SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

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1 COMPETITION POLICY REFORM (QUEENSLAND) BILL 1995

Background

1.1 This Bill was introduced on 2 November 1995 by the Honourable K E De Lacy MLA, Treasurer.

1.2 The object of this legislation is stated in the Explanatory Note:

> *The Bill enacts legislation that will give effect in Queensland to the reform of competition policy, as endorsed by the Council of Australian Governments and as recommended by the Hilmer Report.*

1.3 For convenience the acronyms used in this chapter are set out below:

- FLP - Fundamental legislative principle
- NSL - National scheme legislation
- TPA - *Trade Practices Act 1974*
- TPC - Trade Practices Commission

1.4 The Competition Code involves a slightly reworked form of "the schedule version" of the *Trade Practices Act 1974* (TPA), certain other parts of the TPA and regulations made under the TPA.

1.5 National Scheme Legislation (NSL) involves the negotiation of legislation by the executives of the Commonwealth and the States. This poses significant difficulties for all Parliaments asked to consider such legislation. These problems have been considered by all scrutiny committees nationally in a national discussion paper entitled "The Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles" (particularly paragraphs 2.12 to 2.19). It is hoped that the process embarked upon by all scrutiny committees (of which the discussion paper is the first stage) will result in a satisfactory scrutiny process being developed for NSL. In the meantime it is best that potential conflicts between National Scheme Legislation and FLPs be highlighted in order to better inform the general discussion and to ensure that Parliaments, federal as well as state, are aware of what they are agreeing to.

Amendment of an Act by another Act?

1.6 The Explanatory memorandum highlights two potential conflicts with FLPs.

1.7 The first potential conflict concerns the ability of Queensland to make regulations exempting behaviour that would otherwise be in breach of the TPA under s. 51(1). These exemptions have a two year maximum and can be renewed only by an Act of the Queensland Parliament. The ability to grant exemptions is not uncommon. From the beginning the former Trade Practices Commission (TPC) had the ability to authorise anti-competitive behaviour. The safeguards include the possibility of disallowance, the two year time limit and the fact that they cannot be remade.

1.8 The second potential conflict concerns amendment to the Competition Code. As the Bill would apply Commonwealth law, amendments made to the TPA apply to the Queensland Competition Code. Some amendments would be by legislation, some by regulation. It could be said that the Queensland Bill incorporates the entire Competition Code into an Act of Queensland Parliament. It could then be argued that when the TPA regulations are altered by further regulations, they are also changing the Queensland Act. However, this argument is not a cause for concern. The purpose of the Queensland law is to incorporate both the TPA and TPA regulations into Queensland law. The fact that regulations could be changed by regulations should not be a cause for concern.

1.9 In any case there are four safeguards:

- under the Conduct Code Agreement, modifications to the Competition Code will not be made until "fully participating jurisdictions" have been consulted;
- such amendments cannot take effect for at least two months (s. 6(1)(a));
- the Queensland Government can disallow the amendment by regulation (s. 6(1)(b)); and
- disallowing regulations are themselves subject to disallowance by the Queensland Parliament.

1.10 Indeed, given the legislative power of the Commonwealth in this area, it arguably gives the State a greater say in the effect of competition policy than if the Commonwealth Parliament legislated under its existing powers.

1.11 This gives rise to another potential conflict with FLPs - the ability of a Queensland regulation to affect the operation of a Commonwealth Act that effectively amends the Competition Code which is a part of a Queensland Act.

1.12 However, the reasons for this are to permit disallowance of Commonwealth amendments when the Queensland Parliament is not sitting. This serves to protect the legislative competence of the Queensland Parliament. This could be seen as justifying what would otherwise be a breach of an FLP - or it could be seen as positively enhancing the institution of Parliament in Queensland.

1.13 In either case, it would seem to show sufficient regard for the institution of Parliament and is not in breach of the relevant FLP (s 2 (a) in general or 4 (4) (c) in particular).

1.14 It should be noted that the consequence of too much use of the power of disallowance allows the Commonwealth Minister to declare by notice in the Government Gazette that a state has made significant modifications to the competition code (s. 150K of the TPA). From July 1996, this has very serious consequences for the State:

- it loses Commonwealth financial assistance grants arising under Hilmer;
- it ceases to have a vote in modifications to the Competition Code;
- it ceases to have a say in appointments to the ACCC (Australian Competition Policy and Consumer Commission);
- it ceases to be able to exempt conduct under s. 51(1).

1.15 The State's only protection from a decision by a Commonwealth Minister under s. 150K is that it is reviewable under Commonwealth Administrative Law.

1.16 The effect of the agreement is that States lose most of their freedom of manoeuvre in their own right in competition policy but do have a say within a national body. This is not uncommon under National Schemes.

1.17 Regulations made under this Bill can exempt behaviour that would otherwise be in breach of the Competition Code, that would be enacted into Queensland law by the Bill. They could also prevent the applications of amendments to the Competition Code by the Commonwealth Parliament.

1.18 Although these could be characterised as instances of the legislation authorising the amendment of an Act other than by another Act, these provisions do have sufficient regard to the institution of Parliament. Indeed they may be seen as positively enhancing it.

1.19 In consultation with other scrutiny committees, this Committee will be carefully considering the best means of dealing with the potential difficulties of national scheme legislation.

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2 COURTS (VIDEO LINK) AMENDMENT BILL 1995

2.1 This Bill was introduced on 2 November 1995 by the Honourable M J Foley MLA, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts.

2.2 The Bill amends the *Supreme Court of Queensland Act 1991*, the *District Courts Act 1967* and the *Justices Act 1886*. The purpose of the Bill is:

- to make the use of video link facilities mandatory in bail and remand proceedings, (unless the court, in the interests of justice otherwise orders) where:
  - the defendant is entitled or required to appear in court in person, and
  - video link facilities link the correctional centre where the defendant is held, and the court, and
- to permit the use of video link facilities in other criminal proceedings, at the court's discretion, if all the parties consent.

Sufficient regard to rights and liberties

2.3 Section 4(2)(a) of the *Legislative Standards Act* provides that the fundamental legislative principles contained in the Act include requiring:

> *that legislation has sufficient regard to—*
>
> *rights and liberties of individuals*

2.4 The Committee noted the statements in the Second Reading Speech that:

> *The rights of the defendant are strongly protected in the Bill. The Government has given careful consideration to the concerns of lawyers that defendants' access to the courts should not be prejudiced.*

2.5 The Committee noted the following safeguards incorporated into the Bill:

- Video link facilities can only be used where two-way audio and visual communication between the defendant and the court is available.
- Only the court, the defendant and the defendant's representative may use video link facilities. According to the Explanatory Notes, video link facilities are "not intended to be used for other purposes, such as the taking of evidence from a person who is not a party to the proceedings."
- Facilities for private communication between the defendant and his or her legal representative in court must be made available. These private

communications are confidential and inadmissible as evidence in court proceedings.

2.6 Incarceration is one of the most severe and total deprivations of a citizen's liberty. The common law has long required that it is only done with the authority of the court. The court authorises incarceration of someone who is found guilty through court procedures and sentenced by a judge. That is the point of the criminal law. However, other cases of incarceration are permitted with great reluctance. The law has traditionally required that the executive produce the defendant in court for committal. Irrespective of particular provisions which require the state to produce detainees, the court has an overriding power under the most justly famous writ known to English law - habeas corpus.

2.7 There is a number of reasons for this:

- the court can see who the detainee is
- the court can determine his/her condition
- the citizen can be released immediately on being granted bail
- the court is entirely in control of the detainee
- in addition communication between detainee and solicitor are much easier

2.8 The right of the police to arrest and bring an accused to court is an exception to the general rights of freedom of movement. Bail is a beneficial exception to this rule. However, the right to arrest and detain someone who has not yet been proven guilty would be intolerable without provision for bail.

2.9 The Act seeks to substitute a video appearance by the detainee for a corporeal one, and to substitute confidential communication between lawyer and client for face to face personal contact during a bail hearing.

2.10 There are some safeguards built in and the Act attempts to respect the reasons for a corporeal appearance. The place where the detainee is held is deemed to be a part of the court to allow the court to exercise formal control over the detainees and officials who are holding them. However, this is more theoretical than real. Confidential communication cannot substitute for face to face contact.

2.11 The right to a video hearing seems to be clearly a lesser right than that for which it is substituted.

2.12 Hence the rights and liberties of detainees are clearly affected. In considering whether sufficient regard has been given to the rights of detainees, the Committee considered what other values are being furthered, whether those values could be realised in other ways and in whether those values justify the restriction of this liberty.

2.13 The values that are being furthered by this legislation are:

- the security risks of transferring detainees to court. This amounts to an argument about the protection of the public from detainees escaping from

the court or from transfers between court and detention centre. (The Committee may wish to be satisfied of the number of escapes from detainees in court or in the process of transfer. It is a calculation that the Committee refuses to make as the detainee is entitled to a presumption of innocence.)

- The cost of such transfers;

- to the extent that police resources cannot be simply expanded by further expenditure, the transporting of detainees uses relatively inflexible police resources with the consequent limitation of protection available to others.

2.14 The Committee notes that, although provision is made for confidential communication with a detainee's legal representative, the detainee can be forced to use video links even where he or she is unrepresented. The Committee is not satisfied that all detainees could adequately represent himself or herself through a video link.

2.15 The Committee notes that this Bill seeks to substitute communication via a two way video link for the right to appear in court in bail proceedings. It also seeks to substitute the right to a confidential link (presumably by telephone) between detainee and legal representative for the right of face to face discussion in, or just outside, the court. This new right may be considered a lesser right and hence limits the rights of detainees.

2.16 However, the Committee is of the view that the provision of video link facilities where all parties consent is reasonable.

2.17 In other instances, the question of whether this new right is justified by security and cost considerations is referred to Parliament for debate.

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3 CRIMINAL OFFENCE VICTIMS BILL 1995

Background

3.1 This Bill was introduced on 2 November 1995 by the Honourable M J Foley MLA, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts.

3.2 The Explanatory Notes describe the purpose of the legislation:

> *The primary purpose is to advance the position of victims of crime in the criminal justice process. This occurs two ways. First, the Bill enshrines Fundamental Principles of Justice for Victims of Crime. These constitute a set of guiding principles for public officers dealing with victims of crime. Second, the Bill contains provisions governing the making of compensation claims against offenders and the State. These have been relocated from the Criminal Code and contain several reforms including permitting payments to the families of homicide victims and simplification of the process of applying for criminal compensation.*

Equality before the law? - Clauses 19 and 34

3.3 The definition of a "victim" in cl. 5(c) is as follows:

> *5. A "victim" is a person who has suffered harm from a violation of the State's criminal laws-*
>
> *(a) because a crime is committed that involves violence committed against the person in a direct way; or*
>
> *(c) because the person has directly suffered the harm in intervening to help a victim mentioned in paragraph (a).*

3.4 Part 3 of the Bill which provides for compensation for personal injury from indictable offences, however, does not make provision for the broad category of person covered by cl.5(c) above.

3.5 Clause 34 provides access to compensation for a person who

> *suffers an injury when helping a police officer to make, or attempt to make, an arrest, or to prevent, or attempt to prevent, an offence or suspected offence.*

3.6 In view of the broad definition of "victim" in cl.5, cl.34 may lead to inequality in access to compensation by persons injured whilst providing assistance in the prevention of a crime. A person providing assistance to a victim in the absence of a police officer (arguably the time when a victim would most need to be protected) who is injured in the process will not be entitled to compensation.

3.7 Having attempted to provide rights to "victims" as broadly defined, reasons could be given for providing different treatment of those victims in the latter category described above. On the other hand it could be argued that these are ex gratia payments and as such are not intended to create rights. Yet again, if they are ex gratia payments, is it necessary for the Bill to limit access to such payments?

3.8 The Committee brings this point to the attention of the Minister.

4 EDUCATION (WORK EXPERIENCE) BILL 1995

4.1 This Bill was introduced on 2 November 1995 by the Honourable D J Hamill MLA, Minister for Education.

4.2 The purpose of the Bill, as stated in the Explanatory Notes, is to regulate work experience which students receive as part of their education. The Bill replaces the *Education (Student Work Experience) Act 1978.*

Sufficiently clear and precise drafting?

4.3 The Committee reiterates the view it expressed in its Second Alert Digest that legislation should be drafted in such a way as to make it accessible to the general public.

4.4 On a number of occasions in the Education (Work Experience) Bill, words or phrases are used, the meaning of which must be ascertained in other acts. For example, in the Dictionary to the Bill, to obtain the meaning of "Corporation" and "parent", the *Education (General Provisions) Act 1989* must be consulted.

4.5 The dictionary refers to the *Workers Compensation Act 1990* for the definition of "board".

4.6 "Student with a disability" is explained to mean "a student to whom the *Disability Services Act 1992* applies".

4.7 In addition, in s. 4, which defines the term "educational establishment" for a student, references are made to students enrolled in various types of educational establishments within the meaning of either the *Educational (General Provisions) Act 1989*, the *Vocational Education, Training and Employment Act 1991*, or the *Higher Education (General Provisions) Act 1993.*

4.8 Section 7 (Requirement for workers' compensation) and s. 8 (Protection from liability) also make reference to various types of educational establishments within the meaning of the *Education (General Provisions) Act 1989.*

4.9 In all the above cases, a lay person reading the Education (Work Experience) Bill 1995 may not have access to the other legislation referred to.

4.10 While it may be impracticable to fully define the many different types of educational establishments to which the Act applies within the main body of the Act itself, certain of the definitions (in particular "parent", and "student with disability") could usefully have been incorporated in full into the Dictionary.

4.11 In instances where phrases with specified definitions are used in a Bill the Committee is of the view that, within reason, the Bill should contain that definition. If the definition is commonly used, the Committee is of the view that it should be included in the *Acts Interpretation Act 1954.*

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5 EMERGENCY SERVICES LEGISLATION AMENDMENT BILL 1995

5.1 This Bill was introduced on 2 November 1995 by the Honourable K H Davies MLA, Minister for Emergency Services and Minister for Consumer Affairs.

Background

5.2 The Bill amends the *State Counter-Disaster Organisation Act 1975* and the *Fire Service Act 1990.*

5.3 The amendments to the *State Counter-Disaster Organisation Act 1975* provide a legislative basis for State Emergency Service (SES) members carrying out operations, including search and rescue operations, in emergency situations.

5.4 The amendments to the *Fire Service Act 1990*:

- recognise fire officers as public sector employees under the *Public Sector Management Commission Act 1990*, and
- establish the Public Sector Management Commission as the external appeal authority for these officers.

Retrospectivity ? - Clause 41

5.5 Clause 41 amends the *Fire Service Act 1990* by inserting a new part 12 (ss. 155 to 160). These are transitional provisions.

5.6 Proposed new ss. 159 and 160 provide that:

> ***Annual contributions (excluding 1994-95 financial year)***
>
> ***159.(1)*** *This section applies to amounts prescribed, or purporting to have been prescribed, before the commencement of this section, for section 108 as contributions for a financial year, other than the financial year starting 1 July 1994.*
>
> *(2) To remove any doubt, it is declared that the amounts were, and always have been, validly prescribed as the contributions for the financial year.*
>
> *(3) This section expires on the day of its commencement.*
>
> ***Annual contributions for 1994-95 financial year***
>
> ***160.(1)*** *This section applies to amounts prescribed, or purporting to have been prescribed, as contributions for section 108 under the Fire Service Regulation 1990, as in force immediately after the commencement of the Fire Service Amendment Regulation (No. 2) 1994.*

(2) It is declared that the amounts were, and alway have been, validly prescribed as the contributions for the financial year starting 1 July 1994.

(3) This section expires on the day of its commencement.

5.7 According to the Explanatory Notes:

Sections 159 and 160 of the ***Fire Service Act*** *have the effect of validating fire levies which have been imposed annually since the enactment of that Act. These provisions do not impose any additional financial obligations upon the owners of prescribed properties. Since 1984, differing fire levies have been annually prescribed on the basis of the application of the same criteria as set forth originally in section 34A of the now repealed* ***Fire Brigades Act 1964****. The effect of these validation provisions is to overcome any possible technical irregularity in subordinate legislation promulgated since the enactment of the* ***Fire Service Act 1990****.*

5.8 One of the examples of sufficient regard being had to a fundamental legislative principle is that legislation:

does not adversely affect rights and liberties, or impose obligations, retrospectively.

5.9 Whether a provision is directly beneficial to persons other than the government is a criteria commonly applied by scrutiny committees when considering retrospective provisions.

5.10 Proposed new ss. 159 and 160 clearly impose obligations retrospectively and are, in the Committee's view, not directly beneficial to persons other than the government, although they are indirectly beneficial to those who benefited from the protection afforded by the services funded by the levy.

5.11 However, the need for the validating legislation arose because a head of power had been inadvertently removed. The amendment Bill simply restores the head of power.

5.12 The obligation to pay fire levies was originally imposed in 1984. Accordingly, persons had paid the levies for a number of years and expected to continue to pay them. Furthermore, as the Explanatory Notes point out, the validation provisions do not impose any additional financial obligations on the owners of prescribed properties. Nor do the provisions require persons who were not previously paying fire levies to pay them.

5.13 It is therefore the Committee's view that the effect of the validation provisions is simply to correct an inadvertent error. The Committee thus makes no further comment on this Bill.

Entry of premises - Clause 53

5.14 Clause 53 inserts a new s. 14B into the *State Counter-Disaster Organisation Act 1975*. The section provides as follows:

> ***Powers of authorised officers***
>
> ***14B.(1)*** *To help the SES perform an emergency related function, an authorised officer may—*
>
> *(a) take reasonable steps—*
>
> *(i) to protect persons trapped in a vehicle or receptacle or endangered in another way; and*
>
> *(ii) to protect the officer or other authorised officers or persons from danger, potential danger or assault from other persons; and*
>
> *(b) if it is necessary and reasonable in the circumstances—do any of the acts mentioned in subsection (2).*
>
> *(2) For subsection (1)(b), the acts an authorised officer may do are—*
>
> *(a) enter any premises or vehicle; and*
>
> *(b) open a receptacle, using force that is necessary and reasonable; and*
>
> *(c) bring any apparatus or equipment onto premises; and*
>
> *(d) remove any article or material from a place, or otherwise deal with the article or material; and*
>
> *(e) destroy (entirely or partially), or damage, any premises, vehicle or receptacle; and*
>
> *(f) ask a person to give the authorised officer reasonable help to exercise the authorised officer's powers under paragraphs (a) to (e).*
>
> *(3) Without limiting subsection (1)(a)(ii), an authorised officer may direct a person not to enter, or to leave, a stated area around the site of a danger to a patient.*

5.15 One example of whether legislation has sufficient regard to rights and liberties of individuals is whether it:

> *(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.*[1]

5.16 Section 14B(2)(a) might appear to infringe this fundamental legislative principle. Section 14B(2)(e) might also be considered to infringe the general principle that legislation should pay sufficient regard to the rights and liberties of individuals.

5.17 However, the fundamental legislative principles are not absolute. As the Electoral and Administrative Review Commission (EARC) stated at para 2.76 of its Report on Review of the Office of Parliamentary Counsel:

> *There may be circumstances where the public interest justifies or even requires that a principle be modified or displaced.*

5.18 It is the Committee's view that the social objective of acting to protect persons in emergency situations justifies the provisions in s. 14B(2)(a) and (e).

5.19 The Committee notes also that, in accordance with s. 14B(1)(b) authorised officers "will only be able to do such acts where it is necessary and reasonable in the circumstances".

5.20 The Committee therefore makes no further comment.

[1] Section 4(3)(e) of the *Legislative Standards Act.*

6 HORTICULTURE LEGISLATION AMENDMENT BILL 1995

Background

6.1 This Bill was introduced on 2 November 1995 by the Honourable R J Gibbs MLA, Minister for Primary Industries and Minister for Racing.

6.2 The Bill updates some legislation dealing with the Horticulture industry in Queensland, namely the *City of Brisbane Market Act 1960* and the *Farm Produce Marketing Act 1964*. The amendments establish an expertise-based Brisbane Market Authority to operate and manage the City of Brisbane market and to replace the Brisbane Market Trust. A Horticulture Industry Policy Council is also established, amongst other things, to represent the industry's views and to provide advice on policy issues to the Minister.

Sufficiently clear and precise drafting? - Clause 7 (Division 4)

6.3 Division 4 of the proposed amendments to the *City of Brisbane Market Act 1960* deals with Membership of the Brisbane Market Authority and, for example, provides for the composition of the authority, the selection of members for appointment and the duration of appointment. There is, however, no procedure set out for the filling of casual vacancies. The Committee notes that the existing section dealing with casual vacancies is deleted by the Bill.

6.4 The Committee is aware of the view that, from a drafting perspective, the Bill in its current form is regarded as sufficient because the procedures applicable in the case of a casual vacancy can be implied and the existing provisions for appointment applied.

6.5 The Committee is, however, of the view that the absence of express casual vacancy provisions may lead to ambiguity. It is not clear in the Bill whether there is an expectation that casual vacancies are going to be filled and if so, whether the s.13 procedure (which appears to be a complex, time consuming process) should apply.

6.6 The Committee refers this query to the Minister.

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7 INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1995

7.1 This Bill was introduced on 2 November 1995 by the Honourable M J Foley MLA, Minister for Justice and Attorney-General, Minister for Industrial Relations and Minister for the Arts.

7.2 The Bill amends the *Industrial Relations Act 1990* and the *Public Service Management and Employment Act 1988.*

7.3 The purposes of the Bill include:

- amending the *Industrial Relations Act 1990*
  - to provide that the Queensland Industrial Relations Commission must consider all the circumstances of the case when considering whether a dismissal is unlawful; and
  - to empower the Queensland Industrial Relations and Industrial Magistrates to order the payment of compensation in lieu of notice where there are valid grounds of dismissal but the required notice or compensation was not given; and
- amending the *Public Service Management and Employment Act* to allow the Governor in Council to delegate his power to create and abolish departmental offices (below the Senior Executive Service (SES) level) to the chief executives of departments or their delegates.

Delegation to appropriate persons? - Clause 13

7.4 Clause 13 of the Bill amends the *Public Service Management and Employment Act* by omitting the current s. 21 and inserting the following provision:

> ***Creation and abolition of offices***
>
> *21.(1) The Governor in Council may create or abolish offices in departments.*
>
> *(2) The Governor in Council may delegate the power to create or abolish offices in a department to the chief executive of the department.*
>
> *(3) The delegation may authorise the chief executive to subdelegate the power delegated to the chief executive.*
>
> *(4) This section does not apply to senior executive service positions.*

7.5 The Committee draws attention to the provisions of proposed new s. 21(3). The Committee notes that the persons or classes of persons to whom the Governor in Council's powers may be sub-delegated are not spelt out.

7.6 It is the Committee's view that this provision may infringe the fundamental legislative principle that legislation should allow the delegation of administrative power only in appropriate cases and to appropriate persons.[2]

7.7 Given the significant nature of the power involved, the Committee requests that the Minister give consideration to redrafting proposed new s. 21(3) to provide that the authorisation to subdelegate should specify the persons or classes of persons to whom the subdelegation can be made.

Disallowance motions - Schedule 1, Clause 5

7.8 Schedule 1 of the Industrial Relations Legislation Amendment Bill (No. 2) makes amendments to the *Public Service Management and Employment Act 1988* as a consequence of the omission of schedule 1 of that Act.

7.9 As a result of amendments to ss. 8, 9 and 11 of the *Public Service Management and Employment Act*, inserted by schedule 1, cls. 3 and 4, the Governor in Council, by proclamation, may (inter alia):

- create or discontinue departments of government;
- amalgamate a part of a department with another department;
- discontinue a part of a department;
- give functions to a department, or change the functions given to a department; or
- specify the titles by which chief executives are to be known.

7.10 The existing s. 10 of the *Public Service Management and Employment Act* is also omitted and the following provision is proposed to be inserted:

> ***Additional Powers of Governor in Council***
>
> *10.(1) The Governor in Council may, by proclamation, prescribe anything necessary or convenient to be prescribed—*
>
> *(a) to enable a proclamation to be made under section 8 or 9; or*
>
> *(b) for carrying out or giving effect to a proclamation under section 8 or 9.*

[2] Section 4(3)(c) *Legislative Standards Act.*

(2) The governor in Council may, by gazette notice, prescribe anything necessary or convenient to be prescribed—

(a) to enable a gazette notice to be made under section 8(2); or

(b) for carrying out or giving effect to a gazette notice under section 8(2).

(3) The Governor in Council may do anything else that the Governor in Council considers necessary or desirable to be done—

(a) to enable a proclamation or gazette notice to be made under section 8 or 9; or

(b) for carrying out or giving effect to a proclamation or gazette notice under section 8 or 9.

Examples of action to enable proclamation or gazette notice to be made—

1. Creation of an entity.

2. Amalgamation of a department with another department.

Examples of action for carrying out or giving effect to proclamation or gazette notice—

1. Transfer of position from a department to another department.

2. Transfer of officers and employees from a department to another department.

7.11 Schedule 1, cl. 5 then inserts a new s. 42B into the *Public Service Management and Employment Act 1988*. It provides that:

Proclamations under Act subordinate legislation

***42B.(1)** A proclamation under this Act is subordinate legislation.*

*(2) However, the **Statutory Instruments Act 1992**, section 50 does not apply to a proclamation under this Act.*

7.12 Section 50 of the *Statutory Instruments Act 1992* provides that:

Disallowance

***50.(1)** The Legislative Assembly may pass a resolution disallowing subordinate legislation if notice of a disallowance motion is given by a member within 14 sitting days after the legislation is tabled in the Legislative Assembly.*

(2) If the disallowance motion is not moved on the day for its consideration, the motion lapses.

(3) If the resolution is passed, the subordinate legislation ceases to have effect.

(4) Also, if the resolution has not been disposed of at the end of 14 sitting days after notice is given (whether by withdrawal or lapsing of the disallowance motion or in another way), the subordinate legislation ceases to have effect.

(5) In this section—

*"**subordinate legislation**" includes—*

(a) a provision of subordinate legislation; and

(b) a form required, under an Act or a regulation under this Act, to be tabled in the Legislative Assembly.

7.13 It is the Committee's view that proposed new s. 42B(2) seriously detracts from the Committee's scrutiny role. For example, under s. 22(1) of the *Parliamentary Committees Act 1995* is the Committee's area of responsibility to consider:

(a) the application of fundamental legislative principles[3] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation.[4]

7.14 Under s. 22(2)(b), the Committee's area of responsibility also includes:

monitoring generally the operation of—

part 6 (Procedures after making of subordinate legislation)

7.15 The Committee is deeply concerned about the drafting practice adopted in schedule 1, cl. 5. This is the first occasion on which the Committee has sighted a statutory provision which seeks to exempt subordinate legislation from the requirements of s. 50 of the *Statutory Instruments Act*. The Committee registers its disapproval of this practice and would not wish to see a precedent established by the provision used in schedule 1, cl. 5.

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[3] "Fundamental Legislative Principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, s.49(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

[4] A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, s. 50.

7.16 **The Committee is of the view that Members of Parliament and the public in general are likely to believe that the determination of matters such as the creation or discontinuation of departments are properly matters for the government of the day and do not need to be disallowable.**

7.17 **The Committee is of the opinion that all subordinate legislation should be subject to all the provisions of the *Statutory Instruments Act.***

7.18 **The Committee therefore seeks comment from the Minister as to whether it is necessary that these proclamations take the form of subordinate legislation.**

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8 LOTTERIES AMENDMENT BILL 1995

8.1 This Bill was introduced on 2 November 1995 by the Honourable K E De Lacy MLA, Treasurer.

8.2 The major purpose of the Bill is to deregulate the relationship between the Golden Lottery Corporation and its agents. The creation of a commercial as opposed to a regulatory regime reflects the Government's commitment to national competition policy.

Administrative power insufficiently defined? - Clause 3

8.3 Clause 3 amends the existing s. 13 of the *Lotteries Act 1994* which governs the establishment and functions of the Golden Casket Advisory Board (renamed the Golden Casket Board by a minor amendment contained in the schedule to the Lotteries Amendment Bill 1995). The amendment to s. 13 inserts new sub-sections (2) and (3).

8.4 Proposed new s. 13(2) provides that:

> *(2) The Board's primary function is to act within the limits of the powers delegated to the board by the corporation, as the delegate of the corporation, including for the following—*
>
> *(a) setting, and measuring achievement against, financial and non-financial performance targets;*
>
> *(b) developing business strategies to optimise the corporation's commercial performance;*
>
> *(c) guiding the corporation's marketing strategies through advertising and promotion campaigns, distribution strategies and customer service standards;*
>
> *(d) researching and developing new gaming schemes and products to maintain and enhance the corporation's position in the entertainment industry;*
>
> *(e) investigating technological initiatives to improve operational efficiency and customer service;*
>
> *(f) reviewing decisions made by the corporation that affect agents.*

8.5 The "Corporation" refers to the Golden Casket Lottery Corporation.

8.6 The Committee expresses concern that the criteria for exercising the function specified in s. 13(2)(f) may be insufficiently defined.

8.7 There do not appear to be any provisions in the existing Act or the proposed amendments explaining how a review of decisions of the Corporation which affect agents must be conducted.

8.8 The Committee seeks advice from the Minister as to the mechanisms by which decisions made by the Corporation which affect agents will be reviewed, and the criteria upon which they will be based.

9 MOTOR ACCIDENT INSURANCE LEGISLATION AMENDMENT BILL 1995

Background

9.1 This Bill was introduced on 2 November 1995 by the Honourable K E De Lacy MLA, Treasurer.

9.2 Amongst other things, the Bill extends the scope of the Nominal Defendant scheme to improve protection for persons injured in motor vehicle accidents, and clarifies and reinforces the intent of certain provisions of the *Motor Accident Insurance Act 1994*.

Sufficiently clear and precise drafting? - Clause 4

9.3 The phrase *"public place"* is specifically introduced by this Bill and the following reasoning was provided in the Minister's second reading speech (pp 1 - 2):

> *... there is some conjecture that the definition may exclude from Nominal Defendant cover, places like beaches where people frequently use motor vehicles.*
>
> *The Motor Accident Insurance Legislation Amendment Bill addresses this issue by including a "public place" in the scope of cover and as such affords persons injured as the result of the negligence of an uninsured motor vehicle driver, much wider protection. It certainly extends the cover to our beaches. The definition of a "public place" is aligned to the* ***Motor Vehicles Control Act 1975.***

9.4 The phrase is used several times throughout the Bill but the reasoning revealed in the above quote is not revealed in the Bill itself. The following definition is provided:

> ***"public place"*** *has the meaning given by the* ***Motor Vehicles Control Act 1975.***

9.5 To find out the meaning of *"public place"* a person, therefore has to refer to the *Motor Vehicles Control Act 1975* which provides the following comprehensive definition which itself makes reference to further definitions provided in two other Acts:

> ***"public place"*** *means a place of public resort open to or used by the public as of right, and a place for the time being used for a public purpose or open to access by the public, whether on payment or otherwise, or open to access by the public by the express or tacit consent or sufferance of the owner of that place, whether the place is or is not so open at all times, and a place for the time being declared by regulation to be a public place for the purposes of this Act, but does not include—*

(a) a track which at the material time is being used as a course for racing or testing motor vehicles and from which other traffic is excluded during that use; or

(b) a place that is a road within the meaning of the ***Transport Infrastructure (Roads) Act 1991*** *or the* ***Traffic Act 1949****; or*

(c) a place that is declared under section 25 not to be a public place.

9.6 The Committee is of the view that legislation should be drafted in a way which makes it accessible to the lay person. In particular, where phrases which have a specified meaning are used in a Bill or Act, the Committee is of the view that, where reasonable, the full terms of that specified meaning should also be set out in that Bill or Act. This would mean that if a person has the need to clarify the law on a particular area by reference to a specific piece of legislation, that person will have access to all the applicable definitions in the one document. The only exception to this approach is that some commonly used words and phrases are defined in the *Acts Interpretation Act 1954*.

9.7 If the Committee's view were adopted lay persons may have to refer to the *Acts Interpretation Act* for some common definitions, but there will no longer be a need to refer to several other documents or pieces of legislation to understand a phrase dealt with in the Bill at hand.

9.8 In instances where phrases with specified definitions are used in a Bill the Committee is of the view that, within reason, the Bill should contain that definition. If the definition is commonly used the Committee is of the view that such definitions should be included in the *Acts Interpretation Act 1954*.

9.9 This view is brought to the attention of the Minister.

Retrospective? - clauses 5(1) and 10

9.10 Sections 5(1) and 10 are stated to have commenced on 1 September 1994.

9.11 The Committee notes that these sections are to have retrospective effect, however, the amendments are inserted for clarification purposes only and there are no concerns about detrimental impact caused by the retrospectivity.

Explanatory Notes

9.12 In section 22(2)(a) of the *Parliamentary Committees Act 1995* the Committee's area of responsibility is stated to include monitoring generally the operation of part 4 of the *Legislative Standards Act 1992* which deals with explanatory notes.

9.13 The explanatory notes for this Bill deal thoroughly with all matters covered in section 23(1), *Content of explanatory note for Bill* in the *Legislative Standards Act 1992*.

9.14 The Committee commends the drafters of this explanatory note.

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10 REVENUE LAWS AMENDMENT BILL (NO. 2) 1995

Background

10.1 This Bill was introduced on 2 November 1995 by the Honourable K E De Lacy MLA, Treasurer.

10.2 The reasons for the Bill are stated as follows in the Explanatory Notes:

> *The amendments will ensure that there is a statutory basis for a number of concessions such as the increased stamp duty rebate for first home buyers, exclusion of sales tax from the list price of motor vehicles where an applicant seeking registration of a vehicle is exempt from sales tax, relief from stamp duty on transfers of registration from the Federal Interstate Registration Scheme, exclusion from liability to pay-roll tax of wages paid to long term employees overseas and certain wages paid by the Queensland Country Women's Association.*
>
> *Legislative amendment is also required to provide an efficient means for payment of stamp duty on new products traded on the Australian Stock Exchange.*
>
> *The amendments relating to leases and transfers of statutory licences will close off existing avenues for the avoidance of stamp duty.*

Retrospective?

10.3 This involves a retrospective amendment to the Stamp Act. However, in assessing this retrospectivity against the fundamental legislative principles, it does not adversely affect rights, liberties or impose obligations retrospectively.

10.4 It implements an agreement to allow stock brokers to treat the exercise of options in the same way as the normal trade in shares on the market.

10.5 Although it is a cost to revenue and the purposes of government, it was:

- beneficial to those to whom it was specifically directed; and
- known to those who would be affected.

10.6 While it is technically retrospective legislation, in that its effect predates its proclamation, it is not retrospective as of the date of the government undertaking for which it legislates.

10.7 The Committee notes that this constitutes what is regarded by scrutiny committees in other jurisdictions as "legislation by press release". The Committee considers that this may conflict with the FLP requiring that legislation have sufficient regard to the institution of Parliament.

10.8 This also involves retrospective amendment of the *Payroll Tax Act 1971* to exclude from liability the Country Women's Association in its non commercial activities. It also excludes wages paid for services rendered overseas or rendered overseas once that period exceeds six months. The first is minor and beneficial retrospectivity. The second is technically but not effectively retrospective because the benefit it confers does not operate until the worker has been working for six months overseas during the current financial year - i.e. 1 January. In any case, there is a long tradition of money bills being backdated to the commencement of the relevant financial year.

10.9 The Committee is of the view that retrospectivity in the commencement dates does not conflict with FLPs.

11 SOUTH BANK CORPORATION AMENDMENT BILL 1995

11.1 This Bill was introduced on 2 November 1995 by the Honourable W K Goss MLA, Premier and Minister for Economic and Trade Development.

Background

11.2 This Bill contains powers allowing the South Bank Corporation (the Corporation) to exclude persons causing a public nuisance from the South Bank Parklands and, in certain circumstances, to prevent offenders from re-entering the site for set periods of time.

11.3 Most of the provisions contained in the Bill were previously contained in the South Bank Corporation Amendment By-law (No. 1) 1994.

11.4 The then Committee of Subordinate Legislation reported to Parliament on that subordinate legislation in its *"Report on the Review of the South Bank Corporation Amendment By-Law (No. 1) 1994".*

11.5 This Bill was introduced to overcome concerns held by that Committee.

11.6 The Queensland Council for Civil Liberties has forwarded a submission to the Committee in relation to this Bill. The submission has been included as appendix B to this Alert Digest.

Fundamental Legislative Principles - not exhaustive and not absolute

- **not exhaustive**

11.7 This Committee (like its forerunner, the Committee of Subordinate Legislation) is charged with the duty of considering the application of fundamental legislative principles (see Appendices B and C) to particular Bills. The examples of matters coming within the fundamental legislative principles set out in s.4(2) of the *Legislative Standards Act 1992* are not a closed list. For that matter, the two principles set out in s.4(2) are not themselves a closed list. It is clear therefore, that the Committee may have regard to a wide range of principles in performing its task.

11.8 To illustrate this point, although freedom of movement and freedom of association are not specifically set out in s.4 of the *Legislative Standards Act*, the Committee will have regard to those principles as they exist at common law.

- **not absolute**

11.9 Referring back to the fundamental legislative principles (FLPs), it should also be noted that these are not absolute rules in that they may conflict with each other and other values. The FLP's, as they are presently formulated, have their genesis in a Report of the Electoral and Administrative Review Commission on a Review of the

Office of Parliamentary Counsel[5] in which it was anticipated that, on occasion, it will be appropriate to deviate from the FLPs:

> *There may be occasions where existing rights and liberties may need to be qualified for a legitimate social objective.*
>
> *At the risk of repetition, it should be noted that many of the legislative principles identified in this Chapter are not absolute. There may be circumstances where the public interest justifies or even requires that the principle be modified or displaced.*

11.10 The Committee therefore seeks to ensure that matters which come within the scope of fundamental legislative principles are given sufficient regard in legislation, rather than expecting them to be applied invariably.

Consideration of the South Bank By-law by the Subordinate Legislation Committee

11.11 As previously outlined, this South Bank Corporation Amendment Bill 1995 *largely replicates provisions currently found in the South Bank Corporation Amendment By-Law (No. 1) 1994*[6]. When the (then) Subordinate Legislation Committee considered the by-law, public submissions were received by the Committee, which also conducted a private hearing.

11.12 In essence, the following points were made in public submissions:

- that granting these sorts of powers in subordinate legislation is an abuse of the Parliamentary process and contrary to s.4(5) of the *Legislative Standards Act*;
- that the fundamental rights of freedom of association and freedom of movement were trespassed upon in contravention of s.4(2)(a) of the *Legislative Standards Act;*
- that persons could be excluded from the site for 24 hours or a period of up to 10 days without a means of having those decisions reviewed and that this was contrary to the principles of natural justice (s. 4(3)(d) of the *Legislative Standards Act*); and
- that provisions allowing a court to exclude a person from the site for a period of up to 12 months does not provide for the accused person to be given notice of this process, nor does it provide for them to attend and offer a defence at such proceedings.

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[5] Electoral and Administrative Review Commission (1991) *Report on Review of the Office of Parliamentary Counsel*, Government Printer, Brisbane, paras 2.3 and 2.76.

[6] Explanatory note p. 2.

11.13 After giving full consideration to all points raised, the Subordinate Legislation Committee ultimately reached the following conclusion:

> *The social objective of the By-Law together with the inclusion of the sunset provisions are in the opinion of the Committee sufficient in this case to permit the non-observance of the fundamental legislative principles in ss. 19, 20 and 21. The Committee recommends that a right of review be included for decisions made pursuant to s. 17.*
>
> *If at 30 June 1995 it is necessary for the powers in these sections to be continued then they should be extended by an Act of Parliament and not by by-law procedure or any other form of subordinate legislation.*

The legislative response

11.14 A major objection to the subject powers, when included in the by-law, was the fact that they were improperly contained in subordinate, rather than principal legislation. The previous Committee therefore recommended that these provisions were more appropriately contained in primary legislation.

11.15 This recommendation has been adopted in the Bill.

11.16 Another major objection taken to the original by-law was the absence of a review process. Clause 37G now provides for the review of certain exclusion directions and sets out procedures for review.

11.17 This has overcome another cause of significant complaint by persons with an interest in civil liberties.

11.18 The Committee expresses its appreciation of the adoption of these recommendations of the Subordinate Legislation Committee.

Continuing Issues

11.19 Some of the issues that were raised in relation to the by-law before the Subordinate Legislation Committee could be raised in relation to the Bill.

- **Clause 37B**

11.20 Persons whom it is believed to have committed an exclusion offence under s. 37A may also be excluded from the South Bank site **under cl. 37B**.

11.21 Sub-clauses (2),(3) and (5) could be regarded as diminishing freedom of movement and freedom of association. These freedoms are recognised by the common law and by all statements of human rights including several to which Australia is a party.

11.22 The Committee notes that exclusion directions may be given as verbal directions to persons not to re-enter the site for a period of 24 hours (c.37B(2) and (3)). In contrast, exclusions for periods longer than 24 hours are done in writing (cl.37B(5)).

- **Clause 37D**

11.23 Clause 37D could be regarded as abrogating the common law right to silence.

- **Clause 37E**

11.24 Under cl. 37E the corporation, or a police officer authorised by the corporation, may apply to a court for an order excluding a person from the site because of the person's behaviour on the site. This may be raised during a proceeding for an offence or independently as a separate matter. Notice need only be given in the latter case. This means than an application for exclusion can be brought on without notice during the proceeding for an offence. The Committee believes that defendents should be put on notice of the remedies to be sought by the Corporation.

11.25 However, the right to demand name and address is conditional upon the commission of an offence cl. 37D(6) makes it a complete defence that the primary offence is not proven.

11.26 The Committee considers:

- **that the provision of written notices for all 37B exclusions provides a desirable safeguard for both the issuers and receivers of exclusion orders;**
- **that attention could be given to the review process for 37B exclusions (see below).**

The Review Process

11.27 Although the Act has made exclusion orders the subject of review, the review process adopted has a number of limitations.

11.28 Clause 37B exclusions are based on a claim that an offence has been committed. The issuing of an exclusion order involves the finding by a public official that the individual concerned has committed a criminal offence. Yet this may be reviewed without legal representation or the rules of criminal evidence being used or without the higher standard of proof required in defamation cases where criminal behaviour is alleged.

11.29 The Queensland Council for Civil Liberties made submissions on this subject at pages 3 - 5 of their letter (Appendix B). Among the points made were the following:

We also have considerable concerns as to the hybrid nature of this legislation. The explanatory notes and the second reading speech by the Premier on 2 November 1995 indicate that the intention of the Act is to provide an alternative to criminal law intervention for misbehaving individuals.

However, the alternative has all the trappings of the criminal justice system including using the police with accompanying powers of arrest, except that the normal attributes of a Court hearing with right of representation and costs entitlement have been taken away.

Put differently, the Act uses the agents of the criminal justice system, namely the police at the South Bank site in terms of powers to demand name and address, make arrests etc, but then the Act goes on to describe the Court procedure as something analogous to a small claims proceeding.

If compulsive police-type powers are exercisable by security officers as well as police officers, then the criminal justice system is already being used at the front end of the process.

However, under the Act's provision the criminal justice system with its guarantee of right of representation, costs etc are being denied at the back end.

If police powers etc are to be used then the proper criminal justice model should be employed.

We are not aware of any legislation of a similar type to this in Australia which has taken away the basic rights of a traditional hearing where police powers have been used, especially the right of representation, costs etc.

Accordingly, we see a fundamental flaw in the Bill and we contend that the Bill needs rectification.

11.30 The Committee considers that, as a general proposition, this reasoning has merit and refers the matter to Parliament for its consideration.

11.31 The Committee also notes that decisions to exclude persons for a period of 24 hours are not reviewable because they are excluded from the definition of "reviewable exclusion direction".

11.32 **Clause 37I.(2)(d):** This clause provides that in hearing and deciding an application for the review of a reviewable exclusion direction:

(d) a party to the review cannot be represented by a lawyer;

11.33 A "lawyer" is defined in the *Acts Interpretation Act* as:

> *... a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or the Supreme Court of a State.*

11.34 The Committee will always express some concern when a person's right to legal representation is removed. The Committee is also aware that the cost of engaging legal representation the equal of that which might be afforded by the South Bank Corporation may in fact inhibit the right of persons exercising their right of review.

11.35 The following provisions may breach FLPs:

- **The non-reviewability of exclusions for less than 24 hours**
- **The inability of an excluded person to insist on a trial of a claimed exclusion offence to invalidate an exclusion**
- **The prohibition of legal representation for the applicant**
- **The inability of the court to make an order for costs and the lack of provision for damages**

The Committee refers these matters to Parliament for its consideration.

General consideration of FLPs - "Sufficient Regard to Rights and Liberties"

11.36 In considering the incorporation of elements of a 1992 by-law into a 1989 Act, it is appropriate to consider the application of the 1992 *Legislative Standard Act* and its requirement that Queensland Arts incorporate fundamental legislative principles.

11.37 The Committee notes the following aspects of the Bill which are aimed at protecting civil liberties:

- the many decisions in the Bill which are subject to being made on reasonable grounds;
- the warning required to be given to persons of an offence cl.37D(3);
- the requirement that the review procedure be undertaken by a court as soon as practicable, cl.37I(1);
- the requirement that the corporation report on the exercise of powers under this part in each annual report, cl. 37K.

11.38 The Committee has noted the various common law arguments and points about infringements of individual rights that could be made against this Bill. The Committee is, however, also conscious of the competing rights of other members of the public to have access to this public facility without having to be concerned about their safety.

11.39 The Premier's submission to the Subordinate Legislation Committee makes the point that although individual rights may be affected by this legislation, it is being introduced for the benefit of the rest of the population wishing to enjoy the facilities at South Bank:

> *The by-law protects the community's right to peaceful assembly by enabling security officers employed by the South Bank Corporation and police officers to require individuals who are drunk or disorderly or creating a disturbance to leave the site. ...*
>
> *The by-law promotes the rights of citizens to freely move throughout the South Bank site, including at night-time, without the fear of the threat of violence and intimidation.*

11.40 **Clause 37A:** provides:

> ***Conduct causing public nuisance***
>
> *37A.(1) A person must not, on the site-*
>
> *(a) be drunk or disorderly; or*
>
> *(b) create a disturbance.*
>
> *Maximum penalty - 20 penalty units*
>
> *(2) For this part, an offence under subsection (1) is an* ***"exclusion offence"****.*

11.41 Sections 37A, 37B and 37D involve clear limitations of rights and liberties of some persons - namely the freedom of assembly, the freedom of movement and the right to silence. These are recognised by the Common Law and international human rights instruments. The LSA requires that the legislation have sufficient regard for those rights. Sufficient regard does not preclude restrictions but does require that they be justified by some other value advanced by the legislation and that the restrictions are no greater than are reasonably necessary to achieve that other value. To ensure the most public and highest level of justification, it is appropriate that they be placed before parliament as this committee's predecessor decided.

11.42 The best justification for the limitation of a liberty is that the measure is needed to protect the rights of others to an equal liberty. Thus the rights of some members to peacefully enjoy the South Bank parklands may be legitimately restricted to ensure an equal liberty for others.

11.43 Such restrictions may be easily justified to protect individuals to freely move throughout the South Bank site without fear of the threat of violence and intimidation (the reasons given by the Premier for the Bill and cited in para 12.39

above). However, the "exclusionary offences" listed refer only to "public nuisance" and extend to extremely vague and general terms involving actions that are non-violent, non-intimidatory and not even a nuisance - eg. drunkenness.

11.44 The only justification for exclusionary offences of this breadth would be that they allow a greater enjoyment of the site because they sanction and exclude those whose actions which reduce the enjoyment of the South Bank site. This would seek to justify the restriction of the liberty of those excluded by the expansion of the enjoyment of the South Bank site. This may increase the willingness of the public to use the site. It may be seen as important to increase the public use of public space, doing something to reverse the socially damaging trend to social isolation in private suburban spaces.

11.45 Even if the arguement in para 12.44 is accepted, this would only justify clearly drafted legislation that identified nuisances that would substantially limit the reasonable enjoyment of South Bank by other users.

11.46 In particular, the Committee is concerned that persons may commit an offence and be excluded from a public place for being "drunk".

11.47 The term "drunk" is not defined in the *Liquor Act 1992*, nor in the *Acts Interpretation Act 1954* and can therefore be assumed to have its ordinary meaning. In looking for what the ordinary reasonable man would consider to be the meaning of "drunk", His Honour Judge Wylie QC in *Ibbotson v Junker (No.2)*[7] sought:

> *... evidence of an alcohol-induced appreciable and material impairment of physical and/or mental faculties or judgment bearing in mind that the impairment has to be at such a level as to justify conviction for an offence. Merely to show that alcohol has been consumed will not suffice to prove drunkenness beyond reasonable doubt.*

11.48 The Committee is concerned that, when a security officer or a police officer excludes a person under s. 37B for being "drunk", they will be exercising a judgement on a matter in which it may be difficult to draw the line between a person ceasing to be sober and being "drunk". There are no safeguards to ensure that drunkenness is proven beyond reasonable doubt before a person is given an exclusion order.

11.49 The Queensland Council for Civil Liberties also provided a submission to the Committee on this point, suggesting that:

> *... drunkenness of itself should not be a basis for exclusion from the site and we would suggest that s.37A(1)(a) be changed to read drunk and disorderly.*

11.50 The Comittee considers that, as a general proposition, this reasoning has merit and refers the matter to Parliament for its consideration.

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[7] (1990) 11 Qld Lawyer Reports 125 at 128.

Overall comment

11.51 The Committee notes the arguments that may be made about the infringement of common law rights and the fundamental legislative principles. FLPs are not absolute and Parliament may form the view that this legislation has been put in place to achieve a legitimate social objective.

11.52 However, the Committee considers that Parliament should consider the addition of further safeguards and limitations as set out in the body of this report.

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12 STATUTE LAW (MINOR AMENDMENTS) BILL (NO. 2) 1995

Background

12.1 This Bill was introduced on 2 November 1995 by the Honourable T M Mackenroth MLA, Minister for Housing, Local Government and Planning, Minister for Rural Communities and Minister for Provision of Infrastructure for Aboriginal and Torres Strait Islander Communities.

12.2 This is the second Bill of its kind this year. These Statute Law (Minor Amendments) Bills contain amendments that

> *... taken alone, would be of insufficient importance to justify separate legislation. However, the cumulative effect of the amendments can have a substantial impact on the overall quality and workability of Queensland law.*[8]

12.3 These Bills are stated to contain amendments that are *concise, of a minor nature and non-controversial.*[9]

Minor drafting error

12.4 It appears that sub-clause (2)(a) of clause 42 of the amendment to the *Evidence Act 1977* has accidentally been inserted both at the beginning of sub-cl.(2) and at the end of it. The last reference should probably be deleted.

12.5 The Committee refers this point to the Minister

Sufficiently clear and precise drafting? - cl.3 of *Statutory Bodies Financial Arrangements Act 1982*

12.6 The following amendments to the *Statutory Bodies Financial Arrangements Act 1982* are proposed:

> ***1. Section 3-***
>
> *insert -*
>
> ***"foreign society"** see Financial Institutions Code, section 3.*
>
> ***2. Section 48(1)(b), 'bank'-***

[8] Explanatory notes p. 1.

[9] Explanatory notes p. 1.

omit, insert-

'bank, building society, credit union or foreign society.'

12.7 The definitions of the terms *bank, building society, credit union* are set out in the *Acts Interpretation Act 1954*. To ascertain the definition of "foreign society", however, a person has to have access to a copy of the *Financial Institutions Code*.

12.8 To make legislation more accessible and user friendly the Committee is of the view that, where possible, cross referencing to other legislation should be kept to a minimum.

12.9 As it has previously stated, the Committee is of the view that, in instances where phrases with specified definitions are used in a Bill, the Bill should also contain the definition. If, however, the definition is commonly used the Committee is of the view that such definitions should be included in the *Acts Interpretation Act 1954*.

Regulatory Impact Statements - *Statutory Instruments Act 1992*

12.10 The Statute Law (Minor Amendments) Bill (No. 2) 1995 proposes an amendment to s.46 of the *Statutory Instruments Act 1992*, which sets out the circumstances under which the preparation of a regulatory impact statement (RIS) is not necessary. Section 46(1)(c) presently provides:

> *(c) an amendment of subordinate legislation to take account of current Queensland legislative drafting practice*

12.11 The proposed amendment reads:

> *(3) In subsection (1)(c)—*
>
> ***"amendment"** includes relocation, and repeal and remaking, with or without changes.*
>
> *(4) Subsection (3) and this subsection expire on 31 December 1996.*

12.12 The explanatory note states:

> *Proposed section 46(3) makes clear that the relocating of provisions and the remaking of subordinate legislation to take account of current Queensland legislative drafting practice will not require the preparation of a regulatory impact statement under the **Statutory Instruments Act 1992**, part 5 (Guidelines for regulatory impact statements).*
>
> *The relocation of provisions of instruments could, in some cases, have the effect of extending the automatic expiry of the provisions under the **Statutory Instruments Act 1992**, part 7 (Staged automatic expiry of*

subordinate legislation). Accordingly, the relocation of instruments under the subordinate legislation review program would be done selectively and after appropriate consultation. The relocating instrument will, in any event, be subordinate legislation and subject to tabling and disallowance.

12.13 The Committee supports the proposed amendment from the perspective that it would be counter productive to require RISs to be produced for sections merely amended to take account of current drafting practices.

12.14 The Committee is, however, concerned about the fact that the intention of the staged automatic expiry provisions may be frustrated by such amendments. This could happen where, for example, relevant drafting amendments are made to a statutory instrument without it being reviewed for the purposes of the staged automatic expiry provisions. If the unamended instrument had a period to run before automatic expiry, that period would be increased to 10 years before the instrument would again be subject to compulsory review.

12.15 The Committee does, however, note that the explanatory note provides a recognition of this potential circumvention of the staged expiry provisions and states that relocation of instruments will be done *selectively and after appropriate consultation.*

12.16 The Committee also notes that this amendment is not permanent but, rather, will remain in effect only until December 1996.

12.17 The Committee recognises the care taken to draft this amendment to provide flexibility in updating the drafting whilst protecting the spirit of the RIS and staged automatic expiry provisions.

12.18 To enable the Committee to monitor the effect of this amendment the Committee requests that amendments under this provision be specifically identified in explanatory notes, together with information on the period of time since the last revision of the subject instrument or provisions thereof.

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13 STATUTE LAW REVISION BILL (NO. 2) 1995

13.1 This Bill was introduced on 2 November 1995 by the Honourable T M Mackenroth MLA, Minister for Housing, Local Government and Planning, Minister for Rural Communities and Minister for Provision of Infrastructure for Aboriginal and Torres Strait Islander Communities.

13.2 Schedules 1 and 2 introduce amendments considered to be of a non-controversial and minor nature. Schedules 3 to 10 repeal spent or obsolete Acts or provisions of Acts.

Delegation to Appropriate Persons

13.3 The Committee notes that several Acts dealt with in the Statute Law Revision Bill (No. 2) contain amendments allowing the delegation of powers to "a person" in the absence of any limitations on the persons or classes to whom the powers may be delegated - see:

- *Business Names Act 1962*
- *Education (Teacher Registration) Act 1988*
- *Education (Tertiary Entrance Procedures Authority) Act 1990*

13.4 Section 4(3)(c) 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—*
>
> > *allows the delegation of administrative power only in appropriate cases and to appropriate persons.*

13.5 The Electoral and Administrative Review Commission (EARC) has previously commented on a similar principle contained in the Cabinet Handbook, to the effect that the delegation of administrative powers should be appropriately controlled. According to EARC, the intent of this principle is to ensure that persons who exercise administrative decision-making power should be identified by law.

13.6 The Committee notes that the substance of these provisions remains unchanged and that the relevant sections have merely been redrafted *in accordance with current drafting practice.*

13.7 The Committee draws these concerns to the attention of the Minister for Emergency Services and Consumer Affairs and the Minister for Education.

13.8 The Committee requests that, in each case, the relevant Minister give consideration to redrafting the provisions to specify appropriate persons or classes of persons to whom the powers may be delegated.

Henry VIII Clauses

13.9 The Committee notes that this Bill, like the Statute Law Revision Bill 1995, updates the drafting of Henry VIII clauses in several Acts which incorporate agreements between the Queensland Government and corporations - see:

- *Alcan Queensland Pty. Limited Agreement Act 1965*
- *Austral-Pacific Fertilisers Limited Agreement Act 1967*

13.10 The Committee has previously commented on the use of this drafting practice, when it reported upon the Statute Law Revision Bill 1995 in its first Alert Digest[10].

13.11 On this point, the Committee notes that the Office of Parliamentary Counsel has provided a contrary view which was published in Alert Digest No. 2, Appendix A.

13.12 The use of Henry VIII clauses is the subject of a report to be presented to Parliament in 1996 by the Committee under s. 40 of the *Parliamentary Committees Act 1995*.

13.13 The Committee refers the continuing use of Henry VIII clauses to the attention of Parliament.

Amendments of a minor nature and non-controversial?

13.14 As already mentioned, the Explanatory Notes to this Bill state that the amendments introduced are *of a minor nature and non-controversial.*

13.15 The Committee notes that in, for example, the following Acts:

- *The Queensland Art Gallery Act 1987*
- *Queensland Cultural Centre Trust Act 1976*
- *Queensland Museum Act 1970*
- *Queensland Performing Arts Trust Act 1977*

an amendment has been made allowing payment of fees and allowances to Trust or Board Members who are public servants. This is done by omitting sections which previously prevented such payments.

13.16 The Committee is of the view that this is a potentially controversial amendment which should perhaps not have been dealt with in a Statute Law (Minor Amendments) or Revision Bill.

[10] Paras 7.7 to 7.11.

14 WORKERS COMPENSATION AMENDMENT BILL (NO. 2) 1995

Background

14.1 This Bill was introduced on 2 November 1995 by the Honourable W M Edmond MLA, Minister for Employment and Training and Minister Assisting the Premier on Public Service Matters of Queensland. The object of the Bill is:

> *To introduce a series of immediate measures to ensure that the Workers' Compensation Scheme is returned to a fully funded position over the next 5 years*[11]

Committee's view on the Bill

14.2 This Bill seeks to alter the workers compensation scheme in Queensland. In cases of less serious injury (defined as those where the worker is entitled to less than 20% of the maximum lump sum compensation) workers must choose between a payment by the Workers Compensation Board and going to common law. If they go to common law both sides are encouraged to settle by the statutory imposition of a costs rule. If the court ultimately awards the worker more than the Board offered, the Board has to pay the workers costs, but the reverse applies if the court awards the worker less than the worker offered. If the figure is in between Board and worker have to bear their own costs.

14.3 If there were no provision for workers compensation various arguments could be mounted that rights and liberties had been seriously infringed.

14.4 However, the means by which those rights are realised are a matter of policy debate and difference.

14.5 The changes contemplated in this Bill fall within the latter category.

14.6 This Bill does not need to be reported upon further to Parliament as it does not infringe any FLP.

[11] Explanatory notes p. 1.

- APPENDICES -

Minister for Environment and Heritage

Hon. Tom Barton, MLA
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09 NOV 1995

FAXED 9/11

SCRUTINY OF LEGISLATION COMMITTEE
13 NOV 1995

Mr Jon Sullivan MLA
Chairman
Scrutiny of Legislation Committee
Parliament House
BRISBANE QLD 4000

Dear Mr Sullivan

I am writing in response to your letter dated 30 October 1995 relating to legislation administered by my Department.

I have noted the content of the Committee's Alert Digest No. 2 of 1995. I have set out below my view on the matters raised. In coming to my conclusions I have consulted extensively with officers of my Department and those of the Office of Queensland Parliamentary Counsel.

1. COASTAL PROTECTION AND MANAGEMENT BILL 1995

Sufficient regard to rights and liberties? - Clauses 52 and 53. The Committee is of the view that the safeguards stated in the Explanatory Notes should be reflected in each of these clauses of the Bill.

Clauses 52 and 53 of the Act deal with the issuing of coastal protection notices and tidal works notices by the chief executive.

The Committee states that the "safeguards" provided in the Explanatory Notes should appear in the legislation. It would not be possible to circumscribe all cases in the legislation. The Explanatory Notes merely provide examples of how the sections will operate. The appeal provisions found in clauses 95 - 100 provide adequate "safeguards" in all possible circumstances.

Administrative power sufficiently defined? - Clauses 52 and 53. It appears that the words of cl.52(2)(a) and 53(3) may be regarded as administrative powers which are insufficiently defined.

In response to the Committee's suggestions clauses 52 and 53 were amended so that the works required and the time period for requiring those works to be performed under these clauses must be reasonable.

Administrative power subject to appropriate review? - Clause 54. It appears that the following issues may not have been sufficiently dealt with in this clause:

- the time to lodge an appeal prior to action being taken by the chief executive; and
- the effect of a successful appeal on a debt imposed for the costs of action taken.

The Committee brings the concerns addressed in this shaded box and the box directly above to the attention of the Minister.

Clause 54 provides that the chief executive can arrange for works or actions to be carried out if a person **fails to comply with a notice** under clauses 52 or 53. The chief executive can recover all the costs incurred in carrying out the works from the person who fails to comply with the notice.

The chief executive **cannot** take any action until the period specified in the notice has expired. However, the person who has been served with a notice has the right after the giving of the notice to appeal against the giving of the notice or to comply with the terms of the notice. The matter is at the election of the person who has received the notice. A prudent person would probably first discuss the matter with the chief executive before taking court action.

If the person elects to appeal the giving of the notice, the Court may grant a stay of the decision appealed against to secure the effectiveness of the appeal (clause 98(1)).

If on appeal, the Court orders that the decision be set aside, the chief executive would not be able to recover the costs and expenses under clause 54(3) because it would follow from the Court's decision that a valid notice had not been given.

Compliance with the requirements regarding Regulatory Impact Statements? - Clause 47. The Committee's view is that the circumstances arising in this Bill are sufficiently covered by the terms of the *Statutory Instruments Act 1992*.

Under clause 47(1) the Minister may declare by written notice a control district for an area that requires immediate protection or management. The notice expires six months after it commences unless it is earlier repealed. Clause 47(4) provides that a regulatory impact statement is not required for such a notice.

The purpose of clause 47(4) is to remove doubt as to whether a regulatory impact statement is required under the *Statutory Instruments Act 1992*.

Abrogation of a right to silence? - Clause 75. The Committee agrees with the intent of cl. 75 but notes that cl. 75(1)(b) abrogates the right to silence and recommends that it be deleted from the Bill.

I agree with the Committee that the right to silence is one of the most basic rights developed by the common law. However, there is **nothing** in clause 75 that abrogates this fundamental right.

Clause 75(1)(b) does not require a person to make a statement, however, if the person elects to do so, what he or she says must not be misleading by omission of a material particular.

Similar provisions are standard in Queensland legislation and appear in the following legislation of my Department:

- Section 17 *Contaminated Land Act 1991*;
- Section 157 *Nature Conservation Act 1992;*
- Section 79 *Wet Tropics World Heritage Protection and Management Act 1993*; and
- Section 172 *Environmental Protection Act 1994.*

It also appears in at least 35 other pieces of Queensland legislation including:

- *Mineral Resources Act 1989;*
- *Child Care Act 1991;*
- *Grain Industry (Restructuring) Act 1991;*
- *Classification of Films Act 1991;*
- *Classification of Publications Act 1991;*
- *Electoral Act 1992;*
- *Art Union and Public Amusements Act 1992;*
- *Local Government Act 1993;*
- *Dairy Industry Act 1993;*
- *Agricultural Standards Act 1994;*
- *Transport Operations (Marine Safety) Act 1994;*
- *Transport Infrastructure Act 1994;*
- *Fisheries Act 1994;*
- *Retail Shop Leases Act 1994;* and
- *Workplace Health and Safety Act 1995.*

Sufficiently clear and precise drafting? - Clauses 12 and 55. In instances where phrases with specified definitions are used in a Bill the Committee is of the view that, within reason, the Bills should contain the definition. If the definition is commonly used the Committee is of the view that such definition should be included in the *Acts Interpretation Act 1954.*

This view is brought to the attention of the Minister.

The Committee's views have been referred to the Office of Queensland Parliamentary Counsel for consideration in the current review of the *Acts Interpretation Act 1954.*

Other features of the Bill deserving comment from the Committee. The Committee commends the Minister for the inclusion of such provisions for the protection and benefit of individuals affected by the legislation.

I thank the Committee for their comments supporting the inclusion in the *Coastal Protection and Management Bill 1995* of provisions for the protection and benefit of individuals affected by the legislation. It is the intention of the legislation to ensure that all persons are dealt with fairly and equitably whilst providing for the protection, conservation and rehabilitation of the coast.

2 *ENVIRONMENTAL LEGISLATION AMENDMENT BILL (No. 2) 1995*

Clear and precise language? The Committee brings this concern to the Minister's attention particularly in view of the fact that these sections of the Explanatory Notes may be referred to in the interpretation of the Act as extrinsic material under s. 14B of the *Acts Interpretation Act 1954* and should add to the information provided in the Bill rather than detract from it.

I thank the Committee for their comments regarding the difficulty of interpretation arising from the Explanatory Notes. The Explanatory Note for clause 234 contains a typographical error. The Explanatory Note should read:

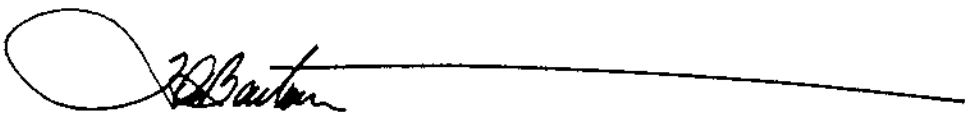
> *Clause 234*: By inserting "other than clause 233A" into this clause 233A expires the day it commences, but the remainder of Division 5 of the *Environmental Protection Act* will not expire until the first applicable day.

I will inform the Legislative Assembly of this error when the Bill is read for a second time.

3 *ENVIRONMENTAL LEGISLATION AMENDMENT BILL 1995*

I note the Committee's further comments regarding amendments made to the *Marine Parks Act 1982, Recreation Areas Management Act 1988* and the *Wet Tropics World Heritage Protection and Management Act 1993*. I confirm the comments made in my letter of 26 October 1995.

Yours sincerely



TOM BARTON

QUEENSLAND GOVERNMENT

Minister for Health

FAXED 31/10/95

SCRUTINY OF LEGISLATION COMMITTEE
01 NOV 1995

31 OCT 1995

Mr J Sullivan MLA
Chairperson
Scrutiny of Legislation Committee
Parliamentary House
BRISBANE QLD 4000

Dear Mr Sullivan Jon,

I refer to your letter of 16 October 1995 concerning Alert Digest No. 1 of 1995 and concerns the Scrutiny of Legislation Committee has raised in respect of Acts under my control as amended by the *Statute Law Revision Bill 1995*.

The following comments are in response to the issues raised:

"Order" by Governor in Council, not "Order in Council" (Alert Digest p.29)

Given that orders in council can be legislative or administrative in nature and it is often difficult to determine that nature, the Office of Parliamentary Counsel (OPC) through its Acts Review Program has been progressively removing this type of statutory instrument from Queensland legislation.

In a practical sense, the difficulty in distinguishing between orders in council of a legislative and administrative nature, presents problems in terms of compliance with the *Statutory Instruments Act 1992*. If an order in council is legislative in nature, it is also likely to be 'subordinate legislation' as defined by that Act, and subject to notification in the Government Gazette and tabling in the Legislative Assembly. If, on the other hand, an order in council is administrative in nature it is not required to be either notified in the Gazette or tabled under that Act. However, it is required to be published in the Gazette.

The orders in council in the *Health Act* which are subject to amendment in the *Statute Law Revision Bill 1995* have been determined to be administrative in nature. Consequently, the type of statutory instrument used has been changed from "order in council" to "order" by Governor in Council to make this clear.

Removal of requirement to notify matters in the Government Gazette Alert Digest p.31)

The decision to remove the requirement to notify certain Board appointments in the Government Gazette was made by OPC in a bid to eliminate unnecessary administrative detail from Queensland legislation.

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Omission of the words "by notification published in the Gazette" will remove the administrative step of publication (which currently is a legal requirement) from the appointment power exercised by Governor in Council. Prior to this amendment, failure to publish the appointment in the Gazette created a defect in the appointment.

Although the publication requirement is to be removed from legislation, I can assure the Committee that notification in the Government Gazette of all statutory appointments in this portfolio will continue by way of administrative arrangement, as is the current practice. For example, appointment of members to Regional Health Authorities under the *Health Services Act 1991* irrespective of whether such appointments are by Governor in Council on constitution or reconstitution or by the Minister as casual vacancies, are Gazetted as a matter of course, even though it is not required by the Act.

Experience has shown that publication of appointments in the Government Gazette is a very cost effective way of communicating such information in a timely manner to the large and decentralised workforce comprising Queensland Health.

Penalties - Conversion to Penalty Units (Alert Digest p.32)

The proposed increase in the penalty that may be fixed by a by-law under the *Pharmacy Act 1976* from $200 to 20 penalty units is to align the maximum general penalty provision under the Act and the maximum penalty under a by-law. Currently, similar provisions exist in other legislation of this type, namely the *Medical Act 1939, Optometrists Act 1974* and *Podiatrists Act 1969.*

It should be noted that the penalties prescribed are maxima and as such there is discretion for a lower penalty to be imposed.

All Health Practitioner Registration Acts in my portfolio are currently under review, and it is anticipated that in the course of that review the whole issue of a gradated system of penalties will be examined.

Yours sincerely

Peter Beattie
MINISTER FOR HEALTH

DEPUTY PREMIER,
MINISTER FOR TOURISM, SPORT AND YOUTH
HON. TOM BURNS M.L.A.

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Your Ref: B2/95.4

1 November 1995

Mr J Sullivan MLA
Chair
Scrutiny of Legislation Committee
Parliament House
BRISBANE QLD 4000

Dear Jon

Thank you for your facsimile of 31 October 1995 seeking further comment in relation to concerns raised by the Committee in its consideration of administrative power conferred on the Australian Sports Drug Agency (the agency) under the *Sports Drug Testing Bill 1995*. I have sought advice from the Office of Parliamentary Counsel on this matter.

The agency is a statutory corporation established under the *Australian Sports Drug Agency Act 1991* (Cwlth). As a statutory body, it has only the powers conferred on it by statute.

Clause 7 says the agency has the powers and functions given to it under the Act. The power to enter premises or to use force against a State competitor has not been conferred.

Clause 9 says the agency has the power to do all things "necessary or convenient for the performance of its functions". A power to do all things "necessary or convenient" for the performance of the agency's functions does not extend to doing things that would be offences or otherwise unlawful under the general law. The power conferred

on the agency by clause 9 would not empower the agency to enter premises by force to collect samples from a State competitor or collect samples from a State competitor by force of deception.

That the agency does not have these powers is evident from a consideration of its functions under clause 8 and a consideration of other provisions of the Bill. Clause 8(1)(a) states that it is a function of the agency to select the State competitors who are to be asked to supply a sample for testing. Clause 10(1) says the agency may ask a State competitor to supply a sample to it. Clause 10(2) says a State competitor may be taken to have not complied with a request to supply a sample only if the agency asked for the sample in the way specified in regulations made under the Commonwealth Act. Clause 11 deals with the agency taking a sample, or accepting a sample from a child. The agency must give the child's parent or guardian written notice that the sample is required and obtain the parent's or guardian's written consent to the sample being taken. Also, the parent or guardian, or a person nominated by the parent or guardian for the purpose, must be present when the sample is taken. In none of those provisions is it suggested that the agency has the power to force compliance with its requests. In fact, the language of the provisions makes it clear that the agency does not have this power.

Clause 12 specifically deals with the situation in which a State competitor does not comply with a request to supply a sample. The agency must give the competitor a written notice stating certain information and inviting the competitor to show a reasonable excuse for not complying with the request. The agency must consider any submissions made by the competitor and decide whether the competitor had a reasonable excuse for not complying and give the competitor written notice of its decision. If the agency decides the competitor did not have a reasonable excuse for not complying, the agency's notice must include the reasons for the agency's decision and a statement that the competitor may apply to the Commonwealth Administrative Appeals Tribunal for a review of the decision. Clause 12 would be superfluous if the agency had the power to take samples from a State competitor by force.

A reading of the Bill makes it clear that the agency may only request a State competitor to supply a sample and that the competitor may refuse the request. Clause 13 of the Bill states the consequences of a competitor not complying with a request to supply a sample.

Clause 9 is a standard provision for which a myriad of precedents exist in all Australian jurisdictions. Taken to its logical conclusion, the Committee's interpretation of the clause would allow the most serious of crimes to be committed under the ostensible authority of a standard, generally expressed provision. Such an interpretation would be contrary to the approach traditionally taken by the courts to protect the rights of the subject, and to maintain the rule of law. To suggest that the clause would allow a sample to be collected by force from a hapless State competitor flies in the face of basic common sense.

The approach of the courts to issues such as these is illustrated by the recent decision of the High Court in Ridgeway v R (1995) 125 ALR 41. The case concerned the

aiding and abetting in the illegal importation of heroin by members of the Australian Federal Police. The court held that all evidence tending to show that the heroin in question supplied to the appellant had been illegally imported should be rejected on public policy grounds. The following passage from the joint judgment of Mason CJ, Deane and Dawson JJ (at page 58) is particularly apposite to the interpretation suggested by the Committee:

> [I]n the context of the fact that deceit and infiltration are of particular importance to the effective investigation and punishment of trafficking in illegal drugs such as heroin, it is arguable that a strict requirement of observance of criminal law by those entrusted with its enforcement undesirably hinders law enforcement. Such an argument must, however, be addressed to the Legislature and not to the courts. If it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements. In the absence of such a legislative regime, the courts have no choice but to set their face firmly against grave criminality on the part of anyone, regardless of whether he or she be government officer or ordinary citizen. To do otherwise would be to undermine the rule of law itself.

I also refer to your letter dated 16 October 1995 seeking my comments on concerns raised by the Committee in its consideration of the *Sports Drug Testing Bill 1995* and my response dated 27 October 1995. In that response, I acknowledged the Committee's concerns about ambiguity concerning clause 20 and provided a draft amendment to allay these concerns. This amendment has now been redrafted as follows:

20(1). This section applies if a State competitor has been prevented from participating, or has become ineligible to participate, in sporting events or sporting activities for a certain period (the "suspension period") because the competitor's name has been entered in the register.

(2) The agency must remove the competitor's name, and all particulars about the competitor, from the register as soon as practicable after-

a) if paragraph (b) does not apply - after the suspension period ends; or

b) if the competitor was, before the suspension period began, receiving State support and, because the competitor's name has been entered in the register, the competitor has been disqualified from receiving, or has become ineligible to receive, the support for a period that ends after the suspension period - the end of that later period.

I thank you for the opportunity to respond to the issues raised by the Committee and trust I have clarified your concerns.

With best wishes

Tom Burns MLA
Deputy Premier,
Minister for Tourism, Sport and Youth and
Member for Lytton

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8 November 1995

Ms L Pink
Research Director
Scrutiny of Bills Committee
Parliament House
BRISBANE QLD 4000

TO FACSIMILE NO 3406 7445

Dear Louisa

SOUTHBANK CORPORATION AMENDMENT BILL

We refer to the above Bill, which was collected by us from Parliament House on the morning of Friday 3 November 1995.

We shall comment on individual provisions and then make any comments of an overview type at the end of the submission.

DEFINITION OF SITE

We are concerned that if the area to be covered by the Southbank Corporation Amendment Act (herein referred to as the Act) can be extended via the by-law process, then it is quite possible that the convention area could be eventually included within the Act's ambit simply via the by-law process.

A practical example as to how the exclusion power can work unfairly will be illustrated in relation to both a restaurant in the Southbank area and a function within the area of the convention centre.

If, on the opening registration/welcoming ceremony of a week long convention to be held at the convention centre, a person is subject to an exclusion order (for engaging in behaviour much less than a disorderly conduct offence), a person who has come from interstate or even overseas to attend a convention can be excluded from attending the entirety of the convention by a 10 day exclusion order which is unlikely under the current scheme to be even capable of review within the currency of the seven day period for which the convention is to operate.

There is no provision in the Act for an immediate/same day exclusion review to be heard by the Magistrates Court.

Therefore, a person on day one of a seven day convention may, under a variety of circumstances, be subject to an exclusion order by an overly officious security officer and be prohibited from attending at the convention centre.

There is currently a computer exhibition being conducted at the convention centre. What if an exhibitor at that Computer Expo is the subject of an exclusion order?

That exhibitor's stand could then be unattended for the entirety of the Computer Expo with the result that the person the subject of the exclusion order could be faced with a very significant economic loss but under the provision of s.37I(2), compensation is not payable for such loss.

SECTION 37A - CONDUCT CAUSING PUBLIC NUISANCE

We note with some concern that this section, which defines an exclusion offence, provides that it would be an exclusion offence simply to be drunk at the Southbank site.

We would suggest that drunkenness of itself should not be a basis for exclusion from the site and we would suggest that s.37A(1)(a) be changed to read drunk and disorderly.

SECTION 37B - POWER TO EXCLUDE PERSONS CAUSING PUBLIC NUISANCE

Section 37B(5)(b) provides that a security officer may by written notice direct a person to leave the site and not re-enter the site for a period of up to 10 days if the security officer is of the opinion that the exclusion from the site is justified because of the person's behaviour.

We submit that such a wide and close to subjective position is contrary to s.4(3)(a) of the Legislative Standards Act 1992 in that it is an administrative power which is insufficiently defined. At the very least it should be clear that the behaviour for which a person is being excluded should be acted upon only after a warning has been given to a person that if they continue particular behaviour they shall be excluded.

At the very least, a warning is needed as that would tend to inject an element of caution into the behaviour of a security officer who may be tempted to overreact and it could be expected to have the beneficial effect of causing a person who may be inappropriately misbehaving to come to his/her senses prior to being excluded.

SECTION 37G TO 37J - PROCEDURE FOR REVIEW OF EXCLUSION DIRECTIONS

We are concerned at the lack of provision within the Act to ensure that a person will be able to achieve a quick review of the exclusion direction.

It is noted in s.37G(3) that the Registrar or Clerk of the Court must give the Corporation a copy of an application for review and whilst procedural fairness justifies such a course of action, there is nothing to prevent the Corporation or a police officer acting on the Corporation's behalf from delaying the hearing of the review on the basis of unavailability of the particular police prosecutor, the absence of the relevant Corporation official etc.

If the review is intended to be meaningful, then there should be provision for the review to be brought on within 24 hours of the exclusion notice being made.

It is noted that s.37A proposes that the review should be done as soon as practicable but we are concerned that such a phrase could lead to delaying and stalling tactics by the Corporation or relevant police officers so as to prevent the matter being brought on quickly.

SPECIFIC CONCERNS RE: COURT REVIEW PROCESS

We note that in the review hearing a Court is not bound by the rules of evidence and may inform itself in any way it considers appropriate.

It should be realised that an important civil right is affected by an exclusion notice, namely the right of freedom of association.

We have some considerable concern that the direct evidence of observation of the alleged offending behaviour will not be before the Court and that a particular security officer or police officer who observed the behaviour which became the basis of the exclusion notice is not required to attend Court.

It is quite possible that under s.37(I)(2)(a) a Court could act on an affidavit containing hearsay evidence many times removed from direct observations.

APPLICATION OF RULES OF EVIDENCE

We consider that the rules of evidence should apply as an important right, namely freedom of association, is at stake here and considerable police and quasi-police power is intended under the Act to be brought to bear in respect of a person the subject of an exclusion order.

NO LEGAL REPRESENTATION

Section 37(I)(2)(d) appears on its face to be evenhanded as between the Corporation and a citizen but in reality there will be a significant imbalance in the status of representation at review hearings.

There would be nothing to prevent the Corporation from

employing a lawyer one of whose tasks would be to represent the Corporation at review hearings.

That employee would not announce his/her appearance as a lawyer for the Corporation but would simply appear as an employee with a designated status within the Corporation.

As well, there is provision for a police officer to represent the Corporation on a review hearing.

In practice, it could be expected that the police officer concerned would be a police prosecutor who can be expected to be a person familiar with Court procedures and instructed in the law and Magistrates Court procedures generally.

Therefore, a situation will emerge where the Corporation will be represented by someone with a legal background and most probably a lawyer or a police prosecutor with considerable Magistrates Court experience.

It is decidedly unfair in those circumstances to prevent a person being represented by a lawyer where that person is challenging the exclusion.

Indeed, we would contend that it is inconsistent with the principles of natural justice as outlined in s.4(3)(b) of the Legislative Standards Act to take away the right of representation per se but particularly in the context of a person of considerable legal experience having the right to appear for the Corporation but not employing the label of "lawyer" in the description given to the Court as to their status vis a vis the Corporation.

We also consider that it is offensive to basic fairness to deprive a person of representation by a lawyer if that person seeks to have a lawyer.

We would again remind you that what is being dealt with here is a basic right of freedom of association and one can imagine a number of situations in relation to the Southbank area where the exclusion of a person from the Southbank site could have a number of important social or business consequences.

There are often a number of ongoing displays over many days which occur at the Southbank area.

As well, many business lunches are held at restaurants in the area and a situation could readily be suggested where the exclusion of the person from the site for greater than 24 hours could have significant personal consequences.

A person could be a member of an entertainment group who have been booked to play at the piazza. If that person was subject to an exclusion order for greater than 24 hours, the consequences of not being able to appear as part of a group,

band etc could have particularly deleterious consequences.

Accordingly, we strongly urge you to delete the provision prohibiting representation by a lawyer.

NO ORDER FOR COSTS

This provision frequently appeared in legislation which emerged during the Bjelke-Petersen years.

There specifically should be a provision for costs to be awarded against a security officer or police officer on an exclusion review if the Court concludes that a security officer or police officer has behaved unreasonably.

Indeed, the normal law of costs as outlined in s.158A of the Justices Act should apply here.

We would point out that the prohibition against a costs order under the Drugs Misuse Act 1986 has meant that quite improper police behaviour leading to an acquittal of a person charged with a drugs offence at a summary level has prohibited the awarding of costs in favour of the arrested person.

An order for costs is a salutary brake on an abuse of power generally. In this regard it is noted that there are no brakes applying in relation to security officers exceeding their powers under this Act.

If a police officer exceeds his power or acts unreasonably, a complaint can be made to the Queensland Police Service or the Criminal Justice Commission.

There is no machinery under this Act for a complaint to be made against a security officer. A costs order serves as a brake on security officers in this context exceeding their powers.

In the same vein, we refer to s.37J, which provides that compensation is not payable in respect of a reviewable exclusion direction confirmed or set aside.

This provision arguably may affect a person's right to sue civilly for wrongful arrest, trespass etc and the section should make it absolutely clear that such a basic right in civil law is not intended to be interfered with.

Even if the section does make it clear that the right to sue for breach of a civil tort is protected, we can see no justification for cutting out the right of compensation in respect of issues arising from a reviewable exclusion being set aside.

Generally, we would submit that costs or compensation should not be awarded against a citizen who is the subject of an

exclusion direction, but it is more than appropriate to make provisions for a costs or compensation order payable against the Corporation or its agents so as to recompense a person who has suffered loss as a result of an exclusion or who has otherwise been harmed as a result of an abuse of power by the security officer or relevant police officer in the circumstances leading up to his exclusion.

GENERAL COMMENTS

We repeat our previous observations that there is no justification for bringing in a special regime in relation to the Southbank area.

Because Southbank is a public place, the normal provisions of the Vagrants, Gaming and Other Offences Act dealing with disorderly behaviour apply equally as they do in any other public place throughout the State.

We also have considerable concerns as to the hybrid nature of this legislation. The explanatory notes and the second reading speech by the Premier on 2 November 1995 indicate that the intention of the Act is to provide an alternative to criminal law intervention for misbehaving individuals.

However, the alternative has all the trappings of the criminal justice system including using the police with accompanying powers of arrest, except that the normal attributes of a Court hearing with right of representation and costs entitlement have been taken away.

Put differently, the Act uses the agents of the criminal justice system, namely the police at the Southbank site in terms of powers to demand name and address, make arrests etc, but then the Act goes on to describe the Court procedure as something analogous to a small claims proceeding.

If compulsive police-type powers are exercisable by security officers as well as police officers, then the criminal justice system is already being used at the front end of the process.

However, under the Act's provision the criminal justice system with its guarantee of right of representation, costs etc are being denied at the back end.

If police powers etc are to be used then the proper criminal justice model should be employed.

We are not aware of any legislation of a similar type to this in Australian which has taken away the basic rights of a traditional hearing where police powers have been used, especially the right of representation, costs etc.

Accordingly, we see a fundamental flaw in the Bill and we contend that the Bill needs rectification.

Yours faithfully
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

T P O'GORMAN
Vice President

TOG:SH:qccl\southbank

APPENDIX C - TERMS OF REFERENCE

The Scrutiny of Legislation Committee was formed on 15 September 1995 under s. 22 of the *Parliamentary Committees Act 1995*.

Terms of Reference

22.(1) The Scrutiny of Legislation Committee's area of responsibility is to consider-

(a) the application of fundamental legislative principles[3]* to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[4].

(2) The commmittee's area of responsibility includes monitoring generally the operation of-

(a) the following provisions of the *Legislative Standards Act 1992*-

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

(b) the following provisions of the *Statutory Instruments Act 1992*-

- section 9 (Meaning of "subordinate legislation")
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)
- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 19 (Transitional)

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

*** The relevant section is extracted overleaf.**

[4] A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, section 50.

APPENDIX D - MEANING OF "FUNDAMENTAL LEGISLATIVE PRINCIPLES"

4.(1) For the purposes of this Act, "**fundamental legislative principles**" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law[5]

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

(a) rights and liberties of individuals; and
(b) the institution of Parliament.

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

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

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

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

(5) Whether subordinate legislation has sufficient regard tot he institution of Parliament depends on whether, for example, the subordinate legislation-

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

(i) in appropriate cases and to appropriate persons; and
(ii) if authorised by an Act.

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

APPENDIX E - CUMULATIVE TABLE OF BILLS

BILL (SHORT TITLE)	DATE INTRODUCED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	A D NO.
Choice of Law (Limitation Periods) Bill	7.9.95	cl. 3	• Retrospective application		1
Coastal Protection and Management Bill	19.10.95	cls. 12 & 55 cl. 47 cl. 52 cl. 53 cl. 54 cl. 75	• Clear and precise drafting • Regulatory impact statements • Administrative power insufficiently defined • Sufficient regard to rights & liberties • Administrative power insufficiently defined • Sufficient regard to rights & liberties • Administrative power not subject to appropriate review • Right to silence abrogated		2
Competition Policy Reform (Queensland) Bill	2.11.95	*	• Henry VIII clause		3
Courts (Video Link) Amendment Bill	2.11.95	*	• Sufficient regard to rights and liberties		3
Criminal Offence Victims Bill	2.11.95	cl. 34	• Equality before the law		3
Education (Work Experience) Bill	2.11.95	*	• Clear and precise drafting		3
Emergency Services Legislation Amendment Bill	2.11.95	cl. 41 cl. 53	• Retrospectivity • Power to enter premises, and search or seize documents without a warrant		3
Environmental Legislation Amendment Bill	14.9.95	cl. 11, cl. 25 cl. 27	• Matter appropriate to subordinate legislation • Regulatory Impact Statements	- Information provided passed 20.10.95. - Information provided passed 20.10.95	1, 2

BILL (SHORT TITLE)	DATE INTRODUCED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	A D NO.
Environmental Legislation Amendment Bill (No. 2)	19.10.95	cl. 233A	• Explanatory notes		2
Financial Intermediaries Bill	20.10.95	cl. 31 cls. 48, 49 & 50 cl. 194 cl. 205 cl. 221	• Power to enter premises, and search or seize documents without a warrant • Administrative power insufficiently defined • Natural justice • Matter appropriate to subordinate legislation • Abrogation of the right to silence		2
Horticulture Legislation Amendment Bill	2.11.95	cl. 7	• Clear and precise drafting		3
Industrial Relations Legislation Amendment Bill (No. 2)	2.11.95	cl. 13 Sch. 1	• Delegation of administrative power to appropriate persons • Disallowance motions		3
Jury Bill	14.9.95	cl. 4 cl. 8 cl. 42 cl. 70 cl. 72	• Sufficient regard to rights and liberties? • Delegation of administrative power to appropriate persons • Sufficient regard to rights and liberties? • Sufficient regard to rights and liberties? • Delegation of administrative power to appropriate persons		1
Lotteries Amendment Bill	2.11.95	cl. 3	• Administrative power insufficiently defined		3
Motor Accident Insurance Legislation Amendment Bill	2.11.95	cl. 4 cl. 5 & 10 whole bill	• Clear and precise drafting • Retrospectivity • Explanatory Notes		3
Revenue Laws Amendment Bill (No. 2)	2.11.95	whole Bill	• Retrospectivity		3

BILL (SHORT TITLE)	DATE INTRODUCED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	A D NO.
South Bank Corporation Amendment Bill	2.11.95	cl. 37A cl. 37B cl. 37D cl. 37E cl. 37I	• Sufficient regard to rights and liberties • Sufficient regard to rights and liberties • Right to silence • Sufficient regard to rights and liberties • Sufficient regard to rights and liberties		3
Sports Drug Testing Bill	7.9.95	cl. 9 cl. 8 cl. 19 cl. 20 cl. 23	• Administrative power insufficiently defined • Privacy • Sufficient regard to rights & liberties • Ambiguity • Confidentiality	- Information provided - Committee concerns overcome - Amendment proposed - Amendment proposed - Information provided	1, 2
Status of Children Amendment Bill	7.9.95	cl. 22 whole bill	• Typographical error • Sufficient regard to Aboriginal tradition and Islander custom		1
Statute Law (Minor Amendments) Bill	14.9.95	*Agricultural Standards Act 1994* - cl. 71 *Children's Court Act 1992* - cl. 30 *Sewerage and Water Supply Act 1949* - cl. 15A *Sewerage and Water Supply Act 1949* - s. 9	• Retrospectivity • Insufficiently defined administrative power • Lack of appropriate review • Insufficiently defined administrative power • Power to grant licences	- Assurances provided - Assurances provided - Information provided - Information provided - Amendment proposed	1, 2
Statute Law (Minor Amendments) Bill (No. 2)	2.11.95	cl. 42 *Statutory Bodies Financial Arrangements Act 1982* - cl. 3 *Statutory Instruments Act 1992*	• Clear and precise drafting • Clear and precise drafting • Regulatory impact statements		3
Statute Law Revision Bill	14.9.95	* * * Amendment No. 19 *Pharmacy Act*	• Order by Governor in Council • Henry VIII clauses • Notification in Government Gazette • Typographical error?	- Information provided - Information provided - Information provided	1, 2

BILL (SHORT TITLE)	DATE INTRODUCED	CLAUSE/ SECTION	PRINCIPLE ARISING	MINISTERIAL RESPONSE	A D NO.
Statute Law Revision Bill (No. 2)	2.11.95	*	• Delegation of administrative powers to appropriate persons		3
		*	• Henry VIII clauses		
		*	• Minor and non-controversial amendments		

* These matters arise several times within the Bill