket Ground) at which major sporting and other events are held.

4. Clause 3 of the bill inserts into the Act new part 4A (proposed ss.30B and 30C).

5. Proposed s.30C provides that a person must not resell a ticket to a "major sports facility event" at a price greater than 10% above the original price of the ticket. A major sports facility event is defined, by an amendment inserted in the Dictionary to the Act, as "a national or international sport, recreational or entertainment event, or special event, staged at a major sports facility".

6. Breach of the s.30C(1) provision is an offence punishable by maximum penalty of 20 penalty units ($1,500).

7. Subsection 30C(2) provides that a person must not purchase such a ticket from a person, other than the event's organiser or an authorised ticket agent, at a price greater than 10% above the original ticket price. Breach of this obligation is again an offence, but punishable by a lesser maximum penalty of 5 penalty units ($300).

8. Subsection (3) provides an exemption in relation to the resale or purchase of tickets by or from a non-profit organisation for fundraising.

9. Proposed s.30C is of course directed against the practice of ticket "scalping".

10. Depending on the circumstances, there may of course be contractual issues about whether a ticket holder can transfer to another person their legal entitlement to enter the major sports facility and witness the event. The Explanatory Notes (at page 1) state:

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

> *Event organisers and ticket agents impose conditions of sale on tickets, usually including that the purchaser cannot resell tickets at a premium price. Breaches of this condition can incur cancellation of the ticket. This disadvantages the purchaser who may pay an inflated price for a ticket and subsequently be refused entry to the event. Purchasers may also be victims of fraudulent activity where tickets may not exist or do not meet the expectations of the purchaser due to false advertising.*

11. Persons purchasing tickets from a "scalper", as the Notes state, accordingly run the risk of being refused entry to the event.

12. The purpose of proposed s.30C, however, is to declare the relevant resales and purchases to be offences, punishable by monetary penalties.

13. It could be argued that the consequences of "scalping" should simply be left to be determined in accordance with the normal civil law of contract. This argument is bolstered by the fact that purchasers of tickets from scalpers freely enter into such transactions, and should be taken to be aware of the risks associated with it.

14. The Explanatory Notes and the Premier's Second Reading Speech, however, both assert that despite the risks, the result in practice is that most purchasers of "scalped" tickets obtain entry, but at the inflated resale price. The Premier states:

> *Although I acknowledge that some may perceive this as punishing the victims of scalping, this legislation is sending a clear message to the law-abiding public that ticket scalping is illegal. The new offences will deter those people who may be tempted to buy tickets from scalpers, and minimise the market available to scalpers.*

15. The committee notes that proposed s.30C (inserted in the *Major Sports Facilities Act 2001* by cl.3) declares the "scalping" of tickets to major sports facility events (that is, resale at a premium of more than 10% above the original ticket price) to be an offence by both the seller and purchaser.

16. The committee refers to Parliament the question of whether the creation of offences by both the seller and purchaser of "scalped" tickets, punishable by monetary penalties, has sufficient regard for the rights of the seller and, in particular, of the purchaser.

♦ **clause 3 (proposed s.30F)**

17. Clause 3 of the bill also inserts in the *Major Sports Facilities Act 2001* part 4B (proposed ss.30D-30G inclusive), relating to advertising.

18. "Advertising", as defined in proposed s.30D for the purpose of part 4B, basically comprises banners or signs attached to aircraft or buildings or other structures, skywriting or sign-writing by aircraft, and any laser or digital projection of advertising.

19. Proposed s.30F provides that a person must not display an "advertisement" in airspace, or on a building or other structure, that is "within sight of" a major sports facility during a "declared period" for the facility. Proposed s.30E enables the Governor in Council, by gazette notice, to declare a major sports facility event to be a declared event for the purpose of these provisions, and to fix a period during which the advertising prohibitions shall apply.

20. Section 30F(2) provides certain exceptions to the ban on advertising, and proposed s.30G enables the Major Sports Facilities Authority, on written application by a person, to authorise the display of such an advertisement within sight of a major sports facility during a declared period.

21. The purpose underlying the introduction of these provisions is apparent from the following statement in the Premier's Speech:

> *This Government is also moving on the issue of unauthorised aerial advertising over major events held at Government-owned venues. Ambush marketing, for example where unauthorised corporate advertisers fly over venues, undermines legitimate corporate sponsorship of major events. This, in turn, has the potential to detract from Queensland's ability to attract and secure major events for the State.*

22. The committee notes that the prohibitions relate to advertising in airspace or on a building or other structure that is "within sight of" a major sports facility during the relevant period. It is therefore not limited to intrusions within the airspace above a major sports facility, nor to circumstances where the nature of the advertisement (particular one associated with an aircraft) is for any reason so intrusive as to constitute a nuisance at common law. It also extends well beyond situations which might constitute a trespass to land at common law. The provisions could clearly apply to buildings or aircraft several kilometres distant from the major sports facility.

23. The activities prohibited by part 4B are activities which, subject to compliance with the laws governing aviation, town planning, building and the like, can at present be legitimately carried on.

24. A question therefore arises as to whether the provisions of proposed s.30F constitute an unreasonable interference with the capacity of persons and corporations to carry on commercial activity. The Premier's Speech and the Explanatory Notes both make the point that the 700 penalty units ($52,500) maximum penalty associated with the s.30F offence will, in the likely event that the offender is a corporation, escalate to 3,500 penalty units ($262,500)(pursuant to s.181B of the *Penalties and Sentences Act 1992*). The Premier's Speech states:

> *This penalty is necessarily high in the context of the amounts corporations pay for advertising.*

25. The committee notes that proposed s.30F (inserted by cl.3) prohibits "advertisements" in airspace, or on a building or other structure, within sight of a major sports facility during a declared period. Breach of the provision is an offence punishable by very significant maximum penalties.

26. The committee refers to Parliament the question of whether the provisions of s.30F have sufficient regard to the rights of persons to conduct commercial activities.

7. MEDICAL BOARD (ADMINISTRATION) BILL 2006

Background

1. The Honourable S Robertson MP, Minister for Health, introduced this bill into the Legislative Assembly on 31 October 2006.

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

   to facilitate the provision of responsive administrative and operational support to the Medical Board of Queensland (the Board).

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

8. POLICE POWERS AND RESPONSIBILITIES AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 2 November 2006.

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

   (1) to amend the Police Powers and Responsibilities Act 2000 (PPRA) by:

   (a) renaming the existing (hoon) vehicle related offences as type 1 vehicle related offences and incorporating type 2 vehicle related offences within Chapter 4 'Motor vehicle impounding powers for prescribed offences and motorbike noise direction offences' of the PPRA;

   (b) extending the liability of the driver to pay costs associated with the initial impoundment of any vehicle impounded under Chapter 4 of the PPRA; and

   (c) enabling the Commissioner of the Queensland Police Service (QPS) to administratively forfeit any vehicle impounded under Chapter 4 of the PPRA, in circumstances where the vehicle has not been recovered by the owner or driver within 30 days after the expiration of the impoundment period;

   (2) to amend the Maritime and Other Legislation Amendment Act 2006 (No.21 of 2006) to modify a number of Immediate Driver Licence Suspension Scheme provisions covering persons charged with high risk drink driving offences; and

   (3) to amend the Transport Operations (Road Use Management) Act 1995 to complement the amendments in this Bill to the Maritime and Other Legislation Amendment Act 2006 relating to immediate driver licence suspensions.

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

♦ **clauses 3-41 inclusive**

3. Part 2 of the bill (cls.3-43 inclusive) extensively amends the *Police Powers and Responsibilities Act 2000,* to extend the range of police powers to impound and subsequently forfeit motor vehicles

4. When these powers were first introduced in 2002, they were exercisable only in relation to "hooning" offences. "Hooning" offences comprised breaches of various provisions of the *Criminal Code* and the *Transport Operations (Road Use Management) Act 1995*, involving speed trials, races between vehicles and "burn outs" on roads in public places, as well as the practice known as "lapping").[20]

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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] The committee reported on the bill introducing the original amendments (the *Police Powers and Responsibilities and Another Act Amendment Bill 2002*): see Alert Digest No. 5 of 2002 at pages 13-18.

5. The scope of the impounding and forfeiture powers was broadened by the *Police Powers and Responsibilities (Motorbike Noise) Amendment Act 2005*[21] which extended them to include noisy off-road motorbikes.

6. The current bill, as mentioned, further broadens the scope of these powers. The powers will now extend to vehicles used in connection with a range of additional driving offences, listed in the Minister's Speech as follows:

   (1) driving under the influence of alcohol (.15% or more);

   (2) drive disqualified;

   (3) drive unlicensed;

   (4) drive or permit to drive an uninsured motor vehicle and drive or permit to drive unregistered; or

   (5) drive an illegally modified motor vehicle.

7. As was the case with the bill which introduced the first expansion of the relevant powers, the provisions of the current bill are quite lengthy, and the committee does not propose to canvass them in detail. However, the new provisions will again obviously have a significant potential impact upon the rights and liberties of the owners of the relevant motor vehicles. However, the rights of those persons must again be balanced against the rights of other road users.

8. In relation to these new provisions, the Explanatory Notes (at page 10) state:

> *… it is considered that the identified triggers* (for impoundment and forfeiture) *are based on improving road safety by modifying driver behaviour and ensuring that only safe vehicles are driven on Queensland roads. Consequently, while the driver of the motor vehicle may be adversely affected, the potential for injury or the death of a member of the public if the motor vehicle is not impounded for the offence is a legitimate reason for taking impounding action.*

9. The committee notes that the bill broadens the current motor vehicle impoundment and forfeiture provisions of the *Police Powers and Responsibilities Act 2000*, to cover vehicles used in the commission of a range of additional driving offences.

10. These provisions will obviously impact adversely on the rights of owners of the relevant motor vehicles. However, the activities for which the vehicles have been used clearly involve unsafe driving practices and therefore impact on the rights of other road users.

11. The committee refers to Parliament the question of whether the provisions of the bill have sufficient regard to the rights and liberties of owners of the relevant motor vehicles, and the rights of other road users.

♦ **clause 7 (proposed s.73A)**

12. As mentioned, the bill broadens police impounding and forfeiture powers in relation to vehicles used in connection with an additional range of driving-related offences (described in the bill as "type 2 vehicle-related offences").

[21] See the committee's report: *Alert Digest No. 11 of 2005* at pages 9-10.

13. Proposed s.73A (inserted by cl.7) provides that the new powers only apply to offences committed in "the application area". This is defined in s.73A(2) as the North Coast Police Region and the Southern Police Region. Section 73A(3) provides that a regulation may extend the application of the powers to another police region or to the whole State.

14. The Explanatory Notes (at pages 7 and 14) indicate that the powers are intended to be initially trialled in two nominated Police Regions, with the capacity to extend them to other regions or the whole State in due course.

15. That is perhaps understandable. Moreover, there have been recent examples of a similar approach in relation to, for example, court-ordered drug diversion programs and late night "lockout" provisions for licensed premises. However, the current bill may perhaps be distinguished from those examples in that the powers it confers are not only adverse to individuals (vehicle owners) rather than beneficial, but are more significant in that they can result in the loss of a valuable asset (a motor vehicle).

16. A question might therefore arise as to the reasonableness of subjecting vehicle owners in certain parts of the State to these provisions, whilst those in other parts of the State are unaffected by them.

17. The committee notes that the new impounding and forfeiture provisions ("type 2 vehicle related offences") will only apply within specified areas of the State, although there is capacity for them to be extended to additional areas, or to the entire State, by regulation.

18. Given the nature of the relevant provisions, the committee refers to Parliament the question of whether it is appropriate to subject vehicle owners in some parts of the State to such provisions, whilst vehicles owners in the remainder of the State are unaffected by them.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[22]

♦ **clause 55 (proposed s.79E)**

19. Section 79B of the *Transport Operations (Road Use Management) Act 1995* (not yet in force) provides that a person's driving licence is immediately suspended in several specified sets of circumstances.

20. Clause 55 of the bill inserts into the Act proposed s.79E, which relates to one such set of circumstances, namely, where the person has been charged with driving a motor vehicle whilst under the influence of liquor, or charged under the *Criminal Code* with dangerous operation of a motor vehicle when the person is over the alcohol limit.

21. Section 79E(2) provides that subject to certain conditions a person whose licence is immediately suspended in that set of circumstances may make application to a court for an order authorising the person to continue to drive motor vehicles, pending hearing of the charge, in stated circumstances. Most of the significant details of this application process,

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

including the persons who are eligible, how an application is to be made, the criteria to be used, the types of restrictions imposed, the duration of orders and the consequences of failure to comply with an order, are to be determined by regulation made under s.79E(4).

22. Given the significance of these matters, a question arises as to why they could not have been stipulated in the Act itself rather than being left to regulation.

23. The committee notes that cl.55 of this bill establishes a process whereby a person, whose licence has been immediately suspended because of particular charges under the *Transport Operations (Road Use Management) Act 1995*, can apply to the court for an order to be allowed to continue driving pending the hearing of the charge.

24. The committee notes that under proposed s.79E(4), most of the important details of that process are to be determined by regulation.

25. Given the significance of these matters, the committee seeks information from the Minister as to why they could not be included in the Act itself rather than being left to regulation.

9. POLICE SERVICE ADMINISTRATION AMENDMENT BILL 2006

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 2 November 2006.

2. The object of the bill, as indicated by the Minister's Second Reading Speech and the Explanatory Notes, is:

> *to remove any doubt about the legal basis on which the Queensland Police Service discloses certain types of information in three specific sets of circumstances.*

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

- **clause 8 (proposed ss.10.2A, 10.2B and 10.2D)**

3. Section 10.1 of the *Police Service Administration Act 1990* imposes a general prohibition on police officers disclosing information obtained in the course of policing processes. However, the section goes on to provide a number of exceptions to that prohibition. One of these exceptions is where the disclosure "is authorised or permitted under this or another Act" (s.10.1(1)(c)).

4. Section 10.2(1) expressly gives the commissioner of the police service a general power to authorise, in writing, disclosure of information that is in the possession of the police service.

5. Many statutes expressly authorise, and indeed require, the commissioner of the police service to provide a range of Queensland public sector entities (and entities such as the police services of other Australian jurisdictions) with the criminal history of individuals.

6. However, it appears from the Explanatory Notes and the Minister's Speech that there are two areas in which the commissioner of the police service either presently supplies, or wishes to commence supplying, such information to additional types of entities.

7. The first of these is the disclosure of criminal history information to the National CrimTrac Agency (see proposed s.10.2A). When founded in 2000, this Commonwealth Government agency was envisaged as (according to its website) "a national law enforcement support initiative to give police ready access to information needed to solve crimes". However, Crim Trac has since broadened its functions, and now supplies criminal history information not only to the public sector, but to private sector employers (or potential employers) wishing to screen applicants for positions. This is only done where the person to whom the information relates has formally consented.

8. The second situation is where criminal history information is desired to be released to assist in assessing the suitability of individual alleged offenders (or convicted offenders) for "diversion programs". At the moment, such diversion programs are all associated with

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

courts, but the Notes indicate this may not always be so. Again, a person is not eligible for consideration for such a program unless they consent to a check being made of their criminal history.

9. The third situation involves “information about particular incidents involving a response by an officer or officers as part of operational activities of the service” (proposed s.10.2D(1)). It is proposed that the commissioner be authorised to disclose such information to the media by means of a “direct data feed” (s.10.2D(2)).

10. The Notes and the Minister’s Speech both attribute the introduction of this bill to concerns about the current legal authority for providing information in these three sets of circumstances.

11. In relation to the supply of information to the CrimTrac Agency, which can ultimately be accessed by the private as well as the public sector, the Notes argue in favour of the provisions of s.10.2A on the basis that numerous private employers are now under a statutory obligation to screen potential employees (for example, where doctors, nurses, teachers, child care workers and other professionals are involved).

12. The Notes (at page 1) assert that there is now also a general community expectation “that persons engaged in financial and other positions of trust, including in the private sector, should be properly screened for previous criminal behaviour for the overall protection of the community”.

13. Proposed s.10.2A authorises the disclosure of criminal history information to the CrimTrac Agency or the police force or service of another jurisdiction, even though the purpose may be to facilitate the release of the criminal history by that agency to someone else under an arrangement. However, it limits the disclosures in several ways: in particular, the disclosure must be for employment screening purposes only, and the commissioner must be satisfied there is likely to be a resultant community benefit. Finally the section, as at present, requires that the person whose criminal history (if any) may be disclosed consent in writing to the process.

14. In relation to assessing suitability for diversion programs, it is of course fundamental to such programs that persons are only eligible for entry to them if they consent. That being the case, it seems unlikely that any practical issue would arise as to an applicant refusing consent to a criminal history check. In any event, proposed s.10.2B provides that disclosures by the commissioner in relation to assessment of suitability for diversion programs will require the person’s written consent.

15. The disclosure of information about operational activities to the media by direct data feed requires that the commissioner be satisfied such disclosure will not adversely affect relevant operational activities, and is appropriate.

16. Proposed s.10.2C provides that misuse of information obtained in relation to the criminal history disclosure provisions of ss.10.2A and 10.2B is an offence punishable by maximum of 100 penalty units ($7,500).

17. As recognised in the Explanatory Notes, the primary issue associated with the cl.8 provisions is the impact on the privacy of individuals whose criminal history (or other

information in the case of direct data feeds) is disclosed. That, of course, must be considered in the context of the matters outlined above.

18. The committee notes that cl.8 of the bill inserts proposed ss.10.2A (Release of criminal history information in relation to employment screening), 10.2B (Disclosure of criminal history for assessing suitability for diversion programs), and 10.2D (Disclosure of information to the media by direct data feed), all of which expressly authorise release of information by the commissioner of the police service in particular circumstances. In the first two cases, the affected person's consent is required.

19. In the circumstances, the committee does not consider the provisions of cl.8 to be objectionable.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[24]

♦ **clause 8 (proposed s.10.2F)**

20. Proposed s.10.2F (inserted by cl.8) provides that any disclosure under the general authorisation provision of s.10.2, for criminal history information in the circumstances envisaged in proposed s.10.2A, or of information to the media by direct data feed in the circumstances envisaged in proposed s.10.2D, is taken to have always been lawfully made.

21. Because of its validating nature, s.10.2F is retrospective in nature.

22. The committee always takes care when examining legislation that commences retrospectively or could have affect 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.

23. The disclosure of information of the type mentioned in s.10.2A has always required consent.

24. The committee notes that proposed s.10.2F validates disclosures of information of certain types dealt with by this bill.

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

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[24] 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.

10. STATE DEVELOPMENT 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 2 November 2006.

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

> (to provide) *more certainty to development and investment, and in particular for critical infrastructure, but not at the expense of appropriate checks and balances.*

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?[25]

♦ **clause 7 (proposed ss.76P and 76W)**

3. Proposed s.76E (inserted into the *State Development and Public Works Organisation Act 1971* by cl.7 of the bill) authorises the Minister, by gazette notice, to declare any of a range of stipulated matters to be a “prescribed project” (s.76E(1)). Under proposed s.76K the coordinator-general may with the approval of the Minister give to statutory decision-makers and applicants, in relation to “prescribed decisions” or “prescribed processes” required to be undertaken in relation to a “prescribed project”, a notice (a “step in notice”) advising them that the coordinator-general will make the assessments and decisions about these matters.

4. Proposed s.76P(1) then provides that in relation to such decisions of the coordinator-general, “a person may not appeal against the coordinator-general’s decision under this Act or the relevant law”.

5. The effect of this provision is to deprive affected persons of access to any of the usual statutory appeal processes.

6. Section 76E(4) authorises the Minister, when declaring a project to be a “prescribed project”, to also declare the project to be a “critical infrastructure project” .

7. Proposed s.76W declares that in relation to this latter declaration, and in relation to a range of subsequent related decisions about “critical infrastructure projects”, such as “progression notices”, “notices to decide” and “step in notices” and the decisions ultimately made pursuant to such notices, essential parts of the *Judicial Review Act 1991* shall not apply.

8. The first part listed as not applying is part 3 (which provides the now almost invariable avenue of judicial review address, the “statutory order of review”). Also listed is “part … 5, other than section 41(1)”.

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[25] 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.

9. Part 5 of the *Judicial Review Act* essentially declares that the Supreme Court retains its original common law jurisdiction in relation to the prerogative writs of mandamus, prohibition or certiorari, but that the writs in question are no longer to actually be issued by the court (s.41(1)). An equivalent remedy must be provided in the form of an order (s.41(2)). Part 5 extensively regulates the processes for obtaining redress in reliance on the Supreme Court's "original" (inherent) jurisdiction.

10. In essence, s.76W declares inapplicable all of part 5 except for s.41(1) (which provides that the three prerogative writs shall no longer be issued).

11. The Explanatory Notes address this provision in the following terms:

> *While the proposed provisions will remove the right to appeal under the SDPWO Act and to judicial review for prescribed projects as assessed by the Minister for critical infrastructure under s76E(4), the Supreme Court retains its inherent jurisdiction. As such, the proposed provisions do not exhaust the right to appeal and review of a decision. If a person or persons so wished, they could still bring action before the Supreme Court of Queensland.*

12. Quite clearly, the disapplication of part 3 of the *Judicial Review Act* will prevent any access to the "statutory order of review" means of obtaining judicial review. Despite the statement in the Notes quoted above, it is not entirely clear to the committee that the disapplication of part 5 (other than s.41(1), which prevents the issue of writs of mandamus, prohibition or certiorari) leaves any, or any significant, scope for seeking judicial review of the relevant decisions via the Supreme Court's residual inherent jurisdiction.

13. As the Explanatory Notes (at page 5) state, the removal of appeal and review rights is consistent with the purpose of the part 5A ("prescribed projects") provisions inserted by cl.7 of the bill. They appear moreover to be consistent with the underlying philosophy of the *State Development and Public Works Organisation Act*, namely, that in relation to projects of sufficient scope or importance, the planning and regulatory regimes normally applicable to such projects can be set aside in the perceived public interest, and the project be regulated by the coordinator-general.

14. The committee notes that proposed ss.76P and 76W (both inserted by cl.7) remove normal statutory appeal rights and severely curtail (or perhaps even completely remove) rights to judicial review, the first in relation to "prescribed projects" and the second in relation to such projects which are also declared to be "critical infrastructure projects".

15. In this regard the above provisions reflect the general philosophy underlying the *State Development and Public Works Organisation Act 1971* in relation to projects of significant scope or importance.

16. The committee refers to Parliament the question of whether the provisions of proposed ss.76P and 76W have sufficient regard to the rights of persons deprived by these sections of appeal and review rights.

11. STATE PENALTIES ENFORCEMENT AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable R J Welford MP, Acting Attorney-General and Minister for Justice and Women, introduced this bill into the Legislative Assembly on 31 October 2006.

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

> (to improve) *the operation of SPER's fine collection system.*
>
> ...
>
> *The bill also makes minor amendments to the Guardianship and Administration Act 2000 and the Land and Resources Tribunal Act 1999.*

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

12. SUMMARY OFFENCES AND OTHER ACTS AMENDMENT BILL 2006

Background

1. The Honourable J C Spence MP, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 2 November 2006.

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

> *to ensure that police officers may more effectively combat graffiti crime, that road safety is maintained on Queensland roads and that the Domestic and Family Violence Protection Act 1989, the PPRA, the Police Service Administration Act 1990, the Prostitution Act 1999 and the Weapons Act 1990 remain current and effective.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[26]

♦ **clause 5 (proposed ss.23B and 23C)**

3. Proposed s.23B (inserted in the *Summary Offences Act 2005* by cl.4) provides that a seller of spray paint must not sell spray paint to a minor. Breach of this obligation is an offence punishable by maximum penalties of 140 penalty units ($10,500) for a first offence, 280 penalty units ($21,000) for a second offence and 420 ($31,500) for a third offence. It is a defence to such a charge for the seller to prove that the seller or an employee of the seller required a person to produce "acceptable evidence of age" (such as a driver's licence or passport), and that the seller had no reason to believe the evidence produced was false.

4. An employee of a seller cannot be prosecuted under this section (see s.23B(2)).

5. Proposed s.23C provides that if a seller has taken "prevention measures" in relation to an employee of the seller, which involves instructing the employee not to sell spray paint to minors, and to sight acceptable evidence of age, and informing the employee of the s.23C offence, an employee may be prosecuted for selling spray paint to a minor. A lower range of maximum penalties (20 penalty units ($1,500) for a first offence, and 40 penalty units ($3,000) for a second offence), applies.

6. The introduction of proposed s.23B and 23C is attributed by both the Minister and the Explanatory Notes to the fact that some spray paint is used to create graffiti on walls, buildings and the like, and to the fact that graffiti offenders appear to be primarily minors and young adults.

7. The introduction of these provisions will clearly impact upon the capacity of minors to obtain spray paint. However, given that there would appear to be only limited circumstances in which a minor could demonstrate any financial or other material detriment resulting from this impediment, the committee considers any infringement of minors' individual rights by s.23B is relatively insignificant.

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[26] 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 proposed ss.23B and 23C (inserted in the *Summary Offences Act 2005* by cl.5) prohibit the sale of spray paint to minors.

9. The committee considers that, in the circumstances, any intrusion by these proposed sections upon the rights of minors is relatively insignificant.

♦ **clause 6 (proposed s.24A)**

10. Proposed s.24A (inserted in the *Summary Offences Act* by cl.6) provides that a person must not, "in trade or commerce", provide a service of informing another person of the location of a traffic enforcement site in order to enable that other person to avoid or be prepared for a check made at the site.

11. Subsection (2) provides that this occurs if information is made available by a "relevant message". "Relevant message" is defined in s.24A(6) as meaning an internet message, an SMS message or another type of message that may be heard, read or otherwise viewed by persons using a mobile phone. Breach of the s.24A obligation is punishable by a maximum penalty of 100 penalty units ($7,500).

12. The introduction of this provision, as indicated in the Explanatory Notes, is due to the operations of a Gold Coast business, Road Spy, which has apparently conducted a service sending SMS text warning messages to the mobile phones of its subscribers about the locations of police traffic enforcement sites and also about general traffic delays and road hazards in its areas of operation. As the Explanatory Notes point out, "relevant message" is defined so as to exclude commercial radio stations, which will not be prohibited from broadcasting such information over the air. These broadcasts are apparently less frequent, less specific and more likely to be delayed rather than contemporaneous, as compared with the operations of Road Spy.

13. The introduction of s.24A will obviously have negative consequences for the business of those operators, such as Road Spy, who fall within the parameters of s.24A. On the other hand, as the Explanatory Notes point out, it can be strongly argued that their operations prejudice road safety, by increasing the likelihood that motorists prone to speeding and other breaches of the road rules will escape detection. Indeed, whilst less serious in nature, these operations could perhaps be compared to the intentional interference with an undercover police operation to detect criminal activities such as drug dealing.

14. The committee notes that proposed s.24A (inserted in the *Summary Offences Act* by cl.6) prohibits the operations of businesses which inform persons, by specified means, of the location of traffic enforcement sites.

15. In the circumstances, the committee does not consider this provision to be objectionable.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[27]

♦ **clause 5 (proposed ss.23B and 23C)**

16. As mentioned earlier, proposed s.23B(1) prohibits a "seller" of spray paint from selling spray paint to a minor.

17. An employee of a seller cannot be prosecuted under this section for making such a sale (s.23B(2)), but can be prosecuted (under s.23C) if the employee's employer has taken the "prevention measures" referred to in proposed s.23A. Also, a seller who is an employer can obviously be prosecuted under s.23B(1) for sales made personally by the employer.

18. It would appear to be the legislative intent that an employer can be prosecuted under s.23B(1) for sales made by his or her employee, if the employer has not taken the "prevention measures". This is suggested by the overall structure of the cl.5 provisions, and by the fact that the definition of "seller" inserted in the Dictionary (see cl.8) declares that it "includes an employee of a seller".

19. If so, this would for the first time introduce into the *Summary Offences Act* a provision making a person liable to prosecution for the acts of another.

20. An employer is of course civilly liable for the actions of an employee carried out within the scope of the employee's duties. An employer, however, is not normally liable to prosecution where the employee's actions constitute a crime or statutory offence. Any legislation which proposes to create such criminal or quasi-criminal liability must therefore do so in terms which are sufficiently clear.

21. The current bill may be perhaps be contrasted with the *Tobacco and Other Smoking Products Act 1998,* which contains a comparable provision (s.10) prohibiting a "supplier" from supplying a smoking product to a child. That Act contains a provision (s.51A) which expressly declares that for a proceeding for an offence, an act done for a person by a "representative" of the person within the scope of their actual apparent authority is taken to have been done by the person, unless they prove they could not by the exercise of reasonable diligence have prevented the act or omission. "Representative" includes an employee.

22. The committee queries whether the apparent legislative intent of this bill might be better achieved by inserting a provision of this nature in the bill.

23. The committee notes that it appears to be the legislative intent of the cl.6 provisions that an employer can be prosecuted under s.23B for the act of his or her employee, if the employer has not taken the "prevention measures" mentioned in S.23A.

24. The committee seeks information from the Minister as to whether this in fact the case.

25. If so, the committee recommends that the Minister consider amending the bill to more expressly make the employer liable to prosecution for the actions of the employee.

[27] 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.

Does the legislation have sufficient regard to the institution of Parliament?[28]

♦ **clause 5 (proposed s.23B(4))**

26. The committee notes that proposed s.23B(4) expressly ousts the application of s.46 of the *Anti-Discrimination Act 1991 (Qld).* This is a prudent step, given that the cl.5 provisions directly discriminate against persons on the basis of age in relation to the supply of goods.

27. The committee notes that the *Age Discrimination Act 2004 (Cwlth)* contains a similar prohibition (see s.28). In the time available, the committee has not been able to examine the Commonwealth statute in more detail.

28. The committee seeks information from the Minister as to whether she is satisfied the provisions of cl.5 of the bill are not inconsistent with the *Age Discrimination Act 2004 (Cwlth).*

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

13. WHISTLEBLOWERS (DISCLOSURE TO MEMBER OF PARLIAMENT) AMENDMENT BILL 2006[29]

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 31 October 2006.

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

   - *First, ...* (to) *... amend the Act to ensure that a member of the Legislative Assembly can be an entity to which a Public Interest Disclosure can be made; and*
   - *Second, ...* (to protect) *... individuals engaged under contract by public sector entities ... if they make a public interest disclosure.*

Does the legislation have sufficient regard to the institution of Parliament?[30]

♦ **clauses 4, 5, 8 and 15**

3. Clauses 4, 5, 8 and 15 of the *Whistleblowers (Disclosure to Member of Parliament) Amendment Bill 2006* provide for the making of public interest disclosures to members of the Legislative Assembly.

4. The impact of the bill in this respect is to be assessed on the basis of the fundamental legislative principles which "underlie a parliamentary democracy based on the rule of law" (s.4(1) *Legislative Standards Act 1992*). In particular, this assessment considers whether those clauses of the bill have sufficient regard to: (b) the institution of Parliament. The impact of the bill on the institution of the Queensland Parliament can be seen by its impact on its members.

SCHEME OF WHISTLEBLOWER ACT

5. Essentially, the bill provides that complaints (called "public interest disclosures") within the scope of the *Whistleblowers Protection Act 1994* ("Whistleblower Act") can now be made to any member of the Legislative Assembly. The Act currently requires public interest disclosures to be made to an "appropriate entity". In the case of a complaint about the conduct of a government department or its officers, the public interest disclosure must be to that department. The bill now provides an additional avenue of complaint to a member of the Legislative Assembly.

6. To fall within the protection of the *Whistleblower Act*, the complaint must fall within the definition of a "public interest disclosure" and the complainant must fall within the class of persons who can make such a complaint. Consequently, complaints of official misconduct, maladministration, waste of public funds and threats to public health can only be made by a

[29] The committee thanks Professor Gerard Carney, School of Law, Bond University, for his valued advice in relation to the scrutiny of this bill.

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

public officer (ss.8 and 15-18). By comparison, the range of complaints which can be made by *any person* within the terms of the *Whistleblower Act* is severely limited to complaints about a substantial and specific danger to the health or safety of a person with a disability, an offence under certain legislation that is or would be a substantial and specific danger to the environment, or a reprisal against a person for making a public interest disclosure (ss.9 and 19-20).

7. Complainants within the scope of the *Whistleblower Act* enjoy two principal legal benefits in relation to their complaint: immunity from liability for what they allege (ss.39-40); and protection from reprisal (ss.41-46).

HISTORY OF PROPOSED AMENDMENT

8. This new role for a member of the Legislative Assembly stems from the recommendations of the *Davies Report* (the *Report of the Queensland Public Hospitals Commission of Inquiry*) which found that the whistleblower over Dr Patel's incompetence at the Bundaberg Hospital, Ms Toni Hoffman, was forced to complain to her local member, Mr Messenger MP, after her complaints to the Queensland Health Department were not adequately investigated. While her complaints to the department were protected under the *Whistleblower Act*, those to her local member of Parliament were not. Accordingly, the *Davies Report* recommended several significant changes to the *Whistleblower Act*, one of which was to protect complaints made to a member of Parliament. However, this recommendation needs to be read in the context of the Report's other recommendations which were:

- *The conferral on the Queensland Ombudsman of an oversight role in respect of all public interest disclosures (except official misconduct) with the power to investigate (6.510).*
- *Complaints involving danger to public health and safety, and negligent or improper management of public funds could be made by any person or body (6.511).*
- *A procedure by which a complaint is made:*
  - *(a) first to the relevant government department;*
  - *(b) but "[i]f the matter is not then resolved within the time [ie 30 days], to the satisfaction of the Ombudsman, the whistleblower ought to be able to make a public interest disclosure to a member of Parliament"; and*
  - *(c) if the complaint is still not resolved to the Ombudsman's satisfaction within another 30 days, then it can be made to the media. (6.512)*

9. This suggested procedure was rejected by the Government in favour of simply adding members of the Legislative Assembly to the list of appropriate public sector entities to whom complaints can be made under the protection of the *Whistleblower Act*. This gives effect to Recommendation 9.21 of the *Forster Report* (*Final Report Queensland Health Systems Review,* September 2005) and Recommendation 5 of The *Review of the Whistleblowers Protection Act 1994* by the Office of the Public Service Commission (October 2006).

IMPACT OF THE BILL ON THE INSTITUTION OF PARLIAMENT

10. The critical issue here is to what extent the proposed amendments to the *Whistleblower Act* enhance or detract from the current role of members of the Legislative Assembly.

Enhancement of Role of Member

11. This bill reinforces one of the traditional roles of a member of Parliament, that of receiving complaints from constituents and other members of the public. Moreover, as the class of complainants under the *Whistleblower Act* substantially comprises public officials, the bill also confers upon members an additional opportunity to scrutinise the activities of the Executive Government. In these respects, the role of a member of the Legislative Assembly is clearly enhanced.

Clarification Required over Immunity of Member

12. The proposed amendments to the *Whistleblower Act* extend the absolute immunity from all legal liability, conferred by s.39(1), to any person who makes a public interest disclosure to a member of the Legislative Assembly. As for the Member referring such a disclosure under the proposed s.28A to an appropriate public sector entity for investigation, no express provision is made to protect the Member for making that referral. Both ss.38 and 39(1) only protect a person who "makes" a public interest disclosure. Possibly, this was thought to also cover the referral by a Member of the complaint. But it seems unlikely that ss.38 and 39(1) would be interpreted that widely. Accordingly, the bill should expressly confer immunity on any Member who refers a public interest disclosure to an appropriate public sector entity under s.28A. The failure to address this aspect probably follows from the absence of any express provision in the *Whistleblower Act* covering the liability of public officials who investigate public interest disclosures.

13. If the bill is clarified in that way, it effectively fills a gap in the freedom of speech protection conferred by s.8 of the *Parliament of Queensland Act 2001* which is to the same effect as Part 9 of the *Bill of Rights 1689* (see proposed s.28B(1)). While these provisions ensure members of Parliament are not liable for anything they say in the course of parliamentary debate or other parliamentary proceedings, any communications which they receive from the public are usually not protected. Some communications may become protected if they are acted on by the Member in the course of parliamentary debate: see s.9 of the *Parliament of Queensland Act 2001*; *O'Chee v Rowley* (1997) 150 ALR 199; cf *Erglis v Buckley* [2005] QSC 25. But where a Member passes on a complaint from a constituent to a government body for investigation, the complaint and its republication to the government body are not absolutely protected. The constituent and the Member are potentially liable for defamation, although they can claim qualified privilege as a defence (see *R v Rule* [1937] 2 KB 375; *R v Grassby* (1991) 55 A Crim R 419).

14. The proposed amendments therefore protect a limited class of complaints to members which might not be protected by parliamentary privilege. However, the bill should expressly confer absolute immunity on members who refer on a public interest disclosure pursuant to the proposed s.28A.

Further Concerns with the Bill

15. The traditional role of members to receive and act on complaints should not be unnecessarily hampered by the bill. Yet, there is a risk that this might occur for several reasons.

16. First, a Member will now have to assess every complaint received to determine whether it constitutes a public interest disclosure. This will require at times detailed consideration of the terms of the Act.

17. Currently, public interest disclosures under the *Whistleblower A*ct are made to public sector entities which are government departments or other government bodies. The inclusion of members of Parliament will, for the first time, allow disclosures to an *individual person* who is less likely to have the facilities to assess the status of the complaint. The *Davies Report* recommendation (6.512(b)) avoided this dilemma for members by having the Ombudsman make an assessment before a complaint could be made to a Member under the Act. Although the Premier's Second Reading Speech states that members will have access to "specialist advice" from the Crime and Misconduct Commission, the Ombudsman and the Office of the Public Service Commissioner, the need to check complaints to determine whether they fall within the protection of the *Whistleblower Ac*t, and to consult any of these bodies, adds to the administrative burden of every member of Parliament's office.

18. Secondly, it is not entirely clear from the proposed amendments that the Crime and Misconduct Commission (CMC) will have no responsibility for investigating breaches of the *Whistleblower Act* committed by members under parliamentary privilege. An obligation of confidentiality is imposed on members by s.55 of the Act, and if breached, renders the Member liable to a penalty and constitutes misconduct under s.57. Misconduct under s.57 also arises where a member commits an indictable offence under s.56 for false and misleading information in a public interest disclosure. The Explanatory Notes to cl.15 claim that the CMC would only address breaches of s.57 in so far as they occur outside the confines of parliamentary privilege, leaving the Legislative Assembly to deal with breaches which occur within privilege. There is, however, no clear demarcation here. As noted earlier, certain communications with members may be protected under s 9 of the *Parliament of Queensland Act 2001*. While the proposed s.8B effectively provides that the *Whistleblower Act* "does not limit" parliamentary privilege, this does not preclude an additional concurrent jurisdiction in the CMC.

19. The Premier's Second Reading Speech contemplated new Standing Orders to guide members on how to deal with public interest disclosures, and presumably to deal with breaches of the *Whistleblower Act* occurring under parliamentary privilege. This is more easily said than done. One approach is to adapt the guidelines adopted by Resolution 9 of the Australian Senate made on 25 February 1988 in relation to the exercise of the freedom of speech within that House (see Evans (ed), *Odgers' Australian Senate Practice*, 11th ed 2004 at 603). But those guidelines do not include any enforcement mechanism. They rely upon the usual powers of the Senate to discipline their members. That is the approach most likely to be adopted by the Legislative Assembly.

20. Thirdly, there seems to be some uncertainty over what a Member should do when a public interest disclosure is made to that Member. The only course of action contemplated by the bill is for the Member to "refer" the matter to an appropriate public sector entity (cl.4(1)). The Explanatory Notes to the bill incorrectly assert that the Member "must" refer (see Notes

on Provisions, cl.4), whereas the proposed new s.28A(1) clearly states that the Member "may refer" the disclosure to another appropriate entity that is a public sector entity which the Member considers has power to investigate or remedy the complaint.

21. Under the *Whistleblower Act* at present, there is merely an expectation that the public sector entity will investigate a public interest disclosure (see eg ss.30(2)(b) and 32). There is no express statutory obligation on that entity to investigate. Can a Member then undertake some investigation of the matter? Although the traditional role of a Member includes a limited investigative function, the bill clearly denies a Member any investigatory role under the *Whistleblower Act*. The proposed s.28A(2) provides that "[f]or the purposes of this Act, the Member has no role in investigating the disclosure". Presumably, this does not prevent a Member from investigating any complaint in the usual way. The confinement of s.28A(2) to "for the purposes of this Act" means that any investigation pursued by a Member will not be protected by the *Whistleblower Act*. The assertion made in the Premier's Second Reading Speech that members "are not to have any authority to investigate the matter" needs to be read in that light. If the Premier believes that the bill curtails the normal investigative capacity of a member of Parliament, then this is not how the bill should be interpreted, and if it were to have that effect, it would be a serious incursion upon the traditional role of a Member.

22. There is also a risk that the overall effect of the bill might lead to an unreasonable expectation of how far members of the Legislative Assembly can assist in resolving complaints on behalf of whistleblowers. As The *Review of the Whistleblowers Protection Act 1994* by the Office of the Public Service Commission (October 2006) recognised, the investigation of public interest disclosures is "a sensitive and often complex undertaking" (page 15). In practice, members are likely only to refer complaints to the relevant government body or to the Ombudsman. Their role is to put pressure on the appropriate authorities to respond to, and hopefully resolve, the complaint.

23. At times, complaints within the scope of the *Whistleblower Act* may involve federal issues which might be equally addressed to a member of the Commonwealth Parliament. But of course the bill is only concerned with members of the Queensland Legislative Assembly.

CONCLUSION

24. The concerns raised above need to be balanced against the enhanced role of members of the Legislative Assembly which the bill provides in terms of legal protection and the opportunity to scrutinise the Executive. The bill requires amendment to ensure that the referral of a public interest disclosure by a member is absolutely protected, and to clarify the role of the Crime and Misconduct Commission. Parliament may consider that these issues require closer examination by the Members' Ethics and Parliamentary Privileges Committee.

25. The bill (cls.4, 5, 8 and 15) provides for the making of public interest disclosures, under the *Whistleblowers Protection Act*, to members of the Legislative Assembly.

26. The committee refers to Parliament for its consideration the various issues mentioned above in relation to these provisions.

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

- **clause 15(2)**

27. Clause 15(2) of the bill amends the definition of "officer" in the Dictionary to the *Whistleblowers Protection Act* by including in the definition an additional category of person (see below).

28. Under the current provisions of the *Whistleblowers Protection Act 1994*, "public interest disclosures" may only be made by a "public officer". That term is currently defined in the Dictionary to the Act as, relevantly, a person who is an "officer" of a public sector entity.

29. The term "officer" is in turn presently defined as including, relevantly, "an employee of the public sector entity, whether employed on a permanent or temporary basis" (paragraph (b) of the definition).

30. Clause 15(2) of the bill will add to the definition of "officer" an additional category, as follows:

> *(ba) without limiting paragraph (b), an individual engaged by the public sector entity under a contract of service.*

31. The background to this amendment is set out in the Explanatory Notes (at pages 1, 2 and 7).

32. As the previous Scrutiny of Legislation Committee stated in its report on the *Whistleblowers Protection Amendment Bill 2006,*[32] a private member's bill introduced by the then Leader of the Opposition, Mr L J Springborg MP, on 7 June 2006, which lapsed upon calling of the recent state election:

> *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.*
>
> *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.*

33. The current committee considers the same comment is applicable to the current bill.

34. The committee notes that cl.15(2) of the bill broadens the range of persons who may make public interest disclosures under the *Whistleblowers Protection Act*. Statutory whistleblower

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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.

[32] Alert Digest No. 8 of 2006 at pages 11-13.

protection, whilst benefiting whistleblowers, may potentially have adverse impacts upon the position of individuals against whom whistleblower allegations are made.

35. The committee refers to Parliament the question of whether, in the circumstances, the extension made by the bill is appropriate.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[33]

♦ **clause 15(2)**

36. As mentioned, cl.15(2) of the bill amends the definition of "officer" so as to enable an additional category of persons to make public interest disclosures. The additional category is:

> *(ba) without limiting paragraph (b), an individual engaged by the public sector entity under a contract of service.*

37. The committee notes that the definition of "officer" already includes "employees" of the entity, "whether employed on a permanent or temporary basis" (paragraph (b) of the definition).

38. It is not clear to the committee precisely what category of persons the amendment is intended to encompass.

39. The committee notes the following statements in the Explanatory Notes:

> *The Bill extends the protections provided by the Act to individuals engaged by a public sector entity on individual contract of service arrangements. This extends the protections afforded under the Act to many nurses, IT professionals, engineers and other groups engaged under contract rather than being directly employed. This will provide protection to a group of public sector workers who may suspect wrongdoing, but are currently not protected under the Act.* (at page 2)
>
> *Clause 15 expands the definition of officer to include individuals engaged by a public sector entity under a contract of service. This extends the protections provided by the Act to individuals engaged by a public sector entity under a contract of service who would not otherwise be considered to be employees of a public sector entity for the purposes of the Act. It is not intended to include individuals engaged under a contract for service, such as self employed tradesmen, where there is no employment relationship. The definition of officer is also not intended to include individuals engaged by a non-public sector entity to provide service to a public sector entity under a subcontracting arrangement.* (at page 7)

40. In addition, the Premier in his Second Reading Speech states:

> *Mr Speaker, the second major reform is an extension of the coverage of the Act to include persons engaged on individual contracts by public sector entities. This group would include certain nurses, as well as many IT professionals and engineers. It does not include staff hired from labour hire firms.*

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[33] 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.

41. As noted, the Act already applies to employees, even if only employed temporarily. It also seems clear that the policy intention is not to include independent contractors. Given the several references to "casual nurses, IT professionals and engineers", it might have been assumed the target group was persons supplied to the relevant public sector entity under a contractual agreement between the entity and an employment agency. In such cases the person, whether or not at law an employee of the employment agency, would not be an employee of the public sector entity.

42. However, the Premier's reference to the extension not including "staff hired from labour hire firms" militates against this view.

43. Moreover, the amendment refers to individuals "engaged by the public sector entity under a contract of service". The term "contract of service" has a well-established legal meaning, and connotes a relationship of employment. It is defined in *Butterworths Australian Legal Dictionary* (1997) at page 265 as follows:

> *A contract under which a person is engaged in the service of an employer to do such work as is contracted for and where the employer directs what is to be done. It differs from a contract for services, under which a person engages to perform work for another, providing services for that person but not entering into that person's employment. Statutory provisions may extend the scope of 'contract of service':*

44. The committee notes that cl.15(2) of the bill extends the range of "officers" of public sector entities who may make public interest disclosures under the *Whistleblower Protection Act 1994*. For the reasons set out above, the committee considers it is not clear what categories of persons the extension is intended to encompass.

45. The committee seeks information from the Premier in relation to this matter.

14. WHISTLEBLOWERS PROTECTION AMENDMENT BILL 2006

Background

1. Mr J W Seeney MP, Leader of the Opposition and Member for Callide, introduced this bill into the Legislative Assembly on 31 October 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 the relevant recommendations of:*
>
> - *the Queensland Public Hospitals Commission of Inquiry Report; and*
> - *the report of the Parliamentary Crime and Misconduct Committee on the Three Year Review of the Crime and Misconduct Commission.*

3. This bill is identical to the *Whistleblowers Protection Amendment Bill 2006* which was introduced on 7 June 2006 by the then Leader of the Opposition, Mr L J Springborg MP 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 11 to 13). 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?[34]

♦ **clauses 3-14**

5. 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 and the Parliamentary Crime and Misconduct Committee's report, Three Year Review of the Crime and Misconduct Commission.

6. 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.

7. 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

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

environment. Secondly, many disclosures may be made only by "public officers". Thirdly, there are significant restrictions on whom disclosures may be made to.

8. 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).

9. 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).

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

11. 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.

12. 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.

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

14. 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.

15. 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?[35]

♦ **clause 15**

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

[35] 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.

15. WILD RIVERS AND OTHER LEGISLATION AMENDMENT BILL 2006

Background

1. The Honourable K G Shine MP, the then Minister for Natural Resources and Water, introduced this bill into the Legislative Assembly on 31 October 2006.

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

   (to amend) *a number of important pieces of legislation.*

   These Acts include the Wild Rivers Act 2005, the Water Act 2000, the Building Act 1975 and the Valuation of Land Act 1944.

   This bill will help to preserve and conserve Queensland water.

   This bill will further assist the Government to strike the balance between the water needs of users and the environment.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[36]

♦ **clause 83 (proposed ss.1145 and 1146)**

3. Clause 78 of the bill amends s.360ZD of the *Water Act 2000*, which empowers the Queensland Water Commission to impose a written restriction, in specified areas, on the volume of water taken, the hours when water may be used, and the way water may be used. The bill amends the section to provide that, rather than being imposed in "the SEQ region or a designated region", it may now be imposed "in all or part of" such regions. Clause 78 also inserts an amendment expressly providing that the Commission restriction may provide an exemption from part or all of the restriction.

4. Clause 80 amends s.388 of the *Water Act*, which empowers a water service provider to impose similar restrictions. The bill inserts a provision authorising the inclusion of exemptions from all or part of the restriction.

5. Against this background, proposed ss.1145 and 1146 (inserted in the *Water Act* by cl.83 of the bill), validate purported exercises of power by the Commission under s.360ZD, and by a water service provider under s.388, before the commencement of this bill's provisions. Both sections declare the exercises of power to be as valid as if the powers were exercised after commencement of this bill's provisions.

6. In the circumstances, and although the matter is not addressed in the Explanatory Notes or the Attorney's Speech, it would appear that certain previous exercises of power (under

[36] 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.

s.360ZD) have purported to apply a restriction to part only of a specified area, and (under both ss.360ZD and 366) to include exemptions in a restriction.

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

8. In the view of the committee this is not a situation where there is any clear invalidity, but at most a situation where, as the Explanatory Notes argue, there merely may be an element of doubt. In any event, the matters concerned are clearly purely technical in nature.

9. The committee notes that cl.83 inserts two validating provisions (proposed ss.1145 and 1146) into the *Water Act 2000*.

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

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

16. 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. The committee notes that this bill was passed, without amendment, on 2 November 2006.

2. The committee commented on this bill in its Alert Digest No 9 of 2006 at pages 15 to 19. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[37]

♦ **clauses 6, 8 and 42**

3. The committee noted that cls.6, 8 and 42 of the bill extended, 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***

   As you note in paragraph 3, it is not surprising that the legislature has seen fit to confer extensive and intrusive powers on authorised fire officers. The extensive powers currently enjoyed 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.

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[37] 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.

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 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 who 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?[38]

♦ **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 increased maximum penalties associated with a number of serious offences against the Act. Clause 25 also largely excluded the operation of two pivotal provisions of the *Criminal Code*, whilst replacing them with more limited forms of defence.

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:

- ***Clauses 19, 20, 22, 23, 24, 25 and 46***

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 3 persons in the Sandgate boarding house fire in 2002. The level of the penalties reflected 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 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, pg 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

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

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?[39]

♦ **clauses 11 and 12**

11. The committee noted that cls.11 and 12 of the bill denied persons the benefit of the rule 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 commented 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 where the 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 comments.

[39] 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.

17. 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. The committee notes that this bill was passed, with amendments, on 1 November 2006.

2. The committee commented on this bill in its Alert Digest No 9 of 2006 at pages 20 to 22. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[40]

♦ **clause 121**

3. The committee noted that cl.121 of the bill extended 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.

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

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

6. The Minister commented as follows:

> *As noted by the Committee, clause 121 of the Bill extends the application of Chapter 3, Part 3 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. I wish to confirm that the Commonwealth Migration Act 1958 has been identified as the main piece of legislation that could be prescribed, although there are a number of other Acts that also allow for detention without charge. The relevant Commonwealth and State agencies will be consulted about what legislation is to be prescribed as well as the policies and procedures required to support the proposed regulation.*

7. The committee thanks the Minister for this information.

♦ **clause 303 (proposed s.21B)**

8. The committee noted 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

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

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*.

9. The committee sought 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.

10. The Minister responded as follows:

> *The Committee also sought information about the amendment to the Transplantation and Anatomy Act 1979 dealing with authorised donations of skeletal muscle tissue, oral tissue and perioral tissue for research purposes. I have been advised by my department that consideration was given to incorporating the relevant consent requirements for such donations into the Act. However, it was determined that it would be more appropriate to reference the National Statement on Ethical Conduct in Research Involving Humans (the National Statement) issued by the National Health and Medical Research Council (NHMRC). The National Statement is a national reference point for the ethical consideration of matters relevant to all research involving humans. The underlying object of the statement is to protect the welfare and the rights of participants in research while facilitating the conduct of research that is, or will be, of benefit to the researcher's community or to humankind. The National Statement has been the subject of an extensive consultation process and builds on the original Statement on Human Experimentation and Supplementary Notes published by the NHMRC in 1992, which has undergone several revisions in the light of international ethical and scientific developments.*
>
> *I trust the above information addresses the Committee's concerns and note that the other issue raised by the Committee was referred to the Parliament.*

11. The committee notes the Minister's response.

18. 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. The committee notes that this bill was passed, without amendment, on 2 November 2006.

2. The committee commented on this bill in its Alert Digest No 9 of 2006 at pages 25 to 26. The Minister's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

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

♦ **clause 32**

3. The committee noted 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.

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

5. The Minister responded as follows:

> *In regard to the Committee's query regarding the Grain Research Foundation, I advise that the Explanatory Notes for the Bill address the matter of Foundation members suffering financial detriment. The Explanatory Notes include the following statement:*
>
> *"Section 41 provides that a member of the foundation goes out of office on the transfer day and that no compensation is payable. The foundation is a part time body and members are only paid sitting fees. The amount of sitting fees paid is low and designed merely to compensate a member for the time absent from normal employment. Since termination of the appointment means that a member will no longer need to be absent from normal employment, compensation for loss of sitting fees is not justified."*

6. The committee notes the Minister's response.

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41 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 confer immunity from proceeding or prosecution without adequate justification?[42]

♦ **clause 37 (proposed s.15S)**

7. The committee noted 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.

8. Given the nature and functions of the Tribunal, the conferral of this immunity appeared to be appropriate.

9. The Minister commented as follows:

> *I also note the Committee's comments regarding the amendments to the* Veterinary Surgeons Act 1936*.*

10. The committee notes the Minister's comments.

[42] 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.

19. 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. The committee notes that this bill was passed, without amendment, on 31 October 2006.

2. The committee commented on this bill in its Alert Digest No 9 of 2006 at pages 27 to 30. The Treasurer's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[43]

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

3. The committee noted 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.

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

5. In the circumstances, the committee had no concerns in relation to these retrospective provisions.

6. The Treasurer commented as follows:

> *It is noted that the Scrutiny of Legislation Committee has no concerns in relation to the retrospectivity of the above provisions due to the fact that they either extend exemptions from taxes or extend eligibility for subsidies, and are therefore beneficial to individuals.*

7. The committee notes the Treasurer's comments.

[43] 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.

Does the bill authorise the amendment of an Act only by another Act (by a "Henry VIII clause")?[44]

♦ **clause 6 (proposed s.81A)**

8. The committee noted 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.

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

10. The committee made no further comment in relation to this "Henry VIII clause".

11. The Treasurer commented as follows:

> *Under the Community Ambulance Cover Act 2003, electricity retailers act as agents of the Commissioner of State Revenue for collecting the Community Ambulance Cover levy and performing related functions. Under the Act, electricity retailers may contract with a person (an authorised subcontractor) to perform some or all of these functions, but only with the Commissioner's written approval. In addition, the effect of recent changes to the Community Ambulance Cover Act 2003 by the Energy Assets (Restructuring and Disposal) Act 2006 is that functions of electricity retailers may be subcontracted to further tiers of subcontractors with the requirement to obtain the Commissioner's approval for each such contract.*
>
> *To avoid unnecessary burden for electricity retailers and their subcontractors, it has been identified that certain processes relating to the performance of electricity retailer functions under the Act should be able to be subcontracted without the requirement to obtain Commissioner approval. However, this type of exclusion is appropriate only for ancillary, administrative processes such as printing and mailing services, and not processes involving the carrying out of key elements in the performance of electricity retailers under the Act.*
>
> *Clause 6 of the Bill therefore allows exclusions from the requirement for Commissioner approval to be specified by Regulation, but only for ancillary, administrative processes. As noted by the Scrutiny of Legislation Committee, the operation of clause 6, which the Committee considers to be a "Henry V111 clause", is expressly limited to ancillary, administrative functions which are of minor significance only.*

12. The committee notes the Treasurer's comments.

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[44] 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.

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?[45]

♦ **clause 28 (proposed s.93A(4))**

13. The committee noted 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.

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

15. The Treasurer commented as follows:

> *The discretion contained in clause 28 to allow a minor to claim the new first home transfer duty concession for vacant land ensure that limitations imposed on claiming the concession do not operate harshly in genuine cases.*
>
> *The Bill imposes a minimum 18 year age requirement on taxpayers claiming the new first home transfer duty concession for vacant land which is to be introduced by the Bill. The discretion is designed to ensure that a minor may claim a concession where there is no avoidance scheme in relation to a first home transaction involving vacant land.*
>
> *The same 18 year age requirement, with a discretion to exclude a taxpayer from this requirement, currently applies under the Duties Act ZOO1 for taxpayers claiming the existing first home transfer duty concession for an established home or a first home borrower mortgage duty concession.*
>
> *Experience with the first home owner grant scheme administered under the First Home Owner Grant Act 2000 is that there can be genuine cases where a minor could acquire a first home.*
>
> *The discretion strikes an appropriate balance between preserving the integrity of the duty concessions while ensuring that the duty concessions may still be claimed in genuine circumstances. Without the discretion it would be difficult to deal with the wide range of circumstances that may be encountered where a minor is involved.*
>
> *The Committee correctly notes that the discretion is exercisable only in relation to one matter, namely, whether an avoidance scheme exists. It permits the Commissioner of State Revenue to consider all relevant facts and circumstances in determining whether or not such a scheme exists, having regard to the objectives of imposing an 18 year age requirement to preserve the integrity of the duty concessions and the revenue base. The inclusion of the discretions is beneficial for minor taxpayers who would otherwise not be entitled to claim these duty concessions, despite the absence of an avoidance scheme.*

16. The committee notes the Treasurer's comments.

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[45] 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.

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[46]

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

[46] 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
174	Transport Infrastructure (State-controlled Roads) Regulation 2006	31/10/06
192	Water Resource (Mary Basin) Plan 2006	31/10/06
203	Nature Conservation (Administration) Regulation 2006	28/11/06
204	Nature Conservation (Protected Areas Management) Regulation 2006	28/11/06
208	Nature Conservation (Koala) Conservation Plan 2006	28/11/06
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

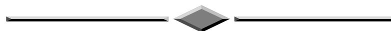
SECTION B – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCLUDED ITS INQUIRIES**

(INCLUDING LIST OF CORRESPONDENCE)

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*
154	**Statutory Instruments Amendment Regulation (No.1) 2006** ➢ Letter to the Minister dated 10 August 2006 ➢ Letter from the Minister dated 27 October 2006 ➢ Letter to the Minister dated 27 November 2006	8/8/06
184	**Mineral Resources Amendment Regulation (No.1) 2006** ➢ Letter to the Minister dated 8 November 2006 ➢ Letter from the Minister dated 16 November 2006 ➢ Letter to the Minister dated 27 November 2006	31/10/06
200	**Electricity Regulation 2006** ➢ Letter to the Minister dated 8 November 2006 ➢ Letter from the Minister dated 16 November 2006 ➢ Letter to the Minister dated 27 November 2006	31/10/06

(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 10th 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

28 November 2006

APPENDIX

CORRESPONDENCE

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