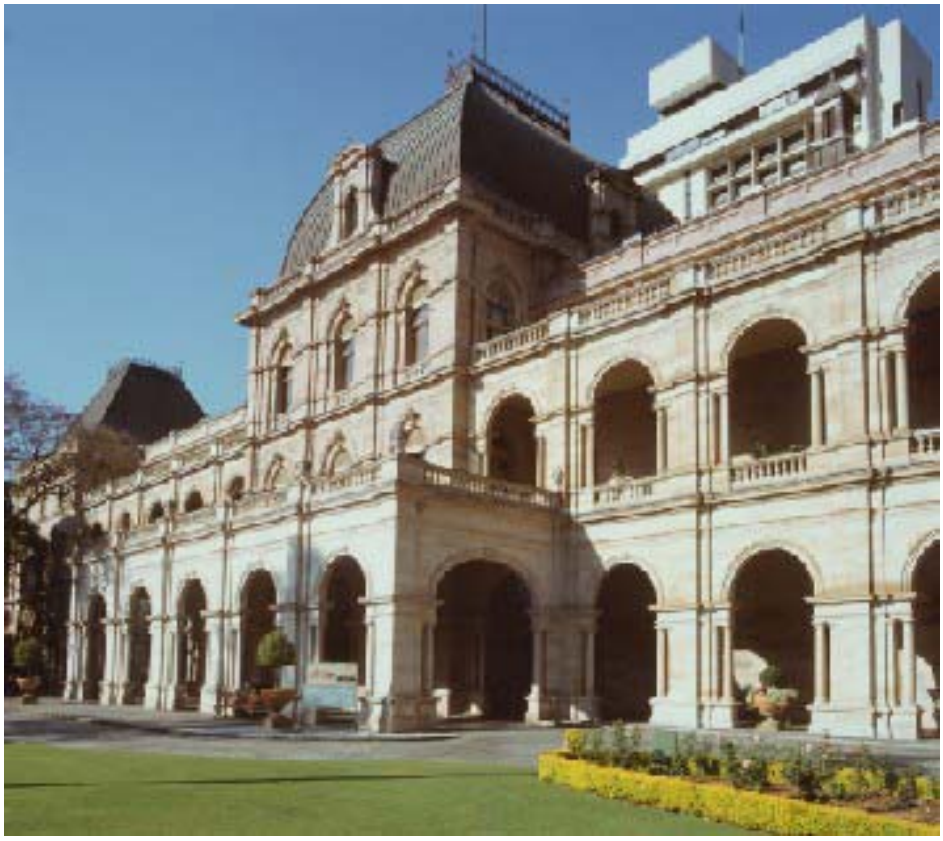
SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



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SCRUTINY OF LEGISLATION COMMITTEE
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50TH PARLIAMENT, 1ST SESSION

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

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

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

TERMS OF REFERENCE

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

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

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

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

by examining all Bills and subordinate legislation.

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

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

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

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

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

FUNDAMENTAL LEGISLATIVE PRINCIPLES

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

Section 4 is reproduced below:

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

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

* The relevant section is extracted overleaf.

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

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

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

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

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

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

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

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

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

PART I

BILLS

PART I - BILLS

SECTION A – BILLS REPORTED ON

1. APPROPRIATION BILL 2003

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 5 June 2003.

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

> (to) *provide for:*
>
> - *Appropriation for 2003-04 to fund the cost of delivering departmental outputs, administered items and equity adjustment in that year and certain outputs, administered items and equity adjustment delivered in the previous year but not previously funded; and*
> - *Supply for 2004-05 to allow the normal operations of government to continue until the Appropriation Bill for 2004-05 receives assent.*

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

2. APPROPRIATION (PARLIAMENT) BILL 2003

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 5 June 2003.

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

> (to) *provide for:*
>
> - *Appropriation for 2003-04 to fund the cost of providing the outputs, equity adjustment and administered items of the Legislative Assembly and parliamentary service in that year and certain outputs, equity adjustment and administered items delivered in the previous year, not previously funded; and*
> - *Supply for 2004-05 to allow the normal operations of the Legislative Assembly and parliamentary service to continue until the Appropriation (Parliament) Bill for 2004-05 receives assent.*

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

3. ARTS LEGISLATION AMENDMENT BILL 2003

Background

1. The Honourable M J Foley MP, Minister for Employment, Training and Youth and Minister for the Arts, introduced this bill into the Legislative Assembly on 3 June 2003.

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

> *To implement the recommendations of a review of five separate acts.*
>
> *These acts provide for the administration of Queensland's five cultural statutory authorities.*
>
> *They are the Queensland Art Gallery Act 1987, the Libraries Act 1988, the Queensland Museum Act 1970, the Queensland Performing Arts Trust Act 1977 and the Royal Queensland Theatre Company Act 1970.*

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

4. CHILD PROTECTION (INTERNATIONAL MEASURES) BILL 2003

Background

1. The Honourable J C Spence, Minister for Families and Minister for Aboriginal and Torres Strait Islander Policy and Minister for Disability Services and Minister for Seniors, introduced this bill into the Legislative Assembly on 4 June 2003.

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

> *To implement the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Child Protection Convention) in Queensland.*
>
> *To make amendments to the Child Protection Act 1999 to correct minor drafting errors, clarify the intention of the Act and to address anomalies. To make amendments to the Juvenile Justice Act 1992 to correct minor drafting errors.*

Does the legislation have sufficient regard to the institution of Parliament?[3]

♦ The bill generally

3. This bill forms part of a concerted approach by all Australian jurisdictions to the implementation of Australia's obligations under the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (the Convention), which the Commonwealth has ratified with effect from 1 August 2003.[4] This raises the possibility that it may form part of national scheme legislation.[5]

4. National schemes of legislation have been a source of considerable concern, both to the committee and to its interstate and commonwealth counterparts.[6] These schemes take a number of forms and the objection to them is greatest when they involve predetermined legislative provisions.

5. The Explanatory Notes assert (at page 7) that the bill does not constitute national scheme legislation, but the committee does not regard that issue as being clearcut.

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

4 See Explanatory Notes at pages 2-3.

5 The committee uses this term to describe broadly:

any and all methods of developing legislation, which is –

- uniform or substantially uniform in application;
- in more than one jurisdiction, several jurisdictions or nationally.

6 The relevant issues are canvassed in detail in *Scrutiny of National Schemes of Legislation – A Position Paper of Representatives of Scrutiny of Legislation Committees throughout Australia*, October 1996.

6. There is in one sense no intergovernmental agreement, in that the Commonwealth would presumably have constitutional power, if the States declined to cooperate, to simply implement the entirety of the Convention by passing its own legislation.

7. Further, as the Notes point out, the current bill is substantially based on a model bill which has been developed to assist State and Territory jurisdictions in implementing the Convention, but adoption of the model bill is to be at the discretion of each State and Territory. On the other hand, even though each State and Territory will control the form of its own bill, the Notes state that it is expected there will be little variation in the substance of the various State and Territory legislation.

8. The committee notes in passing that the model legislation upon which this bill is substantially based was developed by the Office of Queensland Parliamentary Counsel. This raises an expectation that, because of that Office's familiarity with Queensland drafting standards and with the fundamental legislative principles against which this committee assesses legislation, the bill may exhibit a relatively high degree of compliance with those standards and principles. In fact, the committee's scrutiny of the bill (excluding, of course, the Convention attached to it) indicates that this is the case, as it appears to raise very few issues for the committee.

9. Because of the background to this bill, there is a possibility that it may form part of national scheme legislation. Many elements of such schemes have been identified by scrutiny committees nationally as undermining the institution of Parliament.

10. The committee concedes, however, that this bill may not in fact fall into that category, and moreover notes that although it is substantially based upon a model bill available for adoption by any participating jurisdiction, the model bill was drafted by the Office of Queensland Parliamentary Counsel.

Does the legislation have sufficient regard to the rights and liberties of individuals?[7]

- **Schedule 3, items 14, 15 and 18**

11. Items 14, 15 and 18 of Schedule 3 to the bill are among a number of provisions which amend the *Child Protection Act 1999*. The effect of items 14, 15 and 18 is to broaden the range of persons who will be subject to the provision of compulsory criminal, domestic violence and traffic history checks.

12. In its report on the bill for the *Child Protection Act 1999* (see Alert Digest No. 11 of 1998 at pages 11-13) an earlier Scrutiny of Legislation Committee commented on provisions of that legislation which authorised the conduct of such checks. The committee canvassed the various issues associated with this matter at some length, and readers are referred to that report.

13. As the Explanatory Notes (at page 9) indicate, the effect of the amendments contained in the current bill is to broaden the range of persons subject to this regime by including persons

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

who have access to children in care because of their position within a licensed care service. The Notes state:

> *It is considered that the rights of vulnerable children to be protected from further harm while in the care of the State override adult rights in these circumstances.*

14. The committee notes that items 14, 15 and 18 of Schedule 3 to the bill amend the *Child Protection Act 1999* to extend the range of persons who can be required to undergo criminal, domestic violence and traffic history checks. The ramifications of this checking system have been canvassed in an earlier committee report.

15. The committee draws to the attention of Parliament the extension of the compulsory checking regime via these amendments.

5. FARM DEBT MEDIATION BILL 2003

Background

1. Mrs E A Cunningham MP, Member for Gladstone, introduced this bill into the Legislative Assembly on 5 June 2003.

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

> *to provide for the efficient and equitable resolution of farm debt disputes. Mediation is required before a creditor can take possession of property or other enforcement action under a farm mortgage.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[8]

- **Clauses 6 and 8**

3. Clause 8 of the bill provides that a creditor who is owed money by a farmer under a farm mortgage must not take enforcement action against the farmer in relation to the farm mortgage until at least 21 days after the creditor has given a notice to the farmer. Clause 9 provides that a farmer who has been given such a notice may within 21 days require mediation of the debt. Clause 6 of the bill provides that enforcement action taken by a creditor who has not complied with these and the other requirements of the bill is void.

4. Clause 11 of the bill provides that the Queensland Rural Adjustment Authority may effectively permit the creditor to initiate enforcement action against the farmer once the mediation process has been completed or been offered in accordance with the bill's requirements.

5. The net effect of the provisions mentioned above is that a creditor is prevented from enforcing the terms of a farm mortgage, for example where the farmer has defaulted on payments due under the mortgage, without going through a mediation process. This constitutes a restriction upon the contractual rights of the creditor under the mortgage instrument.

6. However, in the Australian context commerce operates under a wide range of statutory restrictions and prohibitions, and in that sense the restrictions proposed by this bill cannot be said to be unprecedented in nature.

7. Whether the particular restrictions proposed are appropriate is ultimately a matter for Parliament to determine.

8. The committee notes that paragraphs 6 and 8 of the bill restrict the capacity of creditors to enforce their contractual rights under farm mortgages, in that they will not be able to take enforcement action where the farmer breaches the agreement (by defaulting on payments due

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

under it or otherwise) without first offering the farmer mediation.

9. The committee refers to Parliament the question of whether these restrictions are appropriate in the circumstances.

♦ **Clause 31**

10. Clause 31 provides that proceedings for an offence against the provisions of the bill may be brought within 3 years after commission of the offence or, with the consent of the Attorney-General, at any later time.

11. Whilst prosecutions for criminal offences (essentially those under the *Criminal Code*) are not subject to any time limitation it is in the committee's experience highly unusual, if not unprecedented, for prosecutions for breach of statutory duty not to be subject to some ultimate time limitation.

12. The committee notes that cl.31 of the bill, whilst imposing a general 3 year limitation period upon the commencement of proceedings for offences against the bill's provisions, enables the Attorney-General to waive that limitation and permit proceedings to be brought at any later time.

13. The committee considers that prosecutions for breach of statutory duty should be subject to a time limitation, and that such limitations should be not unduly lengthy. The committee considers that in the current circumstances the period of 3 years mentioned in cl.31 may well be more than adequate as an ultimate limitation.

14. The committee recommends that the bill be amended to accommodate these concerns.

Does the legislation confer immunity from proceeding or prosecution without adequate justification?[9]

♦ **Clause 20**

15. As mentioned earlier, the bill provides for mediation of farm debt disputes. Clause 20 provides that mediators shall be immune from any action, liability, claim or demand in relation to anything done or omitted to be done by them, provided the Act or omission is in good faith for the purposes of executing the provisions of the bill.

16. Given that mediators do not have power to make any binding decisions, and that their function is to assist the parties to reach a settlement agreement, it is perhaps unlikely that a claim could successfully be brought against them in any event. However, there might be at least the technical possibility of claims based on, for example, defamation or economic loss caused by negligent advice given, or breach of confidence by, the mediator.

[9] 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.

17. The committee notes that the indemnity, as opposed to that routinely inserted in most bills which it examines, does not require that the mediator not have acted negligently.

18. The committee notes that cl.20 of the bill confers immunity from legal proceedings upon mediators for acts or omissions in relation to their execution of the provisions of the bill, provided only that the mediator has acted in good faith.

19. The committee refers to Parliament the question of whether this indemnity is appropriate in the circumstances.

6. HEALTH LEGISLATION AMENDMENT BILL 2003

Background

1. The Honourable W M Edmond MP, Minister for Health and Minister Assisting the Premier on Women's Policy, introduced this bill into the Legislative Assembly on 3 June 2003.

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

> (to amend) *11 Health portfolio Acts to provide greater protection for health service consumers and greater certainty to registered providers.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[10]

- **Clause 4 (proposed s.120A), cl.14 (proposed s.139A), cl.15 (proposed ss.140, 140A, 140B, 140C), cl.17, cl.33 (proposed s.124A), cl.94 (proposed s.121A) and cl.105 (proposed s.120A)**

3. This bill amends a range of health practitioner-related Acts which presently contain broad statutory definitions which restrict various practices to particular professions. The bill replaces these provisions with more specific restrictions on relevant "core practices", in other words, practices which are considered to pose a high risk of harm to patients. In so doing, the bill creates a number of new statutory offences in the various Acts, namely, the offence of performing the core practices if not registered as a relevant health practitioner. The new offences are universally accompanied by a prescribed maximum penalty of 1,000 penalty units ($75,000).

4. These maximum penalties are consistent with those contained in current provisions of the amended Acts which prohibit persons from taking restricted titles (some of these provisions have also been re-enacted in amended form with the same maximum penalties). The penalties nevertheless deserve mention because of their magnitude.

5. The committee notes that a number of provisions of the bill create offences for which the maximum penalty is 1,000 penalty units ($75,000).

6. The committee draws to the attention of Parliament the magnitude of these maximum penalties.

- **Clause 12 (proposed s.133A), cl.61 (definition of "criminal history"), cls.66, 67, 68, 69, 71 and 75 (proposed s.77A)**

7. As mentioned earlier, this bill amends a range of health practitioner-related Acts.

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

8. One feature of the bill is that it inserts into several of these Acts provisions which authorise requirements by registering authorities that applicants for registration disclose their criminal history, or which authorise the registering authority to have regard to that history.

9. In each case the provision expressly excludes the application of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. This means that all the applicant's convictions, no matter how old, will need to be disclosed and may be taken into consideration by the registering authority. Moreover cl.61 provides, for the purposes of the *Nursing Act 1992*, a definition of "criminal history" which includes not only convictions but charges which did not result in a conviction.

10. In relation to the matters mentioned above, the Explanatory Notes state:

> (The registering authority) *will have a more complete picture of an applicant's criminal history, including information about "old" convictions which may indicate a pattern of behaviour that could compromise the applicant's ability to practice the profession safely and competently.*
>
> *Provisions of this kind are common in occupational registration legislation where, for the purpose of protecting the public, the integrity of industry participants must be ensured.*
>
> *The provision currently exists in relation to* (other health professionals)*, consistent with the scope of criminal history provisions in other legislation dealing with registration of people who work primarily with children and other vulnerable people.*
>
> *While the amendments make provision for an applicant's criminal history to be taken into account by* (the registering authority)*, the possession of a criminal history does not necessarily make an applicant ineligible for registration, enrolment or authorisation. Nor does it mean that* (the registering authority) *must automatically refuse to register, enrol or authorise the applicant to practise.*
>
> *If an applicant is aggrieved by a decision of* (the registering authority) *to refuse an applicant for registration, the person may appeal against the decision to a District Court Judge.*

11. The committee notes that various provisions of the bill exclude the operation of the rehabilitation period provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, and that a definition of "criminal history" in the bill includes not only convictions but charges.

12. The Explanatory Notes deal with these issues in some detail.

13. The committee refers to Parliament the question of whether the provisions of the relevant clauses of the bill are appropriate in the circumstances.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[11]

- **Clause 59**

14. Clause 59 of the bill validates functions which were exercised by district health councils under the *Health Services Act 1991*, at any time when the council's membership was less than the minimum number required under the Act at the time of the exercise.

15. 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.

16. The factor giving rise to the possible invalidity of the relevant actions by district health councils, namely, the number of persons who were members of the council at the time, would appear to be a technical matter. In saying this, the committee assumes that the shortfall involved was in each case relatively small.

17. The committee notes that cl.59 validates certain actions taken by district health councils, and the clause can therefore be said to have retrospective effect.

18. However, the deficiency giving rise to the possible invalidity appears to be technical in nature.

19. The committee accordingly has no concerns in respect of this validating provision.

- **Clause 102 (proposed s.140B)**

20. Clause 102 inserts into the *Nursing Act 1992* proposed ss.140A-140C. These provisions require registrants to give the Queensland Nursing Council notice of various events all of which reflect, or might reflect, on their appropriateness to continue as a registrant.

21. Proposed s.140A requires a registrant to notify the Council if they are convicted of an indictable offence or an offence against a "corresponding law". Provisions of this nature are commonly encountered in legislation establishing registration regimes for the practice of professions and occupations. Proposed s.140C imposes an obligation to give notice of disciplinary action, and of cancellation suspension or imposition of conditions or undertakings under a "corresponding law".

22. In addition, proposed s.140B requires a registrant to give the Council notice of a court judgment, or out-of-court settlement, in respect of any court proceedings brought against the registrant "claiming damages or other compensation for alleged negligence by the relevant

[11] 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.

person in the practice of nursing". A maximum penalty of 50 penalty units ($3750) is provided for breach.

23. This lastmentioned provision takes the notification process beyond the traditional obligations contained in proposed ss.140A and 140C. It penalises a failure to notify the existence of any court judgments, and, in the case of out-of-court settlements, arguably intrudes upon the registrant's privacy. The possibility of legal proceedings based upon alleged professional negligence is nowadays a routine aspect of the practice of any profession. It could be argued that the fact that an individual claimant establishes legal liability against a health professional in relation to a single event does not necessarily reflect discredit upon the registrant's general professional abilities. This is even more so in relation to settlements of legal actions, which are made without any legal liability having been established by a court, and which often flow from a desire to avoid the vagaries and uncertainties of litigation. Settlements of negligence actions are routinely made with a denial of negligence and an assertion that the settlement is made in order to avoid these vagaries and uncertainties.[12]

24. The fact that a judgment has been entered, or an out-of-court settlement reached, in relation to an action for professional negligence does not of itself provide grounds for the institution of disciplinary action against the registrant. Much would depend upon the circumstances.

25. The Explanatory Notes do not appear to address these issues.

26. The committee notes that proposed s.140B (inserted by cl.102) inserts provisions which oblige a nursing registrant to notify the Queensland Nursing Council of, amongst other things, every judgment and out-of-court settlement given or reached in relation to negligence claims brought against the registrant in relation to the practice of nursing.

27. The committee seeks information from the Minister as to why the imposition of such a requirement is considered appropriate.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[13]

- **Clause 81 (proposed ss.101A and 101C)**

28. Proposed s.101A (inserted into the *Nursing Act 1992* by cl.81) empowers the Queensland Nursing Council to develop a code of practice or adopt another entity's code of practice, to provide guidance for nurses, midwives and other persons as to appropriate professional conduct or nursing practice. The code of practice is of no effect until approved by the Minister by gazette notice.

[12] The committee made similar comments on a identical provision of the *Health Practitioners Legislation Amendment Bill 2000* (see Alert Digest No. 13 of 2000 at pages 12-14).

[13] Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

29. Under proposed s.101C, an approved code of practice is admissible as evidence in disciplinary proceedings, in order to provide evidence of appropriate professional conduct or nursing practice.

30. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated will be dealt with by regulations, to be processed through an alternative means which does not constitute subordinate legislation.[14]

31. The significance of providing for matters to be dealt with by these alternative processes, as opposed to regulations, is of course that the relevant instruments are not "subordinate legislation" and are therefore not subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*, nor to scrutiny by this committee.

32. In considering whether such alternative processes are appropriate, the committee takes into account the importance of the subject matter dealt with, and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation. The relevant issues do not appear to be addressed in the Explanatory Notes.

33. The content of the codes of practices is likely to be of some significance, as it can be used to provide evidence of appropriate professional conduct disciplinary proceedings.

34. The current provisions of the *Nursing Act*, which will be repealed by this bill and replaced by the provisions mentioned above, are somewhat similar in nature, although they expressly provide that breach of the code of conduct is grounds for disciplinary action. The current bill is slightly less express in linking the code to appropriate standards of conduct.

35. However, whereas the current provisions provide that a code of conduct must be approved by regulation, which instrument is of course subject to tabling and disallowance and to scrutiny by this committee, the provisions of proposed s.101A, which provide for approval by a gazette notice, will avoid such parliamentary scrutiny.

36. The committee notes that proposed ss.101A and 101C (inserted by cl.81) authorise the making of codes of conduct which are of some significance and which are neither themselves, nor are given effect to, by any subordinate legislative instrument. They are accordingly not subject to parliamentary scrutiny.

37. The committee seeks information from the Minister as to why it is considered appropriate that such codes of conduct should not be subject, either directly or indirectly, to parliamentary scrutiny.

[14] See for example Alert Digest No. 8 of 1998 at pages 9-10.

7. HIGHER EDUCATION (GENERAL PROVISIONS) BILL 2003

Background

1. The Honourable A M Bligh MP, Minister for Education, introduced this bill into the Legislative Assembly on 27 May 2003.

2. The objects of the bill, as indicated by the Explanatory Notes, are to:

    - *uphold the standards of education delivered by higher education institutions; and*
    - *maintain public confidence in the higher education sector in the State.*

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[15]

♦ **Clauses 50 and 64**

3. Clause 50 imposes a standard condition upon the accreditation of accredited courses. The condition is to the effect that the governing body of the non-university provider offering the course must:

    - allow the Minister to enter, at any reasonable time, a place to examine the provider's operation of the course at that place; and
    - comply with all reasonable requests by the Minister to give the Minister information or records.

4. The purpose of these conditions, in the words of cl.50, is to enable the Minister to consider whether, having regard to the relevant criteria mentioned in the national protocols, the course and the way of delivering it are appropriate to the type of award to which the course relates.

5. Clause 64 imposes similar standard conditions in relation to approvals under cl.63, which enables an interstate university to operate in Queensland under an agency arrangement.

6. These are significant entry and post-entry powers, even though they are conferred in a much briefer form than is usually the case with similar statutory powers, and although they are characterised not as statutory powers but as conditions of the relevant approval.

7. Given the nature of the relevant accreditations and approvals, the fact that the bill incorporates entry and post-entry powers is not entirely surprising. The entry powers are, however, significant in that they are exercisable without consent or the obtaining of a warrant.

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

8. The committee notes that cls.50 and 64 confer significant entry and post-entry powers.

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

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[16]

♦ **Clauses 78 and 79**

10. Clause 78 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).

11. Clause 79 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

12. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.

13. Clauses 78 and 79, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

14. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.

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

16. The committee refers to Parliament the question of whether cls.78 and 79 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

[16] 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.

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[17]

- **Clause 84**

17. Clause 84 authorises the Minister to issue guidelines for the bill. The subjects with which the guidelines may deal are set out cl.84(2), which states that the guidelines "give guidance" about these matters. The matters concerned are administrative matters relevant to applications under the bill, how an applicant should deal with issues involved in the proper formulation of the application, and the type of information to be included in an annual report.

18. The guidelines are not subordinate legislation. The chief consequence of this is that they are not subject to the tabling and disallowance provisions of part 6 of the *Statutory Instruments Act 1992*, nor to scrutiny by this committee.

19. The committee has, in the past, commented adversely on provisions preventing matters which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means such as this.

20. In the present case, however, it seems quite clear from cl.84 that the guidelines will deal with matters of detail and that the guidelines are moreover not prescriptive in nature.

21. The committee notes that cl.84 authorises the Minister to issue guidelines for the bill. These guidelines will not be subordinate legislation and will not therefore be subject to the scrutiny of Parliament or of this committee.

22. However, given the nature of the subjects to be dealt with by the guidelines, the committee does not consider the provisions of cl.84 to be objectionable.

Does the legislation have sufficient regard to the institution of Parliament?[18]

- **Clauses 16(4), 25(2), 30(5), 42(2), 44, 46(2), 58, 65 and 71**

23. Clauses 16(4), 25(2), 30(5), 42(2), 46(2) and 65 of the bill provide that the Minister may approve applications in relation to a range of important matters, such as an institution's application for approval to be established or recognised as a university in Queensland, or to operate an overseas higher education institution in Queensland, only if the Minister is satisfied there is compliance with relevant criteria mentioned in the 'national protocols'.

24. The 'national protocols' are defined in the dictionary to the bill as follows:

> *"**national protocols**" means the document entitled 'National protocols for higher education approval processes' that was approved by MCEETYA on 31 March 2000.*[19]

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17 Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

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

19 A copy of the document may be inspected during office hours on business days at the head office of the department.

25. 'MCEETYA', referred to in the definition of "national protocols', is in turn defined in the dictionary as follows:

> ***"MCEETYA"*** *means the Ministerial Council on Education, Employment, Training and Youth Affairs*

26. The effect of these provisions is to incorporate into Queensland law an external document, namely, the "national protocols". However, the reference in the definition to the document approved on 31 March 2000 indicates that what is incorporated is the document as in existence at that date, and does not include any subsequent amendments to the document.

27. Clauses 44, 58 and 71 of the bill prohibit the conferral, or holding out of authority to confer, "higher education awards" by higher educational institutions, non-university providers, and interstate universities operating in Queensland under agency arrangements respectively.

28. "Higher education award" is defined in the dictionary to the bill as including "any other award, if the course of study relating to it is classified as higher education in the course descriptions stated in the Australian Qualifications Framework". This later term is, in turn, defined in the dictionary as follows:

> *"**Australian Qualifications Framework**" means the national framework of educational qualifications –*
>
> *(a) approved by MCEETYA; and*
>
> *(b) stated in the implementation handbook for that framework published by the Australian Qualifications Framework Advisory Board, as in force from time to time.*[20](underlining added).

29. This provision incorporates into Queensland law the contents of another extrinsic document, but on this occasion the incorporation automatically includes any amendments which may subsequently be made to the document.

30. Both the "national protocols" and the "Australian Qualifications Framework" are of considerable importance in the scheme of the bill.

31. The incorporation by reference of the contents of external documents, either in fixed form or in whatever corm they may take from time to time, is a feature of a significant number of bills examined by the committee. The fixed form option is acceptable. provided the document concerned is readily accessible to readers of the legislation, and that appears to the case with the "national protocols".

32. The incorporation of external documents in whatever form they may take from time to time (as with the Australian Qualifications Framework)[21] raises an additional issue, namely, that this practice has the tendency to undermine the institution of Parliament by effectively delegating the making of Queensland law to outside bodies.

33. It is the committee's preference that the incorporation of external documents by bills be kept to the minimum achievable in the circumstances, and this is particularly so where a

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[20] The implementation handbook may be inspected during office hours on business days at the head office of the department or viewed at the web site at http://www.curriculum.edu.au/aqfab.htm

[21] The footnote to the definition of this term in the bill indicates that copies of this document will be readily accessible to readers.

document is incorporated in the form it may take from time to time. Having said this, the committee recognises that there may be cases where there are practical arguments in favour of the use of this drafting device.

34. In relation to these matters, the Explanatory Notes state:

> *It is arguable that referring to the National Protocols and the Australian Qualifications Framework does not have sufficient regard to the institution of Parliament in that it allows for the delegation of legislative power and does not subject the exercise of the delegated legislative power to the scrutiny of the Legislative Assembly.*
>
> *The management of the National Protocols and AQF are the responsibility of MCEETYA. The Minister for Education is a member of the MCEETYA and is involved in the maintenance and operation of the National Protocols and the AQF.*
>
> *The National Protocols and the AQF are an integral part of a national framework for higher education in Australia that ensures national consistency.*
>
> *As such, the provisions are justifiable given the status the national framework and the fact that all states and territories recognise the National Protocols and the AQF.*

35. The committee notes that several clauses of the bill incorporate by reference the contents of external documents, in one case in its current form and in the other in its form from time to time.

36. The committee considers the incorporation in its current form of the "national protocols" is not objectionable in the circumstances.

37. The committee refers to Parliament the question of whether, in the circumstances, the incorporation in ambulatory form of the Australian Qualifications Framework is appropriate.

8. HOUSING BILL 2003

Background

1. The Honourable R E Schwarten MP, Minister for Public Works and Minister for Housing, introduced this bill into the Legislative Assembly on 27 May 2003.

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

> (to make) *way for a more contemporary and flexible system for the administration of the State's housing programs.*

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

♦ **Clause 40**

3. Part 4 of the bill (cls.20-37 inclusive) establishes a system under which the chief executive may register various entities (both public and private) stipulated in cl.21 as "registered providers" of housing services. Once they are registered, the chief executive may give them financial and other assistance with which to provide such services.

4. The bill contains a number of provisions which regulate various aspects of the operations of registered providers. In particular, part 5 of the bill (cls.38–62) enables the chief executive to appoint an "interim manager" of a "private" registered provider at any time it is providing a "funded service" (cl 40).

5. The definitions relating to the exercise of this power (see cl.39) are framed in such terms that the power may be exercised even where the property administered by the registered provider has been derived only <u>partly</u> from grants, loans or other financial assistance provided by the chief executive.

6. In other words, even if the provider's relevant assets have been funded primarily from non-government sources, it will potentially be subject to the exercise of this power if <u>any</u> assistance has been provided by the chief executive.

7. This is subject to the requirement of cl.41(2)(b) that in deciding whether an interim manager should be appointed, the chief executive must have regard to, amongst other matters:

> *the amount and type of assistance provided by the chief executive to the* (entity) *to provide the funded service.*

8. As the Explanatory Notes concede, the appointment of an interim manager is a significant step, which may affect the rights and liberties of employees and officers of the registered provider, as well as those of third parties such as creditors.

9. In relation to these matters, the Explanatory Notes state:

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

> *The overriding objective of the registration scheme established in the Bill is to protect clients, tenants, funds and assets acquired through the granting of public funds.*
>
> *...*
>
> *It is considered that these provisions are necessary to protect the public interest and that they strike a reasonable balance between the rights and interests of clients who may be protected by the appointment of an interim manager and other individuals who may be adversely affected by the appointment.*

10. The committee notes that under Part 5 of the bill, an interim manager may be appointed in relation to certain registered providers, even if their operations have been only partly funded by departmental funds. However, in deciding whether to make such an appointment, the chief executive is required to have regard to the amount and type of assistance which has been provided by the department.

11. In the opinion of the committee, this appears to achieve an appropriate balance between the competing interests of the department, clients and tenants on the one hand, and those of the provider, its employees, officers and creditors on the other.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[23]

- **Clause 63**

12. Part 6 of the bill (cls.63-67 inclusive) establishes a system of review of decisions made under the bill. A list of reviewable decisions, which appears to include all significant decisions likely to be made under the bill, appears in cl.63.

13. However, the review provided is to the chief executive and not, either immediately or ultimately, to an external reviewer such as a court or tribunal.

14. An aggrieved person could still seek judicial review under the *Judicial Review Act 1991*, although that process is limited, relatively expensive and procedurally-oriented and does not address the merits of decisions.

15. The reviewable decisions are essentially those made by the chief executive about the provision to individuals of public housing services, and those in relation to registered providers registered under Part 4 of the bill.

16. In relation to decisions concerning registered providers, the Explanatory Notes state:

> *Registration enables an entity potentially to receive financial and other assistance from the Department under Part 4 of the Bill. Since the benefit of registration is to enable access to State money to provide housing services it is considered that there is insufficient justification to impose a requirement for external review of the allocation of State funds.*

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

Part 4 of the Bill specifies that registration may only be cancelled where there is no assistance agreement in force with the registered provider and the chief executive is satisfied that it is unlikely that action will be taken to enforce compliance by the provider with the Act or grant further assistance to the provider. The effect of these provisions ensures that there can be no funding relationship and no outstanding business between the Department and a registered provider when a decision to cancel registration is made. The power to cancel registration is considered therefore, to be appropriately limited. A decision to cancel registration is specified to be a "reviewable" decision under Part 6 of the Bill and accordingly, upon application by a registered provider, will be subject to review by the Department of Housing.

The department will continue to consider the issue of external review throughout the implementation of the new legislation and when the legislation is reviewed.

17. The Explanatory Notes do not appear to provide justifications for limitation of the appeal process in relation to decisions about an individual's eligibility for public housing. Presumably the Minister would justify those restrictions on the basis of operational imperatives such as the nature and substantial number of the relevant decisions.

18. The committee notes that whilst cl.63 provides a system of review in relation to what appears to be all significant decisions made under the bill, that review will be conducted by the chief executive and will not, either directly or ultimately, be to an external reviewer such as a court or tribunal.

19. The Explanatory Notes address this issue at length in relation to registered providers, although not in relation to decisions concerning individuals.

20. The committee refers to Parliament the question of whether the review process provided by the bill is appropriate in the circumstances.

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

- **Clauses 76-86 inclusive**

21. Clause 77 of the bill empowers authorised officers to enter a place for the purpose of monitoring or enforcing certain provisions of the bill and of the *Residential Tenancies Act* (see also cl.68). These powers are noticeably limited, in that they do not provide for the issue of entry warrants, and apart from consent situations, apply only to public places where entry is made while the public place is open to the public, or to places which are not residences and where entry is made where the place is open for the conduct of business. Importantly, the entry powers do not apply in relation to residences provided to persons under the bill.

22. Once entry has been effected, cl.79 confers on authorised officers a range of powers. These powers are similar to those the committee has examined in a range of other bills.

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

23. An obvious issue for the drafters of this bill was that whilst it is not normal to confer statutory powers of entry without warrant in relation to premises where people reside, monitoring and enforcement of the provisions of this bill will largely concern premises which are in fact residences. For example, a significant matter for investigation may be whether individual housing clients are complying with the statutory obligations imposed upon them under Part 3 of the bill (cls.16-19) (such as unauthorised use or subletting of rental accommodation).

24. It appears that the drafters of the bill have made a conscious decision that enforcement and monitoring will be based on information gathering, rather than on entry of client premises.

25. In relation to the entry and post-entry powers, the Minister in his Second Reading Speech states:

> *The Bill provides Authorised Officers with the power to require information or documents from any person for information gathering and enforcement purposes. This power may be exercised in relation to the individual or organisation under investigation, and third parties. It is intended to allow the department to obtain sufficient information in order to establish whether or not an offence or other non-compliance has been committed.*
>
> *The Bill also grants powers of entry by consent to assist authorised officers to conduct investigations in respect of registered providers. It should be noted that authorised officers do not have the power to enter residential premises of departmental clients in the course of investigating possible breaches of the legislation.*
>
> *The integrity of the services and programs provided and/or funded by Government will be better maintained through these information gathering and enforcement provisions ...*

26. The committee notes that cl.77 of the bill confers relatively limited powers of entry, whilst cl.79 confers reasonably extensive post-entry powers. The entry powers reflect a legislative policy to conduct monitoring and enforcement functions primarily via information gathering.

27. If appropriate enforcement and monitoring can be achieved in this way, the legislative option adopted by this bill is to be commended.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[25]

- **Clauses 90 and 91**

28. Clause 90 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).

29. Clause 91 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

[25] 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.

30. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.

31. Clauses 90 and 91, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

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

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

34. The committee refers to Parliament the question of whether cls.90 and 91 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[26]

- **Clause 152**

35. Clause 152 authorises the making of transitional regulations for the bill.

36. The committee has found that transitional regulation-making provisions can give rise to a range of issues, and has commented adversely on some such provisions. The committee notes that cl.152 is broadly framed, and authorises the making of regulations which are retrospective at least to the date of commencement to the bill. However, both cl.152 and any regulations made under it expire 12 months after the bill's commencement.

37. The committee notes that cl.152 confers broad transitional regulation-making powers. However, the committee notes that the clause and any regulations made under it expire 12 months after the bill's commencement.

38. The committee refers to Parliament the question of whether the provisions of cl.152, in the circumstances, are reasonable.

[26] 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.

9. INTEGRATED PLANNING AND OTHER LEGISLATION AMENDMENT BILL 2003

Background

1. The Honourable J I Cunningham MP, Minister for Local Government and Planning, introduced this bill into the Legislative Assembly on 4 June 2003.

2. The objects of the bill, as indicated by the Explanatory Notes, are:

> *to amend the operation of aspects of the Integrated Planning Act 1997 (IPA), in particular—*
>
> - *existing use provisions—to simplify and clarify;*
> - *several provisions for planning schemes and planning scheme policies—to improve legibility and assist with implementing IPA planning schemes;*
> - *procedures for designation of land for community infrastructure;*
> - *infrastructure planning and funding mechanisms;*
> - *several provisions of the Integrated Development Assessment System (IDAS), to address deficiencies and improve legibility; and*
> - *transitional arrangements in chapter 6 of the IPA—to improve their clarity and operation.*

Overview of the bill

3. This bill contains the second major round of amendments to the *Integrated Planning Act 1997*.

4. The bill is a substantial document of 158 pages, with Explanatory Notes totalling 137 pages. The *Integrated Planning Act 1997*, which the bill extensively amends, introduced an innovative planning and development assessment regime which is to an extent is still in a developmental stage.

5. Whilst the provisions of the bill doubtless impact in various ways upon the rights of individuals, the provisions are technical in nature as well as being rather complex and specialised. Their appropriateness is ultimately a matter for Parliament to decide.[27]

6. However, the committee makes the following comments in relation to the bill.

[27] In its report on the first substantial amending bill, the *Integrated Planning and Other Legislation Amendment Bill 2001*, reported on in Alert Digest No 9 of 2001 at pages 8-12, the committee made similar comments in respect of the general effect of that bill.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[28]

- **Clauses 2(1), 2(2), 98 and 101**

7. Clause 2(1) of the bill provides that cl.98 of the bill "is taken to have commenced on 30 March 1998". Clause 2(2) provides that cl.101 "is taken to have commenced on 31 March 2003".

8. These provisions will therefore have retrospective effect.[29]

9. 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.

10. The *Integrated Planning Act 1997*, which is the principal statute amended by this bill, is a highly complex and rather procedurally-oriented piece of legislation. It is accordingly difficult for the committee to discern whether the retrospective provisions included in the bill have any adverse effects on persons other than the State and/or local governments. However, the committee notes that the retrospectivity issue is dealt with at some length in the Explanatory Notes (see pages 3-4) and that the Notes state:

> *The Bill contains no provisions that will adversely affect the rights and liberties of individuals.*
>
> *Several of the amendments to the transitional arrangements in chapter 6 of the IPA will be deemed to have commenced at an earlier date, and will consequently be retrospective in their effect. In all cases, these provisions are aimed at enhancing or clarifying rights by addressing deficiencies in the existing provisions. For example—*
>
> ……
>
> (Four examples follow, relating to cls.99, 102 and 103)

11. The committee notes that the bill contains several provisions which have, or may have, retrospective effect. These include several clauses which are given retrospective effect by cl.2.

12. The committee has had difficulty in identifying any effects of such provisions which are adverse to individuals other than the State and/or local governments.

13. The committee makes no further comment in relation to the retrospective operation of the bill.

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28 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.

29 The Explanatory Notes also refer to several other provisions of the bill which in a more indirect way may ultimately have retrospective effect.

Does the bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?[30]

- **The bill generally, and cl.106**

14. As was the case with the first set of major amendments to the *Integrated Planning Act*[31], an examination of the current bill reveals that overall it contains many provisions which authorise the making of regulations. Many of these appear to deal with matters which are potentially of significance.

15. As with the earlier bill, it may well be that this extensive reliance on regulations reflects the subject-matter of the *Integrated Planning Act*, and perhaps also the innovative nature of that legislation.

16. In addition, cl.106 confers power to make transitional regulations in order to facilitate the introduction of the provisions of this bill.

17. The committee has found that transitional regulation-making provisions can give rise to a range of issues, and has sometimes commented adversely on such provisions. The committee notes that whilst the cl.106 (proposed s.6.2.1) regulation-making power is broadly framed, the proposed section (in contrast to some similar provisions in other bills) does not purport to authorise regulations affecting the operation of the Act in such a manner as to constitute it a "Henry VIII clause". It does, however, authorise the making of regulations which are retrospective, at least to the date of assent of the bill. Also, the committee notes that any transitional regulations made under the provision, together with the provision itself, expire 1 year after commencement of the bill.

18. The subject-matter of the bill, and perhaps also the innovative nature of the *Integrated Planning Act*, probably renders the inclusion of a broadly-framed transitional regulation-making power less objectionable and, the committee concedes, perhaps even necessary.

19. In her response to the committee's report on the earlier bill the Minister (as no doubt she would again) referred, in relation to the bill's extensive reliance on regulations, to the nature of the subject-matter as effectively making such reliance inevitable.

20. The committee notes that the bill contains many provisions which authorise the making of regulations about matters of apparent significance, and further notes that the bill also includes a broadly-framed transitional regulation-making power.

21. Whilst the committee concedes that, in the circumstances, the presence of these provisions is probably not objectionable, the committee nevertheless draws their presence to the attention of Parliament.

30 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.

31 The *Integrated Planning and Other Legislation Amendment Bill 2001*, mentioned earlier.

10. LAND TAX AMENDMENT BILL 2003

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 4 June 2003.

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

> *to amend the Land Tax Act 1915 to implement measures announced in the 2003-2004 State Budget.*

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[32]

♦ **Clauses 2-9 inclusive**

3. Clause 2 of the bill declares that it "is taken to have commenced on 1 July 2003". Whilst the bill was introduced into Parliament on 4 June 2003, Parliament does not sit again until 19 August 2003 and the bill will therefore not have been passed and assented to prior to 1 July.

4. Clause 2 might not of itself cause the bill to have retrospective effect. Land tax is charged on land "as owned at midnight on 30 June immediately preceding the financial year in and for which the tax is levied" (s.12, *Land Tax Act 1915*).

5. However, cl.9 makes it clear that the bill is to operate retrospectively, by providing that:

> *This Act as amended by* (this bill)*, applies to land tax levied for the financial year beginning on 1 July 2003 and each later financial year.*

6. The committee always take 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.

7. As to the first matter, the committee notes that the changes made by cls.4-8 inclusive of the bill appear to be universally beneficial to taxpayers. Each of the clauses raises the minimum

[32] 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.

amount of land value applicable in relation to rebates (cl.4), taxable value of land (cl.5), land exempted from tax (cl.6), obligation to furnish returns (cl.7), and capacity to refrain from levying where the amount of land tax which would be levied is small (cl.8).

8. The committee notes that whilst the bill has retrospective effect, the changes which it makes appear to be universally beneficial to taxpayers.

9. The committee accordingly has no concerns in relation to the retrospective operation of this bill.

11. LIQUOR AMENDMENT BILL 2003

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 27 May 2003.

2. The objects of the bill, as indicated by the Explanatory Notes, are to:

   - *require new licensees and nominees to provide evidence of having attended a licensee's course as part of their liquor application process; and*
   - *introduce a scheme for the approval of trainers to deliver the licensee's course;*
   - *to clarify that areas under a special facility licence may be subleased by the licensee to another person.*

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

12. MAJOR SPORTS FACILITIES AMENDMENT BILL 2003

Background

1. The Honourable T M Mackenroth MP, Deputy Premier, Treasurer and Minister for Sport, introduced this bill into the Legislative Assembly on 27 May 2003. It was subsequently passed as an urgent bill on the same day following suspension of Standing Orders.

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 yet been assented to, there is in practice no scope for it to come back before Parliament once it has passed the third reading stage. Accordingly, it would be futile for the committee to attempt to comment on the bill's contents.

4. The committee only has jurisdiction to comment on bills not Acts. 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.

13. SURVEY AND MAPPING INFRASTRUCTURE BILL 2003

Background

1. The Honourable S Robertson MP, Minister for Natural Resources and Minister for Mines, introduced this bill into the Legislative Assembly on 27 May 2003.

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

> *to provide an appropriate level of legislative support for the development and maintenance of the state's survey and mapping infrastructure. The Bill consolidates into one Act, and updates where necessary, the relevant provisions of the Survey Coordination Act 1952, Administrative Boundaries Terminology Act 1985 and the Surveyors Act 1977.*

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[33]

- **Clauses 6 and 7**

3. Clause 6(1) of the bill authorises the chief executive to make "survey standards" which are described as "written standards for surveying … to achieve an acceptable level of survey quality". The survey standards must be consistent with principles stated in a regulation (cl.62). A survey standard is a statutory instrument, but is not subordinate legislation (cl.65).

4. However, a survey standard has no effect unless the Minister notifies its making by gazette notice. The gazette notice is subordinate legislation (cl.9).

5. Clause 7 authorises the chief executive to make "survey guidelines", that is "written guidelines for surveying … stating ways of complying with survey standards". A survey guideline is a statutory instrument, but is not subordinate legislation (cl.7(3)). A survey guideline takes effect when it is published on the department's website on the internet (cl.9(5)).

6. The committee has previously commented adversely on bills which permit matters, which it might reasonably be anticipated will be dealt with by regulations, to be processed through an alternative means which does not constituted subordinate legislation. An important consequence of this is that the instruments are not subject to the Parliamentary tabling and disallowance provisions of Part 6 of the *Statutory Instruments act 1992*.

7. As mentioned, the bill expressly states that neither the survey standards nor the survey guidelines are subordinate legislation. However, as also mentioned, the survey standards (as opposed to the survey guidelines) do not come into force until notified by gazette notice, which is itself subordinate legislation.

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[33] Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

8. Whilst the survey standards are of undoubted importance, it seems probable that their content will be highly technical in nature and will not readily lend itself to incorporation in legislative form. In the case of the survey guidelines, which are again of some significance, it seems even clearer that content may not be easily rendered into legislative form.

9. The committee notes that cls.6 (survey standards) and 7 (survey guidelines) both authorise the making of instruments of some significance which are not subordinate legislation. However, the survey standards do not take effect until notified by a Gazette notice which is itself subordinate legislation.

10. Given the nature of the instruments in question and their likely content, the committee does not consider cls.6 and 7 to be objectionable.

♦ **Clauses 10, 54 and 64**

11. The bill provides that the chief executive may require payment of "a fee decided by the chief executive" for supplying to a person a copy of a survey standard or survey guideline (cl.10), and for inspecting and obtaining copies of information contained in the publicly available part of a state data set held in the department. If the data set is held by an entity under cl.53, the fee is to be decided by, and payable to, the entity for the same services (cl.54).

12. Clause 64 provides that any such fees set for a copy of a document or information contained in a document "must not be more than (the relevant entity's) reasonable cost of producing the copy".

13. The committee has recently given general consideration to the manner in which fees provided for in bills are set, and in particular, whether fees are prescribed by regulation or are set administratively. This bill again draws attention to that issue. The committee is developing its views on the matter, and intends in the near future to either declare a general policy on the matter or table a report on it.

14. In the circumstances, the committee makes no further comment on the provisions of cls.10, 54 and 64.

15. The committee notes that cls.10 and 54 of the bill provide for certain fees to be set by the chief executive or other relevant entity, rather than being prescribed by regulation.

16. The committee intends in the near future to declare a general policy on the setting of fees, or to table a report on the subject.

17. In the circumstances, the committee had decided to make no further comment at this time on the provisions of cls.10 and 54.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?[34]

- **Clauses 19, 20 and 43**

18. Clause 20, in relation to a decision of the chief executive under cl.19 adverse to an applicant for exemption from a survey standard for a particular survey, provides a ministerial review process.

19. Clause 43 also provides a ministerial review process in relation to decisions of the chief executive adverse to an applicant seeking authority to interfere with a recognised permanent survey mark.

20. In relation to both these matters the Explanatory Notes state:

> *The option of providing an appeal to the Magistrate's Court was considered. However, as this is a technical matter in which the Court may not have sufficient expertise, it was considered more appropriate to provide an avenue of appeal to the Minister. The Minister is in a position to seek independent technical advice before making the decision.*

21. The committee notes that in respect of certain types of administrative decisions, cls.19 and 43 provide for a ministerial review process rather than review by a court or tribunal.

22. The Explanatory Notes provide arguments in favour of these provisions.

23. The committee draws the provisions of cls.19, 20 and 43 to the attention of Parliament.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[35]

- **Clauses 22-27 inclusive**

24. Clause 22 of the bill provides that a surveyor may enter freehold land or land held under the *Land Act 1994* "at any reasonable time" in order to carry out a survey or place a permanent survey mark on the land. Prior to entry, the surveyor must make a reasonable attempt to inform the occupant of his or her intention to enter. This entry power is quite widely framed, although it may only be exercised for a limited range of purposes.

25. Clause 24 confers a range of powers exercisable after entry has been effected. They are again fairly comprehensive in nature, although limited to a specific purpose.

26. The committee notes that cls.22-27 inclusive of the bill confer upon surveyors fairly widely-

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

[35] 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.

framed powers of entry, and similarly broad post-entry powers.

27. The committee draws these provisions to the attention of Parliament.

14. SURVEYORS BILL 2003

Background

1. The Honourable S Robertson MP, Minister for Natural Resources and Minister for Mines, introduced this bill into the Legislative Assembly on 27 May 2003.

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

> *to protect the public who commission surveys, through a system of registration for surveyors. The Bill replaces those parts of the Surveyors Act 1977 that provide for the system of registration and discipline of surveyors in Queensland. The Bill arises from an NCP review of the Surveyors Act 1977, addressing a number of issues raised in that review and also dealing with a range of other administrative issues.*

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[36]

♦ **Clause 39**

3. Clause 39(1) authorises the Surveyors Board of Queensland to establish "the competency frameworks appropriate for the qualifications, skills, knowledge and experience needed for … registration as a surveyor, etc, under the bill". Clause 39(3) provides that a competency framework is a statutory instrument, but is not subordinate legislation.

4. The "competency frameworks" will therefore not be subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*, nor will they be subject to scrutiny by this committee. The committee has, in the past, commented adversely on provisions permitting matters which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means such as this.

5. In considering whether it is appropriate that matters be dealt with through such alternative processes, the committee takes into account the importance of the subjects dealt with, and the practicality or otherwise of including those matters in subordinate legislation.[37]

6. In this case, the competency frameworks will deal with matters clearly of some importance, since they will underpin the board's approach to approving the registration of persons. On the other hand, it appears that the basis upon which applicants for registration are to be assessed may be broader and less prescriptive than under previous legislation. In relation to this matter, the Explanatory Notes state:

> *The competency framework establishes the basis for the operation of the registration system, as registration provides evidence of competency. While it is likely that most people obtaining*

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[36] Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

[37] The technical nature of the content of such instruments, and the need for rapid amendment, are often factors cited by Ministers in support of such provisions.

registration will have completed tertiary training, it is possible for persons to obtain the same level of knowledge without tertiary training. The focus of the competency framework is on the qualifications, skills, knowledge and experience that the person is required to have, and not on how they obtained them.

7. Were the possession of an appropriate tertiary qualification effectively to be a prerequisite to registration, the committee would probably have considered it appropriate that the relevant qualifications be listed in a regulation. As the Notes indicate, however, the importance of possessing an appropriate tertiary qualification is reduced under the bill's provisions, which place more emphasis upon the possession of relevant qualities.

8. In the circumstances, it may be that there would be some difficulties involved in formulating these attributes in a manner suitable for legislation.

9. The committee notes that cl.39 provides for the establishment of "competency frameworks" which, whilst statutory instruments, will not be subordinate legislation and will not therefore be subject to the scrutiny of Parliament or of this committee.

10. The committee seeks information from the Minister as to why the content of these frameworks is not to be incorporated in regulations.

♦ **Clause 80**

11. Clause 80(1) requires the board to develop "a written code of practice" to provide guidance to registrants about appropriate professional conduct. Clause 80(5) provides that whilst the code of practice is a statutory instrument, it is not subordinate legislation.

12. As mentioned earlier, this means that the instrument will not be subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*, nor will it be subject to scrutiny by this committee. As also mentioned earlier, the committee has in the past commented adversely on provisions permitting matters which it might reasonably be anticipated would be dealt with by regulation, to be processed through an alternative means such as a code of practice.

13. The code will be of some importance, as, under cl.118, a disciplinary committee, when deciding whether a registrant has engaged in professional misconduct, "must have regard (amongst other matters) to … the code of practice …".

14. Under cl.83, the code of practice "is admissible as evidence in disciplinary proceedings brought by the board against a registrant" although only "to provide evidence of appropriate professional conduct or practice".

15. Again, in considering whether it is appropriate that matters be dealt with through such alternative processes, the committee takes into account the importance of the subjects dealt with, and the practicality or otherwise of including those matters in subordinate legislation.

16. Whilst, as mentioned, the code is of undoubted importance, it is not clear to the committee whether its contents would be difficult to incorporate in legislative form.

17. The committee notes that cl.80 requires the board to develop a written code of practice in

relation to appropriate professional conduct, and that this code of practice will not constitute subordinate legislation.

18. Accordingly, it will not be subject to the scrutiny of Parliament.

19. The committee seeks information from the Minister as to whether, and if so why, there would be difficulties in incorporating this document into a regulation.

♦ **Clauses 40, 42 and 68**

20. Clauses 40, 42 and 68 all provide that in exchange for supplying persons with copies of the competency framework, records of accredited entities and information from the board's register of surveyors, surveying graduates, surveying associates and emeritus surveyors, the board may require payment of a "fee decided by the board".

21. Clause 186 provides that such fees must be not more than the board's reasonable cost of producing the copy.

22. On the other hand, cls.44, 45, 54 and 60 stipulate that fees for applications for competency assessment (cl.44), registration or registration endorsement (cl.45), renewal of registration or registration endorsement (cl.54), and restoration of registration or registration endorsement (cl.60), are to be prescribed by regulation.

23. As mentioned in its report elsewhere in this Alert Digest on the *Survey and Mapping Infrastructure Bill 2003*, the committee is currently considering the general issue of the mode of setting fees in bills, and intends in the near future to either declare a general policy on the matter or table a report on it.

24. The committee notes that certain fees payable under the bill may be determined by the board itself, rather than being set by regulation. The board is currently considering the general issue of the mode of setting fees in bills, and intends either declaring a general policy on the matter or tabling a report on it.

25. In the circumstances, the committee makes no further comment on cls.40, 42, and 58 at this time.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[38]

♦ **Clauses 139-162**

26. Clause 139 of the bill confers upon investigators powers of entry which extend somewhat beyond situations where the occupier consents or the entry is authorised by warrant. However, the entry powers are relatively modest when compared with those included in a number of bills previously examined by the committee.

[38] 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.

27. Clauses 140-162 inclusive confer an extensive range of post-entry powers, broadly similar to those employed in a number of bills previously examined by the committee.

28. The committee notes that the bill confers upon investigators powers of entry which extend somewhat beyond situations where the occupier consents or a warrant has been obtained.

29. The committee further notes that once entry has been effected, the bill confers on investigators a wide range of additional powers.

30. The committee draws these entry and post-entry powers to the attention of Parliament.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[39]

- **Clauses 184 and 185**

31. Clause 184 effectively declares persons (including corporations) to be guilty of offences committed by their representatives (which term, in the case of corporations, includes their executive officers).

32. Clause 185 obliges executive officers of a corporation to ensure that the corporation complies with the provisions of the bill, and provides that if the corporation commits an offence against the provisions of the bill, each executive officer also commits an offence.

33. Both clauses provide grounds upon which liability may be avoided. These are essentially that the person took reasonable steps to ensure compliance and/or to prevent the offending act or omission, or that the person was not in a position to influence the conduct of the relevant person, corporation or partnership.

34. Clauses 184 and 185, which are in a form routinely employed in many bills examined by the committee, both effectively reverse the onus of proof, since under the law a person generally cannot be found guilty of an offence unless he or she has the necessary intent.

35. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations.

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

37. The committee refers to Parliament the question of whether cls.184 and 185 contain a justifiable reversal of the onus of proof, and therefore have sufficient regard to the rights and liberties of individuals.

[39] 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.

15. TOURISM SERVICES BILL 2003

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 27 May 2003.

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

> *provide protection for consumers by regulating the conduct of inbound tour operators and tour guides.*

Overview of the bill

3. This bill introduces a regulatory scheme in relation to inbound tour operators. It establishes a registration system, provides for codes of conduct and prohibits "unconscionable conduct" by inbound tour operators and tour guides.

4. The stated purposes of the bill are twofold. Its first aim is to curb the exploitation of tourists travelling on packages organised by inbound tour operators (the tourists concerned are almost exclusively overseas tourists). Its second aim is, in the words of the Explanatory Notes, "to protect the interests of those tourism-based businesses who do not participate in undesirable and unfair trading practices".

5. This bill is similar to most forms of consumer protection legislation in that it can, at least to an extent, be said to interfere with the commercial relationship between inbound tour operators and the tourists who purchase their packages. However, some of the practices referred to in the Explanatory Notes, such as inbound tour operators knowingly giving their customers false information about the outlets they are visiting and the prices and accessibility of alternative outlets, seem clearly inconsistent with what the tourists in question must have expected from their tour operators.

6. The bill will at least indirectly benefit other tourism-based businesses, which do not participate in the undesirable and unfair trading practices addressed by the bill.

7. Legislation interfering in one way or another with the conduct of commercial activities is commonplace and, as mentioned earlier, almost all consumer protection legislation has this effect. The appropriateness or otherwise of the restrictions contained in the bill is a matter for Parliament to determine.

8. The following specific aspects of the bill require comment.

Is the legislation consistent with the principles of natural justice?[40]

♦ **Clause 29**

9. Clause 29 provides that the Commissioner for Fair Trading may, if the commissioner considers on reasonable grounds that a registrant is contravening or has contravened the provisions of the bill or other related legislation[41] and that tourists may suffer or have suffered detriment because of that contravention, suspend the registrant's registration for a period of up to 28 days.

10. This suspension takes effect immediately an "information notice" is given by the commissioner to the registrant.

11. The registrant may appeal against the imposition of this suspension.

12. There is no requirement that, before imposing the suspension, the commissioner must provide the registrant with an opportunity to make submissions about relevant matters.

13. The suspension continues beyond the 28 day period if, during the suspension, the commissioner commences disciplinary proceedings against the registrant (cl.30).

14. The provisions mentioned above clearly impact upon a person's right to natural justice.

15. Depending upon the subject dealt with by a particular bill, there may well be sufficient justification for permitting immediate suspension without any right to make submissions. Examples in other bills examined by the committee, with which the committee has not taken issue, are those involving significant issues of public safety or public health. In the present case, the issues underlying the suspension power appear to be primarily concerned with financial detriment to consumers.

16. The committee notes that cl.29 of the bill authorises the commissioner, in particular circumstances, to immediately suspend a registrant's registration if the commissioner considers on reasonable grounds that various consumer protection Acts (including the bill) are being contravened, and that tourists have or may suffer detriment because of that conduct.

17. This provision is inconsistent with the registrant's right to natural justice.

18. The committee refers to Parliament the question of whether, in the circumstances dealt with by this bill, the denial of natural justice is justified.

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40 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.

41 *The Fair Trading Act 1989, The Travel Agents Act 1988, The Trade Practices Act 1974* (Cwth) or a "corresponding law".

Does the legislation have sufficient regard to the rights and liberties of individuals?[42]

♦ Clause 32

19. Clause 32 provides that a person's registration is automatically cancelled if the person is convicted of a "serious offence", or if an order is made against the person under part 9 of the bill.

20. The clause defines "serious offence" as an offence under *The Fair Trading Act 1989*, part 3,[43] or a corresponding law for which the maximum penalty is at least 100 penalty units ($7,500) or imprisonment. Part 9 of the bill authorises the District Court, upon application by the commissioner or a person who claims to have suffered financial loss because of a contravention of the bill's provisions, to make an order requiring the relevant inbound tour operator or tour guide to pay a money penalty to the State or to pay an amount to the "injured person" as compensation.

21. It should be noted that cl.32 does not merely require the commissioner to have regard to such convictions or orders and provide the commissioner with a discretion as to whether or not to cancel the registration on that basis, but provides that registration shall automatically be cancelled.

22. The committee notes that cl.32 of the bill provides that if persons are convicted of certain offences, or if an order is made against them under part 9 of the bill, their registration is automatically cancelled.

23. The committee refers to Parliament the question of whether, in the circumstances, such automatic cancellation has sufficient regard to the rights of registrants.

♦ Clause 93

24. Clauses 93(1) and (2) provide that the Minister or commissioner may issue public statements identifying, and giving warnings or information about, unconscionable conduct, contraventions of the bill and offences against the bill, and in doing so identify particular persons.

25. Clause 93(3) provides that such public statements or warnings must not be issued by the Minister or commissioner "unless satisfied that it is in the public interest to do so".

26. Individual inbound tour operators, tour guides and other persons could clearly be adversely affected by the contents of such statements. The principal legal issue raised by such statements is that of possible defamation.

27. In this regard, the committee notes that cl.95 provides that an "official" (defined as including the Minister and commissioner) "is not civilly liable for an act done, or an admission made honestly and without negligence under (the bill)".

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

43 Part 3 incorporates into Queensland law a range of offences under *The Trade Practices Act 1974* (Cwth) primarily concerning misleading, deceptive or unconscionable conduct, false or misleading representations and the like.

28. This provision would provide some protection to the Minister or commissioner in proceedings for defamation, as under the general law a person can be liable for defamation even if they did not intend that the statement made should defame, or even if they had no reason to suspect that it would have that effect.

29. However, whilst protecting the Minister and commissioner personally, the clause does not in itself prevent an action being brought, as cl.95(2) effectively transfers any civil liability which would otherwise attach to the Minister or commissioner, to the State.

30. Provisions similar to cl.93 have appeared in a number of other consumer protection-oriented bills which the committee has examined.

31. The committee notes that cl.93 authorises the Minister or commissioner to give public statements or public warnings or information in relation to contraventions of the bill, in the course of which individuals may be named.

32. This clearly has the potential to impact adversely upon the position of those individuals.

33. The bill does not appear to confer any ultimate immunity from legal liability in relation to such statements, warnings and information.

34. The committee draws the contents of cl.93 to the attention of Parliament.

Does the legislation confer power to enter premises and to search for or seize documents or other property without a duly issued warrant?[44]

- **Clauses 44 to 64 inclusive**

35. Part 6, division 2 of the bill (cl.44 to 64 inclusive) contains provisions about the powers of inspectors.

36. Clause 44 empowers an inspector to enter "places". This power extends beyond situations where the occupier consents or the entry is authorised by warrant, in that it applies to a variety of other places provided entry is made when the place is open to the public or open for carrying on business or otherwise open for entry. The places in question are public places, places where inbound tour operators and tour guides carry on business, and places where the inspector reasonably believes records relating to the business of such persons are kept.

37. Given the nature of the offences created by the bill, it is likely that a very large percentage of such offences will in fact occur in places of one or more of the above types which are open to the public, or open for the carrying on of business or otherwise open for entry.

38. Once entry is effected pursuant to cl.44, the bill confers a wide range of post-entry powers similar to those which the committee has observed in other bills it has examined.

[44] 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 o other property, only with a warrant issued by a judge or other judicial officer.

39. The committee notes that cl.44 of the bill confers upon inspectors powers of entry which extend somewhat beyond situations where the occupier consents or entry is authorised by a warrant. Once entry has been effected, the bill confers an extensive range of post-entry powers.

40. The committee draws to the attention of Parliament the nature and extent of these entry and post-entry powers.

Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?[45]

- **Clauses 12, 79(5), 79(6), 89 and 90**

41. The bill contains several provisions which effectively reverse the onus of proof.

42. Firstly, cl.79(2) provides that a court may order an inbound tour operator or tour guide to pay to the State as a money penalty, or to a person who has suffered financial loss as compensation, "an amount up to the limit of the court's civil jurisdiction".

43. Clause 79(5) goes on to provide that if the inbound tour operator is a corporation and does not have the resources to pay the penalty or compensation, "the executive officers of the corporation are jointly and severely liable to pay any amount not paid by the corporation". Clause 79(6) provides grounds upon which this liability may be avoided. These are essentially that the executive officer took reasonable steps to ensure the corporation did not commit the contravention which gave rise to the orders, or was not in a position to influence the conduct of the corporation in relation to that matter.

44. Secondly, cl.89 contains a provision, identical to that included in a number of other bills the committee has examined, requiring the executive officers of a corporation to ensure that the corporation complies with the bill's provisions, and providing that if the corporation commits an offence against the provision of the bill, each of its executive officers also commits the offence of failing to ensure the corporation complies with the provision. Again, the clause provides grounds upon which liability may be avoided. These are similar to the grounds set out in cl.79(6).

45. Thirdly, cl.90(5) provides that if a contravention or offence against a provision of the bill is taken to have been committed by a partnership, the contravention or offence is taken to have been committed by each of the partners.

46. Clause 90(6) provides grounds upon which liability may be avoided. These are again similar to those set out in cl.79(6).

47. Fourthly, cl.12 of the bill, which creates the offence of carrying on the business of an inbound tour operator whilst not registered, provides that it is a defence to prove that the

[45] 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.

person is an "exempt person". An exempt person is defined, in brief, as an operator which sells less than 20% of its total travel packages to overseas entities.

48. All of these provisions effectively reverse the onus of proof. In the second and third cases, this occurs because under the law a person generally cannot be found guilty of an offence unless he/she has the necessary intent. In the first case, a corporation's executive officers are made *prima facie* liable for one category of its civil debts if it is unable to pay them. In the fourth case, the reversal of onus occurs because the offence provision is framed in such a way that a burden of proof is placed upon the tour operator to prove that it sells to the overseas market to an extent of less than 20%.

49. In relation to the reversal of onus contained in cls.89 and 90 (essentially identical issues arise in cl.79) the Explanatory Notes state:

> *These clauses are included because provisions which a corporation or partnership may contravene have the potential to cause substantial detriment to consumers and to Queensland's tourism industry. In these circumstances, it is appropriate that an executive officer or partner who is in a position to influence the conduct of the corporation or partnership, and who is responsible for a contravention, should be accountable for such a contravention. This is especially relevant to the inbound tour industry, because many of the people who use the services of an inbound tour operator have little or no knowledge of English or of how business operates in Australia.*

50. In relation to cl.12, the Notes state:

> *This is appropriate because the person seeking to rely on the defence will be in the best position to prove the number of sales made to overseas entities or otherwise, and the time those sales were made. Evidence of these facts is peculiarly within the defendant's knowledge and is not something the prosecution could reasonably obtain or disprove to the required standard.*

51. The committee notes that cls.12, 79, 89 and 90 contain reversals of the onus of proof. Apart from cl.79, which relates to civil liabilities, the provisions all concern offences created under the bill.

52. In relation to the three offence-related reversals of onus, the committee makes the following observations.

53. The committee has previously considered provisions which reverse the onus of proof, particularly in relation to corporations. Whilst difficulties of determining liability in certain circumstances (for example, corporations) are appreciated, the committee as a general rule does not endorse such provisions.

54. The committee refers to Parliament the question of whether cls.12, 89 and 90 contain justifiable reversals on the onus of proof, and therefore have sufficient regard to the rights of liberties of individuals.

16. TRANS-TASMAN MUTUAL RECOGNITION (QUEENSLAND) BILL 2003

Background

1. The Honourable T A Barton MP, Minister for State Development, introduced this bill into the Legislative Assembly on 4 June 2003.

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

> (to) *replace the Trans-Tasman Mutual Recognition (Queensland) Act 1999.*

Overview of the bill

3. The *Trans-Tasman Mutual Recognition (Queensland) Act 1999* ("the 1999 Act"), which this bill replaces, was passed by Parliament on 9 March 1999 and assented to 18 March 1999.

4. The objective of the 1999 Act was to make Queensland a participating party in the Trans-Tasman Mutual Recognition Arrangement, by national scheme legislation, via adopting the Commonwealth *Trans-Tasman Mutual Recognition Act 1997* ("the Commonwealth Act").

5. An earlier Scrutiny of Legislation Committee reported on the bill for the 1999 Act in Alert Digest No. 6 of 1998 at pages 24-27. The Premier's response to the committee's comments was reported in Alert Digest No. 9 of 1998 at pages 32-33.[46] As mentioned, the 1999 Act gave effect to the relevant Arrangement by adopting the Commonwealth Act under s.51(xxxvii) of the *Commonwealth Constitution*.

6. The adoption of the Commonwealth Act by the 1999 Act was stated to end, at the latest, 5 years after the date fixed under the Commonwealth Act (that is, by 30 April 2003).

7. As the Minister indicates in his Second Reading Speech, a proposed review by the Commonwealth of the Arrangement and associated legislation was not completed prior to the expiry of the Queensland Act, and is ongoing.

8. Accordingly, under this bill Queensland will re-enact the Commonwealth Act, in order to provide continuity of the existing arrangements until such time as the current review is completed and the legislation reconsidered. For that purpose, the current bill (by way of contrast with the 1999 Act), provides (see cl.6) that the effect of the current bill will terminate on a date which the Governor in Council may fix at a future time.

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[46] A bill in identical form to the 1999 Act had been introduced into Parliament by the Hon R E Borbidge MLA, former Premier, on 17 March 1998. A previous Scrutiny of Legislation Committee reported on that bill in Alert Digest No 3 of 1998 at pages 37-40.That bill was not enacted prior to dissolution of the Parliament in May 1998, and accordingly lapsed.

Does the legislation have sufficient regard to the institution of Parliament?[47]

- **Clause 5**

9. The current bill, as was the case with the 1999 Act and the earlier lapsed bill, adopts the Commonwealth Act "as originally enacted and as amended from time to time by regulations made under the Commonwealth Act".

10. The issues raised by the current bill, which are essentially identical to those raised by the 1999 Act, were addressed in some detail in the committee's report on the bill for that Act (see Alert Digest No. 6 of 1998 at pages 24-27), and in the Premier's response (see Alert Digest No. 9 of 1998 at pages 32-33).

11. The committee has established that since 1998, the only amendments to the Commonwealth Act have been amendments to schedule 1 of the Act (made by a Commonwealth amending Act) and to schedules 2 and 3 of the Act (made by Commonwealth regulations). The substantive provisions of the Commonwealth Act appear to be identical to those commented on by the committee in 1998.

12. Accordingly, the committee sees no merit in again canvassing these issues, and refers readers to its reports on the bill for the 1999 Act.

13. The committee notes that this bill raises issues in terms of the institution of Parliament which are identical to those raised by the Act which it replaces.

14. Those issues were canvassed at length by an earlier Scrutiny of Legislation Committee in its reports on the bill for the earlier Act (Alert Digest No. 6 of 1998 at pages 24-27 and Alert Digest No. 9 of 1998 at pages 32-33), which the current committee adopts and repeats in relation to this bill. Readers are referred to those comments.

Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?[48]

- **Clause 2 and 10**

15. Clause 2 declares that the current bill, other than s.12 and the schedule, "is taken to have commenced on 1 May 2003".

16. Clause 10 validates anything done or purporting to have been done between the expiry of the 1999 Act on 30 April 2003 and the date upon which this bill is enacted.

17. The bill therefore clearly has retrospective effect.

18. 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

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

48 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.

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.

19. As the Premier in his Second Reading Speech, and the Explanatory Notes, both assert, the purpose of these provisions of the bill is to preserve and safeguard the system which has been established since the Trans-Tasman Mutual Recognition Arrangement was instituted. This arrangement is clearly both facilitative and beneficial in nature. Moreover, given the circumstances surrounding the expiry of the 1999 Act as outlined by the Minister and the Explanatory Notes, the committee accepts that it is appropriate this bill should operate retrospectively to the expiry date, and that any actions taken in the meantime under the 1999 Act should be validated.

20. The committee notes that cls.2 and 10 of the bill are retrospective in nature.

21. Given the nature of the relevant legislative scheme and the circumstances surrounding expiry of the current Queensland legislation, the committee considers the insertion of these validating provisions is unobjectionable and indeed appropriate.

22. Accordingly, the committee has no concerns in relation to the retrospective aspects of this bill.

17. TRANSPORT INFRASTRUCTURE AND ANOTHER ACT AMENDMENT BILL 2003

Background

1. The Honourable S D Bredhauer MP, Minister for Transport and Minister for Main Roads, introduced this bill into the Legislative Assembly on 3 June 2003.

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

   - *to amend the Transport Infrastructure Act 1994 for various reasons; and*
   - *to make minor amendments to the Transport Operations (Passenger Transport) Act 1994.*

Does the bill sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly?[49]

♦ **Clause 21 (proposed s.101X)**

3. Clause 21 inserts into the *Transport Infrastructure Act 1994* proposed s.101X, which deals with the reporting by "accredited persons" of "serious incidents".

4. Section 101X(2) authorises the chief executive to make written guidelines with respect to various matters. These are:

   - guidelines to which they are to have regard in deciding whether an incident is one which needs to be reported under s.101X(1);

   and guidelines about:

   - the information that must be included in reports;
   - the times within which reports must be made;
   - the form of reports.

5. The guidelines will of course not be subordinate legislation and will therefore not be subject to the tabling and disallowance provisions of Part 6 of the *Statutory Instruments Act 1992*, nor will they be subject to scrutiny by this committee. The committee has, in the past, commented adversely on provisions permitting matters which it might reasonably be anticipated should be dealt with by regulations, to be processed through an alternative means such as guidelines.

[49] Section 4(4)(b) of the *Legislative Standards Act 1992* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

6. In considering whether it is appropriate that matters be dealt with through such alternative processes, the committee takes into account the importance of the subjects dealt with, and the practicality or otherwise of including those matters in subordinate legislation. The Explanatory Notes do not appear to address these issues.

7. Some of the matters mentioned in s.101X(2), including matters to which regard must be had in deciding whether an incident is reportable, and (in particular) the times within which reports must be made, appear to the committee to be matters the nature of which should lend itself to inclusion in regulations.

8. In this case, the guidelines appear to deal with matters of mixed importance. On the one hand, guidelines concerning matters to which regard must be had by accredited persons in deciding whether a reportable incident has occurred are of some significance, but this is reduced by the fact that they are not prescriptive in nature but are only matters to which regard must be had. The guidelines laying down requirements about information to be included in reports, and the form of reports, would not appear to be of great significance. However, the guidelines prescribing the times within which reports must be made, in the overall scheme of things, would appear to be of some importance.

9. The committee notes that whilst the guidelines themselves are not subordinate legislation, they do not take effect until the Minister notifies their making. The relevant notice is subordinate legislation (s.101X(6)). Whilst this mechanism, which is employed in a significant number of bills examined by the committee, does indirectly provide accountability to Parliament, the appropriateness of the guidelines process itself remains a live issue.

10. The committee notes that proposed s.101X (inserted by cl.21) authorises the making by the chief executive of guidelines about various matters, and that these guidelines will not constitute subordinate legislation. However, the guidelines will not take effect until a notice, which is subordinate legislation, is published by the chief executive.

11. Some of the matters which may be dealt with in the guidelines appear to be of some significance, and appear to be of such a nature that they could be accommodated in regulations.

12. The committee seeks information from the Minister as to whether consideration was given to including some or all of the subject matter of these guidelines in subordinate legislation.

Does the legislation provide appropriate protection against self-incrimination?[50]

- **Clause 20 (proposed s.101Q)**

13. Clause 20 inserts into the *Transport Infrastructure Act* proposed s.101P, which authorises a rail safety officer to require an "accredited person" to produce a document "required to be kept by the accredited person under the approved safety management system" for the railway managed or operated by the accredited person. The section also authorises requirements to produce documents "prepared under the approved safety management

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

system.…that the officer reasonably believes is necessary for the officer to consider, to understand or verify a document that is required to be kept under the system".

14. Section 101Q(1) provides that a person to whom such a requirement is directed must produce the relevant document, unless the person has a reasonable excuse. Section 101Q(2) provides that it is not a reasonable excuse for a person that complying with the requirement might tend to incriminate the person.

15. Provisions similar to this have appeared in a number of bills considered by the committee in recent years.

16. The committee's views on provisions denying persons the benefit of the rule against self-incrimination are well known. In short, the committee normally considers such provisions are only potentially justifiable if:

- the matters concerned are matters peculiarly within the knowledge of the persons denied the benefit of the self-incrimination rule, and which it will be difficult or impossible to establish via any alternative evidentiary means;
- the bill prohibits the use of the information obtained in prosecutions against the person;
- in order to secure this restriction of the use of the information obtained, the person should not be required to fulfil any conditions such as formally claiming the right.

17. The bill does not appear to contain any express restriction on the use of the information obtained through the production of the relevant documents ("derivative use immunity"). However, the denial of the self-incrimination protection only applies in relation to a relatively narrow range of documents, namely, documents required to be kept under the approved railway safety system (and associated explanatory documents).

18. In relation to this matter, the Explanatory Notes state:

> *However, the requirement needs to be viewed in the overall scheme of the Act setting up a co-regulation system. As such, accredited persons develop their own safety management systems and are required to implement and continually improve them. Without access to documents forming part of the system, rail safety officers would not be able to audit the system and find hidden faults and problems. It is considered that this departure is justified because of the need to uncover breaches of the Act and thereby prevent loss of life, considerable injury, significant property losses and damage to railway infrastructure.*

19. The committee notes that proposed s.101Q (inserted by cl.20) denies persons the benefit of the rule against self-incrimination in relation to production of documents required to be kept under an approved safety management system, and associated explanatory documents.

20. The committee generally opposes the removal of the benefit of the self-incrimination rule, and usually only considers it potentially justifiable if certain conditions (mentioned above) are satisfied.

21. The Explanatory Notes set out arguments in favour of excluding the rule in the current circumstances.

22. The committee refers to Parliament the question of whether the denial of the benefit of the

self-incrimination rule by proposed s.101Q is justifiable.

18. VAGRANTS, GAMING AND OTHER OFFENCES (FLAG PROTECTION) AMENDMENT BILL 2003[51]

Background

1. Mrs E A Cunningham MP, Member for Gladstone, introduced this bill into the Legislative Assembly on 4 June 2003 as a private member's bill.

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

> *amend the Vagrants, Gaming and Other Offences Act 1931 to provide protection for our State and National flags.*

Does the legislation have sufficient regard to the rights and liberties of individuals?[52]

♦ **Clause 4**

3. Clause 4 inserts into the *Vagrants, Gaming and Other Offences Act 1931* proposed s.35A ("Damaging or destroying State or Commonwealth flag"). The proposed section is in the following terms:

> *'A person must not intentionally burn, slash or otherwise damage or destroy a flag of a State or the Commonwealth in the view of another person.*
>
> *Maximum penalty—100 penalty units.'*[53]

4. Whilst the proposed section is very broadly framed, it is clear from the Member's Second Reading Speech and the Explanatory Notes that it is primarily aimed at situations in which a State or Commonwealth flag is destroyed in a public setting as a form of political protest against some governmental action or policy.

5. As the Explanatory Notes and the Member in her Second Reading Speech both clearly recognise, it is arguable that the bill's prohibition of actions which, at least in the context mentioned above, are intended as a form of political comment, constitutes a restriction upon freedom of expression.

6. Under the common law, freedom of expression is a "negative" right or freedom, in that it exists only where the law does not impose restrictions upon it.[54] The common law (as well as statute law) imposes a range of such restrictions. The common law of defamation and the common law offence of blasphemy are examples.

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

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

53 100 penalty units equates to $7,500.

54 *Halsbury's Laws of Australia*, paragraph 80-1945: *James v Commonwealth (1936) 55 CLR 1*.

7. However, the committee is unaware of any provision of the common law, or of current statute law, which clearly prohibits persons from destroying or damaging a flag where that flag is their property.[55]

8. In her Second Reading Speech the Member states:

> *This Bill in no way restricts the right of individuals and groups to peaceful protest. It will however, remove one aspect of protest which has, in the past caused concern and distress to some in the community. The sight of our National flag being set alight has caused a great deal of distress and sadness particularly to those returned service men and women who have fought under the flag for the freedom of our nation. It has been expressed to me that the wanton destruction of the flag merely to emphasise a point during a protest is an act of disrespect that also disrespects the memory of those who have died for our nation.*
>
> *I believe that many who burn or slash the flags as a sign of protest would not consider the hurt they may be causing others who view their actions. However the strength of feeling expressed to me in relation to this matter has been strong and consistent.*
>
> *The flag, as a symbol of our State and our Nation, should have conferred on it sufficient status and protection to ensure respect and dignity are afforded, not just to the tangible aspects of the flag but the symbolism for which it stands.*

9. There are two aspects of the drafting of the proposed section which, whilst also raising issues concerning clarity,[56] are relevant to its impact upon the rights and liberties of individuals.

10. Firstly, as mentioned earlier, the circumstances in which the section prohibits a person from intentionally damaging or destroying a flag are very wide, as it applies to any such event which takes place "in the view of another person". Whilst, as also mentioned earlier, the provision is clearly primarily aimed at events occurring in a public setting, its wording suggests it will also apply to events taking place in any number of private or semi-private contexts. This could include, for example, an event which occurs in a person's home in the presence of a family member who is not involved in the exercise.

11. In the opinion of the committee, the provision's apparent application to events occurring in private settings raises additional, and significant, concerns. Indeed, the committee questions the justification for applying it in many, if not most, such settings (for example, a person's home), given that this would constitute a major intrusion upon the rights and liberties of citizens.

12. In the opinion of the committee the range of circumstances to which the provision, as presently drafted, will apply is unacceptably wide. The committee considers the provision should be amended in order to specify those circumstances in suitably qualified terms[57].

13. Secondly, the term "flag" is not defined in the bill. The term is of course defined in general dictionaries, for example:

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55 Depending on the circumstances, it is of course possible that the damaging or destruction of a flag will give rise to breaches of other laws, such as those relating to fire safety, public safety or traffic.

56 These are addressed later in this Chapter.

57 For example, it could be declared to apply to events occurring in public places, with that term being suitably defined..

> ***a****. a piece of cloth, usu. oblong or square, with particular colours and often symbols, attachable by one edge to a pole or rope and used as a country's emblem or as a standard, signal, etc.* ***b*** *a small toy, device, etc, resembling a flag.*[58].

14. These definitions suggest that the prohibition will apply not only in relation to a flag as traditionally understood, but also to other items (such as a sheet of paper) which bear a reproduction of the design of a Commonwealth or State flag. The range of additional items is potentially quite broad, and the uncertainty as to the range of such items is undesirable. The committee considers the term "flag" should be appropriately defined in the bill.

15. The committee notes that cl.4 inserts into the *Vagrants, Gaming and Other Offences Act 1931* an additional s.35A, which prohibits the intentional burning, slashing or otherwise damaging or destroying a flag of the State or Commonwealth "in the view of another person". A maximum penalty of 100 penalty units ($7,500) is provided for breach.

16. This provision arguably has the potential to restrict the capacity of persons to engage in political comment, and thereby to restrict their freedom of expression.

17. Also, to the extent that the provision applies to events occurring in private settings, it is arguably an unwarranted intrusion upon the rights of citizens.

18. The committee considers the bill should be amended to suitably qualify the range of circumstances in which the provision will apply, and to insert a definition of the term "flag".

Does the legislation have sufficient regard to the institution of Parliament?[59]

- **Clause 4**

19. In the opinion of the committee, the only apparent basis for questioning the constitutional validity of the cl.4 proposed offence, if enacted, is that it infringes the constitutional freedom of political communication implied from the *Commonwealth Constitution*. This implied freedom derives from those provisions of the *Commonwealth Constitution*, especially ss.7 and 24, which are based on the principle of representative and responsible government. Sections 7 and 24 guarantee the direct election by the people of the members of the Commonwealth Parliament. The High Court in a series of decision in the 1990s derived this implied freedom to ensure that the electorate is sufficiently informed to enable it to exercise a real choice in voting (see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106).

20. As an implied freedom, it operates as a restriction on the power of the Commonwealth Parliament and Executive to curtail or inhibit all forms of communication about government or political affairs. Moreover, it has also been held by the High Court to operate as a restriction on State legislative and executive power: *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 1. While some doubt may remain as to whether it operates at that level in relation to matters of pure State political concern, it is clearly applicable in relation to any matters which may be the subject of federal political concern.

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58 *Australian Concise Oxford Dictionary*, Third Edition.

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

21. In this context, a succinct statement of the test to be applied to assess the validity of Commonwealth and State laws was provided in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568:

> *First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?*
>
> *Second, if the law effectively burdens that freedom, 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 and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people*
>
> *.... If the first question is answered 'yes' and the second is answered 'no', the law is invalid.*

22. In prohibiting the desecration of the Commonwealth and State flags, the proposed offence clearly prohibits a form of political communication which is likely to relate to matters of federal concern. The mere act of desecrating the flag is communicating a political message. Non-verbal communications have been held to fall within the protection of this implied freedom: *Levy v Victoria* (1997) 189 CLR 579. As the first of the above questions is answered affirmatively, the issue is whether the terms of the proposed offence are "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".

23. As the Member observed in her Second Reading Speech, the proposed offence has been introduced to reinforce the respect and dignity of the flag; to accord it "sufficient status and protection to ensure respect and dignity are afforded, not just to the tangible aspects of the flag but the symbolism for which it stands". Reference was also made to the distress suffered by certain members of the community when they observe mistreatment of Australia's flag, particularly those who fought under the flag. And mention might have been made to the consequent risk of inciting a breach of the peace.

24. Clearly these concerns are legitimate. So the critical issue is whether the terms of the proposed offence are *reasonably* appropriate and adapted in addressing those concerns. In other words, is the proposed offence a *proportionate response* to those concerns, given the curtailment of the freedom of political communication which they inflict. This requires a balancing of the competing rights at stake here.

25. The arguments *in favour* of the proportionality of the proposed offence would include:

- The flag is the pivotal emblem of the nation or of each State, a symbol of nationhood and national unity, which deserves respect; desecration of the flag is disrespectful to the nation or State as a whole.

- The freedom to express dissatisfaction with the nation or State may be expressed in many other ways which involve no disrespect to the flag and for what it represents.

26. The arguments *against* the proportionality of the proposed provision include:

- The protection afforded the feelings of certain citizens who become distressed at flag desecration is outweighed by the fundamental nature of the freedom of political

communication to express dissatisfaction with the nation or State. This freedom of expression is not to be easily compromised. The fact certain people become upset is insufficient justification for curtailing freedom of political expression.

- Similar offences have been held by the United States Supreme Court to be a violation of the freedom of speech in the First Amendment to the United States Constitution (see *Texas v Johnson* (1989)). Notably, the majority judgment in *United States v Eichman* (1990) observed: "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."

- The proposed offence is too widely drafted in failing to define the physical character of the flag. Is desecration of a photo of the flag sufficient? Nor is it confined to desecration performed in a public place.

27. Since individual opinions will differ on this issue of proportionality, it is not possible to determine with any degree of certainty whether the proposed offence violates the implied freedom of political communication. The enactment of this offence clearly raises an issue of constitutional validity.

28. If the Commonwealth were to enact a similar offence which was inconsistent with the proposed Queensland offence, this would provide an additional ground for invalidating the Queensland offence.

29. The committee has previously expressed its view that it would be a breach of fundamental legislative principles for Parliament to enact laws which are clearly constitutionally invalid.[60] In the opinion of the committee this bill does not fall into that category, but is instead legislation whose constitutional validity is subject to some doubt.

30. The committee considers that this bill raises issues of constitutional validity, which are outlined above.

31. The committee draws these issues to the attention of Parliament.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?[61]

♦ **Clause 4**

32. As mentioned earlier, the bill raises a number of drafting issues. Because these have implications for the rights and liberties of individuals, they were canvassed in detail earlier in this Chapter under that FLP heading.

33. However, the comments which the committee made under that heading also bear upon the clarity of the bill.

60 See the committee's report *Scrutiny of Bills for Constitutional Validity*, December 2002 at page 2.

61 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.

34. As mentioned, the circumstances in which the prohibition will apply are widely-framed. Indeed, they are so widely-framed that the committee considers the Courts might be tempted to "read down" the provision and imply a range of restrictions in that regard.

35. However, the extent to which this might occur is unpredictable and it is in any event undesirable that citizens should be subjected to such a degree of uncertainty.

36. The importance of this issue is further emphasized by the statement in the Explanatory Notes that:

> *Clause 4 amends section 35A of the Vagrants, Gaming and Other Offences Act 1931 to make it an offence to intentionally burn, slash or otherwise damage or destroy the flag of a State or the Commonwealth in a public place. The clause allows however for the private destruction of a damaged aged or tattered flag prior to its disposal.*

37. Clause 5 does not on its face incorporate either the restriction to events occurring in a public place, or the exemption for destruction of damaged aged or tattered flags, referred to in the Notes. As mentioned earlier, the Courts may well "read down" the clause's provisions (and in so doing, have regard to the contents of the Explanatory Notes), but in the opinion of the committee it is undesirable that reliance should be placed upon such a process.

38. The committee accordingly considers, as mentioned earlier, that the places in which the prohibition will apply, and any permissible purposes of damage or destruction, should be appropriately specified in the bill.

39. In addition, as also mentioned, the committee considers the term "flag" should be defined in the bill.

40. The committee notes that the bill raises several interpretational issues. These concern the places where the relevant prohibition will apply, what (if any) purposes of damage or destruction are permissible, and the meaning of term "flag".

41. The committee recommends that the bill be amended to address these issues.

19. VEGETATION (APPLICATION FOR CLEARING) BILL 2003

Background

1. The Honourable S Robertson MP, Minister for Natural Resources and Minister for Mines, introduced this bill into the Legislative Assembly on 27 May 2003. It was subsequently passed as an urgent bill on 29 May 2003 following suspension of Standing Orders.

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 yet been assented to, there is in practice no scope for it to come back before Parliament once it has passed the third reading stage. Accordingly, it would be futile for the committee to attempt to comment on the bill's contents.

4. The committee only has jurisdiction to comment on bills not Acts. 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, a report by the committee at this stage would be of limited value.

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

PART I - BILLS

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

(NO MINISTERIAL CORRESPONDENCE IS REPORTED ON IN THIS ALERT DIGEST.)

PART I - BILLS

SECTION C – AMENDMENTS TO BILLS[62]

CIVIL LIABILITY BILL 2003

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 3 of 2003 at pages 1-4. During the committee stage of debate, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable R J Welford MP, Attorney-General and Minister for Justice. The bill was subsequently passed, with the amendments proposed by the Attorney incorporated in it, on 3 April 2003.

2. The amendments moved by the Attorney, and subsequently incorporated, are quite extensive. However, they are principally aimed at clarifying numerous aspects of the transition from the earlier law to the new scheme.

3. As the committee noted in its report on the bill as originally introduced (Alert Digest No. 3 of 2003 at pages 3-4) cl.2 of the bill provides that, with the exception of various stipulated provisions, the bill is taken to have commenced on 2 December 2002. The bill provided a certain amount of detail as to the application of the previous law, and the law as declared in the bill, to relevant types of events, depending on when they occurred.

4. However, as is apparent from the length of the amendments moved by the Attorney, the introduction of such far-reaching changes as those incorporated in the bill necessitates an extensive range of provisions dealing with many specific issues of this nature.

5. In this respect, the Attorney's amendments can be regarded as significantly clarifying the operation of the bill, which as indicated earlier, has clearly always been intended to have extensive retrospective effect. The bill (see cl.76) provided power to make transitional regulations for "any matter for which (the bill) does not make provision or sufficient provision". Whilst this provision may have authorised regulations covering a significant part of the matters dealt with in the Attorney's amendments, the committee considers it appropriate that these matters have instead been inserted in the bill itself.

6. The committee commends the Attorney for having adopted this course.

7. In summary, therefore, the committee notes that the amendments moved by Attorney and incorporated in the bill significantly enhance the clarity of its provisions.

8. The amendments to the bill raised no other issues within the committee's terms of reference.

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[62] On Wednesday 7 November 2001, Parliament resolved as follows:

> *the House confers upon the Scrutiny of Legislation Committee the function and discretion to examine and report to the House, if it so wishes, on the application of the Fundamental Legislative Principles to amendments* (to bills)*, whether or not the bill to which the amendments relate has received Royal Assent.*

On 18 February 2002 the committee resolved to commence reporting on amendments to bills, on the following basis:

- *all proposed amendments of which prior notice has been given to the committee will be scrutinised and included in the report on the relevant bill in the Alert Digest, if time permits*
- *the committee will not normally attempt to scrutinise or report on amendments moved on the floor of the House, without reasonable prior notice, during debate on a bill*
- *the committee will ultimately scrutinise and report on all amendments, even where that cannot be done until after the bill has been passed by Parliament (or assented to), except where the amendment was defeated or the bill to which it relates was passed before the committee could report on the bill itself.*

COMMERCIAL AND CONSUMER TRIBUNAL BILL 2003

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 5 of 2003 at pages 7-9. During the committee stage of debate, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable M Rose MP, Minister for Tourism and Racing and Minister for Fair Trading. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 14 May 2003.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

CORONERS BILL 2002 and CREMATIONS BILL 2002

1. The committee reported on these bills, as they were originally introduced, in its Alert Digest No 1 of 2003 at pages 5-11. During the committee stage of the cognate debate on the bills, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable R J Welford MP, Attorney-General and Minister for Justice. The bill was subsequently passed, with the amendments proposed by the Attorney incorporated in them, on 1 April 2003.

2. The amendments proposed by the Attorney raised only one issue within the committee's terms of reference.

3. Amendments numbers 4 and 5 to the Cremations Bill replaced original cl.11 with a new clause which provided that once a cremation has been carried out, disposal of the ashes remaining is largely at the behest of the applicant for permission to cremate. Although the applicant may be the deceased's personal representative, it may also be a close relative of the deceased.

4. As new subclause 11(5) declared, and as the Attorney indicated in the committee stage when moving the amendments, these provisions are to an extent inconsistent with the common law, under which disposal of the ashes was technically at the behest of the personal representative.

5. This displacement of the common law is consistent with the provisions of cls.7 and 8 of the bill (commented on in the committee's report on the bill as originally introduced), under which the bill replaced the personal representative's common law power to dictate whether or not a cremation should occur, by providing that a person may give a binding direction in their will that their body be cremated, and by also providing that where no such direction has been given, a close relative can prevent a cremation occurring.

6. To that extent, the provisions of the amendment are consistent with the approach embodied in cls.7 and 8. The committee does not object to this amendment.

LAND LEGISLATION AMENDMENT BILL 2003

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 4 of 2003 at pages 3-5. During the committee stage of debate, Parliament agreed to amendments proposed by the Honourable S Robertson MP, Minister for Natural Resources and Minister for Mines. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 1 May 2003.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2002

1. The committee reported on this bill, as originally introduced, in its Alert Digest No 11 of 2002 at page 23. During the committee stage of debate, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable A M Bligh MP, Minister for Education. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 30 April 2003.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

VALUATION OF LAND AMENDMENT BILL 2003

1. The committee reported on this bill, as it was originally introduced, in its Alert Digest No 6 of 2003 at page 22. During the committee stage of the debate on the bill, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable S Robertson, Minister for Natural Resources and Minister for Mines. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in them, on 27 May 2003.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

WEAPONS (HANDGUNS AND TRAFFICKING) AMENDMENT BILL 2003

1. The committee reported on this bill, as it was originally introduced, in its Alert Digest No 6 of 2003 at pages 23-30. During the committee stage of the debate on the bill, Parliament agreed to amendments proposed by the Minister sponsoring the bill, the Honourable T McGrady, Minister for Police and Corrective Services and Minister Assisting the Premier on the Carpentaria Minerals Province. The bill was subsequently passed, with the amendments proposed by the Minister incorporated in it, on 28 May 2003.

2. The amendments proposed by the Minister raised no issues within the committee's terms of reference.

APPENDIX

MINISTERIAL CORRESPONDENCE

(NO MINISTERIAL CORRESPONDENCE IS REPORTED ON IN THIS ALERT DIGEST.)

PART II

SUBORDINATE LEGISLATION

PART II – SUBORDINATE LEGISLATION

SECTION A – INDEX OF SUBORDINATE LEGISLATION ABOUT WHICH COMMITTEE HAS CONCERNS*

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*
21	Animal Care and Protection Amendment Regulation (No.1) 2003	27/5/03
54	Discrimination Law (Marital Status) Amendment Regulation (No.1) 2003	27/5/03

* Where the committee has concerns about a particular piece of subordinate legislation, or wishes to comment on a matter within its jurisdiction raised by that subordinate legislation, it conveys its concerns or views directly to the relevant Minister in writing. The committee sometimes also tables a report to Parliament on its scrutiny of a particular piece of subordinate legislation.

PART II – SUBORDINATE LEGISLATION

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

(INCLUDING LIST OF CORRESPONDENCE)

Sub-Leg No.	Name	Date concerns first notified *(dates are approximate)*
13	**Water Amendment Regulation (No.1) 2003** • Letter from the Minister dated 26 May 2003 • Letter to the Minister dated 18 June 2003	29/4/03
67	**Duties Amendment Regulation (No.2) 2003** • No correspondence.	5/6/03

(Copies of the correspondence mentioned above are contained in the Appendix which follows this Index)

** This Index lists all subordinate legislation about which the committee, having written to the relevant Minister conveying its concerns or commenting on a matter within its jurisdiction, has now concluded its inquiries. The nature of the committee's concerns or views, and of the Minister's responses, are apparent from the copy correspondence contained in the Appendix which follows this index.

This concludes the Scrutiny of Legislation Committee's 7th report to Parliament in 2003.

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

Warren Pitt MP
Chair

19 August 2003

APPENDIX

CORRESPONDENCE

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