SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST

Tabled and Ordered to be Printed
15 May 2001

Issue No 1 of 2001

SCRUTINY OF LEGISLATION COMMITTEE

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50TH PARLIAMENT, 1ST SESSION

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* These bills were considered to raise no issues within the committee's terms of reference.

1 See also Chapter 25 of this Alert Digest.

2 See also Chapter 26 of this Alert Digest.

SECTION A

BILLS REPORTED ON

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted[3]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[4] of a provision may therefore be considered as extrinsic material in its interpretation.

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3 Section 14B(3)(c) Acts Interpretation Act 1954.

4 The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 Acts Interpretation Act 1954.

SECTION A – BILLS REPORTED ON

1. ANTI-DISCRIMINATION AMENDMENT BILL 2001[5]

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 22 March 2001.

2. The bill is identical (apart from certain formatting changes) to the *Anti-Discrimination Amendment Bill 2000*, which was introduced into the Legislative Assembly by the Honourable M J Foley MP, Attorney-General and Minister for Justice and Minister for The Arts, on 11 November 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

3. According to the Explanatory Notes, the objective of the bill is to insert new civil and criminal vilification laws of wider scope than presently exist under the *Anti-Discrimination Act 1991* (Qld) and to remedy deficiencies in relation to the extra-territorial operation of the Act and to ensure that the Act also applies to discrimination in work arrangements between a principal and a worker where no direct contractual relationship exists.

Effect of the bill

4. The bill seeks to increase the ambit of the protection under the *Anti-Discrimination Act 1991* (Qld) to include discrimination that occurs on a ship at sea and discrimination in respect of workers who are not in a direct contractual relationship with the principal.

5. The Bill also introduces civil and criminal sanctions for the incitement of racial hatred.

APPLICATION OF ACT TO SHIPS CONNECTED WITH QUEENSLAND

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[6]

- **Clause 3 (proposed s.3A)**

6. The Explanatory Notes[7] state that this amendment:

> *… results from an Anti-Discrimination Tribunal decision that the Act does not apply to discrimination or sexual harassment which occurs outside Queensland territorial waters. This means that where a complaint relates to conduct on a ship a complainant may currently have to rely on federal legislation…*

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

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

7 At p 2.

7. Clause 3A declares that the Act applies to acts done on ships connected with Queensland. Subclause (3) then defines for the section what is a ship connected with Queensland.

8. The committee is concerned that the definition of "ship connected with Queensland" is not sufficiently wide to apply to all acts of discrimination.

9. The definition centres upon two classes of ships:

- Firstly those owned or chartered by persons connected with Queensland either by residence or place of business and,
- Secondly, ships registered under the *Shipping Registration Act 1981* (Commonwealth) and registered or required to be registered or licensed under the *Transport Operations (Marine Safety) Act 1994* (Qld).

10. The committee seeks information from the Premier as to why the application of proposed s.3A does not extend to complainants who are connected with Queensland but are on ships not connected with Queensland.

11. A variation of the facts of *Carter v Sercombe* [2000] QADT 11 (referred to in the Explanatory Notes at p 2) illustrates the point. Suppose the complainant in question there was a crew member on a recreational ship from a foreign country in Queensland waters for less than one year and which ship was not owned or chartered by a person whose place of residence or business was in Queensland. That ship would not need to be registered pursuant to Part 5 Division 2 of the *Transport Operations (Marine Safety) Act 1994* by virtue of the exemption in s.37(2)(j) of the *Transport Operations (Marine Safety) Regulations 1995* (Qld).

12. Thus, if either discrimination or sexual harassment were to occur it would not be subject to the *Anti-Discrimination Act 1991* (Qld). The same would be the case where an act of discrimination occurred on a tender used in conjunction with a ship owned by an interstate owner. The ship would have to be registered but the tender may be exempt under s.37(2)(f) of the *Transport Operations (Marine Safety) Regulations 1995*.

13. The Committee suggests that this gap could be filled by including in the definition of 'ships connected with Queensland' those 'upon which a complainant is an individual whose place of residence or principal place of residence is in Queensland'. This would have the effect of protecting a further group of Queensland citizens from discrimination.

RACIAL AND RELIGIOUS VILIFICATION

Does the legislation have sufficient regard to the rights and liberties of individuals?[8]
Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[9]

♦ **Clause 8 (proposed s.124A) and clause 9 (proposed s.126)**

14. The committee notes that the provisions enacted by cls. 6 and 8 have important ramifications for the fundamental right each individual enjoys to freedom of speech in Queensland[10]. The Explanatory Notes to the bill, at p 3, recognise that the bill contains limitations on that right but state that that right is not absolute and is limited by a number of existing laws such as defamation and censorship. The Notes go on to state that the limitation in the bill is reasonable and proportionate, pointing in particular to the exceptions in proposed s.124A(2).

15. The proposed legislation is said to be closely modelled on the NSW legislation which avoids:

> *…."reinventing the wheel", instead building on the New South Wales experience with racial vilification laws over the last eleven years.*[11]

16. However, as will be observed by the committee below, there are significant disagreements on material issues between differently constituted Tribunals and Appeal Boards in NSW.[12] In addition, both proposed s.124A (Racial and religious vilification unlawful) and proposed s.126 (Offence of serious racial and religious vilification) in Queensland differ in material respects from the corresponding ss.20C and 20D of the *Anti-Discrimination Act 1977* NSW.

A: THE CIVIL DIMENSION OF UNLAWFUL VILIFICATION

(I) Constitutional freedom to communicate on matters of government and politics

17. A recent decision of the NSW Administrative Decisions Tribunal underlines the implications for free speech of this legislation. In *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 Deputy President Hennessy and Members Farmer and Jowett held that the publication in the *Australian Financial Review* of an opinion, expressed in vigorous language, that the Palestinians and not the Israelis were responsible for derailing the peace process in the Middle East was a breach of s.20C of the New South Wales legislation in that it incited hatred or serious contempt for all Palestinians.

18. The Tribunal rejected an argument that the legislation was invalid as infringing the constitutional freedom of communication about government or political matters as expressed in the Full High Court decision of *Lange v Australian Broadcasting Corporation* (1997) 189

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

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

10 The fundamental right to freedom of speech has been recognised in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

11 Second Reading Speech circulated by the authority of the Honourable the Premier of Queensland at page 2.

12 For example: as to the requirement of intention in the element of 'incite'; on the relevance of a vigorous ongoing debate on an issue; as to the way the meaning of 'ethno-religious' should be determined under the Act.

CLR 520. The Tribunal accepted that the New South Wales equivalent of the proposed s.124A *did* effectively burden freedom of communication about government or political matters but was reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This decision is presently on appeal to the New South Wales Anti-Discrimination Tribunal Appeal Panel.

19. The same constitutional issue was raised on appeal to the New South Wales Appeal Panel in *Jones & Anor v Western Aboriginal Legal Service Limited* [2000] NSWADTAP 28. At that hearing the New South Wales Solicitor-General appeared as a result of notices issued under s.78B of the *Judiciary Act 1903* (Cth)[13]. However, the Appeal Panel allowed the appeal on the narrow issue of the lack of standing of the complainant to bring the action and it became unnecessary to determine the constitutional issue.

20. The committee is concerned that the exemptions in proposed s.124A(2) of the Queensland bill, which are said to balance the limitation on free speech, may not go far enough to comply with the requirements of the test enunciated in *Lange's* Case.[14] The committee also notes that the exemptions available in the case of unlawful vilification, which might arguably answer the criteria in *Lange's* Case, are not available in the case of the criminal offence of vilification created by proposed s.126.

21. The committee seeks information from the Premier as to whether he is satisfied the exemptions in proposed s.124A(2), and the absence of these in relation to the offence created by proposed s.126, sufficiently comply with the requirements of the constitutional right to communication on matters of government and politics. The committee also seeks information as to whether the advice of the Solicitor-General, who will have to intervene in the event of any constitutional challenge, has been sought in relation to these issues.

(II) Religious Vilification

22. **Racial** vilification laws have been enacted in New South Wales, South Australia, Western Australia, the Australian Capital Territory and by the Commonwealth Parliament. None of these laws extend to **religious** vilification.

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13 Section 78A and 78B of the *Judiciary Act 1903* (Cth) require the giving of notice to the Federal and State Attorney-Generals and permit their intervention in any court in any proceeding that relates to a matter arising under the Constitution or its interpretation. While the Anti-Discrimination Tribunals are probably not a court of a State, appeals from their decisions ultimately will be to a State court.

14 In *Lange's* Case the High Court concluded that there was an implied freedom under the Australian Constitution to publish and communicate on matters of parliament and politics. The joint judgement adopted the statement of McHugh J in *Stephens* (1994) 182 CLR 211 at 264 "Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally." The test adopted was twofold: Firstly, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect. Secondly, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. According to the High Court, in the context of defamatory material published widely, the second question would be answered in the affirmative if the defamation law gave qualified privilege to publications where the publisher could prove reasonableness of conduct together with the requirement that the defence will be defeated if the complainant could prove that the publication was actuated by common law malice.

23. The only other State to include religious vilification laws is Tasmania in 1998. Those laws remain as yet untested. Victoria has proposed laws that include religious vilification[15] but this has provoked widespread concerns including amongst church groups. This has caused the Victorian government to consider material changes to the draft legislation.

24. The committee is concerned that the proposed extension to include religious vilification is an unwarranted inroad into the right to freedom of speech and possibly the right to freedom of religion.

25. This concern can be illustrated by the recent New South Wales decision of *A obo V and A v NSW Department of School Education* [1999] NSWADT 120.

26. In that case a Jewish family brought proceedings against a school in NSW alleging discrimination and vilification on the grounds of race arising out of the school's conducting school prayers, marking Christmas by re-enacting the nativity and receiving a visit by Santa Claus and celebrating Easter.

27. The Tribunal finally dismissed the complaints on the ground that they were of a religious and not a racial nature. The New South Wales Act defines "race" to include colour, nationality, descent and ethnic, **ethno-religious** or national origin. Because the term "ethno-religious" had no ordinary meaning and could not be found in any major dictionary the Tribunal determined that it was therefore a word that had to be given a meaning for the purposes of the *Anti-Discrimination Act* alone. Therefore the tribunal felt justified in going to the 2nd Reading Speech of the Attorney-General in introducing the bill to help resolve its meaning. This led the Tribunal to the conclusion that the relevance of the religion of the complainant was only to determine their race and did not enable a person to bring proceedings on the grounds of religious discrimination. The decision of the tribunal was upheld on appeal by the Appeal Panel who agreed that it was permissible to go to the second reading speech to help resolve the issue.[16]

28. The committee notes in passing that it is clear from the second reading speech referred to in these decisions that it was the clear intention of the New South Wales Parliament *not* to extend the provisions of the *Anti-Discrimination Act 1977* (NSW) to religious vilification

29. The decisions of the Tribunal and the Appeal Panel in *A obo V and A v NSW Department of School Education* as discussed, appear to be in conflict with the later decision in *Khan v Commissioner, Department of Corrective Services and anor* [2001] NSWADTAP 1 where the Appeal Panel expressly rejected the argument that it was permissible to go to the second Reading Speech to determine the meaning of "ethno-religious". The Appeal Panel held that the *Interpretation Act 1987* (NSW) did not permit recourse to extrinsic materials in these circumstances and it was not therefore permissible to "[substitute] the words of the Minister for the text of the legislation"[17]. The matter was remitted to the Tribunal to "first determine the meaning of "ethno-religious origin" as a question of law and then determine whether the applicant, as a Muslim, came within that definition." In order to answer the second question the Appeal Panel expressed the view that the Tribunal should have before it "some expert

15 A discussion paper and model *Racial and Religious Tolerance Bill* were released for public discussion in December 2000 and may be found at the site of the Victorian Department of Premier and Cabinet at www.dpc.vic.gov.au.

16 *A obo V and A v NSW Department of School Education* [2000] NSWADTAP 14

17 At para 39-40 applying *Re Bolton; ex parte Beane* (1987) 70 ALR 225; (1987) 162 CLR 514.

evidence as to whether or not the appellant's adherence to the Muslim faith accords with the meaning of "ethno-religious origin".

30. The committee is concerned that there is no attempt to define "religion" in the bill and these decisions illustrate the difficulties associated with the concept. Religion, unlike race, is usually a peculiarly private set of beliefs and values relating generally to a supreme order, conscientiously held, which are shared to a greater or lesser extent by others.

31. One is free to choose which religion one is to embrace and a person may embrace a number of different religions at the one time. Membership of a particular religion therefore generally has no relationship to membership of a particular race. On the other hand, race is more often determined at birth and is something over which one has little control although to some extent it is true that one can, by virtue of the definition of race in the *Anti-Discrimination Act 1991(Qld),* "adopt a race" via the avenue of nationality.

32. Religious beliefs often extend to beliefs which mainstream society may reject but the protagonists of which would fiercely defend as proper.

33. Is has been the practice of the Tribunals in NSW and elsewhere to simply go to the dictionary, when a word appears in such legislation, to discover its meaning.

34. Religion is defined, for example, in the Concise Oxford Dictionary as follows:

> *1. The belief in a superhuman controlling power, esp in a personal God or gods committed to obedience and worship 2.the expression of this in worship. 3.a particular system of faith and worship....5 a thing that one is devoted to (* football is their religion).

35. The High Court of Australia answered the question "Is Scientology a religion"? in *Church of the New State v Commissioner of Pay-Roll Tax (Vict)* [1983] 154 CLR 120. Mason ACJ and Brennan J held, at p 136, that:

> *for the purposes of the law, the criteria of a religion are twofold: first, a belief in a* supernatural Being, Thing or Principle*; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion (emphasis added).*

36. In their Honours' view (at p 140) religion was not restricted to theistic religions rather:

> *religious belief is satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described.*

37. Their Honours also were of the view, at p 141, that:

> *charlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers [emphasis added].*

38. Murphy J observed, at p 151, that the categories of religion are not closed and include any body which claims to be religious, whose beliefs or practices are a revival of or resemble earlier cults; or who believe in a supernatural Being or Beings, whether physical and visible

such as the sun and stars, or a physical invisible God or spirit or abstract God or entity; Any body which offers a way to find meaning and purpose in life.

39. Wilson and Deane JJ, at p 173-174, were of the view that there is no single characteristic which can be laid down as constituting a formularised legal criterion, whether of inclusion or exclusion, of whether a particular system of ideas and practices constitutes a religion within a particular State of the Commonwealth. They identified five of the more important indicia of religion: belief that reality extends beyond that which is capable of perception by the senses; man's nature and place in the universe; adherents are expected to participate in practices; adherents are an identifiable group; they see their ideas and practices as constituting a religion.

40. The judgments in the *Church of the New State* case are therefore sufficiently broad as to include almost any organised "religious" group, no matter how extreme their beliefs may be.

41. The committee draws to the attention of Parliament the broadening by the bill of previously-understood notions of racial vilification, and the imprecision of the concepts of "religion" and "ethno-religious".[18]

What has to be established

42. Under the New South Wales law unlawful vilification requires the complainant to prove to the civil standard that, by a public act, the respondent incited hatred, serious contempt for or severe ridicule of a person on the grounds of race. If that is established the onus of proof shifts to the respondent to establish that the vilification comes within one of the exemptions which include:

- a fair report of a public act;
- a public act that would attract the defence of absolute privilege in an action for defamation;
- a public act done reasonably and in good faith for academic, artistic, scientific or research purposes or other purposes in the public interest including discussion or debate about and expositions of any act or matter.

43. According to the New South Wales Anti-Discrimination Tribunal decisions, there need not be any incitement in fact. All that is required is that a hypothetical ordinary reader or recipient could or is likely to be incited to feel hatred, serious contempt or severe ridicule[19]

44. Decisions by the New South Wales Anti-Discrimination Tribunal have adopted the following interpretations:

- "Incite" means to urge, spur on,…stir up, animate; stimulate (the ordinary reasonable person) to do something (whether or not anyone is in fact incited)[20]
- "Hatred" includes feelings of extreme ill will[21]or intense dislike; detestation[22]

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18 As illustrated by the cases of *A v V; Khan* and *Church of the New State*.

19 *Kazak v Fairfax Publications Limited* [2000] NSWADT 77 at para 71; *Western Aboriginal Legal Service Limited v Jones and anor* [2000] NSWADT 102 at paras 88-89; *Wagga Wagga Aboriginal Action Group & ors v Eldridge* (1995) EOC 92-701.

20 *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77; *Western Aboriginal Legal Service Limited v Jones and anor* [2000] NSWADT 102; *Anti Discrimination Amendment Bill 2001* (Qld) Explanatory Notes p 5.

- "Serious contempt for" includes a mental process of looking down upon or treating as inferior[23]scorning or despising
- "Severe ridicule of" includes words or actions intended to excite contemptuous laughter at a person or thing; derision[24]
- A corporation can incite but only a *natural*[25] person or group of natural persons can be vilified
- "On the grounds of race" requires that it be the race of the person that is the reason for the reasonable person having the requisite feelings ie there must be some causal connection between the race of the person and the feelings.[26]

(III) The extent of the exemptions under s.124A(2)

45. The committee is concerned that although the racial vilification laws have their genesis in the defamation laws, that which would be the subject of qualified privilege under the defamation laws may still be unlawful vilification under the proposed amendments to the *Anti-Discrimination Act 1991 (*Qld).

46. In *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 the Tribunal drew heavily on the concepts and principles of defamation law in determining the meaning of the provisions of the New South Wales equivalent of s.124A (see eg paras 78, 96-105, 117-127). In that case a radio broadcaster made a number of comments on his talk-back radio program regarding the right of a landlord to refuse to rent to a prospective tenant against the background of an award of $6,000.00 by the Equal Opportunity Tribunal. The award had been made to an Aboriginal woman from Dubbo who had been refused accommodation while her white friend had not. In particular the Tribunal held that the common law defence of fair comment was broader than the exception in the equivalent of s.124A of the Queensland Bill. The Tribunal held at para 121:

> *"thus, it is apparent that the common law defence of fair comment is broader or more liberal than the exception in s.20C(2)(c) that the public act be "done reasonably and in good faith". For a comment or statement to be "reasonable", as opposed to "fair", it must be one which the ordinary, reasonable person would consider to be reasonable in the circumstances of the case. In contrast, as Professor Fleming indicates, a comment which is fair need not be reasonable … t may be exaggerated, obstinate or prejudicial, provided it is honestly held. It follows that a comment or statement which is exaggerated, obstinate or prejudicial is unlikely to be "reasonable".*

47. The position is likely to be the same under the Queensland defamation laws.[27]

48. In *Kazak's Case* the Tribunal held that an opinion piece in the *Australian Financial Review*, commenting on the Middle East peace process, was unlawful vilification notwithstanding

21 *Kazaks Case* [2000] NSWADT 77 at para 42 quoting with approval *Nealy v Johnson* (1989) 10 C.H.R.R. D/6450

22 *Western Aboriginal Legal Services Limited* [2000] NSWADT 102 at p 110

23 *Kazaks Case*[2000] NSWADT 77 at para 42

24 *Kazak v Fairfax Publications Limited* [2000] NSWADT 77

25 *Western Aboriginal Legal Services* [2000] NSWADT 102

26 *Western Aboriginal Legal Services* [2000] NSWADT 102 at para 113.

27 See *Defamation Act 1889* Qld section 14 Protection – fair comment.

that it was expressed as part of an intense, even acrimonious discussion or debate about a particular issue. On the contrary, the tribunal was of the view that this was "a likely breeding ground for racially vilifying comments". The tribunal accepted that this view was contrary to previous decisions in New South Wales in *Hellenic Council of NSW v Apoleski and the Macedonian Youth Association* (1995) NSWEOT and *Aegean Macedonian Association of Australia v Karagiannakis* (1999) NSWADT 130.[28]

49. In *Kazak's Case* the opinion was expressed that the Palestinians cannot be trusted in the peace process, that they had pursued over 300 terrorist attacks against innocent Israeli civilians and were vicious thugs. The Tribunal held that this was not exempted under the New South Wales equivalent of the proposed s.124A(2)(c), the onus of establishing which lay on the respondent.

The exemption for religious debate

50. One of the principal concerns in Victoria, expressed in the public consultation process for the *Racial and Religious Tolerance Bill*, was that the laws would prohibit religious debate. The Victorian Government has responded by resolving to include religious debate as a specific exemption notwithstanding that the proposed exemptions were in virtually identical terms to that of New South Wales and those proposed in Queensland[29].

51. The committee seeks information from the Premier as to whether he is satisfied the exemptions in s.124A(2) provide a sufficient counter-balance to the bill's limitations on free speech, particularly in relation to religious debate.

B: THE CRIMINAL DIMENSION OF UNLAWFUL VILIFICATION

52. The proposed offence-creating provision s.126 applies to both racial and religious vilification. However, the exemptions that apply to unlawful vilification under s.125 do not apply to s.126[30]. Rather, because Queensland is a "code" State, the provisions of the *Criminal Code (Qld)* will determine whether any defences or excuses are available to a defendant once the elements of the offence are made out.[31] In particular, Chapter 5 of the *Criminal Code (Qld)* contains the provisions relating to criminal responsibility, including the principal defences and excuses. Other excuses, however, such as self-defence, are found elsewhere in the code.

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28 It is also contrary to the view of the High Court in *Langes* case that the vigour of an attack or the pungency of a defamatory statement, without more, cannot discharge a plaintiff's onus of proof on the issue of whether a statement was actuated by ill will or other improper motive.

29 Clause 8 of the draft *Racial and Religious Tolerance Bill* provides "A person does not contravene [the vilification provisions] if the person's conduct was engaged in reasonably and in good faith-

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing a fair and accurate report of any event or matter of public interest."

30 This is also the case in the NSW, ACT and SA Acts. However, the Draft Proposals for a *Racial and Religious Tolerance Bill* in Victoria apply the various exemptions to the offences of racial or religious vilification.

31 Section 2 of the *Criminal Code Act 1899* Qld*;* s 36 of the *Criminal Code (Qld)*

53. The committee has concerns about two aspects of the proposed criminal offence, namely:

- Its extension to religious vilification;
- The nature of the requisite mental element or "guilty mind" that is required before an offence is committed.

The elements of the offence

54. The offence of serious racial vilification requires proof beyond reasonable doubt of the following:

- by a public act [defined widely in s.4A]
- knowingly or recklessly (the "mental element" discussed further below)
- incite
- in a way that includes either:
  threatening physical harm towards the person or group or their property **or**
  inciting others to so threaten harm etc
- hatred **or**
  serious contempt for **or**
  severe ridicule of
- a person or group of persons
- on the grounds of race **or**
  on the ground of religion.

The issue of "intent" as a mental element in the offence

55. The only other Australian States or Territory to create a criminal offence of racial vilification are New South Wales, the Australian Capital Territory, South Australia and Western Australia. The Commonwealth, Tasmanian and Victorian vilification laws do not create offences (although Victoria is presently considering introducing the *Racial and Religious Tolerance Bill* which will create offences).

56. Importantly, the committee notes that none of these existing offence-creating provisions includes religious vilification as a basis for criminal responsibility.

57. It is unlikely that any of these offences can be committed without the proof of an intention on the part of the defendant to incite. The committee is unaware of any prosecutions for an offence of racial vilification in the common law jurisdictions of New South Wales, South Australia or the Australian Capital Territory. However, there is a presumption that there be

proof of *mens rea* (a guilty mind) in any statutory offence in the common law jurisdictions[32]. It is probable therefore that the view expressed by the New South Wales Anti-Discrimination Tribunal, that an intention to incite is an element of the criminal offence, will be followed[33]. The Victorian Government has also apparently responded to public submissions and proposes to amend its draft *Racial and Religious Tolerance Bill* to require proof of intention[34]. The Western Australian offences are in the *Criminal Code (WA)*, not the *Equal Opportunity Act 1984* WA, and expressly require proof that the defendant intended that hatred of the racial group be created, promoted or increased or that the defendant intended that the racial group be harassed[35]. The committee is not aware of any prosecutions under these provisions.

The proposed Queensland "mental element"

58. In contrast the proposed Queensland s.126 does not require proof of any intention, and motive is irrelevant.[36] Rather, the offence merely requires that the defendant **either** knowingly **or** recklessly incite.

59. The term "knowingly" is not defined in the Act and is a term not generally used in Queensland to express the mental element required in an offence.

60. According to the Collins Dictionary to "know" is:

> *to be or feel certain of the truth or accuracy of a fact etc;*

61. The term is defined in the Commonwealth Criminal Code.[37] Thus, it appears, one can do something "knowingly" without *intending* the consequence. If the New South Wales approach to the meaning of "incite" is followed in Queensland the relevant consequence in the case of vilification is the likelihood that an ordinary reasonable recipient of the public act will be urged, spurred or stimulated to develop the requisite ill feelings[38].

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32 *He Kaw Te v R* (1985) 157 CLR 523. See also Gillies, P, *Criminal Law* 3rd edn Law Book Coy Sydney 1993 at p 651 where the author observes "There is little authority dealing with the mental element of incitement [to commit a crime], if only because the reported cases have concerned persons who patently had the purpose of inciting the commission of crime. Incitement is a common law offence, and in general the common law requires mens rea as a requisite for criminal liability. It follows that incitement is an offence of mens rea. In order to be guilty of incitement D, it is proposed, must intend that another person will commit the actus reus of an offence."

33 *Kazak v Fairfax Publications Limited* [2000] NSWADT 77 at para 71; *Western Aboriginal Legal Service Limited v Jones and anor* [2000] NSWADT 102 at paras 88-89; *Wagga Wagga Aboriginal Action Group & ors v Eldridge* (1995) EOC 92-701.

34 "Laws against inciting racial or religious vilification in Queensland and Australia: The Anti-Discrimination Amendment Bill 2001' Queensland Parliamentary Library Research Bulletin No 1/01 March 2001 ISBN 0 7242 7906 7 at 4.7 and p 42.

35 Chap XI, ss 77-80.

36 Section 23 (2) of the *Criminal Code (Qld)* provides that "unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial". Subsection 3 provides that "Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility".

37 Division 5 of the Schedule to the *Criminal Code Act 1995* (Cth) [the *Criminal Code (Cth)*] defines the fault elements of an offence for the purposes of the Commonwealth and section 5.3 defines "Knowledge" as "A person has knowledge of a circumstance if he or she is aware that it exists in the ordinary course of events".

38 *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 ; *Western Aboriginal Legal Service Limited v Jones* [2000] NSWADT 102; *Anti Discrimination Amendment Bill 2001* (Qld) Explanatory Notes p 5.

62. However, the committee notes that even if the use of the word "knowingly" might be thought to require something akin to an intention to incite, the word "recklessly" clearly does not. Moreover, "recklessly" may not require any subjective state of mind at all[39]. Recklessness is not defined in the Act and is also not a term used in Queensland to express the mental element required for an offence.

63. In ordinary usage it is a word of wide import. In its legal context recklessness does not necessarily require proof even of a conscious advertence by the defendant to the consequences of their actions, provided those consequences were objectively foreseeable as probable or likely.

64. More familiar to the criminal law of Queensland is the mental element of "wilfully". This mental element requires proof **either** of an intention to do the harm **or** the deliberate doing of an act and being **aware at the time that the result was a likely consequence** of the act **and then recklessly** doing the act regardless of the risk[40]. It is reasonably clear from the judgments in *R v T* [1997] 1 Qd R 623 that "recklessness" is but an element of "wilfully" that comes into play *after* the defendant has consciously adverted to the consequence.[41] The case of *R v T* at least illustrates the uncertainty in the concept of "recklessness". The term has been defined with precision for the purposes of the Commonwealth Criminal Code.[42]

65. If, as has been the approach in recent New South Wales Anti-Discrimination Tribunal decisions, recourse is had to the principles and concepts of defamation law to discover the meaning of terms used in racial vilification law, the meaning of "reckless" in this context may be interpreted as "*not caring whether the [public act incited or not]* .[43]

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39 See Gillies, P, *Criminal Law* 3rd edn Law Book Coy Sydney 1993 at 57 where the author observes "Because there is no universal agreement on the meaning to be attributed to these words, in the context of the law (and for that matter, in ordinary usage) it follows that the use of the word "reckless", or its derivatives, in a statute or a definition of an offence at common law, is not to be read as necessarily importing mens rea. Compare the discussion in *Final Report, Chap 2: General Principles of Criminal Responsibility* (December 1992) Criminal Law Officers Committee of the Standing Committee of Attorneys-General ISBN 0 644 28743 8 at pp 29-30.

40 See *R v T* [1997] 1 Qd R 623 ; *R v Lockwood; ex parte A-G* [1981] Qd R 209

41 While expressing only a tentative view on the issue of the meaning of term "likely" in the definition of "wilfully", Justice Mackenzie observed, at p 667: "..where criminal responsibility depends on the conjunction of foresight that a consequence is likely to occur *and the doing of an act deliberately and recklessly after having foreseen the likelihood of the consequences occurring,* proof that it was foreseen that the consequence is more probable than not is necessary rather than a lower threshold"(emphasis added). See also Fitzgerald P at 660 lines 27 to 42 and Pincus JA at 664 lines 6-11.

42 Section 5.4.1 of the *Criminal Code (Cth)* defines "Recklessness" as "A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known ot him or her, it is unjustifiable to take the risk";

The same definition is adopted in the *Criminal Code (Cth)* in the case of recklessness with respect to a result.

43 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

66. The committee draws to the attention of Parliament the apparently low threshold that needs to be satisfied before a criminal offence is committed under this provision, and also the imprecision in the use of the mental elements of "knowingly" and "recklessly".

67. The committee seeks information from the Premier as to why there is not a requirement of proof that a person *intended* to incite or, at the very least, that the person *wilfully* incited before they can be guilty of a criminal offence given that, if the New South Wales view is correct, it need not be proved that anybody was in fact incited[44].

Criminality of religious vilification

68. The bill will create a criminal offence of reckless incitement involving the threat of injury to property on the grounds of religion. Given that the definition of religion is, in the view of the High Court, extremely wide, the committee draws to the attention of the Parliament the sweeping breadth of this offence.

69. An illustration may underline this. Suppose that members of a particular religion believe they or their children should not accept medical treatment. Suppose also that two Queensland citizens in a public place [or even in a private place where conversations can be overheard by the public, such as in the stairwell of an apartment block[45]] vigorously express the view that the members of the religion should be treated with serious contempt for their beliefs and that their property should be forcibly entered in order to render medical assistance to them or to their children. Those citizens would be guilty of an offence against s.126. This would be so even if they made no effort to check if anyone was able to overhear their conversations but were merely reckless in making the statements. They would have to find a defence or excuse under the *Criminal Code*, and none readily suggests itself other than perhaps some weak argument that they were aiding in self-defence[46]. Suppose again the religion embraced attitudes towards women that contemporary Australian society abhors and the defendants express views that this should be stopped by means that involve forceful intervention. Suppose the religion involved beliefs about the way members can gain access to paradise by mass suicide that members of contemporary society believe should be interfered with even by forceful means. Suppose it adopts methods of inducing children or vulnerable adults away from their family members by a form of indoctrination that members of contemporary society believe warrants forceful intervention. Suppose the religion believes that its members can survive on air, water and faith and refuse to take food. Generally speaking these religious beliefs would not contravene the law. Queensland citizens may however commit a criminal offences if they publicly condemned these beliefs and advocated physical intervention.

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44 *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 ; *Western Aboriginal Legal Service Limited v Jones* [2000] NSWADT 102; *Anti Discrimination Amendment Bill 2001* (Qld) Explanatory Notes p 5.

45 An illustration of this is the case of *Anderson v Thompson* [2001] NSWADT 11 (5 February 2001).

46 Section 273 of the *Criminal Code (Qld)* makes it lawful to use force in defence of a person who could themselves lawfully use force in their own defence.

70. The committee draws to the attention of Parliament the potential that an offence of religious vilification has to stifle legitimate debate, where that debate includes incitement of contempt by condemning members of a religious group for their beliefs in a way that includes threats which the defendant genuinely believes are justified.

The decision to prosecute

71. In New South Wales, on which the Queensland provision is expressed to be modelled, and in South Australia prosecutions can only be instituted with the approval of the Attorney-General[47] or the Department of Public Prosecutions[48]. This is obviously seen as a necessary filtering process. The Queensland provision, however, leaves the decision whether to prosecute for a criminal offence to the Anti-Discrimination Commissioner. In addition, as discussed below, cl. 126A of the bill permits the Commissioner to proceed both by way of civil complaint and by way of a prosecution for a criminal offence.

72. The committee notes that the present Commissioner has "actively lobbied successive governments"[49] in Queensland for the introduction of the present laws and "disputes suggestions that the push for new laws is simply a response to political correctness and contradictory to the notion that we are a tolerant society"[50].

73. The committee seeks information from the Premier as to why the final decision to prosecute for a criminal offence is not left to the Attorney-General or the Director of Public Prosecutions, thus ensuring an additional filtering process exists in relation to criminal prosecutions.

Does the legislation have sufficient regard to the rights and liberties of individuals?[51]

- **Clause 9(proposed s126A)(complaint of serious vilification may be dealt with by both Anti-Discrimination Tribunal and Magistrates Court)**

74. Proposed s.126A provides that the Anti-Discrimination Commissioner may deal with a complaint of a contravention of proposed s.126 (Offence of Serious Racial or Religious Vilification), either as a complaint of a contravention of proposed s.124A (Unlawful Racial

47 Section 20D (2) of the *Anti-Discrimination Act 1977* (NSW) provides that a person shall not be prosecuted for an offence [of serious racial vilification] unless the Attorney General has consented to the prosecution.

48 Section 5 of the *Racial Vilification Act 1996* (SA) provides that a prosecution for an offence…cannot be commenced without the DPP's written consent.

49 Milliner, K. *A matter of freedom* Courier Mail 8/6/99 quoted in "Laws against inciting racial or religious vilification in Queensland and Australia: The Anti-Discrimination Amendment Bill 2001' Queensland Parliamentary Library Research Bulletin No 1/01 March 2001 ISBN 0 7242 7906 7 at p 32; *Anti Discrimination Amendment Bill 2001* Second Reading Speech circulated by the Honourable the Premier at p 2.

50 Milliner, K. *A matter of freedom* Courier Mail 8/6/99 quoted in "Laws against inciting racial or religious vilification in Queensland and Australia: The Anti-Discrimination Amendment Bill 2001' Queensland Parliamentary Library Research Bulletin No 1/01 March 2001 ISBN 0 7242 7906 7 at p 32;

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

or Religious Vilification) or as an offence against proposed s.126 **or both.** In the former case it is amenable to civil remedies upon referral to the Anti-Discrimination Tribunal by the Commissioner whereupon, under s.209, the Tribunal may make a number of orders if the complaint is proven including the payment of money or the doing of things to compensate or redress loss or damage to the complainant. Failure to comply with these orders is itself an offence. In the latter case, under s.226, the offence is dealt with by the Magistrate's Court on the complaint of the Commissioner. The Magistrate has the usual sentencing options available under the *Penalties and Sentences Act 1992* including orders for restitution and compensation.

75. Section 16 of the *Criminal Code* provides that a person cannot be twice punished for the same Act or omission. While it may not be strictly correct to describe orders made by the Tribunal pursuant to s.209 as "punishment" when a complaint of unlawful racial or religious vilification has been proven, there may well be such a perception in the community. This would be particularly so where no person is proved to have been incited and there is no incitement directed against any particular individual.

76. As Justice Dowsett observed in *Pennisi v Wyvill and O'Sullivan* [1994] 74 A Crim R 168 :

> *(Section 16 of the* Criminal Code*) does not rely for its operation upon punishment following a conviction. It relates only to punishment for an act or omission … it does not use the word "offence" as does s.17. The section extends to punishment under the provisions of any law.*

77. The words "same act or omission" would apply to the complaint under s.124A and the "aggravated" offence under s.126 because of their common elements of incitement of hatred, serious contempt for or severe ridicule of a person.

78. In *R v Shepherd* [2000] QCA 57 and *R v R and S* [1999] QCA 181 the members of the Queensland Court of Appeal followed in principle the decision of the High Court in *Pearce v R* (1998) 194 CLR 610 adopting the view that it would be contrary to the common law notions embodied in s.16 to twice punish for those elements of different offence that overlap. Pincus JA in *Shepherd* [2000] QCA adopted the following quote from *Pearce*:

> *To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which boundaries of particular offences are drawn.*

79. The committee is concerned that cl.126A may have the effect of overriding at least the spirit of the protection of s.16 of the *Criminal Code.*

80. The committee seeks clarification from the Premier as to why it is not sufficient for the Anti-Discrimination Commissioner to choose between the avenues of referral to the Tribunal or making, with the consent of the Attorney-General or Director of Public Prosecutions, a complaint to the Magistrates Court where allegations of contravention of proposed s.126 are made.

2. COMMUNITY SERVICES LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable J C Spence MP, Minister for Families, Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services, introduced this bill into the Legislative Assembly on 3 April 2001.

2. The objects of the bill, as indicated by the Minister in her Second Reading Speech, are to:

> *….address deficiencies and dated provisions in the Community Services Acts. Included in the Bill are provisions to improve financial accountability in regard to the loan making powers of Aboriginal and Island Councils, and to increase the maximum penalty that can be stipulated in a by-law of an Aboriginal or Island Council. Also included are provisions to improve the corporate governance and the commercial prospects of the Island Industries Board.*

Does the legislation have sufficient regard to Aboriginal tradition and Island custom?[52]

♦ The bill generally

3. This bill is in many ways similar to, and represents a continuation of processes initiated in, the *Community Services Legislation Amendment Bill 1999*, on which the committee reported in Alert Digest No 4 of 1999 at pages 15-17 and Alert Digest No 5 of 1999 at pages 36-37.

4. The current bill, as did the earlier bill, amends the C*ommunity Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984*, which are the statutory vehicles through which local government is provided to 32 Aboriginal and Torres Strait Islander communities across Queensland. The committee considers the general effect of the current bill is basically as indicated by the Minister, namely, to bring about an increase in the financial accountability of the relevant bodies, and also (in the case of the Island Industries Board) to improve its corporate governance and commercial prospects.

5. The committee observes from the Explanatory Notes that there appears to have been significant consultation with relevant Aboriginal and Torres Strait Islander representative bodies.

6. Generally speaking, the committee is satisfied that the current bill's provisions have sufficient regard for Aboriginal tradition and Island custom, given the need for accountability by all bodies (indigenous and non-indigenous) in the administration of State and Commonwealth grant monies (which make up a major part of the finances of the relevant Councils)[53]

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[52] Section 4(3)(j) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

[53] This conclusion is similar to that which the committee reached in relation to the earlier bill.

7. On the available information, the committee is satisfied that the bill's provisions have sufficient regard to Aboriginal tradition and Island custom.

Does the legislation have sufficient regard to the rights and liberties of individuals?[54]

♦ **Clause 32 (proposed s.84A)**

8. As mentioned earlier, the bill amends various legislative provisions relating to the operation of the Island Industries Board. As part of this process, cl.25 inserts new provisions relating to the membership of the Board. In particular, Board members will now be required to possess commercial or management skills and experience or other relevant skills and experience.

9. Proposed s.84A (which is inserted by cl.32) effectively provides for the immediate commencement of this new regime, as it declares that on the commencement of the bill's provisions the existing members of the Board go out of office. Section 84A(2) provides that no compensation is payable to existing members in relation to that event.

10. The committee has on previous occasions queried provisions of this type, although much depends upon the nature of the office abolished and the likely quantum of the financial detriment caused to the incumbents.

11. In relation to proposed s.84A, the Explanatory Notes state:

> *Clause 32 amends the Community Services (Torres Strait) Act 1984 by inserting a new section 84A which provides that, on the commencement, the existing members of the Island Industries Board go out of office and no compensation is payable to an existing member of the Board because of the removal from office. The question of the expectations of the Board members to continue in their role may be considered a possible breach. This expectation to remain on the Board however does not amount to a right. It is however, the right of the Executive to set policy and to introduce legislation into the Parliament with the intention of giving effect to that policy. This provision is regarded as justifiable on the basis that existing members of the Board have been given substantial advance notice of the change in membership of the Board and are aware that the changes are a crucial part of the strategy for the Island Industries Board's recovery and improved future management.*

12. The committee refers to Parliament the question of whether the provisions of proposed s.84A have sufficient regard to the rights of current members of the Island Industries Board.

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

3. CORRECTIVE SERVICES AMENDMENT BILL 2001

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 2 May 2001.

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

> …. *ensure that there is a sufficient statutory basis to maintain current strip searching practices essential for the security of facilities and the safety of staff and prisoners.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[55]

♦ The bill generally

Overview of the Bill

3. *The Corrective Services Act 2000* (ss. 25 – 33 inclusive) currently contains provisions relating to search of prisoners. Section 27 deals specifically with strip searches, and details the circumstances in which a prisoner may be ordered to submit to such a search and the manner in which the search must be carried out. Section 112 authorises the use of non-lethal force reasonably necessary to compel a prisoner to obey an order (including, quite clearly, an order to submit to a strip search).

4. The primary purpose of the bill is to insert a number of additional provisions relating to strip searches, that, it is fair to say, extend the capacity to conduct such searches beyond what is presently provided for in the Act. The Minister in his Second Reading Speech, and the Explanatory Notes, argue for these more general strip search powers on the basis of maintenance of security and safety of staff and prisoners. The Minister indicates in his speech that the provisions of the bill are intended to provide a statutory basis for the continuation of strip searching practices which:

> *under the Corrective Services Act 1988, …. have developed in accordance with operational requirements.*
>
> *This bill seeks to ensure that a statutory basis is provided to allow for these practices to be continued. The bill does not herald an expansion of strip searching beyond current practices.*

5. In its report on the *Corrective Services Bill 2000*[56], the committee considered generally what rights prisoners possess. The committee concluded that whilst prisoners do have rights, those rights must necessarily take a significantly attenuated form, given the status of prisoners and the imperatives necessarily associated with the conduct of corrective

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

[56] See Alert Digest No 10 of 2000 at pages 1-3.

institutions. The committee referred to the striking of an appropriate balance between the rights of prisoners and the countervailing rights of the public, corrective services staff and even of other prisoners.

6. These issues are canvassed in some detail, in relation to the specific issue of strip searching, in the Minister's Speech and the Explanatory Notes.

7. Strip searching is an intrusive practice, which under the Act may be enforced by coercive means. As such, it clearly impinges upon the rights of prisoners, but as mentioned earlier those rights must be weighed against the rights of prison staff, the public and other prisoners. Whilst authorising a more extensive use of strip searches, the bill also incorporates in proposed s.27A a number of requirements about the manner in which they are to be carried out. These requirements, which are similar to some of those incorporated in the *Police Powers and Responsibilities Act 2000*, provide some safeguards for the rights of prisoners.

8. The bill statutorially extends the capacity to conduct strip searches of prisoners, whilst also incorporating a series of safeguards in relation to the conduct of such searches.

9. The committee refers to Parliament the question of whether the provisions of the bill in relation to strip searches have sufficient regard to the rights of prisoners subjected to such searches, as well to those of prison staff, the general public and other prisoners.

♦ **Clause 4**

10. Clause 4 amends s.25(2) of the *Corrective Services Act 2000*, which enables a corrective services officer to conduct a scanning search, general search or personal search of a prisoner "if the officer *believes* the prisoner possesses something that jeopardises or is likely to jeopardise" security, good order or safety of persons in the corrective services facility.

11. The bill replaces the word "believes" with "suspects".

12. In its report on the *Police Powers and Responsibilities Bill 2000*[57], which made a similar amendment to provisions of the *Juvenile Justice Act 1992*, the committee expressed the view that the word "suspects" appeared to constitute a lower threshold test than "belief". The committee also commented on this distinction in relation to certain provisions of the Corrective Services Bill 2000 which concerned the use of force.[58].

[57] See Alert Digest No 3 of 2000 at pages 4 – 5.

[58] See Alert Digest No 10 of 2000 at page 5.

13. The committee notes that cl.4 of the bill amends provisions of the Act relating to the conduct of scanning searches, general searches and personal searches, by replacing the requirement that the corrective services officer reasonably "believe" certain circumstances exist with a requirement that he or she reasonably "suspect" such matters exist. The committee considers the new term imposes a lower standard upon the corrective services officer than did its predecessor.

14. The committee refers to Parliament the question of whether this lowering of the threshold requirement for the conduct of the relevant searches has sufficient regard for the rights of prisoners required to undergo such searches.

4. CRIMES AT SEA BILL 2001

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 3 April 2001. It was subsequently passed, unamended, on 3 May 2001 before the committee had an opportunity to table a report in relation to it.[59]

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

[59] In its Alert Digesr No 16 of 2000 at pages 1-8, the previous Scrutiny of Legislation Committee reported on the earlier *Crimes at Sea Bill 2000*, which lapsed when Parliament was dissolved on 23 January 2001. *A*part from certain formatting changes and the insertion of more legible text in the Schedule, Appendix 1 Map, the current bill is identical to that earlier bill.

5. DANGEROUS GOODS SAFETY MANAGEMENT BILL 2001

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from certain formatting changes) to the *Dangerous Goods Safety Management Bill 2000* which was introduced into the Legislative Assembly by the Honourable S Robertson MP, Minister for Emergency Services, on 22 June 2000, and was reported on by the previous Scrutiny of Legislation Committee in Alert Digest No 9 of 2000 at pages 18-29 and Alert Digest No 10 of 2000 at pages 36-38. The earlier bill lapsed when Parliament was dissolved on 23 January 2001.

3. The present committee adopts and repeats, in relation to the current bill, the comments made by the previous committee in relation to the earlier lapsed bill.

6. ELECTORAL AND OTHER ACTS AMENDMENT BILL 2001

Background

1. The Honourable R Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 3 April 2001.

2. This bill is identical (apart from certain formatting changes) to the *Electoral and Other Acts Amendment Bill 2000* which was introduced into the Legislative Assembly by the Honourable M J Foley MP, Attorney-General and Minister for Justice and Minister for The Arts, on 5 September 2000, and was reported on by the previous Scrutiny of Legislation Committee in Alert Digest No 13 of 2000 at pages 9-11. The earlier bill lapsed when Parliament was dissolved on 23 January 2001.

3. The present committee adopts and repeats, in relation to the current bill, the comments made by the previous committee in relation to the earlier lapsed bill.

7. FEDERAL COURTS (CONSEQUENTIAL AMENDMENTS) BILL 2001

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from some insignificant changes to content and certain formatting changes) to the *Federal Courts (Consequential Amendments) Bill 2000* which was introduced into the Legislative Assembly by the Honourable the Premier on 24 August 2000. The previous Scrutiny of Legislation Committee reported on that bill in Alert Digest No 11 of 2000 at pages 1-4, and Alert Digest No 13 of 2000 at pages 52-53. The earlier bill lapsed when Parliament was dissolved on 23 January 2001.

3. The present committee adopts and repeats, in relation to the current bill, the comments made by the previous committee in relation to the earlier lapsed bill.

8. FIRST HOME OWNER GRANT AND OTHER LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 1 May 2001.

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

> *to amend the First Home Owner Grant Act 2000 to give effect to the temporary extension of the First Home Owner Grant ("FHOG") Scheme on and from 9 March 2001, and to amend the Gas Pipelines Access (Queensland) Act 1998 to specify a further date for the lodgement of access principles for the PNG to Queensland gas pipeline.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[60]

- **Clauses 2 and 4**

3. Part 2 of the bill (cls 3 – 5 inclusive) amends the *First Home Owner Grant Act 2000*. Clause 2 of the bill deems those amendments to have commenced on 9 March 2001 (that being the date on which, according to the Minister's Second Reading Speech and the Explanatory Notes, the Prime Minister announced the relevant extensions to the First Home Owner Grant Scheme).

4. The bill enables certain persons who are currently entitled to the $7,000 maximum grant to obtain additional grant funds of $7,000 (making a total grant of $14,000). Eligibility for the additional funds is limited to "special eligible transactions", these being certain "eligible transactions"[61] entered into between 9 March 2001 and 31 December 2001. The eligibility criteria for the additional funds, subject to specified requirements mainly relating to dates of commencement, completion and the like, are identical to the criteria applicable to the original $7,000 grants.

5. It appears from the Second Reading Speech and the Explanatory Notes that since the extended scheme was announced by the Prime Minister on 9 March 2001, the Office of State Revenue, which administers the scheme in this State, has assessed the entitlement of home owner applicants to the additional funds and, it would also appear, has made a number of payments of additional grant monies.

6. The bill will therefore:

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

61 The term "eligible transactions" is defined in the Dictionary to the Act.

- retrospectively extend to certain persons who, whilst satisfying the eligibility criteria applying to the original grant, have entered into a "special eligible transaction" during the specified period, the capacity to obtain an additional $7,000 in grant funds; and
- validate any actions already taken by the Office of State Revenue in relation to administration of the extended scheme, including validating any payments of additional funds which have already been made.

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

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

8. The committee considers all the retrospective effects of the relevant clauses of this bill can be characterised as beneficial to the grant applicants mentioned in the bill, and that (as the Explanatory Notes assert) these provisions of the bill are not adverse to parties other than the Government.

9. The committee notes that, by virtue of cls. 2 and 4 of the bill, certain of its provisions are given retrospective effect. The committee is satisfied however that that retrospective effect is beneficial, as regards parties other than the Government, in that it facilitates the grant to certain home owners of additional public funds.

10. The committee therefore has no concerns about these retrospective provisions.

9. FISHERIES AMENDMENT BILL 2001

Background

1. The Honourable H Palaszczuk MP, Minister for Primary Industries and Rural Communities, introduced this bill into the Legislative Assembly on 22 March 2001.

2. The bill is identical (apart from certain formatting changes) to the *Fisheries Amendment Bill 2000*, which was introduced into the Legislative Assembly by the Minister on 15 November 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

3. The objectives of the current bill, as indicated by the Explanatory Notes, are:

> *To amend:*
>
> - *sections 36, 67 and 68 of the Fisheries Act 1994 to facilitate proposed amendments to the Fisheries (East Coast Trawl) Management Plan 1999;*
> - *certain provisions of the Fisheries Act 1994 that have been identified as necessary or desirable by the Queensland Fisheries Service; and*
> - *the Fisheries (Spanner Crab) Management Plan 1999 to remedy an unintended anomaly in the allocation of Individual Transferable Quota units.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[62]

♦ Clause 19 (proposed s 223A)

4. Clause 19 inserts new s.223A, subsection (1) of which is in the following terms:

> *223A.(1) The fisheries (Spanner Crab) Management Plan 1999, section 94,[3] is taken to have always applied to the eligible licences under the plan numbered QFV10865K and QFV11689K.*

5. New s.223A validates the past inadvertent application to two "eligible licences" of a formula relating to the calculation of "transferable catch quotas".

6. The Explanatory Notes state that:

- the application of the formula to the two licences, although inadvertent and technically in breach of the provisions of the relevant Management Plan, reflected what was the general Government policy in relation to this issue
- the adverse effect of the retrospective validation on licence holders other than the two benefited by the bill, is in the order of 0.7% of the total catch for the entire spanner crab

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

fishery. This adverse impact, which would be absorbed on a pro-rata basis by all of the other licensees, is therefore quite small.

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

8. The committee refers to Parliament the question of whether the provisions of proposed s. 223A are acceptable in the circumstances.

10. INDUSTRIAL RELATIONS AND ANOTHER ACT AMENDMENT BILL 2001

Background

1. The Honourable G R Nuttall MP, Minister for Industrial Relations, introduced this bill into the Legislative Assembly on 22 March 2001. It was subsequently passed, with amendments, on 2 May 2001 before the committee had tabled a report in relation to it.

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

11. INTRODUCTION AGENTS BILL 2001

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 3 April 2001.

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

Eliminate exploitative and unfair practices from the introduction agency industry.

Does the legislation have sufficient regard to the rights and liberties of individuals?[63]

♦ **Clauses 34 and 35**

3. Clauses 34 and 35 prohibit various false representations by introduction agents, their employees or associated persons. The provisions are directed at practices which presumably are prevalent in the introduction agency industry.

4. Both provisions provide substantial maximum penalties for breach. The maximum penalty concerned is 540 penalty units ($40,500).

5. The committee draws to the attention of Parliament the substantial maximum penalties imposed by cls. 34 and 35 for breach of these provisions.

♦ **Clause 36**

6. Clause 36 imposes certain obligations upon introduction agents in relation to access to, and use of, personal information given to them by clients and potential clients. Clause 36 significantly restricts that access and use. Breach of the statutory obligations renders introduction agents, employees of introduction agents and other persons liable to a maximum penalty of 200 penalty units ($15,000).

7. Given the undoubtedly sensitive nature of much of the information involved, cl.35 is of significant benefit to the clients of introduction agents.

8. The committee notes with approval the range of confidentiality obligations imposed by cl.36 upon introduction agents, their employees and others in relation to personal information supplied by clients and potential clients. This provision enhances clients' rights of privacy.

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

♦ **Clause 57**

9. Clause 57 contains provisions dealing with attempts by introduction agents to introduce contractual terms, which purport to vary or exclude the provisions of the bill. Clause 57(2) provides, as is quite commonly done, that any such term is void. However, it should be noted that cl.57(1) goes further by rendering any attempt to introduce such terms an offence on the part of the agent, punishable by a maximum penalty of 200 penalty units ($15,000). This should act as a significant deterrent to such behaviour.

10. The committee notes that cl.57, as well as declaring void any contractual provisions which purport to vary or exclude the operation of the bill, makes it an offence for an agent to enter into such provisions.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[64]

♦ **Clauses 65 to 77 inclusive**

11. The bill confers upon inspectors powers of entry which extend beyond situations where the occupier consents or where entry is authorised by warrant. In particular, entry can be effected to "public places" when they are open to the public and to introduction agents' places of business which are open for carrying on the business, otherwise open for entry, or required to be open for inspection under the introduction agent's licence (cl.61).

12. Once entry has been effected, the bill confers on inspectors a wide range of powers (see cls.71-77).

13. The various powers mentioned above are in a form generally similar to that employed in a number of recent bills.

14. Whilst the bill confers upon inspectors significant powers of entry and wide post-entry, investigative and enforcement powers, the committee recognises the significant efforts which have been made in drafting many of those provisions to take account of fundamental legislative principles.

15. The committee notes that the bill confers on inspectors powers of entry which extend significantly beyond situations where the occupier consents or where a warrant has been obtained. The committee notes that once entry has been effected, the bill confers on investigators a further wide range of powers. Finally, the committee notes that the bill confers on investigators significant powers to obtain information.

16. The committee brings the powers of entry, and the extent of the others powers referred to above, to the attention of Parliament.

[64] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[65]

♦ **Clauses 35(2) and (3)**

17. As mentioned earlier, cl.35 prohibits introduction agents and others from making various false representations of a type apparently not uncommon in the introduction agency industry.

18. Clause 35, so far as is relevant, is in the following terms:

(1) An introduction agent must not, directly or indirectly –

(a) …

(b) falsely represent that a particular person, whether identified by name, likeness or otherwise, is available to be introduced to persons entering into introduction agreements with the agent; or

(c) falsely represent that a database of a specified size or composition is available to persons entering into introduction agreements with the agent; or

(d) represent that a person having specified characteristics is available to be introduced to persons entering into introduction agreements with the agent, if the person mentioned in the representation is not available to be introduced to persons entering into introduction agreements with the agent.

19. Sub-clauses 35(2) and (3) then provide as follows:

(2) In a prosecution against an introduction agent for an offence against subsection (1)(b) or (c), the agent bears the onus of proving that the relevant representation is not false if there is evidence of the falsity of the relevant representation.

(3) In a prosecution against an introduction agent for an offence against subsection (1)(d), the agent bears the onus of proving that the person mentioned in the representation was available at the relevant time to be introduced to persons entering into introduction agreements with the agent if there is evidence of the falsity of the relevant representation.

20. In the normal course of events the prosecuting authority, in establishing a case against an introduction agent for breach of cl.35(1)(b), (c) or (d) would carry the burden of proof in relation to both the "evidential" burden and the "legal" burden.[66]

21. The former is the burden of establishing a *prima facie* case on an issue. The latter is the burden of actually establishing guilt in terms of the relevant evidentiary standard.

22. Whilst the former burden of establishing a *prima facie* case continues to rest with the prosecuting authorities (there must be "evidence" of the falsity of the relevant representations), the "legal" onus is shifted to the introduction agent who must, if a *prima facie* case is established by the prosecuting authorities, then prove to the satisfaction of the court that the relevant representations were not in fact false.

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

66 *Purkess-v-Crittenden* (1965) 114 CLR 164 at 167-8

23. As a general principle, the committee does not approve of provisions in legislation which reverse the onus of proof. Therefore, the committee seeks to ascertain whether the circumstances in which the particular legislative provision will operate are such as to justify such a reversal of the onus.

24. The committee notes that the Explanatory Notes state as follows:

> *Clause 35 of the Bill provides for the reversal of the onus of proof in proceedings for specific criminal offences relating to false representations. In the case of these particular offences, the fact to be proved is clearly within the knowledge of the offenders and therefore can be easily disproved by them. In contrast, it is difficult to gather evidence to prove those facts, eg. in the case of fictitious clients. For these reasons, it is considered that the reversal of the onus of proof is justified.*

25. The committee notes that cl.35 reverses the onus of proof in relation to the offences provided for in cl.35(1)(b), (c) and (d).

26. The committee notes the view expressed in the Explanatory Notes that this reversal of onus is justified on the basis that the facts concerned are clearly within the knowledge of alleged offenders and can therefore be easily disproved by them.

27. The committee refers to Parliament the question of whether the reversal of onus of proof created by cl.35 is justified in the circumstances.

♦ **Clause 94**

28. Clause 94 provides that if a corporation commits an offence against a provision of the bill, its executive officers also commit an offence punishable by the same maximum penalty.

29. Clause 94 provides grounds upon which liability may be avoided. These are that the person took all reasonable steps to ensure compliance, or that the person was not in a position to influence the conduct of the corporation.

30. Clause 94, which is in a form employed in many bills examined by the committee, effectively reverses the onus of proof, since under the law a person generally cannot be found of guilty of an offence unless he or she has the necessary intent.

31. In relation to cl.94, the Explanatory Notes state:

> *The clause is included because provisions which a corporation may contravene have the potential to cause substantial consumer detriment and it is appropriate that an executive officer who is in a position to influence the conduct of the corporation, and who is responsible for a contravention, should be accountable.*

32. The committee has previously considered provisions which, like cl.94, reverse the onus of proof in relation to corporations.

33. Whilst the difficulties of determining liability in certain circumstances (such as in relation to corporations) are appreciated, the committee as a general rule does not endorse such provisions.

34. The committee refers to Parliament the question of whether cl.94 contains a justifiable reversal of the onus of proof, and therefore has sufficient regard to the rights and liberties of individuals.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[67]

♦ **Clause 96**

35. Clause 96 contains various provisions protecting "officials" from civil legal liability.

36. Sub-clauses 96(2) and 96(3) are unexceptionable and require no further comment.

37. However, cl.96(1) provides that an "official" is not civilly liable for:

> *Any disclosure or publication made in the public interest by the official about the commercial or business reputation of any person involved in providing an introduction service.*

38. "Official" is defined in cl.96(4) as meaning:

> *(e) the Minister; or*
>
> *(f) the chief executive; or*
>
> *(g) the commissioner of fair trading; or*
>
> *(h) an inspector.*

39. Clause 96(1) effectively extends complete immunity to the Minister and other "officials" in relation to the relevant disclosures or publications. The only precondition is that the disclosure or publication be "made in the public interest". "Officials" will be protected by cl.96(1) from potential liability in relation to, in particular, defamation, and possibly also in relation to breach of confidence, negligence and the like, associated with the disclosure or publication.

40. Clause 96 is not dissimilar to provisions which appear in a number of other consumer-oriented statutes.[68]

41. The committee refers to Parliament the question of whether the immunity from civil liability conferred by cl.96(1) is justified in the circumstances.

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67 Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

68 See, for example, the Committee's report on cl.36 of the *Queensland Building Services Authority Amendment Bill 1999*, in Alert Digest No 9 of 1999 at page 16.

12. LEGACY TRUST FUND BILL 2001

Background

1. The Honourable J C Spence MP, Minister for Families and Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from certain formatting changes) to the *Legacy Trust Fund Bill 2000* which was introduced into the Legislative Assembly by the Honourable A Bligh on 15 November 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

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

> *To enable certain funds held by the Department* (of Families, Youth and Community Care) *in the Legacy Trust Fund to be used for the benefit of the vision impaired free of any legal ambiguity.*

Does the legislation provide for the compulsory acquisition of property only with fair compensation?[69]

- **Clauses 6 and 7**

4. As indicated in the Explanatory Notes and in the Minister's Second Reading Speech, an amount of approximately $370,000 is presently held in a Departmental account called the "Legacy Trust Fund", administered by the Minister's Department.

5. These funds are derived from various sources, and have accumulated over a period of more than 100 years. Most funds were legacies from the estates of deceased persons, who would have indicated the purpose for which the monies were intended to be used. However, Departmental records are incomplete and it is apparently impossible to ascertain what were the wishes of many or even most such persons. Other fund monies derive from gifts received from the public, revenue generated by institutions staffed by people with vision impairments, and at least one substantial donation from government.

6. Legal advice obtained by the Minister from the Crown Solicitor is to the effect that most trust funds are likely to be the absolute property of the Department, which it may disperse as it sees fit, but that an indeterminate proportion of the funds is probably subject to a variety of trust purposes.

7. It is not possible to establish conclusively from Departmental records which parts of the fund are in fact subject to trusts, and what the terms of all those trusts might be. It seems from the Explanatory Notes and the Minister's Second Reading Speech that any attempt to

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[69] Section 4(3)(i) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.

establish the legal position by recourse to the Courts would be time-consuming and extremely costly, with the fund most probably bearing the legal costs.

8. Clause 6 of the bill provides that the Minister may spend the Legacy Trust Fund monies only for stipulated purposes, namely:

> *(i) a purpose that benefits persons with a vision impairment, including, for example, children and workers with a vision impairment;*
>
> *(j) another purpose the Minister reasonably considers is consistent with any stated condition or purpose related to an amount comprising the fund money.*

9. The bill therefore displaces any trusts which may currently exist (except where the terms of those trusts are clearly stated in a trust document), and creates (via cl.6) something akin to a statutory trust in relation to all the monies.

10. Even where trust purposes are clearly stated in a surviving trust document, the bill gives the Minister a discretion to apply the relevant funds to another purpose the Minister considers is consistent with the trust purposes.

11. Self-evidently, the bill may deprive a range of persons and/or organisations of entitlements which they had under existing trusts over parts of the fund monies. However, those trusts are replaced with an administrative obligation imposed on the Minister to apply all fund monies towards purposes generally similar to those imposed, or which would be likely to have been imposed, by the original trusts.

12. The Explanatory Notes address this issue as follows:

> *Although there is a possibility that some persons or organisations may claim entitlement to a proportion of the fund on the basis of a specific trust, the Department has been unable to find any relevant records despite an extensive search. It is therefor considered appropriate to disburse the funds according to a set of legislative principles that will reflect, so far as is possible, the primary wish that may have been expressed in any specific bequests, that is for the benefit of persons with a vision impairment.*

13. Given the uncertainties associated with the existence and terms of any trusts over the various monies in the fund, and the expense and impracticality of resolving those issues by recourse to the courts, the committee does not consider the legislative solution imposed by this bill to be unreasonable.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[70]

♦ **Clause 7**

14. Consequent upon the statutory resolution achieved by the bill, cl.7(1) provides that any rights, other than those of the State, to the fund monies, and any liabilities or fiduciary obligations of the State relating to those monies, end. Clause 7(2) further provides that

[70] Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

persons may not make applications under the *Trusts Act 1973* in relation to the fund, or claims or applications against the State or a State entity for Acts or omissions "done or made in the exercise or purported exercise, of a power conferred by law or by an instrument creating a trust". The provisions of cls.7(1) and (2) do not appear to the committee to be unreasonable, given the general acceptability of the legislative solution imposed by the bill.

15. Clause 7(3) relates to proceedings which have already been started, and provides that any such proceeding "is stayed and the Court concerned must dismiss it without making an order as to costs".

16. The requirement that existing proceedings be dismissed "without making an order as to costs" could act to the detriment of a current litigant who would have ultimately been able to establish an entitlement. Whilst, as mentioned above, the fund documentation is generally incomplete, and whilst success in litigation is never guaranteed, it may be that in some cases the provisions of cl.7(3) could act to the detriment of an individual claimant.

17. The committee seeks information from the Minister is to whether any proceedings of the type mentioned in cl.7(3) are presently on foot.

13. LIQUOR AMENDMENT BILL 2001

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing, introduced this bill into the Legislative Assembly on 22 March 2001.

2. The bill is identical (apart from some insignificant changes to content and certain formatting changes) to the *Liquor Amendment Bill 2000* which was introduced into the Legislative Assembly by the Minister on 16 November 2000. That earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

3. The objectives of the current bill, as indicated by the Explanatory Notes, are:

   - *to implement recommendations arising from the National Competition Policy Review of the Liquor Act 1992 ("the Act"); and*
   - *to amend the Act in order to enhance the administrative efficiency, clarify existing provisions and address anomalies.*

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[71]

♦ **Clause 12 (Proposed s 20A)**

4. Clause 12 of the bill inserts into the *Liquor Act* 1992 s 20A, which provides as follows:

> *20A. A member of the Tribunal has, in the performance of the member's duties as a member of the Tribunal, the same protection and immunity as a District Court judge has in the performance of the judge's duties.*

5. The "Tribunal" in question is the Liquor Appeals Tribunal, which hears appeals against decisions of the chief executive in relation to the grant or refusal of licences or permits, the imposition of conditions, the cancellation or suspension of licences or permits, and other such matters.

6. Given the nature and functions of the Liquor Appeals Tribunal, the committee does not object to the immunity conferred by proposed s.20A.

[71] Section 4(3)(h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

Is the legislation consistent with the principles of natural justice?[72]

♦ **Clause 85 (Proposed s 137C)**

7. Clause 85 of the bill inserts various provisions relating to disciplinary action in respect of licences. Whilst other sections inserted by cl.85 generally require the chief executive to give written notice to licensees in the event that disciplinary action is proposed, new s.137C (which is entitled "urgent suspension") provides that the chief executive may immediately suspend a licence without first giving notice to the licensee and hearing any submissions the licensee may care to make.

8. Section 137C(1)(b) limits the operation of these "urgent suspensions" to situations where "harm may be caused to members of the public if urgent action to suspend the licence is not taken". The section also requires that, together with the notice of suspension, the licensee be given reasons for the urgent suspension and be informed of their capacity to appeal to the tribunal within 28 days. Section 137C(5) provides that urgent suspensions continue for a maximum of 60 days.

9. The committee refers to Parliament the question of whether the provision under proposed s. 137C for immediate suspension of licences, without inviting and considering submissions from the licensee, has sufficient regard for the rights of licensees.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[73]

♦ **Clause 54 and clause 105 (Proposed s 264)**

10. Clause 54 amends s.85 of the *Liquor Act 1992* to provide that a club licence does not authorise the sale or supply or liquor from "a facility ordinarily known as a drive-in or drive-through bottle shop". Proposed s.264 declares that s.85(1C) "has effect in relation to a club licence even if, before the commencement of this section, the holder of the licence could lawfully sell or supply liquor from a facility ordinarily known as a drive-in or drive through-bottle shop".

11. The Explanatory Notes state that there is only one club currently operating such a facility. The Explanatory Notes provide the following background information:

> *Clause 54 amends section 85 of the Act by specifically stating (in new subsection (1C) that a club licence does not authorise the sale or supply of liquor from a facility ordinarily known as a drive-in or drive-through bottle shop. This had been a long-standing Government policy although it was never in the legislation.*
>
> *Clause 106 inserts new section 264 which specifies that section 85(1C) has effect even if before the commencement of the section, the holder of the club licence could sell from a facility ordinarily known as a drive-in or drive-through bottle shop.*

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72 Section 4(3)(b) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with the principles of natural justice.

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

The operation of these two sections together will preclude any clubs that currently operate such facilities from continuing to do so. In fact, there is only one club that currently operates such a facility.

The policy to prohibit facilities of this nature resulted from the National Competition Review of the Act and was publicly announced in March 2000. Subsequent to this announcement a club appealed to the Liquor Appeals Tribunal against a decision of the chief executive to refuse an application to operate a drive-in bottle shop. The Tribunal granted the application in June 2000 and the club commenced trading in October 2000.

The Government advised the club in July 2000 that it intended to pursue a legislative amendment to prohibit these facilities.

It could be argued that the effect of the Bill is to adversely affect the interests of this club. However the section does not purport to operate retrospectively, in that it does not affect the trading that occurred prior to the commencement of the Bill.

Even if the view is taken that a fundamental legislative principle is infringed, it is considered that the infringement is justified. The policy was well known within the industry and of long-standing. Additionally, reasonable steps were taken to ensure that the particular club did not incur costs without full knowledge of the Government's intention in this regard. As stated earlier, the policy was publicly announced and the particular club was advised in writing of the intended amendment.

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

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

13. In relation to this amendment, the committee notes the following:

- The one club which operates such a facility will be adversely affected by cls.54 and 106;
- The Government's intention to prohibit facilities of this nature was publicly announced in March 2000;
- Although the relevant club subsequently successfully appealed to the Liquor Appeals Tribunal against the decision of the chief executive refusing to grant an application to operate such a facility (the tribunal's decision was handed down in June 2000) the Government advised the club in July 2000 that it intended to pursue a legislative amendment to prohibit such facilities;
- The club commenced trading in the relevant facility in October 2000.

14. Although the committee does not promote the practice of "legislation by press release", the practice of publicly announcing a change in legislation prior to making the change serves to forewarn affected individuals, and to decrease reliance on the existing legislation. Moreover, in this case the affected club was subsequently directly informed of the Government's intent.

15. The committee refers to Parliament the question of whether the retrospective prohibition of drive-in and drive-through bottle shops has sufficient regard to the rights of the sole club which currently operates such a facility.

14. LOCAL GOVERNMENT AND OTHER LEGISLATION AMENDMENT BILL 2001

Background

1. The Honourable J I Cunningham MP, Minister for Local Government and Planning, introduced this bill into the Legislative Assembly on 2 May 2001.

2. This bill is identical (apart from certain relatively insignificant changes to content and certain formatting changes) to the *Local Government and Other Legislation Amendment Bill (No.2) 2000*, which was introduced into the Legislative Assembly by the Honourable T M Mackenroth MP Minister for Communication and Information, Local Government and Planning and Minister for Sport, on 15 November 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

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

> *…. to achieve a number of objectives in the areas of National Competition Policy, local government electoral arrangements, provision of local government infrastructure and integrated State planning.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[74]

- **Clauses 6 and 7**

4. Clause 6 inserts into the *Local Government Act 1993* a new s 224A, which provides that a councillor ceases to be a councillor if he or she nominates for election to the Queensland or Commonwealth Parliaments. Clause 7 amends current s 298 of the Act to prevent a person who has nominated for election as a member of an Australian Parliament from being nominated for election, or appointed as, a councillor of a Queensland local government until the election is effectively finalised under either the Queensland or Commonwealth electoral laws.

5. Section 221(f) of the Act currently prevents a person who is a member of an Australian Parliament from being or becoming a councillor. Clauses 6 and 7 extend this disqualification to the candidature stage.

6. These provisions of cls.6 and 7 impose restrictions upon the right of certain individuals (who happen to be current or aspiring councillors) to seek election to State or Commonwealth Parliaments, and limit the right of the public to be provided with the widest range of candidates.

7. The Minister deals with the issue at length in her Second Reading Speech, which refers to the following arguments which would support the provisions of cls 6 and 7:

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

- The provisions bring about consistency between the position of councillors and intending councillors, and that of members of the Legislative Assembly, where either seek higher office (in the case of councillors, election to either a State or Commonwealth Parliament, and in the case of members of the Legislative Assembly, election to the Commonwealth Parliament).[75] The Minister asserts that local governments in Queensland enjoy a level of autonomy which enables them to be regarded, in a sense, as "Governments in their own right"

- The current arrangements encourage "nomination without responsibility"

- A conflict may exist between a councillor's quest for higher office and the councillor's duties as councillor

- Councillors would be prevented from being elected with the intention of then seeking higher office prior to completing their full term of office.

8. The Explanatory Notes (at page 26) advance a further technical argument in justification of the cl.7 provisions, namely:

> *Given that section 221(f) provides that a member of an Australian Parliament is not qualified to be or become a councillor, the intent of the provision is to avoid a situation where a person is elected to an Australian Parliament while at the same time a candidate for election as a councillor. Once a ballot paper for a local government election is prepared, it is not possible to remove the name of a candidate who becomes unqualified for office by virtue of election to an Australian Parliament. However, once an election for an Australian Parliament is concluded, an unsuccessful candidate is not prevented from nominating for election as a councillor.*
>
> *The provision is intended to also apply to appointment of a councillor, eg, where a vacancy in the office of councillor occurs in the twelve months prior to the local government quadrennial elections.*

9. The committee notes that cls.6 and 7 impose restrictions upon the rights of current or aspiring councillors to nominate for election to the Queensland or Commonwealth Parliaments, by declaring that in the event of any such nomination, the relevant persons will be prevented from continuing as councillors or from being eligible for nomination or appointment as a councillor.

10. The committee refers to Parliament the question of whether the provisions of cls. 6 and 7 have sufficient regard to the rights of current and aspiring councillors, and to the rights of the electorate.

[75] Section 164 of the *Commonwealth Electoral 1918* provides that members of State Parliaments, and the Legislative Assemblies of the Northern Territory and Australian Capital Territory, are not capable of being nominated as Senators or Members of the House of Representatives.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[76]

♦ **Clauses 6 and 7**

11. As mentioned above, current s.221(f) of the *Local Government Act 1993* provides that a person is not qualified to be or become a councillor if the person is a member of "an Australian Parliament". Clause 6 inserts new s.224A, which is headed "Councillor ceases to be councillor on becoming candidate for an Australian Parliament", and cl.7 inserts s.298(3), which refers to "a person who is a candidate for election as a member of an Australian Parliament". However, both new s.224A and new s.298(3) then proceed to impose restrictions on such persons in relation to events occurring under the "*Electoral Act 1992"* (which under s.6 of the *Acts Interpretation Act 1954* means the Queensland statute of that name, and the *Commonwealth Electoral Act 1918 (Cwlth).*

12. A question therefore arises as to whether the prohibitions imposed by the new provisions are indeed intended to apply to persons who are candidates for election as a member of "an Australian Parliament", or only to persons nominating for election to the Commonwealth or Queensland Parliaments. If that is the case, the reference in cls. 6 and 7 to "an Australian Parliament" is not strictly correct.

13. The committee seeks advice from the Minister as to whether the prohibitions imposed under cls. 6 and 7 are intended to apply to persons who are candidate for election as a member of any Australian Parliament, or only to persons who are candidates for election as a member of the Queensland or Commonwealth Parliaments.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[77]

♦ **Clause 10 (proposed s.1267)**

14. Proposed s.1267 confers power to make transitional regulations about matters arising out of the transition from the repealed *Townsville/Thuringowa Water Supply Board Act 1987* to this Act, in relation to which "(the Act) does not make provision or sufficient provision".

15. The committee has found that transitional regulation-making provisions can give rise to a range of issues, and has commented adversely on many such provisions. The committee notes that whilst the s.1267 regulation-making power is broadly framed, the section (in contrast to some other such provisions) does not purport to authorise regulations affecting the operation of the Act in such a manner as to constitute it a "Henry VIII Clause", nor does it authorise the making of transitional regulations which are retrospective. In addition, the committee notes that any transitional regulations made under s.1267 expire, at most, one year after they are made and that s.1267 itself expires at the end of that period.

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

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

16. The committee notes that proposed s.1267 confers broad transitional regulation-making powers. However, the committee also notes that s.1267 does not incorporate various objectionable features sometimes found in provisions of this type, and further notes that express "sunsetting" provisions are included.

17. The committee refers to Parliament the question of whether the provisions of s.1267 are reasonable in the circumstances.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[78]

- **Clauses 2(1) and 15**

18. Clause 15 amends s.6.1.45A of the *Integrated Planning Act 1997*, by inserting provisions about development control plans made under the repealed *Local Government (Planning and Environment) Act 1990.*

19. Clause 2(1) provides that the relevant provisions "(are) taken to have commenced on 30 March 1998".

20. The Explanatory Notes state, in relation to these provisions:

> *Retrospective commencement is proposed for the amendment to section 6.1.45A of the Integrated Planning Act 1997. This will clarify that the intent of the provision since its commencement has been to preserve the operation of Development Control Plans made under the repealed Local Government (Planning and Environment) Act 1990, and to validate plans made under them and development approved in accordance with those plans.*

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

22. In the case of the relevant provisions, which preserve the operation of development control plans and validate plans made under them or developed and approved in accordance with them, the committee finds it difficult to identify what adverse effects would flow from such provisions. Moreover, the committee notes that the relevant plans are not demonstrably invalid, but are merely subject to an element of doubt in that regard.

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

23. The committee makes no further comment on the retrospective aspects of cl.15.

15. MOTOR VEHICLES SECURITIES AND OTHER ACTS AMENDMENT BILL 2001

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 3 April 2001.

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

> *(amend) the Motor Vehicles Securities Act 1986 and other Acts to:*
>
> - *Add security interests over boats to the existing register;*
> - *Provide for consistency of the Act with similar legislation in other States; and*
> - *Streamline administrative procedures and recognise current practices relating to the register.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[79]

♦ **Clauses 26(4)(proposed s.39(3)) and 27 (proposed s.45)**

3. Section 39(2) of the *Motor Vehicles Securities Act 1986* currently provides a general power of the Governor in Council to make regulations with respect to "fees, costs and charges….payable under this Act". Clause 26(3) will add to s.39 a new sub-section (3), which provides that the power to prescribe fees "includes, and is declared to have always included" power to prescribe fees for:

- Applications to change particulars of registered security interests in the register
- Applications for correction of errors in the register
- Applications for approval to hold accounts for fees payable
- Inspection of applications (other than those for approval to hold accounts).

4. Clause 27 inserts new Part 7 (comprising proposed s.45), which provides that certain "regulatory provisions" are "taken to be, and always to have been" validly made. By virtue of the definition of "matter", and paragraph (b) of the definition of "regulatory provision" in proposed s.45, this validation covers fees previously imposed by regulation in respect of the four subjects mentioned above.

5. However, as s.45 defines "matter" as <u>including</u> fees, and because of the contents of paragraph (a) of the definition "regulatory provision", the validation effected by proposed s.45 extends beyond fees for the four abovementioned subjects to the matters dealt with in

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

ss.9(3), 11(b) and 12 of the *Motor Vehicles Securities Regulation 1995.* These latter provisions:

- Authorise the chief executive to waive the fee for an application to correct an error
- Authorise the chief executive to allow a person to inspect any application made under the Act (other than an application for approval as an account holder)
- Authorise the chief executive to give approval for a person to hold an account for fees payable (fees are then payable not as the services are provided, but within 14 days of the chief executive providing the account holder with a list of outstanding fees).

6. It is appropriate to deal with the two categories of validation separately.

Fees

7. The Explanatory Notes and the Minister's Second Reading Speech both indicate that proposed ss.39(3) and 45 are intended to remove doubt about the validity of fees imposed by regulation in respect of the four bulleted matters mentioned in paragraph 3 of this chapter. Whilst clear statutory authority is generally required for the imposition of fees, that principle is qualified by the fact that is possible to impose reasonable fees for the provision of a service by a governmental body. It may well be that all of the matters mentioned in the four bulleted points fall within this category. On that basis, the fee provisions would in fact be valid, and the bill would not alter the current legal position.

Applications to change particulars in register, applications for correction of error, applications for approval to hold account for fees payable, authorisation of inspection of applications.

8. As mentioned earlier, proposed s.45 extends beyond the validation of the relevant fees, and also validates the provisions of the regulations dealing with the three bulleted matters in paragraph 5 of this chapter.

9. In relation to the first such matter (the power of the chief executive to waive a fee in relation to an application to correct an error), the committee notes that by a combination of ss.26 and 30(B) of the *Statutory Instruments Act 1992* , that provision may well currently be valid. As to the remaining two matters (the provision allowing the chief executive to allow persons to hold an account requiring periodic payment of outstanding fees rather than immediate payment on a case by case basis, and the provision permitting approval to be given for inspection of applications other than those for permission to hold an account), the committee agrees there could well be some doubt about the validity of these provisions.

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

> *There is some possibility that some sections of the Regulation and four of the fees currently collected under the Motor Vehicles Securities Regulation 1995 may be beyond the power of the Act. The Bill, for the avoidance of doubt, will validate these sections and the collection of these fees in the past.*

Such a validating provision may be considered retrospective legislation. However, the provision is considered justified as it does not in any practical way change previous rights, obligations or expectations. It is curative in that it confirms the status quo and provides certainty by placing the validity of already existing legislative provisions beyond doubt.

11. As mentioned earlier, the committee considers the issue of invalidity only significantly arises in relation to the provisions allowing persons to inspect applications and to hold accounts for payment of fees. It is difficult to see that any person (other than the State) would be adversely affected by the validation of the second of these two provisions. The first might perhaps adversely affect the position of applicants whose applications were permitted to be searched. However, the precise ramifications of this are not entirely clear.

12. The committee notes that cls. 26(4) and 27 (proposed s.45) validate existing regulations and the Schedule to the regulations imposing fees in respect of those matters. The committee considers the provisions relating to fees may well presently be valid, in which case the bill will have no substantive effect. Further, with one exception, the operative provisions validated by the bill are either probably already valid or their validation does not produce any adverse effect.

13. The committee refers to Parliament the question of whether the validations effected by cls.26(4) and 27 (proposed s.45) are reasonable in the circumstances.

16. OCCUPATIONAL THERAPISTS REGISTRATION BILL 2001 (PLUS 13 COGNATE BILLS)

(Cognate Bills: Chiropractors Registration Bill 2001, Dental Practitioners Registration Bill 2001, Dental Technicians and Dental Prosthetists Registration Bill 2001, Health Practitioners Legislation Amendment Bill 2001, Medical Practitioners Registration Bill 2001, Medical Radiation Technologists Registration Bill 2001, Optometrists Registration Bill 2001, Osteopaths Registration Bill 2001, Pharmacists Registration Bill 2001, Physiotherapists Registration Bill 2001, Podiatrists Registration Bill 2001, Psychologists Registration Bill 2001 and Speech Pathologists Registration Bill 2001)

Background

1. The *Occupational Therapists Registration Bill 2001*, together with the 13 cognate bills listed above, were introduced by the Honourable W M Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, into the Legislative Assembly on 22 March 2001. The bills were subsequently passed, unamended, on 1 May 2001 before the committee had tabled a report in relation to them.

2. Upon receiving the Governor's assent, the bills become Acts. The committee only has jurisdiction to comment on bills, and once assent has been given the committee has no jurisdiction to comment on them.

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bills have already been assented to, the committee has no jurisdiction to comment on them. Even if they have not been assented to, it would in practical terms be futile for the committee to comment.

5. The committee accordingly makes no comment in respect of these bills.

17. OFFICIALS IN PARLIAMENT BILL 2001

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 22 March 2001. It was subsequently passed, unamended, as an urgent bill on the same day following suspension of the Standing Orders before the committee had tabled a report in relation to it.

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

18. PARLIAMENTARY COMMITTEES AND CRIMINAL JUSTICE AMENDMENT BILL 2001

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 3 April 2001. It was subsequently passed, unamended, on 1 May 2001 before the committee had tabled a report in relation to it.

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

19. POLICE POWERS AND RESPONSIBILITIES AND ANOTHER ACT AMENDMENT BILL 2001

Background

1. The Honourable A McGrady MP, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from several insignificant changes to content and certain formatting changes) to the *Police Powers and Responsibilities and Another Act Amendment Bill 2000* which was introduced into the Legislative Assembly by the Honourable T A Barton MP, Minister for Police and Corrective Services on 9 November 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001, before the committee had tabled a report in relation to it.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[80]

- **Clause 2**

3. Part 2 of the bill (cls.3-6 inclusive) makes various amendments to the *Police Powers and Responsibilities Act 2000* in respect of the use of force. Clause 2(1) provides that those amendments are "taken to have commenced on 1 July 2000, immediately after the commencement of the provisions of the *Police Powers and Responsibilities Act 2000* that commenced on that day". The Part 2 provisions will therefore have retrospective effect from the date this bill is enacted back to 1 July 2000.

4. As explained in the Minister's Second Reading Speech, the Part 2 provisions are being enacted to remove any element of doubt about the capacity of police to use force when installing, maintaining, replacing or removing surveillance devices under warrants issued by Supreme Court judges under s.131 of the Act. The doubt arose because whilst s.144, which relates to the issue of surveillance warrants by magistrates, expressly refers to "power to use reasonable force to install, maintain, replace or remove a tracking device", that power is not specifically referred to in s.131. It was thought that the failure to mention the use of such force in s.131 might give rise to an argument that that power was not intended to be available in relation to Supreme Court surveillance warrants. The Part 2 provisions amend a number of sections to make it quite clear that the relevant power is available under both s.131 and s.144.

5. The practice of making retrospectively validating legislation is not one which the committee endorses because such law could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. The committee

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

does, however, recognise that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals, is justified to correct unintended legislative consequences.

6. The effect of cl.2(1) would be to validate any relevant use of force by police officers since 1 July 2000.

7. However, advice by the Solicitor-General to the Department, mentioned in the Minister's speech, was not that the Act did not currently confer the relevant powers, but only that that might be the case. Whilst the Part 2 provisions concern the use of force (against property rather than persons), the committee concurs with the Solicitor-General's view, and considers it more likely than not that the Act does presently confer those powers. On that basis, the bill will probably not make any change to the current law.

8. Although the Explanatory Notes and the Minister's speech do not address the point, the committee assumes that the relevant powers have purportedly been exercised on a number of occasions since 1 July 2000.

9. Clause 2 of the bill purports to give retrospective effect to various provisions of the bill which relate to the use of force against property. The committee nevertheless considers it probable that the relevant powers are already conferred by the Act, and that the amendment will not change the current legal position.

10. In the circumstances, the committee makes no further comment on the retrospective aspects of the bill.

20. RACIAL AND RELIGIOUS OFFENCES BILL 2001[81]

Background

1. The Honourable L J Springborg MP, Shadow Attorney–General and Shadow Minister for Justice, introduced this bill into the Legislative Assembly on 1 May 2001 as a private member's bill.

2. According to the Explanatory Notes the objective of the bill is to:

> *amend the Penalties and Sentences Act 1992 by inserting a new section making racial or religious vilification a circumstance of aggravation in the committing of an offence.*

Effect of the bill

3. The primary objective of the bill is stated to be to ensure that those who commit hate crimes are punished not only for their actions but for the motivation behind their actions.

Does the legislation have sufficient regard to the rights and liberties of individuals?[82]

- **Clauses 1 to 3 inclusive**

Comparison with the Anti-Discrimination Amendment Bill 2001

4. Both this bill and the *Anti-Discrimination Amendment Bill 2001,* which was introduced by the Honourable the Premier on 22 March 2001, deal with the subject of racial and religious vilification. The committee has reported at length on the *Anti-Discrimination Amendment Bill 2001* elsewhere in this Alert Digest.

5. Accordingly, the Committee's report on the current bill primarily takes the form of a comparison between that bill and the *Anti-Discrimination Amendment Bill 2001*.

6. The current bill differs from the *Anti-Discrimination Amendment Bill 2001* in that it does not create an offence, as such, for racial or religious vilification. It also does not draw a distinction between civil and criminal sanctions for racial vilification.

7. Rather the *Racial and Religious Offence Bill 2001* amends the *Penalties and Sentences Act 1992* by inserting a new Part 9AA which attempts to create a circumstance of aggravation in the case where an offence already known to the law of Queensland has been committed. In that case the proposed new part gives to a sentencing judge the power to increase the penalty, by up to 3 years imprisonment, that would otherwise be imposed for the offence but for the racial or religious vilification 'involved' in the commission of the offence.

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

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

8. The *Racial and Religious Offences Bill 2001* takes much the same approach to defining vilification as does the *Anti-Discrimination Amendment Bill 2001*, in that it requires proof of:
   - a public act that
   - incites
   - hatred towards OR
   - serious contempt for OR
   - severe ridicule of the person or group
   - on the ground of race or religion
   - in a way that includes threatening physical harm OR
   - inciting others to threaten physical harm.

9. "Public Act" is defined in a similar way to the *Anti-Discrimination Amendment Bill 2001*, except that it does not include the words 'by electronic means'.

10. Because the Bill simply amends the *Penalties and Sentences Act 1992* it contains no definition of race or religion and, unlike the *Anti-Discrimination Amendment Bill 2001*, does not include the definitions already in the *Anti-Discrimination Act 1991*.

11. The committee notes therefore that many of the observations about definitional problems made in the report on the *Anti-Discrimination Amendment Bill 2001* apply also to the *Racial and Religious Offence Bill 2001*

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[83]

♦ **Clause 3**

Circumstances of Aggravation increasing the penalties for an offence.

12. The scheme of the bill is to give to the judge who imposes a sentence for an offence *punishable by imprisonment* the power to impose an additional punishment of up to three years if the offence involves the person, by a public act, inciting racial or religious hatred that includes threatening physical harm towards the person or their property or inciting others to so threaten harm.

13. The bill provides that:

> *'if a person commits an offence punishable by imprisonment, it is a circumstance of aggravation if the offence involves (a public act of vilification)'*

14. It further provides that:

> *if a person 'is found guilty of the offence, with the circumstance of aggravation …the imprisonment to which the offender is liable is increased by 3 years'.*

15. Before a person can have an additional punishment imposed two things need to be established. Firstly, the elements of whatever offence is charged, must be established beyond

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

reasonable doubt. Secondly, the circumstance of aggravation that the offender, by a public act, incited vilification must also be established.

16. Section 132C of the *Evidence Act 1977* provides that if an allegation of fact during a sentencing procedure under the *Penalties and Sentences Act 1992* is not admitted it may be proved on the balance of probabilities even if adverse to the offender. On the other hand the 'elements' of any offence must be established by the Prosecution beyond reasonable doubt.

17. Generally, a circumstance of aggravation of an offence is regarded as an element of the offence and thus must be proved beyond reasonable doubt. This is because the circumstance of aggravation is usually part of the specific offence-creating provision. Examples are Assault *occasioning bodily harm*[84] and Doing Grievous Body Harm *with intent to maim disfigure of disable*[85]. Section 575 of the *Criminal Code (Qld)* provides that if an indictment charges a person with an offence committed with a circumstance of aggravation, the person may be convicted of any offence established by the evidence. It is clear from this that the circumstance of aggravation must be alleged in the indictment or complaint. It then must be proved beyond reasonable doubt before a jury (if a trial on indictment) or magistrate (if an offence dealt with summarily) or by the informed plea of guilty by the defendant before the court.

18. The committee notes that proposed Part 9AA of the *Penalties and Sentences Act 1992* is unclear as to whether the circumstance of aggravation giving rise to additional punishment is an element of the offence [the most likely position], or whether it is an allegation of a fact adverse to the person during the sentencing procedure which need only be established on the balanced of probabilities.

[84] S 339 *Criminal Code (Qld)*

[85] S 317 *Criminal Code (Qld)*

21. RACING AND BETTING AMENDMENT BILL 2001

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 22 March 2001.

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

   - *provide certainty and ensure that existing rights are maintained in relation to decisions and actions of the Harness Racing Board (HRB) by declaring that section 43(1)(f) of the Racing and Betting Act 1980 (the Act) did not operate to vacate John Crowley's office as a member and Chairperson of the HRB; and*
   - *replace outdated conflict of interest provisions.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[86]

♦ **Clause 7**

3. Clauses 3-6 inclusive of the bill insert into the *Racing and Betting Act 1980* new provisions dealing with financial conflicts of interest by members of the Harness Racing Board and the Greyhound Authority. These new provisions basically require any member who has a "direct or indirect financial interest in" an issue being considered by the Board or Authority, which interest could conflict with the proper performance of the member's duties in relation to the matter, to promptly disclose to a meeting of the Board or Authority the nature of the member's interest. The new provisions then require the member, unless the Board or Authority otherwise directs, to absent him or herself whilst the issue is considered, and not to take part in any decision on the issue.

4. These provisions replace the current provisions (ss.43(1)(f), 84(1)(f)) which basically declare that the office of a member of a Board or Authority shall become vacant if the member "is entitled to a benefit directly or indirectly from work done or to be done for or goods supplied or to be supplied to the (Board or Authority)".

5. The Explanatory Notes state that it recently became apparent that during the tenure of John Crowley as member and chairperson of the Harness Racing Board, the current provisions were breached because the Board purchased motor vehicles from a company in which Mr Crowley was a shareholder.[87] It would therefore appear that, in terms of the Act as it presently stands, Mr Crowley's position became vacant upon the occurrence of the first such event.

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

87 The Explanatory Notes also state that investigations revealed no impropriety on the part of Mr Crowley or any employees of the Harness Racing Board.

6. In consequence, it appears that a number of the Board's subsequent decisions (the relevant period appears to be from 19 May 1995 to 23 August 2000) may have been invalid by reason of Mr Crowley's involvement in those decisions at a time when, as it now appears, he was not in fact a Board member.

7. Clause 7 of the bill overcomes this difficulty by declaring that the relevant provision of the Act did not in fact cause Mr Crowley's office as member or chairperson to become vacant at any time during the relevant period. The effect of cl.7 is to validate any decisions of the Board in which Mr Crowley participated during that period.

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

9. The Explanatory Notes state:

> *In the circumstances, it is difficult to identify any adverse effect that the amendments would have on any person. The HRB has made decisions and acted in good faith. Reliance has been placed on these decisions and actions and it would not be in the public interest to allow such decisions to now be subject to legal challenge.*

10. In the circumstances, the committee makes no further comment on the retrospective aspects of this bill.

22. STATUS OF CHILDREN AMENDMENT BILL 2001

Background

1. The Honourable R J Welford MP, Attorney-General and Minister for Justice, introduced this bill into the Legislative Assembly on 3 April 2001. It was subsequently passed, unamended, on 1 May 2001 before the committee had tabled a report in relation to it.

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

23. TOBACCO AND OTHER SMOKING PRODUCTS (PREVENTION OF SUPPLY TO CHILDREN) AMENDMENT BILL 2001

Background

1. The Honourable W D Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, introduced this bill into the Legislative Assembly on 3 April 2001. It was subsequently passed, unamended, on 3 May 2001 before the committee had tabled a report in relation to it.

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

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

4. The committee only has jurisdiction to comment on bills not Acts. If the bill has already been assented to, the committee has no jurisdiction to comment on it. Even if it has not been assented to, it would in practical terms be futile for the committee to comment.

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

24. TRANS-TASMAN MUTUAL RECOGNITION (QUEENSLAND) AUTHORISATION BILL 2001

Background

1. The Honourable P D Beattie MP, Premier and Minister for Trade, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from certain formatting changes) to the *Trans-Tasman Mutual Recognition (Queensland) Authorisation Bill 2000*, which was introduced into the Legislative Assembly by the Premier on 5 September 2000 and was reported on by the previous Scrutiny of Legislation Committee in Alert Digest No 13 of 2000 at pages 49-50, tabled on 3 October 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001.

3. The present committee adopts and repeats, in relation to the current bill, the comments made by the previous committee in relation to the earlier lapsed bill.

25. VALUERS REGISTRATION AMENDMENT BILL 2001

Background

1. The Honourable S Robertson MP, Minister for Natural Resources and Minister for Mines, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from an insignificant change to content and certain formatting changes) to the *Valuers Registration Amendment Bill 2000* which was introduced into the Legislative Assembly by the Honourable R J Welford MP, Minister for Environment and Heritage and Minister for Natural Resources, on 4 October 2000. The earlier bill was examined but not reported on by the previous Scrutiny of Legislation Committee in Alert Digest No 14 of 2000, tabled on 17 October 2000. The earlier bill lapsed when parliament was dissolved on 23 January 2001.

3. The present committee adopts, in relation to the current bill, the decision of the previous committee to classify the earlier lapsed bill under the category "examined but not reported on".

26. WINE INDUSTRY AMENDMENT BILL 2001

Background

1. The Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading, introduced this bill into the Legislative Assembly on 22 March 2001.

2. This bill is identical (apart from certain formatting changes) to the *Wine Industry Amendment Bill 2000*, which was introduced into the Legislative Assembly by the Minister on 24 August 2000 and was examined but not reported on by the previous Scrutiny of Legislation Committee in Alert Digest No 11 of 2000, tabled on 5 September 2000. The earlier bill lapsed when Parliament was dissolved on 23 January 2001.

3. The present committee adopts, in relation to the current bill, the decision of the previous committee to classify the earlier lapsed bill under the category "examined but not reported on".

SECTION B

COMMITTEE RESPONSE TO MINISTERIAL ORRESPONDENCE

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to "extrinsic material" in the interpretation of a provision of an Act in certain circumstances. The definition of "extrinsic material" provided in that section includes:

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted[88]

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment[89] of a provision may therefore be considered as extrinsic material in its interpretation.

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[88] Section 14B(3)(c) Acts *Interpretation Act 1954*.

[89] The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 *Acts Interpretation Act 1954*.

SECTION B– COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

27. CRIMES AT SEA BILL 2000

Background

1. The Honourable M J Foley MP, the then Attorney-General and Minister for Justice and Minister for The Arts, introduced this bill into the Legislative Assembly on 17 October 2000. The bill was not passed before Parliament was dissolved on 23 January 2001, and it accordingly lapsed.

2. The previous committee commented on this bill in its Alert Digest No 16 of 2000 at pages 1 to 8. The former Attorney-General's response to those comments is reproduced in full in Appendix A of this digest.

3. As the bill was introduced during the life of a previous committee and moreover has lapsed, the current committee does not respond to the former Attorney-General's comments. However, the former Attorney-General's letter is reproduced in accordance with the committee's policy of placing all such correspondence on the public record.

4. The committee refers readers to, but does not comment upon, the former Attorney-General's response.

28. SUPERANNUATION AND OTHER LEGISLATION AMENDMENT BILL 2000

Background

1. The Honourable D J Hamill MP, Treasurer, introduced this bill into the Legislative Assembly on 19 October 2000. The bill was passed, unamended, on 8 November 2000.

2. The previous committee commented on this bill in its Alert Digest No 16 of 2000 at pages 9 to 12. The former Treasurer's response to those comments is referred to in part below and reproduced in full in Appendix A to this Digest. Although the bill was passed in the last Parliament, the former Treasurer's letter is reproduced in accordance with the committee's policy of placing all such correspondence received on the public record.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[90]

- **Clause 2(1), 2(2) and 2(4)**

3. Clause 2(1) provides that cl.6 is taken to commence on 1 July 2000. The previous committee noted the retrospective operation of cl.6 and sought information from the former Treasurer as to whether any current scheme members are, or are likely to be, affected by cl 6 (and perhaps also by cl.8), and whether that effect would be adverse in any way.

4. The former Treasurer provided the following comments:

> *The Scrutiny of Legislation Committee (the Committee) has questioned clause 6 and clause 8 of the Bill which seeks to restrict the payment of personal contributions by Members of Parliament over age 70. In relation to the Committee's concerns, one member of the Parliamentary Contributory Superannuation Scheme has reached age 70. This member has been advised that their benefit will be treated consistently with Commonwealth Government superannuation legislation. It has been determined that no other Members will reach age 70 before the next State election.*

5. The committee notes the former Treasurer's comments.

Clause 34

6. Clause 34 of the bill exempts from the operation of Part 7 of the *Statutory Instruments Act* (which establishes a general mechanism for the staged automatic expiry of subordinate legislation) the Deed governing the operations of the QSuper public sector superannuation

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

scheme. The previous committee referred to Parliament the question of whether the provisions of cl.34 have sufficient regard to the rights and liberties of individuals.

7. The former Treasurer commented as follows:

> *The Committee also questioned clause 34 of the Bill that exempts the* Superannuation (State Public Sector) Deed 1990 *(QSuper Deed) from the operation of Part 7 of the* Statutory Instruments Act 1992 *(SI Act). The rules of the State Public Sector Superannuation Scheme (QSuper) are contained in the QSuper Deed. From time to time, the QSuper Deed is reviewed by the QSuper Board of Trustees in light of the changing nature of the State public sector and the Commonwealth Government's superannuation legislation. Furthermore, Commonwealth Government legislation does not allow any reduction in members' accrued benefits. I wish to assure the Committee that members' rights and benefits are essentially reviewed on an ongoing basis and the inclusion of the QSuper Deed in Schedule 2A of the SI Act does not serve to remove any member rights or liberties.*

8. The committee notes the former Treasurer's comments.

29. WORKCOVER QUEENSLAND AND OTHER ACTS AMENDMENT BILL 2000

Background

1. The Honourable P J Braddy MP, Minister for Employment, Training and Industrial Relations, introduced this bill into the Legislative Assembly on 17 October 2000. The bill was passed, with amendments, on 14 November 2000.

2. The previous committee commented on this bill in its Alert Digest No 16 of 2000 at pages 13 - 16. Although the bill was passed in the last Parliament, the former Minister's response to the committee's comments is reproduced in accordance with the committee's policy of placing all such correspondence received on the public record.

3. The former Minister's letter is referred to in part below and reproduced in full in Appendix A of this digest.

Does the legislation have sufficient regard to the rights and liberties of individuals?[91]

- **Clause 20 (proposed s.434)**

4. Clause 20 of the bill makes various amendments to Chapter 7 of the *WorkCover Queensland Act 1996* dealing with Medical Assessment Tribunals. The previous committee noted that proposed s.434 broadens the powers of removal of tribunal panel members, and sought information from the former Minister as to the types of conditions which are likely to be imposed upon the appointment of tribunal panel members under proposed s.434(2).

5. The former Minister provided the following comments:

> *The Committee has sought information as to the types of conditions that are likely to be imposed upon appointees to Medical Assessment Tribunals.*
>
> *The Committee's comments go to two considerations: the conditions of appointment and the procedures by which an appointee can be removed from office.*
>
> *The Amending Act provides that appointees hold office on the conditions not otherwise provided for by the Act, decided by the Governor in Council. (s.434(1))*
>
> *The Amending Act also provides that the office of the appointee becomes vacant if the appointee is removed from office by a signed notice from the Minister given in accordance with the conditions of the appointee's appointment (s 434(3)(c)).*
>
> *The Conditions of Appointment will ensure that all workers are treated fairly and with respect, and to ensure that the Medical Assessment Tribunals operate efficiently and effectively.*

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

The relationship between tribunal members and workers differs from that between treating medical specialists and patients. Notwithstanding this difference, it is expected that the professional ethics and standards of conduct of the medical profession will prevail.

The proposed Conditions of Appointment will include general conditions of appointment including procedures to be followed and ethical requirements to ensure that tribunal member maintain the independence and integrity of the Tribunal on which they serve. These Conditions of Appointment will go to maintaining confidentiality, disclosures of conflict of interest and expected standards of conduct.

WorkCover Queensland advise that consultation has occurred with the past Chair of the General Medical Assessment and the Deputy Chairs. Further consultation will be undertaken with members of the Medical Assessment Tribunals, the Australian Medical Association and speciality medical associations prior to the Conditions of Appointment being finalised. The results of consultation to date indicate broad support.

A standard grievance procedure is also being developed that will apply to alleged breaches of conditions of appointment.

6. The committee notes the former Minister's comments.

♦ **Clause 59**

7. Clause 59 introduces amendments to s.84 of the *Building and Construction Industry (Portable Long Service Leave) Act 1991* which adjust the interest payable on unpaid long service leave levies.

8. The previous committee drew to the attention of Parliament the potential for significant increases in the amount for which persons will be liable, in respect of unpaid long service leave levies.

9. The former Minister commented on this as follows:

The Committee is correct in that the amendment to adjust interest at the prescribed rate to compound interest will increase the amount payable on unpaid long service leave levy. However, this compounding interest will only be applied from the proclamation of the legislation being 1 January 2001.

All unpaid levies prior to 1 January 2001 will have the simple interest rate applied.

Q-Leave's method of collection of the levy can be considered a success in terms of compliance. Compliance with the levy is 95% when compared to Australian Bureau of Statistics data. However, there is an on going need to be vigilant in addressing compliance issues and this amendment will ensure that Q-Leave continues to be successful in terms of collection of the levy.

The primary deterrent available to Q-Leave to minimise non-payment of the levy is the interest penalty. It is considered that the enhanced interest penalties will act as a stronger deterrent to non-compliance with payment of the levy.

It is also considered that this amendment will further strengthen the Authority's high level of compliance within the industry

10. The committee notes the former Minister's comments.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[92]

- **Clauses 24 and 25**

11. Clauses 24 and 25 amend the *WorkCover Queensland Act* by broadening the range of purposes for which entry by authorised persons to workplaces may be effected, and inserting a wide-ranging set of post-entry powers. The previous committee drew the attention of Parliament to these matters.

12. The former Minister responded to the committee's comments:

> *Section 471 of the WorkCover Queensland Act 1996 (the Act) empowers an authorised person to apply to a Magistrate for a warrant to enter a place "on reasonable grounds". Under section 473, an authorised person can seize the evidence for which the warrant was issued or seize another thing "on reasonable grounds". However, authorised persons do not have the powers to search.*
>
> *On two occasions in recent years a warrant for entry has been sought to exercise an implied right to search. On both occasions, the Magistrate denied the right to search on the basis that under the Act, WorkCover has a right to enter premises with a warrant (section 471) and seize documents (section 473) but not search. There have also been several instances where a warrant has not been sought because of the anomaly that exists, that is, to enter and seize but not to search.*
>
> *The power to search complements existing powers to enter and seize. These powers are essential in relation to fraud and premium compliance*

13. The committee notes the former Minister's comments.

- **Clause 62**

14. The previous committee drew to the attention of Parliament the fact that the bill broadens the range of places which may be entered by an authorised officer in order to monitor compliance with the *Building and Construction Industry (Portable Long Service Leave) Act 1991*.

15. The former Minister provided the following comments:

> *The Committee is correct, through the amendments authorised officers will have authority to monitor and enter a range of places, but only where it reasonably believes that a person has information or documents about workers or building and construction work.*
>
> *Currently, the* Building and Construction Industry (Portable Long Service Leave) Act 1991 *allows an authorised officer entry to a site where building and construction work is taking place in order to obtain/search for documents and records relating to such work or workers. However, in many instances, the information and documents required are not kept "on site" but are kept elsewhere. For example, an architect may maintain the records relating to*

[92] Section 4(3)(e) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

building and construction work at their business premises whereas the work itself is being conducted at another location.

Consequently, the current provisions are restrictive in nature and are preventing proper compliance activities.

The provision proposed is justifiable and allows an authorised officer to enter a place when it is open for business on the condition that the officer reasonably believes relevant and necessary information or documents are held there. With this restriction removed, the provision will enable more efficient and effective investigative and compliance activities.

It will give stronger legislative basis to ensure that the Act is complied with in notification of building and construction work, payment of the levy and the registration and supply of service particulars by employers.

16. The committee notes the former Minister's comments.

This concludes the Scrutiny of Legislation Committee's 1st report to Parliament in 2001.

The committee wishes to thank all departmental officers and ministerial staff for their assistance in providing information to the committee office on bills dealt with in this digest.

Warren Pitt MP
Chair

15May 2001

APPENDICES

Appendix A	—	Ministerial Correspondence
Appendix B	—	Terms of Reference
Appendix C	—	Meaning of “Fundamental Legislative Principles”
Appendix D	—	Table of bills recently considered

APPENDIX B – TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established on 15 September 1995 by s.4 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[93] to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation[94].

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

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

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

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

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

93 "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.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.

94 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.

APPENDIX C - 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.[95]

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

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

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

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with the principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

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

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

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

(a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

(e) allows the subdelegation of a power delegated by an Act only –

(i) in appropriate cases and to appropriate persons; and

(ii) if authorised by an Act.

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95 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 D – TABLE OF BILLS RECENTLY CONSIDERED

(Appendix D is not reproduced in this Alert Digest – copies of the Appendix can be obtained from the Committee's Secretariat upon request.)