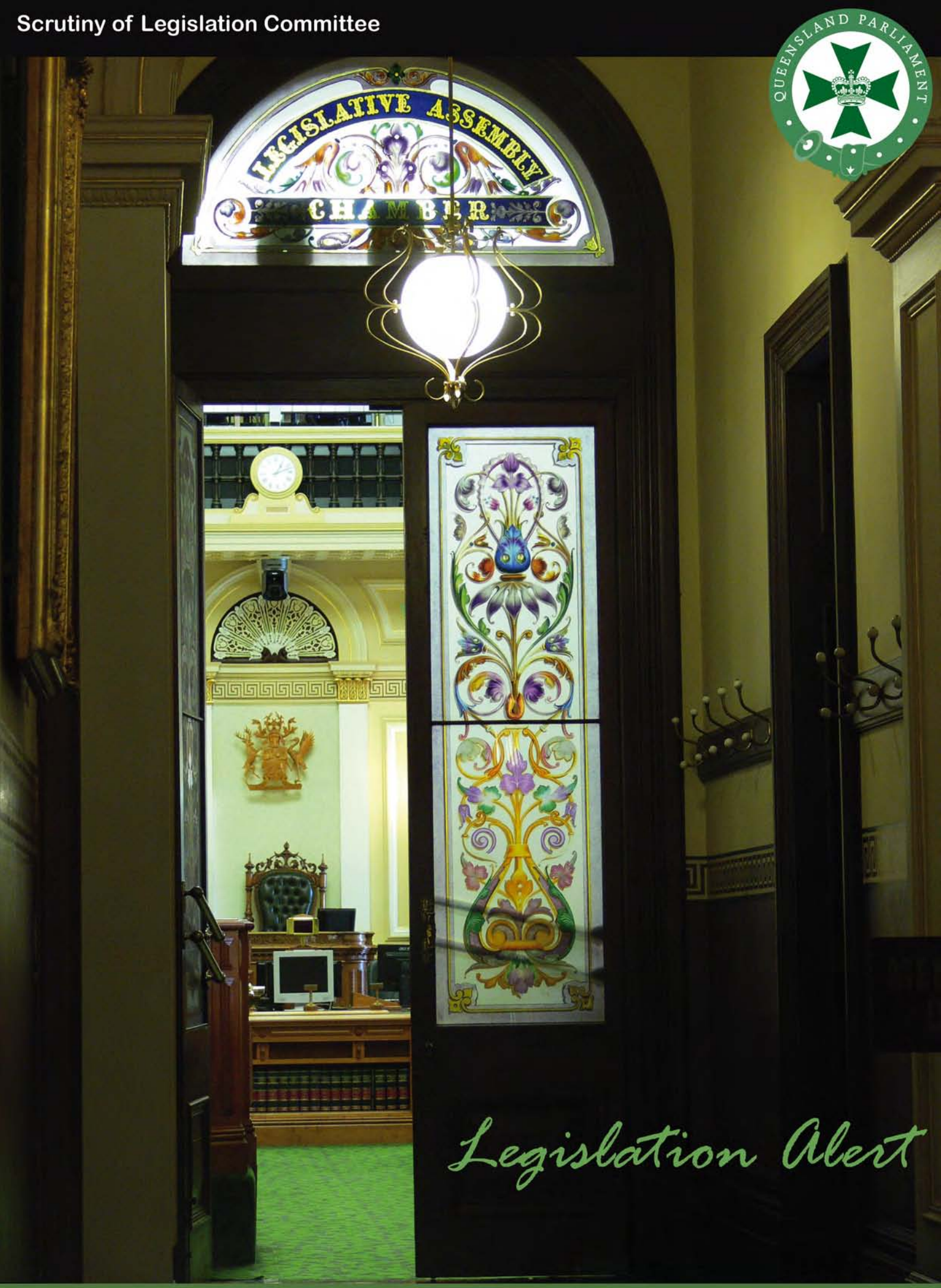

Legislation Alert

Tabled 10 May 2011 - Issue No 05 of 2011

Scrutiny of Legislation Committee

53rd Parliament

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Index of bills examined:	Use above web link and click on the 'Index of bills examined' link in the menu bar

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COMMITTEE RESPONSIBILITY

Section 103 of the *Parliament of Queensland Act 2001* confers the committee with a responsibility that has two parts: examination of legislation and monitoring of the operation of certain statutory provisions.

As outlined in the explanatory notes to the *Parliament of Queensland Act* (at 43):

[T]he committee's role is to monitor legislation. The committee may raise issues (such as breaches of fundamental legislative principles) with the responsible Minister, or with a Member sponsoring a Private Member's Bill, prior to pursuing issues, where appropriate, in the Assembly.

1. Examination of legislation

The committee is to consider, by examining all bills and subordinate legislation:

- the application of fundamental legislative principles to particular bills and particular subordinate legislation; and
- the lawfulness of particular subordinate legislation.

Section 4 of the *Legislative Standards Act* states that 'fundamental legislative principles' are 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. They include that legislation have sufficient regard to:

- rights and liberties of individuals; and
- the institution of Parliament.

Section 4 provides examples of 'sufficient regard': see the diagram on the opposite page.

2. Monitoring the operation of statutory provisions

The committee is to monitor generally the operation of specific provisions of the *Legislative Standards Act 1992* and the *Statutory Instruments Act 1992*:

Legislative Standards Act	*Statutory Instruments Act*
• Meaning of 'fundamental legislative principles' (section 4) • Explanatory notes (part 4)	• Meaning of 'subordinate legislation' (section 9) • Guidelines for regulatory impact statements (part 5) • Procedures after making of subordinate legislation (part 6) • Staged automatic expiry of subordinate legislation (part 7) • Forms (part 8) • Transitional (part 10)

Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly* instructs the committee that it is to include in the *Legislation Alert* compliance with requirements in part 4 of the *Legislative Standards Act* regarding explanatory notes.

Fundamental legislative principles require, for example, legislation have sufficient regard to:

<table>
<tr><td rowspan="2">Rights and liberties of individuals</td><td colspan="2">Bills and subordinate legislation
make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review
are consistent with the principles of natural justice
don’t reverse the onus of proof in criminal proceedings without adequate justification
confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer
provide adequate protection against self-incrimination
does not adversely affect rights and liberties, or impose obligations, retrospectively
does not confer immunity from proceeding or prosecution without adequate justification
provide for the compulsory acquisition of property only with fair compensation
have sufficient regard to Aboriginal tradition and Island custom
are unambiguous and drafted in a sufficiently clear and precise way</td></tr>
<tr><td>Institution of Parliament</td><td>Bills
allow the delegation of legislative power only in appropriate cases and to appropriate persons
sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly
authorise the amendment of an Act only by another Act</td><td>Subordinate legislation
is within the power that allows the subordinate legislation to be made
is consistent with the policy objectives of the authorising law
contains only matter appropriate to subordinate legislation
amends statutory instruments only
allows the subdelegation of a power delegated by an Act only –
in appropriate cases to appropriate persons
if authorised by an Act.</td></tr>
</table>

REPORT

Structure

This report follows committee examination of:

- bills (part 1);
- subordinate legislation (part 2); and
- correspondence received from ministers regarding committee examination of legislation (part 3).

Availability of submissions received

Submissions received by the committee and authorised for tabling and publication are available:

- on the committee’s webpage (www.parliament.qld.gov.au/SLC); and
- from the Tabled Papers database (www.parliament.qld.gov.au/view/legislativeAssembly/tabledPapers).

PART 1 – BILLS EXAMINED

1. ELECTORAL REFORM AND ACCOUNTABILITY AMENDMENT BILL 2011

Date introduced: 7 April 2011

Responsible minister: Hon PT Lucas MP

Portfolio responsibility: Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 15** amending the *Electoral Act* to insert new offence provisions;
   - **clause 15** raising issues regarding the freedom of individuals to communicate about political matters prior to an election;
   - **clause 15** imposing limits on who might be appointed as an agent for a registered political party;
   - **clause 15** conferring the Electoral Commission with administrative power which may not be subject to appropriate review;
   - **clause 15** conferring authorised officers with significant post-entry powers after entry had been gained via warrant or consent; and
   - **clause 17** providing for the capping of political donations during the period commencing 1 January 2011; and
   - **clause 15** protecting in prescribed ways specified people acting under the legislation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 15** which may, in a number of proposed provisions, allow amendment of the *Electoral Act* by way of regulation.

BACKGROUND

3. The legislation would alter:
   - requirements regarding political donations, election campaign expenditure and funding for general State elections; and
   - procedures for enrolment and voting.

LEGISLATIVE PURPOSE

4. The bill is intended to amend the *Electoral Act 1992* to (explanatory notes, 1):

   … improve the integrity and public accountability of state elections. The reforms aim to limit any potential for undue influence being exercised by any one donor or lobby group in relation to an election campaign – or any perception of such influence. To balance the effects of capping electoral donations and expenditure, the Bill provides for increased public funding to political parties and candidates for elections and administrative funding for political parties and independent members.

   The Bill also aims to improve enrolment and voting procedures for Queenslanders. The reforms are aimed at encouraging participation in the electoral processes of Queensland.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

Right to equal application and equal protection of the law

6. **Clause 15** would amend the *Electoral Act* to insert new offence provisions, as identified below.

New section	Proposed offence	Proposed maximum penalty
177C	Failing to keep State campaign account	200 penalty units ($20 000)
177CA	Failing to ensure political donations paid into State campaign account	200 penalty units ($20 000)
177CB(1)	Failing to ensure that only prescribed payments are made into State campaign account	100 penalty units ($10 000)
177CC	Failing to repay amount borrowed	200 penalty units ($20 000)
177FC(1)	Making political donation to political party in excess of cap	100 penalty units ($10 000)
177FD(1)	Political party accepting political donation in excess of applicable donation cap	200 penalty units ($20 000)
177FE(1)	Making political donation to candidate in excess of cap	100 penalty units ($10 000)
177FF(1)	Candidate accepting political donation in excess of applicable donation cap	200 penalty units ($20 000)
177FG(1)	Making political donation to third party in excess of cap	100 penalty units ($10 000)
177FH(1)	Third party accepting political donation in excess of applicable donation cap	200 penalty units ($20 000)
177GD(6)	Candidate failing to inform donor of requirement to lodge return	20 penalty units ($2000)
177GE(12)	Registered political party failing to inform donor of requirement to lodge return	20 penalty units ($2000)
177GF(14)	Registered political party failing to inform donor of requirement to lodge return regarding large gift	20 penalty units ($2000)
177HC	Receiving gift of foreign property in proscribed circumstances	Payment of amount equal to value of gift
177HD	Receiving anonymous gift	Payment of amount equal to valued of gift
177HE	Receiving proscribed loan	Payment of amount equal to valued of loan
177IB	Failing to ensure electoral expenditure paid from state campaign account	200 penalty units ($20 000)
177IH	Incurring prohibited electoral expenditure	200 penalty units ($20 000)
177LE	Failing to notify commissioner of change of details	100 penalty units ($10 000)
177MA(1) – 117MA(10)	Various offences	Various penalties
177MA(11)	Receipt of unlawful under section 177HC(1) by a registered political party that is a corporation, a candidate or an associated entity that is a corporation	One year's imprisonment or 240 penalty units ($24 000)
177ME(2)	Auditor failing to give notice of contravention	100 penalty units ($10 000)

New section	Proposed offence	Proposed maximum penalty
177ML(2)	Unlawfully accepting a political donation	Greater of amount twice the amount of donation or 200 penalty units ($20 000)
177NG	Failing to return identity care	20 penalty units ($2000)
177PC(1)	Contravening a help requirement	50 penalty units ($5000)
177QD	Contravening a seizure requirement	50 penalty units ($5000)
177QE(1)	Tampering with seized item	50 penalty units ($5000)
177QE(2)	Unlawfully entering place to tamper with seized item	50 penalty units ($5000)
177RA(1)	Contravening a personal details requirement	50 penalty units ($5000)
177RC(1)	Contravening a document production requirement	50 penalty units ($5000)
177RD(1)	Contravening a document certification requirement	50 penalty units ($5000)
177RF(1)	Contravening an information requirement	200 penalty units ($20 000) or one year's imprisonment
177SC(1)	Giving authorised officer false or misleading information	200 penalty units ($20 000) or two years' imprisonment
177SD(1)	Obstructing authorised officer	200 penalty units ($20 000) or one year's imprisonment
177SE	Impersonating an authorised officer	80 penalty units ($8000)
177SH(1)	Disclosing confidential information	100 penalty units ($10 000)

Right to vote and participate in the electoral process

7. **Clauses 8 and 10** would increase the number of people able to exercise the right to vote.

8. Clause 8 would amend section 101 of the *Electoral Act* to expand the cohort of people able to vote at an election. The amendment would allow voting by a person not enrolled but entitled to be enrolled if he or she, after cut off day for the electoral rolls but prior to 5pm on the day before polling day, gave notice to an electoral registrar for the electoral district under section 65.

9. Clause 10 (new section 104D) would allow for assistance to vote to be provided to a person in a pre-poll office in a pre-poll office who had satisfied an issuing officer in a pre-poll office that he or she required help to vote.

10. The committee notes that these proposed provisions would strengthen the right to vote in Queensland elections.

Freedom of political communication

11. **Clause 15** (provisions in new part 9A) raises issues regarding the freedom of individuals to communicate about political matters prior to an election.

12. New part 9A would relate to election funding and financial disclosure. Relevant provisions might affect adversely the freedom of people to communicate about political matters prior to an election. In relation to political donations, they include new sections imposing a cap on political donations:

- 177FC – a person may make to a registered political party in a financial year;
- 177FD – a registered political party may receive in a financial year;
- 177FE – a person may make to a candidate in an election in a financial year;
- 177FF – a candidate or person acting on behalf of a candidate may accept in a financial year;
- 177FG – a person may make to a third party in a financial year; and

- 177FH – a third party or a person acting on behalf of a third party may accept in a financial year.

13. In relation to particular gifts and loans, relevant provisions would prohibit specified:

- 177HC – gifts of foreign property;
- 177HD – anonymous gifts; and
- 177HE – loans.

14. Regarding electoral expenditure, relevant proposed provisions would impose a cap on electoral expenditure during the capped expenditure period by:

- 177IC – registered political parties for general elections;
- 177ID – registered political parties for by-elections;
- 177IE – candidates;
- 177IF – registered third parties; and
- 177IG – third parties.

15. State legislation imposing caps or bans on private funding of elections, or on election expenditure, raises issues as to whether it might inappropriately burden freedom of communication on matters of government and politics, infringing the implied freedom of political communication and constituting an invalid exercise of State legislative power.

16. In an *Electoral Reform Green Paper – Donations, Funding and Expenditure,* issued by the Australian Government in December 2008, constitutional issues which may be raised by the imposition of caps or bans on private funding, and caps on election expenditure, were described in detail.[1]

17. In *Coleman v Power* (2004) 220 CLR 1 at [95]-[96], it was suggested by McHugh J that the freedom of political communication would extend to limit State legislative power (and this had been implicit also in the judgments of the Queensland Court of Appeal in the same matter). In that case, a majority of the High Court supported the following two-fold test for determining whether legislation would infringe the implied freedom:[2]

- does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect; and
- if so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

18. The explanatory notes do not address specifically whether the implied freedom of political communication might limit the power of the Queensland Parliament to enact the proposed provisions in the new part 9A. The explanatory notes state (at 2), in respect of the effect of the legislation on freedom of speech:

> *By capping political donations and electoral expenditure the Bill potentially imposes barriers on freedom of speech. However, it is submitted that the capping is justified in ensuring that all people in the community, irrespective of their individual wealth, have equal access to the political process. As set out above, although certain donations and expenditure are capped, any adverse effect of these caps is proposed to be offset by additional injections of public funding.*

19. The committee invites the minister to provide information regarding clause 15 (new part 9A) and the implied freedom of political communication.

Right to work and work-related rights

20. **Clause 15** (new section 177BC) would impose limits on who may be appointed as an agent for a registered political party. For appointment, a person must:

- be an adult (new section 177BC(1)(a)); and
- not have been convicted of an offence under new part 9A at any time in the past.

21. The explanatory notes do not address the consistency of new section 177BC with fundamental legislative principles.

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1 Available at: www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.

2 At [95]-[96], [195]-[196] and [211].

Administrative power

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

23. **Clause 15** would confer the Electoral Commission with administrative power to decide whether to accept or refuse claims for election funding and administrative funding, but the power may not be subject to appropriate review.

24. Respectively, new sections 177DI and 177EF would provide for the Electoral Commission to decide claims for election funding and administrative funding. The explanatory notes identify the absence of a right of external merits review in respect of such decisions, but indicate (at 3-4) that sufficient regard would be had to rights and liberties of individuals:

> *As indicated above, the Bill provides for candidates and political parties to apply to the commission for election funding and also administrative funding. The commission may refuse the claim and the applicant may then apply for an internal review. These provisions restate those which have been in the Act for some time and which were modelled on those in the* Commonwealth Electoral Act 1918*. Although there is no external appeal from the commissioner's decision, it is considered this is justified as the grounds on which a claim may be refused are extremely limited and do not involve the exercise of a discretion. The applicants of course retain their rights to apply for a review under the* Judicial Review Act 1991.

Power to enter premises

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

26. **Clause 15** (new division 16) would confer authorised officers with significant post-entry powers after entry had been gained via warrant or consent.

27. New division 15 would confer authorised officers to enter premises only with a warrant or with consent of the occupier. New division 16 would then confer powers including:

- general powers, such as to search any party of the place, inspect, examine or film any part of the place or anything at the place and to remain for the time necessary to achieve the purpose of the entry (new section 177PA);
- power to require reasonable help, with failure to provide such help an offence with maximum penalty of 50 penalty units (new section 177PB); and
- power to seize evidence, including at public places that may be entered without consent or warrant (new sections 177Q and 177QA).

28. The explanatory notes state (at 3):

> *An authorised officer has power to enter places only: if it's open to the public; the occupier consents or entry is permitted by a warrant issued by a Magistrate. Entry by warrant must be made at a reasonable time. On entry, authorised officers have the power to search a place, copy documents and require persons to provide reasonable help. A person may refuse to answer a question or produce a document if to do so would incriminate him or her. Authorised officers entering by way of warrant only, may seize "things" but must supply receipts for seized things, and allow the owner to have access to the thing unless it is finally forfeited. If an authorised officer damages anything in exercising his or her powers, then he or she must give notice of the damage and the owner may apply for compensation…*
>
> *In summary, adequate investigative powers with appropriate safeguards are essential for the commission to ensure the integrity of the regulatory regime.*

Protection against self-incrimination

29. Section 4(3)(f) of the *Legislative Standards Act* 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.

30. **Clause 15** (new sections 177PC and 177SF) appears to provide appropriate protection against self-incrimination.

31. New section 177PC(1) would make it an offence to fail, without reasonable excuse, to comply with a requirement to provide an authorised officer with reasonable help to exercise a power conferred by the

legislation. New section 177PC(2) would provide that it would be a reasonable excuse for an individual not to comply if to do so might then to incriminate the individual or expose him or her to a penalty.

32. New section 177SF would provide evidential immunity for people giving or producing information or a document to an authorised officer under new section 177PB. Under new section 177SF(2), evidence of the information or document, and other evidence derived from the them, would not be admissible against the individual in any proceeding to the extent that it would tend to incriminate the person.

33. The proposed provisions appear to have sufficient regard to rights and liberties of individuals, as indicated (at 3) in the explanatory notes:

The Act retains the common law right against self-incrimination.

Retrospective operation

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

35. **Clause 17** would provide for the capping of political donations during the period commencing 1 January 2011.

36. It would insert a new section 199, a transitional provision, stating in part that if an amount received as a gift by a party, candidate or third party after 1 January 2011 was deposited in the relevant State campaign account of the party, candidate or third party, the amount would be taken to be a political donation and subject to the applicable donation cap.

37. Where legislation may have retrospective operation, the committee examines whether the retrospectivity might have any adverse effects on rights or liberties or whether obligations imposed retrospectively might be unduly onerous. When considering sufficient regard, the committee generally examines whether:

- the retrospective operation would be adverse to persons other than the government; and
- individuals would have relied upon and would have legitimate expectations based on the existing law.

38. The explanatory notes state (at 2):

The donation cap applies for the period from 1 January 2011. However, there is no retrospective obligation placed on parties in relation to the period prior to assent to the Bill.

Immunity from proceeding or prosecution

39. Section 4(3)(h) of the *Legislative Standards Act* 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.

40. **Clause 15** (new sections 177SF and 177SG) would protect in prescribed ways specified people acting under the legislation.

41. New section 177SF would provide evidential immunity for people giving or producing information or a document to an authorised officer under new section 177PB.

42. New section 177SG would protect from civil liability the commissioner, an authorised officer or a person acting under the authority of an authorised officer in respect of acts done, or omissions made, honestly and without negligence under new part 9A. Liability would attach instead to the State.

43. The committee draws provisions such as these to the attention of the Legislative Assembly as they do not comply with the principle that all people are equal before the law.

44. The explanatory notes do not address the consistency of the provisions with section 4(3)(h) of the *Legislative Standards Act*, but the committee notes that under new section 177SG a person affected would not be left without a remedy as liability would attach to the State.

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

45. Section 4(4)(c) of the *Legislative Standards Act* states 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.

46. **Clause 15** may, in a number of proposed provisions, allow amendment of the *Electoral Act* by way of regulation.

47. The following proposed provisions would allow for subordinate legislation to be made to:

- 177AD(5) – provide a for the statement of principles for use in deciding the amount or value of a gift consisting of or including a disposition of property other than money;
- 177KH(3) – allow the amount of information required by section 177HK of the Electoral Act to be reduced; and
- 177SB(6) – prescribe other matters that may, or must, be taken into account by a court considering whether it is just to order compensation.

48. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. In January 1997, the committee reported to the Parliament on Henry VIII clauses. While the committee has generally opposed the use of Henry VIII clauses in bills, the committee's report stated that usually it did not consider provisions enabling definitions of terms to be extended by regulation to be Henry VIII clauses. Further, the committee stated that it considered Henry VIII clauses may be excusable, depending on the given circumstances, where the clause is to facilitate:

- immediate executive action;
- the effective application of innovative legislation;
- transitional arrangements; and
- the application of national schemes of legislation.

49. Where provisions fall within the scope of those considered 'Henry VIII' provisions, the committee then examines whether the provisions would represent an appropriate delegation of legislative power.

50. The committee notes that the clauses identified above do not appear to fall within any of the categories of Henry VIII provisions considered excusable by the committee. Further, the committee draws to the attention of the Parliament the substantive nature of matters to be prescribed by regulation.

51. As the explanatory notes do not address the consistency of the legislation with section 4(4)(c) of the *Legislative Standards Act*, the committee invites the minister to provide information about this matter.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

52. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;

- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

53. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

54. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and generally contain the information required by section 23.

Achievement of policy objectives

55. The committee notes that the explanatory notes contain limited information about the proposed reforms regarding election funding and financial disclosure, despite the importance to our system of representative democracy of the selection of legislators by the people of Queensland.

Consistency with fundamental legislative principles

56. Similarly, the committee notes that limited information was provided regarding consistency with fundamental legislative principles.

Substantial uniformity with legislation of another jurisdiction

57. In relation to consistency with electoral legislation in other Australian jurisdictions, the explanatory notes state (3):

> *Originally all of the regulatory provisions relating to campaign funding were contained in a schedule to emphasise that they mirrored equivalent provisions in the* Commonwealth Electoral Act 1918 *("the Commonwealth Act"). With this Bill, because the provisions in the schedule are being substantially amended and added to they are being moved to the body of the Act to ensure clarity and transparency. The standard investigative powers are being moved and updated as part of that process.*

Forms

58. Clause 16 would insert a new section 179A to state that the commissioner may approve forms for use under the *Electoral Act*.

2. FORENSIC DISABILITY BILL 2011

Date introduced: 7 April 2011

Responsible minister: Hon CW Pitt MP

Portfolio responsibility: Minister for Disability Services, Mental Health and Aboriginal and Torres Strait Islander Partnerships

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 230** allowing the Mental Health Court to make a forensic disability order requiring a person be detained for involuntary treatment or care;
   - **clauses 33, 37, 113, 142, 144, 155, 224, 235 and 254** authorising decisions and actions regarding places of detention, temporary detention, taking a person to a service, transfer between services, the use of medication and the use of force;
   - **clause 130** restricting interstate or overseas changes in residence;
   - **chapter 6** authorising and regulating the use of 'behaviour control';
   - **clause 82** authorising refusal to allow a person to visit a person under a forensic disability order;
   - **chapter 7, part 1** authorising searches of people under forensic disability orders and of their possessions;
   - **clauses 49, 54, 60 and 116-25** creating offences;
   - **clause 251** increasing the penalty in respect of one offence in the *Mental Health Act*;
   - **clauses 38, 77, 92, 224, 226 and 250** which may affect rights of individuals to privacy;
   - **clause 173** providing immunity from criminal responsibility in respect of acts, occurring under the legislation, which would otherwise constitute offences for breach of privacy;
   - **clause 88** conferring the director of the forensic disability service with administrative power that may not be sufficiently defined;
   - **clause 33** allowing the transfer of a person under a forensic disability order from a forensic disability service to a mental health service without consent;
   - **clauses 147-8 and 224** which may be inconsistent with principles of natural justice;
   - **clause 254** providing for a provision of the Forensic Disability Act to have retrospective operation; and
   - **clause 128** providing immunity from civil proceedings for people exercising powers under the legislation in specific circumstances.

2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 91** requiring the director to issue policies and procedures, which may affect rights and liberties of individuals in significant ways and may be legislative in nature, but which would not be subject to parliamentary scrutiny.

BACKGROUND

3. The legislation is to establish a Forensic Disability Service for adults with intellectual or cognitive disability (but not a diagnosed mental illness) who are charged with a serious offence, referred to the Mental Health Court, found by the Mental Health Court to be of unsound mind or unfit for trial, and placed on a 'forensic disability order' requiring involuntary detention for treatment and care.[3]

[3] It follows respective reviews by the then Mr Brendan Butler AM SC (*Promoting balance in the forensic mental health system – Final Report – Review of the Queensland Mental Health Act 2000*) and the Hon Mr WJ Carter QC (*Challenging Behaviour and Disability – A Targeted Response* (2006)). See: www.communities.qld.gov.au/disability/key-projects/positive-futures/forensic-disability-service.

LEGISLATIVE PURPOSE

4. Clause 3 states the purpose of the bill:

> The purpose of this Act is to provide for the involuntary detention, and the care and support and protection, of forensic disability clients, while at the same time—
>
> (a) safeguarding their rights and freedoms; and
>
> (b) balancing their rights and freedoms with the rights and freedoms of other people; and
>
> (c) promoting their individual development and enhancing their opportunities for quality of life; and
>
> (d) maximising their opportunities for reintegration into the community.

5. Clause 4 identifies the measures via which the purpose is to be achieved:

> The purpose of this Act is to be achieved mainly by—
>
> (a) stating the human rights and other principles applying to the administration of this Act in relation to forensic disability clients; and
>
> (b) providing for the detention, admission, assessment, care and support and protection of clients; and
>
> (c) providing for a multidisciplinary model of care and support for clients that is designed to promote their continual development, independence and quality of life; and
>
> (d) when making a decision under this Act about a client, taking into account each of the following—
>
> (i) the protection of the community;
>
> (ii) the needs of a victim of the alleged offence to which the applicable forensic order relates;
>
> (iii) the client's individual development plan, including any limited community treatment.

6. Therefore, in addition to enacting the *Forensic Disability Act*, the bill would amend the:

- *Bail Act 1980*;
- *Commissions of Inquiry Act 1950*;
- *Coroners Act 2003*;
- *Crime and Misconduct Commission Act 2001*;
- Criminal Code;
- Criminal Practice Rules 1999;
- *Disability Services Act 2006*;
- *Guardianship and Administration Act 2000*;
- Guardianship and Administration Regulation 2000;
- *Limitation of Actions Act 1974*;
- *Mental Health Act 2000*;
- *Police Powers and Responsibilities Act 2000*;
- *Powers of Attorney Act 1998*;
- *Mental Health Review Tribunal Act 2009*;
- Mental Health Review Tribunal Rules 2009;
- *Residential Services (Accreditation) Act 2002*;
- *Residential Tenancies and Rooming Accommodation Act 2008*; and
- *Supreme Court of Queensland Act 1991*.

7. It would also make minor and consequential amendments to the:

- *Child Protection (Offender Prohibition Order) Act 2008*;
- *Child Protection (Offender Reporting) Act 2004*;
- Mental Health Regulation 2002.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

8. In relation to the consistency of the legislation with fundamental legislative principles generally, the explanatory notes state (at 8):

> *While the Bill is generally consistent with fundamental legislative principles, where the proposed legislation does infringe on legislative principles as set out in the* Legislative Standards Act 1992*, these departures occur within the context of managing the tension between safeguarding the rights of individuals detained in the forensic disability service and the need to provide for the safety of forensic disability clients and others, adequate protection for the community and appropriate security for the facility.*

Sufficient regard to rights and liberties of individuals

Rights and liberties

9. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

10. In relation to the general consistency of the legislation with rights and liberties of individuals, the explanatory notes provide the following information (at 4):

> *To achieve its objectives the Bill aims to be consistent with the principles, goals and objectives reflected in the United Nations* Convention on the Rights of Persons With Disabilities *which sets out the fundamental human rights of persons with disabilities. To this end, the focus of the legislative scheme (within the constraints of a detention environment) is on safeguarding rights and freedoms, promoting individual development, ensuring clients are supported to take part in making decisions, enhancing opportunities for quality of life and maximising opportunities for participation and reintegration into the community. These objectives must be balanced with the provision of a secure forensic disability service for people detained in the service, the need to protect the community and to ensure the safety of forensic disability clients and others.*

11. The *Convention on the Rights of Persons with Disabilities* was signed by the Australian Government on 30 March 2007 and ratified by Australia, with a reservation, on 17 July 2008. On 21 August 2009, Australia ratified the Optional Protocol to the Convention without reservation.[4] Article 1 of the Convention states:

> The aim of the Convention is to make sure that people with disability enjoy human rights, freedoms and respect like other people.
>
> 'Persons with disabilities' (referred to in this guide as 'people with disability') include people who have long-term physical, mental, intellectual or sensory impairments which may hold them back from doing things or sharing in society in the same way other people do.

12. Where relevant to examination of the legislation, provisions of the Convention are set out below.

Right to life, liberty and security of person; right to freedom of movement, residence and association

13. **Clause 230** would allow the Mental Health Court to make a forensic order (Mental Health Court – Disability) requiring a person be detained for involuntary treatment or care.

14. It would replace existing section 288 of the *Mental Health Act*, which provides the Mental Health Court with the power to make a forensic order after the matter of a person's mental condition relating to an offence has been referred to the court under section 256.

15. New section 288 would allow the Mental Health Court to make one of two different types of forensic orders:

- a forensic order (Mental Health Court – Disability); or
- a forensic order (Mental Health Court).

16. As an alternative to the existing forensic order, the new forensic disability order would allow the Court to order a person's detention in the forensic disability service.

17. Under clause 150, the person under a forensic disability order would be in the legal custody of the administrator of the forensic disability service. Under clause 141, the benefit a person was receiving from care and support provided under a forensic disability order would be reviewed each five years.

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4 See: www.ema.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_UnitedNationsConventionontheRightsofPersonswithDisabilities

18. Article 9 of the *International Covenant on Civil and Political Rights* states that everyone has the right to liberty and security of person, to be free from arbitrary detention and should not be deprived of liberty except on such grounds and in accordance with such procedures as are established by law. Article 14 of the *Convention on the Rights of Persons with Disabilities* states:

> People with disability have the same right to liberty and security as other people. Countries are to make sure they are not imprisoned or held somewhere, unless the law says this should be done and only if there is a proper reason for it. No-one is to be imprisoned or held somewhere only because they have a disability.
>
> Where people with disability are imprisoned or held somewhere, their human rights, including the rights in this Convention, are not to be taken away from them.
>
> The laws that set out these rights should apply to people with disability in the same way they apply to other people. However, reasonable changes should be made to the way things are done or the place where the person with disability is held in order to take account of the person's disability and to protect their rights under this Convention.

19. While the explanatory notes do not state specifically that clause 230 would have sufficient regard to rights and liberties of individuals, clauses 3 and 4 state clearly that the legislation is to safeguard the rights and freedoms of forensic disability clients and to balance their rights and freedoms with the rights and freedoms of other people.

20. **Clauses 33, 37, 113, 142, 144, 155, 224, 235 and 254** would authorise decisions and actions regarding places of detention, temporary detention, taking a person to a service, transfer between services, the use of medication and the use of force.

21. Clause 235 (new section 309B of the *Mental Health Act*) would provide for temporary detention of prescribed people subject to forensic disability orders in authorised mental health services.

22. Clause 33 would allow the director of the forensic disability service to transfer a person to an authorised mental health service if satisfied that the transfer would be in the client's best interests and the director of the other service agreed to the transfer.

23. In respect of clause 33, the explanatory notes state (at 14):

> *Clause 33 provides the Director of Forensic Disability with the power to order the person's transfer from a forensic disability service to an authorised mental health service. This could be regarded as affecting the rights and liberties of individuals as the person's consent is not required and the transfer may adversely affect the person. It could also be seen as denying the person natural justice as there is no formal opportunity for the person to have input into the transfer decision or a right to an administrative review of the transfer decision.*
>
> *However, under section 203 of the* Mental Health Act 2000 *as applied under Chapter 10 of this Bill, the person may apply for a review of their forensic order to the Mental Health Review Tribunal. One of the decisions the tribunal may make when reviewing the forensic order is an order about the transfer of a client between an authorised mental health service and the forensic disability service. While this is not a strict administrative review of the transfer decision by the Director of Forensic Disability, the tribunal review provides an opportunity for the client to have the issue of their transfer considered as part of an independent review process.*

24. Clauses 34, 37, 113, 142, 224 (new sections 169A, 169G and 169J of the *Mental Health Act*) and 254 (new section 602 of the *Mental Health Act*) would allow for a person under a forensic disability order to be taken or transferred to or from a relevant service. In respect of taking a person to a service, the proposed provisions would authorise the use of necessary and reasonable minimum force.

25. Similarly, clause 155 would authorise the use of reasonable force for prescribed purposes under the Forensic Disability Act, providing that specified people using force in these circumstances would be public officials under the *Police Powers and Responsibilities Act 2000*.

26. Clauses 144 and 224 (new section 169N of the *Mental Health Act*) would allow, in respect of transfer, the administration of medication to a person under a forensic disability order without the consent of the person. In relation to consistency with fundamental legislative principles, the explanatory notes provide (at 11) the following information:

> *Clause 144 provides for the administration of medication to a client without their consent while being transferred from the forensic disability service to an authorised mental health service. Similarly, clause 224 (inserting new section 169N in the* Mental Health Act 2000*) also provides a comparative power for medication to be administered to a client without their consent while being transferred from an authorised mental health service to the forensic disability service. However, this may only be administered if a medical practitioner is satisfied that it is necessary to ensure the safety of the client or others while the client is being transferred, or taken to the relevant service and must be administered by a doctor, or registered nurse under the instruction of a doctor.*

27. **Clause 130** would restrict an interstate or overseas move by a person under a forensic disability order.

28. Clause 130 would apply provisions of the *Mental Health Act* (chapter 5, part 1, division 3, with the exception of section 175) to require the approval of the Mental Health Review Tribunal for such a person to move out of Queensland.

29. Clause 130 is located within chapter 10 of the bill which provides for the application of the *Mental Health Act* to the Forensic Disability Act.

30. **Chapter 6** would authorise and regulate the use of 'behaviour control' in respect of people subject to a forensic disability order.

31. Clause 42 states that the purpose of chapter 6 is to protect the rights of forensic disability clients by regulating the use of:

- 'behaviour control mediation' as defined in clause 44 (see part 2, division 2; clauses 49-53);
- 'restraint', as defined in clause 45 (see part 2, division 3; clauses 54-9); and
- 'seclusion', as defined in clause 46 (see part 2, division 4; clauses 60-7).

32. It states further that the regulated behaviour control is to be used only:

- if considered necessary and the least restrictive way to protect the health and safety of clients or to protect others; and
- in a way that –
  - has regard for the human rights of forensic disability clients;
  - aims to reduce or eliminate the need for its use; and
  - ensures transparency and accountability in its use.

33. It would be an offence for a person to administer a behaviour control other than in accordance with chapter 6 (clauses 49, 54 and 60).

34. However, for each regulated behaviour control, chapter 6 states that it would not be necessary to obtain the client's consent to the use of restraint on the client (clauses 53, 59 and 67). Further, under clause 68, a senior practitioner or an authorised practitioner might implement a behaviour control, with the help and using the minimal force necessary and reasonable in the circumstances. Similarly:

- clause 155 authorises the use of necessary and reasonable force in respect of powers exercisable under the legislation; and
- clause 219 would make similar provision in the *Mental Health Act*.

35. The explanatory notes state (at 9-10) that while chapter 6 would adversely affect rights and liberties of individuals, it would be consistent with fundamental legislative principles:

> *Chapter 6 deals with regulated behaviour controls which include seclusion, restraint and medication for behaviour control. These regulated behaviour controls adversely affect a person's rights and liberties as set out in section 4(2)(a) of the* Legislative Standards Act 1992 *and other common law rights including freedom of movement and association with other people. However, it is considered that where the Bill derogates from these rights, there are sufficient measures, safeguards and justifications for the use of these behaviour control interventions.*
>
> *A key intention is to provide for transparency and accountability in the use of regulated behaviour controls and safeguards for clients. It is intended that regulated behaviour control is used as a last resort, rather than a standard practice. Chapter 1, Part 3 sets out principles for exercising powers and performing functions under the Bill, and there is a requirement that a power or function must be exercised or performed so that the person's liberty and rights are adversely affected only if there is no less restrictive way to protect his or her health or to protect others; and any adverse affect on the person's liberty and rights is the minimum necessary in the circumstances.*
>
> *The Director of Forensic Disability has an important oversight role in relation to regulated behaviour controls. The use of all regulated behaviour controls must be reported to the Director of Forensic Disability, who has the power to order restraint or seclusion to stop and to order a review of the use of medication for behaviour control.*
>
> *There are strict requirements for the authorised administration of medication for behaviour control including:*
>
> *- it must be prescribed by a psychiatrist (clause 50)*
>
> *- it must be administered by a senior practitioner who is a doctor or a nurse, or by a doctor or nurse under the direction of the senior practitioner, who is a doctor or registered nurse (clause 50)*
>
> *- it must be administered in accordance with the psychiatrist's directions, including directions about the dose, route and frequency of the medication and any restrictions on its use (clause 50).*

The transparency and accountability regime also extends to any medication prescribed and administered to a client in the forensic disability service. If the client is prescribed any medication (including, but not restricted to medication for behaviour control) the details must be included in the individual development plan (clause 15(3)(a)). A senior practitioner must ensure a psychiatrist regularly reviews a clients need for and the application of any behaviour control medication prescribed for a client, at least every 3 months (clause 52). A senior practitioner must also ensure a medical practitioner regularly reviews a client's need for and appropriateness of medication (other than behaviour control medication) (clause 145).

There are also strict limitations on the use of both restraint and seclusion. Only the Director of Forensic Disability can authorise the use of restraint on a forensic disability client and only a device approved by the Director of Forensic Disability may be used. A client may only be put into seclusion if authorised by the senior practitioner or in urgent circumstances by an authorised practitioner (clause 61). Both the authorisation of restraint and seclusion must be given by a written order which details the reasons for use and the details of how they may be used. The authorisation for restraint or an order for seclusion must end within 3 hours after the order is made (clauses 56 and 62).

There are obligations to record the details of restraint and seclusion in the client's file (clauses 57 and 63). Special safeguards apply where an authorised practitioner places a client in seclusion in urgent circumstances (clause 64), including that a senior practitioner must be immediately informed of the seclusion.

Clients must be observed while being restrained or secluded and have all of their reasonable needs met including sufficient bedding and clothing, sufficient food and drink and access to toilet facilities (clauses 69 and 70).

The Bill also provides that it is an offence to administer behaviour control medication, use restraint or place a client in seclusion other than in accordance with the provisions in the Bill (clauses 49, 54 and 60).

36. Further, in relation to clauses 68 and 155, the explanatory notes indicate (at 15):

Clause 68 provides for the use of reasonable force to be used by a senior practitioner or authorised practitioner and those who assist them when administering behaviour control medication, using restraint on a client or placing them in seclusion. Clause 155 provides that a practitioner or administrator may exercise their powers with the help and using the minimum force that is necessary and reasonable in the circumstances. This impacts on the rights and liberties of individuals. However, the Bill places firm limits on the use of force. Under clause 155 the use of reasonable force is limited to the exercise of the administrator's power to detain a forensic disability client under the Act or a forensic order, or a practitioner's powers under section 37 (Taking client to authorised mental health service if transferred), section 113(2) or (3) (Taking client to forensic disability service or authorised mental health service) or under section 151 (Taking client to appear before court and return to forensic disability service).

When force is used, it must be the minimum force that is necessary and reasonable in the circumstances. Further safeguards include an offence provision in the Bill relating to the ill-treatment of forensic disability clients by a person who has responsibility for the detention, care and support and protection of a forensic disability client.

37. **Clause 82** would authorise the administrator to refuse to allow a person to visit a person under a forensic disability order.

38. Refusal would be possible if the administrator were satisfied a proposed visit would affect adversely a person's care and support. The administrator would be required to give the visitor written notice of the decision stating the reasons for the decision and providing information regarding appeal of the decision.

39. The explanatory notes indicate (at 12) sufficient regard to rights and liberties of individuals:

Chapter 7, Part 2 also provides the administrator with the power to exclude a person from visiting a client in the forensic disability service. However, this power may only be exercised if the administrator is satisfied that the proposed visit will adversely affect the person's care. The person who is excluded has a right of appeal to the Mental Health Review Tribunal and the Bill provides that written notice of the decision and the reasons (including the right to appeal and how the appeal is made), must be provided to the visitor.

40. **Chapter 7, part 1** (clauses 75-81) would authorise searches of people under forensic disability orders and of their possessions.

41. Clause 75 states that the purpose of part 1 is to ensure the protection of forensic disability clients and the security and good order of the forensic disability service. Clause 76 would authorise a senior practitioner or authorised practitioner to carry out a search in accordance with the procedures identified in clause 77. A search might be conducted without a person's consent (clause 76(2)) and a practitioner might, with the administrator's consent, remove and inspect all, or part of a client's clothing (clause 77(3)). The search may be carried out using the minimum force necessary and reasonable in the circumstances (clause 77(7)). Further, anything found during the search that is suspected to be a harmful thing may be seized (clause 78).

42. In relation to consistency with fundamental legislative principles, the explanatory notes acknowledge an adverse effect upon rights and liberties of people subject to the powers to be authorised by part 1. However, justification is provided and legislative safeguards are identified (at 11-2):

Chapter 7 provides powers to search a person on a forensic order while they are in the forensic disability service and to seize certain material that is potentially harmful. These provisions are a departure from the general fundamental legislative principle that sufficient regard must be given to the rights and liberties of individuals and potentially infringes on a person's right to privacy. The powers are necessary to enable proper security to be maintained and to ensure the safety of clients, staff and visitors within the forensic disability service. Limitations and safeguards apply in the application of these powers.

The Bill provides for how the search can be carried out and strict limitations are placed on these powers including:

- *providing the search can only occur on the reasonable belief that the client is in possession of a harmful thing, and only senior practitioners or authorised practitioners are able to carry out the search (clause 76);*
- *providing that records must be kept of the search and things seized and strict provisions in the proposed Bill determine what must happen to the thing if it is seized (clause 80);*
- *providing for the privacy and dignity of the client to be respected, and that more invasive searching of the client must be approved by the administrator of the service if it is deemed necessary in the circumstances to carry out a proper search (clause 77);*
- *providing that compensation may be paid if the possessions of the client are damaged in the exercise of the power to search (clause 81).*

Right to equal application and equal protection of the law

43. **Clauses 49, 54, 60 and 116-25** would create offences, as identified below.

Clause	Proposed offence	Proposed maximum penalty
49	Unlawfully administering behaviour control medication	50 penalty units ($5000)
54	Unlawfully using restraint	50 penalty units ($5000)
60	Unlawfully keeping a client in seclusion	50 penalty units ($5000)
116(2)	Ill-treating a forensic disability client	150 penalty units ($15 000) or one year's imprisonment
117(3)	Wilfully allowing a client to abscond	200 penalty units ($20 000) or two years' imprisonment
117(4)	Helping a client to abscond	200 penalty units ($20 000) or two years' imprisonment
118(1)	Inducing or knowingly helping a client to be unlawfully absent from a service; and knowingly harbouring a client who is unlawfully absent.	200 penalty units ($20 000) or two years' imprisonment
118(3)	Wilfully allowing a client to be unlawfully absent	200 penalty units ($20 000) or two years' imprisonment
119(1)	Obstructing an official	40 penalty units ($4000)
120(1)	Making a false or misleading statement in a document	40 penalty units ($4000)
121(2)	Disclosing or giving access to a confidential document	50 penalty units ($5000) or six months' imprisonment
122(2)	Unlawfully disclosing information	100 penalty units ($10 000)
124(4)	Failing to comply with requirement to provide reasonable help	40 penalty units ($4000)
125(4)	Failing to produce documents	40 penalty units ($4000)

44. The explanatory notes state, generally, in the context of consistency of the legislation with the principles, goals and objectives of the Convention on the Rights of Persons with Disabilities (at 6):

There are also a range of offences to safeguard the forensic disability client and manage risk and security.

45. **Clause 251** would increase the penalty in respect of one offence in the *Mental Health Act*, as identified below.

Clause	New section	Proposed offence	Proposed maximum penalty
251	518	Ill-treating a patient in an authorised mental health service	150 penalty units ($15 000) or one year's imprisonment [currently, 100 penalty units ($10 000) or one year's imprisonment]

46. In respect of clause 251, the explanatory notes provide (at 15) the following information:

Clause 251 increases the penalty for ill-treating a patient in an authorized mental health service from a maximum of 100 to 150 penalty units. This is also reflected in the maximum penalty for ill-treating a forensic disability client in clause 116 of the Bill. This increase in penalty is proportionate to the seriousness of the offence of ill-treating a patient or client by someone who has responsibility for their care and protection.

Right to privacy

47. **Clauses 38, 77, 92, 224, 226 and 250** may affect rights of individuals to privacy.

48. Respectively, these provisions would allow:

- the director (forensic disability) to give to director (mental health) or his or her nominee specified information including personal and medical information of a person under a forensic disability order (clause 38);
- a practitioner to carry out a search of a person under a forensic disability, or of his or her possessions – for example, the practitioner would be authorised, subject to the administrator's approval, to remove and inspect all or part of the client's clothing (clause 77);
- the director (forensic disability), or nominee, to give information about a person who is or was a forensic disability client to the director (mental health) or nominee (clause 92(1));
- a person exercising power under the Forensic Disability Act to disclose confidential information, which may include personal information (clause 123);
- the director (mental health) to give to the director (forensic disability) or nominee information about a patient for facilitating transfer and care (clause 224, new section 169K);
- the Mental Health Review Tribunal to order a patient to submit to an examination (clause 226, amendment of section 203A of the Mental Health Act); and
- the director (mental health) or nominee to give information about a person who is or was a patient to the director (forensic disability) or nominee.

49. Information about the consistency of some of the provisions identified above is provided in the explanatory notes. In relation to clauses 38 and 224, the explanatory notes state (at 12-3):

Clause 38 empowers the Director of Forensic Disability to give the Director of Mental Health certain information about the person (for example, the person's personal and medical information; details of the person's individual development plan; their response to care and willingness to continue care). The same power is given to the Director of Mental Health in new section 169K Mental Health Act 2000 *inserted by clause 224. This could be regarded as an infringement of a person's right of privacy.*

It is considered that this potential breach is justified to ensure there is continuity of care for the person when they are transferred from the forensic disability service to an authorised mental health service. Further, it allows the director of the service receiving the person to administer, and enforce the forensic order – which is consistent with the principles of the Bill. This is achieved by allowing release of, for example:

- *A complete and up-to-date history in relation to the person's personal and medical information;*
- *Information in relation to the circumstances giving rise to the forensic order (including information contained in any report considered by the Mental Health Court in making the order);Details of the forensic order;*
- *The person's response to care and willingness to continue care;*
- *Details as to whether the Mental Health Court or Mental Health Review Tribunal has approved limited community care, including any condition imposed;*

- *When the tribunal is to conduct a review of the person's mental condition;*
- *Whether the person has an allied person and their contact details.*

A key principle in clause 7 reflects that a person's right to confidentiality of information must be recognised and taken into account. Further, clause 122 provides that it is an offence for a person to disclose information about a person who is or has been a forensic disability client unless it is permitted by law (including under this Bill), or the person about whom the information is provided agrees to the disclosure.

50. In relation to clause 77, the explanatory notes indicate (at 11-2):

Chapter 7 provides powers to search a person on a forensic order while they are in the forensic disability service and to seize certain material that is potentially harmful. These provisions are a departure from the general fundamental legislative principle that sufficient regard must be given to the rights and liberties of individuals and potentially infringes on a person's right to privacy. The powers are necessary to enable proper security to be maintained and to ensure the safety of clients, staff and visitors within the forensic disability service. Limitations and safeguards apply in the application of these powers.

The Bill provides for how the search can be carried out and strict limitations are placed on these powers including:

- *providing the search can only occur on the reasonable belief that the client is in possession of a harmful thing, and only senior practitioners or authorised practitioners are able to carry out the search (clause 76);*
- *providing that records must be kept of the search and things seized and strict provisions in the proposed Bill determine what must happen to the thing if it is seized (clause 80);*
- *providing for the privacy and dignity of the client to be respected, and that more invasive searching of the client must be approved by the administrator of the service if it is deemed necessary in the circumstances to carry out a proper search (clause 77);*
- *providing that compensation may be paid if the possessions of the client are damaged in the exercise of the power to search (clause 81).*

51. Regarding clauses 92 and 250, it is said (at 13):

Clauses 92 and 250 empowers the Director of Forensic Disability and the Director of Mental Health to give each other, or a person nominated by either directors, information about a person who is or was a forensic disability client or a patient, in order to enable each director to perform their functions under the Forensic Disability Act and the Mental Health Act 2000 *accordingly.*

It is considered that this potential breach of a person's right to privacy is justified to ensure that the Director of Forensic Disability and Director of Mental Health are able to perform their functions under the Forensic Disability Act and the Mental Health Act 2000*, which under the* Forensic Disability Act *includes the protection of the rights of clients and ensuring the involuntary detention, assessment, care and support and protection of forensic disability clients. This power also supports the provision of continuity of care for clients or patients who are transferred between the forensic disability service and an authorised mental health service for care and support and treatment. Clause 92 envisages the scenario when a forensic patient is transferred to an authorised mental health service from a forensic disability service, or detained in the authorised mental health service temporarily. Clause 250 that inserts new section 493B in the* Mental Health Act 2000*, envisages the scenario where a patient in an authorized mental health service is transferred to the forensic disability service. The power to provide information in both clauses is limited by the requirement that the information is reasonably necessary for enabling either director to perform their functions under the respective Acts.*

52. **Clause 173** would provide immunity from criminal responsibility in respect of acts, occurring under the legislation, which would otherwise constitute offences for breach of privacy. Clause 173 is examined below, under the heading 'Immunity from proceeding or prosecution'.

Administrative power

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

54. **Clause 88** would confer the director of the forensic disability service with administrative power which is stated in very broad terms; that is, power that may not be sufficiently defined.

55. Clause 88(2) states that the director 'has power to do all things necessary or convenient to be done in performing the director's functions'.

56. The explanatory notes do not address the consistency of clause 88 with section 4(3)(a) of the *Legislative Standards Act.*

Natural justice

57. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

58. **Clause 33** would allow the transfer of a person under a forensic disability order from a forensic disability service to a mental health service without consent.

59. Clause 33 was examined above under the heading, 'Rights and liberties' and information included in the explanatory notes (at 14) relevant to consistency with section 4(3)(b) of the *Legislative Standards Act* included in that context.

60. **Clauses 147-8 and 224** may be inconsistent with principles of natural justice.

61. Clause 147 would allow a person, authorised or required under the *Forensic Disability Act* to give notice to or inform a person about a matter, to comply with the requirement or authorisation only 'to the extent that is reasonably practicable in the circumstances'.

62. Clause 148 would allow an administrator required to give notice or tell an allied person about a matter to be taken to have complied with the requirement if he or she purportedly, but honestly and reasonably, complies.

63. The explanatory notes do not address the consistency of either clause 147 or 148 with fundamental legislative principles.

64. New section 169F of the *Mental Health Act* (clause 224) would allow the Mental Health Review Tribunal to decide an application for a transfer order without an applicant or forensic patient attending the hearing of the application. In respect of this provision, the explanatory notes provide (at 109) the following information regarding its intended operation:

> *Section 169F enables an application to the Mental Health Review Tribunal for a transfer order to be heard by the President of the tribunal on written materials and submissions, rather than holding a hearing involving the relevant parties. This will help ensure that such applications are considered and dealt with in a timely manner.*

Retrospective operation

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

66. **Clause 254** would provide for a provision of the *Forensic Disability Act* to have retrospective operation. The intended operation of clause 254 is outlined in the explanatory notes and justification for an inconsistency with section 4(3)(g) of the *Legislative Standards Act* provided (at 16):

> *The Bill amends the* Mental Health Act 2000 *(at Chapter 16, Part 5) to insert a declaratory and validating provision to the effect that section 305A of the* Mental Health Act 2000*, which states who a special notification forensic patient is, and therefore who can be ordered to submit to a psychiatric examination before the Mental Health Review Tribunal revokes the person's forensic order. Special notification patients are generally persons alleged to have committed murder, rape or the dangerous operation of a vehicle causing death or grievous bodily harm.*
>
> *In effect, section 305A of the* Mental Health Act 2000 *will have commenced on 28 February 2008 and will retrospectively apply to the Bill.*
>
> *This could be regarded as affecting the rights and liberties of individuals retrospectively. However, it is considered that this potential breach is justified on balance because of the serious offences involved.*

Immunity from proceeding or prosecution

67. Section 4(3)(h) of the *Legislative Standards Act* 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.

68. **Clause 128** would provide immunity from civil proceedings for people exercising powers under the legislation in specific circumstances.

69. Clause 128 would protect an official from incurring civil liability for an act done, or omission made, honestly and without negligence under the legislation. Should the clause prevent civil liability from attaching to an official, the liability would attach to the State instead. Justification for the proposed provision is provided (at 14-5) by the explanatory notes:

> *Clause 128 of the Bill provides that particular persons are not personally liable for anything done or omitted to be done honestly and without negligence under the Act.*

The general rule is that all persons are equal before the law and immunity should not be conferred. The Legislative Standards Act 1992 *section 4(3)(h) provides that legislation should not confer immunity from proceeding or prosecution without adequate justification. The conferral of immunity in this instance may be justified as it is necessary for the administration of this Act to protect officials from prosecution for duties they have legitimately carried out.*

The powers and functions for officials under the Act are necessary to enable proper security to be maintained and to ensure the safety and protection of forensic disability clients, staff and visitors within the forensic disability service. This clause is also required to allow them to appropriately perform their powers or functions without fear of civil liability. Importantly the protection is only provided if they carry out their functions honestly and without negligence, and there are limitations and safeguards that apply in the application of their powers and functions throughout the Bill - so that any improper use of powers would not be covered under this clause.

70. **Clause 173** would provide immunity from criminal responsibility in respect of acts, occurring under the legislation, which would otherwise constitute offences for breach of privacy. Clause 173 is examined above, under the heading 'Right to privacy'.

71. Section 227A of the Criminal Code proscribes observations or recordings in breach of privacy. Section 227B contains the offence of distributing prohibited visual recordings.

72. Clause 173 would amend section 227C of the Criminal Code to exclude criminal responsibility for offences against 227A and 227B in respect of acts while a person was in detention under the *Mental Health Act* or the *Forensic Disability Act*. The explanatory notes provide (at 89) information about the intended operation of the amended section:

Clause 173 amends section 227C to provide that lawful custody includes detention under the Mental Health Act 2000 *in the forensic disability service within the meaning of the* Forensic Disability Act*.*

The effect of this amendment is to provide that a person is not responsible for an offence against section 227A(1) or (2) (Observations and recordings in breach of privacy) or 227B (Distributing prohibiting visual recordings), in relation to an observation or visual recording of another person who is detained in the forensic disability service, if the person is, at the time of the offence, acting in the course of the person's duties in relation to the person's detention, and the person's conduct is reasonable in the circumstances for the performance of the duties.

Sufficient regard to the institution of Parliament

Parliamentary scrutiny of delegated power

73. Section 4(4)(b) of *the Legislative Standards Act* 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.

74. **Clause 91** would require the director to issue policies and procedures about detention, care and support of clients.

75. The policies and procedures would address matters including the use of regulated behaviour controls and the detention, care and support and protection of special notification clients. Accordingly, these instruments may affect rights and liberties of individuals in significant ways. Further, the instruments may be legislative in nature.

76. However, as clause 91 refers to the instruments as 'policies and procedures' they would not fall within the definition of 'subordinate legislation' in section 9 of the *Statutory Instruments Act*. The instruments would not, therefore, need to be tabled in the Legislative Assembly and would not be subject to the scrutiny of the Legislative Assembly.

77. The explanatory notes do not address this matter.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

78. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

79. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and generally contain the information required by section 23.

Forms

80. Clause 158 would provide that the director of the forensic disability service may approve forms for use under the *Forensic Disability Act*.

3. GAS SECURITY AMENDMENT BILL 2011

Date introduced: 6 April 2011

Responsible minister: Hon SJ Hinchliffe MP

Portfolio responsibility: Minister for Employment, Skills and Mining

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 4** which amends the definition of affected land for the purposes of the Collingwood Park State guarantee;
   - **clause 16** creating new offence provisions which may impose liability for acts or omissions of others and would impose an evidential burden on defendants;
   - **clauses 6 and 26** which may adversely affect rights and liberties retrospectively;
   - **clause 5** which would insert a definition of market value for the purposes of the Collingwood Park State guarantee; and
   - **clauses 18 and 28**, which would incorporate definitions in the *State Development and Public Works Organisation Act 1971* in the *Petroleum and Gas (Production and Safety) Act* .
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 16** which may allow the delegation of a legislative power in an inappropriate case.
3. The committee invites the minister to provide further information about:
   - the boundary changes to Collingwood Park, including any map of the boundary changes; and
   - the effect that clause 6 will have on the rights and liberties of individuals under the Collingwood Park State guarantee.

BACKGROUND

4. The legislation is to make a number of amendments to the Collingwood Park State guarantee and to petroleum and gas legislation.

LEGISLATIVE PURPOSE

5. The bill is intended to (explanatory notes, 1):
   - establish a gas short term trading market for the State to increase gas usage through greater market access and improved price competition and transparency;
   - provide a legislative framework to implement a prospective gas production land reserve policy, if supply constraints to domestic markets are identified;
   - streamline administrative processes related to easements obtained for State Development Areas by the Coordinator-General;
   - improve the administration of petroleum tenure legislation for making an application for a petroleum lease application and for transferring exploration authorities;
   - preserve the arrangements agreed to by the Queensland Government for the economic regulation of the Carpentaria Gas Pipeline;
   - provide consistency across resources legislation regarding the frequency of lodgement of royalty returns; and
   - clarify elements of the Queensland Government's Collingwood Park State Guarantee.
6. In addition, the bill would amend the:
   - *Mineral Resources Act 1989*;
   - *National Gas (Queensland) Act 2008*;
   - *Petroleum and Gas (Production and Safety) Act 2004*;
   - *Petroleum and Gas (Production and Safety) Regulation 2004*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

7. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

Right to equal application and equal protection of the law

8. **Clause 4** may affect the rights and liberties of individuals by excluding land from the definition of affected land that may otherwise have been covered by the Collingwood Park State guarantee.

9. The Collingwood Park State guarantee was introduced as an amendment to the *Mineral Resources Act* in 2008 to provide a guarantee to land owners in Collingwood Park that the state government would repair or purchase property damaged by mine subsidence.

10. Clause 4 would amend the definition of 'affected land' in section 381A of the *Mineral Resources Act* to narrow the definition to land that:

- was part of Collingwood Park on 5 November 2008; and
- is used only for a residential, charitable or religious purpose.

11. In relation to consistency with fundamental legislative principles, the explanatory notes state (at 12 and 15):

The definition of 'affected land' is also amended to clarify that 'affected land' is land used only for a residential, charitable or religious purpose. This amendment which clarifies the original intent of the State Guarantee will not negatively impact on any claims submitted to date as there have been no existing claims in relation to land other than residential land…

Clause 4 amends section 381A to clarify that the definition of "affected land" means land that, on 5 November 2008 was used only for a residential, charitable or religious purpose and was part of the place given the name of Collingwood Park and entered in the Gazetteer of Place Names under the Place Names Act 1994. As was the original intent.

12. **Clause 16** would insert new offence provisions in the *Petroleum and Gas (Production and Safety) Act* as identified below.

Amended section	Proposed offence	Proposed maximum penalty
175C(1)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual
175C(3)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual
175H(2)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual
175H(3)	Failing to ensure corporation complies with legislation	Penalty for contravention by individual

13. The proposed offences, detailed above, may impose liability for acts or omissions of others.

14. By the operation of section 814 of the *Petroleum and Gas (Production and Safety) Act*, if a corporation commits an offence against new sections 175C(1), (3) or 175H(2), (3), each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation.

15. The explanatory notes do not address the issue of derivative liability in relation to consistency with fundamental legislative principles.

16. The committee notes that the Council of Australian Governments is undertaking a review of provisions that impose liability on executive officers. The object of the review is to ensure that sufficient justification exists to make officers liable for corporate fault.

17. Clause 16 is also referred to under the onus of proof.

Onus of proof

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

19. Legislation provides for the 'reversal' of the 'onus of proof' where it declares the proof of a particular matter to be a defence or when it refers to acts done without justification or excuse, the proof of which lies on the accused.

20. **Clause 16** would insert new sections 175C(1), (3) and 175H(2), (3) which would impose an evidential burden on a defendant.

21. As previously noted, under section 814 of the *Petroleum and Gas (Production and Safety) Act*, if a corporation commits an offence against new sections 175C(1), (3) or 175H(2), (3), each of the executive officers would also commit an offence of failing to ensure that the corporation complied with the legislation. Evidence that the corporation has been convicted of an offence is evidence that each of the executive officers has committed the offence of failing to ensure compliance (section 814(3)).Section 814(4) provides alternate defences for an executive officer, namely, that he or she:

- exercised reasonable diligence to ensure compliance; or
- was not in a position to influence the relevant conduct of the corporation.

22. The explanatory notes address the onus of proof (at 11):

> *Departmental consideration was given to whether the inclusion of the common provision into the* Petroleum and Gas (Production and Safety) Act 2004*, to provide that where a corporation has been convicted of an offence, then its Executive Officers are also taken to be guilty of an offence could be a reversal of the onus of proof.*
>
> *However, section 814(4)* Petroleum and Gas (Production and Safety) Act 2004 *provides adequate defences for Executive Officers, by allowing them to prove that either they exercised reasonable diligence to ensure their corporation complied with the relevant provision; or they were not in a position to influence the corporation's conduct in relation to the offence.*

Retrospective operation

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

24. **Clauses 6 and 26** may have the potential to adversely affect rights and liberties of individuals retrospectively.

25. Clause 6 would insert new section 783 in the *Mineral Resources Act* to provide that the proposed amended definition of affected land, for the purposes of the Collingwood Park state guarantee, have retrospective effect to 5 November 2008.

26. Where legislation may have retrospective operation, the committee examines whether the retrospectivity might have any adverse effects on rights or liberties or whether obligations imposed retrospectively might be unduly onerous. When considering sufficient regard, the committee generally examines whether:

- the retrospective operation would be adverse to persons other than the government; and
- individuals would have relied upon and would have legitimate expectations based on the existing law.

27. In relation to consistency with fundamental legislative principles, the explanatory notes state (at 12):

> *Clause 6 inserts a transitional provision under section 783 to provide that section 381A is taken to have had effect on and from 5 November 2008 when part 10AA of the* Mineral Resources Act 1989 *(which includes section 381A) commenced. The amendments are drafted on the basis that the State Guarantee was intended to apply to land that was in Collingwood Park at the time the State Guarantee was given, the boundaries of Collingwood Park have since changed.*

28. Clause 26 would insert new section 954 in the *Petroleum and Gas (Production and Safety) Act* to provide that the proposed amendment of section 910(1)(a)(i) have retrospective effect from 31 December 2010.

29. The proposed amendments to section 910 would provide that for renewal applications dealing with the conversion of an authority to prospect issued the *Petroleum Act 1923*, certain requirements as to the timing, approved form and fees will not apply.

30. The explanatory notes provide (at 11):

Section 910 of the Petroleum and Gas (Production and Safety) Act 2004 *is amended to apply amendments to the application processes to convert a authority to prospect held under the* Petroleum Act 1923 *with a replacement tenure under the* Petroleum and Gas (Production and Safety) Act 2004 *retrospectively (to 31 December 2004).*

The amendment corrects an error in the original drafting to reflect the original intent and current administrative practice for applications for replacement tenure. The proposed retrospective effect is not considered to negatively impact on the rights and liberties of individuals but rather will actually provide benefits by ensuring applications processed under the incorrect provision are protected from any risk of being seen as invalid.

31. The committee invites the minister to provide further information, in relation to the consistency of clause 6 with rights and liberties of individuals, about:

- the boundary changes to Collingwood Park, including any map of the boundary changes; and
- the effect that clause 6 will have on the rights and liberties of individuals under the Collingwood Park State guarantee.

Compulsory acquisition of property

32. Section 4(3)(i) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.

33. Under the Collingwood Park State guarantee, section 381B of the *Mineral Resources Act* provides that the State guarantees to purchase at market value any affected land that has subsidence damage and is considered uneconomical to repair. Market value is not defined.

34. **Clause 5** would amend section 381B to insert a definition of market value based on the market value of the land at the time that the chief executive forms the opinion that it is not cost effective to repair the damage and as if the subsidence had not occurred.

35. In relation to consistency with fundamental legislative principles, the explanatory notes state (at 11-12):

Part 10AA of the Mineral Resources Act 1989 gives a guarantee by the State in relation to particular land in Collingwood Park affected by subsidence.

Part of the State Guarantee is to purchase land at 'market value'. However, 'market value' is not defined, a new definition is inserted to make it clear that it is the 'market value' the land would have had, if the subsidence damage had not happened, at the time the chief executive formed the opinion that it was not cost-effective for the State to repair the damage. As the department has given written offers of purchase in relation to current claims, no current claims will be affected by the changes. The effect of the amendments will however provide clarity for future negotiations in relation to claims.

Clear meaning

36. Section 4(3)(k) of the *Legislative Standards Act* 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 way.

37. **Clauses 18 and 28** may not be drafted in a sufficiently clear way as the new sections cannot be read without having reference to another Act.

38. Clauses 18 and 28 would incorporate definitions of 'acquires' and 'co-ordinator general' in the *Petroleum and Gas (Production and Safety) Act* by reference to the definitions contained in the *State Development and Public Works Organisation Act 1971.* These definitions are not reproduced within the bill.

39. The committee draws to the attention of Parliament, clauses 18 and 28, regarding the incorporation of definitions in the bill by reference to definitions contained in another Act.

Sufficient regard to the institution of Parliament

Delegation of legislative power

40. Section 4(4)(a) of the *Legislative Standards Act* 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.

41. **Clause 16,** new section 175H(2) may allow the delegation of legislative power in an inappropriate case.

42. New section 175H(2) would delegate legislative power to prescribe for an offence, the nature of the records, duration and way records must be kept for each supply by the selling entity of gas from a prospective gas production land reserve.

43. The explanatory notes state (at 6):

> *Tenure holders for Prospective Gas Production Land Reserve land and entities who purchase, or are otherwise supplied, gas from said land for further sale or supply will also be required to keep records of all sales and supply agreements and provide those records to the Government on request. A regulation-making power is provided to establish the type of records to be kept, as well as the period they are to be kept for and the manner in which they are kept. Regulations will also provide the circumstances in which an internal company auditor/chief financial officer should notify and/or report to the Minister or Chief Executive in relation to a potential breach of an Australian market supply condition. Monitoring powers have been designed to place the onus on industry to ensure compliance, whilst minimising costs. They are not onerous in design, complementing existing financial reporting requirements under the* Corporations Act 2001 *(Cth).*

44. However, the explanatory notes do not provide specific information regarding the appropriateness of the delegation of legislative power in new section 175H(2).

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

45. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

46. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

47. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and generally contain the information required by section 23.

Consistency with fundamental legislative principles

48. The committee notes that in relation to a number of matters regarding the consistency of the legislation with fundamental legislative principles identified above, specific information and/or justification was not provided in the explanatory notes.

4. PARLIAMENT OF QUEENSLAND (REFORM AND MODERNISATION) AMENDMENT BILL 2011

Date introduced: 5 April 2011

Responsible minister: Hon AM Bligh MP

Portfolio responsibility: Premier and Minister for Reconstruction

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 35** amending powers conferred on an authorised person to enter land without warrant or consent;
   - **clause 2(1)** providing for certain amendments to have retrospective operation;
   - **clause 7**, conferring responsibilities on the statutory Committee of the Legislative Assembly and which may not be drafted in a sufficiently clear and precise way; and
   - **clause 29** which may not be drafted in a sufficiently clear way as it does not include a note regarding definitions of terms included in the *Acts Interpretation Act*.
2. The committee invites the Premier to provide further information regarding the application of fundamental legislative principles to:
   - **clause 41** and whether it is unambiguous and drafted in a sufficiently clear and precise way;
   - **clause 7** and whether it would allow undue Executive intrusion into the separate parliamentary branch of government;
   - **clauses 7 and 41**, respectively conferring responsibilities on the proposed statutory Committee of the Legislative Assembly and Ethics Committee, and whether the proposed provisions would have sufficient regard to the institution of Parliament;
   - **clause 29**, providing for the establishment, operation and role of portfolio committees, and whether it would have sufficient regard to the institution of Parliament; and
   - **clause 7** and whether it might impair the role and status of the Speaker.
3. In relation to the consideration of the bill, and if the bill in its current drafted form has sufficient regard to the institution of Parliament, two members of the committee – the Deputy Chair, Mr Peter Wellington MP, and Dr Alex Douglas MP – find the bill in its current draft form, may allow undue executive intrusion by the Government, into the separate Parliamentary branch of Government, and that this part of the bill should not be supported in its present form.
4. The committee invites the Premier to provide information regarding the consistency of the explanatory notes with section 23 of the *Legislative Standards Act*.

BACKGROUND

5. The legislation would:
   - require the tabling of explanatory notes in respect of all subordinate legislation;
   - establish a new Legislative Assembly committee system;
   - create the parliamentary position of 'Manager of Opposition Business'; and
   - combine a register of written waivers as to public appointment with the Register of Members' Interests.

LEGISLATIVE PURPOSE

6. The policy objectives of the bill are to (explanatory notes, 1):

> *… reform and modernise the Queensland parliamentary committee system to strengthen and support the role of the Legislative Assembly in scrutinising legislation and executive government.*

7. Accordingly, the bill would amend the *Parliament of Queensland Act 2001*. In addition, it would make associated amendments to the:

- *Auditor-General Act 2009*;
- *Criminal Organisation Act 2009*;
- *Electoral Act 1992*;
- *Information Privacy Act 2009*;
- *Integrity Act 2009*;
- *Legislative Standards Act*;
- *Ombudsman Act 2001*; and
- *Right to Information Act 2009*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Evidence provided to the committee

8. To assist its examination of the application of fundamental legislative principles to the amending bill, the committee sought advice from Professor Gerard Carney, Deputy Dean, Faculty of Law, Bond University. A copy of the advice received from Prof Carney follows immediately after this chapter.

9. In this chapter, reference is made to Prof Carney's advice and to:

- evidence provided to the committee during meetings regarding the bill held on 6 April 2011 and 9 May 2011 by –
  - Mr Mike Reynolds;
  - Mr Jim Fouras;
  - Hon John Mickel MP, Speaker, Parliament of Queensland;
  - Mrs Beryce Nelson;
  - Hon Kevin Rozzoli;
  - Mr John Pyke;
  - Dr Geoff Allan; and
  - Hon Ms Judy Spence MP, Leader of the House; and
  - Mr Neil Turner (evidence received on 9 May 2011); and
- submissions received regarding the bill, with submissions received from:
  - Mr John Pyke;
  - Mr Harry Evans; and
  - Hon John Mickel MP, the Speaker of the Legislative Assembly.

10. The committee has authorised the tabling and publication of the transcript of the evidence received (with the exception of evidence received on 9 May 2011, to be tabled subsequently), documents tabled during the hearing of evidence and the submissions. Each is available at: www.parliament.qld.gov.au/slc.

Scope of committee's responsibility

11. The submission received from the Hon John Mickel MP, Speaker of the Legislative Assembly, raised an issue regarding the committee's responsibilities regarding bills.

12. Section 103(1) states that the Scrutiny of Legislation Committee's area of responsibility is to consider the application of fundamental legislative principles to particular Bills and particular subordinate legislation … by examining all bills and subordinate legislation.

13. The nature of this 'technical scrutiny' was examined in some detail in a lengthy submission to the Parliamentary Committee System Review Committee.[5] It is also discussed in chapter 6 of *Delegated Legislation in Australia*.[6]

14. In his submission, the Hon Mickel stated (at 3):

> *I ask the committee to consider how it is being drawn into a defective and deceptive process of validating illegitimately conceived aspects of the Bill in question. The committee has been asked in effect to give credence and authority to legislation that in part has been improperly conceived and does not adhere to fundamental legislative principles. If the Bill were to receive the committee's imprimatur, it would be seen by the Parliament as being properly conceived in terms of policy objectives, as being the subject of an appropriate level of consultation and also as having sufficient regard for fundamental legislative principles. In truth, however, the Bill does not withstand scrutiny on any of these grounds.*
>
> *I ask the committee to consider the important role it can play in acting as a check and a balance on what clearly are legislative proposals arising from the unauthorised actions of a Parliamentary committee. Those Review Committee's recommendations which unambiguously fall outside the committee's terms of reference can be seen, and ought to be seen, as the work and product of a "rogue" committee. The Scrutiny of Legislation Committee has an obligation to the Parliament to hold this committee to account, and to not allow those recommendations that are not within the committee's terms of reference to form the basis of legislative proposals to be submitted via the Scrutiny of Legislation Committee to the Parliament for approval.*

15. This matter was raised also in evidence provided to the committee (see transcript at 1 (Reynolds), 5 (Fouras), 7 (Mickel), 12 (Nelson), 14 (Rozzoli) and 25 (Pyke)).

16. With due respect to and consideration of the request from the Speaker of the Legislative Assembly and the others who raised this matter, the committee has determined that the holding of a past select committee to account would not fall within its statutory responsibilities. It may be a matter for the Legislative Assembly (see statements of Mr Pyke, transcript, 25).

17. The committee notes that, in its consideration as to the enactment of the provisions of the Parliament of Queensland (Reform and Modernisation) Bill, the report of the Parliamentary Committee System Review Committee referred to in the submission is only one element of the evidence to be weighed by the Legislative Assembly in relation to the bill. If, as suggested by the Speaker of the Legislative Assembly in his submission, the recommendations to the Legislative Assembly made in the report do not in themselves appear to be based on the weight of evidence, or to be contrary to the weight of evidence, these are matters for the consideration of the Legislative Assembly in relation to the bill.

18. In this chapter, the committee examines the application of fundamental legislative principles to the bill. Consistent with that responsibility, the committee provides the Legislative Assembly with relevant information. In particular, the committee provides significant information and seeks further information about whether the bill would have sufficient regard to rights and liberties of individuals and the institution of Parliament.

19. In relation to consistency of the bill with fundamental legislative principles, the explanatory notes state generally (at 3):

> *The Bill is consistent with the fundamental legislative principles set out in the* Legislative Standards Act 1992.

Sufficient regard to rights and liberties of individuals

Power to enter premises

20. Section 4(3)(e) of the *Legislative Standards Act* 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.

21. **Clause 35** would amend powers conferred on an authorised person to enter land without warrant or consent.

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5 Available at: www.parliament.qld.gov.au/CSRC.

6 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed, 2005).

22. Currently, section 99 of the *Parliament of Queensland Act* allows a committee member or authorised person of the Public Accounts and Public Works Committee to enter onto premises without warrant or consent where:

    - the chief executive of the constructing authority for the works attempted but was unable to obtain consent; and
    - at least seven days' written notice of the entry has been given to the owner or occupier of the place.

23. Clause 35 would amend section 99 to:

    - extend the power of entry and inspection to all portfolio committees;
    - require an authorised person who enters and inspects a place without consent or warrant to give written notice, within seven days after the entry, to the owner or occupier of their name and the date and time of entry; and
    - exclude residential premises.

24. The explanatory notes address this issue (at 11):

    The Bill reflects the Scrutiny of Legislation Committee's comments in Legislation Alert 01/11 Neighbourhood Disputes Resolution Bill 2010. Accordingly, the clause also contains safeguards to protect fundamental legislative principles in relation to restricting powers of entry. The clause ensures that if an authorised person enters a place in the occupier's absence, the owner or occupier must be supplied with details relating to the entry. It also excludes the application of these provisions to residential premises.

Retrospective operation

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

26. **Clause 2(1)** would provide for certain amendments to have retrospective operation. These amendments relate to the remuneration of the Committee of the Legislative Assembly and the 'Manager of Opposition Business' and would have retrospective effect from 10 March 2011.

27. Clause 2 would provide for the following amendments to the *Parliament of Queensland Act* to have effect from 10 March 2011:

    - section 112(1)(a) would be amended to include the office of Minister of Opposition Business and the Committee of Legislative Assembly within the list of offices and committees entitling members to additional salary entitlements; and
    - new section 173(3) would be inserted to provide retrospective effect to 10 March 2011 to the Gazette notice providing for when the additional salary of the office of Manager of Opposition Business takes effect.

28. The committee examines legislation that would have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

    - the retrospective operation would be adverse to people other than the government; and
    - people have relied on and would have legitimate expectations based on the existing law.

29. The explanatory notes state (at 3):

    The Bill is consistent with the fundamental legislative principles set out in the Legislative Standards Act 1992*. While there are some minor provisions that will apply from 10 March 2011, the date on which the Parliament resolved to establish a Committee of the Legislative Assembly, the legislation does not adversely affect rights and liberties of, or retrospectively impose obligations on, individuals.*

Clear meaning

30. Section 4(3)(k) of the *Legislative Standards Act* 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 way.

31. **Clause 7**, which would confer responsibilities on the statutory Committee of the Legislative Assembly, may not be drafted in a sufficiently clear and precise way.

32. New section 79E(d) would confer the Committee of the Legislative Assembly with responsibility which would include 'any other matters for which the committee is given responsibility under the standing rules and orders'. The broad terms used in the proposed provision may mean that it may not be drafted in a sufficiently clear and precise way, as discussed below, under the heading 'Independence of the Legislative Assembly'.

33. **Clause 29** may not be drafted in a sufficiently clear way as it does not include a note regarding definitions of terms defined in the *Acts Interpretation Act 1954*.

34. New section 88 would provide for the establishment of portfolio committees. It uses the terms 'department' and 'Administrative Arrangements'. These terms are defined, respectively, in sections 33 and 36 of the *Acts Interpretation Act*. However, as new section 88 does not include a note referring to these definitions, it may not be drafted in a sufficiently clear and precise way.

35. **Clause 41** may:

- not be drafted in a sufficiently clear and precise way when it refers to 'breaches of privilege'; and
- be ambiguous as to the scope of operation of new section 104C.

36. New section 104B, based on an existing provision in the *Parliament of Queensland Act*, would confer the Ethics Committee (to be established under clause 41) with responsibility to deal with 'breaches of parliamentary privilege by members of the Assembly and other persons'. However, it may be more appropriate for the new section to refer to 'alleged breaches'.

37. New section 104C, again based on an existing provision in the *Parliament of Queensland Act*, would provide for complaints about the ethical conduct of particular members to be made to the statutory Ethics Committee. As drafted, it is not clear whether new section 104C would allow:

- members of the public to make complaints directly to the Ethics Committee; and
- the Ethics Committee to instigate an inquiry into complaints regarding ethical conduct of a member of the Legislative Assembly on its own initiative.

38. The committee notes that, although new sections 104B and 104C are based on existing provisions of the *Parliament of Queensland Act*, within the context of reforms to implement wider public involvement in the parliamentary committee system, the committee invites the Premier to provide clarification regarding the intended operation of new sections 104B and 104C.

Sufficient regard to the institution of Parliament

Institution of Parliament

39. Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of Parliament. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

Independence of the Legislative Assembly

40. **Clause 7** may not have sufficient regard to the institution of Parliament as it may allow undue Executive intrusion into the separate parliamentary branch of government.

41. In *Bell v Beattie & Ors* [2003] QSC 333, MacKenzie J (as he then was) spoke in his judgment of a need to ensure the independence of the Legislative Assembly within our system of government in Queensland. Accordingly, the courts should accord the Parliament:[7]

> *… the respect which is conventionally accorded to a separate branch of Government with its own ancient rights and privileges reflected in the* Bill of Rights *of 1689, established by long standing tradition and recognized in many places including in the law of Parliament.*

42. Clause 7 would establish a parliamentary committee with membership dominated by the 'Executive'. In this section, the term Executive is used to mean either:

- Executive Government; or
- Executive members of the Government and Opposition.

43. Accordingly, the distinction is made in the text, where relevant.

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7 At [28].

44. Clause 7 would insert new chapter 5, part 1A of the *Parliament of Queensland Act* to establish the Committee of the Legislative Assembly. Two issues arise regarding the Committee of the Legislative Assembly's:

- membership; and
- responsibilities.

45. First, in relation to membership, there are two aspects. One is that the membership may be dominated by Executive Government, with a limited role for the Speaker (discussed below, also, under the heading 'Office and role of the Speaker'). The other is in relation to the membership not including backbench or Independent members.

46. New section 79B(1) would provide for the committee membership to comprise the:

- Leader of the House or 'alternate' (see new section 79B(2));
- Premier or alternate;
- Deputy Premier or alternate;
- Manager of Opposition Business or alternate;
- Leader of the Opposition or alternate;
- Deputy Leader of the Opposition or alternate; and
- Speaker, when the committee was dealing with a matter relating to the Standing Rules and Orders.

47. New section 79C would provide for the Leader of the House to be the chairperson of the committee and new section 79D states that a quorum of the committee would be four members other than the Speaker and that the chairperson would have a casting vote.

48. Currently, a select Committee of the Legislative Assembly exists, having been established on 10 March 2011 by resolution of the Legislative Assembly. The membership of the current select committee mirrors the proposed membership of the Committee of the Legislative Assembly to be established by clause 7.

49. Prof Carney's advice indicates (at 3-4) that the proposed membership in clause 7 might facilitate intrusion by the Executive into the affairs of the Legislative Assembly, for a number of identified reasons.

50. Similarly, in a submission to the committee, Mr Harry Evans, former Clerk of the Australian Senate, expressed concern about the proposed restriction in clause 7 of the membership to Government and Opposition Executive members or their nominees. Mr Evans stated that committee decisions would be likely to reflect increasingly the imperatives of the Executive rather than the rights of ordinary members and of the Legislative Assembly.

51. Evidence to the committee also raised concern regarding the effect upon the independence of the Legislative Assembly because of possible the Executive intrusion (see transcript, 2-3 (Reynolds), 5 (Fouras), 14 (Rozzoli) and 23 and 25 (Pyke)).

52. Former Speaker Reynolds said to the committee (transcript, 3):

I think executive governments always try to control the parliament. The Speaker's role is to really give a fair go to all members.

53. In relation to the second aspect, Mr Evans' submission and evidence provided to the committee by expressed concern regarding a lack of backbench and Independent members on the Committee of the Legislative Assembly (see transcript, 4-6 (Fouras), 7-8 (Mickel), 14 (Rozzoli) and 12 (Nelson)).

54. Hon Rozzoli stated (transcript, 14):

… the history of parliaments that are run by some sort of executive board or executive decision-making authority is that they have generally failed because they strip power from the rank-and-file members of the parliament and breach the doctrine of the collective power of the parliament, which is that decisions affecting the parliament are made by a representative majority of the members of that parliament. It cannot be construed by any stretch of the imagination that an executive dominated committee represents the rank-and-file interests of the parliament.

55. Second, in relation to committee responsibilities, clause 7 (new section 79E(d)) would confer the Committee of the Legislative Assembly with responsibility which would include 'any other matters for which the committee is given responsibility under the standing rules and orders'. This clause is referred to above also, under the heading 'Clear meaning'.

56. Although, on its face, new section 79E(d) may not allow undue Executive Government intrusion into the affairs of the Legislative Assembly, the committee notes two matters.

57. One arises from the potential for increased dominance by the Executive Government in the functioning of the Parliament and, in particular, in respect of the administration of the Parliament. The Government response to the recommendations in the report of the Parliamentary Committee System Review Committee may identify a broader range of responsibilities regarding the management and administration of the Parliament to be conferred on the Committee of the Legislative Assembly than the responsibilities currently specified in new section 79E(d).[8] The Government response states (at 4-5):

The Government will establish the CLA. The CLA will have three major functions. Firstly, it will arrange the business of the Parliament, that is agree the timetable for the consideration of House business and make determinations in relation to the referral of Bills to portfolio committees. Secondly, it will consider changes to the Standing Orders, the rules of the House, and propose changes to the operation of the Parliament. Thirdly, it will act as a committee to manage and ensure the implementation of the recommendations of the Review. That is, the CLA is to oversee the parliament's budget, facilities management for parliamentary committees, maintenance for the parliamentary buildings and policies for the management of the Parliament.

58. Section 5 of the *Parliamentary Service Act 1988* (Administration under Speaker's control) states that the Speaker controls accommodation and services in the parliamentary precinct and accommodation and services supplied elsewhere by the Legislative Assembly for its members.

59. However, the committee notes that the report of the Parliamentary Committee System Review Committee, *Review of the Queensland Parliamentary Committee System*, recommended that:[9]

- the *Parliamentary Service Act 1988* be reviewed. The Committee of the Legislative Assembly should determined the budget and resources of committees and make submissions to government to ensure the committees of the Parliament are sufficiently resourced (recommendation 10);
- the Committee of the Legislative Assembly oversee the establishment of new committee facilities in the parliamentary precinct (recommendation 11); and
- responsibility for the management of construction and maintenance of the parliamentary buildings and electorate offices (along with the relevant budget) be transferred to the Department of Public Works (recommendation 12).

60. In respect of recommendation 12, the Government Response to the Committee System Review Committee report states (at 5-6):[10]

The Government supports the ability of the Parliament to decide which organisations are best placed to deliver maintenance services to the Parliament. Accordingly, the Government will move to empower the CLA to oversee the management of construction and maintenance of the parliamentary buildings and electorate offices.

The Government acknowledges that for more than 125 years, until the late 1980s, a committee of Members of Parliament have been responsible for overseeing the management of parliamentary buildings. That is, there was a parliamentary buildings committee from the first parliament in 1860. For a large part of that time, the Department of Public Works undertook the work in the Parliamentary precinct. The former Parliamentary Building Committee and the Department of Public Works worked together on buildings and maintenance in the Parliament. There is no reason why this practice could not return, should it be agreed by the CLA.

61. Accordingly, it appears that, under new section 79E(d), the Committee of the Legislative Assembly may be conferred with the administrative functions currently conferred on the Speaker by section 5 of the *Parliamentary Service Act*. This matter was discussed in the submission by Mr Pyke (and in evidence, see transcript 16 and 22-3) and acknowledged by the Leader of the House in evidence to the committee (transcript, 21).

62. Concern about new section 79E(d) – and subsequent amendments to the bill, the *Parliamentary Service Act* or the standing rules and orders facilitating a greater Executive Government role regarding the management and administration of the Legislative Assembly – and possible undue Executive Government intrusion regarding parliamentary administration is noted in Prof Carney's advice (at 5-6 and 8). In addition, it was expressed to the committee by the Speaker of the Legislative Assembly (transcript, 7-8 and 11) and former Speakers of the Queensland and New South Wales' Parliaments (see: transcript, 2 (Reynolds), 4 (Fouras) and 14 (Rozzoli); see also transcript, 12-3 (Nelson)).

63. The committee notes also that the Speaker of the Legislative Assembly has expressed concern to the committee (in a submission dated 29 April 2011) that 'unwarranted executive intrusion into the

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8 Tabled on 9 March 2011, available at: www.parliament.qld.gov.au/CSRC; see also transcript 4 (Fouras) and 22 (Pyke).

9 Available at: www.parliament.qld.gov.au/CSRC.

10 Tabled on 9 March 2011, available at:: www.parliament.qld.gov.au/CSRC.

management affairs of the Parliament' has occurred already. The Hon Mickel MP advised (at 4) that the Cabinet Budget Review Committee had provided the Parliamentary Service with a 2011-12 budget allocation 'to undertake a business case to examine options for committee meeting space, for example relocation of corporate services', without parliamentary input.

64. The other matter regarding new section 79E arises from the broad scope of the general wording used in new section 79E(d).

65. Section 11 of the *Parliament of Queensland Act* states that the Legislative Assembly prepares and adopts standing rules and orders. Accordingly, it will be the Legislative Assembly which will confer responsibility to the Committee of the Legislative Assembly under new section 79E(d).

66. However, in the context of the issues above regarding possible undue Executive Government intrusion into the separate parliamentary branch of Government arising from the stated responsibilities likely to be conferred on the Committee of the Legislative Assembly, the committee notes a current Executive Government role regarding the responsibilities conferred on the Committee of the Legislative Assembly by resolution. When established on 10 March 2011, the Committee of the Legislative Assembly was conferred with responsibility to consider:

- issues arising from the Report of the Committee System Review Committee tabled on 15 December 2010 titled *Review of the Queensland Parliamentary Committee System*;
- issues arising from the debate in the Legislative Assembly on the noting of the committee report;
- the government response to the committee report; and
- issues and matters relating to the reforms contained in the report and incidental matters referred to the committee by the Premier.

67. The last of the responsibilities, conferring responsibility to consider incidental matters referred 'by the Premier' may be contrasted with section 84(2) of the *Parliament of Queensland Act* which requires a statutory committee to deal with an issue referred to the committee 'by the Assembly'. The conferral under new section 79E(d) of a responsibility to consider matters referred by the Premier might indicate also a committee more responsive to executive imperatives than parliamentary imperatives.

68. The committee invites the Premier to provide information about whether clause 7 would allow undue Executive intrusion into the separate parliamentary branch of government.

69. In relation to the consideration of the bill, and if the bill in its current drafted form has sufficient regard to the institution of Parliament, two members of the committee – the Deputy Chair, Mr Peter Wellington MP, and Dr Alex Douglas MP – find the bill in its current draft form, may allow undue executive intrusion by the Government, into the separate Parliamentary branch of Government, and that this part of the bill should not be supported in its present form.

Scrutiny role of Parliament

70. **Clauses 7 and 41**, respectively conferring responsibilities on the proposed statutory Committee of the Legislative Assembly and Ethics Committee, may have insufficient regard to the institution of Parliament.

71. It would insert new chapter 5, part 1A of the *Parliament of Queensland Act* to establish a Committee of the Legislative Assembly. Two issues arise from the evidence provided to the committee.

72. First, new section 79E would provide for the Committee of the Legislative Assembly to have the following areas of responsibility:

- the ethical conduct of members;
- parliamentary powers, rights and immunities;
- standing rules and orders about the conduct of business by, and the practices and the procedures of, the Assembly and its committees; and
- any other matters for which the committee is given responsibility under the standing rules and orders.

73. In his advice, Prof Carney examines the reviews which led to the establishment of the existing parliamentary committee system. In respect of the proposed system, he reiterates (at 5) an earlier parliamentary concern (of the Parliamentary Committee for Electoral and Administrative Review) regarding recommendations made by the Electoral and Administrative Review Commission that the breadth and significance of the areas of responsibility to be conferred by new section 79E might

threaten the capacity of the Committee of the Legislative Assembly to perform its role properly (see also transcript, 5 (Fouras) and 14 (Rozzoli)).

74. Prof Carney notes with concern a need to ensure flexibility in decision-making and the capacity to act expeditiously when necessary; for example, about matters of parliamentary administration, including security matters. Provision is required for continuity following the dissolution of the Legislative Assembly – currently, the Speaker continues in office until the new Parliament convenes. Evidence about this important issue was provided to the committee by the current and a former Speaker and a former member (transcript, 2 (Reynolds), 10 (Mickel) and 12 (Nelson). Former Speaker Reynolds stated:

The Speaker makes decisions in regard to the parliamentary precinct, the parliament, questions on notice, the security of the parliament—a whole range of things that come up on a day-to-day basis. They come up in the middle of the night at times. Are we expecting this committee, in terms of buildings and the precinct, to take the decisions that the Speaker is going to be taking?

75. Second, bifurcation of committee responsibility for matters regarding parliamentary privilege may lead to inconvenience or confusion.

76. Following commencement of all proposed provisions, the:

- Committee of the Legislative Assembly would have responsibility for parliamentary powers, rights and immunities (clauses 7, 25 and 28); and
- Ethics Committee would deal with (new section 104B) –
  - complaints about the ethical conduct of particular members; and
  - alleged breaches of parliamentary privilege by members of the Assembly and other persons (clause 41, inserting a new chapter 5, part 4).

77. Evidence provided to the committee suggests that the division of parliamentary privilege in this way may not serve the best interests of the Legislative Assembly (see Evans and transcript, 25-6 (Pyke)).

78. **Clause 29**, providing for the establishment, operation and role of portfolio committees, may have insufficient regard to the institution of Parliament.

79. It would replace chapter 5, part 3 of the *Parliament of Queensland Act*. New section 88 would provide for the establishment, by standing rules and orders, of portfolio committees. New section 92 would prescribe the role of portfolio committees. Five issues arise regarding the parliamentary functions of questioning and criticising government on behalf of the people (see *Egan v Willis* (1998) 195 CLR 424 at 451, quoting Mill, and cited (at 4) in advice received from Prof Carney).

80. First, given the breadth of proposed portfolios,[11] Prof Carney (at 9-10), identifies a risk that individual portfolio committees may be unable to perform effectively the roles identified in new section 92.

81. Second, new section 92(1) may raise issues regarding scrutiny of appropriations by committees. New section 92(1) states that, in relation to its portfolio areas, a committee 'may' consider appropriation bills.

82. However, the parliamentary appropriation bill would not fall within new section 92(1).

83. Third, the committee notes that the general provision in new section 92(1) may not provide clearly for scrutiny of appropriation for entities which do not fall neatly within a 'portfolio area'. Such entities may include:

- the office of the Governor;
- statutory authorities, statutory offices and similar entities; and
- government owned corporations, which may fall within more than one portfolio area.

84. Fourth, new section 93 would confer portfolio committees with responsibility for examining each bill and instrument of subordinate legislation in its portfolio area. Accordingly, the committee must consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles to the legislation; and
- for subordinate legislation—its lawfulness.

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[11] See: 'Table of proposed new committee structure', tabled on 5 April 2011 (Ref no 4206), available at: www.parliament.qld.gov.au/view/legislativeAssembly/tabledPapers/home.

85. In addition, a portfolio committee:

- would be conferred with responsibility regarding relevant public accounts (including the assessment of the integrity, economy, efficiency and effectiveness of government financial management) and public works (amended section 95);
- might refer issues within its area of responsibility regarding public accounts to the auditor-general for consideration (amended section 96);
- could exercise rights of entry and inspection of places (amended section 99);
- must deal with commercially sensitive information in private session (amended section 101); and
- may report commercially sensitive information to the Assembly only if the committee considered to do so would be in the public interest (amended section 102).

86. Both Prof Carney (at 10) and Mr Evans (at 2) expressed concern to the committee that each portfolio committee might be unable to exercise, to the same degree, the specialist scrutiny functions of the Public Accounts and Public Works Committee and the Scrutiny of Legislation Committee. Mr Evans's submission states that the fragmentation of the scrutiny role might lead to inconsistent and uneven application of the task, causing confusion in the drafting and interpretation of legislation (see also transcript, 12 (Nelson)).

87. Finally, the committee notes a concern stated in the submission received from Mr Evans. It relates to the establishment of parliamentary committees under legislation:

> *I enter a comment on the potentially undesirable effect of establishing a committee system by statute rather than by resolution. This may result in the partial removal of the immunity of parliamentary proceedings from impeachment and question in other tribunals, and the subjecting of parliamentary deliberations to challenge before the courts. For example, would a person, using the terms of the statute, be able to contest in court a committee's interpretation of its terms of reference and seek to restrain it from hearing certain evidence, or attempt to restrain the Assembly from considering a committee report allegedly going beyond its statutory authority? Such questions arising from the use of statutes to regulate parliamentary proceedings have not been resolved as far as I am aware.*

88. The committee notes that the *Parliament of Queensland Act* and the *Crime and Misconduct Act 2001* currently provide for the establishment of committees. Each statute, when enacted, re-enacted earlier statutory provision for committees. Accordingly, generally speaking, the statutory committee system has existed in Queensland since 1995.

89. The committee notes further that the courts have examined the justiciability of parliamentary matters on a number of occasions since 1995. See, for example, *Bell v Beattie & Ors*, in which Mackenzie J stated (at [27] – [28]):

> *In* Eastgate v Rozzoli *(1990) 20 NSWLR 188, 199, Kirby P said that the power to issue injunctions and to make declarations in relation to the deliberative stages of proceedings in Parliament will virtually always be refused out of the necessity to permit Parliament to conclude its deliberations. Even after the passage of legislation, and before presentation of the Bill to the Governor for royal assent, the courts will "virtually never" issue an injunction or make a declaration at that stage. It will be left to the applicant to seek relief after the royal assent has been given and the Bill has become law.*
>
> *He said that it was in this way that the courts in Australia had achieved an appropriate balance between:*
>
> *(a) the fulfilment of their role as guardians of the rule of law, including in respect of any requirements that may be laid down by law and which Parliament is obliged to obey in respect of the passage of the particular law; and*
>
> *(b) the respect which is conventionally accorded to a separate branch of Government with its own ancient rights and privileges reflected in the* Bill of Rights of 1689*, established by long standing tradition and recognised in many places including in the law of Parliament.*
>
> *As to (b), see also* Parliament of Queensland Act 2001*, ss 8 and 9.*

90. The committee notes this issue because, as stated by Mr Evans, the relevant law is not settled.

91. The committee invites the minister to provide information about whether clause 29 would have sufficient regard to the institution of Parliament.

Office and role of Speaker

92. **Clause 7** might impair the role and status of the Speaker.

93. Clause 7 is examined also above under the headings, 'Independence of the Legislative Assembly' and 'Scrutiny role of Parliament'. It would insert new chapter 5, part 1A of the *Parliament of Queensland Act* to establish a Committee of the Legislative Assembly.

94. New section 79B(1)(g) would provide for the Speaker to be a member of the Committee of the Legislative Assembly 'when the committee is dealing with a matter relating to the standing rules and orders'.

95. Prof Carney identified (at 6) three direct adverse effects upon the role of the Speaker arising out of the proposed provision:

- the Speaker would no longer chair the Standing Orders Committee, the functions of which would be transferred to the statutory Committee of the Legislative Assembly;
- the Speaker would become a part-time member of the Committee of the Legislative Assembly, 'a central committee of the House dominated by the executive of the government and the opposition'; and
- the Speaker would receive different treatment from other members of the Committee of the Legislative Assembly.

96. In addition, the committee received a great deal of evidence regarding new section 79B(1)(g) (see transcript 1-3 (Reynolds), 5 (fouras), 8 (Mickel), 12-3 (Nelson), 14 (Rozzoli), but compare transcript 19-21 (Spence), 20 (Allan) and 22 and 24 (Pyke)).

97. The advice received from Prof Carney (at 8) examines the likely effect of the the Speaker's membership on the Committee of the Legislative Assembly being limited to proceedings when the committee is dealing with a matter relating to the standing rules and orders. Difficulty may arise in determining whether a matter before the Committee of the Legislative Assembly actually 'relates to' standing rules and orders. In this context, the committee notes that the Government response to the recommendations of the Parliamentary Committee System Review Committee states that the Speaker will be 'invited' to attend meetings when relevant.[12]

98. Prof Carney's advice identifies additional issues which suggest that the Speaker's limited membership of the Committee of the Legislative Assembly would affect adversely the Speaker's capacity to perform key functions of his or her role and, in turn, the functioning of the Parliament. Prof Carney states that even the perception of Executive intrusion tends to undermine the status of the Speaker and in turn that of the Assembly (see transcript, 7 (Mickel)).

99. In his submission, Mr Evans stated that the proposed section would relegate the Speaker to 'the position of a second-class member of the committee' and that he had 'never seen a presiding officer treated in such a way'.

100. Conversely, the Leader of the House advised the committee that in respect of the Speaker the only element of the bill which differed from the current position was that 'he is not longer the chair of the Standing Orders Committee but he becomes a member – a voting member of the Standing Orders Committee' (transcript, 19 and 21 (Spence) and 22 (Pyke)).

101. The committee invites the Premier to provide information about whether new section 79B(1)(g) would have sufficient regard to the institution of Parliament.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

102. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;

[12] At 5.

- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

103. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

104. Consistent with responsibilities under section 103 of the *Parliament of Queensland Act* and schedule 6 of the *Standing Rules and Orders of the Legislative Assembly*, the committee notes that explanatory notes were tabled at the first reading of the bill.

105. The submission received from the Hon Mickel MP, the Speaker of the Legislative Assembly, raised concerns regarding the compliance of the explanatory notes with section 23; in particular, the submission indicates statements in the explanatory notes may not comply with, or may be misleading with respect to:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

106. The committee invites the Premier to provide information regarding the consistency of the explanatory notes with section 23.

Requirement for explanatory notes for all subordinate legislation

107. The committee notes that the bill would amend part 4 of the *Legislative Standards Act*. Section 22(2) requires that, when 'significant subordinate legislation' is tabled in the Legislative Assembly, it must be accompanied by an explanatory note prepared under the authority of the responsible minister. Section 24 prescribes the content to be included in an explanatory note for significant subordinate legislation.

108. Clauses 4 and 5 would amend sections 22 and 24 respectively. All references to 'significant subordinate legislation' would be replaced with references to 'subordinate legislation'. The explanatory notes to the bill state (at 4):

This provides that when subordinate legislation is tabled in the Legislative Assembly, it is to be accompanied by an Explanatory Note

109. Therefore, clauses 4 and 5 will strengthen significantly parliamentary scrutiny and control of delegated legislative power, as provided in a recommendation for statutory reform of this nature made in committee report 42, Review of part 7 of the *Statutory Instruments Act*.[13]

[13] August 2010, available at: www.parliament.qld.gov.au/slc; see recommendation 5 and chapter 9.

The meaning of 'subordinate legislation'

110. Section 9(1) of the *Statutory Instruments Act* provides the definition of 'subordinate legislation'. Section 9(2)(b) states that 'a rule, order, direction or practice of the Legislative Assembly' is not subordinate legislation.

111. Accordingly, where the bill refers to 'standing rules and orders', it is referring to documents which are 'statutory instruments' within the definition in section 7 of the *Statutory Instruments Act*, but not 'subordinate legislation' within the definition in section 9.

112. The committee notes that, as such, 'standing rules and orders' must comply with section 4 of the *Legislative Standards Act*, and must be consistent with the principles that underlie a parliamentary democracy based on the rule of law. However, as the new section 93 would provide for the technical scrutiny of 'subordinate legislation', the technical scrutiny of standing rules and orders will not fall to be examined under new section 93 (clause 29).

Memorandum of Advice

To: The Chair of the Scrutiny of Legislation Committee
From: Gerard Carney, Professor of Law, Bond University
Date: 5 May 2011
Re: Parliament of Queensland (Reform and Modernisation) Amendment Bill 2011

Executive Summary

The Parliament of Queensland (Reform and Modernisation) Amendment Bill 2011 intends to amend the *Parliament of Queensland Act 2001* in the following ways in two stages – upon assent and later when the remainder of the Bill is proclaimed into force:

1. upon assent - by creating a new statutory committee, the Committee of the Legislative Assembly, to which are transferred the functions of the Standing Orders Committee and certain functions of the Integrity, Ethics and Parliamentary Privileges Committee;
2. upon proclamation - by authorising and requiring the Assembly under its Standing Rules and Orders to replace most of its other standing committees with "portfolio committees" to cover all departments of government;
3. upon proclamation - by transferring to these new portfolio committees, the functions of the Scrutiny Committee and of the Public Accounts and Public Works Committee, in so far as they relate to each committee's portfolio;
4. upon proclamation - by creating a new statutory committee, the Ethics Committee, to handle complaints about any failure to comply with the code of ethical conduct and any breaches of parliamentary privilege.

In terms of fundamental legislative principles, each of the above proposed amendments impacts on the institution of Parliament in the following ways:

1. Proposed Committee of the Legislative Assembly

a) The composition of the committee facilitates an intrusion by the Executive in the affairs of the Legislative Assembly, which will undermine the capacity of the House to perform its key constitutional functions.
b) The part-time membership of the Speaker on the committee impairs the role and status of the Speaker.
c) The committee's areas of responsibility, including the likelihood that further areas will be added, threaten the capacity of the committee to perform its role properly.
d) It would be inappropriate to transfer to the committee, as constituted, responsibility for the management of the parliamentary precinct and electorate offices.

2. New portfolio committees

It is necessary to ensure that the portfolio committees are adequately resourced, that their intended areas of responsibility are not so onerous that they prevent the committees from being effective, and that they receive expert assistance when needed, especially for their financial scrutiny role.

3. Specialist scrutiny and estimates roles

It seems unlikely that each portfolio committee will be able to exercise, to the same degree, the specialist scrutiny functions of the Public Accounts and Public Works Committee and of the Scrutiny Committee.

4. Split roles: ethics and privileges

The splitting of the roles, on the one hand of reviewing the register of interests, the code of ethical conduct and parliamentary privileges by one committee, and on the other of the handling of complaints and violations of those regimes by another committee, will not serve the best interests of the Legislative Assembly.

Introduction

I have been asked to advise the Committee on whether the Parliament of Queensland (Reform and Modernisation) Amendment Bill 2011, which was introduced in the Legislative Assembly by the Premier on 5 April 2011, has sufficient regard to the institution of Parliament and the rights and liberties of individuals, in accordance with the fundamental legislative principles in s 4 of the *Legislative Standards Act 1992* (Qld).

The Explanatory Notes to the Bill state: "The policy objectives of the Bill are to reform and modernise the Queensland parliamentary committee system to strengthen and support the role of the Legislative Assembly in scrutinising legislation and executive government". This is further elaborated on: "The proposed new structure is designed to create a parliamentary committee system that:

- contributes to the development of best practice policy and legislation;
- provides enhanced parliamentary oversight of the expenditure and activities of the government; and
- maintains the standards and operational requirements of Parliament, as a legislature and as a public sector organisation."

Clearly, these policy objectives are consistent with the fundamental legislative principle in s 4(4) of the *Legislative Standards Act 1992* (Qld) for every Bill to have "sufficient regard to the institution of Parliament".

This Bill only goes some way towards achieving its objectives. For instance, it does not actually establish or define the new portfolio committees; it merely lays the foundation for their establishment under Standing Orders.

The task of your Committee is to determine whether the Bill, if enacted in its present form, will support the institution of Parliament in the way contemplated by the Bill's policy objectives. Most Bills which are scrutinised by the Committee have little or no impact on Parliament itself. Since this Bill affects the core functioning of Parliament, it requires the closest scrutiny.

Impact of the Bill in terms of the Executive's policy objectives

This Bill seeks to achieve its objectives – at least in part - by amending the *Parliament of Queensland Act* 2001 in the following ways in two stages – upon assent and later when the remainder of the Bill is proclaimed into force:

1. upon assent - by creating a new statutory committee, the Committee of the Legislative Assembly, to which are transferred the functions of the Standing Orders Committee and certain functions of the Integrity, Ethics and Parliamentary Privileges Committee;
2. upon proclamation - by authorising and requiring the Assembly under its Standing Rules and Orders to replace most of its other standing committees with "portfolio committees" to cover all departments of government;
3. upon proclamation - by transferring to these new portfolio committees, the functions of the Scrutiny Committee and of the Public Accounts and Public Works Committee, in so far as they relate to each committee's portfolio;
4. upon proclamation - by creating a new statutory committee, the Ethics Committee, to handle complaints about any failure to comply with the code of ethical conduct and any breaches of parliamentary privilege.

Each of the above impacts is considered separately in terms of the fundamental legislative principles.

1. Proposed Committee of the Legislative Assembly

Clause 7 of the Bill proposes the insertion of a new Part 1A in Chapter 5 of the *Parliament of Queensland Act* 2001 (Qld) to establish in s 79A the Committee of the Legislative Assembly. Such a committee has already been established by resolution of the Legislative Assembly (referred to as "the current CLA").

The proposed membership of the committee under s 79B(1) is:

a) the Leader of the House or alternate;
b) the Premier or alternate;

c) the Deputy Premier or alternate;
d) the Manager of Opposition Business or alternate;
e) the Leader of the Opposition or alternate;
f) the Deputy Leader of the Opposition or alternate;
g) when the committee is dealing with a matter relating to the standing rules and orders – the Speaker.

"Alternate" is defined by s 79B(2) to mean another member of the Assembly nominated by the first member to perform that role.

Section 79C proposes this committee be chaired by the Leader of the House.

Section 79D provides that a quorum is 4 members (excluding the Speaker), and that each member has one vote with the chairperson having also a casting vote.

Section 79E proposes that the committee have the following "areas of responsibility":

a) the ethical conduct of members;
b) parliamentary powers, rights and immunities;
c) standing rules and orders about the conduct of business by, and the practices and the procedures of, the Assembly and its committees;
d) any other matters for which the committee is given responsibility under the standing rules and orders.

In relation to para (a) the ethical conduct of members, ss 79F and 79G make it clear that the committee is to review respectively the register of the interests of members and the code of ethical conduct for members. These integrity mechanisms are already established under Standing Orders and resolutions of the House. This function is being transferred from the Integrity, Ethics and Parliamentary Privileges Committee.

In relation to para (b), parliamentary powers, rights and immunities, s 79H provides that this area of responsibility "includes the powers, rights and immunities of the Assembly, and its committees and members." This reflects the current s 93. This function is also transferred from the Integrity, Ethics and Parliamentary Privileges Committee.

However, the new Committee is not being given responsibility for dealing with alleged violations of the register of interests requirements, the code of ethical conduct, nor breaches of parliamentary privilege. These functions are retained by the Integrity, Ethics and Parliamentary Privileges Committee until clause 41 of the Bill is proclaimed into force, whereupon the new Ethics Committee is established and assumes those functions (see ss 104B and 104C).

In relation to para (c), the Committee assumes the same responsibility of the current Standing Orders Committee (see current s 104), which has always been chaired by the Speaker.

In relation to para (d), it is by this provision that the Committee can acquire further areas of responsibility. Significantly, this can be achieved not by legislative amendment of the *Parliament of Queensland Act*, but simply by changes to the Standing Rules and Orders.

<u>Assessment in terms of Fundamental Legislative Principles</u>

The provisions of the Bill providing for the Committee of the Legislative Assembly clearly impact on the institution of Parliament. To assess that impact, it is necessary to consider three matters:

a) The composition of the committee;
b) The committee's areas of responsibility; and
c) The impact on the role of the Speaker.

(a) The composition of the committee

The composition of the committee is a matter of concern since it will be composed entirely of the executive of both government and opposition – except when the Speaker sits and that is only when the committee is dealing with the standing orders. The House has no ongoing say in the membership of the committee. Backbenchers may be appointed as the alternate by any of the specified members of the committee but that

is not guaranteed. Further, the tenure of each alternate is not assured since they are liable to be replaced at anytime, and are vulnerable to direct instructions from their nominator. This precarious position is hardly conducive to each alternate performing their role on the committee in the best interests of the Assembly.

The proposed composition of the committee appears to facilitate an intrusion by the Executive in the affairs of the Legislative Assembly, which will undermine the capacity of the House to perform its key constitutional functions.

It is axiomatic within our Westminster system of government that each House of Parliament is a separate institution of government, distinct from the Executive branch. The reason for that is not explained simply by citing the doctrine of separation of powers. The reason is to enable each House to perform its functions properly, namely, to be able to scrutinise bills and subordinate legislation and to scrutinise the activities of the other two branches of government - the executive and the judiciary.

The critical importance of the scrutiny role of each House was recognised by the High Court of Australia in *Egan v Willis* (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ:

> "A system of responsible government traditionally has been considered to encompass 'the means by which the Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'. The point was made by Mill, writing in 1861, who spoke of the task of the legislature 'to watch and control the government: to throw the light of publicity on its acts'. It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people.'" (footnotes omitted)

It follows that in order to perform this scrutiny role of the Executive, each House cannot be subservient to the Executive. Such check and balance functions depend on a constitutional landscape which respects those functions and recognises the need for some level of independence for each House.

Accordingly, the capacity of each House to scrutinise the Executive should not be unnecessarily impaired. While the Executive only holds office with the support of the Legislative Assembly, this does not mean that the Assembly must capitulate to the Executive on all matters. Quite the opposite. It means that the Executive must be held to account for the trust reposed in it by the House. Consequently, there will always be a degree of tension between the House and the Executive, especially in Queensland with only one House. This tension is clearly recognised in s 20 of the *Constitution of Queensland* which requires there to be a separate appropriation bill for the appropriation of funds for the Legislative Assembly and the parliamentary service. It was also recognised when the requirement for the Governor's approval for changes to standing orders was dispensed with by s 11 of the *Parliament of Queensland Act* 2001. This was done because the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly recognised that "the internal proceedings of the Assembly should not be a matter requiring approval from the Executive" (*Consolidation of the Queensland Constitution: Final Report*; Report No 13, April 1999, Notes to clause 11 of the Parliament of Queensland Bill 1999).

This tension between a House and the Executive needs to be recognised as a normal feature of our system of government, and managed appropriately. The Executive should not be allowed to intrude on the control of the House or its management. Yet this is what the Bill appears to do in so far as it purports to stack with executive members what is likely to become the key parliamentary committee.

Further, since the initial areas of responsibility of the committee concern the ethics of members and parliamentary privilege, the committee ought to include a cross-section of the members of the House, especially of the backbenchers, including an independent if possible.

This state of affairs, if it is not remedied by amendments to the Bill, should not be aggravated by vesting further areas of responsibility in that proposed committee, particularly those concerned with the management and administration and the parliamentary precinct. This aspect is considered further below.

(b) The committee's areas of responsibility

Section 79E proposes that the committee have the following "areas of responsibility":

a) the ethical conduct of members;
b) parliamentary powers, rights and immunities;
c) standing rules and orders about the conduct of business by, and the practices and the procedures of, the Assembly and its committees;
d) any other matters for which the committee is given responsibility under the standing rules and orders.

The vesting of the first two areas in the same committee reflects the current position with the Integrity, Ethics and Parliamentary Privilege Committee. Both areas are interrelated. However, the Bill splits the function of reviewing these areas from the function of their enforcement. The latter function remains with the Integrity, Ethics and Parliamentary Privilege Committee until clause 41 of the Bill is proclaimed into force, whereupon that function is transplanted to the new Ethics Committee. The undesirability of this split is discussed in issue (4) below.

However, the Bill goes further and vests in the Committee of the Legislative Assembly the additional area of responsibility of para (c): standing rules and orders about the conduct of business by, and the practices and the procedures of, the Assembly and its committees. Whether this, along with the functions in paras (a) and (b), will overload the committee requires careful consideration. This risk is heightened by the fact that all three areas involve complex issues of parliamentary governance.

The same fusion of these three functions in one committee, which had been recommended by EARC, was rejected by the Parliamentary Committee for Electoral and Administrative Review (PCEAR) in its *Report on Review of Parliamentary Committees* (Report No 19 October 1993). PCEAR recommended the retention of the Standing Orders Committee as a separate committee since its "functions are sufficiently specialist and important to require specific attention". The PCEAR also noted that "it may be desirable that the Premier and the Leader of the Opposition no longer be members of [the Standing Orders Committee]" (para 9.1.10). It did recommend the fusion of the privileges and members' interests committee into one committee which would have responsibility for investigating allegations or complaints regarding members' disclosure of their interests, their compliance with the Members' Code of Conduct, and breaches of privilege (para 9.1.9).

This careful analysis of EARC's recommendation by PCEAR suggests that the vesting in the Committee of the Legislative Assembly of the three functions in paras (a), (b) and (c) above may be undesirable. Nor is this necessarily alleviated by relieving the committee of hearing complaints – especially when this entails its own drawbacks which are outlined in issue (4) below.

Then on top of the functions (a), (b) and (c) which may be too much, there is the possibility of further overloading the committee if additional areas of responsibility are vested in the committee as contemplated by s 79E(d).

Apparently the Government has referred to the current CLA possible amendments to the *Parliamentary Service Act*. If this suggests that the Speaker's role in relation to the management of the parliamentary precinct and electorate offices under the *Parliamentary Service Act* might be transferred to the new Committee of the Legislative Assembly, or worse to the Department of Public Works as recommended by the Review Committee (Rec 12), this would have serious repercussions for:

- the capacity of the committee to cope with its workload if vested with that additional responsibility;
- the independence of the Assembly (if vested in a government department);
- the status of the Speaker (see below); and
- the effective management of the parliamentary precinct and the provision of services and accommodation for all members.

Of particular concern is the potential for increased dominance by the Executive in the functioning of the Parliament. This would breach the Commonwealth Parliamentary Association's *Recommended Benchmarks for Democratic Legislatures* that "The legislature, rather than the executive branch, shall control the parliamentary service..." (para 5.1.2).

In relation to the last dot point concern above, there is a need to ensure no lack of flexibility in decision making where the Speaker is currently able to respond quickly in appropriate circumstances, for example in relation to the security of the parliamentary precinct. Similar flexibility of decision making is needed when the Assembly is dissolved since the Speaker continues in office.

It should be noted that additional areas of responsibility can be vested in the Committee of the Legislative Assembly simply by way of changes to the Standing Rules and Orders. Such changes currently do not fall within the role of the Scrutiny Committee since they are not subordinate legislation (s 9(2) *Statutory Instruments Act* 1992). But if they necessitate amendment of related statutes (eg the *Parliamentary Service Act* 1988), the Scrutiny Committee would then be able to scrutinise those changes along with the relevant Bill. In respect of changes to the Standing Orders without the need for any statutory change, it is likely that this will not be subject to any formal scrutiny other than by the Committee itself which has already approved the changes or by the Assembly as a whole.

(c) The impact of the Bill on the role of Speaker

This Bill directly impacts on the role of the Speaker in the following ways:

1. The Speaker no longer chairs the Standing Orders Committee whose function is transferred to the proposed Committee of the Legislative Assembly.
2. The Speaker becomes a part-time member of a central committee of the House dominated by the executive of the government and the opposition.
3. As a member of the proposed Committee of the Legislative Assembly, the Speaker is treated differently from the other members of the committee in the following respects:
    - the Speaker is only a member of the committee when it is dealing with a matter relating to the standing rules and orders.
    - the Speaker is not entitled to nominate an alternate.
    - the Speaker is not required for a quorum – even when the committee is dealing with a matter relating to the standing rules and orders.

To understand this impact, it is necessary to consider first the role of the Speaker.

The Role of the Speaker

The position of Speaker of the Legislative Assembly is mandated by s 14 of the *Parliament of Queensland Act* 2001 which requires the members of the Assembly immediately on sitting after every general election to elect a member as Speaker, and for the Speaker to preside at all meetings of the Assembly. The Speaker usually holds office until the day before the Assembly's first sitting day after a general election, even if the Speaker did not contest or win a seat (s 15).

<u>Traditional functions</u>

Traditionally, the Speaker has two key functions, integral to the functioning of the Assembly:

(1) chairs and controls the proceedings of the House; and
(2) represents the House as a whole and speaks on its behalf as a separate and distinct institution of government.

These functions have been inherited from the Speaker of the UK House of Commons whose role is described by *Erskine May* as follows:

> "The Speaker of the House of Commons is the representative of the House itself in its powers, proceedings and dignity. The Speaker's functions fall into two main categories. On the one hand

> the Speaker is the spokesman or representative of the House in its relations with the Crown, the House of Lords and other authorities and persons outside Parliament. On the other hand the Speaker presides over the debates of the House of Commons and enforces the observance of all rules for preserving order in its proceedings." (Limon & McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed 1997 at 188.)

The representative function of the Speaker is expressly confirmed in the NSW Constitution where the Speaker of the NSW Legislative Assembly is "recognised as [the] independent and impartial representative" of the Assembly (s 31(1) of the *Constitution Act* 1902 (NSW)). This was inserted in 1992 as part of the compact for the Greiner minority government (see: A Twomey, *The Constitution of New South Wales*, Federation Press 2004 at 478). The same position exists in Queensland as a matter of constitutional principle, although it is not expressly included in the Queensland Constitution.

Administrative functions

The Speaker is also vested with administrative responsibilities under Part 2 of the *Parliamentary Service Act* 1988.

Section 5 vests in the Speaker "control of – (a) accommodation and services in the parliamentary precinct; and (b) accommodation and services supplied elsewhere by the Legislative Assembly for its members." The only qualification to this wide power of the Speaker arises under (a) when the House is in session whereupon its chamber and galleries revert to the control of the House itself (see the definition of "parliamentary precinct" in s 4). Para (b) covers the electorate offices of members.

Section 6(1) provides that "[t]he general role of the Speaker in relation to the parliamentary service is to –

a) decide major policies to guide the operation and management of the parliamentary service;
b) prepare budgets;
c) decide the size and organisation of the parliamentary service and the services to be supplied by the parliamentary service;
d) be the employing authority, for the Legislative Assembly, of parliamentary service officers and employees deciding their remuneration and conditions of service;
e) supervise the management and delivery of services by the parliamentary service.

Section 7 declares the powers and legal capacity of the Speaker in performing the administrative functions of the Speaker's office, including the Speaker's role in relation to the parliamentary service – namely, the powers include all the powers, and the legal capacity, that an individual has in a private capacity, which may be exercised at any place, and are exercised for the Legislative Assembly.

In other jurisdictions, some or all of these functions are vested in a committee or commission of the House but even then, the Speaker chairs such a body. This is the position, for instance, with the UK House of Commons Commission, the Canadian Board of Internal Economy, and the Committee on the National Assembly of Quebec. The appropriateness of the Speaker chairing these bodies, which manage the facilities of the House, stems from the second of the two integral functions noted earlier, whereby the Speaker represents the House as a whole.

While the Speaker in Queensland is vested with the control of the House and of the parliamentary precinct, he has appointed an advisory committee of sitting members, pursuant to s 9 of the Parliamentary Service Act, to advise him on issues arising under this Act. As well, the Clerk of Parliament is appointed by s 20 of the Parliamentary Service Act as the chief executive of the parliamentary service. The Clerk is subject to the control and direction of the Speaker and to policies determined by the Speaker, and is responsible to the Speaker "for the efficient and economical management of the parliamentary service."

The constitutional role of Speaker

The role of the Speaker is inextricably linked to the dual role of the House as a law-making body and as the chief scrutineer of the Executive. This means that the Speaker is an integral figure in our system of responsible government, especially in facilitating the scrutiny of the Executive.

As noted earlier, there is a natural tension between the lower House and the Executive to which it is responsible. This needs to be recognised as a normal feature of our system of government, and it needs to be managed appropriately. It should never be the subject of attack by the Executive. A critical figure in managing this natural tension of our system of government is the Speaker.

Even in a Westminster system such as ours where the Speaker retains his or her political allegiance, the Speaker must possess a level of impartiality when exercising the functions of office. As noted earlier, the Speaker of the NSW Legislative Assembly is to be "recognised as [the] independent and impartial representative" of the Assembly (s 31(1) *Constitution Act* 1902 (NSW)).

This impartiality needs to be both actual and apparent. It also needs to be recognised and not undermined by the Executive. The capacity of the Speaker to control parliamentary proceedings and to speak on behalf of the House depends on respect for and the status of the Speaker. Any attempt to undermine the Speaker's status is likely to adversely impact on the capacity of the Speaker to perform the role of that office and this in turn undermines the effective functioning of the House itself.

It follows that this Bill in so far as it alters the status and responsibilities of the office of Speaker will affect the delicate constitutional machinery of this State. The constitutional arrangements under a Westminster system involve complex and at times subtle relationships between the various institutions which are designed to facilitate their optimum operation. Any proposal to alter the role of the Speaker must therefore be considered with special care. Even the perception of executive intrusion tends to undermine the status of the Speaker and in turn that of the Assembly.

Assessment in terms of Fundamental Legislative Principles

The central issue is whether the proposed limited role of the Speaker on the Committee of the Legislative Assembly adversely impacts on the Speaker's capacity to perform either of those key functions outlined earlier, and so in turn impacts adversely on the functioning of the Parliament.

The following matters suggest that the Bill does adversely impact on those two key functions of the Speaker.

The status of the Speaker is undermined by:

- not being a permanent member of the committee;
- not being the chair of the committee;
- being a member of a committee which is dominated by the Executive in the manner outlined above;
- the possibility that there will be uncertainty at times as to whether a matter before the committee actually "relates to" the standing orders.

The position, in which a Speaker will find himself or herself under this Bill, will be one of reduced status and unwarranted compromise in terms of his or her ability to perform the functions of office. This in turn will impair the effective management and functioning of the House. It also threatens the maintenance of an appropriate level of separation between the House and the Executive by undermining the delicate role of a politically appointed Speaker who must try to retain the trust of both government and opposition.

The value of having one person, who is ultimately responsible for parliamentary administration, has been recognised at the Commonwealth level: "The lack of a person authorised to advocate, negotiate and plan in the interests of Parliament as an institution has greatly impeded the growth of an effective parliamentary administration." (GS Reid and M Forrest, *Australia's Commonwealth Parliament 1901-1988*, Melbourne University Press 1989 at 433.)

Significant concern has been expressed over the possibility referred to above that the Speaker's role in relation to the management of the parliamentary buildings and electorate offices under the *Parliamentary Service Act* might be transferred to the new Committee of the Legislative Assembly, or even to the Department of Public Works as recommended by the Review Committee (Rec 12). If this were to occur, this would further undermine in a significant way the status of the Speaker.

Conclusions:

a) The composition of the committee facilitates an intrusion by the Executive in the affairs of the Legislative Assembly, which will undermine the capacity of the House to perform its key constitutional functions.
b) The part-time membership of the Speaker on the committee impairs the role and status of the Speaker.
c) The committee's areas of responsibility, including the likelihood that further areas will be added, threaten the capacity of the committee to perform its role properly.
d) It would be inappropriate to transfer to the committee, as constituted, responsibility for the management of the parliamentary precinct and electorate offices.

2. New Portfolio Committee system

Section 88 of the Bill does not actually establish or name any new portfolio committees; instead it leaves this to the Assembly, under its Standing Rules and Orders, to determine the number of new committees by name and area of responsibility, to cover all government departments, and to ensure that the committees are adjusted to correlate with any future changes in government departments (ie the Administrative Arrangements). The Bill also prescribes rules in relation to their composition, quorum, and voting (ss 89-91). Significantly, each committee is to be composed of an equal number of government and opposition members, nominated by the Leader of the House and the Leader of the Opposition respectively, although chaired by a government member. The appropriateness of every committee being chaired by a government member deserves further consideration, given the unicameral nature of the Parliament.

The Assembly will no doubt have regard to the list of nine portfolios recommended by the Committee System Review Committee in its Report, *Review of the Queensland Parliamentary Committee System* (December 2010) in Recommendation 4, namely:

- Economics and Industry Committee
- Education Committee
- Environment and Resource Management Committee
- Finance and Administration Committee
- Health Committee
- Legal Affairs Committee
- Police and Public Safety Committee
- Social Affairs Committee
- Transport and Infrastructure Committee

The Premier intimated in her Second Reading Speech that the Committee of the Legislative Assembly will advise the Assembly soon on the establishment of these portfolio committees. This expectation follows from the fact that the Committee of the Legislative Assembly has responsibility for the Legislative Assembly's Standing Rules and Orders under which the new portfolio committees are required to be established.

There is a risk, with the comprehensive system which this Bill requires, that each portfolio committee will be unable to perform its functions effectively due to the breadth of each portfolio, the limited time members have to devote to committee business, the geographical hurdles of a large State, or the lack of sufficient resources.

These concerns were recognised by the Parliamentary Committee for Electoral and Administrative Review (PCEAR) in its *Report on Review of Parliamentary Committees* (Report No 19 October 1993) when it rejected EARC's proposal for a comprehensive system of investigatory standing committees to examine policy and administration in all areas of the public sector. Five public administration committees were recommended along with a Scrutiny of Legislation Committee. PCEAR rejected this proposal at that time for several reasons: the risk of a multiplicity of functions meant that some are done better than others;

committees may therefore prefer their "legislative or policy function to detailed and demanding scrutiny of government administration which may attract little attention or reward" (para 5.3.6); and "the need for specialist expert committees, rather than generalist, multi-purpose committees" (5.3.11). PCEAR did observe, however, that the committee system might over time evolve along the lines envisaged by EARC.

The PCEAR report also recognised the demands on the time of members in a unicameral parliament of only 89 members, warning of "the need for the functions of committees to be strongly focussed on those areas which are essential to the parliamentary role, as opposed to those which can be performed by other bodies, or which are additional or incidental to the parliamentary function" (para 5.5.2).

Each of the proposed portfolio committees will possess all the powers of a statutory committee under Chapter 3 of the *Parliament of Queensland Act*, in particular, the power to order the attendance of witnesses (other than a member) and the production of documents (ss 25 and 33). They will also possess the powers of entry and inspection in relation to public works currently exercised by the Public Accounts and Public Works Committee.

Conclusion:

Given the risks listed earlier in a wide-ranging committee system, it is necessary to ensure that the committees are adequately resourced, that their intended areas of responsibility are not so onerous that they prevent the committees from being effective, and that they receive expert assistance when needed, especially for their financial scrutiny role (see next issue).

3. Specialist scrutiny and estimates roles

The Bill transfers the specialist functions currently performed by the Scrutiny Committee and the Public Accounts and Public Works Committee to each of the new portfolio committees in relation to their respective areas of responsibility (see ss 92 and 93). The role of the Scrutiny Committee is very specific in terms of reviewing bills and subordinate legislation to see how compliant they are with the fundamental legislative principles under *the Legislative Standards Act* 1992 which concern the institution of Parliament and the rights and liberties of the individual (s 103). The Public Accounts and Public Works Committee is tasked with responsibility to assess the integrity, economy, efficiency and effectiveness of government financial management by examining government financial documents and considering the annual and other reports of the Auditor-General, as well as reviewing all public works (s 95).

There is a risk that these specialist roles may not be as well performed by each of the new portfolio committees. The reasons for this are:

- the specialist nature of both these forms of scrutiny;
- the expertise of the members of the current committees has evolved because of their specialist area of responsibility but this expertise is unlikely to evolve to the same degree in every one of the new portfolio committees which is responsible for reviewing all aspects of administration within their portfolio areas;
- the risk of inconsistency between committees when scrutinising;
- overlaps will occur between committees scrutinising the same bill which will add to the risk of inconsistency.

What seems essential to reduce this risk is for the current secretariats of both the Scrutiny Committee and the Public Accounts and Public Works Committee to be retained.

Conclusion

It seems unlikely that each portfolio committee will be able to exercise, to the same degree, the specialist scrutiny functions of the Public Accounts and Public Works Committee and of the Scrutiny Committee.

4. Split roles: ethics and privileges

Upon proclamation of clause 41 of the Bill, ss 104B and 104C create a new statutory committee, the Ethics Committee, to handle complaints about any failure to comply with the register of interests requirements, violations of the code of ethical conduct, and any breaches of parliamentary privilege. This function will be transferred from the Integrity, Ethics and Parliamentary Privileges Committee.

However, as noted earlier, responsibility for reviewing the ethical regime of members (ie the register of interests and the code of ethical conduct of members), as well as reviewing parliamentary privileges, will be transferred upon the Bill's assent from the Integrity, Ethics and Parliamentary Privileges Committee to the new Committee of the Legislative Assembly.

It is appropriate for the areas of ethical conduct and parliamentary privilege to be vested in the same committee since they do interrelate. A violation in one area can easily entail a violation in the other. But to split the function of reviewing these areas from the function of enforcing them is likely to lead to confusion and inconsistency. It will also necessitate duplication in expertise since the members of both committees will need to have a comparable level of understanding of complex areas of public integrity law. Such a split appears to be without precedent.

It was clearly not an option considered by the Parliamentary Committee for Electoral and Administrative Review (PCEAR) in its *Report on Review of Parliamentary Committees* (Report No 19 October 1993) when it recommended the fusion of the then privileges committee and members' interests committee into one committee which would have responsibility for investigating allegations or complaints regarding members' disclosure of their interests, their compliance with the Members' Code of Conduct, and breaches of privilege (para 9.1.9). The PCEAR rejected EARC's recommendation that the standing orders committee also be merged with that committee in view of the specialist nature of each of those areas.

Others concerns arise in relation to these changes:

- Section 104B ought to refer to "alleged" breaches" of parliamentary privilege.
- It is unclear whether complaints to the new Ethics Committee can be made directly by members of the public; and, whether the new committee can instigate an inquiry into a member of the Assembly on its own initiative.

Conclusion

All this suggests that the splitting of the roles, on the one hand of reviewing the register of interests, the code of ethical conduct and parliamentary privileges by one committee, and on the other, the handling of complaints and violations of those regimes by another committee, will not serve the best interests of the Legislative Assembly.

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PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 23 MARCH TO 5 APRIL 2011

(Listed in order of sub-leg number)

SLNo 2011	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, EI)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
25	Forestry and Nature Conservation Legislation Amendment Regulation (No.1) 2011	EN	25/03/2011	2/08/2011	5/04/2011	3/08/2011
26	Nature Conservation (Protected Areas) Amendment Regulation (No.1) 2011	EN	25/03/2011	2/08/2011	5/04/2011	3/08/2011
27	Architects Amendment Regulation (No.1) 2011	EN	25/03/2011	2/08/2011	5/04/2011	3/08/2011
28	Nature Conservation (Protected Plants Harvest Period) Notice 2011	EN	25/03/2011	2/08/2011	5/04/2011	3/08/2011
29	Traffic Amendment Regulation (No.1) 2011	EN	25/03/2011	2/08/2011	5/04/2011	3/08/2011
30	Not Tabled.					
31	Child Care Amendment Regulation (No.1) 2011	EN	1/04/2011	2/08/2011	5/04/2011	3/08/2011
32	Mines and Energy Legislation Amendment Regulation (No.1) 2011	EN	1/04/2011	2/08/2011	5/04/2011	3/08/2011
33	Aboriginal Land Amendment Regulation (No.1) 2011	EN	1/04/2011	2/08/2011	5/04/2011	3/08/2011
34	Traffic Amendment Regulation (No.2) 2011	EN	1/04/2011	2/08/2011	5/04/2011	3/08/2011

* EN – Explanatory Notes. RIS – Regulatory Impact Statement. EI – Explanatory Information received.
TBA – Disallowance date to be advised when subordinate legislation has been tabled.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

5. AGENTS FINANCIAL ADMINISTRATION BILL 2010

Date introduced: 24 November 2010
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading
Committee report on bill: 1/11; at 5 – 12
Date response received: 20 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **the large number of clauses** creating offence provisions;
   - **clause 134** imposing time limits for the commencement of proceedings and regulating proceedings for offences;
   - **clauses 135-6** which may make a person liable for the acts or omissions of others;
   - **clause 139** allowing public statements by the minister or chief executive to provide information or warnings, including by identifying people;
   - **clause 41** which may make rights and liberties dependent on administrative power which may not be subject to appropriate review;
   - **clause 39** which may be inconsistent with principles of natural justice; and
   - **clauses 132-3 and 135-6** which may impose evidential burdens on a person charged with an offence under the legislation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to the proposed delegations of legislative power in **clauses 104 and 145**.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Hon Paul Lucas MP

Deputy Premier and Attorney-General
Minister for Local Government and
Special Minister of State

Our ref: FTP-00573

Your ref: B62.10

18 APR 2011

SCRUTINY OF
20 APR 2011
LEGISLATION COMMITTEE
B62.10

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo

I refer to your letter of 14 February 2011 to Mr Peter Lawlor MP, about the Agents Financial Administration Bill 2010. Following recent ministerial changes, responsibility for fair trading has been transferred to me as the Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

Thank you for your comments in the committee's *Legislation Alert* No. 1 of 2011. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals and whether the Bill has sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I note that the committee has found that the explanatory notes, as tabled at the first reading of the Bill, are compliant with Part 4 of the *Legislative Standards Act 1992*, contain the information required by section 23 of the Act and are clear and precise.

I trust this information is of assistance.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 1 OF 2011

Agents Financial Administration Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Agents Financial Administration Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- the large number of clauses creating offence provisions;
- **clause 134** imposing time limits for the commencement of proceedings and regulating proceedings for offences;
- **clauses 135-6** which may make a person liable for the acts or omissions of others;
- **clause 139** allowing public statements by the minister or chief executive to provide information or warnings, including by identifying people;
- **clause 41** which may make rights and liberties dependent on administrative power which may not be subject to appropriate review;
- **clause 39** which may be inconsistent with principles of natural justice; and
- **clauses 132-3 and 135-6** which may impose evidential burdens on a person charged with an offence under the legislation.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clauses 104 and 145** which may allow the delegation of legislative power in inappropriate circumstances.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

The large number of clauses creating offence provisions in the Bill

The committee states that the Bill creates a large number of offence provisions, and notes:

- a large number of offence provisions would enforce the regulation of the activities of commercial agents, particularly when read with the other legislation regulating the agents in the relevant occupation;
- some offence provisions are in similar terms (see, for example, clauses 129 and 17-8); and
- where the proposed maximum penalties include terms of imprisonment, the term of imprisonment may differ between offences even where the maximum monetary penalty would not.

Response:

The offences in the Bill continue the offences and associated penalties established under the *Property Agents and Motor Dealers Act* (PAMD Act). Consequently, existing licensees will be subject to the same offences as they were under the PAMD Act.

The PAMD Act, having been in force for more than 9 years has acted as an effective deterrent against undesirable practices, and in doing so have protected consumers from financial loss in significant transactions. Additionally, there have been a substantial number of prosecutions and enforcement action for breaches of the offence provisions.

The offences and their respective penalties deter undesirable practices and provide recourse to punish those licensees who do the wrong thing.

The committee is concerned that some offences are in similar terms and provides the example of clauses 17, 18 and 129. It should be noted that these offences have very distinct purposes. Clause 17 requires trust money to be kept in accordance with the Act, clause 18 sets out requirements for when trust money may be withdrawn from a trust account and clause 129 prohibits an unauthorised person operating the trust account. These offences are all necessary to ensure that trust money is appropriately dealt with.

Some offences have the same maximum monetary penalty but different maximum imprisonment penalties. Offences with these higher imprisonment terms have the potential for consumers to suffer more significant detriment. For example, while clause 12 (Dealing with amount on receipt) and 14 (No other payments to trust account) have the same maximum monetary penalty, clause 12 has a higher maximum imprisonment term, because the damage to a consumer could be more significant where a licensee fails to pay money from a transaction into a trust account, than if the licensee paid money other than trust money into the account. Where the maximum monetary penalty is insufficient to punish a particularly serious breach, these higher imprisonment penalties allow the court to consider a more significant penalty, where there is more serious detriment to consumers.

Clause 134 (Proceedings for an offence)

The committee states that clause 134 governing proceedings for offences imposes time limits for the commencement of proceedings and allows for the prosecution to elect for an indictable offence to be heard summarily or on indictment.

Response:

The time limits within which to commence a proceeding under the Bill are reasonable and necessary to provide certainty for licensees about when the risk of prosecution for an alleged breach ends. Time limits are used to create certainty for parties in other proceedings, for instance, the *Limitation of Actions Act 1974* provides statutory limits for commencing civil actions.

Although the prosecution may elect for an indictable offence to be heard summarily, the person charged with the indictable offence may still ask, at the start of a summary proceeding, that the charge be prosecuted on indictment. If the person does make the request, the magistrate must not decide the charge as a summary offence and must proceed by way of a committal proceeding.

Clauses 135 (Responsibility for acts or omissions of representatives) and 136 (Executive officers must ensure corporation complies with Act)

The committee identifies that clauses 135 and 136 may impose liability on a person for the acts or omissions of others.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clause 139 (Public warning statement)

The committee notes that clause 139 allows the Minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people, which may affect a person's privacy rights.

Response:

The committee notes that the explanatory notes provide sufficient justification.

In addition, in practice public warning statements are usually only made when:

- a business's conduct poses actual or likely imminent financial or other loss, or imminent personal injury to consumers; and/or the conduct is deceptive, unethical, unfair or improper; and
- on available evidence a *prima facie* breach has occurred; and
- the business is an itinerant operation and/or has avoided or rejected the Office of Fair Tradings's attempts to investigate its operation.

Clause 41 (Person to ask the Queensland Civil and Administrative Tribunal to review chief executive's decision)

The committee notes that clause 41 may make rights and liberties dependent on administrative power which may not be subject to appropriate review, as it does not allow the Queensland Civil and Administrative Tribunal (QCAT) to stay the decision of the chief executive during a review of the decision.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clause 39 (Chief executive may freeze licensee's accounts in particular cases)

The committee notes that clause 39 which may be inconsistent with principles of natural justice, as it allows the chief executive to freeze a trust account without providing a licensee with the opportunity to make representations about why the trust account should not be frozen.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clauses 132 (Evidentiary provisions), 133 (Entries made in licensees documents), 135 (Responsibility for acts or omissions of representatives) and 136 (Executive officers must ensure corporation complies with Act).

The committee notes that these clauses may impose evidential burdens on a person charged with an offence under the legislation.

Response:

The committee notes that the explanatory notes provide sufficient justification.

2. *SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT*

Clauses 104 (Limits on recovery from fund) and 145 (Regulation making power)

The committee notes that these provisions would delegate legislative power to prescribe particular matters in a regulation.

Response:

The committee notes that the explanatory notes provide sufficient justification.

6. BODY CORPORATE AND COMMUNITY MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 23 November 2010

Responsible minister: Hon PJ Lawlor MP

Portfolio responsibility: Minister for Tourism and Fair Trading

Date passed: 6 April 2011

Committee report on bill: 1/11; at 13 – 18

Date response received: 5 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 5** permitting market value to be used as the sole consideration to set lot entitlements;
   - **clauses 7 ,8, 12, 21 and 41** creating offences and amending an existing offence provision;
   - **clause 8** removing the right of lot owners in some community titles schemes to apply for adjustment of their contribution schedule lot entitlements; and
   - **clause 41** requiring bodies corporate to revert contribution schedule lot entitlements to their original settings on the application of one lot owner.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 17** which may delegate legislative power for regulation modules potentially affecting rights and liberties of individuals.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Hon Paul Lucas MP

Deputy Premier and Attorney-General
Minister for Local Government and
Special Minister of State

Our ref: FTP-00573

Your ref: B56.10

SCRUTINY OF
05 APR 2011
LEGISLATION COMMITTEE
B56.10

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo-Ann

I refer to your letter of 14 February 2011 to Mr Peter Lawlor MP, about the Body Corporate and Community Management and Other Legislation Amendment Bill 2010. Following recent ministerial changes, responsibility for fair trading has been transferred to me as Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

I refer to the committee's comments in Legislation Alert 01/11 in relation to the Bill.

I note the committee has raised several issues arising from the Bill, comments on which I have attached to this letter.

I trust this information is of assistance.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

Encl.

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 1 OF 2011

Body Corporate and Community Management and Other Legislation Amendment Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Body Corporate and Community Management and Other Legislation Amendment Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clause 5** permitting market value to be used as the sole consideration to set lot entitlements;
- **clauses 7, 8, 12, 21 and 41** creating offences and amending an existing offence provision;
- **clause 8** removing the right of lot owners in some community titles schemes to apply for adjustment of their contribution schedule lot entitlements; and
- **clause 41** requiring bodies corporate to revert contribution schedule lot entitlements to their original settings on the application of one lot owner.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clause 17** which may delegate legislative power for regulation modules potentially affecting rights and liberties of individuals.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clause 5

The committee states that clause 5 of the Bill may affect the rights and liberties of individuals by permitting market value to be used as the sole consideration to set lot entitlements.

Response:
The possible breach of the fundamental legislation principle is justified as inclusion of using market value as an element of the relativity principle provides flexibility around the setting of contribution schedule lot entitlements. Anecdotal evidence and the results of consultation suggests market value was commonly used (although not legislated) for setting lot entitlements prior to the introduction of the *Body Corporate and Community Management Act 1997*. The use of market value for setting lot entitlements assisted with housing affordability in the past as it allowed smaller cheaper units to have low body corporate fees and larger more expensive units to have higher body corporate fees. Therefore, it is proposed to introduce this method for setting contribution schedule lot entitlements as an element of the relativity principle. The relativity principle is about providing flexibility for developers when setting contribution schedule lot entitlements, which in turn will assist with the housing affordability crisis currently experienced in Queensland. The enhanced disclosure provisions provide added transparency to the process.

Clauses 7, 8, 12, 21 and 41

The committee states that clauses 7, 8, 12, 21 and 41 of the Bill would insert new offences and amend an existing offence.

Response:
I note the Committee's comments that the amendments provided at clauses 7, 8, 12, 21 and 41 may affect the rights and liberties of individuals by creating offences and amending an existing offence provision.

Clauses 7, 8, 12 and 41 provide for new offences where a body corporate fails to quickly lodge a request to record a new community management statement in specific circumstances. This offence provides a maximum of 100 penalty units and is consistent with the offence provisions already provided in the *Body Corporate and Community Management Act 1997* for bodies corporate failing to quickly lodge a request to record a new community management statement in specific circumstances.

In relation to clause 21, the amendments to the Act create penalties for an owner or occupier of a lot in a two-lot scheme to which the Specified Two-Lot Schemes Module applies who is issued a notice for contravening the by-laws of the scheme but fails to comply with the notice. This provision provides a maximum of 20 penalty units. This offence is consistent with the offence provisions already provided in the Act for by-law contraventions in community titles schemes. A defence will continue to be available for all schemes if a person is not contravening the by-laws in the way provided for in the contravention notice.

Clause 8

The committee states that clause 8 of the Bill may affect the rights and liberties of individuals by removing the right of lot owners in some community titles schemes to apply for adjustment of their contribution schedule lot entitlements.

Response:
It is necessary to provide different rights for schemes established before the commencement of the Bill and schemes established after the commencement of the Bill. This is because up until the Bill commences, lot owners purchase their lots knowing what their expected annual body corporate contributions are to be (as the figure is required to be disclosed in their contracts) without necessarily knowing how their lot entitlements have been set or why their lot entitlements were set that way.

However, for the sale of lots in schemes established after the commencement of the Bill, there will be a requirement to provide increased transparency and disclosure. In particular, the principle used to set the contribution schedule lot entitlements for lots in a scheme must be documented in the community management statement and the community management statement is to form part of a contract for the sale of a lot in a scheme.

While the rights and liberties of some individuals may be affected by removing the right of lot owners in some schemes to apply for an adjustment of their contribution schedule lot entitlements, the policy intent is to create certainty and stability in the marketplace and ensure the community titles sector remains an attractive and affordable option for Queenslanders.

Clause 41

The committee states that clause 41 of the Bill may adversely affect rights and liberties of all lot owners.

Response:
Sections 385 and 387 provide a mechanism to return the contribution schedule lot entitlements to the pre-adjustment schedule where a scheme has been the subject of an adjustment order.

The policy rationale for the reversion mechanism is that lot owners usually purchased their lot on the basis of 'known' entitlements and therefore known out-goings.

For some lot owners, typically a minority or sometimes only one owner to have secured an adjustment order, frequently without the express knowledge and involvement of other lot owners (usually the majority of owners and often the more vulnerable) is not in the public interest.

Therefore, the Bill provides a mechanism to return contribution schedule lot entitlements to the pre-adjustment schedule in circumstances where lot owners were adversely affected by the order.

2. *SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT*

Clause 17

New Chapter 3, Part 1, Division 5

The committee is concerned that clause 17 may delegate legislative power in inappropriate cases.

Response:
Paragraph 49 of the Committee's alert considers that the rights and obligations of individuals to be core provisions of sufficient significance to be protected by an Act rather than being left to regulations.

The Act was established to provide for the development of regulation modules that would cater for specific types of community titles schemes. The Act is currently supported by four regulation modules (the Standard, Accommodation, Commercial and Small Schemes Modules), which provide detailed management processes for community titles schemes.

A comprehensive review of the four regulation modules in 2008 identified a need for less formal arrangements for residential two-lot schemes given the significant non-compliance of owners in two-lot schemes regarding the administrative provisions set out in the existing modules. The review found some bodies corporate of two-lot schemes do not maintain administrative and sinking funds or hold body corporate meetings, which are requirements under each existing module (including the Small Schemes Modules).

As a result, the Specified Two-Lot Schemes Module will provide a simpler and more practical regulatory framework designed to meet the needs of schemes with only two lots. For example, written lot owner agreements will replace the need to hold meetings, simpler financial arrangements will be implemented and a more practical approach to enforcing by-laws will be introduced.

7. COMMERCIAL AGENTS BILL 2010

Date introduced: 24 November 2010
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading
Date passed: 6 April 2011
Committee report on bill: 1/11; at 19 – 29
Date response received: 20 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **the large number of clauses** creating offence provisions;
   - **clause 144** imposing time limits on commencement of proceedings and allowing the prosecution to elect for an indictable offence to be heard summarily on indictment;
   - **clauses 145-6** which may impose liability for the acts or omissions of others;
   - **the large number of clauses** which may affect rights to privacy;
   - **clause 149** allowing public information or warning statements, including statements identifying people;
   - **clauses 15, 17 and 85-6** imposing restrictions on people who may be issued with licences or registration certificates;
   - **clauses 28, 48, 93 and 104** allowing conditional licences and suspension of licences and registration certificates;
   - **clauses 24 and 91** making people aged under 18 ineligible for a licence or registration;
   - **clauses 10, 17, 25, 33, 36, 41, 44, 48, 82, 92-3, 95, 98, 101 and 104** making access to licences and registration dependent on administrative power which may be insufficiently defined;
   - **clauses 49 and 105** which may make rights and liberties subject to administrative power which may not be subject to appropriate review;
   - **clauses 48-9 and 104-5** which may be inconsistent with principles of natural justice; and
   - **clauses 138, 142-3 and 145-6** which may impose evidential burdens on a person charged with an offence.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clause 155** which does not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system; and
   - **clauses 70-1, 110 and 138** which may allow the delegation of legislative power other than in appropriate cases.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Hon Paul Lucas MP

Deputy Premier and Attorney-General
Minister for Local Government and
Special Minister of State

Our ref: FTP-00573

Your ref: B61.10

18 APR 2011

SCRUTINY OF
20 APR 2011
LEGISLATION COMMITTEE
B61.10

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo-Ann

I refer to your letter of 14 February 2011 to Mr Peter Lawlor MP, about the Commercial Agents Bill 2010. Following recent ministerial changes, responsibility for fair trading has been transferred to me as the Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

Thank you for your comments in the committee's *Legislation Alert* No. 1 of 2011. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals and whether the Bill has sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I note that the committee has found that the explanatory notes, as tabled at the first reading of the Bill, are compliant with Part 4 of the *Legislative Standards Act 1992*, contain the information required by section 23 of the Act and are clear and precise.

I trust this information is of assistance

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 1 OF 2011

Commercial Agents Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Commercial Agents Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- the large number of clauses creating offence provisions;
- **clause 144** imposing time limits on commencement of proceedings and allowing the prosecution to elect for an indictable offence to be heard summarily on indictment;
- **clauses 145-6** which may impose liability for the acts or omissions of others;
- the large number of clauses which may affect rights to privacy;
- **clause 149** allowing public information or warning statements, including statements identifying people;
- **clauses 15, 17 and 85-6** imposing restrictions on people who may be issued with licences or registration certificates;
- **clauses 28, 48, 93 and 104** allowing conditional licences and suspension of licences and registration certificates;
- **clauses 24 and 91** making people aged under 18 ineligible for a licence or registration;
- **clauses 10, 17, 25, 33, 36, 41, 44, 48, 82, 92-3, 95, 98, 101 and 104** making access to licences and registration dependent on administrative power which may be insufficiently defined;
- **clauses 49 and 105** which may make rights and liberties subject to administrative power which may not be subject to appropriate review;
- **clauses 48-9 and 104-5** which may be inconsistent with principles of natural justice; and
- **clauses 138, 142-3 and 145-6** which may impose evidential burdens on a person charged with an offence.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clauses 70-1, 110 and 138** which may allow the delegation of legislative power other than in appropriate cases; and
- **clause 155** which does not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

The large number of clauses creating offence provisions

The committee states that the Bill creates a large number of offence provisions, and notes:

- a large number of offence provisions would enforce the regulation of the activities of commercial agents;
- the large number of offence provisions which would have elements of the offence prescribed by regulation (see, below, under 'Delegation of legislative power');
- together, the acts or omissions proscribed by clauses 48 and 49 appear similar to those proscribed by clause 45; and
- where the proposed maximum penalties include terms of imprisonment, the term of imprisonment may differ between offences even where the maximum monetary penalty would not.

Response:

The offences in the Bill continue the offences and associated penalties applying under the *Property Agents and Motor Dealers Act* (PAMD Act). Consequently, existing licensees will be subject to the same offences as they were under the PAMD Act.

The PAMD Act, having been in force for more than 9 years has acted as an effective deterrent against undesirable practices, and in doing so have protected consumers from financial loss in significant transactions. Additionally, there have been a substantial number of prosecutions and enforcement action for breaches of the offence provisions.

The offences and their respective penalties deter undesirable practices and provide recourse to punish those licensees who do the wrong thing.

The committee was concerned that some offences are in similar terms and provides clause 45 and 48 as an example. This is to provide clarity to licensees about their obligations. For example, while both these clauses provide that a licensee must return a suspended licence to the chief executive within 14 days of the suspension, clause 45 addresses when licences should be returned to the chief executive in a number of circumstances and clause 48 is more specific to the process that applies when a licence is suspended.

Some offences have the same maximum monetary penalty but different maximum imprisonment penalties. Offences with these higher imprisonment terms have the potential for consumers to suffer more significant detriment in the case of more serious breaches. Where the maximum monetary penalty is insufficient to punish a particularly serious breach, these higher imprisonment penalties allow the court to impose a more significant penalty, to address the more serious detriment to consumers.

Clause 144 (Proceedings for offences)

The committee has identified that clause 144 imposes time limits on the commencement of proceedings and allows the prosecution to elect for an indictable offence to be heard summarily on indictment

Response:

The time limits within which to commence a proceeding under the Bill are reasonable and necessary to provide certainty for licensees about when the risk of prosecution for an alleged breach ends. Time limits are used to create certainty for parties in other proceedings, for instance, the *Limitation of Actions Act 1974* provides statutory limits for commencing civil actions.

Although the prosecution may elect for an indictable offence to be heard summarily, the person charged with the indictable offence may still ask, at the start of a summary proceeding, that the charge be prosecuted on indictment. If the person does make the request, the magistrate must not decide the charge as a summary offence and must proceed by way of a committal proceeding.

Clauses 145 (Responsibility for acts or omissions of representatives) and 146 (Executive officers must ensure corporation complies with Act)

The committee identifies that clauses 145 and 146 may impose liability on a person for the acts or omissions of others.

Response:

The committee notes that the explanatory notes provide sufficient justification.

The large number of clauses which may affect rights to privacy

Response:

The collection of private information, including criminal histories, is necessary for an effective licensing and regulatory regime. The collection of this information is done in accordance with the *Information Privacy Act 2009, Public Records Act 2002* and *Right to Information Act 2009*.

The committee notes that the explanatory notes provide sufficient justification for provisions which may affect an individual's privacy rights.

Clause 149 (Public warning statement)

The committee notes that clause 149 allows the Minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people, which may affect a person's privacy rights.

Response:

The committee notes that the explanatory notes provide sufficient justification.

In addition, in practice public warning statements are usually only made when:

- a business' conduct poses actual or likely imminent financial or other loss, or imminent personal injury to consumers; and/or the conduct is deceptive, unethical, unfair or improper; and
- on available evidence a *prima facie* breach has occurred; and
- the business is an itinerant operation and/or has avoided or rejected the Office of Fair Tradings's attempts to investigate its operation.

Clauses 15 (Suitability of applicants and licensees – individual), 17 (Chief executive must consider suitability of applicants and licensees), and 85 (Suitability of applicants) and 86 (Chief executive must consider suitability of applicants)

The committee notes that these clauses may prevent some people from working as commercial agents and commercial subagents.

Response:

A licensing and registration system is essential to the consumer protection regime provided in the Bill, which continues that in PAMD Act.

The imposition of eligibility and suitability requirements is central to the licensing and registration system as this goes towards protecting consumers by ensuring they deal with qualified and professional licensees.

While this imposes barriers towards employment, consumer protection in these areas is of utmost importance.

The committee notes that the explanatory notes provide justification.

Clauses 28 (Licence – conditions), 48 (Immediate suspension), 93 (Registration certificate – conditions) and 104 (Immediate suspension)

The committee notes that these clauses provide for conditional licences and suspension of licences and registration certificates.

Response:

The power of the chief executive to impose conditions and suspend licences and registration certificates is necessary to ensure that only suitable licensees are able to perform the activities of a commercial agent or commercial subagent.

The committee notes that the explanatory notes provide justification.

Clauses 24 (Eligibility for licence) and 91 (Eligibility for registration as commercial agent)

The committee states that these clauses make people under the age of 18 ineligible for a licence or registration.

Response:

The Bill provides that an individual must be at least 18 years to be eligible to obtain a commercial agent licence (clause 24) or registration as a commercial subagent (clause 91). This age discrimination is justified on the grounds that consumers expect to deal with licensees and registered employees that have the necessary maturity, judgement and capacity given the pecuniary nature of the transactions involved in working as commercial agent or a commercial subagent. Accordingly, it is for the protection of consumers that individuals are at least 18 years to be eligible to obtain a licence or registration certificate

Clauses 10, 17, 25, 33, 36, 41, 44, 48, 82, 92-3, 95, 98, 101 and 104

The committee comments that these clauses make rights to licences and registration certificates dependent on administrative power that may be insufficiently defined.

Response:

These clauses are carried over from the PAMD Act, which has been in force since 2000. While the chief executive has some discretion in deciding whether to issue, renew or impose a condition on a licence or registration certificate, the clauses are explicitly set out relevant matters which must be considered in making these decisions.

There is the capacity for discretion to be exercised in assessing these relevant matters, for example, in considering the 'character' of a person in assessing their suitability to hold a licence. However, an assessment of a person's character is necessary to ensure that only suitable and eligible people are licensed as commercial agents.

Further, a person can seek a review of the chief executive's decision under all these clauses to the Queensland Civil and Administrative Tribunal.

Clauses 49 (Immediate cancellation) and 105 (Immediate cancellation)

The committee notes that clauses 49 and 105 make rights and liberties subject to administrative power which may not be subject to appropriate review.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clauses 48 (Immediate suspension), 49 (immediate cancellation), and 104 (Immediate suspension) and 105 (immediate cancellation)

The committee notes that these clauses may be inconsistent with the principles of natural justice.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clauses 138 (Offence to ask for, or receive, excess or improper remuneration), 142 (Evidentiary provisions), 143 (Entries made in licensees documents), 145 (Responsibility for acts or omissions of representatives) and 146 (Executive officers must ensure corporation complies with Act).

The committee notes that these clauses may impose evidential burdens on a person charged with an offence under the legislation.

Response:

The committee notes that the explanatory notes provide sufficient justification.

2. SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Clauses 70 (Publication of a licensee's name), 71 (Principal licensee must keep an employment register), 110 (Commercial subagents to notify chief executive of changes in circumstances) and 138 (Offence to ask for, or receive excess or improper remuneration)

The committee is concerned that these clauses may allow the delegation of legislative power in inappropriate cases.

Response:

It is appropriate that the particular matters comprising these offences are prescribed by regulation, as they are administrative in nature and subject to change over time. For example, in relation to clause 70, it may be necessary to prescribe an additional matter that a licensee should publish in an advertisement for their business, to ensure consumers are provided with enough information to make an informed decision about whether to engage a particular commercial agent.

Likewise, the matters to be prescribed in a principal licensee's employment register under clause 71, or the matters that commercial subagents must notify the chief executive of a change in under clause 110, may change over time, to improve the consumer protections that these provisions provide.

It is also appropriate that the maximum commission for a transaction under clause 138 be prescribed by a regulation, to be adjusted as the value of transactions change over time.

Clause 155 (Regulation-making power)

The committee states that clause 155 may not confine the delegated power to prescribe fees to the recovery of the costs of administering the licensing system.

Response:

Clause 155 allows a regulation to prescribe fees, and replicates the equivalent provision in the PAMD Act. It would be inappropriate for the legislation to confine the power to prescribe fees to a particular methodology – including the recovery of the costs of administering the licensing system because while a fee should have some relationship to the costs of administration, the setting of fees is ultimately a matter for government policy and can be subject to considerations other than cost recovery. Such matters are not appropriate to be included in legislation.

8. FAIR TRADING INSPECTORS BILL 2011

Date introduced: 17 February 2011
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: (Former) Minister for Tourism and Fair Trading
Committee report on bill: 2/11; at 1 - 13
Date response received: 18 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 14, 31, 35, 40, 42-3, 56, 58-9, 61, 64, 68-70, 92 and 165** creating offence provisions and replacing one existing offence provision;
   - **clauses 83-5 and 87** creating evidentiary presumptions to apply in proceedings under the legislation;
   - **parts 2 and 3** (as modified by schedule 1) conferring powers of entry under warrant or with consent and various post-entry powers;
   - **clauses 34-5, 39-40, 55-8 and 60-1** modifying common law and statutory rights to silence; and
   - **clause 90** protecting designated people from civil liability.
2. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **clause 63** and whether it would have sufficient regard to rights of individuals to privacy;
   - **clause 22** and the officers who might issue a warrant to allow inspectors to exercise powers of entry; and
   - **clauses 47, 49-50, 52-4, 116, 122, 129, 133, 139, 150, 156, 166, 175 and 183**, providing for forfeiture of property and which may provide for compulsory acquisition of property other than with fair compensation.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Office of the
Deputy Premier and Attorney-General
Minister for Local Government
and Special Minister of State

SCRUTINY OF
18 APR 2011
LEGISLATION COMMITTEE
B2.11

Our ref: FTP-00587, 316027

Your ref: B02.11

13 APR 2011

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms ~~Miller~~ Jo-Ann

Thank you for your letter of 7 March 2011 about the Scrutiny of Legislation Committee's examination of the Fair Trading Inspectors Bill 2011 in the *Legislation Alert* No. 02 of 2011.

The committee has drawn the Parliament's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals.

The attached document addresses each of these concerns in turn.

I note the committee has found that the explanatory notes, as tabled in the first reading of the Bill, are compliant with part 4 of the *Legislative Standards Act 1992*, contain the information required by section 23 of the Act, and are clear and precise.

I trust this information is of assistance. If you require any further information, please contact Chris Irons, Director, Fair Trading Policy Branch, Office of Regulatory Policy, Department of Justice and Attorney-General, on 3898 0172 who will be pleased to assist.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 2 OF 2011

Fair Trading Inspectors Bill 2011

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Fair Trading Inspectors Bill 2011 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clauses 14, 31, 35, 40, 42-3, 56, 58-9, 61, 64, 68-70, 92 and 165** creating offence provisions and replacing one existing offence provision;
- **clauses 83-5 and 87** creating evidentiary presumptions to apply in proceedings under the legislation;
- **parts 2 and 3** (as modified by schedule 1) conferring powers of entry under warrant or with consent and various post-entry powers;
- **clauses 34-5, 39-40, 55-8 and 60-1** modifying common law and statutory rights to silence; and
- **clause 90** protecting designated people from civil liability.

Additionally, the committee has invited the Minister to provide further information regarding the application of fundamental legislative principles to:

- **clause 63** and whether it would have sufficient regard to rights of individuals to privacy;
- **clause 22** and the officers who might issue a warrant to allow inspectors to exercise powers of entry; and
- **clauses 47, 49-50, 52-4, 116, 122, 129, 133, 139, 150, 156, 166, 175 and 183** providing for forfeiture of property and which may provide for compulsory acquisition of property other than with fair compensation.

1. *SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS*

Clauses 14, 31, 35, 40, 42-3, 56, 58-9, 61, 64, 68-70, 92 and 165

The committee has identified that these clauses create offence provisions and replace one existing offence provision.

Response:

These offence provisions essentially continue those that currently exist in the majority of primary Acts. As indicated in the explanatory notes, clause 59 creates a new offence for a person to contravene a document certification requirement. This offence forms part of the precedent provisions and is also found in other Queensland legislation. The explanatory notes also describe the approach taken in relation to setting maximum penalties.

Clause 165 replaces the current section 25A of the *Security Providers Act 1993* with a new section 25A. The new section 25A does not refer to an inspector, as an inspector would exercise their powers under the Bill to request the production of a licence. Apart from this change, the new section 25A otherwise continues the position in the current section 25A and continues the offence provision and maximum penalty.

Clause 63

The committee has identified that clause 63 would allow the chief executive to obtain criminal history reports and has invited the Minister to provide further information about whether the clause would have sufficient regard to rights of individuals to privacy as well as in respect to other matters.

Response:

Generally, clause 63 is based on section 767 of the *Water Act 2000*. However, clause 63 creates a higher threshold for obtaining a criminal history in that the inspector must also reasonably suspect that the person may create an unacceptable level of risk to the inspector's safety. It is submitted that the imposition of this additional requirement has greater regard to the rights and liberties of individuals.

Clause 63 is necessary to ensure the safety of inspectors when entering a place, as experience has shown that certain industries and licensed occupations may be infiltrated by, or have ties to, criminal organisations. If there is considered to be a risk to an inspector's safety, police assistance may be sought to effect the entry.

In terms of ensuring an inspector's safety, the committee has suggested that a police presence during entry would address this concern and may have greater regard to privacy rights. There are situations where inspectors do request police assistance 'on the spot' based on the immediate circumstances, particularly when investigating crowd controllers at licensed venues such as pubs and clubs. However, the ability to request criminal histories prior to entering a place is integral when planning certain investigations and sustained operations. It also ensures that police resources can be used effectively should a need for police assistance arise.

Clause 63 is not intended to displace the 'rehabilitation period' provisions or other provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. Accordingly,

the reference to 'criminal history' in the Bill would take the usual meaning provided in the Criminal Law (Rehabilitation of Offenders) Act.

The Bill does not identify whether a criminal history will be provided upon payment of a fee. This matter is handled administratively, in collaboration with the Queensland Police Service. While the Office of Fair Trading will bear the costs of obtaining criminal histories, the costs will be met within existing allocations. In any event, it is not anticipated that there will be a large number of requests.

Clause 63(5) allows the chief executive to give the inspector information in the report about offences involving the use of a weapon or violence against a person. This is appropriate and necessary as it is the inspector, not the chief executive, who will enter the premises.

The Bill does not provide how the criminal history is to be transmitted and does not prescribe in detail internal processes. However, it is noted that other legislation does not go into this level of detail as such matters are handled at an administrative level. Clause 64 provides for the confidentiality and destruction of criminal histories in the usual manner provided in legislation.

Clauses 83-5 and 87

The committee has identified that clauses 83-5 and 87 create evidentiary presumptions to apply in proceedings under the legislation.

Response:

These evidentiary provisions are common in legislation and continue the position currently in most primary Acts. It is submitted that the matters to which the clauses relate are non-contentious. It is also noted that the committee does not consider clause 83 to expand the powers otherwise conferred by the Bill, but facilitates proof of the powers.

Parts 2 and 3

The committee has identified that parts 2 and 3 (as modified by schedule 1) would confer powers of entry under warrant or with consent and various post-entry powers.

Response:

The committee has queried whether, under clause 22, a 'magistrate' would include a justice of the peace, court officers and other officers. It is not intended that the reference to a magistrate include any of these other classes of persons, in order to have sufficient regard to fundamental legislative principles. 'Magistrate' is defined in section 36 of the *Acts Interpretation Act 1954* to mean a magistrate appointed under the *Magistrates Act 1991*. Accordingly, a warrant under the Bill can only be issued by a magistrate appointed under the Magistrates Act.

It is noted that the committee has referred to the explanatory notes in relation to the remaining clauses of parts 2 and 3 and has not made any additional comments.

Clauses 34-5, 39-40, 55-8 and 60-1

The committee has identified that these clauses would modify common law and statutory rights to silence.

Response:

It is noted that the committee has referred to the explanatory notes and has not made any additional comments. In addition to the explanatory notes, the power to make requirements of persons (for example to produce information and documents) is an essential power. Inspectors would not be able to properly investigate possible breaches of legislation if such powers were not included in the Bill and as a consequence, the consumer protection objects of the primary Acts could not be achieved.

The explanatory notes also provide justification for abrogating the privilege against self-incrimination and evidential immunity is provided in clause 71 to balance the abrogation.

Clause 90

The committee has identified that clause 90 would protect designated people from civil liability.

Response:

It is noted that the committee has referred to the explanatory notes and has not made any additional comments.

Clauses 47, 49-50, 52-4, 116, 122, 129, 133, 139, 150, 156, 166, 175 and 183

The committee has identified that these clauses provide for forfeiture of property and may provide for compulsory acquisition of property other than with fair compensation.

Response:

Under the Bill, property can only be seized if it is authorised under a warrant or an inspector reasonably believes the property is evidence of an offence, or has just been used in committing an offence (clauses 36-7). The Bill contains safeguards for seized things, such as requiring an inspector to give a receipt and information notice, allowing the owner to have access to the seized thing, and providing for the return of the seized thing (clauses 44-6). The Bill contains additional safeguards as the decision to seize a thing is subject to an internal review process and may be appealed against to the Magistrates Court (chapter 3, part 1).

The chief executive's power to order the forfeiture of a seized thing to the State is sufficiently limited under clause 47. The chief executive may make an order if an inspector— after making reasonable inquiries, can not find an owner; or after making reasonable efforts, can not return it to an owner; or reasonably believes it is necessary to keep the thing to prevent it being used to commit the offence for which it was seized. The Bill contains additional safeguards as the forfeiture decision is subject to an internal review process and may be appealed against to the Magistrates Court (chapter 3, part 1).

Clause 50 allows the court to make a forfeiture order upon the conviction of a person for an offence. Clause 51(2)(a) requires the court to hear any submissions that any

person claiming to have any property in the thing may wish to make. The decision to forfeit property therefore, is ultimately a matter for the court, based on the circumstances of the particular case. Clause 54 similarly allows the court to make disposal orders.

Under clause 67, a person may claim compensation from the State if the person incurs a loss because of the exercise, or purported exercise, of a power by or for an inspector including a loss arising from compliance with a requirement made of the person under chapter 2. This does not include loss arising from a lawful seizure as it is not considered appropriate for a person to be able to claim compensation for a thing seized in relation to the commission of an offence. However, clause 49(3) provides that if the chief executive sells a forfeited thing, the chief executive may, after deducting the costs of the sale, return the proceeds of the sale to the former owner of the thing.

The remaining clauses identified by the committee insert mirroring provisions into the primary Acts to allow the court to make forfeiture and disposal orders. This ensures the court's powers under the primary Acts are consistent with the Bill.

The *Tourism Services Act 2003* is currently the only primary Act which contains forfeiture on conviction provisions and has been included in the Bill. While the primary Acts do not contain disposal order provisions, such provisions have been included in the Bill as it complements the forfeiture on conviction provisions. It is reiterated that the court may only make such orders on the conviction of a person for an offence and the court is required to hear submissions from any person claiming to have any property in the thing to be forfeited or disposed of.

9. MOTOR DEALERS AND CHATTEL AUCTIONEERS BILL 2010

Date introduced: 24 November 2010
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading
Committee report on bill: 1/11; at 61 – 74
Date response received: 20 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 214** excluding specified people from making a claim against the claim fund;
   - **the large number of clauses** creating offence provisions;
   - **clause 250** imposing time limits form the commencement of proceedings for offences and allowing the prosecution to elect for an indictable offence to be heard summarily or on indictment;
   - **clauses 251-2** which may impose liability for the acts or omissions of others;
   - **the large number of clauses** which may affect rights of individuals to privacy;
   - **clause 255** allowing the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people;
   - **parts 2 and 5** which may prevent some people from working as motor dealers and chattel auctioneers;
   - **clauses 28-9 and 191** making people aged under 18 ineligible for a motor dealer licence or registration as a motor salesperson or trainee chattel auctioneer;
   - **clauses 14, 21, 24, 32, 35, 40, 43, 48, 51, 55, 182, 186, 192-3, 195, 198 and 210** making rights to licences and registration dependent on administrative power which may be insufficiently defined;
   - **clauses 56 and 205** making rights and liberties subject to administrative power which may not be subject to appropriate review;
   - **clauses 51, 55-6, 201, 204-5** which may be inconsistent with principles of natural justice; and
   - **clauses 82, 149, 236-7, 242, 246-9, 251-2 and 254** which may impose evidential burdens on a person charged with an offence under the legislation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **the large number of clauses** which may allow the delegation of legislative power in inappropriate cases;
   - **clause 261**, which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system; and
   - **the large number of clauses** which may authorise amendment of the Act by regulation.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Hon Paul Lucas MP

Deputy Premier and Attorney-General
Minister for Local Government and
Special Minister of State

Our ref: FTP-00573

Your ref: B60.10

18 APR 2011

SCRUTINY OF
20 APR 2011
LEGISLATION COMMITTEE
B60.10

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo-Ann

I refer to your letter of 14 February 2011 to Mr Peter Lawlor MP, about the Motor Dealers and Chattel Auctioneers Bill 2010. Following recent ministerial changes, responsibility for fair trading has been transferred to me as the Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

Thank you for your comments in the committee's *Legislation Alert* No. 1 of 2011. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals and whether the Bill has sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I note that the committee has found that the explanatory notes, as tabled at the first reading of the Bill, are compliant with Part 4 of the *Legislative Standards Act 1992*, contain the information required by section 23 of the Act and are clear and precise.

I trust this information is of assistance.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 1 OF 2011

Motor Dealers and Chattel Auctioneers Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Motor Dealers and Chattel Auctioneers Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clause 214**
- **clause 250**
- **clause 251-2**
- **clause 255**
- **clause 28-9 and 191**
- **clauses 14, 21, 24, 32 ,35, 40, 43, 48. 51, 55, 182, 186, 192-3, 195, 198, 210**
- **clause 56 and 205**
- **clause 51, 55-6, 201, 204-5**
- **clause 82, 149, 236-7, 242, 246-9, 251-2, 254**

Additionally, in relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to:

- the large number of clauses creating offence provisions
- the large number of clauses which may affect rights of individuals to privacy
- **parts 2 and 5**

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clause 261**
- the large number of clauses which may allow the delegation of legislative power in inappropriate cases;
- the large number of clauses which may authorise amendment of the Act by regulation.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clause 214

The committee states that clause 214 of the Bill may exclude specified people from making a claim against the claim fund.

Response:

The purpose of claim fund is to protect consumers who suffer financial loss because of particular contraventions by a licensee. A person who engages a chattel auctioneer and suffers financial loss in relation to the sale of livestock under a *del credere* agreement can not make a claim against the claim fund, because under a *del credere* agreement a licensee guarantees payment to the seller of the livestock's purchase price. Accordingly, any financial loss suffered by the seller is a private contractual matter.

The clause prevents licensees from making claims as the purpose of the claim fund is to protect consumers, not licensees. The clause also prevents other people involved in motor dealer transactions who are not consumers from making claims against the fund, for example a financier of a motor dealer's business who suffers financial loss because of financing the motor dealers business, as this is a commercial arrangement.

The large number of clauses creating offence provisions

The committee has identified a large number of clauses creating offence provisions.

Response:

The offences in the Bill continue the offences and associated penalties applying to motor dealers and auctioneers of chattels under the *Property Agents and Motor Dealers Act 2000* (PAMD Act). Consequently, existing licensees will be subject to the same offences as they were under the PAMD Act.

The PAMD Act, having been in force for more than 9 years has acted as an effective deterrent against undesirable practices. Additionally, there have been a substantial number of prosecutions and enforcement action for breaches of the offence provisions.

The offences and their respective penalties provide necessary consumer protections. They deter undesirable practices and provide recourse to punish those licensees who do the wrong thing.

Clause 250

The committee has identified that clause 250 imposes time limits for the commencement of proceedings for offences and allows the prosecution to elect for an indictable offence to be heard summarily or on indictment.

Response:

The time limits within which to commence a proceeding under the Bill are reasonable and necessary to provide certainty for licensees about when the risk of prosecution for an alleged breach ends. Time limits are used to create certainty for parties in other proceedings, for instance, the *Limitation of Actions Act 1974* provides statutory limits for commencing civil actions.

Although the prosecution may elect for an indictable offence to be heard summarily, the person charged with the indictable offence may still ask, at the start of a summary proceeding, that the charge be prosecuted on indictment. If the person does make the request, the magistrate must not decide the charge as a summary offence and must proceed by way of a committal proceeding.

Clause 251-2

The committee identifies that clauses 251-2 may impose liability for the acts or omissions of others.

Response:

The committee notes that the explanatory notes provide sufficient justification.

The large number of clauses which may affect rights of individuals to privacy

Response:

The collection of private information, including criminal histories, is necessary for an effective licensing and regulatory regime. The collection of this information is done in accordance with the *Information Privacy Act 2009*, the *Public Records Act 2002* and the *Right to Information Act 2009.*

The committee notes that the explanatory notes provide sufficient justification for provisions which may affect individual rights to privacy.

Clause 255

The committee states that clause 255 allows the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people.

Response:

The committee notes that the explanatory notes provide sufficient justification.

In addition, in practice public warning statements are usually only made when:

- a business's conduct poses actual or likely imminent financial or other loss, or imminent personal injury to consumers; and/or the conduct is deceptive, unethical, unfair or improper; and

- on available evidence a *prima facie* breach has occurred; and
- the business is an itinerant operation and/or has avoided or rejected the Office of Fair Tradings's attempts to investigate its operation.

Part 2, divisions 5-7 and 9-10, and part 5, divisions 5-7 and 9-10

The committee comments that parts 2 and 5 may prevent some people from working as motor dealers and chattel auctioneers.

Response:

A licensing and registration system is essential to the consumer protection regime provided in the Bill, which continues that contained within the PAMD Act.

The imposition of eligibility and suitability requirements is central to the licensing and registration system as this goes towards protecting consumers by ensuring they deal with qualified and professional licensees.

While this imposes barriers towards employment, consumer protection in these areas is of utmost importance.

The committee notes that the explanatory notes provide sufficient justification.

Clauses 28-9 and 191

The committee states that clauses 28-9 and 191 make people aged under 18 ineligible for a motor dealer licence or registration as a motor salesperson or trainee chattel auctioneer.

Response:

The committee has noted the justification provided in the explanatory notes. The Bill provides that an individual must be at least 18 years to be eligible to obtain a motor dealer licence (clause 28) or chattel auctioneer licence (clause 29), or registration as a motor salesperson or trainee chattel auctioneer (clause 191). The explanatory notes explain that this age discrimination is justified on the grounds that consumers expect to deal with licensees and registered employees that have the necessary maturity, judgement and capacity given the pecuniary nature of the transactions involved the sale of used motor vehicles and the auction of chattels. Accordingly, it is for the protection of consumers that individuals are at least 18 years to be eligible to obtain a licence or registration certificate.

Clauses 14, 21, 24, 32, 35, 40, 43, 48, 51, 55, 182, 186, 192-3, 195, 198 and 210

The committee comments that these clauses make rights to licences and registration dependent on administrative power which may be insufficiently defined.

Response:

These clauses continue the position currently in the PAMD Act. While there may appear to be wide discretion by the chief executive, again this is necessary to ensure the suitability and eligibility of licensees and registered employees. This goes toward fulfilling the consumer protection object of the Bill. Additionally, the administrative powers of the chief executive to consider applications for licences and registration certificates are sufficiently defined and reviewable by the Queensland Civil and Administrative Tribunal (QCAT).

Clauses 56 and 205

The committee notes that clauses 56 and 205 make rights and liberties subject to administrative power which may not be subject to appropriate review.

Response:

This inconsistency with the fundamental legislative principle is justified on the grounds that immediate cancellation is limited to the most serious of instances that could create the greatest detriment to consumers. In particular, a licence may only be cancelled under clause 56 if the licensee is convicted of a serious offence; if the licensee is an individual, the licensee is affected by bankruptcy action; or if the licensee is a corporation, the licensee has been wound up or struck off under the Corporations Act. For a registration certificate, the certificate may only be cancelled under clause 205 if the employee is convicted of a serious offence. The happening of any of the events goes to the very core of a licensee or registered employee's ability to perform the activities authorised by their licence or registration certificate. The immediate cancellation of the licence or registration certificate prevents the likelihood of detriment, or further detriment, to consumers.

It should also be noted that the cancellation of a licence or registration certificate does not prevent the former licensee or employee from applying for a new licence or registration certificate. However, the person must meet the suitability and eligibility requirements. Additionally, the Bill does not prevent a licensee or registered employee from seeking judicial review of the decision.

Clauses 51, 55-6, 201, 204-5

The committee states that these clauses may be inconsistent with principles of natural justice.

Response:

Inconsistency with the principles of natural justice may also be raised in relation to the immediate suspension of licences and registration certificates (clauses 55 and 204) as there is no prior notification or 'show cause' process. However, a right of review is available to QCAT. Immediate suspension of a licence or registration certificate is only limited to certain circumstances and is considered necessary to prevent the likelihood of detriment, or further detriment, to consumers.

Clauses 82, 149, 236-7, 242, 246-9, 251-2 and 254

The committee notes that these clauses may impose evidential burdens on a person charged with an offence under the legislation.

Response:

The committee has noted the justification provided in the explanatory notes about clauses 82, 149, 236 and 237 such that the reversal of the onus of proof is justified on the grounds that knowledge about the reasonableness or otherwise of the representation is information which is peculiarly within the knowledge of the person who made the representation, and would otherwise be difficult to establish.

Clause 242 is justified because it is provided that a licensee will not commit an offence if the licensee establishes to the court's satisfaction, on the balance of probabilities, that the expenditure was lawfully incurred. The reversal of the onus of proof is justified on the grounds that the information relating to the relevant expenditure would be peculiarly within the knowledge of the licensee and would otherwise be difficult to establish.

The explanatory notes justification also applies to clauses 236, 246, 247 and 249.

Clause 248 deals with evidentiary matters and is a standard provision in legislation.

The committee notes that Clause 252 is justified for similar reasons. Clause 252 provides that if a corporation commits an offence against a provision of the Bill, each of the executive officers of the corporation also commit an offence, namely, the offence of failing to ensure the corporation complies with the provision. It is a defence for an executive officer to prove the officer took all reasonable steps to ensure the corporation complied with the provision, or the officer was not in a position to influence the conduct of the corporation in relation to the offence. The reversal of the onus of proof is justified as the provisions a corporation could contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation be accountable. Additionally, the information relating to the executive officer's influence on the conduct of the corporation would be peculiarly within the knowledge of the officer and would otherwise be difficult to establish.

To provide further justification, clause 252 is consistent with one of the main themes of the Bill in that principal licensees must ensure their employees comply with the Bill, and are responsible for the acts and omissions of their employees. So too, should executive officers be liable for offences of a corporation, but only where the executive officer was in a position to influence the conduct of the corporation in relation to the offence. The clause is also consistent with the suitability requirements for applicants and licensees in clause 21. In deciding whether a corporation is suitable, the chief executive must have regard to whether an executive officer of the corporation has been convicted of an offence against this Bill, the other Agents Bills or the Agents Financial Administration Bill. If derivative liability was not imposed, an executive officer who had influence over an offence by a corporation, and the corporation's licence was cancelled, could continue the unlawful conduct under a new corporate entity.

Another issue that may be raised in relation to clause 252 is that derivative liability can potentially apply to any offence under the Bill. However, it is not considered appropriate to limit derivative liability to certain offences, such as more serious offences. This is because there is potential for the commission of relatively minor offences in a manner that is systematic and widespread.

It is noted that the Council of Australian Governments is undertaking a review of provisions imposing liability on executive officers. The object of the review is to ensure there is sufficient justification for making directors liable for corporate fault. As the review has not yet been finalised, it is anticipated that any further assessment around the appropriateness of derivative liability for executive officers in the Bill be undertaken once the review is completed.

2. SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

The large number of clauses which may allow the delegation of legislative power in inappropriate cases

The committee is concerned that a large number of clauses may allow the delegation of legislative power in inappropriate cases.

Response:

The Bill replicates the relevant heads of regulatory power under the PAMD Act. The matters to be prescribed under regulation are those matters usually prescribed under regulations, i.e. fees, qualification requirements, minor offences. As these are mostly administrative matters that can be subject to changes over time, it is appropriate that they are provided for in a regulation, rather than primary legislation. The regulation will comply with the requirements of section 4(5) of the *Legislative Standards Act 1992*.

The penalties are appropriate as the penalties are for offences in the Bill, and not in a regulation.

Clause 261

The committee states that clause 261 may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system

Response:

Clause 261 allows a regulation to prescribe fees, and replicates the equivalent provision in the PAMD Act. It would be inappropriate for the legislation to confine the power to prescribe fees to a particular methodology – including the recovery of the costs of administering the licensing system because while a fee should have some relationship to the costs of administration, the setting of fees is ultimately a matter for government policy and can be subject to considerations other than cost recovery. Such matters are not appropriate to be included in legislation.

The large number of clauses which may authorise amendment of the Act by regulation

The committee notes that a large number of clauses may authorise amendment of the Act by regulation.

Response:

It should be noted that these are administrative matters only and any regulation is subject to scrutiny by Parliament. In relation to clause 13(2)(a) specifically, this is not a Henry VIII clause as it does not amend the Act. The regulation can only limit the activities that may be performed by a limited licensee from the activities listed in clause 63(1). This allows for the continuation of limited motor dealer licences for wrecking and broking.

10. PROPERTY AGENTS BILL 2010

Date introduced: 24 November 2010

Responsible minister: Hon PJ Lawlor MP

Portfolio responsibility: Minister for Tourism and Fair Trading

Committee report on bill: 1/11; at 81 – 96

Date response received: 20 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 193** excluding specified people from making a claim against the claim fund;
   - **the large number of clauses** creating offences;
   - **clause 253** imposing time limits for the commencement of proceedings and regulating proceedings for offences under the legislation;
   - **clauses 254-5** which may impose liability for the acts or omissions of others;
   - **the large number of clauses** which may affect rights of individuals to privacy;
   - **clause 259** allowing the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people;
   - **clause 72** which may affect rights and liberties of people wishing to work as pastoral agents;
   - **parts 2 and 5** which may prevent some people from working as property agents;
   - **clauses 35-6 and 142** making people aged under 18 ineligible for a licence or registration;
   - **clauses 27, 40, 44, 49, 52, 57, 60, 64, 137, 143-4, 146, 149, 152 and 155** which may make rights to licences and registration dependent on administrative power which may be insufficiently defined;
   - **clause 201 and schedule 1** which may make rights and liberties subject to administrative power which is not subject to appropriate review;
   - **clauses 60, 64-5, 152, 155-6 and 212** which may be inconsistent with principles of natural justice;
   - **clauses 169, 213, 230, 235, 238, 246, 254-5, 258** which may impose evidentiary burdens on defendants to proceedings; and
   - **clause 209** abrogating protections of the privilege against self-incrimination.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **the large number of clauses** which may allow the delegation of legislative power in inappropriate cases; and
   - **clause 265**, which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.
4. The committee makes no further comment regarding the bill.

Queensland Government

Hon Paul Lucas MP

Deputy Premier and Attorney-General
Minister for Local Government and
Special Minister of State

Our ref: FTP-00573

Your ref: B59.10

18 APR 2011

SCRUTINY OF
20 APR 2011
LEGISLATION COMMITTEE
B59.10

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo-Ann

I refer to your letter of 14 February 2011 to Mr Peter Lawlor MP, about the Property Agents Bill 2010. Following recent ministerial changes, responsibility for fair trading has been transferred to me as the Deputy Premier and Attorney-General, Minister for Local Government and Special Minister of State.

Thank you for your comments in the committee's *Legislation Alert* No. 1 of 2011. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals and whether the Bill has sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I note that the committee has found that the explanatory notes, as tabled at the first reading of the Bill, are compliant with Part 4 of the *Legislative Standards Act 1992*, contain the information required by section 23 of the Act and are clear and precise.

I trust this information is of assistance.

Yours sincerely

PAUL LUCAS MP
Deputy Premier and Attorney-General,
Minister for Local Government
and Special Minister of State

Encl.

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 1 OF 2011

Property Agents Bill 2010

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Property Agents Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992.*

In relation to whether the Bill has sufficient regard to the rights and liberties of individuals, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- **clause 193** excluding specified people from making a claim against the claim fund;
- the large number of clauses creating offences;
- **clause 253** imposing time limits for the commencement of proceedings and regulating proceedings for offences under the legislation;
- **clause 254-5** which may impose liability for the acts or omissions of others;
- the large number of clauses which may affect rights of individuals to privacy;
- **clause 259** allowing the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people;
- **clause 72** which may affect rights and liberties of people wishing to work as pastoral agents;
- **parts 2 and 5** which may prevent some people from working as property agents;
- **clause 35-6 and 142** making people aged under 18 ineligible for a licence or registration;
- **clause 27, 40, 44, 49, 52, 57, 60, 64, 137, 143-4, 146, 149, 152 and 155** which may make rights to licences and registration dependent on administrative power which may be insufficiently defined;
- **clause 201 and schedule 1** which may make rights and liberties subject to administrative power which is not subject to appropriate review;
- **clause 60, 64-5, 152, 155-6 and 212** which may be inconsistent with principles of natural justice;
- **clause 169, 213, 230, 235, 238, 246, 254-5, 258** which may impose evidentiary burdens on defendants to proceedings; and
- **clause 209** abrogating protections of the privilege against self-incrimination.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the committee has drawn the attention of the Parliament to the following clauses of the Bill:

- the large number of clauses which may allow the delegation of legislative power in inappropriate cases; and
- **clause 265** which may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clause 193 (Persons who cannot claim)

The committee states that clause 193 of the Bill may exclude specified people from making a claim against the claim fund.

Response:

The purpose of the claim fund is to protect consumers who suffer financial loss because of particular contraventions by a licensee. The clause also prevents other people involved in property transactions who are not consumers from making claims against the fund, for example a financier of a property agent's business who suffers financial loss because of financing the property agent's business, as this is a commercial arrangement.

The large number of clauses creating offences

The committee notes that:

- a large number of detailed offence provisions would enforce the regulation of the activities of property agents;
- a large number of offence provisions would have elements of the offence prescribed by regulation (see, below, under 'Delegation of legislative power');
- some of the offence provisions appear similar in acts or omissions, such as clauses 61(3) and 65(2); and
- when proposed maximum penalties are compared, offences with the same maximum monetary penalties may have quite different maximum terms of imprisonment.

Response:

The offences in the Bill replicate the offences and associated penalties applying to real estate agents and resident letting agents under the *Property Agents and Motor Dealers Act* (PAMD Act). Consequently, existing licensees will be subject to the same offences as they were under the PAMD Act.

The PAMD Act, having been in force for more than 9 years has acted as an effective deterrent against undesirable practices. Additionally, there have been a substantial number of prosecutions and enforcement action for breaches of the offence provisions.

The offences and their respective penalties provide necessary consumer protections. They deter undesirable practices and provide recourse to punish those licensees who do the wrong thing.

The committee was concerned that some offences are in similar terms and provides clause 61 and 65 as an example. This is to provide clarity to licensees about their obligations. For example, while both these clauses provide that a licensee must return a suspended licence to the chief executive within 14 days of the suspension, clause 61 addresses when licences should be returned to the chief executive in a number of circumstances and clause 65 is more specific to the process that applies when a licence is suspended.

Some offences have the same maximum monetary penalty but different maximum imprisonment penalties. Offences with these higher imprisonment terms have the potential for consumers to suffer more significant detriment in the case of more serious breaches. Where the maximum monetary penalty is insufficient to punish a particularly serious breach, these higher imprisonment penalties allow the court to impose a more significant penalty, to address the more serious detriment to consumers.

Clause 253 (Proceedings for an offence)

The committee has identified that clause 253 imposes time limits for the commencement of proceedings for offences and allows the prosecution to elect for an indictable offence to be heard summarily or on indictment.

Response:

The time limits within which to commence a proceeding under the Bill are reasonable and necessary to provide certainty for licensees about when the risk of prosecution for an alleged breach ends. Time limits are used to create certainty for parties in other proceedings, for instance, the *Limitation of Actions Act 1974* provides statutory limits for commencing civil actions.

Although the prosecution may elect for an indictable offence to be heard summarily, the person charged with the indictable offence may still ask, at the start of a summary proceeding, that the charge be prosecuted on indictment. If the person does make the request, the magistrate must not decide the charge as a summary offence and must proceed by way of a committal proceeding.

Clause 254 (Responsibility for acts or omissions of representatives) and 255 (Executive officers must ensure corporation complies with Act)

The committee states that clauses 254 and 255 may impose liability for the acts or omissions of others.

Response:

The committee notes that the explanatory notes provide sufficient justification.

The large number of clauses which may affect rights of individuals to privacy

Response:

The collection of private information, including criminal histories, is necessary for an effective licensing and regulatory regime. The collection of this information is done in accordance with the *Information Privacy Act 2009, Public Records Act 2002* and *Right to Information Act 2009*.

The committee notes that the explanatory notes provide sufficient justification for provisions which may affect individual rights to privacy.

Clause 259 (Public warning statements)

The committee states that clause 259 allows the minister or chief executive to make or issue public statements to provide information or warnings, including statements identifying people.

Response:

The committee notes that the explanatory notes provide sufficient justification.

In addition, in practice public warning statements are usually only made when:

- a business's conduct poses actual or likely imminent financial or other loss, or imminent personal injury to consumers; and/or the conduct is deceptive, unethical, unfair or improper; and
- on available evidence a *prima facie* breach has occurred; and
- the business is an itinerant operation and/or has avoided or rejected the Office of Fair Tradings's attempts to investigate its operation.

Clause 72 (What a property agent licence authorises)

The committee comments that clause 72 may affect rights and liberties of people wishing to work as pastoral agents.

Response:

It should be noted that the pastoral agent licence was established in the 1980s and at a time when it was difficult for licensees and potential licensees in rural and regional Queensland to access training and education that would have otherwise seen them able to qualify as full licensees.

In the present day and age, these practical difficulties are not as significant an issue

Rural and regional Queensland will not lose out as a result of pastoral house licensing being abolished. Existing pastoral house licensees will be transitioned to the relevant licence category of real estate agency and/or chattel auctioneer under the new regime and in many cases, this will entitle them to undertake a wider range of duties, which in turn will give Queenslanders in rural and regional communities greater choice and promote enhanced competition in the marketplace.

Parts 2 and 5

The committee comments that parts 2 and 5 may prevent some people from working as property agents.

Response:

A licensing and registration system is essential to the consumer protection regime provided in the Bill, which continues that in PAMD Act.

The imposition of eligibility and suitability requirements is central to the licensing and registration system as this goes towards protecting consumers by ensuring they deal with qualified and professional licensees. While this imposes barriers towards employment, consumer protection in these areas is of utmost importance.

The committee notes that the explanatory notes provide sufficient justification.

Clause 35, 36 and 142

The committee states that clauses 35-6 and 142 make people aged under 18 ineligible for a motor dealer licence or registration as a motor salesperson or trainee chattel auctioneer.

Response:

The Bill provides that an individual must be at least 18 years to be eligible to obtain a property agent licence (clause 35) or a resident letting agent licence (clause 36), or registration as a property agent salesperson (clause 142). This age discrimination is justified on the grounds that consumers expect to deal with licensees and registered employees that have the necessary maturity, judgement and capacity given the pecuniary nature of the transactions involved in the purchase, sale, exchange and letting of property. Accordingly, it is for the protection of consumers that individuals are at least 18 years to be eligible to obtain a licence or registration certificate.

Clause 27, 40, 44, 49, 52, 57, 60, 64, 137, 143-4, 146, 149, 152 and 155

The committee comments that these clauses make rights to licences and registration dependent on administrative power which may be insufficiently defined.

Response:

These clauses are carried over from the PAMD Act, which has been in force since 2000. While the chief executive has some discretion in deciding whether to issue, renew or impose a condition on a licence or registration certificate, the clauses are explicitly set out relevant matters which must be considered in making these decisions.

There is the capacity for discretion to be exercised in assessing these relevant matters, for example, in considering the 'character' of a person in assessing their suitability to hold a licence. However, an assessment of a person's character is necessary to ensure that only suitable and eligible people are licensed as property agents.

Further, a person can seek a review of the chief executive's decision under all these clauses to the Queensland Civil and Administrative Tribunal (QCAT).

Clause 201 and schedule 1

The committee comments that clause 201 and schedule 1 may make rights and liberties subject to administrative power which is not subject to appropriate review.

Response:

Clause 201 protects individual rights by providing a necessary channel of review for a person who is dissatisfied with a decision of the chief executive made under a provision mentioned in schedule 1. Under this clause, a person may apply to QCAT to have the decision reviewed.

Clause 60, 64-5, 152, 155-6 and 212

The committee states that these clauses may be inconsistent with principles of natural justice.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clause 169, 213, 230, 235, 238, 246, 254-5, 258

The committee notes that these clauses may impose evidential burdens on a person charged with an offence under the legislation.

Response:

The committee notes that the explanatory notes provide sufficient justification.

Clause 209 (Person must answer particular questions)

The committee comments that clause 209 may be abrogating protections of the privilege against self-incrimination.

Response:

The committee notes that the explanatory notes provide sufficient justification.

2. SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

The large number of clauses which may allow the delegation of legislative power in inappropriate cases

The committee is concerned that a large number of clauses may allow the delegation of legislative power in inappropriate cases.

Response:

It is appropriate that the particular matters comprising these offences are prescribed by regulation, as they are administrative in nature and subject to change over time. For example, in relation to clause 67, it may be necessary to update the way a principal licensee must display the licensee's licence at the licensee's principal place of business.

Clause 265 (Regulation-making power)

The committee states that clause 265 may not confine the delegated power to prescribe fees to recovery of the costs of administering the licensing system

Response:

Clause 265 allows a regulation to prescribe fees, and replicates the equivalent provision in the PAMD Act. It would be inappropriate for the legislation to confine the power to prescribe fees to a particular methodology – including the recovery of the costs of administering the licensing system because while a fee should have some relationship to the costs of administration, the setting of fees is ultimately a matter for government policy and can be subject to considerations other than cost recovery. Such matters are not appropriate to be included in legislation.

11. REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2011

Date introduced: 22 March 2011
Responsible minister: Hon AP Fraser MP
Portfolio responsibility: Treasurer and Minister for State Development and Trade
Date passed: 5 April 2011
Committee report on bill: 4/11; at 7 - 23
Date response received: 21 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 92** removing rights of members of the Royal National Agricultural and Industrial Association of Queensland to gain financially on its winding-up;
   - **clause 104** inserting new offence provisions in the *Sustainable Planning Act 2009*;
   - **clause 112** extending the powers of the chief executive regarding water rights;
   - **clause 121** repealing prohibitions on price exploitation;
   - **clause 50** extending the time within which a prosecution may be commenced under the *First Home Owner Grant Act 2000*;
   - **clause 98** which may affect work-related rights of employees of relevant water entities;
   - **clause 106** abolishing iconic place development assessment panels;
   - **clauses 111 and 117** which may make rights and liberties, or obligations, dependent on administrative power which may not be either sufficiently defined or subject to appropriate review;
   - **clause 45** which may be inconsistent with principles of natural justice;
   - **clauses 7 and 58** which would allow the minister to direct a local government change commission regarding its assessment of a proposed change;
   - **clause 111** which would allow the chief executive to impose conditions on the taking of water, a function which is otherwise carried out by the making of subordinate legislation;
   - **clauses 47, 55 and 86** providing for amendments to have retrospective operation;
   - **clause 113** which may have some retrospective operation; and
   - **clause 98** which would allow the transfer of interests without consent.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clause 98** which would allow the minister to give a direction regarding the restructuring of a relevant water entity; and
   - **clauses 95 and 98** which may allow amendment of an Act by subordinate legislation.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **clause 5**, ending proceedings before the Land Tribunal in relation to a claim for specified Aboriginal land;
   - **parts 3 and 7**, which may affect rights and liberties regarding employee superannuation;
   - the scope of the discretionary administrative power to be conferred on local government change commissions under amendments to be made by **clauses 7 and 58**;
   - **clause 10** which may be inconsistent with principles of natural justice;
   - **clause 98** which would confer immunity from proceeding and prosecution; and
   - **clause 98** and whether it would have sufficient regard to the institution of Parliament.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

4. The committee thanks the minister for the information provided in his letter.
5. The committee makes no further comment regarding the bill.

Hon Andrew Fraser MP
Member for Mount Coot-tha

Queensland Government

Treasurer of Queensland
Minister for State Development
and Trade

QTO-11839

18 APR 2011

SCRUTINY OF
21 APR 2011
LEGISLATION COMMITTEE
B4.11

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Jo-Ann

Thank you for your letter of 4 April 2011 enclosing pages of the Committee's Legislation Alert No. 4 of 2011 relating to the Revenue and Other Legislation Amendment Bill 2011.

My reply to the issues raised by the Committee is set out in the enclosed document.

I trust this information is of assistance.

Yours sincerely

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RESPONSE TO SCRUTINY OF LEGISLATION COMMITTEE'S COMMENTS

REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2011

Amendments to revenue legislation

Whether the Bill is consistent with principles of natural justice

Clause 45

This clause will enable the Commissioner of State Revenue to impose administrative penalties as an alternative to prosecuting for an offence for four additional self assessment matters. This is consistent with existing arrangements for other self assessment related offences under the *Duties Act 2001*. As the explanatory notes point out, the Commissioner of State Revenue must provide a notice that explains the reasons for imposing the penalty and that the decision to impose the penalty is reviewable. In addition, the penalty is not payable when prosecution proceedings for the offence are started.

Whether the Bill has sufficient regard to rights and liberties of individuals

Clause 50

The Committee's comments are noted. This clause will extend to five years the time for commencing a prosecution under the *First Home Owner Grant Act 2000*. This will align the time for commencing a proceeding under that Act with the timeframe under the *Taxation Administration Act 2001*, which applies for all of the other revenue legislation administered by the Commissioner of State Revenue. It will also better align the *First Home Owner Grant Act 2000* with corresponding interstate legislation in this regard.

Clauses 47, 55, 86 **Insertion of new ch 17, pt 14**
Insertion of new pt 10, div 5
Insertion of new pt 10

The Committee's comments that these clauses have retrospective effect are noted. However, as clarified in the explanatory notes, all the amendments are beneficial and some have operated under administrative arrangements. It is therefore considered that they do not adversely affect rights and liberties, or impose obligations, retrospectively.

Amendment of the *South East Queensland Water (Restructuring) Act 2007*

Part 11

The Committee has made a number of observations about new provisions of the *South East Queensland Water (Restructuring) Act 2007* (SEQWR Act). At paragraphs 97 to 101, the Committee has invited specific comment from the Minister on new section 106 (clause 98) insofar as it would confer immunity from proceeding and prosecution. At paragraphs 108 to 113 of Legislation Alert 04/11, the Committee has also sought advice on whether new section 115 (clause 98) would have sufficient regard to the institution of Parliament. The Committee's specific queries are addressed below. Comments additional to those already included in explanatory notes are also provided for the Committee's information.

Clause 98 - Insertion of new chapter 5 and chapter 6 heading

Clause 98 inserts a new chapter 5 into the SEQWR Act to provide an ongoing mechanism for the restructure of relevant water entities. Below is a response to the Committee on particular sections inserted by clause 98.

New section 105 (Transfer of shares, assets, liabilities, etc. to relevant water entity) and new section 111 (Preservation of rights of transferred employee)

New section 105 enables a regulation to make provision about any of the matters listed under section 105(1), including the transfer of the assets, liabilities, instruments, employees of a relevant water entity to another relevant water entity. A regulation made under new section 105 has effect despite any other law or instrument (section 105(2)(b)).

I note the Committee's comments that a regulation made under section 105 may make certain transfers, including the transfer of an employee of a relevant water entity to another relevant water entity, without consent.

As noted by the Committee , the explanatory notes explain that these provisions do not override the substance of third party rights but instead are intended to maintain the status quo and ensure there is a smooth transition of any assets, liabilities, employees etc that transfer under a regulation. To the extent that a regulation may transfer assets and liabilities, a regulation may only transfer assets and liabilities between relevant water entities. A 'relevant water entity' has been defined so that it may only extend to government entities.

With respect to the ability of a regulation to transfer an employee of a relevant water entity, new section 111 preserves the existing terms and conditions of employment of an employee that is transferred as part of the WaterSecure-Seqwater merger. This provision has been tailored to specifically reflect the industrial relations legislation and instruments that will apply to the WaterSecure-Seqwater merger. While a transfer has effect despite any other law or instrument, it cannot displace the application of section 111 to a transfer of an employee from WaterSecure to Seqwater.

New section 106 (Effect on legal relationships)

New section 106 protects the State and other relevant entities listed under section 106(4) from liability for things done under the new chapter 5, including by providing that any consent or notice required to do something under this chapter is taken to have been given unconditionally.

I note the Committee's comments that consideration may need to be given as to whether this provision has sufficient regard to the rights and liberties of individuals, given that it confers immunity from proceeding or prosecution. The immunity conferred by this provision is justified on the basis that it is necessary in order to give comfort and protection to relevant entities that they cannot be liable for performing an action in relation to a restructure of a relevant water entity, including taking actions in compliance with a regulation or a Ministerial direction made under the new chapter 5. As explained in the explanatory notes, the intention of this provision is not to override the substance of third party rights or enhance any rights being conferred on relevant water entities but to maintain the status quo and facilitate the smooth transfer of assets, employees, instruments etc between relevant water entities.

Provisions of this nature are standard and necessary in the context of major structural reform projects and have been included in other legislation, such as the *Energy Assets (Restructuring and Disposal) Act 2006*, the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*, the *Government Owned Corporations Act 1993* and (the now expired) Chapter 3 of the SEQWR Act.

New section 114 (Excluded matter for Corporations Act)

I note the Committee's comments in relation to new section 114 in its discussion (at p 20) of the Ministerial direction power set out under new section 107. Section 114 declares that anything done by the Minister under the Ministerial direction power under section 107 is an excluded matter in relation to chapter 2D of the Corporations Act, which sets out provisions relating to officers and employees of corporations. The purpose of section 114 is to ensure that the Minister, when giving directions to a relevant water entity (or its board), is not held to be a director of a company for the purposes of the Corporations Act. Similar provisions have been included in other restructuring legislation, such as in (the now expired) Chapter 3 of the SEQWR Act.

New section 115 (Severability)

New section 115 provides that if a provision of chapter 5 or a regulation made under section 105 is held by a court or judge to be beyond power, invalid or unenforceable, the provision is to be disregarded or severed and the remaining provisions of the chapter or regulation will continue to have effect. I note that the Committee has invited me to provide information about whether this provision has sufficient regard to the institution of Parliament.

Section 115 is intended to ensure that, in the event a court or a judge determines that a provision of chapter 5 or a regulation made under section 105 is invalid, the balance of the remaining provisions, which are otherwise valid, continue to take effect. This section has sufficient regard to the institution of Parliament as it ensures that the new chapter 5 or a regulation made under section 105 operate to the full extent of Parliament's legislative power. This is consistent with section 9 of the *Acts Interpretation Act 1954*.

With respect to section 115(1)(a), the provision merely states a general law principle in relation to severance. Where a provision of an Act is held by a Court to be invalid whether because it is contrary to the Queensland Constitution or because of a section 109 inconsistency under the Commonwealth Constitution, an invalid provision may be struck down. If a particular provision, or action under a power in an Act, is struck down, this does not invalidate the other provisions of the Act. Section 115(1)(a) does not purport to fetter judicial discretion and is a clear statement by the Parliament as to its intention.

Given that a regulation made under section 105 may make provision about a substantial number of matters related to a restructure, such as the transfer of particular instruments or contracts, this section provides certainty to the restructure of a relevant water entity in that it ensures that an entire regulation is not invalidated due to a defect in a particular aspect of a regulation. An example may be the transfer of a particular contract of a relevant water entity which may, subsequent to a transfer, be found to be governed by the law of another jurisdiction and subsequently beyond the power of Parliament. This provision ensures that the remaining and otherwise valid provisions of the regulation continue to take effect.

Section 115 has been modelled on section 17A of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009*.

It is submitted that this provision does pay due regard to the institution of Parliament.

Repeal of the *New Tax System Price Exploitation Code (Queensland) Act 1999*

Clause 121 – Repeal

I note the Committee's comments in regard to the repeal of the *New Tax System Price Exploitation Code (Queensland) Act 1999*. As noted by the Committee, the Act's consumer protections were intended to be of a transitional nature during the introduction of the New Tax System and it is now unlikely that a business could attribute a price rise to the introduction of the New Tax System. Accordingly, the repeal of the Act is consistent with fundamental legislative principles. As the Committee also notes, the repeal of the Act is substantially uniform with legislation of the Commonwealth.

Amendment of the *Royal National Agricultural and Industrial Association of Queensland Act*

Clause 92 - removing rights of members of Royal National Agricultural and Industrial Association of Queensland to gain financially on its winding-up.

The Association was established in 1875 by its then members with objects to promote agriculture and industry in Queensland and with rules that intend that members should not gain financially from the profits or property of the Association. The legislation governing the Association at section 17 reflects this rule by ensuring that no dividend, bonus or other distribution of profit shall at any time be paid out of the income or property of the Association to any member. However, this provision does not extend to situations where the Association is wound-up by its members. This event is governed by provisions under the *Associations Incorporation Act 1981* which allow an association's members to vote to wind-up and to vote to distribute surplus assets of an association. The amendment removes this right only in so far as its prevents members of the Association distributing surplus assets to themselves.

The objects and rules of the Association include the reinvestment of any profits in promotional activities and exclude any returns to members from their membership. It would be the intention of the members to promote the objects of the Association without expecting any personal gain from the income, property or the return of assets on winding-up of the Association. Therefore, the proposed loss of an existing right to vote to distribute surplus assets to themselves does not take away a right which members would have aspired to. The amendment maintains the members right to vote to wind up the Association and continues to allow them to vote to distribute surplus assets to another body with similar objects whose members cannot gain financially from the income or assets of that body, including on its winding-up.

The amendment will allow the members to continue to fulfil the Association's objects as a charitable institution promoting Queensland's agricultural and industrial activities, as well as maintaining its income tax exempt status under Commonwealth legislation.

Amendments to the *Local Government Act 2009* and *City of Brisbane Act 2010*

Parts 3 and 7 – Rights to work and work-related rights

Paragraphs 30-32

I have considered the comments of the Committee and submit that the amendments have been drafted in consideration of section 4(2) of the *Legislative Standards Act 1992* and are necessary to achieve the objectives of the Bill. The issues have been explained in the explanatory notes accompanying the Bill. As indicated in the explanatory notes, the proposed merger aligns with the key findings of the 2010 Cooper review into Australia's superannuation system and that the merger would be in both funds' interests. It would also meet the successor fund transfer requirements under the *Superannuation Industry Supervision Act 1993* (Cwlth).

The proposed superannuation fund merger is not expected to have adverse impacts on LG Super members or City Super members, as the *Superannuation Industry Supervision Act 1993* (Cwlth) requires that the trustees of both funds assess and determine that transferring members will receive, at least, equivalent rights within the transferee fund. The positive impacts on members will include lower costs and improved services due to the greater scale available to the Board. Improvements in services will include access to a larger number of investment options than previously available to members.

Extensive consultation during the drafting of the amendments occurred with the Australian Workers Union (AWU), the Australian Services Union (ASU)-Queensland Branch, LG Super, City Super, BCC, and the Local Government Association of Queensland (LGAQ). All consulted stakeholders have indicated support for the merger amendments.

Clauses 7 and 58 – Administrative Power

Paragraphs 43-49

I have considered the Committee's comments and submit that clauses 7 and 58 have been drafted in consideration of section 4(3)(a) of the *Legislative Standards Act 1992*.

At paragraphs 47 and 48 the Committee noted that clause 7 would amend the *City of Brisbane Act 2010* and clause 58 would amend the *Local Government Act 2009* to remove minimum requirements regarding assessment of a proposed local government change by the Local Government Change Commission (the Commission).

In relation to the Committee's specific request for information regarding the scope of the discretionary power to be conferred on the Commission under the amendments made by clauses 7 and 58, I advise that the scope of the Commission's discretionary powers is provided by the *City of Brisbane Act 2010* section 21 subsections (1), (2) and the *Local Government Act 2009* section 19 subsections (1), (2), respectively. Under these provisions the Commission is responsible for assessing whether a proposed local government change is in the public interest, whether the proposed change is consistent with a local government related law, what the views of the Minister may be, and any other matters prescribed under a regulation. Further, the *City of Brisbane (Operations) Regulation 2010* part 2 and the *Local Government (Operations) Regulation 2010* part 2 provide that matters that the Commission must consider include having regard to communities of interest, joint arrangements, planning and resource base sufficiency.
The policy intent of clauses 7 and 58 is to provide the Commission with discretion to call for submissions and conduct public hearings where an application is minor in nature, uncontentious, and unlikely to generate a significant level of public interest. For example, an application may be to realign one owner's boundary within a single local government area. Without clauses 7 and 58 the Commission is required to call for submissions and conduct public hearings for all change applications even if the parties to the change agree and the application is unlikely to generate a significant level of public interest. Holding public hearings and calling for submissions for minor applications may incur unnecessary travel expenses and may delay the assessment of the application.

Clause 10 – Natural Justice

Paragraphs 58-63

I have considered the Committee's comments and submit that clause 10 has been drafted in consideration of section 4(3)(b) of the *Legislative Standards Act 1992*.

At paragraphs 59 and 62 the Committee indicated that the amendments regarding disciplinary action which may be taken under the *City of Brisbane Act 2010* may be inconsistent with the principles of natural justice.

In relation to the Committee's specific request for information regarding the consistency of clause 10 with section (4)(3)(b) of the *Legislative standards Act 1992* I point out that the amendments would only come into play if the councillor concerned had already been found to have engaged in inappropriate conduct or misconduct. In relation to the Committee's comment at paragraph 62, the amendments only relate to the determination of subsequent disciplinary action. In this regard, it is not unusual in other contexts for past instances of misbehaviour to be taken into account in determining an appropriate penalty. For example, the Legal Practice Committee refers to past instances of inappropriate conduct of a legal practitioner when considering the penalties it will impose. Also, the judiciary commonly takes previous offending history into account during sentencing. As a safeguard, the amendments provide that in considering any allegation made in the hearing that was admitted, or was not challenged, the panel or tribunal may consider an allegation that was not admitted, or was challenged, only if the panel or tribunal is satisfied that the allegation is true. The degree to which the panel or tribunal must be satisfied depends on the consequences, that are adverse to the councillor, of finding the allegation to be true.

Clauses 7 and 58 – Delegation of administrative power

Paragraphs 67-75

I have considered the comments of the Committee in relation to clauses 7 and 58 regarding the delegation of administrative power and submit that the amendments are necessary to achieve the objectives of the Bill. The issues have been explained in the explanatory notes accompanying the Bill. As indicated in the explanatory notes, the amendments also provide that any direction by the Minister to the Change Commission must be included in the annual report of the Change Commission. This ensures transparency and scrutiny by Parliament of the exercise of this particular administrative power by the Minister.

Amendment of the *Sustainable Planning Act 2009*

Clause Number 104 – Insertion of new ch 9, pt 7B

The insertion of new offence provisions in the *Sustainable Planning Act 2009* is considered a reasonable accountability measure to ensure appropriate panel conduct and the ability for the panel to provide unbiased advice to local governments.

Clause Number 106 – Insertion of new ch 10, pt 3

This issue is acknowledged and the information presented in the Explanatory Notes is reiterated.

The non payment of compensation to the iconic panel members on dissolution of the current panels has been raised as a potential FLP issue in relation to the member's rights and liberties. Under amendments to SPA, compensation is not provided to panel members due to the proposed dissolution of the iconic panels, and is not considered necessary. Panel members are aware of the short-term nature of their appointments, which will cease on 19 June 2011, and the proposal to change the panel's role to that of an advisory panel. Should the amendments commence after 19 June 2011, reappointment of existing members or appointment of new members will be required so that the panel's current development assessment responsibilities can continue. Should this occur, panel members will be again advised of the temporary nature of their appointments, and that no compensation will be payable on dissolution of the panel on commencement.

Amendment of the *Aboriginal Land Act 1991*

Clause Number - 5

I am informed by the Department of Environment and Resource Management that the amendment to the *Aboriginal Land Act 1991* has sufficient regard to rights and liberties for the following reasons. The amendment enables the Government to give effect to the recommendations of the Land Tribunal for the grant of the claimed Aboriginal land to the Aboriginal claimants, which would otherwise not be feasible because the areas to be granted now comprise a complex mosaic of claimable and transferable land. The Aboriginal claimants and regional Aboriginal organisations have been consulted on the amendment and have advised that in their view the best approach is to seek legislative amendments with the effect of making the claimed areas transferable. Finally, in relation to the areas to be made transferable through this amendment, proceedings before the Land Tribunal in relation to claims for the lands have already ended, and the real effect of this amendment is to provide for the land to be granted to the Aboriginal groups recommended as grantees by the Land Tribunal.

12. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2011

Date introduced: 23 March 2011
Responsible minister: Hon A Palaszczuk MP
Portfolio responsibility: Minister for Transport and Multicultural Affairs
Date passed: 7 April 2011
Committee report on bill: 4/11; at 25 - 39
Date response received: 12 April 2011 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 10, 41, 47, 87 and 100** amending existing offence provisions;
   - **clauses 63, 80 and 88** creating offence provisions;
   - **clause 88** allowing a court to impose a civil banning order, restricting or banning a person's use of public transport, even if the person had not committed an offence;
   - **clauses 72 and 100-10**, to implement drink driving reforms, and which may affect a person's right to a just legal process, capacity to work in a chosen field or rights to family life;
   - **clauses 77 and 90** which may affect eligibility of people to passenger transport driver authorisation;
   - **clauses 37-9** conferring rights to enter land without consent or warrant in order to investigate potential rail corridors;
   - **clause 66** validating all transport infrastructure constructed over, under, on or in watercourses, including in the past;
   - **clause 124** conferring immunity on a person making a public interest disclosure; and
   - **part 9** which may, in a number of respects, provide for the compulsory acquisition of property other than with fair compensation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clauses 32 and 63** which would allow the minister to issue gazette notices to make declarations about land tenure.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to **clause 62** and whether it would affect rights and liberties, or impose obligations, retrospectively.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

4. The committee thanks the minister for the information provided in her letter.
5. The committee makes no further comment regarding the bill.

Hon Annastacia Palaszczuk MP
Member for Inala

Queensland Government

Minister for Transport and Multicultural Affairs

Our ref: MC56251

Your ref: B6.11

0 8 APR 2011

SCRUTINY OF
12 APR 2011
LEGISLATION COMMITTEE
B6.11

Mrs Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Mrs Miller Jo-Ann

Thank you for your letter of 4 April 2011 about the Committee's comments on the Transport and Other Legislation Amendment Bill 2011, which were included in Alert Digest No. 4 of 2011.

The Committee noted that the Bill contained a number of potential breaches of fundamental legislative principles. It has also identified material in the accompanying explanatory notes justifying the potential breaches.

I welcome the opportunity to provide the Committee with further information on a number of the matters raised in the Alert. I have enclosed a detailed response prepared by my department to the report.

I thank the Committee for its careful consideration of the legislation and for their comments.

If you require further information, please call Mr Rob Hillier, Director (Government Services) on 3306 7044. Mr Hillier will be pleased to assist.

Yours sincerely

Annastacia Palaszczuk MP
Minister for Transport and Multicultural Affairs

Enc (1)

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TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2011
Scrutiny – responses to individual clauses

In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:

Clauses 10, 41, 47, 87 and 100 amending existing offence provisions;

- Clause 10 – Amendment of s 328A (Dangerous operation of a vehicle)
  - The Committee has noted without comment that clause 10 of the Bill will amend section 328A of the Criminal Code. This amendment is consequential on the introduction of the new middle alcohol limit offence. The amendment ensures that any prior convictions for that offence are treated in the same manner as other drink driving convictions, for the purpose of sentencing under section 328A.

- Clause 41 – Amendment of s 116 (Pretending to be an investigator etc.)
  - The offence provision in section 116 (Pretending to be an investigator etc.) with a maximum penalty of 80 penalty units was originally inserted by the *Transport Legislation Amendment Act (No 2) 1998*. As noted in the explanatory notes, the power to investigate a rail corridor is being extended to include the chief executive. This penalty will now apply to a person pretending to be an investigator or the chief executive. The maximum penalty of 80 penalty units ($8,000) remains the same.

- Clause 47 – Amendment of s 255 (Interfering with railway)
  - As noted by the Committee this section is being amended to clarify that the railway manager's power is within a railway corridor. The existing offence for interfering with a railway remains the same at 160 penalty units ($16,000).

- Clause 87 – Amendment of s 129ZG (Offence to contravene exclusion order)
  - The Department acknowledges that the insertion of the word 'reasonable' is an amendment to a current offence provision. It should be noted that the Department is not aware of a person who has been issued with an exclusion order by the courts. As a result, a change to this provision would not appear to affect any person.

- Clause 100 – Amendment of s 79 (Vehicle offences involving liquor or other drugs)
  - The Committee's report notes that clauses 100 and 101 of the Bill will introduce a new *middle alcohol limit* and will create a new offence for a person to drive, attempt to put in motion or be in charge of a particular vehicle while over that limit but under the *high alcohol limit*.
  - At paragraph 47 of the report, the Committee states that *"...the explanatory notes provide (at 22) justification for any inconsistency of clauses 100 and 101 with rights and liberties of individuals*".

Clause 63, 80 and 88 creating offence provisions;

- Clause 63 – Insertion of new ch 15A
  - Clause 63 extends the existing light rail interface management provisions penalties to busways. The maximum penalty provisions remain the same.
  - The Department regards the offence provisions in sections 475ZK(5) (Failing to enter into transport interface agreement) and 475ZL(5) (Failing to comply with direction to implement transport interface arrangements) as necessary to ensure the safety of persons and the maintenance of structural and operational integrity of all transport infrastructure and public transport networks. As noted by the Committee these penalty provisions are consistent with similar provisions in the *Transport (Rail Safety Act) 2010*.

- Clause 80 – Insertion of new ch 4A
  - The Department regards the new offence provisions relating to bailment and the civil banning regime as necessary and having appropriate penalty provisions.

- Clause 88 – Insertion of new ch 11, pt 4C
  - The Department regards the new offence settings for civil banning orders as necessary to ensure the regime delivers on its policy intent. The penalty provisions are proportionate and well adapted.

Clause 88 allowing a court to impose a civil banning order, restricting or banning a person's use of public transport, even if the person had not committed an offence;

- Clause 88 – Insertion of new ch 11, pt 4C
  - The Department concedes that civil banning orders are not issued to people who have necessarily committed an offence. The Committee notes the explanatory notes which explain how the benefits of civil banning orders must be balanced with the impact on people's rights and liberties.
  - The Committee gives regard to the Australian Constitution and how rules of civil proceedings promote fairness and justice. The Department acknowledges these important points and notes that the legislation is vigilant in ensuring that civil banning orders will only be made by courts and that courts will make these orders, within the context of rigorous safeguards and appropriate discretions.

Clause 72 and 100-10, to implement drink driving reforms, and which may affect a person's right to a just legal process, capacity to work in a chosen field or rights to family life;

- Clause 72 – Amendment of s 202E (Other limitations on ordering a restricted licence)
  - In relation to paragraph 51 of the Committee's report, I indicate that the amendment in clause 72 is not related to the immediate licence suspension amendments in clause 102. Clause 72 contains an amendment that is consequential on the introduction of the new *middle alcohol limit* offence in clause 100(2). The amendment simply preserves the existing policy position in the *Transport Operations (Marine Safety) Act 1994* that a person can not obtain a restricted marine licence if they have been convicted of an offence of being in charge of ship with a blood/breath alcohol concentration of 0.05 or more but less than 0.149 at a time when they were subject to the *no alcohol limit*.

- Clause 100-10

  Middle alcohol limit offence
  - The Committee's report notes that clauses 100 and 101 of the Bill will introduce a new *middle alcohol limit* and will create a new offence for a person to drive, attempt to put in motion or be in charge of a particular vehicle while over that limit but under the high alcohol limit.
  - At paragraph 47 of the report, the Committee states that "*...the explanatory notes provide (at 22) justification for any inconsistency of clauses 100 and 101 with rights and liberties of individuals*".
  - In that context, I provide no further comment on those amendments.

  Immediate suspension or disqualification
  - Currently, in Queensland, a person will have their driver licence immediately suspended on being charged with certain high-risk drink driving related offences. That suspension remains in place until the court makes an order allowing the person to continue driving or until the charge has been finalised.
  - These immediate suspensions were introduced to make Queensland roads safer and to protect the community by preventing persons charged with high-risk drink driving offences from continuing to drive prior to their court hearing.

- The majority of other Australian jurisdictions have some form of immediate suspension for drink driving offences. New South Wales and South Australia immediately suspend the licence of drivers charged with a blood/breath alcohol concentration of 0.08 or higher, as does the Northern Territory for second or subsequent offences. Victoria immediately suspends learner and provisional driver licence holders who are charged with a blood/breath alcohol concentration of 0.07 or higher and open licence holders at 0.10 or higher. Tasmania and the Northern Territory immediately suspend the licence of drivers charged with an offence involving a blood/breath alcohol concentration of 0.15 or higher.
- The Bill will extend immediate licence suspensions in Queensland to those charged with the new middle alcohol limit offence.
- In a submission to the Committee, the Queensland Law Society has indicated it does not support this amendment as it believes:
  "...clause 102 breaches fundamental legislative principles by imposing an immediate suspension of a person's driver licence who may, for example, rely on their driver licence for employment purposes or be a single parent and rely on their licence to carry out their duties of parenthood."
- Research has, however, indicated a clear relationship between a driver's alcohol level and their level of crash risk. A person with a blood/breath alcohol concentration of 0.10 (that is, at the lower end of the new *middle alcohol limit*) has a crash risk that is approximately five times higher than a driver with no alcohol in their system.
- As mentioned in the explanatory notes:
  "In the 7 years to 2007/08, drivers recording a blood/breath alcohol concentration of 0.10 or higher accounted for approximately 80% of drink driving-related fatal crashes in Queensland."
- The extension of the immediate suspension provisions is, therefore, targeted at those who pose a very significant road safety risk.
- A person whose licence is immediately suspended due to being charged with a *middle alcohol limit* offence may be entitled to apply to the court for an order authorising them to continue driving prior to their court appearance. These orders are contained in existing section 79E of *the Transport Operations (Road Use Management) Act 1995.* The current eligibility criteria and restrictions will apply in relation to any such application and order.
- The extension of these orders to people whose licence is suspended for a *middle alcohol limit* offence is achieved by the amendments in clauses 103 and 116 of the Bill.
- As such, a person charged with the *middle alcohol limit* offence who, for example, relies on their driver licence for employment purposes or to carry out duties of parenthood may, in appropriate circumstances, obtain such an order from the court.
- It is believed that immediately suspending the driver licence of a person charged with the new *middle alcohol limit* offence, together with the extension of the existing section 79E orders, has sufficient regard to the right and liberties of individuals.

Clause 105 - Increase in time for obtaining a specimen

- As noted in the Committee's report, clause 105 will extend by an hour the period of time police have to require a driver to provide a specimen of breath or blood for the purpose of testing for alcohol. That time limit will now be three hours from the time the officer reasonably suspected the person was driving, attempting to put in motion or in charge of a particular vehicle.
- While the Committee has not identified any inconsistency with the fundamental legislative principles, extracts of a submission made by the Queensland Law Society have been included in the report. In that submission, the Society expresses the view that this increase in the maximum period for making a requirement will adversely affect the rights and liberties of individuals as it "*will mean that individuals are subjected to a further hour of detainment*".

- The aim of the amendment is not to allow police to detain drivers for a further hour or, indeed, for any period that is longer than necessary. It should be noted that the legislation currently provides that a requirement for a specimen must be made by the police officer as soon as practicable. This provision will not be affected by the legislation. The amendment simply establishes a new maximum period in which that requirement can be made.
- The Queensland Police Service has indicated that providing additional time for the requiring of a specimen will be of specific assistance to police officers in rural and remote areas where the necessary testing equipment may not be so readily available. For example, crashes in rural and remote areas may occur a considerable distance away from the closest hospital.
- In addition to assisting officers in rural and remote areas, the increased timeframe may assist in other situations encountered by police. For example, following a motor vehicle crash it may be difficult for police to quickly identify the driver of the vehicle. This could be due to the vehicle being extensively damaged or, in some instances, the driver leaving the scene of the crash. Where vehicles are extensively damaged, it may take some time for drivers to be removed from the vehicle. The driver may then need to be transferred to hospital for treatment before a specimen can be obtained from them. For less serious crashes, it may take some time for police to attend the scene, particularly during periods of heavy demand on police resources or in less populated areas.
- Time limits on testing vary across jurisdictions but are on average significantly longer than two hours. Victoria and Tasmania have a three hour limit. The more geographically dispersed jurisdictions of the Northern Territory and Western Australia have a four hour limit and South Australia has an eight hour limit. New South Wales and the Australian Capital Territory have a two hour limit.
- Increasing Queensland's limit to three hours will align the alcohol testing timeframe with that which is currently in place for the testing of saliva or blood for relevant drugs.
- An extension of the time limit was recommended by the former Parliamentary Travelsafe Committee in its report titled '*Getting Tough on Drink Drivers*' (Report No. 46). That report noted (paragraph 78):
  "*In some circumstances, especially in rural areas, police may experience difficulties in arriving at the scene, or hospital, within the required two hour timeframe. This may be due to the need to travel extensive distances or attend other, more urgent, police work. In such circumstances, police cannot test or charge an individual with drink driving even if they know the person has offended.*"
- The report recommended that the *Transport Operations (Road Use Management) Act 1995* be amended to provide police officers with the power to conduct breath and/or blood testing of all suspected drink driving offenders for a period up to 4 hours from the time of driving. At this stage, it is proposed to increase the testing time to just three hours to align with the drug testing provisions.
- It is important that an appropriate balance is struck between the rights of the individual and the rights of the community to ensure that drink drivers are detected and dealt with. Given the serious road safety risk posed by drink driving, it is believed that this amendment will not unduly affect the rights and liberties of individuals.

Arresting/detaining police officer to conduct breath analysis

- As noted in the Committee's report, clause 105 will also allow a police officer who detains or arrests a suspected drink driver to conduct an analysis of the person's breath by a breath analysing instrument.
- This will only apply, however, where the detaining/arresting officer is authorised in writing by the commissioner of police (or a duly appointed delegate) to operate a breath analysing instrument. This reflects the existing restriction contained within sections 80(8F) and 80(8G) of the *Transport*

Operations (Road Use Management) Act 1995. This restriction is not being amended.

- I am advised that no other jurisdiction in Australia has a legislative prohibition on the detaining/arresting police officer carrying out breath analysis using a breath analysing instrument.
- The Queensland Police Service has indicated that this procedure was originally incorporated into Queensland legislation to ensure that two officers (the detaining/ arresting officer and the officer operating the instrument) could verify the circumstances surrounding the operation of the instrument and could corroborate evidence associated with the case. This was especially relevant with the early breath analysing instruments used in Queensland that required human intervention to operate the instrument to determine the level of alcohol present in a sample of breath. The instrument now used in Queensland is fully automated and undertakes self calibration and testing prior to each use. As a result, there is no need for a second officer to be involved in the process to ensure the results are accurate.
- In rural and remote areas it can be difficult for the investigating officer to secure a second qualified officer to operate the breath analysing instrument. In some circumstances, an officer will have to travel to another police station or secure an off-duty officer to operate the instrument or travel long distances to a medical practitioner to have a specimen of blood taken from the alleged drink driver.
- Currently, other policing devices such as mobile and hand held radar and speed camera devices are operated professionally by single officers.
- I am advised that the operational policy of the Queensland Police Service will continue to be that, where possible, two officers should be involved in the breath analysis process. The adoption of this operational policy is in line with the operational policy adopted by police in most other Australian jurisdictions.
- The amendment will, however, allow for those situations where it is not reasonably practicable for a second officer to be involved. This will assist in ensuring that drink drivers do not avoid detection where a second officer is not reasonably available.

Clauses 77 and 90 which may affect eligibility of people to passenger transport driver authorisation;

- Clause 77 and 90 – Amendment of s 28B (Driver authorisation – category B driver disqualifying offences) and Insertion of new s 148BA
  - The Department, as noted in the explanatory notes, concedes that these changes may result in a loss of Driver Authorisation for some existing holders. The Department notes that these changes reflect a cabinet decision to align the Driver Authorisation regime with the Commission for Children and Young People and Child Guardian processes. As the explanatory notes state, the *Transport Operations (Passenger Transport) Act 1994* requires the chief executive to take account of the paramount principle that children and other vulnerable members of the community must be protected.

Clauses 37-9 conferring rights to enter land without consent or warrant in order to investigate potential rail corridors;

- Clause 37-9
  - The Committee states that new section 109A does not require a person who enters land to provide written notice that the land has been entered. With regards to the giving of appropriate notice new section 109A(2) provides that the chief executive must give a written notice to the owner or occupier of the land prior to entry for the first time.
  - As a safeguard, the amendments to section 115 (Investigator to issue associated person with identification) inserts new subsection (8), which requires that, if the owner or occupier is not present at the time of entry, the chief executive/authorised person must, before leaving the land, leave a

notice in a conspicuous position and in a reasonably secure way. New subsection (8) also outlines the details required on the notice, including the action that was taken under section 109A, and when the action was taken.

Clause 66 validating all transport infrastructure constructed over, under, on or in watercourses, including in the past;

- Clause 66 – Insertion of new ch 21, pt 3
  - The Department acknowledges the Committee's reference to retrospective operation of legislation in section 4(3)(g) of the Legislative Standards Act, in relation to the insertion of new section 578 in clause 66 of the Bill, which is a transitional provision for new section 477F (Watercourse crossings).
  - As noted in the explanatory notes, the provision will simply clarify that the chief executive has, and has always had, the legislative authority to construct watercourse crossings. The provision will not impact on the rights of any person - it is merely clarifying pre-existing powers of the chief executive and the legitimacy of existing infrastructure.

Clause 124 conferring immunity on a person making a public interest disclosure;

- Clause 124 – Insertion of new pt 12A
  - Persons disclosing information are not provided with immunity for their own illegal acts. Immunity is only in relation to the disclosure. For example, defamation, or breach of confidentiality agreement or oath.

Part 9 which may, in a number of respects, provide for the compulsory acquisition of property other than with fair compensation;

- Part 9 – Amendment of Transport Infrastructure Act 1994

  Clauses 28-30
  - The committee notes that information regarding the consistency of the amendments with fundamental legislative principles was not provided in the explanatory notes. However, it is believed that the amendments do not adversely affect the rights and liberties of individuals.
  - The amendments provide for a simplified administrative process when existing leases of State toll road corridor land are to be amended by including additional land. However, the Bill does not amend the existing legislative provisions dealing with the Minister's authority to make a land declaration – that is, other than the effect on the leases of the land, the declaration of the additional land will be subject to the same legislative provisions as applied to the original land declaration. These provisions adequately take into account the rights and liberties of individuals in the ways set out below.
  - Firstly, the categories of land which may be the subject of the declaration are limited by the *Transport Infrastructure Act 1994* to non-freehold land on or within which road or rail transport infrastructure is situated and other land held by the State.
  - Secondly, the *Transport Infrastructure Act 1994* expressly allows the Minister to declare stated interests to continue in relation to the State toll road corridor land, for example, easements granted to public utility providers.
  - Finally, a person whose interest in the land has not been continued in the Minister's declaration will be entitled to claim compensation in accordance with the *Acquisition of Land Act 1967*. Paragraph 77 the Report states that *'the committee draws the attention of the Parliament to proposed legislation which would vary the conditions imposed by the Acquisition of Land Act'*. The amendments in clauses 28 to 30 do not alter the compensation rights contained in the *Transport Infrastructure Act 1994* for declarations of State toll road corridor land which are consistent with the *Acquisition of Land Act 1967*.

Clauses 31 – 35

- The committee refers to amendments to provisions regarding local government tollways, specifically to the proposed amendments to section 105H of the *Transport Infrastructure Act 1994* in clause 32. The Report identifies that, in relation to this amendment, the explanatory notes contain justification for any potential breach of the fundamental legislative principle that legislation that provides for the compulsory acquisition of property must only do so with fair compensation.
- The committee refers to proposed amendments in clauses 34 and 35 which will allow additional land to be included in leases of local government tollway corridor land. The justification outlined above for clauses 28 - 30 also applies to these amendments.

In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to clauses 32 and 63 which would allow the minister to issue gazette notices to make declarations about land tenure;

- Clause 32 – Amendment of s 105H (Declaration of land as local government tollway corridor land)
  - Clause 32 makes a number of amendments to the existing process which allows the Minister to declare specific land to be local government tollway corridor land, by gazette notice. A similar process exists for State toll road corridor land.
  - The issue of whether the declaration process has sufficient regard to the institution of Parliament was raised by the Scrutiny Committee in Alert Digest 2005/13 in relation to amendments in 2005 to the Transport Infrastructure Act 1994. The 2005 amendments allowed State toll roads to be declared by a gazette notice made by the Minister, rather than a regulation. The then Minister for Transport and Main Roads, Honourable Paul Lucas MP, noted in his reply to the Committee that the contractual arrangements relating to toll road infrastructure are commercial in nature and private sector investors require a minimum level of certainty that their investment will not be placed at risk. Further, the gazettal process provides a high level of transparency. The process for making the declaration is embedded in the *Transport Infrastructure Act 1994* and is consistent with other declaration processes in that Act. It is therefore considered that the gazettal approach appropriately balances the community's expectation for transparency and private proponents' requirement for an acceptable level of certainty.
  - In addition, in order to identify the land which is declared to be local government tollway corridor land or State toll road corridor land, it may be necessary to refer to hundreds of registered plan numbers and details of many interests in the land which are to be continued. Therefore, it would be impractical to include all of the technical land references for the declaration in subordinate legislation.

- Clause 63 – Insertion of new ch 15A
  - In paragraph 106 the committee refers to clause 63 of the Bill that inserts new section 475ZI (Declaration of transport interface management area) that will enable the chief executive by Gazette notice to declare land or part of land to be a transport interface management area. Clause 63 of the Bill inserts new Chapter 15A (Transport interface management) into the *Transport Infrastructure Act 1994* and extends the existing light rail interface provisions to busways.
  - Section 475ZH sets out the meaning and scope of transport interface agreement and section 475H(3) provides that an interface agreement must be consistent with the objectives of the *Transport Infrastructure Act 1994* and other transport laws. Prior to any declaration of an interface management area the chief executive is required to undertake consultation with, and consider submissions from, all parties potentially impacted by a declaration of an interface area.

- The constraints on the chief executive powers and the rights and obligations of all parties are contained within Chapter 15A of the *Transport Infrastructure Act 1994*. The declaration, by gazette, of a transport interface management area under section 475ZI does not does provide for additional powers or alter the rights and liberties of persons. The declaration by gazette notice is a transparent and public mechanism that activates the framework established by Chapter 15A (Transport Interface Management).
- As previously stated in the explanatory notes, the State has a responsibility for the safety of persons and the maintenance of structural and operational integrity of all transport infrastructure and pubic transport networks. New chapter 15A does not impact on existing safety, maintenance or liability obligations of the parties within a possible interface area, but instead, establishes a framework within which these obligations can be effectively managed and coordinated. The amendments are designed to ensure these interactions are undertaken in a manner that ensures the safety, structural and operational integrity of transport infrastructure.

The committee invites the minister to provide further information regarding the application of fundamental legislative principles to clause 62 and whether it would affect rights and liberties, or impose obligations, retrospectively;

- Clause 62 – Amendment of s 377R (Limited compensation for easements etc. or damage relating to overhead wiring for a light rail)
  - In paragraph 102 of the Report, the committee requested information on whether the lack of transitional arrangements for section 377R (Limited compensation for easements etc. or damage relating to overhead wiring for a light rail) of the *Transport Infrastructure Act 1994* would affect rights and liberties, or impose obligations, retrospectively. The amendments to section 377R will not affect any rights and liberties or have a retrospective operation as construction of the light rail system and the installation of overhead wiring has not yet commenced and therefore there are no current compensation claims.