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## *Abbreviations*

AD*	Alert Digest (for example, AD 2003/1 represents Alert Digest No. 1 of 2003)
EARC Report	Electoral and Administration Review Commission Report on the Review of the Office of the Parliamentary Counsel, No. 91/R2
FLP	Fundamental legislative principle
Scrutiny Committee	Scrutiny of Legislation Committee

\* The abbreviation 'AD' is used in lists of citations that are not part of a sentence. 'Alert Digest' is used when it is a phrase in a sentence.

# Introduction

## About the OQPC notebook

The notebook offers information about the operation of fundamental legislative principles in the context of Queensland legislation. It is prepared by, and subject to ongoing development by, the Office of the Queensland Parliamentary Counsel (OQPC). The notebook is used within OQPC to inform drafters. The notebook is also currently being made available to policy officers involved in the drafting of new legislation to—

- help officers to understand what fundamental legislative principles are; and
- help officers to identify and resolve fundamental legislative principle issues; and
- encourage feedback from officers to improve this publication.

The notebook is intended as a companion to *The Queensland Legislation Handbook*, which is part of a suite of policy and administrative handbooks collectively called *Governing Queensland*. The *Queensland Legislation Handbook* outlines relevant policies, recommendations, information and procedures for the realisation of policy in the form of Acts of Parliament or subordinate legislation. The handbook is available on the OQPC web site <[www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)>.

## Queensland legislation to be of the highest standard

In establishing the Office of the Queensland Parliamentary Counsel, the Queensland Parliament expressly stated a purpose of the *Legislative Standards Act 1992* was to ensure Queensland legislation is of the highest standard.

Basic democratic values contain a number of principles regarded as fundamental to high quality laws. Legislation should not be seen as an end in itself. It is a way to achieve clearly identified goals with sufficient regard to other goals such as the fundamental legislative principles. The degree to which this is achieved is a measure of the quality of legislation.

Fundamental legislative principles are principles. They are not rules.

The principles are not capable of being exhaustively defined and continue to develop. Further, they are not absolute and modification or displacement of a principle may sometimes be justifiable or

essential for consistency with the framework of basic democratic values.

### **Queensland system for assessment of legislation against FLPs**

Queensland has a system—established in response to the *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald Report)—that is designed to ensure that fundamental legislative principles underpin its legislation and that departure from the principles is explained and justified.

The system involves the constant assessment of legislative proposals against these principles during the policy development, drafting and parliamentary processes.

System for assessment of primary legislation—

- In developing the policy for a Bill, the sponsoring department and, if consulted, OQPC, consider FLP issues.
- In the submission to Cabinet for authority to prepare a Bill, the sponsoring department is required to include any FLP issues it has identified.
- Before Cabinet considers the submission, OQPC must also brief the government about FLP issues identifiable from the preliminary drafting instructions attached to the department's submission. OQPC's brief is provided to the Department of the Premier and Cabinet before the department prepares its brief to the Premier. OQPC's brief is also provided to the sponsoring department.
- Cabinet makes its decision about any FLP issues raised in the Cabinet submission or by any Minister.
- During the drafting process, OQPC seeks to ensure the Bill is consistent with the values from which fundamental legislative principles are derived. OQPC also continues to identify to the sponsoring department any potential departures and works with the sponsoring department to resolve any FLP issues.
- This process involving the sponsoring department, OQPC and Cabinet is repeated for the submission to Cabinet for authority to introduce the Bill.
- If Cabinet authorises introduction of the Bill, the explanatory notes prepared by the sponsoring department to accompany the Bill must explain and justify any FLP departures.
- The Bill is examined, after introduction into the Legislative Assembly, by the Scrutiny of Legislation Committee, the parliamentary committee that reports to Parliament on the application of fundamental legislative principles to the Bill.

- The final assessment of the Bill against the values from which the principles are derived is undertaken by the individual members of the Legislative Assembly. A member may raise FLP concerns during the second reading debate and when the House resolves into committee to consider the Bill.

#### **System for assessment of subordinate legislation—**

- In developing the policy for subordinate legislation, the sponsoring department and, if consulted, OQPC, consider FLP issues.
- During the drafting process, OQPC seeks to ensure the subordinate legislation is consistent with the values from which fundamental legislative principles are derived. OQPC also continues to identify to the sponsoring department any potential departures and works with the sponsoring department to resolve any FLP issues.
- Before subordinate legislation, other than exempt subordinate legislation, is made, it must be certified by OQPC. To certify, OQPC must be satisfied that the proposed subordinate legislation has sufficient regard to FLPs. If OQPC declines to certify, the proposed subordinate legislation can not proceed to be made unless it is presented to Cabinet and Cabinet agrees to its being made.
- If made, the application of FLPs to the subordinate legislation is then examined by the Scrutiny of Legislation Committee, which corresponds with the sponsoring Minister if necessary and may report any unresolved concerns to Parliament. The committee can directly oppose an objectionable provision in subordinate legislation by asking Parliament to support a motion to disallow the provision.
- If the subordinate legislation is significant, some of the steps for assessment of primary legislation also apply.

Note that these procedures operate before legislation comes into force or in connection with the legislation coming into force. In some jurisdictions, including the United States, Canada and the European Community, reliance is placed on the courts deciding whether legislation breaches fundamental rights. The Queensland approach involves self-assessment by the Government, public sector and Parliament to ensure that legislation has sufficient regard to fundamental legislative principles.

#### **Basis for Queensland system**

While many aspects of the Queensland system for assessment of legislative proposals against fundamental legislative principles are provided for by *The Cabinet Handbook*, 3 critical aspects have a statutory basis.

The *Legislative Standards Act 1992* provides a statutory definition of fundamental legislative principles. This Act also makes it a function of the Office of the Queensland Parliamentary Counsel to advise about the application of fundamental legislative principles.

The *Parliament of Queensland Act 2001* establishes the Scrutiny of Legislation Committee and entrusts the committee to examine each Bill and item of subordinate legislation to consider the application of fundamental legislative principles. The committee's area of responsibility also includes monitoring the operation of the statutory definition of fundamental legislative principles.

### **More information about the notebook**

The Office of the Queensland Parliamentary Counsel hopes the notebook contributes to the education of participants in the policy development, drafting and parliamentary processes about the fundamental legislative principles underpinning Queensland legislation. Increased awareness of the principles and of their application in the Queensland context is crucial to the achievement of the highest standard for Queensland legislation.

The office welcomes comment about the notebook and envisages that the notebook will be continually updated. Correspondence about the notebook should be addressed to—

The Parliamentary Counsel  
Office of the Queensland Parliamentary Counsel  
PO Box 15185, City East Qld 4002  
<parliamentarycounsel@oqpc.qld.gov.au>.



# *Chapter 1: Fundamental legislative principles and how they should be approached*

## **Scope of chapter**

This chapter looks at what is meant by the term fundamental legislative principles in the Queensland context. It also outlines information to help those involved in the assessment and development of Queensland legislation from an FLP perspective to understand how to approach the principles.

## **Background**

In the long history of the common law, some values have been recognised as the enduring values of a free and democratic society and they are the values which inform the development of the common law and help to mould the meaning of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws (Hon. Justice G.E. Brennan, 'Courts, Democracy and the Law' (1991) 65 ALJ 32 at 40).

Basic democratic values contain a number of principles regarded as fundamental to high quality laws. In various jurisdictions worldwide these legislative principles are governed by a variety of factors including—

- parliamentary conventions
- common law rules and presumptions
- evolving doctrines associated with the general field of administrative law
- the perspective of parliamentary scrutiny of legislation committees
- bills of rights guaranteeing human rights
- statutory schemes promoting human rights, for example, anti-discrimination legislation
- international conventions and treaties, for example, the United Nations Covenant on Civil and Political Rights

- specific legal and administrative policies established by the government of the day. EARC Report, para. 2.6.

In many jurisdictions, governments have checks and balances in place to ensure adequate attention is given to proposed legislation that varies significant principles, particularly if the proposal negates or reduces traditional rights or modifies principles of parliamentary government. EARC Report, para. 2.9.

### **Catalyst for Queensland's concern for FLPs**

In Queensland in the early 1990s there was a review, recommended in the Fitzgerald Report, of the role and functions of the Office of the Parliamentary Counsel to ensure the office's independence. The Electoral and Administrative Review Commission performed the review and it published its report *Report on Review of the Office of the Parliamentary Counsel* in May 1991.

As a result of reforms flowing from the review, Queensland has a systematic approach to legislative principles. There is a statutory definition of what are called fundamental legislative principles and a system involving continuous assessment, from a fundamental legislative principle perspective, of legislative proposals during their policy development, drafting and parliamentary processes. The examples in the introduction outline the systems.

### **What are fundamental legislative principles?**

Fundamental legislative principles are defined in the *Legislative Standards Act 1992*. See 'Appendix A: Legislative Standards Act 1992, section 4' on page 182. The *Legislative Standards Act 1992*, section 4(1) contains the basic statement that FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. All other statements about FLPs in section 4 are illustrative of this basic statement and not a complete list of its application.

As acknowledged by the Scrutiny of Legislation Committee, the specific examples of rights and liberties listed in the *Legislative Standards Act 1992*, sections 4(3), 4(4) and 4(5) are not intended to be exhaustive. AD 1996/2, p. 17.

The *Legislative Standards Act 1992*, section 4(2) mentions 2 examples of what must be had regard to in order to comply with the basic principle—

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

The *Legislative Standards Act 1992*, section 4(3), sets out a list of examples of issues that may be involved in considering whether particular legislation has sufficient regard to the rights and liberties of individuals. These examples are dealt with in Chapter 2. Chapter 3 deals with further examples that are not listed in the *Legislative Standards Act 1992*.

The *Legislative Standards Act 1992*, section 4(4) and (5), sets out lists of examples of issues that may be involved in considering whether particular primary or subordinate legislation has sufficient regard to the institution of Parliament. These examples are dealt with in Chapters 4 and 5. Chapter 6 deals with further examples that are not listed in the *Legislative Standards Act 1992*.

### **What is a parliamentary democracy based on the rule of law?**

A parliamentary democracy based on the rule of law involves—

- the maintenance of a fair and effective system of parliamentary democracy
- the right of an adult citizen to fully participate in the democratic process
- respect for the rights and liberties of individuals
- respect for the institution of Parliament.

### **Legal status of FLPs**

The *Legislative Standards Act 1992* does not establish FLPs as rules of law but rather as important guiding principles to be observed in drafting legislation. In having regard to FLPs, the purpose of the *Legislative Standards Act 1992* to be achieved is that of ensuring Queensland legislation is of the highest standard.

Sometimes, the application of an FLP must be altered to achieve important policy objectives in the community interest. Nevertheless, the system established by the *Legislative Standards Act 1992* and *The Cabinet Handbook* aims to ensure that FLPs are fully considered by the Government before primary legislation is put before Parliament or

subordinate legislation is made. In particular, by requiring the inclusion of FLP issues in submissions to Cabinet about proposed Bills and significant subordinate legislation and by requiring OQPC to advise if proposed legislation is inconsistent with FLPs, *The Cabinet Handbook* aims to ensure Ministers and Cabinet are informed of any proposed departure from an FLP.

Departures from the principles can only be justified on the basis of sound reasoning.

### Local laws and subordinate laws

Compliance with fundamental legislative principles is given significant emphasis in relation to the drafting of local laws and subordinate local laws under the *Local Government Act 1993*. The Local Government Regulation 1994, section 34A is as follows—

#### 34A Prescribed drafting standards

(1) This section prescribes the drafting standards for proposed local laws and subordinate local laws.<sup>1</sup>

(2) Proposed local laws and subordinate local laws must—

- (a) be drafted using gender-neutral language; and
- (b) have sufficient regard to fundamental legislative principles;<sup>2</sup> and
- (c) be consistent with the guidelines issued by the parliamentary counsel under the *Legislative Standards Act 1992*, section 9, for local laws and subordinate local laws.<sup>3</sup>

(3) However, subsection (2)(a) does not apply to a provision of a proposed law that is to apply to a specific gender.

- 
1. Under chapter 12, part 2 of the Act, the process for making a proposed local law or subordinate local law includes giving the Minister a drafting certificate. The certificate must state that the law is drafted in accordance with drafting standards prescribed under a regulation—see definition “drafting certificate” in section 3 of the Act.
  2. See *Legislative Standards Act 1992*, section 4 (Meaning of “fundamental legislative principles”).
  3. The matters mentioned in subsection (2)(a) and (b) are dealt with in detail in the guidelines. Copies of the guidelines are available for inspection from the department at 111 George Street, Brisbane. In addition, the guidelines are included in the website of the Office of the Queensland Parliamentary Counsel: [www.legislation.qld.gov.au](http://www.legislation.qld.gov.au)

## How to approach FLPs

FLPs flag crucial matters to be addressed in the policy-making, drafting and parliamentary processes. The *Legislative Standards Act 1992* is framed in terms of legislation having *sufficient regard* (emphasis added) to rights and liberties of individuals and the institution of Parliament.

A proposed law may sometimes have sufficient regard to FLPs even though it is inconsistent with one of the examples of FLP issues given in the *Legislative Standards Act 1992*. In considering whether sufficient regard is had to FLPs, the following questions should be considered—

- What other values are being furthered?
- Can those values be realised in other ways?
- Do those values justify departure from the principles?

There may be circumstances where the public interest justifies or even requires that a specific FLP example be modified or displaced. For example, the principle relating to the acquisition of property on just terms should not apply to proceeds of crime legislation which is designed to strip criminals of their ill-gotten gains. EARC Report, para. 2.76.

## Contribution of Scrutiny Committee to FLP issues in Queensland legislation

The Scrutiny of Legislation Committee (the Scrutiny Committee) is a Standing Committee of the Legislative Assembly with responsibility for monitoring the operation of the *Legislative Standards Act 1992*, section 4 and the application of FLPs to particular Bills and subordinate legislation. The committee's reports are an excellent reference tool in developing policy and drafting legislation in a way that has sufficient regard to FLPs.

'Appendix B: Parliament of Queensland Act 2001, section 103' on page 184 contains an extract from the *Parliament of Queensland Act 2001* stating the role of the committee.

The Scrutiny Committee's reports include special reports about particular matters and Alert Digests that deal with the Bills introduced into the Legislative Assembly.

The reports of the Scrutiny Committee are the major source of authority for the practical application of FLPs and are applied on a daily basis in the work of the Office of the Queensland Parliamentary Counsel.

### Scrutiny Committee's approach to FLP issues

The Scrutiny Committee's approach to FLP issues is to carefully assess each perceived breach of FLPs to consider whether it is adequately explained and justified. The committee reports concerns about potential breaches to Parliament, leaving the question of whether the legislation has had *sufficient regard* to the FLP to Parliament to decide. Scrutiny Committee Annual Report 1996–1997, para. 1.4; Scrutiny Committee Annual Report 1998–1999, para. 1.8

In considering whether sufficient regard is had to a principle, the committee considers what other values are being furthered, whether those values could be realised in other ways and whether those values justify departure from the principle. AD 1996/2, p. 9.

As for precedent, the committee has emphasised that it is not bound to support new legislation merely because it follows earlier precedents. AD 1999/2, p. 15, para. 4.23. As the committee has said—

The mere fact that a previous enactment failed to pay sufficient regard to FLPs does not mean that future enactments are excused from the high standards set out in the *Legislative Standards Act 1992* (Scrutiny Committee Annual Report 1995–1996, para. 1.29).

The committee has commented that it is not the role of the committee to prescribe the means for remedying potential breaches of FLPs to which it draws the attention of Parliament. See Alert Digest No. 1 of 2002, page 12, paragraph 9.

For primary legislation, the committee only has standing jurisdiction to comment on Bills. It does not have standing jurisdiction to comment on Acts. Further, once a Bill has passed the third reading stage, there is in practice no scope for it to come back before Parliament for amendment as a Bill. Indeed, the committee has often noted that in practical terms it may be futile for the committee to comment once a Bill has passed the third reading stage. AD 2002/4, p. 13, paras 4–5; AD 2001/3, p. 10, para. 4.4; AD 1999/10, p. 1, para. 1.4.

However, there are a number of examples where a Bill has been referred to the committee despite having been passed by the Legislative Assembly. The wording of the resolution has been 'That the

(name of Bill) be referred to the Scrutiny of Legislation Committee for it to consider the application of fundamental legislative principles to the Bill and report to the House, despite the Bill having been passed by this House or receiving royal assent.’ Votes and Proceedings 25 November 2004.

### *Subordinate legislation*

For subordinate legislation, if the committee has concerns about any matters within its terms of reference, it corresponds with the Minister responsible for the particular subordinate legislation. From 30 July 2002, this correspondence is set out in the committee’s Alert Digests. Scrutiny Committee Report No. 22, *Scrutiny of Legislation Committee Reports on Subordinate Legislation*.

If the matter is not resolved, the committee might decide to take no further action because the disadvantages would outweigh the advantages of taking action or because the issue is not so serious as to justify further action. Scrutiny Committee Annual Report 2002–2003, para. 3.8.

Also, the committee can report, by means of a ‘stand alone’ report on any matter which it considers necessary to draw to the attention of the Legislative Assembly. If notice of a disallowance motion is given to the Assembly by a member of Parliament who is not a member of the committee, on a case by case basis, the committee may decide to provide a report on the relevant subordinate legislation, for example, Report No. 28, *Water Amendment Regulation (No. 1) 2003*, paragraph 2.3. See Scrutiny Committee Annual Report 2002–2003, paragraphs 3.9–3.10.

### **Scrutiny Committee recommends addressing FLP issue**

It is better to identify an issue concerning FLPs, and work it through, than to ignore the issue.

The Scrutiny Committee has requested that particular care be taken to draft explanatory notes accurately when assessing their consistency or otherwise with FLPs. In the committee’s view, it is better to raise an issue concerning FLPs and defend the legislation than to ignore the issue. AD 1996/4, p. 31.

### **Scrutiny Committee's comments relating to scrutiny of Bills for constitutional validity**

The committee considers that constitutional validity falls within the fundamental legislative principles. However, because of lack of resources and time, the committee does not generally conduct a detailed examination of the constitutional validity of Bills. As a result of this approach, the lack of any mention of the issue of constitutional validity in the committee's report on a Bill is not to be taken as an indication that the committee—

- has conducted a detailed examination of that matter in relation to the Bill; or
- is satisfied that the Bill is constitutionally valid.

Where the committee does report on an issue about the constitutional validity of a Bill, its approach has been almost always to query the sponsoring Minister as to whether he or she is confident the Bill is constitutionally valid. Scrutiny Committee Report No. 26, *Scrutiny of Bills for Constitutional Validity*.

### **Scrutiny Committee's comments relating to issues about what a Bill does not regulate**

In Alert Digest No. 1 of 2002 the committee, in dealing with the Cloning of Humans (Prohibition) Bill 2001, made some interesting comments on its approach to Bills where much of the criticism is about what is left unregulated rather than what the Bill regulates. See pages 4–5, paragraphs 3–5.

The committee stated 'It may well be the case that the rights and liberties of the individual might be further enhanced by more extensive legislation'. The committee noted that there are 3 problems with this argument—

- (a) it will always be true—it is always possible to do more for human rights
- (b) there is no end to the argument
- (c) any attempt to even start that train of argument will lead the committee into deeply controversial policy questions.

The committee concluded that 'It is better for this committee, though, to steer clear of such issues and keep to the issue of whether the bills presented to Parliament have sufficient regard for the rights and liberties of individuals in what they do try to achieve, rather than in what they fail to attempt or achieve'.



### **Scrutiny Committee's comments on the regulation of rapidly changing complex technologies**

In Alert Digest No. 1 of 2002, in dealing with the Cloning of Humans (Prohibition) Bill 2001, at pages 7 and 8, the committee made the following comments about the regulation of rapidly changing complex technologies—

25. Complex, rapidly-changing technologies are notoriously difficult to regulate. Such technologies and the issues they raise are riven by multi-layered complexities. Criminal law is usually a clumsy means of dealing with the issues such technologies generate. The need for precision in criminal statutes; the emergence of unexpected possibilities; and the increasing pace of technological change – all make criminal law a blunt instrument which cannot be wielded deftly and is as likely to strike the harmless as the harmful.

26. A more effective means of dealing with potential problems is to require prior clearance of the research to be undertaken or the medical procedures to be developed. General guidelines can be set down, institutional committees established, advice given, results compared and new guidelines issued.

27. This is not to leave the matter entirely in the hands of “experts” and “professionals”. Complexity should not be delegated to experts, but neither should it be surrendered to a process of sensationalist and simplistic treatment in which debate is dominated by the shrill and the venal – discouraging involvement by researchers and doctors who would seek to distinguish themselves from both.

28. The institutional committees are at the heart of the system – including a mixture of community representatives as well as the relevant professional.

29. There is always reserve power for the Parliament to step in and lay down limits as to what is acceptable. Once a public consensus has emerged, legislators have the sovereign right to take a different view to ethics committees and ban activities which such committees would permit (though we know of no ethics committee in any well-run first-world democracy that has approved human cloning). However, the first and generally best line of defence is in the combination of community and professional representatives found in committees – with outsiders in a majority.

## *Chapter 2: Individuals' rights and liberties—FLP issues listed in the Legislative Standards Act*

### **Scope of Chapter**

The *Legislative Standards Act 1992* expressly states that fundamental legislative principles include requiring that legislation has sufficient regard to rights and liberties of individuals (section 4(2)). This chapter outlines the specific issues listed in the *Legislative Standards Act 1992* that need to be considered in deciding whether legislation has sufficient regard to rights and liberties of individuals.

### **Background**

Sir Anthony Mason, then Chief Justice of the High Court, made the following relevant comment in *Australian Capital Television Pty Ltd v. Commonwealth* (No. 2) (1992) 177 CLR 106 at 138—

the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people.

Accordingly, legislators have obligations—

- (a) to account for their actions to the people they represent; and
- (b) to respect the fundamental rights and liberties of the people; and
- (c) to maintain the integrity of the institution of Parliament.

From these obligations comes the fundamental legislative principle that laws should have sufficient regard to the rights and liberties of individuals—*Legislative Standards Act 1992*, section 4(2) and (3).

This rationale also supports the aspect of fundamental legislative principles dealing with respect for Parliament which will be considered in Chapter 4. Governments should maintain the integrity of the institution of Parliament and should not seek to enact laws that would undermine Parliament's role as an institution representing the interests of the people.

## 2.1 Defining administrative power

### 2.1.1 *FLP issue*

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined—*Legislative Standards Act 1992*, section 4(3)(a)(first limb).

Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision. The criteria should generally be express and relevant in the ordinary sense of the word.

#### **Scrutiny Committee**

The Scrutiny Committee takes issue with provisions that do not express, or that insufficiently express, the matters to which a decision-maker must have regard in exercising a statutory administrative power. For example, see the committee's comments on the Drugs Misuse Amendment Regulation (No. 1) 1998 and the Land Amendment Regulation 1999. Scrutiny Committee Annual Report 1998–1999, para. 3.10.

### 2.1.2 *Conditions on grant of licence*

If legislation gives an authorised person discretionary powers to impose conditions on the grant of a licence, the legislation should clearly define this administrative power by outlining the factors that the authorised person must or may take into account in making the decision.

### 2.1.3 *Suitability, eligibility and similar criteria*

#### **Scrutiny Committee**

*Eligibility to adopt a child* In relation to the eligibility of a person to adopt a child, the Scrutiny Committee has recommended that the important criteria be included in an Act and not all prescribed under a regulation. AD 2002/4, p. 2, para. 16.

*Suitability for university campus* In the context of a university statute, the Scrutiny Committee has considered that if a statute provides certain consequences for a student the registrar considers is 'not a suitable person to undertake campus service', the statute should contain guidelines about who is not a suitable person.

*Eligibility for taxation concession or grant* The Scrutiny Committee has referred to Parliament the issue of the appropriateness of a provision that included 'significant discretionary powers' introducing 'a significant element of subjectivity' in relation to the approval of a taxation concession or grant. AD 2006/9, pp. 29–30, paras 18–23; AD 2004/1, pp. 7–8, paras 3–11; AD 2003/12, pp. 9–10, paras 3–11.

#### 2.1.4 Power of appointment or employment

##### Scrutiny Committee

*Appointment not to be arbitrary* The Scrutiny Committee has considered there should be sufficient safeguards to protect an administrative appointment under legislation from being arbitrary or made in breach of the principles of natural justice.

*Political office exception* Appointment to a political office, for example, Ministers and political office holders in the Legislative Assembly, may be an exception to this principle. However even for the appointment of whips and junior ministers, it might be expected that the appointments and terminations be the subject of a statement to the Parliament by the Premier. AD 1996/2, p. 4.

*Replacement appointments* In relation to a university statute, the Scrutiny Committee has commented adversely on a provision giving a person power to appoint a replacement for a panel member unable to sit in a particular case without the legislation including a requirement that the replacement hold the same qualification to be a panel member as the replaced panel member. The committee was concerned that the provision effectively gave the appointer power to change the panel's constitution.

*Appointments subject to holding other appointments* The Scrutiny Committee has raised an issue that unfairness could arise if a provision states that an appointment is subject to the holding of another appointment. It has recommended that because the loss of a principal appointment may follow the resignation, for legitimate reasons, from a subsidiary appointment, the resignation from the subsidiary appointment should be only allowed with the approval of the principal employer. The Minister responded that the provision had been included to resolve a legal inconsistency apparent on the face of the legislation. AD 2003/5, pp. 37–38; AD 2003/4, pp. 10–11, paras 3–11.

*2.1.5 Power to direct others to take action*

**Scrutiny Committee**

The Scrutiny Committee has commented that a power authorising a chief executive to give a notice requiring works stated in the notice to be performed is sufficiently defined if it is a legislative requirement that the works required, and the period within which the works must be performed, be reasonable. AD 1996/1, p. 4.

*2.1.6 Power to delegate the setting of criteria for the exercise of power*

**Scrutiny Committee**

The Scrutiny Committee has sought more information from a Minister as to why a provision in the Minister's Bill authorised a regulation to prescribe a form of special health care to which the Guardianship and Administration Tribunal could consent and the criteria for tribunal consent. AD 2000/1, pp. 9–10, paras 69–74.

*2.1.7 Power of trustee*

**Scrutiny Committee**

*Sharing trust benefit between legal and de facto spouse* An Act allowed trustees to apportion the amount of entitlement if a deceased contributor was survived by both a legal and de facto spouse. The trustees were required to have regard to the needs of each spouse and 'the other matters the trustees reasonably considered relevant'. Given the novelty of the task confronting the trustees, the Scrutiny Committee queried whether additional assistance could have been given to the trustees by the inclusion of a list (not necessarily exhaustive) of other matters. AD 2002/7, pp. 27–28.

*2.1.8 Power to direct independent persons and bodies*

A power to direct persons and bodies that are otherwise required to act with independence in the exercise of their powers and functions is potentially inconsistent with that independence. Any provision that empowers the giving of directions to independent persons and bodies has to be considered very carefully to ensure that their independence is not prejudiced.

In the context of the courts, case law also establishes that courts whose independence is implied in the Australian Constitution, including the Supreme Courts of the States, can not have their independence validly prejudiced. See *Kable v. The Director of Public Prosecutions* (NSW) (1995–1996) 189 CLR 51 (High Court of Australia) and *Re Criminal Proceeds Confiscation Act 2002* [2003] QCA 249 (Queensland Supreme Court).

### Scrutiny Committee

*Coroners* The Scrutiny Committee has accepted as reasonable a statutory power given to the State coroner to issue guidelines to other coroners to achieve consistency and best practice. Although coroners are required to be independent, their level of independence is not as high as a judge. AD 2003/1, pp. 5–6, paras 3–18.

#### 2.1.9 *Limiting the period within which a prosecution or proceeding may be started*

The administrative power to start a prosecution or proceeding under legislation should be responsive to the general principle that there must be an end to liability to prosecution or proceedings at some reasonable point.

### Scrutiny Committee

*Limitation period for prosecution for breach of statutory duty* The Scrutiny Committee has expressly recommended that legislation about farm debt mediation be amended to place a 3-year limitation period on when a prosecution could be started for a breach of duty under the legislation. AD 2003/7, p. 8, paras 10–14.

## 2.2 Reviewing the use of administrative power

#### 2.2.1 *FLP issue*

Legislation should make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review—*Legislative Standards Act 1992*, section 4(3)(a)(second limb).

Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process.

If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.

### Scrutiny Committee

The Scrutiny Committee takes particular care to ensure the principle that there should be a review or appeal against the exercise of administrative power is adhered to and the committee is generally opposed to clauses removing the right of review—

Whenever ordinary rights of review are removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the committee takes particular care in assessing whether sufficient regard has been had to individual rights....Such a removal of rights may be justified by the overriding significance of the objectives of the legislation.

The purpose of judicial review is to deal with those actions of public officials who act beyond the powers that are intended for them. It acts to protect the legislative intention approved by Parliament and proposed by the executive. As such, ouster clauses should rarely be contemplated and even more rarely implemented. (AD 1996/2, p. 18, paras 6.20–6.23).

Ideally, review provisions should provide—

- (a) the period within which a person may apply for review; and
- (b) the way application is made; and
- (c) whether the reviewer may consider new material or hear the matter afresh; and
- (d) that the principles of natural justice apply, specifying some of the contentious points that often arise in questions of procedural fairness, for example, whether persons seeking review may be legally represented; and
- (e) whether the reviewer may—
  - (i) confirm the decision being reviewed
  - (ii) set aside the decision being reviewed and substitute another decision
  - (iii) set aside the decision being reviewed and refer the matter back to the original decision-maker with appropriate directions; and
- (f) entitlement to written reasons of the reviewer. AD 1996/1, p. 12.

Occasionally, the Scrutiny Committee has considered to be appropriate a 2-tiered system with an internal review of the original decision-maker's decision and a subsequent right of appeal to a court or tribunal. See, for example, the *Transport Planning and Coordination Act 1994*, part 5 (Review of and appeals against decisions).

The Scrutiny Committee has, in particular circumstances, found provisions removing review under the *Judicial Review Act 1991* unobjectionable if it considers that an adequate alternative review mechanism is provided. AD 2004/8, p. 8, paras 21–24; AD 2003/6, p. 6, paras 46–48.

### 2.2.2 *Reasons for decision and information about review and appeal*

#### **Scrutiny Committee**

To provide practical rights of appeal or review, and consistent with having sufficient regard to the rights and liberties of individuals, a decision-maker should be required to give reasons for a decision, together with information on review or appeal rights. Scrutiny Committee Annual Report 1996–1997, para. 3.3, p. 11. See also *Acts Interpretation Act 1954*, section 27B (Content of statement of reasons for decision).

### 2.2.3 *Peremptory exercise of power*

#### **Scrutiny Committee**

The Scrutiny Committee has commented that the lack of opportunity to make representations before an immediate suspension is made arguably denies the suspended person natural justice. AD 2003/7, p. 41, paras 9–18; AD 2003/5, p. 15, paras 9–14; AD 2002/4, p. 29, paras 22–23; AD 2000/6, pp. 11–12, paras 20–28.

The Scrutiny Committee has commented that administrative powers allowing a chief executive to take action to rectify a problem identified in a Notice To Perform Works should not allow the action to be taken before the end of the period for lodging an appeal against the notice. AD 1996/1, p. 4.

The Scrutiny Committee has referred to Parliament without express objection a provision authorising diseased objects to be destroyed immediately without review or appeal if the reason for the provision was that delay might cause disease to spread among animals. AD 2002/4, p. 8, paras 25–30.

### 2.2.4 *Grant of commercial rights*

If, under legislation, the State may grant rights of a commercial nature to applicants, the State sometimes seeks to justify the lack of appeal rights on the basis that the State is making the best commercial judgement on the matter as part of its management of State resources. The State and the successful applicants enter into what are effectively contractual arrangements about the State's property. The State argues that the process should not be subject to legalistic review processes.

#### **Scrutiny Committee**

*No external merit appeals* The Scrutiny Committee has referred to Parliament, without express objection, legislation that only included rights of review or appeal in relation to 'existing rights' and not against the failure of the State to grant 'new rights' over its resources. AD 2004/3, p. 26, paras 75–79; AD 2004/2, p. 8, paras 35–40. In



similar circumstances, the Scrutiny Committee has stated that on balance it did not object to the provisions. AD 2004/1, pp. 8–9, paras 55–63.

### 2.2.5 *Unexplained reduction in review or appeal rights*

#### **Scrutiny Committee**

The Scrutiny Committee, in considering a provision in a Bill denying an appeal from a decision, has questioned the fact that appeal rights from the decision were not equivalent to the appeal rights currently enjoyed against the same type of decision under an Act whose provisions were being displaced. There did not appear to be any substantial difference in the decision process, suggesting the appeal rights should be the same. The committee also noted that the most striking difference between the appeal provisions under the Bill and the Act was the incapacity under the Bill for the reviewing court to substitute its own decision or make another order it considers appropriate, in lieu of the original decision. AD 2001/7, pp. 37–38, paras 20–25.

The Scrutiny Committee has referred reductions of review and appeal rights to Parliament without express objection when the reduction has been targeted, as opposed to broad, and the explanatory notes have carefully explained the reduction. AD 2006/1, p. 12, paras 41–43 and p. 13, paras 47–48; AD 2004/5, pp. 27–28, paras 15–17; AD 2003/6, pp. 5–6, paras 37–48; AD 2003/5, pp. 19–20, paras 43–49.

### 2.2.6 *Political accountability instead of appeal or review*

Sometimes political accountability can be better than no review at all if to provide a separate review would be impractical.

For example, the Local Government Regulation 1994, section 34B, makes special provision for local government that recognises that it may be impractical to provide a merit based review separate from the particular local government. A provision that a resolution of the local government was sufficient to cover a merit review requirement effectively substituted political accountability for a right of personal action.

#### **Scrutiny Committee**

*Ministerial call in powers* The Scrutiny Committee has referred to Parliament, without express objection, a power of the Minister for Local Government and Planning to ‘call in’ and finally decide an issue about a planning decision with no right of appeal available. AD 2002/8, pp. 12–13, paras 3–16.

*Specific instructions in subordinate legislation* The Scrutiny Committee has referred to Parliament, without express objection, a provision ousting review of a decision or action based on an express instructions included in a plant quarantine area notice (which was subordinate legislation) or regulation that provided for the taking of specifically stated urgent or immediate action. AD 2004/5, pp. 26–27, paras 7–14.

### 2.2.7 *Review or appeal with less than full process*

#### **Scrutiny Committee**

*Restrictions may be justifiable* It is the Scrutiny Committee's view that review provisions providing that the rules of evidence do not apply, denying legal representation and precluding orders for costs or damages, may be appropriate if the decision being reviewed has short term impact, for example, exclusion from a public place for a short time. Arguably this allows reviews to be conducted quickly and at minimal expense to the applicant. Costs or damages awards might be a disincentive for a person who might be contemplating requesting a review. AD 1996/1, p. 16.

*Internal review for action against prisoner* The Scrutiny Committee has referred to Parliament the question of whether the following review process was appropriate—a prisoner accommodated in a maximum security facility under a maximum security order may ask an official visitor to review the order. After investigation, the official visitor may recommend to the chief executive that the order be confirmed, amended or repealed but the recommendation is not binding. AD 1999/3, p. 13, para. 2.14.

*Internal review of decisions for ex gratia assistance* The Scrutiny Committee has expressed concern about a lack of explanation as to why individuals were only being granted review rights internal to the relevant department in relation to decisions about eligibility for public housing. AD 2003/7, pp. 21–22, paras 12–20.

However, on another occasion, the Scrutiny Committee has viewed favourably review, limited to internal review, of decisions about financial assistance. AD 2004/5, p. 37, paras 11–13.

*Internal review of decisions involving technical issues* The Scrutiny Committee drew to the attention of Parliament, without express objection, provisions providing for Ministerial review of decisions about survey standards and survey marks involving technical issues for which a court or tribunal might not have sufficient expertise, and about which the Minister could seek independent technical advice. (OQPC—Presumably the Committee considered there were peculiarities

about the technical issues indicating it was more inherently effective for the Minister to obtain the advice than a court to receive technical evidence in the usual way). AD 2003/7, p. 34, paras 18–23.

### 2.2.8 *National scheme legislation*

#### **Scrutiny Committee**

National scheme legislation provided merits review of certain decisions made under Queensland legislation by the Commonwealth Administrative Review Tribunal. The review was dependent on the decisions being declared to be reviewable State decisions by regulation under Commonwealth legislation. The committee sought information from the Minister as to whether there was any possibility the regulation would not be made. AD 2002/2, p. 18, paras 28–31. For the Minister's response see Alert Digest No. 3 of 2003, pages 20–21.

### 2.2.9 *Miscellaneous subjects of review*

#### **Scrutiny Committee**

*State school dress code* The Scrutiny Committee has considered that a merits review process should have been provided for persons aggrieved by the contents of a state school dress code. AD 1999/2, paras 1.30–1.32.

*Enforceable undertakings* The Scrutiny Committee has found unobjectionable the exclusion from review of decisions under provisions providing for a scheme of enforceable undertakings that was essentially voluntary in nature. AD 2003/1, pp. 26–27, paras 20–24.

*Authority automatically granted if requirements met* The Scrutiny Committee has considered 'probably not objectionable' the absence of appeal rights in relation to refusal of an authority when the authority would be automatically granted if requirements were met, and automatically refused if the requirements were not met. Also, the applicant could apply for a 'higher level' of authority. AD 2004/5, p. 9, para. 7.

*Interim decision* The Scrutiny Committee has considered the absence of appeal rights was 'probably not objectionable' in relation to a particular step that was only one step on the way to a final decision, and was not the true merit decision. AD 2004/5, p. 9, para. 7.

*Energy ombudsman's decision* The Scrutiny Committee has referred to Parliament, without express objection, provisions excluding any appeal, other than judicial review, against a binding energy ombudsman's decision. Under the provisions consumers, but not

energy entities, could elect to accept the decision and make it binding on all parties, or not accept it and pursue other remedies. AD 2006/10, p. 8, paras 9–12.

*Financial assurance in line with industry practice* The Scrutiny Committee has considered ‘probably not objectionable’ the absence of appeal rights in relation to a requirement for ‘financial assurance’ for a matter. It was argued by the proponents of the provision that a workable and equitable system required fixed levels of financial assurance for activities with similar risks and that the particular levels of financial assurance were accepted industry practice. AD 2004/5, p. 9, para. 7.

*Gaming industry* The Scrutiny Committee has referred to Parliament, without express objection, a provision ousting review of decisions made under the *Lotteries Act 1997* by the Governor in Council or the Minister. The committee anticipated the Minister’s argument that the provision was similar to those in other gaming legislation and necessary to prevent unsuitable persons entering into the lottery business. AD 2007/5, pp. 11–12, paras 3–13.

*Public health matters* The Scrutiny Committee has noted in relation to a public health law that while there were only limited rights to merits review of administrative decisions relating to public health under the law, this perhaps reflected the nature of the decisions and the context within which they would be made. AD 2005/4, p. 21, paras 83–87.

*University council decisions* The Scrutiny Committee has referred to Parliament, without express objection, provisions enabling a university council to remove office holders from office, for failing to comply with ethical obligations, without merits review. AD 2005/5, pp. 19–20, paras 5–11.

## 2.3 Consistency with natural justice—3 main principles

### 2.3.1 FLP issue

Legislation should be consistent with the principles of natural justice—*Legislative Standards Act 1992*, section 4(3)(b).

The principles of natural justice are principles developed by the common law.

First principle—The principles require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present the person’s case to the decision-maker.

Second principle—The decision-maker must be unbiased.

Third principle—The principles require procedural fairness, involving a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.

## 2.4 Consistency with natural justice—right to be heard

### 2.4.1 FLP issue

Legislation should be consistent with the principles of natural justice—*Legislative Standards Act 1992*, section 4(3)(b).

This material deals with the right to be heard. This principle has its highest impact in judicial proceedings. Concerning legislation that required a court to make restraining orders against property, the Supreme Court of Queensland in *Re Criminal Proceeds Confiscation Act 2002* (Qld) [2003] QCA 249, has stated the following—

In *In re Hamilton; In re Forrest* [1981] AC 1039, Lord Fraser of Tullybelton (with the concurrence of the other Law Lords) said at 1045:

‘One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of *audi alteram partem* which applies to all judicial proceedings, unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication.’

In support of that he quoted a passage from the reasoning of Baron Parke in *Bonaker v Evans* (1850) 16 QB 162 at 171, to the following effect:

‘. . . no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering

the charge against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.’

The learned author of the Fourth Edition of *De Smith Judicial Review of Administration Action* quotes Baron Parke and in references cited on pages 157-8 demonstrates that the principle can be traced at least back to Biblical times. Superior courts have over the centuries been at pains to ensure that lower courts in the hierarchy, and tribunals exercising judicial or quasi-judicial power, observe the rules of natural justice. One of the requirements thereof is that a party likely to be affected by the decision shall be duly notified when and where the matter will be heard and then be given full opportunity of stating the case in response. There are throughout the law reports innumerable cases containing statements to the effect that a person may not be condemned unheard or without being given reasonable opportunity of putting forward a case. That is a universal principle which applies to both civil and criminal proceedings.

#### 2.4.2 *Immediate action without hearing*

Unless there is sufficient justification, legislation should not provide for the immediate suspension of a person’s licence or other authority without receiving and considering submissions from the person, even if the suspension is subject to subsequent review and appeal processes.

#### **Scrutiny Committee**

*Consumer protection* The Scrutiny Committee has referred to Parliament for consideration, without express objection, a power to immediately suspend a registrant’s registration if a statutory officer reasonably considered that consumer protection legislation had been breached and consumers have suffered or may suffer detriment because of the breach. AD 2003/7, p. 41, paras 9–18.

*Market protection* The Scrutiny Committee has referred to Parliament for consideration, without express objection, a power to immediately suspend a statutory certificate, which was transferable property, if there was reasonable suspicion that it was invalidly created. The suspension protected the market for the certificates. AD 2004/8, p. 5, para. 7.

#### 2.4.3 *Consideration for third parties*

Failure to adequately address rights and expectations of third parties can also be a breach of natural justice. See Chapter 3, where the subject matter of third parties is dealt with separately.

#### 2.4.4 *Public safety*

##### **Scrutiny Committee**

*Weapon possession* The Scrutiny Committee has referred to Parliament for consideration, without express objection, provisions significantly hindering a person's ability to be heard on the reasons that a weapons licence has been refused either at the time of refusal or on appeal against the refusal. The person entitled to grant the licence was empowered to refuse to say why it was refused if the reasons were 'confidential information' and on appeal the magistrates court was required to exclude the public, the appellant and the appellant's lawyer from the court room when those reasons were being revealed to the court. AD 2003/6, p. 27, para. 33.

#### 2.4.5 *Hearing only on the papers*

##### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament, without express objection, adjudication procedures the committee considered restricted the right to natural justice by allowing a matter under a construction contract to be decided solely on the basis of written submissions. The mitigating aspect was that the process gave a quick remedy without stopping a party from taking ordinary legal proceedings. AD 2004/1 p. 4, paras 18–23.

## 2.5 Consistency with natural justice—procedural fairness

#### 2.5.1 *FLP issue*

Legislation should be consistent with the principles of natural justice—*Legislative Standards Act 1992*, section 4(3)(b).

This material deals with the procedural fairness.

Procedural fairness involves a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. The usual requirements of natural justice may be reduced by circumstances of urgency.

The processes by which natural justice may be afforded are indefinite. However, it is likely that the Scrutiny Committee would have concerns about any process purporting to afford natural justice that is not transparent. This means that the process should be reliable because it is made clear to all concerned precisely how natural justice will be afforded and that breaches of natural justice will be avoided and not concealed.

- 2.5.2 Premature action** Depending on the nature of the consequence resulting from a complaint made to an entity, natural justice may include a requirement that an entity investigate whether the complaint is genuine before the consequence follows.
- 2.5.3 Adequate notice of hearing** Persons who are entitled to be heard are entitled to prior notice. The notice should give the person sufficient time and information to prepare and present the person's case and to arrange to attend the hearing or make written submissions. The person should also be put on notice of the possible consequences of an adverse decision. The Law Book Company Limited, *The Laws of Australia*, vol. 2.5, para. 23.
- 2.5.4 Notice of any allegation** **Scrutiny Committee**  
The Scrutiny Committee has commented that natural justice includes the right of a person to be made aware of evidence adverse to the person and to make submissions in relation to it. AD 2000/9, p. 6, para. 34.
- 2.5.5 Notice of requirements** Natural justice includes a person's right to know the criteria necessary to satisfy an entity's requirements in a particular subject area.
- 2.5.6 Conduct of a hearing** Natural justice includes a person's right to answer allegations made against the person.  
Persons who are entitled to be heard must be given a reasonable opportunity to present their case and to respond to any adverse material of which the decision-maker has informed itself. The Law Book Company Limited, *The Laws of Australia*, vol. 2.5, para. 41.  
What is appropriate depends on the circumstances. In a disciplinary proceeding, any of the following matters may be important in ensuring consistency with natural justice—
- (a) Information made available to a disciplinary body adverse to the person must be disclosed to the person.
  - (b) The person must always be permitted to put his or her case.
  - (c) The person may be entitled, having regard to all the circumstances, to put the case orally.
  - (d) The person may be entitled, having regard to all the circumstances, to be represented, even legally represented.



- (e) The person may be entitled to a hearing on the issue of punishment that is separate to the hearing on the question of guilt of a breach.
- (f) It would be useful for legislation to address the contentious points that often arise concerning these matters.

### **Scrutiny Committee**

The Scrutiny Committee regards the power to restrict access to material adverse to a party before the court when the court proposes to rely on the material as contrary to the FLP. This was the case even though the power was judicially exercised to protect children and witnesses. AD 2000/9, p. 6, para. 32.

#### *2.5.7 Legal representation*

### **Scrutiny Committee**

The Scrutiny Committee has commented that, as a general rule, representation by a lawyer enhances a person's right to natural justice because it gives the person the means to most efficiently present the person's case. AD 2005/4, p. 22, paras 88–92.

The committee has considered this principle is most applicable in proceedings where there is a binding outcome imposed by a third party umpire. This happens, for example, in court proceedings or arbitration but not in mediation (an informal dispute resolution process where the outcome, if any, is agreed to by the parties themselves). For mediation, the committee examines whether the representation allowable provides for equality of representation. AD 2000/5, pp. 30–31, paras 27–32.

However, the Scrutiny Committee has considered that the following factors may support arguments that the exclusion of lawyers promotes the effective and even-handed operation of the decision-maker—

- (a) the nature of the particular tribunal
- (b) the cost and lengthening of proceedings associated with legal representation
- (c) whether all and not merely some parties can afford legal representation
- (d) whether matters coming before the tribunal are likely to be practical rather than technical. AD 2002/1, pp. 21–22; AD 2001/8, pp. 18–20; AD 2000/9, p. 6, para. 30.

*Examination by investigator with legal practitioner present* In relation to legislation authorising an investigator to examine a person, the Scrutiny Committee was comfortable about compliance with procedural fairness where—

- (a) provision was made for the legal practitioner acting for the person to attend the examination and examine the person about matters in relation to which the investigator has questioned the person; but
- (b) the legal practitioner was restricted by the provision to addressing the investigator only to the extent permitted by the investigator. AD 1996/5, pp. 14–15, paras 4.21–4.25.

### 2.5.8 Evidence rules

Justification is required for relaxation of the normal rules of evidence applicable to legal proceedings.

However, reports by scientific experts are commonly admitted as an evidential facilitation. The real question is whether there is a reasonable and practical opportunity to challenge the reports by, for example, requiring the author to be called as a witness.

This matter is also significant in relation to the reversal of onus in criminal proceedings.

### Scrutiny Committee

The Scrutiny Committee has expressed the view that provisions authorising evidence to be admitted by a certificate or other way that avoids the normal common law requirements of direct evidence from a witness should be limited to technical and non-contentious matters. AD 2000/9, p. 17, para. 43 and pp. 21–22, paras 28–34; AD 1999/4, pp. 7–8, paras 1.46–1.49.

The Scrutiny Committee has referred to Parliament, without express objection, a provision—

- stating that a certificate or report about a range of matters dealing with a remotely sensed image (including relatively significant matters such as conclusions a person has drawn from the image, whether trees in a stated area have been cleared and whether a stated area is or is likely to be an area of remnant vegetation) is evidence; and
- requiring a party intending to challenge the statement to give at least 28 days notice. AD 2003/2, pp. 5–8, para. 5 (7th dot point) and paras 7–8.

### 2.5.9 Reduction of full process in urgent cases

#### Scrutiny Committee

While noting that the relevant Minister would ‘no doubt argue that the nature of the circumstances involved justifies the availability of these statutory powers’, the Scrutiny Committee has referred to Parliament the question whether the following provisions were justifiable—

- (a) a provision authorising a tribunal, without complying with its usual procedural requirements (including notifying the affected persons and giving them the opportunity to make submissions), to make interim orders if urgent action appears to be required
- (b) a provision authorising a tribunal, without complying with its usual procedural requirements, to suspend for 3 months a guardian or administrator the tribunal suspects is incompetent. AD 2000/1, p. 9, para. 68.

### 2.5.10 Committal proceeding for trial on indictment

The High Court has recognised the importance of a committal proceeding in relation to a charge that will later be dealt with on indictment. In *Grassby v. R* Dawson J (with whose reasons Mason CJ, Brennan, Deane and Toohey JJ agreed) said this—

The importance of the committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witness. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued..... Furthermore, the value of committal proceedings to a person charged may be such as to warrant a trial being stayed or postponed where an ex officio indictment has been presented without committal proceedings, in order to prevent an abuse of process of the trial court and to ensure a fair trial: *Barton v. R*.

#### Scrutiny Committee

The Scrutiny Committee has queried provisions that severely limited the ability of a defendant to cross-examine child witnesses in committal proceedings if there was a particular relationship between the child and the defendant and the offence was of a particular sexual or violent nature. AD 2003/6, pp. 9–11, paras 17–32.

### 2.5.11 *Inconsistency in process*

#### **Scrutiny Committee**

The Scrutiny Committee examined legislation requiring a chief executive, before making a second or subsequent maximum security order for a prisoner, to give written notice to the prisoner advising that consideration was being given to make the order and to provide an opportunity to the prisoner to make submissions. The chief executive was then required to consider any submissions.

The Scrutiny Committee questioned whether the failure to provide a prisoner with the same opportunity to make submissions before making the original maximum security order was consistent with the principles of natural justice. AD 1999/3, p. 13, para. 2.14.

## 2.6 Consistency with natural justice—unbiased decider

### 2.6.1 *FLP issue*

If a decision is subject to the rules of natural justice, a person making the decision must not be actually or ostensibly biased.

Correct, accurate and reliable decision-making requires neutrality on the part of the decision-maker. The overall test is whether the relevant circumstances would give rise, in the mind of a party or a fair-minded and informed member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker. See Chapter 10 of *Judicial Review of Administrative Action* (Aronson, M and Dyer, B, 2000, *Judicial Review of Administrative Action*, 2nd edn, JBC Information Services).

#### **Scrutiny Committee**

The Scrutiny Committee has considered that a person given a function, in legislation, to make a decision on an application must be perceived to be unbiased. See AD 2002/1, p. 12, paras 7–10.

### 2.6.2 *Reviewer separate to decider*

Depending on the seriousness of a decision and the consequences that follow, natural justice may include a requirement that a reviewer of a decision be separate from the original decision-maker.

## 2.7 Appropriateness of delegation of administrative power

### 2.7.1 FLP issue

Legislation should allow the delegation of administrative power only in appropriate cases and to appropriate persons—*Legislative Standards Act 1992*, section 4(3)(c).

Generally, powers should be delegated only to appropriately qualified officers or employees of the administering department. The *Acts Interpretation Act 1954*, section 27A contains extensive provisions dealing with delegations.

Delegation to a person or body outside government is uncommon as it—

potentially circumvents the traditional means of accountability usually applicable to the public sector. For example, administrative decisions made within government are usually subject to accountability mechanisms such as those under the *Freedom of Information Act 1992*, the *Judicial Review Act 1991*, the *Criminal Justice Act 1989* and the *Parliamentary Commissioner Act 1974*. (AD 1997/9, p. 9).

See also the 1997 issues paper by the Administrative Review Council entitled *The Contracting Out of Government Services*.

The appropriateness of a limitation on delegation depends on all the circumstances including the nature of the power, its consequences and whether its use appears to require particular expertise or experience.

### Scrutiny Committee

The approach to the issue set out in the general comment also reflects the following policy of the Scrutiny Committee set out in Policy No. 1 of 1996 in Alert Digest No. 4 of 1996, page 5—

- If a power being delegated is significant, the category of delegate should be limited and the qualifications or office specified.
- If significant powers are delegated to a broad category of people, the legislation should require the delegate to be ‘appropriately qualified’.

The Scrutiny Committee has explained that a power being delegated is significant if the power is extensive, may affect the rights or legitimate expectations of others, or appears to require particular expertise or experience. An example of a ‘significant power’ is the power to grant, suspend or cancel registration.

*2.7.2 Competence of delegate should match the power delegated*

**Scrutiny Committee**

If a power being delegated is significant, it is the Scrutiny Committee’s view that the category of delegate should be limited and the qualifications or office specified either in the legislation or in regulations—the delegations could not be made until the regulations are made. If, despite this view, significant powers are delegated to a broad category of persons, the authorising Act or subordinate legislation should require the delegate to be ‘appropriately qualified’. AD 1996/4, p. 4.

*2.7.3 Delegate should be properly instructed*

**Scrutiny Committee**

If it is desirable to wait for a short period before making the regulations with which the delegations must conform, so that the actual workings of the legislation can be better considered, the Scrutiny Committee has stated it would be comfortable with a sunset clause that would permit delegations without the regulations. AD 1996/6, p. 16, para. 3.28.

The Scrutiny Committee has considered a provision enabling delegation of any power by the Queensland Corrective Services Commission or chief executive officer to any officer of the public service or the commission. The provision provided for ministerial control of the delegation through the issue of directions to the delegates. The committee recommended the directions be incorporated in a regulation. AD 1996/5, p. 19, paras 5.6–5.11.

*2.7.4 Evidential facilitation added to by subordinate legislation*

**Scrutiny Committee**

The Scrutiny Committee has found it generally objectionable for legislation to state that subordinate legislation can provide for evidential certificates or similar provisions, removing the need to call direct evidence by witnesses, when the certificates concern contentious matters. AD 2000/9, p. 17, para. 43; AD 2002/7, pp. 4–5, paras 20–25.

2.7.5 *Appointment power*

**Scrutiny Committee**

*Membership of entity established for Aboriginal and Island communities* The Scrutiny Committee has noted, without express objection, a provision empowering subordinate legislation to prescribe membership of community justice groups in Aboriginal and Island communities. The consultation and negotiation process, and need for flexibility, was probably influential. AD 2002/7, pp. 2–3, paras 3–10 and pp. 17–18, paras 30–33.

2.7.6 *Removal from office*

**Scrutiny Committee**

The Scrutiny Committee has expressed the view that allowing a Minister's opinion to be the basis for removing a person from an independent office of some significance was a breach of this FLP. AD 2000/9, pp. 7–8, paras 38–42.

2.7.7 *Setting of amounts payable*

**Scrutiny Committee**

The Scrutiny Committee considers that generally the amount of fees and charges payable by the general public should at least be fixed by regulation. AD 2006/3, p. 3, para. 15. Taxes should normally be imposed by primary legislation. See 5.3.2 (Taxation laws). However, there are occasional exceptions.

*Voluntary agreements* The Scrutiny Committee has expressly considered probably not objectionable a provision authorising the administrative fixing of fees and charges payable to a category of persons providing services for the purposes of the operation of legislation. AD 2006/3, pp. 3–4, paras 12–19.

## 2.8 Appropriateness of delegation of administrative power—subdelegation

2.8.1 *FLP issue*

Legislation should allow the delegation of administrative power only in appropriate cases and to appropriate persons—*Legislative Standards Act 1992*, section 4(3)(c).

Delegation includes subdelegation, which involves more issues than delegation.

### Scrutiny Committee

The Scrutiny Committee does not necessarily object to the inclusion of a power to subdelegate, but notes it may be inappropriate on some occasions. AD 2002/6, p. 45, paras 6–7.

#### 2.8.2 *Power of appointment*

### Scrutiny Committee

The Scrutiny Committee has sought more information from a sponsoring Minister as to why the Minister thought it necessary and appropriate to provide in a Bill for a registrar of a tribunal to subdelegate to a member of registry staff the power to choose members to constitute a tribunal for a hearing. AD 2002/6, p. 45, paras 6–7.

## 2.9 Appropriateness of reversal of onus of proof in criminal proceedings

#### 2.9.1 *FLP issue*

Legislation should not reverse the onus of proof in criminal proceedings without adequate justification—*Legislative Standards Act 1992*, section 4(3)(d).

Legislation should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence, for example, by disproving a fact the prosecution would otherwise be obliged to prove, unless there is adequate justification.

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.

For example, if legislation prohibits a person from doing something ‘without reasonable excuse’, it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.

Legislation should not provide that something is conclusive evidence of a fact, without the highest justification.



### Scrutiny Committee

Generally, reversal of the onus of proof is opposed or not endorsed. AD 2002/4, p. 27, para. 10.

In relation to certificates evidencing a fact, the Scrutiny Committee has stated that sometimes there is an issue as to whether a thing should even constitute any evidence of a matter. AD 1999/4, pp. 19–20, paras 3.15–3.17.

The Scrutiny Committee does not automatically accept the presence, in 1 legislative instrument, of provisions authorising the use of certificate evidence for a purpose as justifying their replication in other legislation. AD 2005/4, p. 19, paras 62–67; AD 2003/10, p. 18, para. 25.

#### 2.9.2 *Matter peculiarly within defendant's knowledge, expensive to prove*

### Scrutiny Committee

In the context of provisions providing for the civil confiscation of the proceeds of crime, the Scrutiny Committee has noted that reverse onus provisions are a natural extension of the basic common law principle that the burden of proving or negating a state of affairs should rest on the person who has superior or peculiar knowledge of the essential facts. AD 2002/6, pp. 21–22, para. 107.

Justification for the reversal is therefore sometimes found in situations where the matter the subject of proof by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the State to prove. AD 2005/3, pp. 6–7, paras 7–18; AD 2005/1, p. 10, para. 68 and p. 14, paras 10–11; AD 2004/7, pp. 7–8, paras 17–27; AD 2003/7, pp. 44–45, paras 47 and 50–54; AD 2002/6, pp. 21–22, paras 91–109; AD 1997/2, p. 11. Sometimes the Scrutiny Committee has expressed the view that a particular matter is not peculiarly within the defendant's knowledge, for example—

whether something was for a genuine artistic, educational, legal, medical, scientific or public benefit. AD 2005/1, pp. 10–11, paras 66–69.

A reversal of onus of proof to disprove the falsity of representation by introduction agents about contacts they had on offer was referred to Parliament without great concern. AD 2001/1, pp. 32–33, paras 18–27.

**2.9.3 Consistency with common law**

**Scrutiny Committee**

The Scrutiny Committee is not likely to object to a provision that on its face reverses the onus of proof if at common law the onus of proof is on the defendant. AD 2005/1, pp. 13–14, paras 3–15.

**2.9.4 Administration of legislation otherwise impractical**

A further example of ‘adequate justification’ may be circumstances indicating that the provision cannot be practically administered otherwise. This type of justification is used in relation to the following–

- *Drug paraphernalia prohibitions* AD 2007/2, pp. 23–24, paras 15–21
- *Traffic offences* AD 2002/6, pp. 42–43, paras 16–24.

**2.9.5 Consistency with general policy underlying provisions of empowering Act**

**Scrutiny Committee**

*BAC testing* Provision for certificates of analysis of compulsory blood samples that effectively reversed the onus of proof in relation to matters stated in the certificates was merely referred for consideration to the Parliament in relation to the Transport (Compulsory BAC Testing) Amendment Bill 2002. The committee said that the proposed provision was consistent with general policy underlying the provisions of the empowering Act, an Act that already had many evidential aids.

*Release of impounded or forfeited property* The Scrutiny Committee has referred to Parliament without express objection a provision requiring the owner of a vehicle, in order to escape the effect of an impounding or forfeiture, to prove absence of knowledge or consent to the commission of the traffic related offence for which the vehicle has been impounded or forfeited. AD 2002/5, pp. 17–18, paras 36–42.

**2.9.6 Whether a circumstance should be an excuse or a defence**

The Criminal Code distinguishes between excuses and defences. Once an **excuse** is fairly raised by the defence, the prosecution must negative the excuse beyond reasonable doubt. However, the defence must prove the matters constituting a **defence** on the balance of probabilities.

**Scrutiny Committee**

The Scrutiny Committee has noted that most matters relieving a person from criminal responsibility under the Criminal Code are excuses, for example, self defence (ss. 271 and 272), provocation for an assault (s. 269), honest claims of right (s. 22), intoxication

negating intention (s. 28), accident and acts occurring independent of the will (s. 23), extraordinary emergencies (s. 25), mistakes of fact (s. 24) and compulsion (s. 31). AD 2006/9, p. 11, para. 32.

The Scrutiny Committee has sought information from a Minister as to why an exculpatory circumstance should be a defence, rather than an excuse. AD 2006/9, pp. 10–11, paras 26–36.

### 2.9.7 *Inappropriate to override Criminal Code sections 23 and 24*

#### **Scrutiny Committee**

The Scrutiny Committee will not endorse a reversal of onus of proof created by a provision that overrides the *Criminal Code* sections 23 and 24, which provides excuses the prosecution must disprove once there is threshold evidence, with a replacement defence the defendant must always prove.

The Scrutiny Committee has therefore referred a number of provisions to Parliament for consideration.

*Ship sourced marine pollution* Transport Legislation Amendment Bill 2002 (sections 23 and 24).

*Illegal tree clearing* AD 2003/2, pp. 5–8, para. 5 (2nd dot point) and paras 7–8 (section 24).

*Food Act contraventions* AD 2005/13, p. 3, paras 4–7 (sections 23 and 24).

*Fire safety* AD 2006/5, pp. 8–9, paras 8–17.

### 2.9.8 *Facilitation of evidence by certificate etc. may be appropriate*

Legislation may reasonably facilitate the process of proving a fact by providing for a certificate or something else to be evidence (not conclusive) of a fact.

For example, legislation frequently provides that a certificate signed by a person administering a law is evidence of a fact so that a range of basic matters relating to records kept by an administering authority, and to its activities, may be put in evidence before a court through the certificate, rather than be put in evidence through the calling of witnesses.

The party affected should always be given the opportunity to challenge a fact sought to be proved by an evidentiary certificate or other facilitation.

## Scrutiny Committee

*Non-contentious matters* The Scrutiny Committee has considered evidentiary facilitation provisions to be unexceptionable if they relate to matters that are non-contentious. AD 2005/13, p. 6, para. 28; AD 2005/4, p. 19, paras 64–67; AD 2002/3, p. 7, para. 30; AD 2000/5, p. 21, paras 18–22.

*Contentious matters* However, the Scrutiny Committee has expressed concern about a certificate being evidence of the following matters—

- (a) the obtaining, managing and testing of a DNA sample.  
AD 2002/3, p. 7, para. 34
- (b) .....

*Leave required to challenge* The Scrutiny Committee also has noted without express objection that the court's leave was required to challenge an evidentiary certificate. AD 2002/3, p. 8, para. 35.

*Challenge ends evidentiary effect* The Scrutiny Committee's concerns about evidentiary certificates are in large part allayed if they lose their evidentiary effect on challenge. AD 2006/5, pp. 23–24, paras 34–42; AD 2006/1, pp. 16–17, paras 12–20.

### 2.9.9 *Right of review or appeal may be relevant*

#### Scrutiny Committee

The Scrutiny Committee has not objected to evidentiary certificates with conclusive effect when the central decision was subject to appeal rights at a given point of time. The certificates ensured that appeals were taken in the way specified for the particular matter in the relevant legislation, and not into the generally applicable appeal stream by way of claims about allegedly invalid process. AD 2004/8, p. 7, paras 15–20; AD 2003/6, p. 5, paras 32–36; AD 2001/8, p. 62, paras 15–16.

### 2.9.10 *Provision for guilt by association is inappropriate*

A provision making a person guilty of an offence committed by someone else with whom the person is linked, and providing defences allowing the person to disprove connection with the offence, is an apparent breach of this FLP and must be justified. Common situations where these concerns arise are when executive officers of a corporation are taken to be guilty of offences committed by the corporation, or a corporation is taken to be guilty of offences committed by its executive officers.

Legislation requiring executive officers of a corporation to ensure the corporation complies with a law and providing that, if the corporation commits an offence, each executive officer also commits an offence

effectively reverses the onus of proof. Generally, a person can not be guilty of an offence unless the person is a party to the offence. This is potentially objectionable even if the law provides defences if the executive officer took reasonable steps to ensure compliance or was not in a position to influence the corporation's conduct.

### Scrutiny Committee

*Executive officers of corporations* The Scrutiny Committee has on many occasions examined provisions requiring executive officers of a corporation to ensure that the corporation complies with the legislation and providing that if the corporation commits an offence, each executive officer also commits an offence. This effectively reverses 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. Similar considerations apply for a provision effectively declaring persons (including corporations) to be guilty of offences committed by their representatives. In the provisions examined there were defences if the person took reasonable steps to ensure compliance or to prevent the offending act or omission, or if the person was not in a position to influence the conduct of the relevant person.

On these provisions the Scrutiny Committee expressed the view that while it appreciates the difficulties of determining liability in certain circumstances (for example, corporations), it as a general rule does not approve of such provisions. AD 2006/8, pp. 6–7, paras 31–37; AD 2006/1, p. 4, paras 24–30 and pp. 10–11, paras 25–31; AD 2005/13, p. 5, paras 21–27; AD 2005/10, pp. 15–16, paras 37–42; AD 2005/4, p. 6, paras 42–46 and pp. 18–19, paras 54–61; AD 2005/2, pp. 5–6, paras 18–24; AD 2005/1, pp. 14–15, paras 16–21; AD 2004/5, pp. 12–13, paras 40–51 and p. 32, paras 37–43; AD 2004/3, p. 25, paras 66–71; AD 2003/11, p. 22, paras 26–32; AD 2003/9, p. 18, paras 15–21 and p. 27, para. 30 and pp. 30–31, paras 16–20; AD 2003/7, p. 16, paras 10–16 and pp. 23–24, paras 28–34 and p. 39, paras 31–37 and pp. 44–45, paras 41–54; AD 2003/5, p. 20, paras 50–54 and pp. 22–23, paras 12–18; AD 2002/12, p. 3, paras 17–25; AD 2002/7, p. 11, paras 31–38; AD 2001/1, p. 33, paras 28–31; AD 1999/4, pp. 12–13, paras 1.81–1.88. For other consideration of reversals, particularly in relation to corporations, see Alert Digest No. 1 of 2004, page 17, paragraphs 34–39 (and Alert Digest No. 5 of 2003, pages 27–28, paragraphs 30–35); Alert Digest No. 3 of 2002, pages 16–17, paragraphs 19–25 and pages 19–20, paragraphs 9–16; Alert Digest No. 3 of 1999, pages 32–33; Alert Digest No. 6 of 1997, pages 15–16.

In Alert Digest No. 1 of 2002, pages 8–9, in its comments on the Cloning of Humans (Prohibition) Bill 2001, the committee comments more extensively on these provisions.

*Partners* The Scrutiny Committee has considered in a similar light a reversal of onus of proof in relation to partners in an incorporated limited partnership under the *Partnership Act 1891*. AD 2004/5, p. 19, paras 11–12.

*Group of electoral candidates* The Scrutiny Committee has considered in a similar light a reversal of onus of proof in relation to members of a group of electoral candidates when a representative has committed an electoral offence relating to the group activities. AD 2007/1, pp. 7–8, paras 26–32.

### 2.9.11 *Holding occupiers responsible for things found*

#### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament the question of whether a provision deeming the occupier or person concerned in the management or control of a place to be in possession of something found on the place is reasonable in the circumstances.

*Weapons* The committee noted that the exculpatory provisions were more extensive than those used in a similar provision in the *Drugs Misuse Act 1986* [s 129 1(c)]. AD 2003/6, p. 29, paras 43–50.

*Property at a place occupied by a second hand dealer.* AD 2003/9, pp. 2–3, paras 9–15.

### 2.9.12 *Immature age protection*

#### **Scrutiny Committee**

The Scrutiny Committee has examined a provision reversing an existing presumption in the *Criminal Code*, section 29 (Immature age) that children aged between 10 and 14 cannot distinguish between right and wrong and considered the reversal of the onus of proof would have an adverse impact on the rights of the relevant group of children. The committee referred to Parliament the question of whether this reversal was justified. AD 1999/11, pp. 1–3, paras 1.3–1.12.

### 2.9.13 *Weapon against crime*

#### Scrutiny Committee

The Scrutiny Committee has referred to Parliament, without express objection, provisions reversing the onus of proof so that a person suspected of possessing property derived from crime is required to prove a legitimate source of the property. See '2.9.14 Civil proceedings distinguished' on page 43.

### 2.9.14 *Civil proceedings distinguished*

It should be noted that the principle prohibiting the reversal of onus of proof is expressly directed towards criminal proceedings. Other considerations apply when the appropriateness of a reversal mechanism in a civil proceeding is being considered.

#### Scrutiny Committee

*Civil confiscation of the proceeds of crime* The Scrutiny Committee has noted the distinction to be drawn between civil and criminal proceedings in relation to reversal of onus of proof mechanisms. It has noted that there is nothing unfair or contrary to the natural justice rule of equality of parties in the onus shifting in a civil matter once reasonable suspicion has been established. In the context of provisions providing for civil confiscation of the proceeds of crime, it noted this was quite reasonable where it appears to a court that goods in the possession of a person were the proceeds of crime. The person in possession of the goods is in a unique position to account for their source. Reverse onus mechanisms are central to the capacity of civil based forfeiture schemes to achieve their purpose. Otherwise, criminals could insulate themselves from law enforcement protection. The underlying purpose of civil forfeiture is preventative (depriving criminals of the instruments of crime) or restorative (reimbursing the State for the cost of crime), not punitive.

The committee has noted that, in *Brauer v. DPP* (1989) 91 ALR 490, 501-2, Derrington J relied on *Williamson v. Ah On* (1926) 39 CLR 95, 113-114 when acknowledging that a reverse onus aimed at the proceeds of crime is legally acceptable where it appears in a controlled legislative scheme that safeguards against unjustly depriving a suspected person of any of his or her property. For example, allowing the court to take into account any difficulty associated with proving a negative or other forensic disadvantage (such as the person's inability to lead material evidence) would be relevant. AD 2002/10, pp. 9-10, paras 32-39); AD 2002/6, p. 22, para. 109.

## 2.10 Judicial warrant required for entry, search and seizure

### 2.10.1 FLP issue

Legislation should confer 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—*Legislative Standards Act 1992*, section 4(3)(e).

This principle supports a long established rule of common law that protects the property of citizens. Mason CJ, Brennan J and Toohey J, in the High Court in *Plenty v. Dillon* (1991) 171 CLR 635, 639 commented on the common law as follows—

The starting point is the judgment of Lord Camden L.C.J. in *Entick v. Carrington* (1765) 19 St Tr 1029, at p 1066:

“By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.”

And see *Great Central Railway Co. v. Bates* (1921) 3 KB 578, at p 582; *Morris v. Beardmore* (1981) AC 446, at p 464. The principle applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons. As Lord Denning M.R. said in *Southam v. Smout* (1964) 1 QB 308, at p 320, adopting a quotation from the Earl of Chatham:

“ ‘The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.’ So be it - unless he has justification by law.”

And in *Halliday v. Nevill* (1984) 155 CLR 1, Brennan J. said (at 10):

“The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.”

The proposition that any person who “set(s) his foot upon my ground without my licence... is liable to an action” in trespass is qualified by exceptions both at common law and by statute.



Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate. Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority. For comments about a power of entry to enter a public place, when it is open to the public, without a warrant or consent, see Alert Digest No. 3 of 2002, pages 18–19, paragraphs 4–8. The Scrutiny Committee's chief concern is the range of additional powers that become exercisable after entry without a warrant or without consent. AD 2004/5, p. 31, paras 30–36; AD 2004/1, pp. 7–8, paras 49–54; AD 2003/11, pp. 20–21, paras 14–19; AD 2003/9, p. 4, para. 23 and p. 31, paras 21–24; AD 2003/7, pp. 34–35, paras 24–27.

This FLP issue frequently arises in the context of inspectorial powers. Fundamental legislative principles are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals.

Queensland drafting practice currently established, by precedent, to achieve consistency with fundamental legislative principles includes the following—

- (a) An inspector must be issued with official identification documents and, when the inspector is exercising a power, the inspector must produce them to any person against whom the power is being exercised.
- (b) Entry of any premises without consent is strictly controlled through requirements for warrants and limitation of circumstance.
- (c) Entry without consent into anywhere a person lives requires the highest justification.
- (d) The powers that may be exercised, particularly on entry of premises, must be specified as far as practical, and justifiable in proportion to the interference in rights and liberties involved.
- (e) Powers in particular legislation must be limited in ways that are appropriate to the objectives of the particular legislation and the persons against whom, and circumstances in which, the powers may be exercised.
- (f) If it is an offence to obstruct or fail to obey, help, or provide information to an inspector, reasonable excuse must be provided as a defence.
- (g) Property must not be interfered with or seized without particular justification.

- (h) If property may be seized, the circumstances of its return must be specified and the circumstances must be fair, and the owner must be permitted reasonable access to it while it is seized.
- (i) If property is damaged, provision must be made for notice to be given to the owner of property and for payment of compensation unless there is particular justification for not providing compensation.
- (j) There must be particular justification for the provision of power to force someone to provide information and documents, and care must be taken to define the circumstances and way in which the power is exercised.
- (k) The privilege against selfincrimination must be specifically preserved unless there is the highest justification for not doing so.
- (l) If a person loses the privilege against selfincrimination under a provision, the person must be legally protected from the use against the person in criminal proceedings of evidence derived directly or indirectly from the loss of privilege.

### Scrutiny Committee

The Scrutiny Committee examines all powers of entry and can be expected to comment adversely if appropriate safeguards are not provided. The committee has commented that departures from the safeguards provided by search warrants should always be carefully considered and adequately justified in the context of the subject matter dealt with in the particular Bill. AD 2002/1, p. 27, paras 34–42; AD 1997/13, p. 19; AD 1999/4, pp. 11–12, paras 1.75–1.80.

For rights recommended by the Scrutiny Committee if power to enter premises and search for or seize document without a warrant is provided, see Alert Digest No. 5 of 1996, pages 12–14, paragraphs 4.5–4.16.

The Scrutiny Committee commends restraint in the conferral of powers of entry, subject to appropriate enforcement and monitoring being achieved in the restrained way. A compliance regime concerning housing that relied mainly on information gathering and containing very limited powers of entry was commended. AD 2003/7, pp. 22–23, paras 21–27.

#### *2.10.2 Residential premises especially protected*

Residential premises in particular should not be entered except with consent or under a warrant or in the most exceptional circumstances.

### Scrutiny Committee

*Fire* The Scrutiny Committee has referred to Parliament, without express objection, a provision authorising entry to residential premises without consent or a warrant to prevent the loss of life in a fire. The power was restricted to monitoring compliance with safety requirements for particular commercial accommodation. AD 2002/1, p. 3, paras 18–20.

*Child care inquiry* The Scrutiny Committee has referred to Parliament, without express objection, a power, conferred on officers monitoring child care permitted under legislation, to enter a home, without consent or a warrant, while child care was being provided there under a licence.

*Clothing outworkers* The Scrutiny Committee has referred to Parliament, without express objection, a provision conferring a power to enter a home where outwork is being carried on, without consent or a warrant. The explanatory notes had argued that, without the power, workers in a home based ‘sweatshop’ situation could not be protected. AD 2005/3, p. 7, paras 19–23.

*People with a disability* The Scrutiny Committee drew to the attention of Parliament, without express objection, a provision conferring a power to enter a home, without consent or a warrant, in stated circumstances. AD 2006/1, pp. 9–10 paras 20–24.

*Ship in port area, not private land* The Scrutiny Committee found ‘not unreasonable’ an authorised officer’s power to enter a ship in a port authority’s port area for the purpose of deciding whether a charge is payable to the port authority, even though a person might reside in the ship. AD 2005/5, p. 18, paras 15–19.

#### 2.10.3 *Extended powers for health and safety reasons*

Legislation frequently provides more extensive powers of all descriptions for health and safety reasons. In these cases the prevailing public interest is to protect the community. However, the Scrutiny Committee will consider the attempts made to comply as far as possible with fundamental legislative principles.

### Scrutiny Committee

*Coal mining safety* In relation to extensive powers to enter, and take action after entry, the Scrutiny Committee has commented that the question is ultimately whether, in the particular case, the extensive additional inspectorial powers were warranted by the seriousness of

the health and safety risks associated with the coal mining industry, and by the capacity of the inspectorial system to establish causes of accidents and incidents. AD 1999/4, pp. 11–12, paras 1.75–1.80.

*Disaster management* The Scrutiny Committee has referred to Parliament, without express objection, extensive powers exercisable by various categories of persons in circumstances of a disaster or other emergencies. The committee noted the exercise of the powers was subject to a range of conditions and was made less harsh by the inclusion of an entitlement to compensation for damage caused by the exercise of the powers. AD 2003/12, pp. 1–3, paras 3–12.

*Electrical safety* The Scrutiny Committee has referred to Parliament, without express objection, power for an inspector to enter if a place is open to the public, if a place is a workplace under the control of a person with an electrical safety obligation (when open for carrying on business or otherwise open for entry), or if entry is urgently required to investigate circumstances of a serious electrical incident or dangerous electrical event. AD 2002/7, p. 10, paras 25–30.

The Scrutiny Committee has also considered unobjectionable provisions that allow an electricity officer for an electricity entity to enter a place to remedy damage or harm caused in connection with the entity's works, without notice if the harm is serious and the need to remediate is urgent, or otherwise, on 7 days' written notice. AD 2004/8, p. 8, paras 25–29.

*Gas infrastructure safety and reading or testing* The Scrutiny Committee has referred to Parliament, without express objection, powers for 'distribution officers' appointed by gas distribution entities to enter places (other than a part of a place where a person resides) to make gas infrastructure safe and, during daylight hours, to read or test meters. AD 2003/5, pp.15–16, paras 15–21.

*Protection of impaired persons* The committee referred to Parliament, without express objection, power to enter a defined type of premises—not including a private dwelling—where accommodation was being provided to these persons of impaired capacity. The object of the power was to safeguard the wellbeing of these persons. AD 2000/1, pp. 6–7, paras 48–54.

*Protection of children* The Scrutiny Committee has considered justifiable extensive powers to enter without a warrant to search for a child suspected of being in immediate danger or risk of harm, and to use reasonable force in doing so. AD 1998/11, p. 8, paras 1.46–1.50; AD 1997/13, p. 2, paras 1.4–1.7.

*Public health matters generally* The Scrutiny Committee has referred to Parliament, without express objection, an extensive range of entry and post-entry powers for public health matters. AD 2005/13, p. 4, paras 14–20; AD 2005/4, pp. 15–16, paras 36–43.

*Dangerous dogs* The Scrutiny Committee has not expressly objected to legislation allowing entry to property to deal with dangerous dogs. AD 2001/9, pp. 17–18, paras 17–26.

#### 2.10.4 *Pest control*

##### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament without express objection this type of power provided for significant pest control. The powers could be exercised for “ensuring or monitoring compliance” with particular provisions of the legislation or by an authorised person who was directed under the legislation to exercise the powers. The committee noted that the powers were to be used for pests that were potentially highly invasive. There were provisions complying with associated fundamental legislative principles. For example, there was provision for written notice before entry. AD 2002/1, pp. 16–17, paras 19–26.

#### 2.10.5 *Powers after entry—immediate production of documents*

##### **Scrutiny Committee**

The Scrutiny Committee has commented that power to require the immediate production of documents following the exercise of entry powers is not common in legislation and drew Parliament’s attention to this power. AD 2002/3, pp. 25–26, paras 28–33.

#### 2.10.6 *Power to enter ‘access land’ to gain entry to ‘primary land’*

##### **Scrutiny Committee**

*Environmental protection* The Scrutiny Committee has referred this power to Parliament without express comment in relation to environmental protection, but the power in question was severely circumscribed, requiring either consent or a warrant, or 7 days written notice or reasonable belief of imminent risk of environmental harm and reasonable attempts to advise the occupier. AD 2000/14, p. 6, paras 36–40.

#### 2.10.7 *Width of powers to enter and act*

##### **Scrutiny Committee**

In addition to the matters mentioned in entries above, the Scrutiny Committee has referred to Parliament for its consideration powers wider than the standard provision and that have been conferred for miscellaneous reasons. For example, legislation sometimes permits

wider purposes for exercising power, wider powers on entry, or a wider category of places that may be entered without warrant. AD 2006/5, p. 7, paras 3–7; AD 2004/8, pp. 11–12, paras 3–9; AD 2004/5, pp. 23–24, paras 28–32; AD 2004/3, pp. 19–20, paras 24–35; AD 2004/2, pp. 7–8, paras 28–34; AD 2003/12, pp. 14–15, paras 25–28; AD 2003/9, p. 17, paras 10–14; AD 2003/7, pp. 15–16, paras 3–9; AD 2002/11, p. 9, paras 19–24 and p. 10, paras 3–8 and p. 15, paras 19–22; AD 2002/5, pp. 2–3, paras 10–18; AD 2000/16, p. 16, paras 23–29.

Conversely, the Scrutiny Committee has expressed less concern when powers, even though intrusive, are narrowly defined. AD 2003/5, p. 31, paras 19–20.

#### *2.10.8 Warrants required to be obtained later if entry made without warrant*

If legislation empowers inspectors or other authorised persons to enter premises without consent and without warrant in particular circumstances, for example, in an emergency or to urgently preserve evidence that would otherwise be lost, there remains the issue of whether it may be appropriate to require the inspector or authorised person to obtain a warrant after the event.

The purpose of this procedure is to monitor the exercise of urgent powers allowed in urgent circumstances. It also ensures the powers will be used prudently. For an example, see the *Police Powers and Responsibilities Act 2000*, sections 78 and 79.

#### *2.10.9 Status of the issuing authority*

Even if a warrant must be issued for entry, the issue arises of whether the issuing authority is appropriate in all the circumstances.

### **Scrutiny Committee**

In particular cases, the Scrutiny Committee has commented that it may be sufficient apparent justification for the warrant to be issued by a tribunal. However, when issuing a warrant the tribunal should always include at least 1 member with legal qualifications. AD 2000/1, p. 6, para. 47.

#### *2.10.10 General warrants and similar authorisations*

At common law general warrants are regarded as abhorrent and are routinely struck down by the courts. In *Heery v. CJC* [2000] QCA 511 Thomas JA observed, 39 in relation to the issue of a listening device warrant:

The grant of approval for the use of invasive devices of this kind is a power that needs to be exercised with considerable caution. Judges, as designated persons with the authority to approve the

performance of acts which would otherwise be unlawful, exercise considerable care in ensuring that appropriate limitations are attached to such approvals. The limitations that are commonly imposed are not confined merely to time, place and nature of devices, but are designed to prevent general fishing expeditions, or the invasion of a person's premises and privacy in the hope that something discreditable might turn up against him or her. The aversion of the common law to general warrants is well known.

The foundation for the courts' concerns about listening device warrants is discussed in the High Court judgements in *Rockett v. George*, (1990) 170 CLR 104, at p. 110, *Coco v. R* (1994) 179 CLR 427 at pp. 435–438 and p. 446, *Grollo v. Palmer* (1995) 184 CLR 348 at 358–360 and 367 and *Ousley v. R* (1997) 192 CLR 69 at pp. 95, 105 and 11 which are summarised and adopted in the unanimous judgement of the Victorian Full Court in *R v. Nicholas* in 2000 [2000] VSCA 49. At the heart of those concerns is the interference with fundamental rights to privacy and private property. The use of covert surveillance devices involves clandestine installation and highly intrusive activity that would otherwise be illegal or tortious. In *Nicholas* the court struck down a listening surveillance warrant issued under the Customs Act that related to 'one or more persons who obtain or seek to obtain possession of a named bag' known to contain illicit drugs. The court observed that that was no more acceptable than the general warrant struck down in the old case of *Money v. Leach* which had authorised a search for 'the authors, printers and publishers of a certain seditious and treasonable libel, and to apprehend and seize them together with their papers'. AD 2004/2, p. 24, paras 6–8.

### Scrutiny Committee

*Terrorism* The Scrutiny Committee has not objected to powers given to the Crime and Misconduct Commission and the police to obtain a general surveillance warrant to the extent the powers related to terrorism. At the same time, the Scrutiny Committee raised concerns that a general surveillance warrant could be obtained for other matters. AD 2004/2, p. 25, para. 14 and p. 28 para. 30.

## 2.11 Providing appropriate protection against selfincrimination

### 2.11.1 FLP issue

Legislation should provide appropriate protection against selfincrimination—*Legislative Standards Act 1992*, section 4(3)(f).

This principle has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself. In *Sorby v. Commonwealth* (1983) 152 CLR 281 at 288, Gibb CJ said—

It has been a firmly established rule of the common law, since the seventeenth century, that no person can be compelled to incriminate himself (or herself). A person may refuse to answer any question, or to produce any document or thing, if to do so “may tend to bring him (or her) into the peril and possibility of being convicted as a criminal”.

At common law, the privilege is only available to individuals and not to artificial entities, for example, corporations. *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

Provisions denying the privilege are rarely essential to the operation of legislation, although there is a perception that they are essential. By way of comparison, ordinarily a police officer does not have this power when investigating serious crime.

If provided, provision also needs to be made to grant immunity against the use of information gained, directly or indirectly, from forced disclosure contrary to the privilege. The legislation should generally provide that the self-incriminating evidence is not admissible in evidence against the person in any proceeding other than proceedings where the admission of the evidence is justifiable, for example, a proceeding on a charge that the evidence provided was false. This also means that the usefulness of a provision denying the privilege is substantially reduced because the evidence produced can not be used in a court except for the narrow exception.

Traditionally, removing the privilege should be contemplated only when it is more important to know the facts leading to the contravention than to prosecute the contravention. This may be the case if knowledge will allow action to be taken that may save lives or prevent injury in the future.



It may also be necessary to have the power to attack intractable criminal activity, for example, the illegal drug trade or endemic corruption.

### Scrutiny Committee

The Scrutiny Committee has commented that denial of the protection afforded by the selfincrimination rule is only potentially justifiable if—

- (a) the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means; and
- (b) the legislation prohibits use of the information obtained in prosecutions against the person; and
- (c) in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right). See, for example, Alert Digest No. 1 of 2000, page 7, paragraph 57; Alert Digest No. 13 of 1999, page 31; and Alert Digest No. 4 of 1999, page 9, paragraph 1.60.

For comment as to whether a provision providing derivative use immunity in relation to evidence derived directly or indirectly from the potentially incriminating answers or documents provides immunity in relation to use of the answer itself, see Alert Digest No. 1 of 2000, page 8, paragraph 61.

The Scrutiny Committee commended the omission, in an amending Act, of a provision from the principal Act denying a person the benefit of the rule against selfincrimination. AD 2002, p. 20, paras 8–9.

The Scrutiny Committee generally refers to Parliament for consideration without express objection provisions denying the privilege against selfincrimination if use immunity and derivative use immunity is provided. AD 2006/4, pp. 21–23, paras 16–22; AD 2005/13, pp. 6–7, paras 35–42; AD 2005/5, pp. 24–25, paras 29–31; AD 2005/4, pp. 14–15, paras 31–35; AD 2004/8, p. 6, paras 9–14; AD 2004/3, pp. 23–24, paras 56–65; AD 2003/1, pp. 7–8, paras 24–32; AD 2002/11, pp. 26–27, paras 10–17; AD 2002/10, pp. 20–21, paras 11–18.

#### *2.11.2 Filtering devices to control misuse of power to obtain information*

Legislation that provides for a power to require information and removes the privilege against selfincrimination may attract more support if there is a committee or other independent filtering device that controls access to the use of the power.

### Scrutiny Committee

The Scrutiny Committee has noted a provision that interposed a reference committee, including representation from the community, to control access to inquiry powers abrogating the privilege against selfincrimination. AD 2002/6, p. 46, para. 19.

#### 2.11.3 Increased access to information in prescribed documents

Often persons are required under legislation to keep records or other documents about their activities. This issue discusses the attitude that should be taken to provisions allowing inspectorial access to the documents, despite a claim of privilege against selfincrimination.

### Scrutiny Committee

The Scrutiny Committee has even looked unfavourably on a provision that excludes selfincrimination protection only in relation to the production of documents required to be kept under legislation. AD 2006/5, p. 10, paras 22–27; AD 2003/11, p. 21, paras 20–25; AD 2003/1, pp. 25–26, paras 11–16.

However, the Scrutiny Committee has found this less problematical than in other contexts, following the Report of the Law Reform Commission on *The Abrogation of the Privilege Against Self Incrimination*, December 2004, at page 37. The Commission there considered that if a person obtains a licence or other form of registration in order to engage in an activity regulated by statute, this was essentially conditional on their accepting the enforcement regime incorporated in the statute. On this basis, it could be argued that they had waived the benefit of the self-incrimination rule. The Scrutiny Committee has conceded that this argument has some merit. AD 2006/1, pp. 11–12, paras 32–37; AD 2005/13, pp. 6–7, paras 35–42; AD 2005/4, pp. 5–6, paras 34–41.

#### 2.11.4 Increased access to information in issued documents

Often persons are issued with documents under legislation. This issue discusses the attitude that should be taken to provisions allowing inspectorial access to the documents, despite a claim of privilege against selfincrimination.

### Scrutiny Committee

The Scrutiny Committee even apparently looks unfavourably on a provision that excludes selfincrimination protection in relation to the production of documents issued under legislation. AD 2003/11, p. 21, paras 20–25.

However, the Scrutiny Committee has found this less problematical than in other contexts. AD 2006/1, pp. 11–12, paras 32–37; AD 2005/13, pp. 6–7, paras 35–42; AD 2005/4, pp. 5–6, paras 34–41.

Also, this issue has yet to be decided by the Scrutiny Committee separately from access to documents required to be kept under legislation,

### 2.11.5 *Use immunity and requirement to claim the privilege*

#### **Scrutiny Committee**

When legislation provides a compromise for the loss of the privilege against selfincrimination by providing that self-incriminatory material forced from a person must not be used against the person in later proceedings, the Scrutiny Committee generally opposes the imposition of a condition that the person must first claim the privilege against selfincrimination. AD 2002/6, p. 46, paras 16–19.

### 2.11.6 *Corporations*

#### **Scrutiny Committee**

The Scrutiny Committee considers its role as essentially related to individuals. As a corporation can not be imprisoned, denial of the benefit of the selfincrimination rule to it assumes a different aspect from denial to an individual. The committee has therefore either abstained from commenting about, or expressed no objection to, provisions denying the benefit of the rule where the explanatory notes confirmed that the provisions will, in practice, only ever apply to corporations. AD 2006/10, pp. 7–8, paras 3–8; AD 2006/5, p. 29, paras 29–34.

## 2.12 Retrospectivity

### 2.12.1 *FLP issue*

Legislation should not adversely affect rights and liberties, or impose obligations, retrospectively—*Legislative Standards Act 1992*, section 4(3)(g).

Strong argument is required to justify an adverse affect on rights and liberties, or imposition of obligations, retrospectively.

Whether a statutory provision is in fact retrospective can often be difficult to decide. For example, there may be difficulties if the provisions of a Bill apply to an event that comprises several components, some of which happened before the Bill's

commencement and some after. A Bill should not contain any provision that adversely and retrospectively affects rights or liberties, or retrospectively imposes obligations without strong justification.

For subordinate legislation, the *Statutory Instruments Act 1992*, section 32, provides for the commencement of an instrument prospectively. Only section 34 provides otherwise. Section 34 allows an instrument to expressly provide for beneficial retrospectivity, that is, retrospectivity that does not decrease a person's rights or impose liabilities on a person other than the State, a State authority or a local government. Subordinate legislation that purports to have an adverse affect can not be made without the authority of an Act.

### Scrutiny Committee

The Scrutiny Committee brings all provisions in Bills that have effect retrospectively to the attention of Parliament—even if it is not concerned about the implications of the provisions. Scrutiny Committee Annual Report 1997–1998, para. 2.14.

In evaluating legislation with retrospective effect, the Scrutiny Committee typically has regard to—

- (a) whether the retrospective application is beneficial to persons other than the government; and
- (b) whether individuals have relied on the legislation and have a legitimate expectation under the legislation before the retrospective clauses commence. AD 2006/8, pp. 12–13, paras 14–20; AD 2005/6, pp. 3–4, paras 3–15; AD 2004/2, p. 19, para. 13, AD 2003/2, p. 1, para. 4; AD 2002/8, pp. 14–15, paras 17–24; AD 2002/4, pp. 14–15, paras 3–15; AD 2001/4 p. 5, para. 5; AD 1999/3, pp. 44–42, para. 6.8.

The practice of making retrospectively validating legislation is not a practice the Scrutiny Committee endorses, because this could adversely affect rights and liberties or impose obligations retrospectively and therefore breach FLPs. However, the Scrutiny Committee does recognise that there are occasions on which curative retrospective legislation, without significant effects on rights and liberties of individuals, is justified in order to clarify a situation or correct unintended legislative consequences. AD 2007/6, pp. 26–27, paras 3–11; AD 2005/13, p. 10, para. 11; AD 2005/12, pp. 15–16, paras 5–8; AD 2005/6, p. 5, paras 21–24; AD 2004/7, pp. 16–17, paras 19–24; AD 2004/5, pp. 16–17, paras 14–18; AD 2002/4, p. 21, para. 24; AD 1999/3, p. 25, paras 4.17–4.19.

The Scrutiny Committee has no concerns about retrospective provisions that do not appear to adversely affect any person other than the State. AD 2007/4, p. 4, paras 14–16; AD 2006/4, pp. 18–19, paras 19–27; AD 2005/12, pp. 11–12, paras 3–12; AD 2004/5, p. 35, paras 5–7; AD 2004/3, pp. 29–30, paras 3–7; AD 2004/1, p. 9, paras 12–15; AD 2003/11, pp. 15–16, paras 11–17; AD 2003/10, pp. 4–5, paras 26–33; AD 2002/11, pp. 7–8, paras 3–9; AD 2002/10, pp. 19–20, paras 3–10; AD 2002/8, p. 23, paras 7–8; AD 2002/3, pp. 4–5, paras 6–15.

The explanatory notes for a retrospective validating provision should give enough explanation to show whether the validation will have a significant adverse impact on the rights of individuals. Otherwise, the Scrutiny Committee may note the inadequacy of the explanatory notes and seek further information from the Minister. AD 2002/4, p. 21, paras 25–28.

#### *2.12.2 Parliament's role to directly authorise retrospectivity*

##### **Scrutiny Committee**

The Scrutiny Committee prefers that retrospective validation be by Act rather than regulation. If any retrospective regulation-making power is permitted, the committee has considered it should be tightly constrained. AD 1996/3, p. 9.

#### *2.12.3 Penalty liability*

The retrospective imposition of a liability to pay a penalty, in particular a criminal penalty, is one of the most objectionable things that can be provided for in legislation. One of the most commonly understood aspects of the rule of law in a democratic society is that laws only impose liability prospectively, because to do otherwise would be arbitrary.

##### **Scrutiny Committee**

The Scrutiny Committee has considered retrospective liability to pay a penalty is objectionable. AD 1996/5, p. 2, para. 1.5.

#### *2.12.4 Investigation liability*

##### **Scrutiny Committee**

The Scrutiny Committee also has considered objectionable a retrospective extension of the category of person able to be investigated. AD 2002/11, p. 5, paras 31–35; AD 1996/5, p. 2, para. 1.4.

### 2.12.5 *Extending time for starting proceedings*

#### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament, without express objection, a provision allowing a court to extend a time for starting proceedings for unlawful tree clearing even if the time had already expired before the provision commenced. AD 2003/2, pp. 5–7, para. 5, (9th dot point), and paras 7–8.

### 2.12.6 *Commercial liability*

#### **Scrutiny Committee**

Even if retrospective legislation is necessary, the Scrutiny Committee has been concerned when one party was apparently to receive the benefit of retrospectivity in relation to commercial arrangements. In the matter in question, the committee referred its concerns about this provision to Parliament while noting that, although by a possibly questionable administrative requirement, during the relevant period the arrangements may have been conducted on the basis of the proposed provision as retrospectively amended. AD 1999/1, pp. 20–21, paras 4.13–4.28.

*Transitional provision about existing agreements* The Scrutiny Committee has queried a provision imposing on existing contractual arrangements the liabilities and obligations to which they would be subject if granted under new legislation. The committee asked for information about the number of existing agreements and the extent to which the parties to the agreements were likely to be adversely affected. AD 2003/1, p. 4, paras 24–29.

### 2.12.7 *Curing defects to protect or enhance rights or without significantly interfering with rights*

#### **Scrutiny Committee**

*Retrospectivity benefiting members of the community* The Scrutiny Committee has had no criticism when retrospective provisions were beneficial to members of the community and only adverse to the State. For example, if the State—

- pays subsidies to various members of the community or provides other forms of help. AD 2006/9, pp. 27–28; AD 2003/9, pp. 7–8, paras 3–9; AD 2001/1, p. 25, paras 3–10; AD 1999/1, p. 20, paras 4.10–4.13; or
- reduces tax, whether through a decrease in amount, an increase in exemptions or deductions, or another way of reduction. AD 2006/9, pp. 27–28; AD 2004/3, pp. 11–12, paras 1–9; AD 2003/7, paras 7–9; AD 1999/1, p. 24, paras 4.46–4.51.

*Legislative declaration about status of legislative body* The Scrutiny Committee has not objected to legislation retrospectively declaring a statutory body to be an exempt public authority under the

*Corporations Law (Cwlth)* from the day it had come into existence as it did not consider individuals would be in any way disadvantaged by the retrospectivity. AD 1999/1, p. 1, para. 1.13.

*Retrospectivity to produce equity before the law* Commonwealth legislation enabled non-bank financial institutions (NBFIs) to issue cheques from a particular date. To ensure a 'level playing field' between banks and non-bank financial institutions, a provision retrospectively imposed the same debits tax liabilities in relation to NBFI cheque accounts as applied to bank cheque accounts in accordance with the State government's advice to the industry. The Scrutiny Committee did not criticise the provision. AD 1999/1, pp. 18–19, paras 4.4–4.9.

*Retrospectivity to cure adverse impact of inadvertent expiry of legislation* The Scrutiny Committee has considered it appropriate for legislation to retrospectively cure a gap in the recognition of various matters under the Trans-Tasman Mutual Recognition (Queensland) Bill 2003. This gap had happened because the *Trans-Tasman Mutual Recognition (Queensland) Act 1999* had inadvertently expired. AD 2003/7, pp. 47–48, paras 15–22.

*Retrospectivity to rectify inadvertent removal of power to provide a concession* The Scrutiny Committee has had no concerns about a retrospective provision rectifying the unintended removal of the power to give a concession. AD 2005/3, p. 4, paras 10–15

*Retrospectivity to validate employment* The Scrutiny Committee had no concern about a provision validating the employment of certain staff by a statutory body. AD 2005/6, p. 5, paras 21–24.

### 2.12.8 Removal of uncertainty in the general law

Clarification of contentious general law retrospectively may be unobjectionable, as Parliamentary intervention may be the only effective way to end competing claims and conflicts in case law within a practical time frame.

### Scrutiny Committee

*Conflict of laws* The Scrutiny Committee has not found objectionable legislation that clarified that the law of the cause, rather than the law of the forum, applied to proceedings started after the legislation's commencement. Causes of action arising before the commencement of the legislation for which a proceeding had not been started were retrospectively affected. The Scrutiny Committee noted also that, to

minimise impact on potential litigants, commencement was delayed for 6 months so that legal profession (and its clients) were not taken by surprise. AD 1996/2, p. 2.

### 2.12.9 *Removal of uncertainty in legislation*

#### **Scrutiny Committee**

*Protecting contracts* The Scrutiny Committee has not objected to legislation retrospectively protecting contracts from attacks based on the existence of conflicting provisions in legislation. A provision having carefully limited operation dealing with the conflict was viewed by the committee as remedying a defect of a technical nature. AD 2002/3, pp. 22–23, paras 7–16.

*Complex legislative schemes* A complex national legislation scheme that remedied a defect was, in Queensland, retrospectively applied so that it covered the same period as the corresponding Commonwealth legislation. The Scrutiny Committee considered this unobjectionable. AD 2002/10, pp. 6–7, paras 21–27.

*Protection against plant disease* The explanatory notes accompanying a provision retrospectively validating a notice establishing a quarantine for a serious plant disease stated that the provision was included out of an abundance of caution, both counsel advice and judicial opinion having supported the notice's validity. The Scrutiny Committee noted these comments and referred the provision to Parliament without express objection. AD 2004/5, p. 33, paras 44–50.

### 2.12.10 *Fixing a mistake in the legislative process*

#### **Scrutiny Committee**

The Scrutiny Committee has not objected to a retrospective declaratory provision made to clarify the commencement of particular provisions following a numbering error that occurred in the Bill to Act process. AD 2002/5, p. 33, paras 3–5; AD 2002/3, pp. 23–24, paras 17–20.

### 2.12.11 *Reliance on announced proposal as basis for later retrospectivity*

#### **Scrutiny Committee**

*Balanced assessment is required* The Scrutiny Committee does not support retrospectivity merely because the government has announced its intentions to retrospectively legislate. (It has called this 'legislation by press release'.) However, it does recognise that, in assessing its level of concern, the number of persons affected, the period of notice given and the extent to which adverse affects can be avoided beforehand by those to be retrospectively affected are taken into account. AD 2005/6,



pp. 3–4, paras 3–15; AD 2003/3, p. 3, paras 16–23; AD 2002/6, p. 34, para. 12; AD 2001/4, p. 6, paras 7–8; AD 2001/1, pp. 39–41, paras 10–15.

*Prior actual notice may effectively remove the basis of objecting to a later retrospective law* In relation to legislation removing a right to recover from a fund losses arising from certain types of mortgages arranged by solicitors, the Scrutiny Committee did not object to applying the new law retrospectively to the day it was introduced into Parliament because of the amount of notice given to affected persons that a new law was to be introduced that would change the law from the day it was introduced. AD1996/4, pp. 20–22, paras 6.6–6.11.

The Scrutiny Committee has not objected to legislation retrospectively applying a revenue law, that applied to banks, equally to non bank financial institutions, to ensure a ‘level playing field’. The affected institutions were aware of the proposal before the date fixed for retrospective application. AD 1999/1, pp. 18–19, paras 4.4–4.9.

*Ethical regard for position of administrators* The Scrutiny Committee is concerned that proposed legislation publicly announced to achieve easier retrospectivity can compromise public service officers who are bound to uphold the law as it stands, despite promises of retrospective immunity. Also, it pre-empts the Parliament’s ultimate approval. AD 2005/13, pp. 18–19, paras 34–42; AD 2001/4. p. 6, para. 12; AD 1999/13, pp. 12–15.

### 2.12.12 Protection of the interests of children

#### Scrutiny Committee

*Interests of adoptive children* The Scrutiny Committee has expressly stated it did not object to retrospective extinguishment of expectations under a new law that was designed to promote the interests of adoptive children, as opposed to existing priority rights of prospective adoptive parents based on first-in-time application. AD 2002/2, pp. 3–4, paras 21–29.

*Reporting orders on offenders* The Scrutiny Committee drew to Parliament’s attention a retrospective change to reporting requirements for offenders who posed a risk of committing further sexual offences against children. The committee noted that the change, though not a punishment, represented a substantial imposition on an offender. AD 2002/11, p. 22, paras 35–37.

*2.12.13 Protecting the affordability and availability of public liability insurance*

**Scrutiny Committee**

*Civil liability law* An Act introduced extensive limitations on actions for personal injuries in order to protect the viability of insurance against personal injuries. The private rights of individuals had to be weighed against the interests of the community as a whole. The Scrutiny Committee referred to Parliament, without express objection, the issue of whether the Bill had sufficient regard to the rights of potential claimants, as well as the interests of the community as a whole. AD 2002/7, pp. 19–20, paras 8–14.

*Professional standards law* The Scrutiny Committee adopted a similar approach in relation to a Bill enabling members of professional and trade occupational associations to limit their legal liability in return for participating in a scheme requiring them to introduce occupational safeguards that reduced levels of substandard service. AD 2004/3, pp. 27–28, paras 12–14.

*2.12.14 Preserving an established administration of the law later requiring validation*

**Scrutiny Committee**

*Corporations law* As a result of a High Court decision, the validity of substantial tracts of corporations legislation in all jurisdictions were considered uncertain and a new scheme was introduced nationally. Actions taken under the previous law had to be validated as any other course of action would have left an impossible amount of legal decision-making in limbo. The Scrutiny Committee referred to Parliament the retrospective validation of administrative actions under the corporations law scheme, but noted that the invalidities in question were potential rather than established and that the relevant corporations law had been operating for over 10 years on the assumption that it was constitutionally valid. AD 2001/3, pp. 1–3, paras 10–18.

*Revenue law* The Scrutiny Committee has not expressly objected to a revenue law being retrospectively amended for reasons of clarity when the position of taxpayers was not altered by the amendment. There was no element of surprise in the amendment. The revenue in question had already been paid or been the subject of an expectation of payment. AD 2005/3, pp. 3–4, paras 3–9; AD 1996/1, p. 13.

*Miscellaneous authorisations granted but needing confirmation* The Scrutiny Committee has not objected to retrospective validation of authorisation for an ordinary operational matter, for example, to remove something from a quarantine area. AD 1996/4, p. 18.

*Fishing quotas* Minor changes to a fishing quota due to inadvertent application of a legislative provision has been corrected without significant comment. AD 2001/1, pp. 27–28, paras 4–8.

*Land use under local government law* The Scrutiny Committee has merely noted, without express objection, provisions validating use of a place as a market because it was unable to establish any disadvantage to anyone, and the validation was to remove possible invalidity as opposed to a clear breach. See Alert Digest No. 4 of 2002, pages 11–12, paragraphs 3–15.

*Authority of person acting in a role* The Scrutiny Committee has not expressly objected to the validation of acts done by a person acting or purporting to act as State Archivist under legislation that did not expressly provide for a person to act in the absence of the incumbent and where all parties would have assumed the validity of the acts. AD 2002/1, p. 29, paras 53–58.

#### *2.12.15 Removing unintended adverse effect*

##### **Scrutiny Committee**

The Scrutiny Committee has not objected to legislation that retrospectively removed unintended consequences of existing legislation that would have unfairly penalised citizens if allowed to stand. AD 1996/3, p. 9.

#### *2.12.16 Retrospectivity justified by nature of activity*

##### **Scrutiny Committee**

*Unjust enrichment* The Scrutiny Committee has considered that reliance on illegal activity occurring prior to enactment as a trigger for confiscation proceedings is arguably justified on the basis of the general principle that people should not be allowed to unjustly enrich themselves at the expense of other individuals or the community generally as a result of unlawful conduct, and concluded that the Bill was probably not retrospective in nature. AD 2002/10, p. 11, paras 47–50.

#### *2.12.17 Retrospectivity of legislative process*

##### **Scrutiny Committee**

*Necessary for ongoing administration of amended legislation* The Scrutiny Committee has considered, when legislation was amended in a way that affected its ongoing administration, that there was significant merit in an argument that it was justifiable to make amendments about the processing of applications under the legislation pending when the legislation was amended because the amendments were necessary for the ongoing administration of the legislation. AD 2006/3, pp. 4–5, paras 24–35.

## 2.13 Immunity from proceeding or prosecution

### 2.13.1 *FLP issue*

Legislation should not confer immunity from proceeding or prosecution without adequate justification—*Legislative Standards Act 1992*, section 4(3)(h).

The basis for this fundamental legislative principle is that persons who commit a wrong when acting without authority should not be granted immunity.

Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees.

If protection is needed for persons administering Queensland legislation, the preferred provision provides immunity for actions done honestly **and** without negligence. In this case, if liability is removed from a person, it is usually declared to be shifted to the State. For holders of judicial office and others performing judicial functions or functions close to judicial functions, a provision may extend the protection to all honest actions. In this case, usually there is no shifting of liability to the State.

It should be noted that actions taken within the limits of statutory authority do not ordinarily give rise to legal liability. *Allen v. Gulf Oil Refining* [1981] AC 1001 (HL); AD 1999/4, p. 16, paras 2.8–2.14.

#### **Scrutiny Committee**

The Scrutiny Committee has stated that one of the fundamental principles of the law is that everyone is equal before the law, and each persons should therefore be fully liable for their acts or omissions. AD 1998/1, p. 5. However, the committee does recognise that the conferral of immunity is appropriate in certain situations.

### 2.13.2 *Binding the State*

#### **Scrutiny Committee**

The Scrutiny Committee has stated that, as a general principle, it supports the view that, as far as possible, the State and its servants should be placed on similar footing to ordinary citizens in terms of obligations to comply with legislative requirements. AD 2003/11, p. 19, para. 4.

*No practical relevance to State* Where provisions not binding the State had no practical relevance to the State, the committee has considered the exemption of the State to be reasonable. AD 2003/11, p. 19, paras 3–7.

**2.13.3 Public servants implementing announced policy**

**Scrutiny Committee**

The Scrutiny Committee has accepted as appropriate the granting of immunity to officers who do not enforce the law because of the government's announced policy to legislate retrospectively to change the law. AD 2001/4, p. 7, para. 16.

**2.13.4 Persons acting judicially or in roles akin to or associated with judicial process**

It is appropriate that judges, magistrates and other persons acting judicially should be free of personal attack on the basis of illegal or negligent action when performing their roles. This immunity is calculated to ensure that these office holders can act with appropriate confidence in roles carried out in the community interest and that would be difficult to carry out if the office holders were subject to allegations and litigation taken against them personally for their actions in office. Given the nature of their roles, their decisions are also subject normally to the supervision of appeal courts, that is, there is usually an immediate mechanism to correct their decisions at some level. Liability is generally not shifted to the State in these circumstances.

**Scrutiny Committee**

*Adjudicators in claims for progress payments under construction contracts* The Scrutiny Committee has considered, on balance, that the grant of immunity for adjudicators (and approved nominating authorities) subject only to the requirement that they act in good faith is probably not objectionable given the context of the Bill. AD 2004/1, pp. 5–6, paras 30–38.

*Childrens Services Tribunal* In relation to the Childrens Services Tribunal, the Scrutiny Committee has expressed the view that, even though the technical matters making up the tribunal's jurisdiction may or may not justify the granting to the tribunal, its officers, and those appearing the same immunity as if in the Supreme Court because the issues involved children, the granting of the immunity might well be justified to ensure candour. The committee therefore had no objection. AD 2000/9, p. 5, para. 25.

*Conciliator under Residential Services (Accommodation) Act 2002* The Scrutiny Committee has accepted the appropriateness of granting the same protection and immunity as a Supreme Court judge to a conciliator performing functions under the Residential Services (Accommodation) Bill, and of giving related protection to parties to the dispute. AD 2002/3, p. 16, paras 15–18.

*Convenors and coordinators of community justice conferences under the Juvenile Justice Act 1992* The Scrutiny Committee has stated that it was not unreasonable to grant immunity from civil liability to convenors and coordinators acting honestly for the purpose of community justice conferences under the *Juvenile Justice Act 1992*. Liability was not shifted to the State. The immunity was therefore like that of a court or tribunal member. AD 2002/6, pp. 31–32, paras 35–44.

*Dispute resolution officers under the Body Corporate and Community Management Act 1997* The Scrutiny Committee has considered not unreasonable granting these officers the same privileges and immunities from liability as a magistrate exercising magistrates court jurisdiction. AD 2003/1, p. 3, paras 21–23.

*Land Court members* The Scrutiny Committee has not opposed members who preside over proceedings in the Land Court having the same privileges, protection and immunity as would apply to a Supreme Court Judge presiding in that jurisdiction. AD 1999/11, p. 11.

*Legal Practice Tribunal, and those participating in proceedings before it, and the Legal Practice Committee* The Scrutiny Committee did not object to the conferral of immunity given the ‘constitution and functions of these two bodies’. AD 2003/12, p. 16, paras 34–42.

*Liquor Appeal Tribunal* The Scrutiny Committee has accepted the appropriateness of granting protection immunity as a District Court judge to members of the Liquor Appeals Tribunal. AD 2001/1, p. 38, paras 4–5.

*Queensland Building Tribunal* The Scrutiny Committee has also stated that granting the same protection immunity as a District Court judge to the presiding case manager under the *Queensland Building Tribunal Act 2000* when constituting a tribunal or exercising prescribed incidental powers ‘does not appear unreasonable’. AD 2002/6, p. 48, para. 28.

*Mediators in farm debt disputes* The Scrutiny Committee has queried the granting of immunity to farm debt mediators in the absence of dishonesty only, as opposed to an additional requirement of absence of negligence. AD 2003/7, pp. 8–9, paras 15–19.

*Panel of inquiry* The Scrutiny Committee has considered the conferral, on members of a panel of inquiry, and on lawyers and witnesses appearing before the panel, of the same protection and immunity as a Supreme Court judge, and a lawyer or witness appearing before the Supreme Court, to be reasonable. AD 2005/4, p. 18, paras 52–53.

*Teachers Disciplinary Committee* The Scrutiny Committee accepted the appropriateness of granting court-like immunity to members of the Teachers Disciplinary Committee and lawyers and witnesses involved in proceedings heard by the committee. AD 2005/10, p. 14, paras 28–31.

*Veterinary Tribunal of Queensland* The Scrutiny Committee accepted the appropriateness of granting court-like immunity to members of the Veterinary Tribunal of Queensland and lawyers and witnesses appearing at the tribunal's hearings. AD 2006/08, p. 9, paras 10–14.

### 2.13.5 Immunity for carrying out statutory functions

Although actions taken in carrying out statutory functions normally do not attract liability, legislation sometimes expressly provides for immunity, usually to clarify the matter to assure the persons taking the action that the immunity is in place.

#### Scrutiny Committee

*Executive intervention in activities of local government* The Scrutiny Committee considered immunity was not demonstrably inappropriate where the Governor in Council or the financial controller could revoke or suspend the operation of a resolution or order of an Aboriginal or Island Council and provisions exempted the State and the financial controller from legal liability for any loss or expense incurred because of the revocation or suspension. The committee considered it relevant, in assessing the provisions, to point out that if the Governor in Council and the financial controller act within the limits of their statutory authority, legal liability would not normally arise in any event. *Allen v. Gulf Oil Refining* [1981] AC 1001 (HL); AD 1999/4, p. 16, paras 2.8–2.14.

*Immunity from action over disclosure or publication* The Scrutiny Committee has considered the immunity from action for defamation or breach of confidence conferred on persons giving access to public records and giving public records to the archives under the Public Records Bill 2002 was reasonable and appropriate. However, it expressed the view that extending the immunity to the author or other persons might not be reasonable. AD 2002/1, p. 28, paras 43–48.

The Scrutiny Committee referred to Parliament, without express objection, a provision granting immunity from defamation proceedings for disclosures or publications made by a Minister concerning businesses and persons in a fair trading context. AD 2002/3, pp. 24–25, paras 21–27.

*Immunity from action over loss or damage caused by actions of persons associated with enforcement activities* The Scrutiny Committee has expressly declined to object to a provision immunising the State against liability for the actions of tow truck operators and storage yard proprietors handling vehicles that have been previously impounded by police officers. AD 2002/5, p. 16, paras 26–30.

### 2.13.6 Immunity for carrying out statutory obligations

#### Scrutiny Committee

*Intervention in commerce* The Scrutiny Committee has considered as appropriate the granting of immunity to commercial service providers for honest acts done without negligence in compliance with legislative directions that were inconsistent with their commercial arrangements. AD 2005/12, pp. 17–18, paras 25–27.

*Consumer protection obligations* The Scrutiny Committee considered that an auctioneer's immunity from liability for refusing to take a bid from a person who had not complied with certain consumer protection requirements was entirely appropriate given the nature of the system established by the legislation and the auctioneer's obligations under the legislation. AD 2004/6, p. 6, paras 10–13.

*Disclosure obligations* The Scrutiny Committee has considered reasonable/necessary and appropriate provisions granting immunity from liability for the following—

- Teachers—statutory disclosures by employing authority for a school about teachers. AD 2005/10, pp. 13–14, paras 23–27
- Drivers for accredited operator of a passenger transport service—statutory disclosures by the operator about their drivers' criminal history. AD 2005/10, p. 30, paras 28–31
- Providers of community services—mandatory statutory disclosure by service provider to a chief executive. AD 2006/8, p. 7, paras 38–41.

Note that the Scrutiny Committee has queried the grant of immunity, on proof of honesty only, for mandatory disclosures to a government commission, but merely noted the Ministers reply that legislation tended to grant a broader immunity for mandatory disclosure. AD 2005/12, pp. 13–14.



### 2.13.7 *Immunity granted to an unusual extent*

The immunity granted under legislation in relation to statutory activities is usually conferred on persons other than the State and only for acts or omissions done or omitted to be done in good faith and without negligence. Any liability that is covered is transferred to the State.

#### **Scrutiny Committee**

*Disaster management* Although not surprised at the level of immunity conferred, having regard to the nature of the legislation which provided for disaster management, the Scrutiny Committee has referred to Parliament, without express objection, provisions that conferred immunity on the State and local governments and on 'officials' to the extent of things done under the legislation 'in good faith and without reckless disregard'. AD 2003/12, p. 6, paras 37–41.

*Publishing of disciplinary matter* Concerning discipline of members of the legal profession, the Scrutiny Committee has referred to Parliament the question of the appropriateness of a grant of immunity to particular persons for anything done 'in good faith' (as opposed to 'in good faith and without negligence') for publishing of disciplinary action, keeping the discipline register or otherwise performing functions under the legislation. AD 2003/12, p. 16, paras 34–42.

*National scheme legislation (offshore petroleum)* National scheme legislation can present a difficulty if the nationally prepared legislation contains immunity clauses that are wider than the clauses usually found in Queensland legislation. The standard Queensland provision requires honesty and absence of negligence before the automatic conferral of immunity directly by the legislation can have effect. There is also the difficulty that persons acting in Queensland under the legislation may not be Queensland State appointees or employees, and any shift of liability to the State of Queensland may therefore be inappropriate.

The Scrutiny Committee has brought to the attention of Parliament provisions in national scheme legislation that granted immunity to officers carrying out statutory functions under the legislation for things done 'in good faith' (as opposed to 'in good faith and without negligence'), without shifting liability to the State. AD 2004/5, p. 22, paras 16–20.

Also, the Scrutiny Committee brought to the attention of Parliament provisions granting a civil immunity to other persons carrying out functions under the legislation, whether or not the persons act in good faith and without negligence. AD 2004/5, p. 22, paras 21–23.

*Marine pollution controller* The Scrutiny Committee referred to Parliament the question of the appropriateness of a grant of immunity to the marine pollution controller for anything done in good faith and 'without reckless disregard' for the possible occurrence of personal injury or loss or damage to property. AD 2005/10, pp. 29–30, paras 21–27.

*Public health* The Scrutiny Committee has referred to Parliament the question of the appropriateness of a grant of immunity to persons giving information about school children with contagious conditions 'honestly' (as opposed to 'honestly and without negligence'). AD 2005/4, p. 17, paras 44–48.

*Receivers and administrators* The Scrutiny Committee has referred to Parliament the question of the appropriateness of a grant of immunity to receivers and administrators for anything done 'in good faith' (as opposed to 'in good faith and without negligence') AD 2003/12, p. 16, paras 34–42.

### 2.13.8 *Whistleblowing and disclosures akin to whistleblowing*

Legislation should ordinarily provide protection to persons who disclose wrongdoing. In order to encourage candour, the conditions for the grant of the immunity are usually not strict.

#### **Scrutiny Committee**

*Disclosures of breach of Act* The Scrutiny Committee has referred to Parliament without express objection the conferring of complete immunity for those who disclose to appropriate officials that a person has breached the Act, the committee noting that this parallels the protection under the *Whistleblowers Protection Act 1994*. AD 2000/1, p. 5, paras 37–42.

### 2.13.9 *Public safety*

#### **Scrutiny Committee**

The Scrutiny Committee considered the conferral of an immunity from criminal or civil action appropriate for the following legislative obligations—

- The representative of clubs associated with gun use or possession was obliged to advise the commissioner of the police service when a member of the club stopped being a member.
- A professional (health) carer who considered that a person was an unsuitable person to possess a firearm because of the person's mental or physical condition or because the person may be a

danger to himself or others was obliged to advise the police of the carer's opinion.

- Clubs associated with gun use or possession were obliged to advise the police when a majority of their governing body believed that a person was an unsuitable person to possess a firearm because of the person's mental or physical condition or because the person may be a danger to himself or others. AD 2003/6, pp. 27–28, paras 34–41.
- School staff were obliged to report suspected sexual abuse of children by school employees ('not only appropriate but necessary'). AD 2003/11, p. 12, paras 18–22.

### *2.13.10 Disclosures to statutory bodies or inquiries*

Much legislation confers immunity in relation to disclosing information to a statutory body that is of interest to the body in carrying out its statutory functions. As a general rule, there appears to be no significant issue with this unless the immunity would prejudice the public interest in having appropriate action taken against the person for disclosures that implicate the person. The related topic of providing immunity in relation to self-incriminatory disclosures is dealt with under the topic of providing appropriate protection against selfincrimination.

### **Scrutiny Committee**

The Scrutiny Committee has considered as reasonable immunity given to persons providing information to a board about persons undergoing medical training when the board was charged with oversighting the training. AD 2002/3, p. 4, paras 24–25.

### *2.13.11 Achieving significant benefits in the public interest*

There may be a significant public interest in granting immunity. For example, granting immunity may allow the Government to gain necessary information about criminal behaviour relatively more significant than the behaviour to be protected by the immunity. It may also have advantages for both the individual and the public interest where there is much to be gained by addressing individual criminal behaviour or unsafe conditions, processes or practices by offering an immunity that encourages a candid recognition of relevant issues.

### **Scrutiny Committee**

#### *Drug offenders*

**Rehabilitative diversion** The Scrutiny Committee has considered that legislation allowing offenders to be diverted from court proceedings for drug offences, if they satisfied specified criteria and if they consented, and so that they could be subjected to alternative ways of deterring the conduct in question, had sufficient regard to both the individual and community interest. AD 2002/9, p. 1, para. 6.

**Drug detection dogs** The Scrutiny Committee has stated that given the nature of the drug detection activities authorised under legislation to be carried out by drug detection dogs, the immunities granted to the dogs' handlers and the State were generally appropriate. If a drug detection dog physically intruded onto a person or the person's clothing, or otherwise came into contact with a person, or caused damage to a thing that has in or on it an unlawful dangerous drug, the following immunities applied—

- The handler did not incur civil liability for an act done, or omission made, honestly and without negligence, and this liability was transferred to the State if bodily harm was caused.
- The State did not incur any civil liability for an act done by the dog or an act or omission of the handler, other than to the extent liability was transferred to the State.
- The handler was not criminally responsible for an act done by the dog unless the handler intentionally caused the dog to attack a person or was criminally responsible under the Criminal Code, section 289.

*Private distributors of publications authorised by Parliament* The Scrutiny Committee has considered appropriate the conferral of immunity from civil and criminal proceedings on private distributors for publication of matters under parliament's authority. AD 2003/2, pp. 13–14, para. 10.

*Charity work* The Scrutiny Committee has referred to Parliament, without express objection, a provision that granted immunity, on conditions, to persons donating food to community organisations from damage caused by consumption of the food. The reason for the grant of immunity was to encourage this worthwhile cause. AD 2004/7, p. 9, paras 3–8.

### 2.13.12 *Protective of other rights*

#### **Scrutiny Committee**

The Scrutiny Committee has considered provisions allowing claimants, owed monies under a statutory adjudication regime for construction contracts, to suspend their performance of the relevant contract until payment has been received, and conferring on them

immunity from legal liability to the respondent for any loss or damage suffered as a result of the suspension, to be a reasonable adjunct to the adjudication regime established by the Bill. AD 2004/1, pp. 4–5, paras 24–29.

## 2.14 Compulsory acquisition of property

### 2.14.1 *FLP issue*

Legislation should provide for the compulsory acquisition of property only with fair compensation—*Legislative Standards Act 1992*, section 4(3)(i).

A legislatively authorised act of interference with a person's property must be accompanied by a right of compensation, unless there is a good reason (for example, the power to confiscate the profits of crime). An example of interference that should have an associated compensation provision is entry onto another's property with subsequent damage.

Material about the obligation to obtain a warrant before property is seized is included in the entries made for the *Legislative Standards Act 1992*, section 4(3)(e).

If property may be seized and sold under a law, there should be a specific requirement for any surplus remaining after lawful deductions to be paid to the previous owner.

Related to this issue is a requirement that if property may be forfeited under a law because, after reasonable inquiries, the owner has not been located, the law should specify a minimum enquiry period.

### **Scrutiny Committee**

The Scrutiny Committee has noted that it is generally acknowledged that compulsory acquisition of property must only be made with compensation. AD 1996/7, pp. 27–28, para. 7.13.

### 2.14.2 *Legal implication of right to compensation*

### **Scrutiny Committee**

The Scrutiny Committee accepts a legal opinion that the enactment of legislation interfering with pre-existing rights does not normally, at law, give rise to any legal claim on the part of those persons adversely affected. Its view is that the only exception is if a statute has the effect

of compulsorily acquiring property, in which case (the committee considers) the courts will usually interpret the legislation as conferring an entitlement to fair compensation. AD 2001/3, p. 3, para. 20.

**2.14.3** *When strict right of compensation impractical*

**Scrutiny Committee**

There may be circumstances when expense and impracticality overrides a strict application of the principle of fair compensation, which implies potential legal proceedings to decide a dispute. For example, exclusively administrative clarification and rationalisation, without court proceedings, of the purposes of a trust under a special Act may be ‘not unreasonable’ even though compulsory acquisition is involved. This is because the expense and complications of legal proceedings may substantially diminish the value of the trust. AD 2001/1, p. 36, para. 13.

**2.14.4** *Part of a commercial bargain*

**Scrutiny Committee**

In circumstances where the holder of various statutory authorisations over transport infrastructure could be directed by an official to make changes to the infrastructure, the Scrutiny Committee queried the absence of a full right of compensation. It later noted a ministerial reply that effectively argued that this was a condition of a commercial grant of an authorisation—the parties were aware of the condition when they sought the authorisation. The power was necessary, according to the ministerial response, because it was normal for changes to be needed to the infrastructure over time. AD 2001/9, p. 37, paras 6–7; AD 2001/7, p. 47, paras 13–15.

In the local government context, there is High Court authority that if the surrender of property is required as a condition to a consent, for example, a subdivision approval, the acquisition is not compulsory as the developer has the option not to continue with the subdivision. *Lloyd v. Robinson* (1962) 107 CLR 142, Kitto, Menzies and Owen JJ at p. 154.

**2.14.5** *Part of a voluntary process*

**Scrutiny Committee**

*Surrender of right in return for advantage* In circumstances where an applicant for reconfiguration of a lot could have surrender conditions imposed without compensation or without appeal, the Scrutiny Committee considered that this was not compulsory acquisition without compensation because it was a voluntary process. However, the committee queried the lack of appeal rights against inappropriate surrender conditions. It later noted a ministerial response that argued that the person would receive benefits from the surrender and, if the

person did not like the surrender conditions, the person need not proceed with the application. AD 2001/8, pp. 36–37, paras 9–10; AD 2001/7, p. 7.

*Grant of right involving potential intervention* The voluntary undertaking, in a commercial environment, of risk of intervention in the public interest might also be an example of this category. See ‘2.14.9 Public interest’ on page 76.

*Failure to exercise statutory entitlement as anticipated* The Scrutiny Committee has not been concerned about the loss of a statutory entitlement when the loss could easily be avoided by the holder by taking action to exercise the entitlement in the way anticipated by the legislation under which it was granted. AD 2003/6, pp. 12–13, paras 7–19.

*Significance of knowledge that a claim must be made* The Scrutiny Committee has considered that an automatic forfeiture of a right to a share in an association due to a failure to make a claim, when the loser was not fully informed of the need to make the claim, could amount to the compulsory acquisition of property. AD 1996/5, p. 27, paras 7.3–7.5.

#### 2.14.6 *Loss of office*

##### **Scrutiny Committee**

The Scrutiny Committee queries provisions that terminate a person’s holding of office or employment and expressly exclude compensation. AD 2006/8, p. 8, paras 5–8; AD 2005/10, p. 13, paras 21–22; AD 2005/5, pp. 1–2, paras 3–8; AD 2004/1, pp. 14–15, paras 9–12 (and AD 2003/5, pp. 24–26, paras 6–9); AD 2003/12, p. 14, paras 22–24; AD 2003/5, p. 8, paras 9–16; AD 2002/11, p. 12, paras 3–8; AD 2002/1, pp. 15–16, paras 15–18; AD 2001/1, p. 16, paras 3–6.

*Prior notice of potential loss* The Scrutiny Committee will have regard to any notice a person has had of potential loss of office or employment before taking up a position. AD 2004/1, p. 14, paras 9–12 (and AD 2003/5, pp. 24–26, paras 6–9).

#### 2.14.7 *Termination of contractual rights recognised in legislation*

##### **Scrutiny committee**

*Reasonability* The Scrutiny Committee has stated that the issue for the committee in relation to termination of contractual rights recognised in legislation is whether the termination is reasonable in the circumstances. AD 2004/3, pp. 22–23, paras 45–55.

*Fair terms* The Scrutiny Committee has recognised that termination of contractual rights recognised in legislation must be on terms that are fair to the parties. The committee has considered as relevant to this issue the extent to which a party who is adversely affected by the termination could claim damages or compensation. AD 2004/3, pp. 22–23, paras 45–55; AD 2003/9, pp. 10–11.

*No substantial loss in all the circumstances* The Scrutiny Committee has referred to Parliament, without express objection, provisions terminating statutory agreements and abolishing statutory property when—

- under the proposed legislative framework, the statutory agreements would become meaningless and unenforceable
- the statutory property had been distributed to the original recipients at no cost and had minimal value
- it was argued, in the explanatory notes, that parties to the agreements and owners of the property would be benefiting in other ways and ultimately would not be adversely affected by the changes. AD 2004/1, pp. 14–15, paras 13–20 (and AD 2003/5, pp. 25–26, paras 10–17).

#### 2.14.8 *Illegal contract*

##### **Scrutiny Committee**

*Caretaker period contracts* In the context of local government law amendments, the Scrutiny Committee has not objected to provisions making contracts void if they were made under major policy decisions banned during a caretaker period. However, it was concerned about parties being given appropriate public warning about the issue. AD 2007/1, pp. 5–6, paras 9–15.

#### 2.14.9 *Public interest*

##### **Scrutiny Committee**

*Amendment of quarry rights and dredging rights* The Scrutiny Committee has queried an administrative power to amend without compensation quarry rights and dredging rights if amendment was considered necessary or desirable for coastal management. The Minister in response argued in part that the administrative action was available only with fair process and subject to judicial review. (However, this did not deal with the separate further issue of compensation. It might have been a case where the public interest in being able to act without a financial burden being placed on the State was relevant, with that risk to the affected persons being a voluntary one in a commercial undertaking.) AD 2001/8, p. 36, paras 6–7; AD 2001/7, pp. 6–7, paras 10–14.



*Cancellation of mining lease* The Scrutiny Committee referred to Parliament, without express objection, the cancellation of mining leases without compensation in circumstances where it was asserted that it was in the public interest to preserve the relevant land for future generations because of the land's environmental and conservation value. The rights under the leases had never been exercised and were never likely to be capable of effective exercise. AD 2003/4, p. 5, paras 15–20.

*Amendment of fisheries development approval* The Scrutiny Committee has referred to Parliament, without express objection, a provision providing that no compensation was payable (unless under a regulation or management plan under the relevant Act) for an amendment of an approval to undertake particular fisheries development. The explanatory notes had argued that the amendment power was required by the public interest in ensuring approvals were appropriately managed, and that an appeal was available. AD 2003/9, p. 25, paras 9–13.

#### 2.14.10 *Indirect loss due to primary acquisition*

##### **Scrutiny Committee**

In relation to legislation excluding land from the South Bank Area, the Scrutiny Committee has sought information from the sponsoring Minister as to whether the value of the relevant land would be adversely affected by the exclusion. AD 1999/4, pp. 34–35, paras 9.3–9.11.

#### 2.14.11 *Loss due to legislative activity*

##### **Scrutiny Committee**

*New prohibition requiring sell off at a depressed price* The Scrutiny Committee has referred to Parliament, without express objection, the fact that the value of weapons that owners were required to sell off under new national restrictions on ownership was adversely affected by the volume placed on the market. No compensation was payable for this loss. AD 1996/8, p. 34, paras 9.13–9.15; AD 1996/7, p. 32, paras 7.48–7.51.

#### 2.14.12 *Confiscation*

##### **Scrutiny Committee**

*Unjust enrichment* The Scrutiny Committee has not expressly objected to, and has noted as a common response to crime, the confiscation of the proceeds of crime. AD 2002/10, pp. 8–9, paras 28–31.

**2.14.13** *Application of Acquisition of Land Act 1967*

**Scrutiny Committee**

*Access to compensation provisions* The Scrutiny Committee has considered that the application of the compensation provisions of the *Acquisition of Land Act 1967* to the compulsory acquisition of property has removed a breach of this principle. AD 1996/12, pp. 26–27, paras 8.13–8.15.

*Access to acquisition for hardship provisions* The Scrutiny Committee has considered that access to provisions of the *Acquisition of Land Act 1967* allowing for compulsory acquisition of property on hardship grounds overcame its concerns that under the particular legislation in question a Minister could refuse to acquire property even though it had been seriously affected by some legislative activity.

**2.14.14** *Native title*

See entries under ‘2.15 Sufficient regard to Aboriginal tradition and Island custom’ on page 79.

**2.14.15** *Utility easements*

**Scrutiny Committee**

*Additional usage of existing easement* The Scrutiny Committee has referred to Parliament without express objection provisions that enabled existing electricity easements to be used to lay further cabling for other services without compensation to the landholder. AD 1997/9, pp. 15–16, paras 3.17–3.24.

**2.14.16** *Land title clarification*

**Scrutiny Committee**

The Scrutiny Committee has referred to Parliament, without express objection, provisions achieving the following matters—

- Recognition of easements never properly registered or whose registration has not properly been carried over from 1 instrument to another. In some cases, this could involve the registration, without compensation, of an easement of which the current registered owner is unaware. However, the provisions were seen as consistent with already existing exceptions to indefeasibility under the *Land Title Act 1994*. AD 2005/13, pp. 14–15, paras 3–12.
- Stopping for 3 years, without compensation and with only limited exception, the registration of a plan of subdivision showing a tidal boundary in a relocated position. AD 2005/13, pp. 15–17, paras 13–26.
- Denying indefeasibility of title to, and compensation of, a mortgagee who does not take reasonable steps to ensure the

identity of a purported mortgagor. AD 2005/13, pp. 17–18, paras 27–33.

- Correction of survey descriptions of land required for a busway, with declaration of ownership of lands. However, it was unlikely any individual would be adversely affected. AD 2005/10, pp. 31–32, paras 37–43.

## 2.15 Sufficient regard to Aboriginal tradition and Island custom

### 2.15.1 FLP issue

Legislation should have sufficient regard to Aboriginal tradition and Island custom—*Legislative Standards Act 1992*, section 4(3)(j).

For a detailed background to the original enactment of the ‘Aboriginal tradition and Island custom’ principle, see Alert Digest No. 1 of 1999, pages 13–17, paragraphs 3.18–3.29. The Scrutiny Committee considered that the enactment of this particular FLP issue was based on 2 considerations—

- (a) requiring legislative drafters to pay proper regard to the traditions and customs when drafting is ‘a “modest first step” towards recognition of Aboriginal and Island customary law’ designed ‘to avoid unintended legislative impacts on traditional practices’
- (b) the ‘limited concession’ to Aboriginal tradition and Island custom was based on ‘a recognition of the unique status of Aborigines and Torres Strait Islanders as Australia’s indigenous peoples.

An Act enacted after 28 November 1994 affects native title only so far as the Act expressly provides. An Act ‘affects’ native title if it extinguishes the native title rights and interests or it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise. *Acts Interpretation Act 1954*, s13A.

Several significant items of legislation underpin Aboriginal and Island custom. Any amendment of this legislation, whether direct or implied, has to be examined to find out whether the protection to Aboriginal and Island custom contained in them has been adversely affected.

The legislation is as follows—

- *Aboriginal Land Act 1991*
- *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*
- *Community Services (Aborigines) Act 1984*
- *Community Services (Torres Strait) Act 1984*
- *Aboriginal Cultural Heritage Act 2003*
- *Torres Strait Islander Cultural Heritage Act 2003*
- *Local Government (Aboriginal Lands) Act 1978*
- *Native Title (Queensland) Act 1993.*

### 2.15.2 Consultation on proposed legislation

#### Scrutiny Committee

The Scrutiny Committee recognises the significance of consulting with Aboriginal and Islander people and representative bodies on proposed legislation. AD 2001/1, p. 16, para. 5.

### 2.15.3 Animal welfare

#### Scrutiny Committee

The Scrutiny Committee recognises the possibility of a clash between traditional indigenous hunting practices and animal welfare standards now generally accepted in the wider community, and noted that potential conditions imposed by regulation on indigenous practices could establish a reasonable compromise between these competing interests. AD 2001/5, p. 2, paras 12–13.

### 2.15.4 Relationships

#### Scrutiny Committee

The Scrutiny Committee has considered that express recognition of Aboriginal or Island custom by extending definitions such as ‘parents’, or ‘relative’ is an express recognition of customary law. AD 2002/8, p. 8, paras 49–54; AD 2002/3, p. 17, paras 26–30; AD 2001/8, p. 10, paras 18–19; AD 2000/9, p. 10, para. 6; AD 2000/8, p. 15, paras 19–22. Similarly, see the extended definitions of ‘family’ and ‘child’. AD 2002/3, p. 6, paras 16–21.

### 2.15.5 Child Care

#### Scrutiny Committee

*Legislative requirement for sensitivity* An express requirement in the Commission for Children and Young People Bill for the Commissioner of Children to be sensitive to the ethnic or cultural identity and values of Aboriginal and Torres Strait Islander children was commended as

enhancing and expressly recognising and paying regard to Aboriginal tradition and Island custom. AD 2000/9, p. 10, paras 13–14. The Bill also provided that the Minister was to take into account the need for the membership of the tribunal established by the Bill to include Aboriginal people and Torres Strait Islanders. Also, the tribunal was required by the Bill to take reasonable and practical measures to ensure its proceedings were conducted in a way that recognised, and was responsive to, the customs, needs and traditions of parties or witnesses who were Aborigines or Torres Strait Islanders. AD 2000/9, p. 2, para. 4.

*Use of community agencies for advice and consultation* The Scrutiny Committee has commended legislative provisions recognising Aboriginal and Torres Strait Islander agencies as appropriate sources of advice. AD 1998/11, p. 2, para. 17.

#### 2.15.6 Process

#### Scrutiny Committee

*Specific criminal justice provisions* The Scrutiny Committee commends criminal justice legislation that recognises the significance of the following—

- (a) consulting with Aboriginal and Islander people about criminal justice issues. AD 1997/7, pp. 1–2, paras 1.4–1.6
- (b) allowing persons in designated remote areas to be dealt with for certain offences by persons who have a similar cultural background. AD 1997/7, pp. 1–2, paras 1.4–1.6
- (c) allowing a person living within a designated remote area to be dealt with within the person’s local community. AD 1997/7, pp. 1–2, paras 1.4–1.6
- (d) requiring courts, in sentencing Aboriginal and Torres Strait Islander offenders, to hear and have regard to submissions made by any community justice group from within the person’s community—this maximises the amount of information about cultural considerations, local sentencing options and other relevant matters available to courts in the sentencing process. AD 2000/8, p. 7, para. 15.

Considering the substantial amount of information available on the adverse impact of the criminal justice system on persons of Aboriginal and Torres Strait Islander extraction, the Scrutiny Committee has considered that regard should be had to Aboriginal tradition and Island custom in any amendment of the *Criminal Code*. AD 1997/2, p. 5, paras 1.22–1.23.

The Scrutiny Committee has also expressed the view that the following provisions have sufficient regard to Aboriginal tradition and Island tradition—

- (a) a requirement that a respected person of an Aboriginal or Islander community be present when a caution is given to a child. AD 2002/6, p. 30, paras 30–34
- (b) a sentencing principle that, if practicable, a child of Aboriginal or Torres Strait background should be dealt with in a way that involves the child’s community. AD 2002/6, p. 30, paras 30–34.

Possible cultural implications of the Juvenile Justice Legislation Amendment Bill 1996 were raised, by the Scrutiny Committee, including the “yes, boss” syndrome. AD 1996/6, p. 6, paras 1.34–1.35, and p. 7, para. 1.44.

*Membership of important tribunals* The Scrutiny Committee has considered that the independence of the tribunal established under the *Land and Resources Tribunal Act 1998* was critical for the purposes of the *Native Title Act 1993* (Cwlth) to ensure that sufficient regard is effectively given to Aboriginal tradition and Island custom. The committee recommended the following measures for the members of the tribunal—

- appointed to age 70, and appointments terminated only in the same way as for a Supreme Court judge
- obliged to declare an entitlement to share in the profits of companies with interests in mining. AD 1999/1, pp. 7–8, paras 2.22–230.

*Court or tribunal processes generally* To the extent that a tribunal decides matters involving native title and cultural heritage, the Scrutiny Committee has considered a number of procedural and evidentiary issues may arise. These include the following issues—

- the appropriate degree of formality in procedures
- the degree to which strict evidentiary rules, for example the rule against hearsay, should be relaxed
- the determination of witnesses, indigenous or otherwise, to be accepted by the tribunal as ‘expert’ witnesses for local customary laws
- whether ‘group’ evidence from indigenous witnesses should be received
- an appropriate degree of protection for culturally sensitive evidence given by indigenous witnesses

- the lack of fluency in English of some indigenous witnesses, together with the possibility of misunderstandings arising from differences between Aboriginal English and Standard English
- the framing of questions directed to indigenous witnesses, given that their mode of response to such questions will be influenced by cultural factors
- the reception by the tribunal, as evidence, of performances of ceremonial activities
- the question of whether it is necessary or appropriate for parties to be represented by lawyers.

The degree to which legislation takes appropriate account of these issues is a major factor in deciding whether it has sufficient regard to Aboriginal tradition and Island custom. AD 1999/1, pp. 7–8, paras 2.22–2.30.

### *2.15.7 Self management principle of Aboriginal and Torres Strait Islander Communities*

Aboriginal and Torres Strait Island communities in Queensland are primarily governed by three pieces of legislation, namely, the *Community Services (Aborigines) Act 1984*, the *Community Services (Torres Strait) Act 1984* and the *Local Government (Aboriginal Lands) Act 1978*. The provisions of the first two Acts are virtually identical, with one applying to Aboriginal, and the other to Torres Strait Island, communities. The third Act applies to the communities of Aurukun and Mornington Island.

The legislation establishes local governments for the communities, giving the communities a measure of self management. If the legislation did not exist the communities might belong to local government areas not primarily related to the lands in which the communities exist and have local governments for whom the interests of the members of the communities were not the sole or primary interest.

### **Scrutiny Committee**

The Scrutiny Committee specifically considers legislation that has an impact on the self management principles of Aboriginal and Islander communities and refers matters to Parliament for consideration.

*Access to liquor and liquor licences* The Scrutiny Committee has considered provisions restricting access to liquor and liquor licences in Aboriginal communities as a matter potentially affecting the self management principles and as a matter requiring Parliament's consideration on the basis of whether the rights and liberties of

individuals had been unduly affected by laws that were not replicated for persons outside the communities. AD 2004/7, pp. 5–7, paras 3–16; AD 2002/6, pp. 14–15, paras 6–23; AD 2002/2, pp. 2–3, paras 3–10.

*Financial accountability* The Scrutiny Committee has examined legislation that amended the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* to establish councils, provide for intervention by the State and other matters concerning financial accountability. AD 1999/4, p. 15, paras 2.3–2.7.

### 2.15.8 *Corrective services*

#### **Scrutiny Committee**

Given the historically high proportion of Aboriginal and Islander people in Queensland prisons, the Scrutiny Committee notes the significance in corrective services legislation of providing for the following matters specifically benefiting Aboriginal and Islander people—

- (a) If an Aboriginal or Torres Strait Islander prisoner is considered to be dangerously ill or seriously injured, the person in charge must immediately notify, not only the contact person and a chaplain, but also an Aboriginal or Torres Strait Islander legal service that represents the area in which the facility is located and, if practical, an elder, respected person or indigenous spiritual healer who is relevant to the prisoner. AD 2000/10, p. 12, paras 63–64.
- (b) If an Aboriginal or Torres Strait Islander prisoner dies, the person in charge must as soon as practicable notify the organisation and persons mentioned in the first paragraph. AD 2000/10, p. 12, paras 63–64.
- (c) In deciding whether an Aboriginal or Torres Strait Islander child should be permitted to be accommodated with a female prisoner, the best interests of the child should be determined in part by consultation with representatives from the relevant Aboriginal or Torres Strait Islander community. AD 2000/10, p. 12, paras 63–64.
- (d) When establishing a new prison, appropriate arrangements must be made for a meeting place for Aboriginal and Torres Strait Islander prisoners that promotes communication and endorses their indigenous cultural heritage. AD 2000/10, p. 12, paras 63–64.
- (e) The membership of the Queensland Community Corrections Board and regional community corrections boards must consist of at least one appointed member who is an Aboriginal or Torres Strait Islander person. AD 2000/10, p. 12, paras 63–64.



- (f) If appointing official visitors, at least one of the official visitors for a particular corrective services facility must be an Aboriginal or Torres Strait Islander person, if a significant proportion of prisoners in that facility are Aboriginal or Torres Strait Islander prisoners. AD 2000/10, p. 12, paras 63–64.

### *2.15.9 Financial accountability*

#### **Scrutiny Committee**

The Scrutiny Committee has considered it is important for both indigenous and non-indigenous bodies to be financially accountable in the administration of State and Commonwealth grant monies. AD 2001/1, p. 16, para. 6.

### *2.15.10 Recognition of customary laws*

#### **Scrutiny Committee**

The Scrutiny Committee notes that Aboriginal and Island customary laws are in general not recognised within the Australian legal system, although they are given limited recognition for certain purposes. AD 2001/8, p. 10, para. 19; AD 2000/9, p. 2, para. 5 and p. 10, para. 9; AD 2000/8, p. 6, para. 10 and p. 15, para. 19. The FLP concerning Aboriginal tradition and Island custom does not require the recognition of customary laws, although it was described by the Electoral and Administrative Review Commission as a ‘modest first step’ in that direction. AD 2000/9, p. 2, para. 6 and p. 10, para. 10; AD 2000/8, p. 6, para. 11.

*Leave entitlement* The Scrutiny Committee considered that the conferral of a conditional entitlement to 5 days’ unpaid cultural leave on employees required by Aboriginal tradition or Island custom to attend an Aboriginal or Torres Strait Islander ceremony enhanced their rights. AD 2005/3, p. 5.

### *2.15.11 Control over access to liquor*

#### **Scrutiny Committee**

The Scrutiny Committee has considered provisions restricting access to liquor and liquor licences in Aboriginal and Island communities against the background of self management principles implicit in legislation establishing local governments for the communities. The approach of the committee was to refer the matter to Parliament, without express objection, for consideration of whether the rights and liberties of individuals had been unduly affected by laws that were not replicated for persons outside the communities. The committee drew Parliament’s attention to the substantial provision made for decision-making by members of the communities in relation to the matters for which additional regulation was imposed. The controls over access in the committee’s view were about the rights and liberties

of individuals rather than about custom. AD 2002/7, p. 5, paras 26–28; AD 2002/6, pp. 14–15, paras 6–23; AD 2002/2, pp. 2–3, paras 3–10.

### 2.15.12 *Native title*

#### **Scrutiny Committee**

*Responsibility for monitoring affect on native title* In the context of circumstances where the Scrutiny Committee felt that a sponsoring Minister was dismissive of the committee's attempts to find out whether provisions affected native title, the committee has expressed the view it should not need to carry out research to attempt to establish whether legislation has had any regard to Aboriginal tradition and Island custom. The *Legislative Standards Act 1992* places that burden on the drafters and developers of the legislation. The committee's role is to consider whether legislation has had sufficient regard to this issue. AD 1997/6, p. 46, paras 6.7–6.11.

*Support for native title—alternative State provisions* For a detailed background to the introduction of a State legislative package that dealt with a full range of native title issues, see the report on the Native Title (Queensland) State Provisions Bill 1999 in Alert Digest No. 6 of 1998, pages 7–10, paragraphs 3.3–3.20 (This legislation has since been largely repealed for reasons other than opposition to native title.) For a discussion of—

- the potential extinguishment of native title by the Bill, see Alert Digest No. 6 of 1998, page 12, paragraphs 3.36–3.41
- the establishment of a legislative mechanism to deal with future acts that may affect native title with respect to mining, and other related issues, see Alert Digest No. 9 of 1998, pages 10–16, paragraphs 2.23–2.59
- the accommodation of native title rights with mining rights, see the report on the Native Title (Queensland) State Provisions Amendment Bill 1999 in Alert Digest No. 7 of 1999, pages 34–35, paragraphs 6.12–6.20.

*Native title preserved—miscellaneous provisions* The Scrutiny Committee has noted that a transport Bill, providing for taken land to be State land free of any interest, expressly provided that the Act was subject to the *Native Title (Queensland) Act 1993*. AD 1998/11, pp. 57–58, paras 13.18–13.11; AD 1998/9, pp. 22–23, paras 3.20–3.28; AD 1998/4, p. 53, paras 12.11–12.12; AD 1998/2, p. 56, paras 10.18–10.19.

For a similar treatment, see also Alert Digest No. 12 of 1996, page 27, paragraphs 8.17–8.19, and Alert Digest No. 1 of 1997, page 18, paragraphs 7.7–7.8.

The Scrutiny Committee has considered that legislation cannot affect native title unless the specific legislation made express provision for that to occur. AD 1997/13, p. 44, paras 8.23–8.24; AD 1997/12, p. 50, paras 7.25–7.27.

The Scrutiny Committee has considered there was no breach of the FLP in legislation that revived native title rights and interests when the interests granted under legislation ceased to have effect, and where native title claimants consented to the acquisition of native title in the affected land. AD 1997/9, p. 5, paras 1.17–1.20.

*Native title affected—miscellaneous provisions* Under the Offshore Minerals Bill 1997, a person must not explore for or recover minerals in Queensland coastal waters unless the exploration or recovery is authorised by a tenure or special purpose consent. While the grant of a tenure or consent does not extinguish native title in the tenure or consent area, native title in the area is subject to the rights conferred by the tenure or consent. The Scrutiny Committee referred to Parliament the question of whether the tenure or consent had sufficient regard to Aboriginal tradition and Island custom. AD 1998/1, pp. 24–25, paras 3.3–3.8; AD 1998/2, pp. 73–74, paras 15.3–15.6.

The Scrutiny Committee has considered that providing rights to non-indigenous people for negotiation equivalent with indigenous people, based on a ‘strong connection’ test, did not necessarily show any disregard for the unique physical and/or spiritual connection with the land of native title owners. AD 1999/9, p. 7, para. 2.36.

## 2.16 Unambiguous and clear and precise drafting

### 2.16.1 FLP issue

Legislation should be unambiguous and drafted in a sufficiently clear and precise way—*Legislative Standards Act 1992*, section 4(3)(k).

Plain English is commonly recognised as the best approach to the use of language in legislation.

Plain English in legislation involves the deliberate use of simplicity to achieve clear, effective communication. Legislation should be as simple as possible and should only contain the degree of complexity necessary to achieve desired policy objectives in a legally effective way.

Simple language alone may be insufficient to guarantee clear communication. There are a range of ways a law can expose its intent simply, accurately and unambiguously through devices like purpose clauses, preambles, clauses stating key or basic concepts and definitions, explanatory provisions, and examples. Careful attention to appearance and presentation is also part of the plain English technique. The relevance and role of certain information can be conveyed visually, and text made easier to read, by careful arrangement of text on the page. These and other tools can be put to work to establish context and relevance and, ultimately, understanding.

The community should be regarded as the ultimate user of a law. A law that is easy to understand is less likely to result in dispute. This commitment is an integral part of the goal to improve access to justice through more effective communication of legislative rights and obligations. From an access to justice perspective, people should not be expected to have rights and obligations affected by legislation that they can not understand, or be unable to ascertain how to adjust their behaviour to accord with the law.

A commonsense approach should be taken to drafting in plain English. Application of plain English principles does not involve the simplification of a law to the point it becomes legally uncertain. In particular, care should be taken to avoid creating legal uncertainty by dispensing with terms with established meanings for legislation users. However, the objective should always be to produce a law that is both—

- easily read and understood
- legally effective to achieve the desired policy objectives.

This objective should be maintained, even though a law may involve balancing simplicity and legal certainty.

*Please note* that the material under the heading ‘Unambiguous and clear and precise drafting’ is largely limited to comments made by the Scrutiny Committee.

### Scrutiny Committee

The Scrutiny Committee's expectations are that legislation should—

- (a) be user friendly and accessible so ordinary Queenslanders can gain an understanding of the laws relating to a particular matter without having to refer to multiple Acts of Parliament
- (b) contain coherent provisions, addressing foreseeable matters. Scrutiny Committee Annual Report 1998–1999, para. 2.14
- (c) be drafted in a style that is as simple as possible, consistent with the nature of the subject matter
- (d) be structured in a logical, user-friendly and accessible way
- (e) contain provisions that are precisely drafted. Scrutiny Committee Annual Report 1999–2000, para. 2.14.

#### 2.16.2 *Location within appropriate legislation*

### Scrutiny Committee

The Scrutiny Committee has queried the practice of inserting provisions in legislation that are so disparate from the rest of the legislation that public accessibility to legislation was brought into question. AD 2006/3, p. 9, paras 22–26.

#### 2.16.3 *Definitions about definitional provisions*

### Scrutiny Committee

*Definitions applicable to legislation should generally be included in the legislation and not located elsewhere* Definitions in the *Acts Interpretation Act 1954* are an exception. AD 1999/2, p. 2, paras 1.9–1.14; AD 1996/2, p. 11; AD 1996/1, p. 6.

The Scrutiny Committee has commented adversely on the reduction of simplicity and accessibility caused by the practice of stating in one item of legislation that definitions in other legislation apply, for example, by stating that words used in the legislation have the same meaning as in the other legislation, or by otherwise directing the reader to a definition in other legislation. AD 1999/3, p. 7, paras 1.52 and 1.54. However the Scrutiny Committee has in recent years been less critical of cross-referencing because legislation is now more readily accessible, particularly via the internet. AD 2004/2, pp. 21–22, para. 6.

The Scrutiny Committee accepts footnoting of the relevant text from the provision of other legislation as a way to avoid the adverse impact of cross-referencing. AD 1996/5, p. 25, para. 6.5; AD 1996/4, p. 24; AD 1996/2, p. 12.

The Scrutiny Committee has considered that cross-reference should not be made to a law that has been repealed because of the difficulty users may have in accessing the repealed law. AD 1996/2, p. 7.

The Scrutiny Committee has commented on several occasions that it believes that *Financial Administration and Audit Act 1977*, section 22, should be footnoted in every Appropriation Bill. Section 22 states that words used in an Appropriation Act that are defined in *Financial Administration and Audit Act 1977* have the same meaning the words have in that Act, subject to a contrary intention in the Appropriation Act. AD 2001/4, p. 1, paras 3-7; AD 1999/8, pp. 72-73; AD 1999/6, pp. 8-9.

*Terms should be sufficiently defined, particularly when they may have substantial consequences* This principle is particularly important if a sanction applies. AD 1999/2, p. 2, paras 1.9-1.14.

The Scrutiny Committee has applauded the fact that legislation, in contrast to the legislation it replaced, included a definition of a pivotal term. AD 2000/4, pp. 6-7, paras 41-47.

The Scrutiny Committee has expressed concern about the following words—

- ‘contract for service’ as opposed to ‘contract for services’. The committee thought the traditional legal terminology would avoid uncertainty. AD 2002/07, p. 12, paras 39-41
- ‘de facto relationship’. The committee drew to Parliament’s attention that defining the concept in general terms (without listing the factors mentioned in the *Acts Interpretation Act 1954*, section 32DA definition) introduced an element of uncertainty. AD 2003/10, pp. 3-4, paras 18-25
- ‘legal practice’. This term was not defined in legislation where it was a key term, including for the imposition of a substantial penalty. AD 2003/12, p. 13, paras 15-17
- ‘improper or financially unsound way’. This term was not defined in legislation in which its interpretation had the potential to significantly affect a person’s interests. AD 1996/5, p. 14, paras 4.17-4.2
- ‘religion’. In legislation prohibiting religious vilification, religion was not defined, but the Attorney-General noted in response a High Court definition. AD 2001/2, pp. 17-19, paras 7-10; AD 2001/1, pp. 4-9, paras 22-51

- ‘registration’. In legislation in which registration was a central concept, the period of registration was not prescribed nor its absence explained. AD 1996/4, p. 1
- ‘trading unprofitably’. This term was not defined in legislation in which its interpretation had the potential to significantly affect a person’s interests. AD 1996/5, p. 14, paras 4.17–4.20
- ‘undesirable or unsound’. This term was not defined in legislation in which its interpretation had the potential to significantly affect a person’s interests. AD 1996/5, p. 14, paras 4.17–4.20.

*If police officers may be asked to perform a function, the function should be specifically identified* A proposed provision gave the Commission of Land Tax power to ask a police officer to perform a function under another provision. The other provision covered more than 1 function, not all of which were appropriate for a police officer. AD 1999/1, pp. 21–22, paras 4.29–4.36.

*Tautology should be avoided* The committee has considered that ‘practicing practitioner’ was an example of tautology. AD 1996, p. 22.

#### *2.16.4 Format must help and not obscure interpretation*

#### **Scrutiny Committee**

The Scrutiny Committee considers that clauses of substantive separate effect should be numbered and presented on the page in a way at least equivalent to a section. For example, commencement clauses should not be present as unnumbered material in small font. AD 1999/3, p. 41, para. 6.5.

#### *2.16.5 Covering the field*

#### **Scrutiny Committee**

The Scrutiny Committee has considered that, once a complex set of provisions about a particular subject is embarked on, it may be necessary to cover the whole field of the subject for the sake of clarity. For example, complex extraterritorial provisions should not be silent about some persons. AD 2001/1, pp. 1–2, paras 6–13.

#### *2.16.6 Liability should be expressed with clarity*

It is important where a sanction applies that a person should be able to determine with a degree of confidence whether they are subject to the sanction.

### Scrutiny Committee

*Members of Parliament* The Scrutiny Committee has considered that, if early resignation by a member of Parliament could in some circumstances result in the member being required to pay the resultant by-election costs, the circumstances when early resignation is, or is not, justified should be defined in sufficiently precise terms so members are able to decide if their personal circumstances justify early resignation. AD 2002/2, pp. 5–6, paras 17–25.

#### 2.16.7 *Power should be expressed with clarity*

### Scrutiny Committee

*Voting power* The Scrutiny Committee has expressed concern that if a university statute provides that whenever a discipline review panel convenes to hear a matter the registrar will appoint a secretary to the panel, the statute should be clear about whether the secretary is a voting member of the panel.

*Basis of opinion* The Scrutiny Committee has considered that, if a provision is expressed to operate in particular circumstances that depend on an official's opinion, it may be necessary to state the matters to which the official should have regard in reaching the opinion.

*Throwing a wide net* The Scrutiny Committee has considered that legislation should, wherever possible, not use the expression 'such other information as [an entity] may require' but should specify the information required. If a general expression is necessary, it should at least limit the information that may be required to information relevant to the issue concerned.

#### 2.16.8 *Mental element in provisions creating criminal liability*

### Scrutiny Committee

*Intent or knowledge* The Scrutiny Committee has queried the use of 'knowingly or recklessly' to express the mental element of a criminal offence instead of the 'intentionally or wilfully' as commonly used in the *Criminal Code* and defined by case law. AD 2003/4, p. 14, paras 3–6; AD 2001/1, pp. 9–12, paras 52–67; AD 2001/2, pp. 19–23, paras 23–26.

Also, the Scrutiny Committee has referred to parliament the use of 'ought reasonably to know' in a provision creating a statutory offence. AD 2002/1, p. 14, paras 3–4.



### 2.16.9 *Onus of proof*

#### Scrutiny Committee

*The golden thread* The Scrutiny Committee has questioned why legislation providing for an imprisonment order has not required proof beyond a reasonable doubt for the imprisonment of the individual—

Whether or not the legislation can withstand a constitutional challenge such as succeeded in *Kable v DPP (NSW)* (1996) 189 CLR 51 does not derogate from the concerns therein expressed by members of the High Court, such as:

*‘public confidence cannot be maintained in the courts and their criminal processes if the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis of an opinion formed, by reference to material that may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so’ (per Gaudron J).*

and

*‘The Act requires the Supreme Court to inflict punishment without anterior finding of criminal guilt by application of the law to past events, being the facts as found. Such activity is said to be repugnant to judicial process’(per Gummow J)*

This order can be made by the court if satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community.

*(The Scrutiny Committee then quoted material from Rockett v George (1990) 170 CLR 109.)*

The net effect of this part of the legislation is that a person can be imprisoned without charge upon evidence inadmissible in an ordinary criminal trial and upon satisfaction of a standard that falls far below the “golden thread of English criminal law”, namely that the Crown must prove guilt beyond reasonable doubt. (*Woolmington v DPP* [1935] AC 162 at 165, applied to the Queensland Criminal Code by the High Court in *Mullen v R* (1938) 59 CLR 124.)

As *Rockett v George* demonstrates, the standard for a preliminary order is even lower than the standard required in the NSW legislation struck down in *Kable’s case*, namely the balance of probabilities. The prisoner does not even have a right to be present at the application.

(AD 2003/8, p. 3, paras 14–18).

*Prescribing the onus* The Scrutiny Committee has considered that legislation should spell out what the onus of proof is on matters having serious consequences. AD 2005/14, pp. 4–6, paras 20–35.

#### 2.16.10 *Suspicion or belief*

#### Scrutiny Committee

The Scrutiny Committee has commented on the specific distinction between suspicion and belief as the basis for the operation of a provision in legislation—

As to the meaning of *suspicion* and *belief* the High Court observed in *Rockett v George* (1990) 170 CLR 105 at 115 and 116:

*‘Suspicion, as Lord Devlin said in Hussien v Chong Fook Kam “in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’”. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis of suspicion must be shown... ....*

*The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture’.*

[underlining added]

Therefore suspicion in law requires less ‘proof’ than belief, and belief requires less ‘proof’ than that on the balance of probabilities. (AD 2005/14, p. 5, paras 30–31).

The Scrutiny Committee then expressed the view that proof on the balance of possibilities was at least to be required if drastic consequences, for example imprisonment or contact restrictions, follow. AD 2005/14, pp. 4–6, paras 20–35.

#### 2.16.11 *Unintended adverse impact must be avoided*

Legislation should not have an unintended adverse impact on individuals. Legislation should be checked to ensure that there are no gaps that adversely affect individuals. For example, if legislation changes the way a department deals with something, there should be sufficient transitional clauses to protect individuals who are affected by the transition from the existing Act to the Act as changed.

## *Chapter 3: Individuals' rights and liberties—FLP issues not listed in the Legislative Standards Act*

### **Scope of chapter**

Chapter 2 was concerned with the issues listed in the *Legislative Standards Act 1992* (section 4(3)) that need to be considered in deciding whether legislation has sufficient regard to rights and liberties of individuals. This chapter examines examples of other issues dealing with rights and liberties of individuals that are not listed in the *Legislative Standards Act 1992* but to which legislation should have sufficient regard.

### **Background**

The list of examples in the *Legislative Standards Act 1992* is not exhaustive of the issues relevant to deciding whether legislation has sufficient regard to the rights and liberties of individuals. For example, the significance of having the consent of an individual to affect a right or liberty of the individual is not specifically mentioned, but underlies the concepts dealt with in the list of examples. The Scrutiny Committee is therefore less concerned about intrusions into rights and liberty of an individual if consent is obtained. AD 2002/9, pp. 1–2, paras 6–8.

The Scrutiny Committee has consistently taken the approach that the matters specifically listed in the Legislative Standards Act are not exhaustive. The committee takes an expansive approach in identifying rights and liberties. These include traditional common law rights, for example, the right of a landowner to the use and enjoyment of his or her land. They can also encompass, for example, rights that are only incompletely recognised at common law (for example, the right to privacy) and rights (especially human rights) that arise out of Australia's international treaty obligations. Scrutiny Committee Annual Report 1998–1999, para. 2.13.

## **3.1 Abrogation of common law rights must be justified**

### **3.1.1 FLP issue**

Legislation should not abrogate common law rights without sufficient justification.

This principle is recognised by the common law to the extent that the courts will examine carefully any loss of common law rights before accepting that the Parliament intended that loss to happen.

### 3.1.2 *Common law right to personal liberty*

#### **Scrutiny Committee**

The Scrutiny Committee has drawn attention to a High Court judge statement that the right to personal liberty is the most elemental and important of all common law rights—

In the High Court decision of *Trowbridge v Hardy* (1955) 94 CLR 147 at 152, Justice Fullagar described the right to personal liberty as “the most elementary and important of all common law rights”. In another High Court case, *Williams v R* (1986) 161 CLR 278 at 92, Justices Mason and Brennan noted Blackstone’s view that it was an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the law of England “without sufficient cause”: *Commentaries on the Laws of England* (Oxford, 1765), Bk. 1, pp 120-121. Justices Mason and Brennan quoted Blackstone’s warning that:

“Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper...there would soon be an end of all other rights and immunities.” (AD 2005/14, pp. 3-4, paras 15-19).

*Dangerous Prisoners (Sexual Offenders Act) 2003* The extraordinary powers provided under this Act to detain prisoners beyond sentence has naturally been a matter of comment by the committee. AD 2006/4, pp. 34-35, paras 13-20.

### 3.1.3 *Common law right to silence*

#### **Scrutiny Committee**

The right to silence is one of the most basic rights developed by the common law and undoubtedly is a right to which legislation should have sufficient regard. Scrutiny Committee Annual Report 1995-1996, para. 2.18.

The Scrutiny Committee has considered that making it an offence for a person to omit relevant material particulars from an oral statement is an abrogation of the right to silence, because, in the committee’s view, it means that if a person says anything at all, a person must reveal everything. AD 1996/5, p. 16, para. 4.31; AD 1996/1, p. 6. The Scrutiny Committee has noted with approval the removal of this particular clause from the usual model clause. Scrutiny Committee Annual Report 1995-1996, paras 2.18-2.24.

The Scrutiny Committee has also expressed concern that an obligation not to give something containing false or misleading information to an inspector was too wide because in the circumstances the types of information that could be given to an inspector were so wide that some kind of restriction on the types of information that had to be free of material error should have been included. AD 1999/4, p. 7, paras 1.43–1.45.

### *3.1.4 Common law right to silence relating to spouses*

#### **Scrutiny Committee**

The Scrutiny Committee has queried the repeal of a law preventing, generally, a spouse being compelled to give evidence against their spouse, or to reveal communications made during their marriage. The committee had noted that Commonwealth legislation had listed a set of criteria to be applied before a spouse could be compelled to give evidence and had stated that the court must not require the witness to give the evidence if it finds there is a likelihood that harm would or might result to the person or their relationship with the defendant and the nature and extent of the harm outweighs the desirability of having the evidence given. AD 2003/6, pp. 8–9, paras 11–16.

### *3.1.5 Common law property rights*

Two of the most important principles protective of property rights are set out separately under ‘2.10 Judicial warrant required for entry, search and seizure’ on page 44 and ‘2.14 Compulsory acquisition of property’ on page 73. Also, all other fundamental legislative principles relating to the rights and liberties of individuals are heavily concerned with the protection of the person or property of an individual. This section concerns the broader principle that legislation should be generally protective against loss or damage to property.

#### **Scrutiny Committee**

*Right to claim compensation generally for loss or damage* The Scrutiny Committee has supported the inclusion of a provision providing for a general entitlement to claim compensation for loss or damage incurred by a person because of the exercise or purported exercise of a power under an Act. The committee considered the inclusion of the provision enhanced the rights of persons affected by the exercise or purported exercise of the power. AD 2002/1, p. 15, paras 10–14.

*Right to use and enjoyment of property*

**Use of rental accommodation** In relation to a local law, the Scrutiny Committee has commented adversely on legislation providing an absolute ban for all rental properties on smoking in any room designated for sleeping or on sleeping in any room not designated for sleeping.

The Scrutiny Committee has supported ‘the general thrust’ of a private member’s Bill protective of the rights of neighbours. The Scrutiny Committee had regard to the adverse effects objectionable behaviour of a tenant may have on the rights of neighbours, the fact that tenancies are already heavily regulated by statute and the lack of any adequate form of redress either under the common law or statute. AD 2005/11, pp. 11–12, paras 3–14.

**Tree clearing** The Scrutiny Committee has referred to Parliament, without express objection, a provision attaching to land a person’s liability to take action remedying the person’s illegal tree clearing on the land. AD 2003/2, pp. 5–8, para. 5 (4th dot point), paras 7–8.

**Motor vehicle use** The Scrutiny Committee has also referred to Parliament, without express objection, provisions placing restrictions on the use of motor vehicles, and the radios of motor vehicles, in relation to objectionable behaviour called ‘lapping’ in which vehicles lap blocks with radios loudly playing. AD 2002/5, p. 15, paras 18–24.

**Abandoned motor vehicles** The Scrutiny Committee has found not unobjectionable provisions authorising the seizure of abandoned cars from a place where cars were not allowed, together with their disposal on failure to reclaim. The power was justified in the overall context of the relevant legislation. AD 2003/1, p. 16, paras 11–12.

**Cultural heritage** The Scrutiny Committee has referred to Parliament, without express objection, provisions protective of Aboriginal and Torres Strait Islander cultural heritage, the committee noting the precedents (for example, planning and cultural heritage) for restricting the uses to which land may be put in order to achieve an outcome favourable to the community as a whole. AD 2003/9, p. 3, paras 10–17.

**Minerals and energy resources** The Scrutiny Committee has referred to Parliament, without express objection, provisions that claimed for the State mineral and energy resources on or below any land, with a qualified right to claim compensation because of authorised exploration for the energy. The Scrutiny Committee has noted that landholders have been subject to increasing levels of restrictions for decades. AD 2004/3, pp. 17–18, paras 14–15 (petroleum and gas); AD 2004/02, pp. 3–5, paras 3–17 (geothermal energy).

### 3.1.6 *Common law contractual rights*

#### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament, without express objection, the question of whether a statutory regime of rapid adjudication for moneys owing under construction contracts had sufficient regard to the rights of all parties to the contracts. The committee noted that the regime reduced in various ways the capacity of parties to contract freely with each other, and to establish and enforce their contractual entitlements via traditional means. AD 2004/1, pp. 1–3, paras 3–12.

### 3.1.7 *Common law rights to freedom of movement and association*

Common law rights to freedom of movement are associated with the rights to liberty and security of the person, to freedom of peaceful assembly and procession, and to a democratic society respecting the rule of law.

The numerous powers to detain or imprison a person are obvious intrusions into the right of freedom of movement and all of these powers must be fully justified. Incarceration is one of the most severe and total deprivations of a citizen's liberty. The common law has long required that it is only done with the authority of the court. The court authorises incarceration of a person found guilty through court procedures and sentenced by a judge. Other cases of incarceration are permitted with great reluctance.

For example, after a person is charged with an offence, the law has traditionally required the executive to produce the person in court to be dealt with according to the law. In addition to statutory requirements to produce detainees, the court has an overriding power under the habeas corpus writ to decide whether someone should be detained.

There are a number of reasons for this—

- (a) the court can see who the detainee is; and
- (b) the court can find out the detainee's condition; and
- (c) the citizen can be released immediately on being granted bail; and
- (d) the court is entirely in control of the detainee; and
- (e) face to face communication between detainee and solicitor is much easier.

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

Other intrusions may involve control over or intrusive interference into political activity or any association of persons. It can also involve numerous miscellaneous powers, for example, the power to exclude a person from a public place, to require a person to stay out of a place, or to require a person to move on from a place.

### **Scrutiny Committee**

The Scrutiny Committee has acknowledged that these freedoms under the common law are not absolute, and that Parliament has the power to restrict them by legislation but should not do so lightly.

*Obligation to bring person before court when detained* Under the *Courts (Video Link) Amendment Act 1996*, appearance in person by detainees was replaced by video appearance and face to face communication between detainee and solicitor was replaced by phone communications that were given confidentiality. Safeguards were that the video link has to be two-way audio and visual communication and the place where the detainee has to be held is deemed to be part of the court to allow the court to exercise formal control over the detainees and officials who are holding them. Values purportedly furthered by the legislation were improved community security (by eliminating the risk of escape by detainees from court or during transfers and the diversion of police resources in transporting detainees) and decreased cost of transfers. AD 1996/2, p. 9.

*Bail provisions* The Scrutiny Committee examined provisions extending appeals against bail decisions to the prosecution where the decisions were only previously appellable by the accused. The committee referred to Parliament the question of whether the additional avenue of appeal had sufficient regard to the rights and liberties of the accused, the prosecution and the general public. However, the committee commented favourably on the level of awareness of fundamental legislative principles apparent in the drafting of the procedural provisions. AD 1999/1, p. 2, paras 1.7–1.8.

*Freedom of assembly* The Scrutiny Committee has concluded from the principles in the *Peaceful Assembly Act 1992* that freedom of assembly should only be subject to limitation if it is necessary and reasonable in a democratic society in the interests of public safety, public order, or the protection of the rights and freedoms of other



persons. Scrutiny Committee Annual Report 1995–1996, paras 5.87–5.93 The committee also discouraged use of subjective tests. Scrutiny Committee Annual Report 1995–1996, paras 5.94–5.103.

*Exclusion from public places/move on powers* The Scrutiny Committee has commented that the power to exclude a person from a public place may be justified on the basis that the restriction protects the rights of the majority of users by ensuring that they are free to use the place without fear of assault or intimidation. The exclusion powers arguably promote the common law rights of the majority. AD 1996/1, p. 15.

However, the extension of a move on power to all public places was a matter of significance having regard to the particular individuals concerned and the public generally. AD 2006/5, p. 21, paras 9–15.

*Exclusion from institutions for children, controls while at an institution for children* The Scrutiny Committee has considered to be reasonable provisions that enabled persons to be prohibited from entering school premises and that authorised controls over the conduct of persons at school premises, given the presence of children and the obligation of school authorities to protect them. AD 2003/12, pp. 7–8, paras 3–11.

*Political activities* The Scrutiny Committee has referred to Parliament the question of whether provisions that either directly or indirectly encroached on the capacity of political parties to run their own affairs without outside interference and on the capacity of persons to join and remain members of the organisations have sufficient regard to the rights and liberties of the individual and the public in general. The provisions were designed to increase the honesty of internal ballots and to prevent offenders from qualifying as candidates. AD 2002/3, pp. 9–10.

*Public health matters generally* The Scrutiny Committee has considered provisions under public health law that authorised detention of persons with particular conditions if there was an immediate risk to public health. The ultimate question was whether an acceptable balance was struck between the obvious need to adequately protect and promote the health of the public on the one hand and the rights and liberties of the individual on the other. AD 2005/4, p. 12, para. 10 and pp. 13–14, paras 20–25.

*Travel and motor vehicle inspections* The Scrutiny Committee has referred to Parliament, without express objection, the question whether provisions authorising transport inspectors to stop vehicles to check whether they are carrying explosives and complying with the *Explosives*

*Act 1999* had sufficient regard to the rights of owners, drivers and passengers of such vehicles, and of the community as a whole. The legislation arose out of increased security concerns and similar powers already existed to ensure compliance with Transport Acts. AD 2004/7, pp. 41–42.

### 3.1.8 *Right not to be subjected to violence*

#### **Scrutiny Committee**

*Powers of personal search* The Scrutiny Committee has queried increased powers of personal search but recognises the need to find an appropriate balance between the person being searched and the danger to other persons if the search is not carried out. It recognises that personal search is sometimes necessary, and looks for appropriate safeguards. AD 2001/1, pp. 18–19, paras 3–9.

The Scrutiny Committee has queried the lessening of a precondition of the exercise of power by a person from the person ‘believing’ something to merely ‘suspecting’ something’. AD 20021/1, p. 9, paras 10–12.

*Witness protection schemes* The Scrutiny Committee has suggested some considerations to be taken into account when setting up the schemes. AD 2000/9, pp. 39–40, paras 5–12.

The Scrutiny Committee referred to the role of Executive Government to prevent breaches of the law. This includes inhibiting the commission of offences against individuals and enhancing a person’s right not to be subjected to unlawful violence.

It also referred to articles 6 and 9 of the International Covenant on Civil and Political Rights, to which Australia is a signatory.

The committee also referred to the rights of third parties, for example—

- (a) debtors etc. seeking redress against the protected person; and
- (b) restrictions placed on defendants in trying to prove their innocence; and
- (c) variations to normal court proceedings to hide a new identity; and
- (d) obligations imposed on others not to disclose.

### 3.1.9 Freedom of speech and the implied constitutional right to communication on matters of government and politics

The High Court in *Lange v. Australian Broadcasting Commission* [1997] 189 CLR 520 concluded that there was an implied freedom under the Australian Constitution to publish and communicate on matters of parliament and politics.

The joint judgement adopted the statement of McHugh J in *Stephens* (1994) 182 CLR 211 at 264—

Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally.

The test adopted was twofold. Firstly, does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? Secondly, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

#### Scrutiny Committee

The Scrutiny Committee comments on legislation that may infringe the right to communication on matters of government and politics identified by the High Court in *Lange v. Australian Broadcasting Commission* [1997] 189 CLR 520.

*Flag burning* The Scrutiny Committee has queried whether a law prohibiting the burning of a State or Commonwealth flag might infringe this implied freedom, as the desecration of a flag is a non-verbal communication of a political message of dissatisfaction with the State or nation. AD 2003/7, pp. 55–57, paras 19–31.

*Public nuisance offence* The Scrutiny Committee has referred to Parliament, as a possible infringement of the freedom of communication and publication on parliament and public matters, a provision for a public nuisance offence about conduct in a public place that interferes with, or may interfere with, peaceful passage through a public place, or the peaceful enjoyment of a public place. AD 2004/7, pp. 25–35, paras 3–64.

*3.1.10 Freedom of speech and the imposition of a secrecy obligation*

A provision is commonly included in legislation prohibiting unauthorised disclosure of confidential information gained by a person through involvement in administering the Act. The provision is not an apparent breach of fundamental legislative principles.

**Scrutiny Committee**

The Scrutiny Committee has noted that the ordinary prohibition on intentional disclosure is consistent with common law principles. AD 2002/6, p. 30, para. 27.

The Scrutiny Committee has drawn to the attention of Parliament as being unusual a provision that extended an offence against a secrecy obligation beyond intentional disclosure to reckless disclosure. AD 2002/6, p. 30, paras 27–29.

*3.1.11 Freedom of speech and the imposition of an obligation to report*

A provision of an Act commonly requires a person to report stated matters to an appropriate authority. This obligation can be a breach of this principle if it is unreasonable.

**Scrutiny Committee**

The Scrutiny Committee has referred to Parliament without express objection, on the issue of whether the requirement was reasonable, a provision requiring reports to be made on harm to a child detained in a detention centre. In doing so, the committee noted the safeguards given to persons subject to the obligation, including—

- (a) prohibition on disclosure of reporter's identity; and
- (b) preservation of privilege against selfincrimination; and
- (c) provision of a reasonable excuse as an exception to the obligation. AD 2002/6, p. 28, paras 12–17.

*3.1.12 Freedom of speech and anti-vilification laws*

When considering the problem of the vilification of individuals on a discriminatory basis (for example, race, religion, sexuality, and gender identity), it is necessary to balance the value of the right of free speech against the value of protection against unfair and discriminatory abuse.

### Scrutiny Committee

The Scrutiny Committee has considered anti-vilification laws in the context of the restriction of freedom of speech and the rights and liberties of individuals generally. AD 2002/11, pp. 2–3, paras 15–18. It has queried provisions prohibiting racial and religious vilification because it was concerned about the vagueness, in particular, of the concept of religion and how easily vilification could then be found to have happened. AD 2001/2, pp. 15–17, paras 9–10; AD 2001/1, pp. 3–4, paras 17–21.

#### 3.1.13 Freedom of speech and the right not to be defamed

### Scrutiny Committee

The Scrutiny Committee notes the adverse affect on individuals of a power to publish defamatory public statements of warnings about a person. AD 2003/7, pp. 42–43, paras 24–34.

#### 3.1.14 Right of action

The right to take legal action over a wrong is an essential element of rights generally. A right is ephemeral if it can not be protected by legal action. Limitations on rights of action can therefore be an erosion of a right.

### Scrutiny Committee

*Access to damages* The Scrutiny Committee has referred to Parliament for consideration without express objection provisions that regulate access to actions for damages. AD 2002/11, pp. 29–30, paras 3–10.

*Vexatious litigants* See part 3.15 ‘Balancing individual and community or more general interests’.

#### 3.1.15 Right not to be subjected to harmful interference with health or safety

Under the common law, if a person is wrongfully injured by the act of another, the injured person has a right of action. Legislation that potentially has the effect of harming an individual’s health or safety therefore requires the highest justification.

### Scrutiny Committee

*Fluoridation of the water supply* The Scrutiny Committee has considered that the merits or otherwise of a proposal in legislation to require the addition of fluorine to public water supplies was a matter for Parliament to decide. The weight of scientific opinion that fluoridated water is beneficial to the dental health of the population had to be balanced against the arguments that ingesting fluorine had detrimental effects upon persons’ health. In a technologically

advanced country like Australia, the issue was not the act of adding chemicals to the water supply (the addition of chemicals to food and drink being a common event) but the likely benefits and detriments of doing so. AD 2004/6, pp. 1–2, paras 6–12.

## 3.2 Abrogation of established statute law rights and liberties must be justified

### 3.2.1 *FLP issue*

Abrogation of established statute law rights and liberties must be justified.

#### **Background**

The rights and liberties of individuals do not arise merely under the common law. Legislation may also declare a right or liberty, or establish a framework of rules about a particular matter that gives rise to a right or liberty.

A change to legislation that adversely affect rights and liberties previously granted under legislation needs to be justified.

### 3.2.2 *Acquisition of Land Act 1967*

This Act prescribes the procedure for the compulsory acquisition of land that has longstanding acceptance. Legislation that diminishes a person's rights under the Act relating to the compulsory acquisition of their property requires strong justification.

### 3.2.3 *Criminal Law (Rehabilitation of Offenders) Act 1986*

This Act provides for a long established scheme enabling a person convicted of an offence to rehabilitate himself or herself. If the person remains conviction-free for a prescribed period, disclosure of the conviction is not permitted. It also declares a person's criminal history to consist only of recorded convictions of offences.

Any provision eroding the scheme requires strong justification. For more details, see '3.3.6 Privacy and confidentiality rights' on page 113.

## Scrutiny Committee

The Scrutiny Committee ordinarily refers to Parliament for its consideration any erosion of the policy of the *Criminal Law (Rehabilitation of Offenders) Act 1986*. AD 2002/6, pp. 29–30, para. 29.

The Scrutiny Committee has noted that provisions eroding the policy have become increasingly common and referred to Parliament the question of whether they have sufficient regard to the rights of the people subject to disclosure. Examples of provisions eroding the policy include the following—

- (a) legislation protective of children. (The committee has considered this may reflect increased public expectations in this context.) AD 2005/10, pp. 11–12, paras 3–15 and pp. 28–29, paras 8–20; AD 2005/7, pp. 1–2, paras 1–12; AD 2004/8, pp. 3–4, paras 3–11; AD 2003/11, p. 11, paras 12–17; AD 2002/11, pp. 8–9, paras 10–18; AD 2002/8, p. 2, para. 9
- (b) legislation protective of vulnerable persons or persons with a disability. AD 2006/8, pp. 3–5, paras 8–18; AD 2006/1, pp. 7–8, paras 3–14
- (c) legislation about the appropriateness and competence of proposed guardians, administrators and community visitors. AD 2002/5, p. 8, paras 10–15; AD 2000/1, pp. 2–3, paras 12–17
- (d) legislation regulating membership of political parties, candidature for election, and membership of the Legislative Assembly. AD 2002/3, p. 13, paras 31–34
- (e) legislation authorising the commissioner of the police service to disclose spent convictions of persons applying for licences to grow industrial cannabis and of persons associated with the person applying for the licence. AD 2002/5, pp. 1–2, paras 3–9
- (f) legislation authorising the commissioner of the police service to disclose spent convictions of, and mere charges against, persons visiting, or applying to visit, a detention centre. AD 2002/6, pp. 29–30, paras 18–23
- (g) legislation authorising access to the criminal history (including spent convictions) of persons reasonably suspected of being present at premises, to help an authorised person to decide whether the unaccompanied entry to the premises would create an unacceptable level of risk to the authorised person's safety. AD 2005/5, pp. 22–23, paras 13–16; AD 2003/2, pp. 5–8, para. 5 (5th dot point), paras 7–8
- (h) legislation allowing a registering authority for a particular profession to have regard to spent convictions of, and mere

charges against, persons seeking registration. AD 2003/7, pp. 10–11, paras 7–13

- (i) legislation authorising wide ranging information to be gathered about current and proposed officers and staff of the police service and external service providers. AD 2003/12, pp. 11–12, paras 7–12
- (j) legislation allowing
  - exemptions in relation to applicants for practising certificates as legal practitioners and renewals of those certificates; and
  - disclosures by relevant authorities to health assessors in relation to persons seeking admission, applying for a practising certificate or holding a practising certificate. AD 2003/12, p. 14, paras 18–21.

The Scrutiny Committee encourages minimisation of the area of impact of an onerous disclosure requirement. When provisions required criminal history disclosure concerning a wider range of persons than those directly associated with a risk, the committee has queried the extension. AD 2003/12, p. 18, paras 7–12.

### 3.2.4 *Freedom of Information Act 1992*

The *Freedom of Information Act 1992* contains a long established scheme that enables members of the community to gain access to information held by public authorities. Any reduction of access requires strong justification.

#### **Scrutiny Committee**

*Commercial in confidence material* The Scrutiny Committee has referred to Parliament, without express objection, provisions stating that particular information was exempt matter under the *Freedom of Information Act 1992* or that Act did not apply to the information. The explanatory notes had argued that the documents were of a commercial in confidence nature. Further argument has included that the relevant industry would have to be confident in the integrity of the system if it was to take up new and innovative products. AD 2004/1, pp. 3–4, paras 20–23 and p. 16, paras 28–33 (and AD 2003/5, p. 27, paras 24–29).

### 3.2.5 *Ombudsman Act 2001*

The *Ombudsman Act 2001* contains a long established scheme that enables members of the community to seek redress of administrative actions by making complaints to the ombudsman. Any reduction of access requires strong justification.



### Scrutiny Committee

The Scrutiny Committee ordinarily refers to Parliament for its consideration any erosion of the policy of the *Ombudsman Act 2001*. AD 2006/3, pp. 6–7, paras 3–9.

#### 3.2.6 *Whistleblowers Protection Act 1994*

The *Whistleblowers Protection Act 1994* provides legal protection for whistleblower disclosures made by members or employees of public sector entities, and limited protection for some disclosures made by private sector employees.

### Scrutiny Committee

The Scrutiny Committee has raised on a number of occasions the fact that when government functions are taken on by the private sector, traditional accountability can be circumvented.

*Conversion of statutory government owned corporations to company government owned corporations* AD 2006/10, pp. 10–11, paras 3–9.

#### 3.2.7 *Self management principle of Aboriginal and Torres Strait Islander Communities*

See the material set out in ‘2.15 Sufficient regard to Aboriginal tradition and Island custom’ on page 79.

#### 3.2.8 *Right to be consulted under Statutory Instruments Act 1992 regulatory impact statement process*

### Scrutiny Committee

The Scrutiny Committee generally disapproves of legislation providing an express exemption from the regulatory impact statement (RIS) requirements in the *Statutory Instruments Act 1992*, part 5.

*Comparable consultation under another system* An Act included an exemption from the RIS requirements for a regulation. The exemption applied only if the Minister advised the House that consultation about the regulation had already been carried out that was comparable to consultation under the *Statutory Instruments Act 1992*. The Scrutiny Committee acknowledged this would not significantly reduce the benefits achieved through the RIS process. AD 2002/8, p. 3, para. 19.

## 3.3 Abrogation of rights and liberties from any source must be justified

### 3.3.1 *FLP issue*

Legislation should not abrogate other rights, in the broadest sense of the word, from any source without sufficient justification.

### 3.3.2 *Rights of prisoners and other persons in the State's custody*

Legislation in relation to a person in the State's lawful custody, as well as authorising lawful punishment or other custody of a person, should be protective of the person's rights in relation to custody.

#### **Scrutiny Committee**

*Lengthening period before review of sentence* The Scrutiny Committee referred to Parliament a provision lengthening the minimum period before which a nominal life imprisonment sentence may be reviewed by a court. AD 2002/3, p. 7, paras 26–29.

*Limiting types of leave* The Scrutiny Committee has considered that limiting the types of leave for which a particular category of prisoner was eligible to be a relatively minor intrusion on prisoner's rights as the committee considered the granting of leave to prisoners as a form of privilege. AD 2006/9, p. 13, paras 45–50.

### 3.3.3 *Protection of the interests of children*

#### **Scrutiny Committee**

*Adoption priority promoting childrens interests* The Scrutiny Committee has expressly stated it did not object to the extinguishment, under a new law, of existing expectations, when the extinguishment was designed to promote the interests of adoptive children. The existing expectations included priority rights previously granted to prospective adoptive parents based on first-in-time application. AD 2002/2, pp. 3–4, paras 21–29.

*Juvenile justice process* The Scrutiny Committee examines with care any provisions setting up procedure for dealing with children under the criminal law. The committee has an expectation that the length of sentences and other procedures relating to children in the criminal justice system, for example, conditions in custody and parole provisions, should acknowledge the fact that children are entitled to more favourable treatment. AD 1996/6, p. 4, para. 1.21.

The Scrutiny Committee recognises that all legislation dealing with the criminal process involves the rights of citizens—both the citizens whom the criminal law is designed to protect and the citizens who are

accused of violating those rules. If the accused is a child, the committee considers that the only way that the balance can be successfully struck is to ensure sensible process rights for the accused and a corrections system that seeks also to educate and assist the child in his/her moral development. AD 1996/5, p. 18, para. 5.3.

The Scrutiny Committee has considered that there is a need to balance the best interests of the child with the following—

- (a) the rights of the victims of juvenile crime
- (b) the rights of citizens to security.

However, the security rights of citizens may be best protected in the longer term by having children develop into mature, responsible and productive members of the community. AD 1996/6, p. 3, para. 1.16.

The Scrutiny Committee has considered that the range of offences for which juveniles may have finger and palm prints taken without arrest should have excluded the most minor offences even if there were other safeguards, such as court application and a requirement for destruction. AD 1996/5, pp. 19–20, paras 5.12–5.15.

Concerning procedure diverting a child from court, the Scrutiny Committee has been concerned to point out possible adverse impacts on the child. For example—

- (a) use against the child of information gathered in the process. AD 1996/6, p. 7, paras 1.39–1.40; AD 1996/5, p. 21, para. 5.23
- (b) insufficient additional confidentiality about matters revealed out of court. AD 1996/6, p. 8, para. 1.49.

*Legal representation* The Scrutiny Committee has considered there should be an express right to legal representation for children in the following cases—

- (a) in an application to a Children’s Court Magistrate to have an identifying particular taken of a child. AD 1996/6, p. 7, para. 1.38; AD 1996/5, p. 20, para. 5.18
- (b) before agreeing to and signing a community conference agreement. AD 1996/6, p. 7, para. 1.38; AD 1996/5, p. 22, para. 5.29.

*Movement and association restrictions* See entries under 3.1.6 ‘Common law rights to freedom of movement and association’.

*Teacher restrictions* The Scrutiny Committee has referred to Parliament, without express objection, provisions that enhanced the protection of children at school by imposing restrictions on teacher registration. AD 2003/11, pp. 9–11, paras 6–11.

### 3.3.4 Election and referendum

#### Scrutiny Committee

*General right to vote* Legislation affecting any voting right is specifically examined by the Scrutiny Committee.

The Scrutiny Committee has acknowledged the right to vote in a parliamentary election as one of the most fundamental of rights in a parliamentary democracy as it forms part of the definition of the term and was the means by which the Australian Constitution came into being. The committee points out that this right is reflected in the Queensland Constitution (sections 22 and 28), the Australian Constitution (section 24) and many judicial pronouncements.

*Explanatory statements* The Local Government Amendment Bill 1996 proposed explanatory statements be sent to each affected elector before a referendum on possible de-amalgamation of local government areas. The Scrutiny Committee considered safeguards should be included in the interests of protecting the democratic rights of individuals to be accurately and independently informed. The author of the statement should be independent and not have an interest in the outcome of the referendum. AD 1996/2, p. 17.

*Adequate time frames* The Scrutiny Committee has expressed concern about provisions in a university statute that meant that technically an election could be held on the same day as the ballots were sent. The committee has also expressed concern about a provision in a university statute providing that an election was not invalidated by reason of certain things. This removed safeguards designed to ensure the proper conduct of elections and the protection of the rights of candidates and people eligible to vote.

*Review of election* In the context of a university statute giving a chancellor power to enquire into complaints about election processes and to confirm or annul an election, the Scrutiny Committee has expressed concern about a provision in the university statute purporting to make the chancellor's decision 'final and conclusive' and about the absence of guidelines for the chancellor.

*Restrictions and prohibitions on candidature in State elections* The Scrutiny Committee has considered restrictions or prohibitions on nomination for election to Parliament on the basis of whether they infringe the rights and liberties of individuals. It has noted

parliaments have always legislated a range of qualifications and disqualifications relating to voting in, and candidature for, elections. AD 2002/1, pp. 18–19, paras 3–14.

### 3.3.5 *Australia's international treaty obligations*

#### **Scrutiny Committee**

The Scrutiny Committee will enquire into the compliance of proposed legislation with international human rights contained in conventions to which Australia is a party. AD 2002/8, pp. 20–21, para. 7; AD 1999/3, p. 12, para. 2.8; AD 1996/6, pp. 2–3, paras 1.11–1.15 and pp. 3–4, paras 1.18–1.20.

### 3.3.6 *Privacy and confidentiality rights*

#### **Scrutiny Committee**

The right to privacy, the disclosure of private or confidential information, doctor-patient confidentiality, and privacy and confidentiality issues have generally been identified by the Scrutiny Committee as relevant to consideration of whether legislation has sufficient regard to individuals rights and liberties.

*Child protection* The Scrutiny Committee has referred to Parliament, without express objection, provisions authorising or requiring particular entities to share information relating to child protection, and conferring immunity on individuals who give the information. The provisions were extensive and much of the information was sensitive. The provisions clearly impacted significantly on the rights of individuals, including their right to privacy. However, the Scrutiny Committee noted the underlying rationale of the legislation, including the principle that the protection and care needs of children take precedence over the protection of an individual's privacy. AD 2004/7, pp. 1–3, paras 1–11.

*Introduction agent clients* The Scrutiny Committee noted with approval legislation that protected the privacy of clients of introduction agents. AD 2001/02, p. 30, paras 6–8.

*Public record destruction* The Scrutiny Committee considered an individual's privacy rights would be enhanced if the individual were allowed to apply for an authorisation of the destruction of a public record containing personal information about the individual. AD 2002/1, p. 24, paras 11–14. The responsible Minister responding noted that an individual has rights under the *Freedom of Information Act 1992* to request the alteration or annotation of a public record. AD 2002/4, p. 35, para. 4.

*Coronial records* The Scrutiny Committee has referred to Parliament, without express objection, provisions allowing coronial information to be included on a national database. It noted the range of safeguards in the legislation—

- legitimate interest in storing
- access only for legitimate reason
- reasonable conditions imposed on access. AD 2001/5, pp. 7–8, paras 3–9.

*Members of Parliament* The Scrutiny Committee has considered there was an invasion of privacy in requiring a resigning member of Parliament to expose personal matter in order to obtain documentation that would result in the member avoiding liability in relation to the resignation. AD 2002/2, p. 6, paras 26–29.

*Criminal Law (Rehabilitation of Offenders) Act 1986* The policy of this Act is also to protect the privacy of the individual. Erosions of the policy need to be justified. See previous entries under ‘3.3 Abrogation of rights and liberties from any source must be justified’ on page 110.

*Register of prohibited persons* The Scrutiny Committee has considered that the establishment of a weapons register of persons prohibited from having a weapon was intrusive on the privacy of the prohibited persons. Despite there being a statutory duty of confidentiality about the register’s contents, the committee referred to Parliament the question of whether in establishing the register there was sufficient regard to the rights and liberties of prohibited persons. AD 1999/1, p. 27, paras 5.15–5.19.

*Patient confidentiality in medical and associated matters* In relation to doctor–patient confidentiality, the Scrutiny Committee has commented that duties of confidentiality by health professionals towards their patients have long been recognised by the common law, and there is good reason for their existence. However, in the context of persons with impaired capacity, there are obviously strong arguments in favour of negating such duties, at least in relation to the conveying of information to persons authorised under statute to attend to the welfare of those persons. AD 2000/1, pp. 3–4, paras 18–26.

The Scrutiny Committee has referred to Parliament the question whether a mandatory requirement for a doctor/psychologist to inform the police if they consider a patient is not mentally or physically fit to possess a firearm had sufficient regard to the rights and liberties of the patients concerned. AD 1999/1, p. 30, paras 5.42–5.46.

The Scrutiny Committee has considered a number of provisions enabling information to be obtained from health providers and others with information about adults with impaired capacity. All of the provisions overrode any statutory or common law restrictions on the disclosure or confidentiality of information and any claims of confidentiality or privilege in relation to the information. The committee noted the suggested justifications for the provisions and referred to Parliament the question of whether the provisions were reasonable in the circumstances.

*Public health matters generally* The Scrutiny Committee has considered comprehensive provisions under public health law that required disclosure of private health matters by a wide range of professional and other persons. The ultimate question was whether an acceptable balance was struck between the obvious need to adequately protect and promote the health of the public on the one hand and the rights and liberties of the individual on the other. AD 2005/4, pp. 12–13, paras 10–19.

*Telecommunications interception* The Scrutiny Committee has considered proposed legislation of a private member to establish a recording, reporting and inspection regime consistent with the *Telecommunications (Interception) Act 1979* (Cwlth) to enable Queensland police and the Crime and Misconduct Commission to use telecommunications interception as a tool in the investigation of particular serious offences and referred the legislation to Parliament because of its obvious impact on the rights of individuals, including their right to privacy. Parliament subsequently did not pass the Bill due to concerns about the absence from the legislation of provisions usually inserted in Queensland legislation designed to monitor the use of the provisions AD 2004/8, pp. 15–16, paras 5–10; AD 2003/11, pp. 27–28, paras 3–8.

*Observing or visually recording private acts* The Scrutiny Committee has considered proposed offences relating to observing or visually recording persons engaged in private acts. The committee referred to Parliament the question of whether the provisions, whilst protecting the person's right to privacy, had sufficient regard to the rights of others who may be liable to prosecution for relatively minor infringements of the right. AD 2005/13, pp. 10–11, paras 16–26.

### 3.3.7 *Compulsory blood and other personal tests*

#### **Scrutiny Committee**

*Safety* Competing rights of innocent motorists and expectations of relatives of road crash victims have been raised as a justification for compulsory blood sampling of an offending driver. The Scrutiny Committee has referred this to Parliament without express objection. AD 2002/6, pp. 40–42; AD 2002/4, pp. 24–25.

*Police misconduct affecting safety* Provisions providing for the compulsory alcohol testing of police officers and other police administration staff has been referred to Parliament for consideration, but on the issue of the reasonability of the particular provisions, not the requirement of compulsory testing. Given the safety aspects involved, monitoring intoxication was seen, in the circumstances, as consistent with the common law rule that intoxication on duty is misconduct. AD 2003/10, pp. 15–16, paras 3–12.

*Sport* The Scrutiny Committee has considered that legislation supporting compulsory tests for elite athletes had sufficient regard for rights and liberties because no civil or criminal consequences flowed from refusal to cooperate. AD 2002/3, pp. 14–15, paras 3–11.

### 3.3.8 *Access to liquor and liquor licences*

Access to liquor and liquor licences is generally regulated under the *Liquor Act 1992*. Any further restrictions on particular individuals, not applying to the whole community, may give rise to consideration of whether the rights and liberties of individuals have been adversely affected.

This issue has mainly arisen in relation to restrictions limited to Aboriginal and Torres Strait Islander communities. Material on that issue has been set out under ‘2.15 Sufficient regard to Aboriginal tradition and Island custom’ on page 79.

### 3.3.9 *Access to statutory rights generally*

#### **Scrutiny Committee**

*Mining and petroleum leases* In circumstances where a provision froze access to the grant of statutory mining and petroleum leases and it was hard to quantify the impact, the Scrutiny Committee referred to Parliament the question of whether the provision had sufficient regard for the rights of the applicants. AD 2003/9, pp. 20–21, paras 3–17.

### 3.3.10 *Right to strike*

The right of employees to take industrial action has never been unqualified, but is protected to an extent under the law and is recognised under international treaty obligations. AD 2002/8, p. 21, para. 7.



### Scrutiny Committee

The Scrutiny Committee has recognised the need to balance any right that may exist to strike against competing interests, for example, the need to protect employers and others against potential legal liability resulting from the industrial action and to maintain public safety. AD 2002/8, p. 21, paras 7–9.

## 3.4 Imposition of presumed responsibility must be justified

### 3.4.1 *FLP issue*

Legislation should not ordinarily make a person responsible for actions or omissions over which the person may have no control.

Unilateral imposition of responsibility on a person for a matter is an interference with the rights and liberties of the person and requires sufficient justification.

### 3.4.2 *Vicarious liability for offences*

Legislation should not make executive officers of a corporation vicariously liable for alleged offences of a corporation unless it is a practical necessity and unless appropriate safeguards are provided. The preferred approach is to make the individuals behind the corporation liable only if—

- (a) they had actual knowledge of the offence; or
- (b) they had imputed knowledge of it; or
- (c) they were in a position to influence the corporate conduct and failed to influence it.

### 3.4.3 *Strict civil liability*

#### Scrutiny Committee

The Scrutiny Committee queries the need for strict civil liability.

*Ship owners, masters, crew* The Scrutiny Committee has referred to Parliament the issue of strict civil liability imposed on ship owners, masters and responsible crew. AD 2005/5, p. 17, paras 9–14; AD 2002/3, pp. 27–28, paras 15–16.

*College board* The Scrutiny Committee has referred to Parliament the issue of strict civil liability imposed on a college board to repay moneys unlawfully borrowed or disbursed by the board. AD 2005/10, p. 13, paras 16–20.

## 3.5 Ordinary activities should not be unduly restricted

### 3.5.1 *FLP issue*

Legislation should not, without sufficient justification, unduly restrict ordinary activities.

The most general concept of liberty logically requires that an activity should be lawful unless for a sufficient reason it is declared unlawful by an appropriate authority. Many activities are protected under the common law, as indicated in the material about protection of common law rights, but even if not specifically protected under the common law, the principle is the same.

### 3.5.2 *Right to conduct business without interference*

Regulation of business, although prolific, is an intervention in a right to conduct business in the way in which the persons involved consider appropriate.

#### **Scrutiny Committee**

*Adding ethanol to fuel* The Scrutiny Committee has considered a requirement that refinery operators add ethanol to fuel to be an example of intervention in the right to conduct business. The balance of interests involved considering environmental and economic advantages. The committee referred the matter to Parliament without express objection. AD 2004/5, pp. 4–5, paras 6–15; AD 2002/8, p. 17, paras 8–12.

*Appointment of administrator or manager* The Scrutiny Committee has considered the appropriateness of powers to take over management—

- It has considered a power to appoint a manager to a non-profit organisation, partly funded by the government to provide housing services, struck an appropriate balance between the interests of employees, officers, and creditors and the interests of the public (as represented by the relevant department safeguarding public funds), clients, and the tenants. AD 2003/7, pp. 20–21, paras 3–11.
- It has considered a power to appoint a manager to a corporation providing community or disability services not to be objectionable. AD 2006/8, p. 5, paras 19–23; AD 2006/1, p. 9, paras 15–19.

*Contracts controlled by legislation* The Scrutiny Committee has considered that provisions restraining exercise of rights under contracts as not being without precedence, noting that there are many legislative controls over commerce. AD 2003/7, p. 7, paras 3–9.

*Employee entitlements* The Scrutiny Committee has referred to Parliament, without express objection, provisions enhancing the entitlements of employees. AD 2006/1, pp. 5–6, paras 39–44.

*Regulation of naming* The Scrutiny Committee has considered provisions regulating the use of a title or name for a business as raising an issue about the rights and liberties of an individual. If the promotion of public health and safety, or fair trading, is the object, the committee is less concerned than if there are less clear-cut reasons. AD 2003/9, pp. 8–9, paras 10–17.

*Statutory imposition of condition and restriction on advertising* The Scrutiny Committee has considered provisions—

- prohibiting sale of liquor at, and entry of patrons to, licensed premises between 3 am and 7 am; and
- prohibiting particular liquor advertisements.

The committee noted that the commercial sale of liquor had long been heavily regulated due to significant health, crime and other social issues associated with liquor, and made no further adverse comment. AD 2006/5, pp. 11–12, paras 3–10; AD 2005/4, pp. 8–9.

See also part 3.15 Balancing individual and community or more general interests.

### 3.5.3 Gambling

Organised gambling activities have historically been extensively regulated by legislation. Gambling is a lucrative and sometimes addictive activity. The reasons for legislative control include the need to prevent exploitation of gamblers, fraud, inappropriate commercial arrangements and criminal involvement. Restrictions on rights and liberties of individuals may be more easily justifiable than in other circumstances. AD 2005/2, pp. 1–2, paras 6–9; AD 2004/03, p. 14, paras 3–4.

#### Scrutiny Committee

*Restrictions on rights to appeal* The Scrutiny Committee has referred to Parliament, without express objection, abolition of rights to appeal against suspension or cancellation of an (gambling industry) employee licence. AD 2004/3, pp. 14–15, paras 3–10.

*Extended definition of criminal history* The Scrutiny Committee has referred to Parliament, without express objection, an extension of the definition of criminal history in relation to gambling industry appointment and employment. AD 2004/3, pp. 14–15, paras 3–10.

*Restrictions on appointment or employment* The Scrutiny Committee has referred to Parliament, without express objection, provisions prohibiting categories of persons from holding (gambling industry) office. AD 2004/3, pp. 14–15, paras 3–10.

## 3.6 Proportion and relevance

### 3.6.1 *FLP issue*

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation.

A useful analogy to this FLP issue is to be found in the context of the interpretation of legislation. Chief Justice Mason of the High Court, in *Nationwide News Pty Ltd v. Wills* [1991–1992.177 C.L.R.], has made the following influential statement in deciding whether a law came within the power authorising its making—

...even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, i.e., unless it is capable of being considered to be reasonably proportionate to the pursuit of that end... [I]n determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law...

In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.

### 3.6.2 *Penalties of appropriate level*

A penalty should be proportionate to the offence. Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.

General penalty provisions should be avoided. Current Queensland legislation generally does not prescribe general penalties, that is, the same maximum monetary penalty for all breaches. Each offence is separately considered and allocated an appropriate penalty.

General offence provisions are undesirable because—

- (a) they fail generally to adequately distinguish between contraventions that should give rise to criminal consequences and other kinds of contraventions; and
- (b) they fail generally to adequately distinguish between offences according to their seriousness and may not provide appropriate penalty levels.

### Scrutiny Committee

*General penalty* The Scrutiny Committee has noted that general offence provisions seldom appear in current legislation and referred to Parliament the question of whether a particular general offence provision had sufficient regard to the rights and liberties of potential defendants. AD 1999/3, p. 7, paras 1.58–1.60.

*Extremely high penalty* The Scrutiny Committee, if it considers a proposed penalty level is extremely high, refers to Parliament the question of whether the penalty level has sufficient regard to the rights and liberties of the persons potentially subject to the penalties. AD 2006/5, pp. 8–9, paras 8–17 and pp. 28–29, paras 20–28; AD 2006/1, p. 17, paras 21–27; AD 2005/13, pp. 2–3, paras 3–7; AD 2005/10, pp. 19–20, paras 3–9; AD 2005/5, pp. 23–24, paras 21–23; AD 2004/8, p. 12, paras 10–14 and p. 18 paras 8–11; AD 2004/5, pp. 10–11, paras 25–32; and pp. 29–30, paras 24–29; AD 2004/3, pp. 20–21, paras 36–39; AD 2004/2, p. 5, paras 18–20; AD 2004/1, pp. 15–16, paras 21–27 (and AD 2003/5, p. 26, paras 18–23); AD 2003/9, p. 6, paras 3–7 and pp. 25–26, paras 14–22; AD 2003/6, pp. 25–26, paras 17–22; AD 2003/5, pp. 21–22, paras 3–8; AD 2003/2, p. 17, para. 27; AD 2002/12, p. 1, paras 5–8; AD 2002/10, p. 1, paras 3–7; AD 2002/7, pp. 8–9, paras 12–16 and pp. 16–17, paras 24–29; AD 2002/4, p. 7, paras 17–24; AD 2002/3, pp. 6–7, paras 22–25; AD 2002/1, p. 14, paras 3–4; AD 2001/1, p. 30, paras 3–5; AD 1999/3, pp. 27–28, paras 5.11–5.14.

*Disincentive penalties* The Scrutiny Committee has drawn to Parliament's attention, without express objection, extremely high penalties when the commercial rewards for noncompliance were extremely high. AD 2004/1, pp. 3–4, paras 11–19.

*Prescribing levels of penalty*

Legislated suggestions of penalty The Scrutiny Committee has referred to Parliament, without express objection, a provision that, while not binding the court in deciding a penalty for unlawful tree clearing, specified various levels of penalty (according to the ecosystem type in which the clearing occurred) the court may take to be appropriate. AD 2003/2, pp. 5–8, para. 5 (8th dot point) and paras 7–8.

Inexplicable variations The Scrutiny Committee has expressed concern about a university statute effectively allowing the imposition of a higher penalty if a student admits misconduct than if the student does not admit it.

Forfeiture of property on multiple convictions The Scrutiny Committee has referred to Parliament, without express objection, a provision providing for the forfeiture of a lease under the *Land Act 1994* if the lessee has more than 1 conviction (other than spent convictions) under that Act for tree clearing offences. AD 2003/2, pp. 5–8, para. 5 (1st dot point), and paras 7–8.

### 3.6.3 *Continuous penalties*

This issue refers to a liability to a maximum penalty that increases according to the amount of time the offence continues, even though the offender has not been found guilty by a court.

This type of continuing penalty is objectionable primarily because the maximum penalties can increase in a way unconnected with the appropriate application of the judicial sentencing discretion. Also, the offender may be acting on incorrect legal advice that the offender has not committed an offence. Generally, the preferred course is to fix a higher maximum penalty for a particular offence to clearly indicate its severity.

The same issue does not arise if the offender has been found guilty and the offence continues. Also, the same issue does not arise if the object of the penalty is to provide a small penalty for each day, up to a reasonable maximum limit in total. In relation to civil penalties, see AD 2005/4, pp. 2–3, paras 11–18.

### 3.6.4 *Penalties of appropriate nature*

Except for punishment of a generic nature, for example, imprisonment or payment of a fine, if the punishment provided under a provision is that the person committing the offence must do or refrain from doing an act, then the act or omission required of the person must have a reasonable connection to the type and severity of the breach.

### Scrutiny Committee

The Scrutiny Committee has expressed concern about a university statute enabling a disciplinary board to impose penalties that require the person breaching the statute to do something, other than pay a fine, that was not necessarily related to the misconduct.

#### *3.6.5 Authority should be needed to prosecute some offences*

### Scrutiny Committee

The Scrutiny Committee has successfully queried the absence of authorisation of a Crown Law officer to prosecute for the offence of racial or religious vilification. AD 2001/2, p. 23, paras 27–29; AD 2001/1, p. 14, paras 71–73 and Attorney-General’s response.

#### *3.6.6 Information requirements should be relevant and proportionate to the interests being protected*

### Scrutiny Committee

*Information about civil proceedings* The Scrutiny Committee has queried a provision in legislation that required a registrant in an occupation to inform the registering body for the occupation of any judgement or out-of-court settlement against the registrant relating to negligence in the performance of duties in the occupation. The Scrutiny Committee expressed the view that the relevance of civil judgements or settlements for negligence would much depend on the particular circumstances. AD 2003/7, pp. 12–13, paras 20–27.

#### *3.6.7 Extraordinary power must be conferred only for extraordinary or urgent circumstances*

Given the affect on rights and liberties of the use of power conferred by legislation, it is logical that power should be proportionate to the circumstances.

Legislation may be about the seizure of dangerous things, but that does not of itself justify immediate destruction. A power to seize with a right of review, before destruction, has to be considered. However, the law could provide for the use of the more extraordinary power in particularly urgent situations.

Legislation that provides a right of appeal or review, but does not provide for the staying of the effect of the matter being appealed or reviewed, may breach this principle.

## 3.7 Circumstances imposing liability should be adequately defined

### 3.7.1 *FLP issue*

Legislation should only prescribe acts or omissions as circumstances of an offence or another occasion of liability if the acts or omissions are sufficiently specific to enable all persons to understand what is required of them.

### 3.7.2 *Potential unfairness of broadly framed statutory offences, with substantial penalties, for negligent acts*

#### **Scrutiny Committee**

The Scrutiny Committee has noted a legislative trend exemplified in, for example, the Electrical Safety Bill 2002, the Radiation Safety Bill 1999, the Coal Mining Safety and Health Bill 1999 and the *Workplace Health and Safety Act 1995*. It has noted broadly framed and stringent obligations with heavy penalties for breach. The committee usually refers to Parliament the question of whether these provisions have sufficient regard to the rights and liberties of persons potentially subject to the penalties. AD 2004/5, p. 23, paras 24–27; AD 2004/3, p. 22, para. 44; AD 2003/11, pp. 19–20, paras 8–13; AD 2003/1, pp. 24–25, paras 6–10; AD 2002/7, pp. 7–8, paras 3–11; AD 1999/4, pp. 3–4, paras 1.12–1.18.

On this basis, the Scrutiny Committee also referred to Parliament clause 35 of the Guardianship and Administration Bill 1999, which required guardians and administrators to exercise their powers honestly and with reasonable diligence to protect the adult's interests and made failure to comply an offence with a maximum penalty of 200 penalty units. AD 2000/1, p. 4, paras 27–30.

## 3.8 When criminal liability should require proof of intent

### 3.8.1 *FLP issue*

Legislation defining criminal liability should require proof of specific intent in appropriate cases.

In deciding whether specific intent should be an element of a new statutory offence the following may be useful—

- proof of intent was required under the common law
- the Queensland Criminal Code, which overwrote the common law concerning criminal liability, does not impose a requirement of proof of intent as a generally applicable rule for offences under



Queensland legislation, but expressly requires proof of specific intent for numerous particular offences defined in the Code

- a reading of the Criminal Code in relation to when proof of specific intent is or is not required for the offences defined in the Code provides an insight into when it is appropriate to require proof of specific intent as an element of an offence.

### 3.8.2 *Intent in relation to a false or misleading communication*

#### **Scrutiny Committee**

The Scrutiny Committee has referred to Parliament, without express objection, provisions stating that reckless communication of false or misleading material is proof of the intentional communication of false or misleading material. AD 2003/5, p. 18, paras 33–34.

## 3.9 Appropriate standard of proof

### 3.9.1 *FLP issue*

Legislation should provide for an appropriate standard of proof of matters arising under the legislation.

Any change from the common law standard of proof should be justified.

#### **Scrutiny Committee**

The Scrutiny Committee has expressed concern about a university statute prescribing the balance of probabilities as the standard of proof to be used by a disciplinary review panel when considering student disciplinary matters. The committee noted that in the absence of any express provisions, the common law would imply a sliding scale between ‘on the balance of probabilities’ and ‘beyond reasonable doubt’, depending on the seriousness of the consequences of an adverse finding.

## 3.10 Appropriate defences to liability must be provided

### 3.10.1 *FLP issue*

If legislation imposes liability on a person, the legislation should provide appropriate defences to the liability.

The requirement, when devising legislation to impose a liability, to also consider what defences will be made available is essential to ensure that resulting legislation will be fair and just.

### Scrutiny Committee

*Removal of usual defences* The scrutiny committee has sought justification for the removal of particular defences that would otherwise be available under the *Criminal Code*. AD 1999/04, pp. 4–5, paras 1.19–1.24.

*Incongruous defence* The Scrutiny Committee has sought justification as to why a particular defence was appropriate when the same harm could result from the acts constituting the offence whether or not the defence applied. AD 2006/9, pp. 10–11, paras 26–36.

#### 3.10.2 Reasonable excuse

The words ‘without reasonable excuse’ are often used in provisions creating offences in legislation to provide appropriate defences.

The reason for the inclusion of a defence with a wide potential application is that, generally speaking, obligations imposed by legislation should be reasonable. It naturally follows that reasonable excuses should be available. That does not mean that in all cases the defence should be specified as ‘a reasonable excuse’. In each case the nature of the obligation has to be examined.

In relation to offences, existing defences, for example, those provided under the *Criminal Code*, chapter 5, need to be considered on the issue of whether they create sufficient reasonable excuses without the need for further specification of ‘a reasonable excuse’ as a defence. This involves consideration of how certain the application of the offence provision must be. Provisions creating indictable offences, for example, will frequently require a degree of strict consistent observance that means that it would be impractical to go beyond the defences already provided in the *Criminal Code* to the extent of providing defences of the degree of flexibility contained in the defence of ‘a reasonable excuse’.

The more general the terms of an obligation, the more likely that a general defence of ‘a reasonable excuse’ should be provided. The answer to a complaint about the generality of the defence may be to tighten the description of the obligation so as to avoid the need for a very general defence.

Another type of obligation that is likely to attract a requirement for a defence of ‘a reasonable excuse’ is an obligation contained in provisions of legislation that can be administered with varying degrees of strictness. If an obligation tends to be of a type that will be enforced only to the extent an administering authority chooses to enforce it, it is more likely that a defence of ‘reasonable excuse’ is desirable. An example of this would be an offence of failing to obey a requirement made by someone with power to make the requirement under legislation.

Further, even if a defence of ‘a reasonable excuse’ is provided it may be desirable to go further and define what will be taken to be a reasonable defence, even if only by listing a few categories to set up a class. It may also be desirable to list matters that are not to be taken to be ‘reasonable excuse’.

It must be noted that a majority of High Court judges, in *Taikato v. R* (1996) 186 CLR 454, expressed general reservations about the desirability of providing for the defence of ‘a reasonable excuse’. In that case, Mrs Taikato was fined for possessing in a public place something capable of discharging an irritant substance in a public place. The legislation provided that ‘a reasonable excuse’ was a defence.

Brennan CJ, Toohey, McHugh and Gummow JJ stated—

The term “reasonable excuse” has been used in many statutes and is the subject of many reported decisions[18]. But decisions on other statutes provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case[19] but also on the purpose of the provision to which the defence of “reasonable excuse” is an exception. One purpose of s 545E is to protect the public from the use of certain dangerous weapons which are analogous to, but not as dangerous as, guns. It strikes at the person who goes into a public place armed with such a weapon. To achieve this purpose it uses language which arguably catches some pharmaceutical and domestic items that are most unlikely to be used to cause harm to members of the public even when they are carried in a public place. Without a defence of reasonable excuse or lawful purpose the reach of the section would be intolerable in a free society. But having regard to the width of the language of s 545E(1) and its evident purpose, determining what constitutes a “reasonable excuse” is not easy.

Plainly, a person has a reasonable excuse for possessing a prohibited weapon in a public place if the person is carrying it to surrender it to police officers or other relevant authorities[20]. Similarly, the man or woman carrying a pressurised can of insect spray has a reasonable excuse if the spray was carried for domestic use.

So does the trader or carrier who possesses articles, prohibited by s 545E, for ordinary commercial purposes. But given the purpose of the section, it is not easy to conclude that it was a “reasonable excuse” in 1992 for a person to carry an article prohibited by s 545E(1) in a public place for the purpose of using it, if that person happened to be attacked.

The chief difficulty in a court interpreting “reasonable excuse” in s 545E(2) to cover possession for use in case of attack is to find a principled way of distinguishing cases where the legislature could not conceivably have envisaged such a defence arising and those where it may well have envisaged such a defence being available. It is hardly to be supposed that in enacting s 545E the legislature intended that criminals, hoodlums or members of street gangs should be free to carry the prohibited weapons in public places because they had a well-founded fear of attacks from other criminals, hoodlums or street gangs. In addition, it seems almost certain that the legislature intended that a person’s possession of a loaded firearm could not be excused under s 93G on the ground that the loaded firearm was carried for self-defence. Such an excuse would nearly defeat the object of s 93G. Equally, it seems almost certain that the legislature intended that a person’s possession of “a fuse capable of use with an explosive or detonator” or of “a detonator” under s 545E(1)(b) or (c) could not be excused on the ground that it was possessed for self-defence. But if that is so, on what principled basis could the legislature have intended a court to interpret “reasonable excuse” in s 545E(2) so as to provide a defence for persons who have a well-founded fear of attack?

If the rule of law is to have meaning, a criminal law should operate uniformly in circumstances which are not materially different. Consequently, even if in some circumstances a well-founded fear of attack is a necessary but not decisive criterion of “reasonable excuse”, courts will have to formulate various conditions which disqualify some, but not all, individuals or groups from taking advantage of the “reasonable excuse” protection afforded by s 545E(2). That means that, under the label “reasonable excuse”, the courts will have to make what are effectively political judgments by looking for material differences justifying the distributive operation of the criminal law in a variety of circumstances which have many, sometimes almost identical, similarities with each other. Put at its lowest, the courts will have to make value judgments as to what circumstances giving rise to a well-founded fear of attack entitle a person to arm him or herself with a prohibited article or thing. That is to say, the courts will have to make a judgment as to what circumstances deserve to be exempted from the scope of s 545E(1). Courts will have to distinguish between the case of the criminal or hoodlum who has a well-founded fear of attack and other cases or

otherwise hold that a well-founded fear of attack is always a “reasonable excuse” for carrying an article or thing coming within s 545E(1).

However, a person should not be guilty or not guilty of a crime depending on a value judgment by a court as to whether in one case, but not another, a well-founded fear of attack was a “reasonable excuse” and entitled the defendant to carry a prohibited article or thing. The operation of the criminal law should be as certain as possible. If the interpretative choice is between making a value judgment and applying a rule, a court exercising criminal jurisdiction should prefer the rule. That being so, there is much to be said for the view that in 1992 such were the difficulties of holding that the term “reasonable excuse” in s 93G and s 545E included a claim of self-defence that, in the absence of a contrary legislative indication, the term should not be interpreted as covering such a claim.

However, the reality is that when legislatures enact defences such as “reasonable excuse” they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence. That being so, the courts must give effect to the will of Parliament and give effect to their own ideas of what is a “reasonable excuse” in cases coming within s 545E even when it requires the courts to make judgments that are probably better left to the representatives of the people in Parliament to make. It is therefore impossible to say that “self-defence” could never be a “reasonable excuse” for the purpose of s 545E(2) and perhaps even s 93G.

Despite their Honours reservations, they gave a quite restrictive interpretation of what could constitute a reasonable excuse in the circumstances.

## 3.11 Multiple court or tribunal processes for the same liability must be justified

### 3.11.1 *FLP issue*

Legislation should not subject a person to more than one court or tribunal process arising out of a single act or omission without sufficient justification.

A single act or omission may traditionally have both a civil consequence between parties and a criminal consequence between the State and a person. However, multiple processes set up under legislation for a single act or omission must be examined with care to ensure there is sufficient justification.

### Scrutiny Committee

The Scrutiny Committee has queried a power to proceed against a person both criminally and civilly. AD 2001/2, pp. 14–15, paras 74–80 and pp. 23–24, paras 30–32.

## 3.12 Equality under the law

### 3.12.1 FLP issue

Equality under the law is a basic concept of justice. This requires that, for a particular matter, in the absence of justification to treat persons differently, all persons should be treated in the same way.

Equality under the law is commonly understood to be a basic requirement under the rule of law in a democratic society.

This concept includes, but is not limited to, avoiding discrimination on unjustifiable grounds. Queensland has enacted the *Anti-Discrimination Act 1991*. Avoiding discrimination includes, but is not limited to, avoiding the discrimination dealt with under that Act.

### Scrutiny Committee

The Scrutiny Committee supports the principle of equality before the law and equal protection by the law. AD 2005/13, p. 3, para. 8; AD 2002/11, pp. 1–2, paras 5–14.

### 3.12.2 Gender discrimination

### Scrutiny Committee

*Facilities prescribed for males better than those prescribed for females*  
The Scrutiny Committee has considered a proposed local law requiring electrical power points to be provided in camping facilities only in shower blocks for men was contrary to this FLP issue.

### 3.12.3 *Relationship discrimination*

#### **Scrutiny Committee**

The Scrutiny Committee has commended legislation that, for several matters, enacted equality of rights arising from relationships, whether from legal marriage, de facto heterosexual relationships or same sex relationships. AD 2002/11, pp. 1–2, paras 4–14.

### 3.12.4 *Imposition of financial obligations*

#### **Scrutiny Committee**

*Exemptions from stamp duty for some but not others* The Scrutiny Committee has referred to Parliament the question of whether, in exempting from stamp duty all persons investing in a specific company while not granting a similar exemption to investors in other companies, legislation had sufficient regard to the rights and liberties of individuals. AD 1999/1, p. 32, paras 4.53–4.56.

### 3.12.5 *Appointment or employment*

#### **Scrutiny Committee**

*Special treatment for appointment* The Scrutiny Committee queried why the appointment of a chairperson, unlike that of other members, was not subject to a specified maximum term. AD 1999/4, p. 5, para. 1.27

*Conflict between personal life of employee and employment policy of employer* The Scrutiny Committee has considered provisions prohibiting discrimination in employment on the grounds of sexuality or the nature of a personal relationship in the context of policies adopted by schools operated by religious bodies on the employment of staff who were in de facto heterosexual relationships or who were homosexual. The committee considered that this appeared to give rise to the following 2 principal and conflicting rights issues—

- that persons should not be subject to discrimination in employment on the basis of matters related to their private lives, especially where they do not actively draw attention to such matters in their work environment
- that private educational institutions, particularly those conducted by religious bodies, should be able to ensure that persons employed in those institutions are compatible with the values of the institution, and to select or retain staff accordingly.

The Scrutiny Committee referred the matter to Parliament, without express objection. AD 2002/11, pp. 3–5, paras 19–30.

*Protection of children* The Scrutiny Committee has considered a ministerial power to prohibit a person from being employed as a teacher at an educational institution if the Minister considered the

person posed a risk to the safety of children at the institution. It referred the power to Parliament without express objection. AD 2002/11, p. 8, paras 10–16.

### 3.12.6 *Citizens /government officials*

#### **Scrutiny Committee**

The Scrutiny Committee has queried provisions excluding government officers from compliance with legislation when citizens have to comply.

*Food Act provisions* AD 2005/13, pp. 3–4, paras 8–13.

### 3.12.7 *Application variations*

#### **Scrutiny Committee**

*Trialling of new legislative provisions in part only of State* The Scrutiny Committee has referred to Parliament the question whether it is appropriate to apply a legislative scheme for impounding motor vehicles in a range of circumstances to vehicles found in those circumstances in part only of the State (the object being to trial the impoundment provisions). AD 2006/10, pp. 18–19, paras 12–18.

## 3.13 Sensitivity of powers of investigation or inquiry

### 3.13.1 *FLP issue*

When deciding the powers that should be conferred on authorities to investigate or inquire into a matter, consideration must be given to the extent to which the power is capable of abuse or may otherwise be insufficiently sensitive to the rights and liberties of individuals.

### 3.13.2 *Powers of entrapment*

The High Court, in *Ridgeway v. R* (1995) 184 CLR 19 held that while there was no defence of entrapment *per se* nevertheless the use of even legal but improper tactics involving a degree of harassment or manipulation inconsistent with the minimum standards of acceptable police conduct might result in the exercise of discretion to exclude the evidence procured of the commission of an offence.

In the context of considering the appropriateness of proposed legislation, this decision indicates that when deciding to confer the entrapment power, or in deciding what process should accompany the exercise of the entrapment power, consideration should be given to whether the power or, if conferred, how the power, can be circumscribed by an appropriate degree of sensitivity to its affect on the rights and liberties of individuals.



### Scrutiny Committee

*Entrapment process consistent with the nature of the offence* The Scrutiny Committee has drawn to Parliament's attention, without express objection, the impact of the entrapment power, and the occasions when the power is one of the limited ways to deal with the offence. AD 2002/11, pp. 17–19, paras 6–13.

*Protection of children from sexual offences facilitated by internet contact* The Scrutiny Committee has drawn to Parliament's attention, without express objection, the impact of the entrapment power when it was to be used to protect children against the use of the internet by criminals to gain contact with children for the purposes of the commission of sexual offences. AD 2002/11, pp. 18–19, paras 6–13.

*Ability of the entraper to artificially set the level of the offence* The Scrutiny Committee has expressed concern when, in using a proposed entrapment power, the entraper could easily artificially increase the seriousness of character of the offence committed. For example, when the proposed law would deem that statements by the entraper to the offender are matters that the offender is taken to have believed unless the contrary was proved. This would then make the apparent intent of the offender more serious. AD 2002/11, p. 19, paras 14–16.

## 3.14 Reasonable and fair treatment generally

### 3.14.1 *FLP issue*

Legislation should be reasonable and fair in its treatment of individuals. It should not be discriminatory.

Even if legislation does not specifically encroach on rights and liberties recognised under the law, there remains the basic policy issue of whether the legislation is reasonable and fair.

### Scrutiny Committee

The Scrutiny Committee considers the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals.

### 3.14.2 *Imposition of liability*

Provisions imposing liability should be fair and reasonable both in relation to the circumstances in which the liability is imposed, but also in relation to exemptions and defences.

### Scrutiny Committee

*Unnecessary imposition of liability* The Scrutiny Committee will consider whether it is fair and reasonable to make a person liable for doing something which can ordinarily be done without incurring liability. For example, the committee has considered whether it was fair and reasonable to make a member of Parliament who resigns liable to pay the cost of the subsequent by-election when a person can ordinarily resign without incurring liability. AD 2002/2, pp. 4–5, paras 13–16.

*Provision of defence of reasonable excuse* The Scrutiny Committee has recommended the provision of reasonable excuse as a defence when there is nothing about the offence which would suggest the defence is inappropriate. AD 2002/1, p. 25, paras 16–20.

#### 3.14.3 Imposition of unnecessary regulation

### Scrutiny Committee

*Obligation to comply with directions from a number of persons* The Scrutiny Committee has referred to Parliament for its consideration, without express objection, a provision requiring compliance, as soon as reasonably practicable, with directives given by a number of persons. Failure to comply attracted a substantial penalty. There was a review process and stay process. AD 1999/4, pp. 6–7, paras 1.38–1.42.

*Requirement that person should certify something given to an inspector* A legislative scheme authorised an inspector to require certain persons to make available for inspection a document relating to the person's obligations under the Act. It also authorised an inspector to require the person responsible for keeping the document to certify a copy of the document made by the inspector as a true copy of the document and empowered the inspector to keep the document until the person complied with the certification requirement. Non-compliance with a certification requirement was made an offence with a maximum penalty of 100 penalty units. The Scrutiny Committee stated it would not be concerned by a provision enabling an inspector to retain the original document until the person certified a copy as a true copy. However, the committee was concerned that there was a requirement to certify and that non-compliance with the requirement was an offence. The committee asked the sponsoring Minister for justification. AD 1999/4, p. 6, paras 1.34–1.37; AD 1999/3, pp. 30–31, paras 5.32–5.35.

*Executive power to extend effect of previously exercised executive power* The Scrutiny Committee has referred to Parliament a provision conferring power to extend the period (from 21 days to 3 months) in

which ministerial or chief executive notices or declarations imposing significant controls on individuals remained in force. AD 2002/4, p. 6, paras 12–16.

*Shareholding restriction* The Scrutiny Committee has referred the question of whether the restrictions on shareholdings in a government owned corporation had sufficient regard to the rights and liberties of investors and intending investors. The restrictions went well beyond the range of restrictions to which persons owning, or wishing to own, shares in companies were subjected by ordinary corporations legislation.

*School dress code* The Scrutiny Committee's general view is that requirements that state school students wear clothes of a reasonable standard or that, in addition, they wear a prescribed uniform of a reasonable type and price did not unreasonably intrude on the rights and liberties of the students or their parents. Reasonable restrictions on other matters such as hairstyles, jewellery and body adornments were considered by the committee to fall into the same category. The committee considered that whether individual codes are reasonable would depend on the way in which the system is administered.

#### 3.14.4 Removal of rights generally

#### Scrutiny Committee

*Provisions providing for loss of rights should be carefully circumscribed* The Scrutiny Committee commended as best practice the Education (Overseas Students) Bill 1996, clauses 11 to 13 and part 3, in particular, clauses 7(3), 11 (subject to changes recommended at AD 1996/4, p. 9), 23(1)(c), 27(2) and 30(3) and (4) and 32. AD 1996/4, pp. 8–9.

*Acting on the opinion of a single person may be inappropriate* The Scrutiny Committee has considered it could be argued that a provision automatically preventing a person from holding a licence or possessing a weapon on the unsupported opinion of 1 doctor or psychologist is an unreasonable intrusion on the rights and liberties of a licence applicant. AD 1999/1, pp. 26–27, paras 5.7–5.14.

The Scrutiny Committee has queried the appropriateness of a Minister's power to unilaterally remove from office a site safety and health representative elected by coal mine workers. AD 1999/4, p. 5, para. 1.30.

*Reasonably contemporary circumstances only should be relevant* The Scrutiny Committee has had concerns about a provision automatically barring persons convicted of indictable offences from holding a licence or possessing a weapon, particularly because of the exclusion

of protection under the *Criminal Law (Rehabilitation of Offenders) Act 1986* enabling convictions to be ignored for most purposes after a qualifying period and because there was no limit of the type of indictable offences that resulted in disqualification. The committee gave an extreme example—should a person who, 30 years earlier, was convicted of stealing a relatively small amount of money from an employer, be automatically barred from obtaining a weapons licence? AD 1999/1, p. 28, paras 5.20–5.25.

*Stopping legal action* The Scrutiny Committee has considered the introduction of legislation that stops expected specific litigation is to be avoided wherever possible as it has the potential to extinguish legal rights that parties are in the process of enforcing. It also has the potential to involve Parliament in individual cases and has implications for the relationship between the courts and Parliament. If future litigation on technical matters is expected, the committee saw the remedy lying in the review of procedures, not in one-off legislation. AD 1996/4, p. 12.

#### *Removal of pre-existing legislative and contractual entitlements*

##### Public service contracts

In the context of the removal of an automatic right of reversion to tenured employment for public service officers on contract, the Scrutiny Committee was concerned about possible removal of pre-existing legislative and contractual entitlements. AD 1999/3, p. 43, paras 6.16–6.23.

##### Rights relating to a *Body Corporate and Community Management Act 1997* scheme

A provision allowing forced transfer of management rights by letting agents was referred to Parliament without express objection, the Scrutiny Committee noting the safeguards in the legislation and the extensive treatment of the issues in the explanatory notes. AD 2003/1, pp. 1–2, paras 3–8.

##### Commercial powers of attorney

A provision limiting the use by an initial developer of a scheme of an irrevocable power of attorney needed to control the scheme while it was being set up was similarly referred to Parliament without express objection for the same reasons, as well as the fact that the power should no longer have been required for the purpose for which it was originally granted. AD 2003/1, pp. 2–3, paras 14–19.

##### Loss of statutory right following conviction

The Scrutiny Committee has referred to Parliament, without express objection, a provision providing for the forfeiture of a lease under the *Land Act 1994* if the lessee has more than 1 conviction (other than spent convictions) under that Act for tree clearing offences. AD 2003/2, pp. 5–8, para. 5 (1st dot point) and paras 7–8.

Automatic loss of statutory right on conviction or court order

The Scrutiny Committee has referred to Parliament for consideration, without express objection, a provision that automatically, and without the exercise of any discretion, cancelled a person's registration for a business activity when the person was convicted under, or ordered to pay compensation to a consumer under, consumer protection legislation. AD 2003/7, p. 42, paras 19–23.

Established business practice may be relevant

In a commercial setting, the Scrutiny Committee has referred to Parliament, without express objection, a power to terminate a service where that power was only exercisable in accordance with the business practice of the exerciser of the power that would apply even if the legislative power had not been enacted. AD 2003/6, p. 4, paras 29–31.

### 3.14.5 *Information as an important aspect of the protection of rights*

#### **Scrutiny Committee**

*Obligation to provide appropriate information to persons affected by decision* In legislation excluding certain mortgages brokered by solicitors from coverage by the Legal Practitioners Fidelity Guarantee Fund, the Scrutiny Committee commended the inclusion of the following safeguards—

- (a) a requirement that solicitors notify their clients in advance of the lack of cover by the fund
- (b) a requirement that solicitors receive specific authorisation from their clients to proceed
- (c) a provision that failure to comply with these requirements will be professional misconduct.

In legislation enabling a primary industry quota to be converted into shares in a primary industries company, the Scrutiny Committee considered it best to have an obligation placed on the administrator to ensure that the holders were made aware of the requirement that they apply to take up shares and of the consequences of failing to take up the shares. AD 1996/5, p. 27, para. 7.6.

## 3.15 Balancing individual and community or more general interests

### 3.15.1 *FLP issue*

Consideration of the effect of legislation on the rights and liberties of individuals often involves examining the balance between the rights of individuals and the rights of the community or more general rights.

#### **Scrutiny Committee**

The Scrutiny Committee has noted that the extent of interference with civil liberties must be rational, proportionate and reasonably necessary so that the interference does not do more overall harm than good. AD 2002/6, p. 14, para. 50.

### 3.15.2 *Criminal law generally*

#### **Scrutiny Committee**

In assessing a criminal law, the Scrutiny Committee has commented that the primary issue is whether the law maintains a reasonable balance between the rights of wrongdoers and the community generally. AD 2002/6, p. 28, para. 9.

### 3.15.3 *Public interest in winning the fight against crime*

#### **Scrutiny Committee**

##### *Drug trafficking*

The Scrutiny Committee has noted that the public interest in winning the fight against crime, especially “the scourge of drug trafficking offences”, may justify controlled and moderate abridgement of traditional rights and freedoms—without undermining and probably enhancing community confidence in the legal system or the moral authority of the State—where conventional methods have proven to be inadequate or ineffective. AD 2002/6, p. 13, para. 47.

On proposed civil forfeiture provisions for the proceeds of crime, the committee noted that it was necessary to keep firmly in mind the following—

- Good law enforcement is essential to a free society and one of the most basic of all democratic rights. Without it, civil liberties would rapidly become eroded and devalued to the point that although they would theoretically continue to exist they would be practically worthless.

- Law abiding citizens had nothing to fear from the proposal and no one, especially those involved in major or organised crime, had a legitimate right to unjust enrichment. AD 2002/6, p. 12, para. 41.

Other law enforcement provisions considered by the Scrutiny Committee in this context include the following—

- Drug detection dogs AD 2005/11, pp. 6–7, paras 3–12.

*Electronic monitoring device on released person*

The Scrutiny Committee has referred to Parliament, without express objection, the question of whether conferring power on a court to impose on a prisoner subject to a supervised release order a condition that the released prisoner wear an electronic monitoring device has sufficient regard to the rights of the released prisoner, as well as to those of the community. AD 2006/9, pp. 12–13, paras 37–50.

*3.15.4 Public order offences*

**Scrutiny Committee**

The Scrutiny Committee has noted that '[l]egislation regulating behaviour by the use of public order offences will always involve a tension between legitimate law and order issues on the one hand and legitimate concerns about fundamental rights and freedoms on the other. The Committee recognises the difficulty in balancing these concerns in a just and fair contemporary Queensland.' AD 2004/7, p. 25, para. 4.

*3.15.5 Consensual life threatening medical treatment*

**Scrutiny Committee**

The Scrutiny Committee has referred to Parliament without express objection a private member's Bill that enhanced a patient's right to avoid having to endure excessive pain and enhanced a medical professional's right to administer medical treatment with minimal doubt as to the legality of the treatment. The committee referred the Bill to Parliament because the Bill also had negative implications in terms of a patient's right to continue living. The committee commented that Parliament would need to take account of the Bill's ramifications for patients and medical professionals as well as the public interest in ensuring that medical treatment given to patients is compatible with general community standards. AD 2003/3, pp. 5–6, paras 11–15; AD 2002/6, p. 5, paras 14–16.

### 3.15.6 *Right to have weapons*

#### **Scrutiny Committee**

*Indefinite terms for firearm licences* Legislation included replacement of five-year maximum terms for firearm licences with indefinite terms. The Scrutiny Committee noted that the periodic need for licensees to justify their entitlement to possess and use firearms arguably gives the general community a significant degree of protection against misuse of firearms, even though licensees under indefinite terms would still be liable to lose their licences if inappropriate behaviour by them is detected by the administering authorities. The committee referred to Parliament the question of whether replacing fixed terms with indefinite terms had sufficient regard to the rights and liberties of the general public. AD 1999/1, p. 29, paras 5.34–5.37 and para. 5.48.

### 3.15.7 *Health and safety*

#### **Scrutiny Committee**

*Radiation legislation* The Scrutiny Committee has commented that any restrictions legislation imposed on the rights and liberties of individuals using, dealing with, or associated with the use of radiation had to be balanced against the rights and liberties of other members of the community who may be adversely affected by misuse or negligent use of that radiation. AD 1999/3, p. 27, para. 5.8.

*Coal mining legislation* The Scrutiny Committee has considered that the restrictions legislation imposed on the rights and liberties of individuals involved in, or associated with, coal mining had to be balanced against the rights and liberties of persons (particularly mine workers) who would be directly affected by deficiencies in safety standards. AD 1999/4, p. 1, para. 1.5.

*Food contamination legislation* The Scrutiny Committee has referred to Parliament the question of whether legislation imposing notification and withdrawal-from-sale obligations on operators of food businesses in relation to suspected intentional contamination has sufficient regard to the rights of those operators, and of the public interest in food safety. AD 2006/4, pp. 20–21, paras 3–15.

*Food sale prohibition legislation* The Scrutiny Committee has referred to Parliament, without express objection, provisions banning sale of soft drinks at schools to children. AD 2005/6, pp. 16–17, paras 3–9.

*Tobacco legislation* The Scrutiny Committee has referred to Parliament the question of whether legislation prohibiting persons from smoking in a range of public and semi-public areas has sufficient regard to the rights of smokers, of persons conducting relevant businesses, and of the community in general. AD 2004/8, pp. 17–18, paras 3–7.



### 3.15.8 Compulsory education

Article 26 of the *Universal Declaration of Human Rights* to which Australia is a signatory, provides that 'everyone has the right to education'. However, issues of interference with the rights and liberties of children and their parents arise when education is compulsory.

#### Scrutiny Committee

The Scrutiny Committee has referred to Parliament, without express objection, provisions extending the period of compulsory education for children and providing a penalty for parents who fail to comply. AD 2003/9, pp. 34–35, paras 3–11.

### 3.15.9 Third party considerations

#### Scrutiny Committee

##### *General legislation overridden for benefit of particular parties*

Casinos The Scrutiny Committee has expressed concern about the effects on the interests of third parties of an agreement in legislation restricting the ordinary application of significant legislation—the *Judicial Review Act 1991*, *Integrated Planning Act 1997*, *Land Act 1962* and *Queensland Heritage Act 1992*—to a casino's property developments and operations.

The Scrutiny Committee was not concerned about the effect on the State and other parties to the agreement. They had willingly submitted to the agreement, which dealt with relevant matters presumably to the satisfaction of the parties. However, the committee did comment that the exclusion or modification by the agreement of laws which would normally govern the developments under the legislation may adversely impact on the interests of individuals who were not parties to the agreement, for example, neighbouring land owners affected by the development of the casino complex. AD 2006/2, pp. 2–4, paras 8–16; AD 2001/8, pp. 33–34; AD 2001/7, pp. 3–4, paras 12–20.

*Powers to act against third parties when pursuing persons regulated by Act* In legislation dealing with registration of persons as professional engineers or architects, the Scrutiny Committee considered it was not unreasonable for statutory investigatory powers, applicable to the engineers and architects, to apply also to third parties. AD 2002/7, pp. 25–26, paras 3–10.

*Rights of third parties to object to exercise of administrative power affecting their interest* Legislation provided that security given to the State for a permit continued for the benefit of the State even if the permit was transferred. The Scrutiny Committee queried the Minister

on the capacity of third parties to object to the transfer in the protection of their interest in the security. AD 2005/1, p. 21, paras 17–23.

### 3.15.10 Consumer protection

#### Scrutiny Committee

*Defective building work* The Scrutiny Committee has referred to Parliament, without express objection, provisions that allowed builders to be banned from their trade because of defective building work in the context of balancing the rights of builders and the rights of consumers. AD 2002/11, pp. 13–14, paras 3–8.

*Regulation of prices for on-supply of fuel gas* The Scrutiny Committee has referred to Parliament, without express objection, provisions empowering the Minister, by gazette notice, to regulate prices for the on-supply of fuel gas to ‘protected consumers’. AD 2003/5, pp. 17–18, paras 27–32.

*Manufactured homes and residential parks* The Scrutiny Committee has referred to Parliament, without express objection, a statutory regime that impacts for consumer protection reasons on the capacity of residential park owners to conduct commercial activities, and on the capacity of residential park owners and manufactured home owners to freely contract with each other. AD 2003/9, pp. 16–17, paras 3–9.

*Public auction of land* The Scrutiny Committee referred to Parliament, without express objection, provisions requiring the registration of bidders in a public auction of land. The purpose was clearly to enhance consumer protection by reducing the level of collusive practices that artificially raise bids. The industry was already extensively regulated. AD 2004/6, p. 5, paras 3–9.

### 3.15.11 Immunity from prosecution

Granting immunity from prosecution nearly always involves a balancing of the individual interest and the public or community interest. The need for a candid exchange of information to deal with the real issue behind criminal behaviour or unsafe conditions, processes or circumstances may involve offering immunity in return for disclosure. See the material presented under ‘2.13 Immunity from proceeding or prosecution’ on page 64.

### 3.15.12 Reputation and freedom of speech

#### Scrutiny Committee

*Defamation laws* In considering a private member’s Bill which upgraded the statutory offence about defamation, the Scrutiny Committee referred to Parliament the question of whether the Bill had

sufficient regard to competing rights, namely, the rights of individuals to free speech, as well as to the right of individuals to the protection of their reputations. AD 2003/1 pp. 12–13, paras 7 and 11.

The committee quoted from John Fleming, *The Law of Torts* to describe the purpose of the law of defamation—

The law of defamation seeks to protect individual reputations. Its central problem is how to reconcile this purpose with the competing demands of free speech. Both interests are highly valued in our society, one as perhaps the most dearly prized attribute of civilised man, the other the very foundation of a democratic community.

### 3.15.13 *Reputation and whistleblower protection*

#### **Scrutiny Committee**

In considering a private member's Bill expanding protection from liability for whistleblowers who made allegations of negligence, maladministration or misconduct, the Scrutiny Committee noted that, while the Bill benefited whistleblowers and the public interest in having substantiated allegations investigated, the Bill had corresponding negative impacts on individuals against whom allegations are made. The committee referred to Parliament the question of whether the Bill represented an appropriate balance between these 2 competing interests. AD 2006/8, pp. 11–12, paras 3–13.

### 3.15.14 *Restricting right of action*

#### **Scrutiny Committee**

*Vexatious litigants* The Scrutiny Committee has referred to Parliament, without express objection, provisions restricting rights of action, including of appeal, of vexatious litigants, but in the context of balancing the rights of the vexatious litigants against those of the respondents and the community generally. AD 2005/9, p. 9, paras 17–19.

### 3.15.15 *Enhancing right of action*

#### **Scrutiny Committee**

*Survival of actions* The Scrutiny Committee has referred to Parliament, without express objection, provisions that, if a claimant for damages for dust disease dies from the effects of the disease before proceedings for the claim are finalised, lift restrictions on the type of damages claimable by the estate, increasing the liability of the defendant. Otherwise, the frequently short period between diagnosis and death would effectively deny this type of claimant categories of damages (contrary to the public interest?). AD 2005/5, pp. 6–7, paras 9–11.

## *Chapter 4: The institution of Parliament—FLP issues listed in the Legislative Standards Act related to Bills*

### **Scope of chapter**

This chapter discusses the examples of issues impacting on whether a Bill has sufficient regard to the institution of Parliament that are set out in the *Legislative Standards Act 1992*, section 4(4).

### **Background**

The definition of fundamental legislative principles found in the *Legislative Standards Act 1992* is derived from an understanding of our parliamentary system.

(T)he very concept of representative government and representative democracy signifies government by the people through their representatives (Sir Anthony Mason, then Chief Justice of the High Court, in *Australian Capital Television Pty Ltd v. Commonwealth* (No. 2) (1992) 177 CLR 106 at 137).

The most significant fundamental principle underlying our parliamentary democracy is that sovereign power is exercised on behalf of the people by their representatives. Consequently, Parliament is the supreme law-making authority. The courts have a limited capacity to make law by developing common law principles on a case by case basis, but Parliament can override the common law. The Parliament may also repeal laws passed by its predecessors because its democratic authority is regularly renewed.

Parliament may delegate law-making powers to other bodies, including the administrative arm of government and local government. However, it should delegate power in a way that does not undermine its own authority. Parliamentary supremacy requires that the Legislative Assembly have the capacity to scrutinise subordinate legislation (for example, regulations) that have been enacted by the executive arm of government. If the Legislative Assembly considers that subordinate legislation is outside the scope of the law-making power the Legislative Assembly intended to delegate to the executive, it should be able to disallow the subordinate legislation.

Both legislative and executive power ultimately rest with the people through those chosen by the people to represent them.

## Legislative power

The *Constitution Act 1867* and constitutional conventions effectively vest law-making (or legislative) power in the Legislative Assembly, whose members are elected by popular vote.

## Executive power

Executive power is vested in the Queen but is exercised by the Governor on the advice of Ministers. Those Ministers must be members of the Legislative Assembly and be part of a government supported by the majority of that Assembly. Consequently, Ministers are individually elected by their constituencies and indirectly chosen by the people through the support of a majority of other elected representatives.

This system of direct election of the legislature and, through it, the indirect election of the executive gives the Parliament great legitimacy.

From that legitimacy is derived the fundamental legislative principle requiring respect for the institution of Parliament that is recognised under the *Legislative Standards Act 1992*, section 4(2)(b).

# 4.1 Appropriateness of delegation of legislative power

## 4.1.1 FLP issue

A Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons—*Legislative Standards Act 1992*, section 4(4)(a).

This matter is concerned with the level at which delegated legislative power is used.

The greater the level of potential interference with individual rights and liberties, or the institution of Parliament, the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

This FLP issue overlaps the issue outlined in listed in '5.5 Subdelegation' on page 170.

4.1.2 *Taxation*

A power to impose a significant new tax is likely to be only appropriate in an Act of Parliament.

4.1.3 *Jurisdiction of the Supreme Court*

A power to change the jurisdiction of the Supreme Court is likely to be only appropriate in an Act of Parliament.

4.1.4 *Process of review and appeal*

Any process for the review of a decision made by a person under an Act that may adversely affect the rights of another person should be included in the Act, rather than being left to the Executive Government to include in a regulation.

**Scrutiny Committee**

In its commentary on the Education (Queensland State Authority) Bill 2001, the Scrutiny Committee stated the following in relation to the issue—

At the time the legislation is debated, Parliament has no way of knowing when the regulations will be put forward and whether they will be adequate to protect rights in this respect. (AD 2002/1, pp. 12–13, paras 11–14).

4.1.5 *Exclusion of automatic commencement of legislation*

**Scrutiny Committee**

The Scrutiny Committee opposes provisions that completely or indefinitely exclude the operation of the *Acts Interpretation Act 1954*, section 15DA (Automatic commencement of postponed law). AD 2000/5, pp. 5–7. Section 15DA embodies the principle that it is inappropriate for Parliament to relinquish control indefinitely over the commencement of an Act it has passed. AD 2006/4, pp. 32–33; AD 2005/10, pp. 23–25, paras 3–19; AD 2003/10, p. 2, para. 13.

The Scrutiny Committee has considered that the appropriate relief, if necessary, is to extend the automatic commencement under section 15DA(3). If section 15DA is not sufficient, the committee has considered that the relevant Bill should incorporate an extension of the automatic commencement rather than completely excluding the operation of section 15DA. Because this means that the Minister has to return to Parliament at the end of the lengthened period and justify to Parliament why its Act should remain dormant for a further period, the Scrutiny Committee considers that this approach has sufficient regard to the institution of Parliament. AD 2003/10, p. 2, para. 12; AD 2001/9, p. 10, paras 14–15.

The Scrutiny Committee has said that, for a particular case, it had no concerns with a provision that extended the postponement available under the *Acts Interpretation Act 1954*, section 5DA to 2 years when further extensions were also prevented. AD 2001/3, pp. 12–13. The Scrutiny Committee has also stated that 4 years from assent is the maximum period that should be provided for before automatic commencement. AD 2006/4, pp. 32–33; AD 2003/10, p. 2, para. 12.

*4.1.6 Delegation of power to commence legislation to someone other than Parliament or Governor or Governor in Council*

**Scrutiny Committee**

The Scrutiny Committee has considered that commencement of provisions of legislation on a date declared by COAG by gazette notice may not necessarily be objectionable in the case of national scheme legislation. AD 2003/2, p. 16, paras 9–14.

*4.1.7 Delegation to Governor of power to terminate a reference of legislative power to Commonwealth*

**Scrutiny Committee**

The Scrutiny Committee has considered that delegating to the Governor power to terminate a reference of legislative power to the Commonwealth ‘probably not objectionable’ because the required proclamation was subordinate legislation that could be disallowed by Parliament. AD 2003/10, p. 5, paras 34–38.

*4.1.8 Postponement of automatic expiry by subordinate legislation*

The extension of the automatic expiry period under *Statutory Instruments Act 1992* by special provision for particular subordinate legislation should only happen with sufficient justification.

**Scrutiny Committee**

*Agreements a possible reason for extension* The Scrutiny Committee has expressed the view that there is some merit in excluding or extending expiry when obligations under civil, national or international agreements are involved. AD 2000/9, pp. 37–39, paras 28–31.

*4.1.9 Henry VIII clauses*

**Scrutiny Committee**

The Scrutiny Committee has commented that Henry VIII clauses can also be regarded as unacceptable delegations of legislative power. See Alert Digest No. 3 of 2002, page 15, paragraph 11; Alert Digest No. 7 of 2001, page 16, paragraphs 11–14; Alert Digest No. 3 of 2001, page 3, paragraph 18. See material for Henry VIII clauses under ‘4.3 Prohibition on Henry VIII clauses’ on page 159.

#### 4.1.10 *Modifying existing list of matters by another instrument*

It is often convenient to insert in an Act a list of matters to which the Act relates together with a power to insert more by a statutory instrument, for example, a regulation. The effect is to delegate to an entity other than Parliament a power to change the application or effect of the legislation. This obviously gives rise to issues about the institution of Parliament. Good reasons are therefore required to include the power, for example, the impracticality of listing everything in the Act and safety concerns if the ability to add is not included.

#### **Scrutiny Committee**

*Characterisation of power* The Scrutiny Committee sometimes reports on this type of provision as a Henry VIII clause and sometimes as an inappropriate delegation of legislative power.

*Degree of impact* In deciding whether it will positively oppose this type of provision, the Scrutiny Committee has been particularly concerned when relevant powers in the legislation would mean that any addition to a pivotal list by statutory instrument would have far reaching consequences. AD 2004/3, pp. 18–19, paras 16–23.

*Individual/corporation* The Scrutiny Committee has expressly not objected to a provision allowing a regulation and a Gazette notice to expand the territorial operation of powers, on the basis the powers only impacted on corporations and not individuals. (This may have been only because of the Committee's terms of reference.) AD 2006/5, pp. 26–27, paras 3–13.

#### 4.1.11 *Outside bodies effectively making Queensland law*

#### **Scrutiny Committee**

The Scrutiny Committee has considered that a provision of legislation that incorporates into the law documents made by entities outside the framework of government ('outside bodies'), as those documents exist from time to time, adversely affects the institution of Parliament by delegating law-making power to 'outside bodies'. The committee has considered this drafting device should be kept to a minimum although in some cases there may be practical arguments in favour of the device. This is not an issue if the document is a fixed document readily accessible to readers of legislation.

The concerns of the committee are also reduced if the document may only be incorporated under subordinate legislation (which may be disallowed) and attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection.



Also, for an Act that incorporates a document, the Scrutiny Committee's concerns are significantly diminished if any amendments to the document only take effect if they are approved by subordinate legislation (with provision for access to the amendments if they are not in the subordinate legislation). AD 2006/5, p. 3, para. 21.

Queries and relevant issues raised by the Scrutiny Committee have included the following—

- What type of documents are likely to be adopted or incorporated? The committee is likely to have less concern if are they lengthy, detailed and technical in nature. AD 2006/5, p. 3, para. 20.
- What is the importance of the subjects dealt with in the documents?
- Will the documents be readily accessible to the public?
- How often will they require amendment? The need for rapid amendment is a factor in favour of an outside body making them. AD 2006/5, p. 3, para. 20.
- Will any future amendments be readily accessible to the public?
- To what extent does the State play a role in the preparation of the documents or their amendment? Representation of the State with the outside body is a factor in favour of incorporating the documents. AD 2006/5, p. 3, para. 20.
- Do other States incorporate the documents in their legislation? This is a factor in favour of their incorporation. AD 2006/5, p. 3, para. 20.
- What are the practical or other reasons that the power of incorporation is appropriate in the circumstances? For example, does the complexity and constantly changing nature of the documents make it much more cost-effective to incorporate the documents? AD 2006/5, p. 3, para. 20.

*Australian Qualifications Framework, national protocols and MCEETYA (a COAG ministerial council)* AD 2003/9, pp. 36–37, paras 12–19; AD 2003/7, pp. 17–19, paras 23–37.

*Building Code of Australia* AD 2006/5, p. 2, para. 9.

*Environmental conservation or use and non-use value documents* AD 2004/5, pp. 7–8, paras 3–12.

*Gas distribution and marketing documents* AD 2003/5, pp. 21–22, paras 3–7.

*National accreditation framework of the Australian Building Codes Board AD 2006/5, p. 2, para. 16; AD 2002/12, p. 2, paras 11–14.*

*Society of Petroleum Engineers documents AD 2003/9, pp. 22–23, paras 18–31.*

*Professional standards and codes of practice for teachers AD 2005/10, pp. 16–17, paras 43–53.*

*Queensland Development Code AD 2006/5, p. 2, paras 10–11.*

*Industry Codes under the Electricity Act 1994 and the Gas Supply Act 2003 AD 2006/10, pp. 4–5, paras 9–18.*

#### 4.1.12 Offences and penalties in subordinate legislation

In relation to a power to create offences and impose penalties under subordinate legislation, the more serious the consequences, the more likely it is that an offence or penalty should be imposed only by an Act of Parliament.

#### Scrutiny Committee

In Alert Digest No. 4 of 1996, the Scrutiny Committee adopted a formal policy (Policy No. 2 of 1996) on the question of delegation of legislative power to create offences and prescribe penalties—

1.31 The Committee accepts that legislative power to create offences and prescribe penalties may be delegated in limited circumstances provided the following safeguards are observed:

- rights and liberties of individuals should not be affected, and the obligations imposed on persons by such delegated legislation should be limited;
- the maximum penalties should be limited, generally to 20 penalty units;
- where possible, the types of regulation to be made under such provisions, which are foreseeable at the time of drafting the Bill, should be specified in the Bill;
- where the types of regulation to be made are not reasonably foreseeable at the time of drafting the Bill, a sunset clause (for a period not exceeding two years) should be set in respect of the relevant provision to allow time to identify the necessary penalties and offences.

If further offences and penalties are required that do not fall within the types of regulation outlined in the Bill, they can be added by amendment to the principal Act. The principal means of creating offences should always be through Acts of Parliament rather than delegated legislation.

1.32 Where provisions in regulations are made pursuant to delegated legislative power to create offences and prescribe penalties without having regard to these safeguards, the Committee will consider moving for the disallowance of the relevant provisions (AD 1996/4, pp. 7–8).

The Scrutiny Committee takes the view that if further offences and penalties not falling within the types of regulation outlined in the Bill are required, they can be added by amendment to the principal Act. It has considered that the primary way of creating offences should always be through Acts of Parliament rather than delegated legislation. AD 1996/4, pp. 7–8, paras 1.29–1.32.

The Scrutiny Committee continues to oppose the delegation of power contrary to its policy. AD 2006/1, p. 3, paras 17–18; AD 2005/13, pp. 7–8, paras 43–48; AD 2005/4, pp. 20–21, paras 75–82; AD 2004/5, pp. 9–10, paras 18–24; AD 2002/7, pp. 9–10, paras 21–24; AD 2002/4, pp. 8–9, paras 31–37; AD 1999/4, p. 14, paras 1.94–1.95; AD 1999/1, p. 23, para. 4.38; AD 1998/11, pp. 26–27, paras 3.100–3.107; AD 1997/10, pp. 6–7, paras 2.8–2.12; AD 1997/6, pp. 10–11, paras 2.26–2.33.

*Serious offences inappropriate to subordinate legislation* The Scrutiny Committee is particularly reluctant to endorse legislative provisions enabling the creation of serious offences by regulation. The committee has recommended the reduction of maximum penalties of 200 penalty units for offences under explosives legislation despite the seriousness of the danger to health and safety. AD 1998/11, pp. 26–27, paras 3.100–3.107.

*Officious trivial offences* At the other end of the scale, the Scrutiny Committee is also vigilant about provisions delegating power to make insignificant matters the subject of criminal offences, for example, an inappropriate delegation of legislative power to prescribe the sanctions applying to the contravention of a state school dress code. AD 1999/2, pp. 3–4, paras 1.20–1.29.

*4.1.13 Delegation of power the exercise of which has potentially significant affect on individual's rights and liberties*

**Scrutiny Committee**

*Prisoners' rights subject to categories prescribed under regulation* As the classification of a prisoner may be a matter of considerable importance (for example, it may provide grounds for making a maximum security order), the Scrutiny Committee has considered the Act should state the criteria on which different prisoner classifications may be established under a regulation. AD 1999/3, p. 14, para. 2.22.

*Authorised persons having power over people at a place* The Scrutiny Committee has approved as entirely appropriate the relocation from subordinate legislation to an Act of provisions giving significant powers to authorised persons to control people at a venue. AD 2003/3, pp. 9–10, paras 3–11.

*Listing of person's name on commercially available record kept to warn businesses about the person* In relation to a tenancy database made commercially available to warn landlords of poor tenants, the Scrutiny Committee has considered that a legislative provision allowing the reasons for being listed to be prescribed entirely by regulation was too broad a delegated power and at least some of the reasons should have been specified in the Act (presumably to create a class). AD 2003/6. p. 21, paras 3–11.

*Offence prescribed under subordinate legislation to be a category of offence with significant consequences*

*Fisheries* Where identification of an offence as a serious fisheries offence made a person liable to both a monetary penalty and suspension or cancellation of the person's authority and quota, the Scrutiny Committee has considered it appropriate that the offence be stipulated in the Act itself and has queried its prescription under subordinate legislation. AD 2003/9, p. 28, paras 34–36.

*Marine park use regulated in accordance with prescribed purposes* The Scrutiny Committee has queried why lawful purposes for entry or use of a marine park were to be prescribed by regulation as opposed to being stated in the Act, given the heavy penalties for breach. AD 2004/5, pp. 8–9, paras 13–17.

*Notifiable medical conditions prescribed by regulation* The Scrutiny Committee has sought information from the Minister as to why at least the major types of these conditions could not be stated in the Act. AD 2005/4, pp. 19–20, paras 68–74.

*Eligibility* The Scrutiny Committee has sought further information from the Minister about the power to prescribe the circumstances in which an adjudicator will be ineligible to adjudicate in relation to a

particular construction contract. In particular, the committee sought information about the principal circumstances envisaged to be prescribed by regulation and why those matters, at least, could not be included in the Bill itself. AD 2004/1, p. 3, paras 13–17.

*Driver's licence suspensions-special hardship authorisations* The Scrutiny Committee has considered that ordinarily licence matters like criteria and conditions of grant and consequences of contravention should be in primary legislation. AD 2005/10, pp. 32–33, paras 44–50.

*Definition of pivotal term* The Scrutiny Committee has referred to Parliament the question of whether defining an important term by regulation (a health reporting event) represents an appropriate delegation of legislative power. The explanatory notes stated that using a regulation would enable greater flexibility to amend the events prescribed in a timely fashion, so as to maintain consistency with national and State monitoring and reporting practices. AD 2007/2, pp. 24–25, paras 22–28.

#### 4.1.14 *Nature of legislation may require substantial delegated power to prescribe under regulation*

##### **Scrutiny Committee**

The Scrutiny Committee has noted that the extensive reliance on regulations for matters of significance may reflect the subject matter of the empowering legislation and perhaps the innovative nature of the legislation. AD 2003/7, p. 27, paras 14–21; AD 2001/9, pp. 10–11, paras 17–19.

The Scrutiny Committee has referred provisions, without express objection, about the following to Parliament—

- *Child employment* AD 2006/1, pp. 4–5, paras 31–38.

#### 4.1.15 *Prescription of persons and things to have benefit of legislation*

##### **Scrutiny Committee**

*Blocks of land whose lawful use is protected* The Scrutiny Committee has stated it did not object to a power to prescribe particular land whose lawful usage was continued under legislation due to the inherent difficulty in listing the land in the empowering legislation for a variety of reasons. AD 2004/5, pp. 38–39, paras 3–11.

**4.1.16** *Imposing a positive requirement on the Governor in Council to make a regulation*

**Scrutiny Committee**

The Scrutiny Committee has noted, without express objection, that there were precedents for legislation requiring, in particular circumstances, the Governor in Council to make a regulation, for example, the *Local Government Act 1993*, sections 95, 96, 104 and 111. AD 1999/3, p. 3, para. 1.22.

**4.1.17** *Unreasonably general power to make delegated legislation*

**Scrutiny Committee**

The Scrutiny Committee has commented adversely on regulation-making powers being too generally expressed. AD 2001/7, p. 16, paras 11–14.

**4.1.18** *Regulation-making power to fill legislative gaps*

**Scrutiny Committee**

The Scrutiny Committee has considered it is an inappropriate delegation to provide that a regulation may ‘make provision about a matter for which this Act does not make provision or enough provision’. To the committee, this is even more objectionable if the regulation may be given retrospective effect or effect despite any provisions of the principal Act. AD 2003/6, p. 3, paras 16–19; AD 1996/4, p. 28; AD 1996/2, p. 20; Scrutiny Committee Annual Report 1995–1996, paras 2.25–2.35.

## **4.2 Sufficient parliamentary scrutiny**

**4.2.1** *FLP issue*

A Bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly—*Legislative Standards Act 1992*, section 4(4)(b).

For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation.

The matter involves consideration on whether the delegate may only make rules that are subordinate legislation within the meaning of the *Statutory Instruments Act 1992*. With few exceptions, this Act ensures that subordinate legislation must be tabled before, and may be disallowed by, the Legislative Assembly.

If the delegate may make rules that are not subordinate legislation, the issue arises of how the delegate's activities are to be monitored by Parliament.

### Scrutiny Committee

The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny. The Scrutiny Committee has commented adversely on provisions allowing matters, which it might reasonably be anticipated would be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992*, part 6. AD 2002/1, p. 2, paras 8–10 and pp. 25–26, paras 22–27; AD 1996/3, p. 5.

In considering whether it is appropriate that delegated matters be dealt with through an alternative process to the subordinate legislation, the Scrutiny Committee has taken into account—

- the importance of the subject dealt with
- the practicality or otherwise of including those matters entirely in subordinate legislation
- the commercial or technical nature of the subject matter
- whether the provisions were mandatory rules or merely to be had regard to. AD 2007/4, p. 11, para. 54; AD 2003/7, p. 17, paras 17–23; AD 2002/1, p. 2, para. 10; AD 2001/8, p. 15, para. 6; AD 2000/9; AD 1999/4, p. 10, paras 1.65–1.67.

In that regard, the Scrutiny Committee has noted the intention, stated in explanatory notes, that the regulation approving a non legislative code of conduct would encapsulate the provisions of the code that may impose substantive rights or obligations. AD 2001/8, pp. 15–16, para. 6.

If, despite an instrument not being subordinate legislation, there is a provision requiring tabling and providing for disallowances there is not so much concern on the part of the Scrutiny Committee. AD 2004/3, pp. 5–6, paras 30–40; AD 2000/9, pp. 24–25, paras 47–56. \*Therefore, if a document that is not subordinate legislation is intended to be incorporated into subordinate legislation, the Scrutiny Committee encourages the inclusion of an express

provision to require the tabling of the document at the same time as the subordinate legislation. AD 2001/8, p. 16, para. 7; AD 1996/5, p. 9, para. 3.8.

\*When the legislation authorising this to happen is being prepared, care is required to avoid something being set up to fail because of forgetfulness about tabling outside OQPC's automatic tabling process.

Similar considerations apply when a non legislative document is required to be approved by an instrument of subordinate legislation. AD 2003/11, p. 23, paras 33–40.

The tabling of a draft of the proposed material when the Bill is introduced may allay the Scrutiny Committee's concerns. See, for example, Alert Digest No. 4 of 1999, page 26, paragraphs 4.30–4.34, which concern guidelines made by the chief executive for dealing with information.

The Scrutiny Committee has positively approved the amendment of legislation to convert an administrative scheme into subordinate legislation, noting the increased quality of the drafting, increased public access and increased accountability to the public and Parliament. AD 2004/5, p. 36, paras 5–7.

#### 4.2.2 Use of *prescription other than subordinate legislation*

##### **Scrutiny Committee**

*Codes of practice for an occupation* The Scrutiny Committee has queried why these have not been included in subordinate legislation. AD 2003/7, pp. 13–14, paras 28–37.

*Competency frameworks for recognition of skills* The Scrutiny Committee has queried why these have not been included in subordinate legislation, but recognises there may be arguments in favour of incorporating them, even in the form they take from time to time. AD 2003/9, p. 33, paras 3–10 and pp. 36–37, paras 12–19; AD 2003/7, pp. 36–37, paras 3–10.

*Compliance code and collection protocols* The Scrutiny Committee has considered unobjectionable a provision declaring a compliance code and collection protocols not to be subordinate legislation, given their highly technical nature and the difficulty of drafting them in legislative form and given they were subject to tabling and disallowance procedures. AD 2004/1, pp. 5–6, paras 30–40.



*Disability service standards detailing the way in which disability services are to be provided* The Scrutiny Committee sought justification of why these standards, made by the Minister and notified in gazette, could not be made by subordinate legislation. AD 2006/1, pp. 13–14, paras 49–58

*External prescription impacting on warrants* Because the issue and enforcement of a warrant can have substantial effects on the rights and liberties of individuals, the Scrutiny Committee has considered that procedures for the electronic issue and management of warrants should be prescribed by regulation, rather than stated in a document merely approved by regulation. There should be clear safeguards against fraud and the possible misuse of the computer system. AD 1996/3, p. 14. An exception is where the reporting of safeguards would compromise their effectiveness. AD 1996/4, p. 40.

*Infection control guidelines* The Scrutiny Committee has referred to Parliament, without express objection, infection control guidelines, where the explanatory notes had argued that the guidelines could not easily be translated to legislation. AD 2003/11, p. 23, paras 33–40.

*Recognised standards with which a person had to comply to discharge health and safety obligations* The Scrutiny Committee has asked why these standards made by the Minister and notified by gazette could not be made by regulation. AD 1999/4, p. 10, para. 1.69.

*Mines rescue performance criteria for the provision by accredited corporations of mine rescue services for underground mines* The Scrutiny Committee has asked why these criteria made by the Minister and notified by gazette could not be made by regulation. AD 1999/4, p. 11, para. 1.74.

*Board policies for financial requirements and insurance for building work* The Scrutiny Committee has queried why an administrative board's policies, though approved by regulation, could not be made by regulation. AD 2002/11, p. 14, paras 9–14.

*Definition of corresponding laws for cross jurisdictional application* A provision allowed a person to apply to a tribunal to register an order made under an Act or law of another jurisdiction that had been notified by the Minister by gazette notice. Once registered, the order was treated as if it were a tribunal order. The Scrutiny Committee considered the matter would be more appropriately dealt with by a regulation that would be subject to tabling and disallowance. AD 2000/1, p. 10, para. 78.

*Electrical safety* The Scrutiny Committee has not objected to a power of a Minister to prescribe rules about electrical safety in urgent cases. AD 2002/7, p. 9, paras 17–20.

*Survey standards and survey guidelines for achieving an acceptable level of quality in carrying out surveys* The Scrutiny Committee has considered unobjectionable a provision declaring survey standards and guidelines not to be subordinate legislation given their highly technical nature and that they were not easily rendered into legislative form. AD 2003/7, p. 33, para. 10.

*Toll road declaration* The Scrutiny Committee has queried a provision authorising toll roads to be declared by gazette notice instead of a regulation, as this was matter of some significance and the number of toll roads would not be large in absolute terms. AD 2005/13, pp. 22–23, paras 11–18.

*Standards for provision of community services* The Scrutiny Committee has not objected to standards, made by the Minister, to which the chief executive may have regard in making a decision about an application for approval as an approved service provider. AD 2007/4, p. 10–11, paras 44–55.

#### 4.2.3 *Local laws*

In the local government context, where delegated legislation is not subject to any scrutiny by Parliament, the Scrutiny Committee has stated that another principle acknowledged by Parliament operates, that is, that Parliament should pay sufficient regard to the institutions of local government by permitting a degree of autonomy in their deliberations and expecting them to recognise breaches of FLPs themselves. AD 1996/3, p. 6.

#### 4.2.4 *National scheme legislation*

##### **Scrutiny Committee**

The Scrutiny Committee is generally very wary of national scheme legislation because it believes that when the legislation is introduced or tabled in Parliament following national agreement on the laws under administrative arrangements, there is little real capacity of the Parliament to amend, refuse to pass, or disallow the law.

## 4.3 Prohibition on Henry VIII clauses

### 4.3.1 *FLP issue*

A Bill should only authorise the amendment of an Act by another Act—*Legislative Standards Act 1992*, section 4(4)(c).

Henry VIII clauses should not be used. The views of the Scrutiny Committee on the interpretation of what is a Henry VIII clause are the most influential on the subject.

#### Scrutiny Committee

A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or executive action (Scrutiny Committee 1997, *The use of “Henry VIII clauses” in Queensland Legislation*, para 5.7).

The Scrutiny Committee’s approach is that if an Act is purported to be amended by a statutory instrument (other than an Act) in circumstances that are not justified, the committee will voice its opposition by requesting Parliament to disallow the part of the instrument that breaches the fundamental legislative principle requiring legislation to have sufficient regard for the institution of Parliament. The use of “Henry VIII clauses” in Queensland Legislation, paragraph 5.17.

The Scrutiny Committee considers the possibly justifiable uses of Henry VIII clauses to be limited to circumstances such as the following—

- to facilitate immediate executive action
- to facilitate the effective application of innovative legislation
- to facilitate transitional arrangements
- to facilitate the application of national schemes of legislation. (Scrutiny Committee 1997, *The use of “Henry VIII clauses” in Queensland Legislation*, paragraph 5.9).

(But the existence of these circumstances do not *automatically* justify the use of Henry VIII clauses.)

If a Henry VIII clause does not fall within any of the above situations, the Scrutiny Committee classifies it as ‘generally objectionable’. AD 2006/10, p. 6, paras 21–24; AD 2001/8, p. 28, para. 31.

In deciding its level of concern and potential action on objectionable Henry VIII clauses, the Scrutiny Committee takes into account the limited scope of a Henry VIII clause to, for example—

- (a) deal with a single issue arising from a commercial matter.  
AD 2001/4, pp. 3–4, paras 3–6
- (b) allow for extension of a time period under a particular provision for particular circumstances. AD 2002/3, p. 15, paras 10–14;  
AD 2001/9, pp. 13–14, paras 3–13
- (c) deal with emergency or other extraordinary circumstances.  
AD 2003/5, pp. 10–11, paras 3–9
- (d) add to a lengthy list of matters stated in legislation for a purpose if the scope for prescribing additional matters for the purpose would be limited by the nature of the matters.  
AD 2004/5, p. 21, paras 12–15.

The Scrutiny Committee specifically commends the reduction of offending clauses. AD 2003/5, pp. 10–11, paras 6–9; AD 2002/11, pp. 25–26, paras 3–9; AD 2001/7, p. 2, para. 11.

#### 4.3.2 *Facilitating immediate executive action*

##### **Scrutiny Committee**

*Plebiscite arrangements* The Scrutiny Committee has considered acceptable a power for the Minister, by gazette notice, to determine a cut off date for the poll, to overcome difficulty affecting the poll and to substitute a later day for a polling day stated in an Act. The committee was less certain about other powers exercisable by the Minister by gazette notice to expand the area in which a plebiscite was to be conducted and to vary the application of another Act to the plebiscite. AD 2007/1, pp. 14–15, paras 6–11.

#### 4.3.3 *Transitional regulation-making powers*

##### **Scrutiny Committee**

The Scrutiny Committee often reviews transitional regulation-making powers against the background of its opposition to Henry VIII clauses. The form of transitional regulation-making power most objectionable has the following aspects—

- (a) it is expressed to allow for a regulation that can override an Act
- (b) it is so general as to allow for a provision about any subject matter, including those that should be dealt with by Act as opposed to subordinate legislation
- (c) it is not subject to any other control, for example, sunseting.  
AD 1996/3, pp. 18–20, paras 4.15–4.30.

The Scrutiny Committee has stated that it is an inappropriate delegation to provide that a regulation may be made about any matter of a savings, transitional or validating nature ‘for which this part does not make provision or enough provision’ because this anticipates that the Bill may be inadequate and that a matter which otherwise would have been of sufficient importance to be dealt with in the Act will now be dealt with by regulation. AD 1996/3, p. 10 and p. 19.

In the context of urgent legislation, the Scrutiny Committee has indicated that a transitional regulation-making power may have sufficient regard to the institution of Parliament if it is subject to—

- (a) a 12 month sunset clause; and
- (b) a further sunset clause on all the transitional regulations made pursuant to the transitional regulation-making power.  
AD 2003/7, p. 25, paras 35–38; AD 2001/7, p. 54, paras 10–12;  
AD 1996/10, p. 14.

In the context of revenue legislation, the Scrutiny Committee has referred to Parliament, without express objection, a transitional regulation-making power that provided for a 5-year sunset provision (but did not incorporate the other objectionable aspects sometimes found in transitional regulation-making provisions). AD 2004/7, pp. 20–21, paras 3–9.

The Scrutiny Committee has reacted similarly to the following legislation with similar restrictions—

- *Aboriginal Councils transition to Local Government* AD 2004/7, p. 16, paras 14–18
- *Novel civil liability legislation* AD 2003/3, p. 4, paras 24–26.

The Scrutiny Committee has also expressed the view that the subjects about which transitional regulations may be made should be stated in the Bill. AD 2002/7, pp. 3–4, paras 15–19; AD 1997/7, pp. 13–14; AD 1997/5, pp. 10–11; AD 1996/10, pp. 13–14; AD 1996/3, p. 17; AD 1996/2, pp. 19–20.

#### 4.3.4 *National scheme legislation*

##### **Scrutiny Committee**

For discussion of national scheme legislation, see Alert Digest No. 3 of 1996, page 1, where the Scrutiny Committee considered whether authorising the amendment of an Act by regulation had sufficient regard to the institution of Parliament.

Sometimes the Scrutiny Committee makes no further comment when the object of the clause is to facilitate national scheme legislation, particularly novel legislation. AD 2003/12, pp. 15–16, paras 29–33.

The Scrutiny Committee does not automatically accept that Henry VIII clauses are acceptable to facilitate the operation of national scheme legislation. AD 2001/4, p. 8, paras 3–8; AD 2001/3, p. 2, para. 8.

Facilitation of a national scheme on an interim basis may be a justifiable occasion for a Henry VIII clause. AD 2006/4, p. 2, para. 8; AD 2002/10, pp. 14–15, paras 14–20.

#### 4.3.5 *Agreement Acts*

##### **Scrutiny Committee**

The Scrutiny Committee considers an agreement Act incorporates Henry VIII clauses if—

- (a) a provision of the Act gives the agreement the force of law or declares it effective as if enacted; and
- (b) the agreement may be varied by a further agreement approved by regulation; and
- (c) the agreement prevails if there is an inconsistency between the agreement and the Act (or another Act or law).

The Scrutiny Committee considers Henry VIII clauses can be avoided by having the agreement as a schedule to the Act, to be amended only by a further Act.

See the Scrutiny Committee 1997 report *The use of “Henry VIII clauses” in Queensland Legislation*, paragraphs 4.42 and 4.50–4.52 and Alert Digest No. 7 of 2001, page 2, paragraphs 10–11.

#### 4.3.6 *Staged introduction of law*

##### **Scrutiny Committee**

The Scrutiny Committee has considered a provision enabling regulations to require progressive conversion of licensed premises to non-smoking areas during a period leading up to a date on which the legislation required the conversion to be completed. The committee

referred to Parliament the question or whether, in the circumstances, the inclusion of the provision was appropriate. AD 2004/8, pp. 18–19, paras 12–21.

#### *4.3.7 Exemptions from operation of Act*

##### **Scrutiny Committee**

The Scrutiny Committee has considered that a regulation-making power to allow for the exemption of persons from the operation of an Act is a Henry VIII clause and generally objectionable. AD 2002/5, pp. 3–4, paras 20–27; AD 2001/8, p. 28, paras 29–34; AD 2001/7, p. 16, paras 11–14.

The Scrutiny Committee maintains this view even if the regulation-making power is limited in its application. AD 2002/4, p. 16, paras 16–20.

However, circumstances—for example, the narrow restrictions placed on when an exemption could be granted and the impracticality of an alternative license scheme or the transitional nature of the power—may reduce the Scrutiny Committee’s opposition from active intervention to non-endorsement. AD 2006/9, pp. 7–9, paras 10–17; AD 2004/2, p. 6, paras 21–27; AD 2003/11, p. 24, paras 41–47; AD 2001/8, p. 28, paras 29–34.

The Scrutiny Committee may consider that an exemption may include concession, but this is as yet unclear. AD 2001/7, p. 16, paras 11–14

#### *4.3.8 Impact of absence of appropriate explanatory note*

##### **Scrutiny Committee**

A failure to address the issue of a Henry VIII clause at all in the explanatory notes is likely to lead the Scrutiny Committee to ask whether the provision simply involves an inappropriate delegation of legislative power. See Alert Digestion No. 3 of 2002, page 2, paragraphs 12 and 17.

## Chapter 5: *The institution of Parliament—FLP issues listed in the Legislative Standards Act related to subordinate legislation*

### Scope of chapter

This chapter considers the examples of issues that impact on whether legislation has sufficient regard to the institution of Parliament and that are set out in the *Legislative Standards Act 1992*, section 4(5).

### Background

See the material in Chapter 4 under the heading ‘Background’ on page 144.

## 5.1 Authorisation of law

### 5.1.1 *FLP issue*

Subordinate legislation should be within the power that, under an Act or subordinate legislation (the “authorising law”), allows the subordinate legislation to be made—*Legislative Standards Act 1992*, section 4(5)(a).

Subordinate legislation should be authorised by, and not inconsistent with, the authorising law.

The *Acts Interpretation Act 1954* and *Statutory Instruments Act 1992* contain important provisions that may affect the making of subordinate legislation. The *Acts Interpretation Act 1954*, part 8, contains provisions that aid in the interpretation of legislation, including, for example, the definitions of commonly used words and expressions that apply to subordinate legislation (section 36). The *Statutory Instruments Act 1992*, part 4, division 3, contains provisions about statutory instruments. In particular, part 4, division 3, subdivision 2, makes express provision for matters that may be provided for in subordinate legislation.

Case law made by the courts largely covers the field of this topic.



## 5.2 Consistency with objectives of authorisation

- 5.2.1 *FLP issue* Subordinate legislation should be consistent with the policy objectives of the authorising law—*Legislative Standards Act 1992*, section 4(5)(b).

## 5.3 Appropriateness of matter to level of legislation

- 5.3.1 *FLP issue* Subordinate legislation should contain only matter appropriate to that level of legislation—*Legislative Standards Act 1992*, section 4(5)(c).

This issue is the corollary of the issue that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. (See ‘4.1 Appropriateness of delegation of legislative power’ on page 145.)

Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of particular subordinate legislation under the power is appropriate. For example, an Act’s empowering provision may be broadly expressed so that not every item of subordinate legislation that could be made under it is necessarily appropriate to subordinate legislation in every circumstance that arises. Also, for example, an empowering Act may have been enacted under different circumstances to the circumstances of the subordinate legislation and at a much earlier time.

When Parliament delegates the power to make subordinate legislation, it retains the right to disallow particular subordinate legislation on any ground.

### Scrutiny Committee

The Scrutiny Committee has a policy on the delegation of legislative power to create offences and prescribe penalties. See ‘4.1 Appropriateness of delegation of legislative power’ on page 145.

The fact that a subject matter more appropriately dealt with in an Act of Parliament is dealt with in regulations that can be disallowed under *Statutory Instruments Act 1992*, sections 49 and 59, does not cure the Scrutiny Committee’s objection. AD 1996/4, p. 41.

### 5.3.2 *Taxation laws*

Taxation should normally be dealt with by primary legislation.

#### **Scrutiny Committee**

The Scrutiny Committee has criticised a provision allowing an exemption from liability to pay a tax to be made by regulation. AD 1996/3, p. 18.

For the Scrutiny Committee's discussion of a regulation prescribing how a tax is to be calculated and paid, see the Scrutiny Committee Annual Report 1997–1998, paragraph 3.11. If there are overwhelming justifications for subordinate legislation to prescribe the rate, the committee has considered the principal legislation should prescribe either the maximum rate or a method of calculating the maximum rate. AD 2005/13, pp. 12–13, paras 32–45; AD 2005/4, pp. 1–2, paras 3–10; AD 2003/6, p. 2, paras 6–15; Scrutiny Committee Annual Report 1997–1998, para. 3.11.

For the Scrutiny Committee's discussion of fees in subordinate legislation, see the Scrutiny Committee Annual Report 1995–1996, paragraphs 5.16–5.60.

*Individuals/corporations* The Scrutiny Committee has expressly abstained from comment about a regulation-making power to impose a levy on water service providers that were corporations. (This may only have been because of a perceived limitation in the Committee's terms of reference.) AD 2006/5, pp. 27–28, paras 14–19.

### 5.3.3 *Rights of appeal or review*

#### **Scrutiny Committee**

The Scrutiny Committee has stated that review of decisions and appeals should be established in an Act rather than by subordinate legislation. AD 1996/5, p. 15, para. 4.26.

## 5.4 Subordinate legislation should only amend a statutory instrument

### 5.4.1 *FLP issue*

Subordinate legislation should amend statutory instruments only—*Legislative Standards Act 1992*, section 4(5)(d).

The principle of Parliamentary law-making that an Act should only be amended by another Act of Parliament has long been recognised. This principle is supported in Queensland by the *Legislative Standards Act 1992*, section 4(4)(c) for Bills, and the *Legislative Standards Act 1992*, section 4(5)(d) for subordinate legislation.

The material in this section deals with occasions when subordinate legislation has been scrutinised by the Scrutiny Committee.

### Scrutiny Committee

The Scrutiny Committee has drawn attention to the *Statutory Instruments Act 1992*, section 7(1), which provides that a statutory instrument must be made under

- an Act; or
- another statutory instrument; or
- or a power conferred by an Act or statutory instrument and under power conferred otherwise by law.

That provision further requires the instrument to be 1 of the types listed in the provision. An Act is not 1 of the types contained in the list. The *Acts Interpretation Act (Qld) 1954* provides that in an Act 'amend' includes, for an Act or a provision of an Act, amend by implication. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry—Evidence) Regulation 1998*, p. 2, paras 5.6 and 5.9–5.11

The Scrutiny Committee has consistently expressed the view that a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament. Scrutiny Committee Annual Report 1996–1997, p. 11; Scrutiny Committee Annual Report 1997–1998, para. 3.8.

The Scrutiny Committee is of the view that the most effective means to ensure that regulations do not amend something other than a statutory instrument is to ensure that provisions which provide authority for them to do so are not included in legislation. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry—Evidence) Regulation 1998*, p. 9, para 7.12.

The Scrutiny Committee has said that if an Act is purported to be amended by a subordinate instrument in circumstances that are not justified, the Scrutiny Committee will voice its opposition by

requesting Parliament to disallow that part of the instrument that breaches the fundamental legislative principle requiring legislation to have sufficient regard for the institution of Parliament. Scrutiny Committee 1997, *The use of “Henry VIII Clauses” in Queensland Legislation*, p. 60, para 5.17.

For a discussion of the relationship between Henry VIII clauses and the fundamental legislative principle that subordinate legislation should amend statutory instruments only, and further information on this topic refer to the Scrutiny Committee’s report *The use of ‘Henry VIII Clauses’ in Queensland*.

#### 5.4.2 Modification of application of Government Owned Corporations (GOC) Act

##### Scrutiny Committee

*Operation of GOCs* The Scrutiny Committee has reported on a regulation made under the *Government Owned Corporations Act 1993*, where the authorising provision (section 57B) permitted subordinate legislation to prescribe necessary changes to the application of certain sections of that Act. In particular, the committee considered section 57B of the Government Owned Corporations (GOC) Act to be a Henry VIII clause because it has the effect of permitting a regulation to change the text of principal legislation for application purposes. The committee also regarded section 12 of the regulation as not having sufficient regard to the institution of Parliament because it purports to amend the effect of an Act of Parliament. Scrutiny Committee, *Report on Government Owned Corporations (QGC1–3 and AEC) Regulation 1997*.

#### 5.4.3 Need for urgent executive action

##### Scrutiny Committee

*Significant public inquiry* The Scrutiny Committee has considered that a regulation did not ‘amend subordinate legislation only’ in circumstances where it had the effect of subjecting secrecy provisions in particular Acts to the overriding effect of a summons or request to produce documents and certain other things in writing from the chairperson of an Inquiry set up to inquire into the abuse of children. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry–Evidence) Regulation 1998*, p. 4, para. 5.12.

However, 1 of the ‘possibly justifiable uses of Henry VIII clauses’ identified by the Scrutiny Committee in its report on Henry VIII clauses, was to ‘facilitate immediate Executive action’. While the committee recognised that it was the use of the Henry VIII clause, rather than the clause itself, that was in question, it was of the view that similar principles applied to both issues. The committee

interpreted 'immediate' in this context to mean urgent. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry–Evidence) Regulation 1998*, p. 5, paras 6.1–6.3.

The circumstances were that the Inquiry had urgently requested the use of the regulation-making power and the delay in waiting for an amendment by Parliament to achieve the same effect was undesirable.

It was clear to the Scrutiny Committee that the regulation was made to facilitate immediate executive action. The committee did not consider that this would always justify the making of a regulation that amended something other than a statutory instrument. However, if this regulation had not been made, the progress of the Forde Inquiry would have been delayed. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry–Evidence) Regulation 1998*, pp. 8–9, paras 7.7–7.8.

Whether the regulation had sufficient regard to the institution of Parliament depended on whether, in the circumstances, there was adequate justification for making the regulation. Although the regulation appeared to be contrary to section 4(5)(d) of the *Legislative Standards Act 1992* the Scrutiny Committee was satisfied that the regulation has sufficient regard to the institution of Parliament. Scrutiny Committee, *Report on the Commissions of Inquiry (Forde Inquiry–Evidence) Regulation 1998*, p. 4, para. 5.13 and p. 9, para. 7.9.

#### 5.4.4 Enabling commercial agreements

##### Scrutiny Committee

The Scrutiny Committee has expressed concern at the use of subordinate instruments to facilitate amendments to Acts that contain a commercial agreement. In the committee's view, only an Act of Parliament should authorise the amendment of an agreement that forms part of a schedule to an Act. In this case, the subordinate legislation that amended the Act was made under a Henry VIII clause. The committee, in April 1997, brought to the attention of all Ministers the views it expressed in its Henry VIII report at pages 34–37, paragraphs 4.41–4.55. Scrutiny Committee Annual Report 1996–1997, p. 11.

## 5.5 Subdelegation

### 5.5.1 *FLP issue*

Subordinate legislation should allow the subdelegation of a power delegated by an Act only—

- (a) in appropriate cases and to appropriate persons; and
- (b) if authorised by an Act—*Legislative Standards Act 1992*, section 4(5)(e).

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegated legislative power. See '4.2 Sufficient parliamentary scrutiny' on page 154.

#### **Scrutiny Committee**

When considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, the Scrutiny Committee has taken into account the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation. Alert Digest 1999/04, p. 10, paras 1.65–1.67.

## Chapter 6: The institution of Parliament—issues not listed in the *Legislative Standards Act*

### Scope of chapter

Chapters 4 and 5 were concerned with the issues relevant to the institution of Parliament that are listed in the *Legislative Standards Act 1992*, section 4(4) and (5). This chapter examines examples of other issues dealing with the institution of Parliament that are not listed in the *Legislative Standards Act 1992* but to which legislation should have sufficient regard.

### Background

The list of examples in the *Legislative Standards Act 1992*, section 4(4) and (5), is not exhaustive of the issues relevant to deciding whether legislation has sufficient regard to the institution of Parliament.

## 6.1 Constitutional validity

### 6.1.1 *FLP issue*

The institution of Parliament is enhanced by the enactment of effective laws. Laws purportedly enacted by Parliament that are invalid call into question the authority of Parliament and the competence with which its affairs are being conducted.

### 6.1.2 *Connection with the State*

#### Scrutiny Committee

*Offence provision expressly extraterritorial with no express linkage to State* The Scrutiny Committee has recommended that a proposed law that, in the committee's view, apparently expressly created an offence that could be committed by anyone anywhere in or outside the State should express a link with the State. AD 2002/11, pp. 19–20, paras 17–21.\*

\*The Attorney-General drew the committee's attention to the Criminal Code, sections 12 to 14. Not all the elements of the offence were expressly extraterritorial.

**6.1.3** *Freedom of political communication*

**Scrutiny Committee**

See material under '3.1.9 Freedom of speech and the implied constitutional right to communication on matters of government and politics' on page 103.

**6.1.4** *Inconsistency with Commonwealth electoral laws*

**Scrutiny Committee**

The Scrutiny Committee has endorsed a provision omitting a law that was constitutionally invalid because it was inconsistent with a Commonwealth electoral law. AD 2003/11, pp. 14–15, paras 3–10.

## **6.2 Direct democracy**

**6.2.1** *FLP issue*

The institution of Parliament must be distinguished from another process that directly gives effect to the will of the electorate about a particular issue.

The Parliament has an historical role that can involve more than giving effect to the transient will of the electorate on a particular day on a particular issue. For example, a necessary reform may be unpopular.

**6.2.2** *Citizen initiated referendum*

This matter refers to a form of direct democracy by which Executive Government may be required to conduct a referendum on a particular issue with the intent that the result of the referendum will be made into a law. For example, a draft Bill may be required to be prepared in the process associated with the referendum. If the question put to the electorate is answered by the electorate so as to endorse the Bill, the Bill is then required to be either passed as a law or introduced to Parliament for its consideration or some other similar process is required.

**Scrutiny Committee**

As to whether legislation for a citizen-initiated referendum (CIR) has sufficient regard to the institution of Parliament, see Alert Digest No. 7 of 1998, pages 12–16, paragraphs 3.8–3.30 and page 18, paragraph 3.47. The Scrutiny Committee has stated that whether CIR is viewed as an improvement in democracy or an erosion of parliamentary democracy depends essentially on a political or policy



judgment. The committee said it was clear that CIR encroaches on the law-making function of Parliament, and as such the committee was obliged to express its concern that the Bill weakens the institution of Parliament. The committee considered it was for Parliament to decide whether this impact is outweighed by the provision to the electorate of a mechanism of direct democracy. AD 1999/3, p. 5, para. 1.41; AD 1998/7, p. 16, para. 3.34.

## 6.3 Delegation to executive of power to confer office and other rewards on members

### 6.3.1 *FLP issue*

The official activities of members of the Legislative Assembly should ordinarily be controlled by the Legislative Assembly. The principle is that the Legislative Assembly should be allowed to control its own operations and its members should not be open to improper external influence.

### 6.3.2 *Parliamentary secretaries*

#### **Scrutiny Committee**

The Scrutiny Committee has considered it insufficient regard to this FLP issue to state 'A Parliamentary Secretary has the functions decided by the Premier' because wide executive power could be granted to individuals who are not responsible to Parliament and whose powers and functions are not defined by statute.

The Scrutiny Committee's view was that legislation should limit the functions that can be allocated and the legislation should require written allocation. AD 1996/2, p. 4.

### 6.3.3 *Members of the Legislative Assembly*

#### **Scrutiny Committee**

*Executive appointments* Compromise of parliamentary independence was discussed by the Scrutiny Committee in the context of a Bill enhancing the capacity of the Crown to use members of Parliament for executive purposes. The committee considered the effect this might have on the independence of members and therefore on the Parliament would be reduced by the absence of any pecuniary advantage to the members. However, the committee also noted that particular Crown appointments are likely to be attractive to members for various reasons, in particular, the benefit of public exposure and the opportunity to demonstrate administrative skills and therefore ministerial potential. AD 1999/4, pp. 32–33, paras 8.6–8.13.

## 6.4 Membership of Legislative Assembly

### 6.4.1 *FLP issue*

There is an inherent connection between respect for the institution of Parliament and the right of a person to be elected as a member of Parliament.

### 6.4.2 *Restrictions on candidature*

#### **Scrutiny Committee**

The Scrutiny Committee looks at restrictions or prohibitions on nomination for election to State Parliament on the basis of whether they undermine the institution of Parliament. It has noted Parliaments have always legislated a range of qualifications and disqualifications relating to voting in, and candidature for, elections. AD 2002/1, pp. 18–19, paras 3–14.

The Scrutiny Committee referred to Parliament the question of whether provisions which either directly or indirectly encroached on the capacity of political parties to run their own affairs without outside interference, and on the capacity of persons to join and remain members of the organisations, had sufficient regard to the institution of Parliament. The provisions were designed to increase the honesty of internal ballots and to prevent offenders from qualifying as candidates. AD 2002/3, pp. 9–10.

### 6.4.3 *Penalty for early resignations*

#### **Scrutiny Committee**

The Scrutiny Committee considered a Bill imposing liability for by-election costs on members who resign early without due cause may affect the standing and functioning of Parliament (and, accordingly, may affect the institution of Parliament) by—

- (a) adding to the perceived disadvantages of being elected to Parliament and thereby deterring potential candidates; and
- (b) effectively forcing a member to remain in Parliament for fear of incurring the liability despite the member being unable or unwilling to continue to perform the duties of a member; and
- (c) resulting in the undermining of the political rights of the member's constituents because the member's electorate would not be effectively represented in the Parliament by an incapacitated or unwilling member who is fearful of resigning. AD 2002/2, pp. 8–9, para. 39.

#### 6.4.4 *Automatic vacation of office if change of political status*

#### **Scrutiny Committee**

The Scrutiny Committee considered a Bill providing that a member's seat in the Assembly becomes vacant if—

- (a) a member elected as a candidate of a political party resigns from the party or joins another party; or
- (b) a member elected as an independent joins a party.

The committee stated the Bill's general philosophy was consistent with the FLP that legislation should have sufficient regard to the institution of Parliament (AD 2003/10, p. 14, para. 34) as 'representations made by parliamentary candidates as to their political affiliation or non-affiliation are fundamental representations upon which the electorate bases its vote...What is at stake here [if members change political status] is the accountability of members to their electorates and the level of public confidence in their integrity.' AD 2003/10, p. 9, para. 7. The committee went on to state that 'Two clear benefits which flow from this bill are a reduction in the likelihood of political corruption and the maintenance of political stability.' AD 2003/10, p. 10, para. 12.

However, the committee had the following concerns—

- the cost of by-elections. AD 2003/10, p. 11, para. 17
- by-elections leave electorates unrepresented and should be required to be held within a particular time. AD 2003/10, p. 11, para. 17 and p. 14, para. 30
- members might be discouraged from resigning from a political party where they can no longer accept party policy or from taking a stand on conscientious grounds. AD 2003/10, pp. 11–12, para. 18
- other betrayals of electoral trust were not dealt with. AD 2003/10, p. 12, para. 19
- merger and splitting of political parties were not allowed, creating an issue about constitutional validity on the basis that the implied freedom of political communication derived from the *Commonwealth Constitution* was infringed. AD 2003/10, pp. 12–13, paras 20–27.

## 6.5 National scheme legislation

### 6.5.1 *FLP issue*

Parliament's sovereign power to make laws for Queensland should not be compromised by administrative agreements made between Australian executive governments that bind the parties to obtain specific laws from their Parliaments without amendment by their Parliaments.

The need for governments of more than 1 parliamentary jurisdiction in a federation to agree on legislation to be passed in jurisdictions to some extent may cause a practical difficulty for the independence of their Parliaments.

Agreements tend to be negotiated administratively and are difficult to uniformly implement unless the legislatures of the jurisdictions accept the agreements, that is, do not amend proposed legislation that is agreed to administratively under the agreements.

A tension is therefore created between the efficient collaboration between the several jurisdictions of Australia and the independence of action of each of their sovereign Parliaments.

#### **Scrutiny Committee**

National schemes of legislation have been a source of considerable concern, both to the Queensland Scrutiny Committee and to its interstate and Commonwealth counterparts. See *Scrutiny of National Schemes of Legislation—a Position Paper of Representatives of Scrutiny of Legislation Committees throughout Australia*, October 1996.

The Scrutiny Committee's greatest objection to national schemes of legislation is when they involve predetermined legislative schemes. The committee takes the view that it has become ineffectual for members to propose amendments because of the stance taken by sponsoring Ministers that they have an obligation to keep to the terms of legislation agreed between various jurisdictions. AD 2006/4, pp. 1–2, paras 3–8; AD 2003/10, p. 1, paras 5–6; AD 2003/2, p. 15, paras 3–8; AD 2001, pp. 7–8, paras 6–12; AD 1998/2, pp. 73–74, paras 15.3–15.6; AD 1998/1, pp. 24–25, paras 3.3–3.8.

The Scrutiny Committee may discern the stance likely to be taken by the sponsoring Minister from the explanatory notes. See *Alert Digest No. 10 of 2003*, page 1, paragraph 7; *Alert Digest No. 3 of 2002*, page 1, paragraph 6.

The Scrutiny Committee has considered legislation drafted in Queensland and not in a predetermined form, or drafted in a way that incorporates Queensland drafting practices as well as modifications addressing local issues, is less objectionable. AD 2005/12, p. 20, para. 10; AD 2005/9, p. 8, para. 10; AD 2005/8, pp. 4–6, paras 13–22; AD 2004/5, pp. 20–21, paras 3–11; AD 2003/6, pp. 17–18, paras 9–15; AD 2002/11, pp. 35–36, paras 12–17.

### 6.5.2 *Queensland filters*

Concerns about the implementation of national scheme legislation can be considered by asking what filters are in place to control the implementation of new or amended national scheme legislation in Queensland.

#### **Scrutiny Committee**

*Amendment requiring approval of Queensland Act* The Scrutiny Committee has found it acceptable that a Queensland Act was required to give effect in Queensland to amendments to a Commonwealth Act (carried out by a Commonwealth regulation) that was otherwise adopted in Queensland.

*Adoption by incorporation of a fixed—as opposed to ambulatory—instrument* The Scrutiny Committee has not considered objectionable the adoption, by incorporation, of a fixed instrument, but has considered that the adoption, by incorporation, of an ambulatory instrument should be kept to a minimum because it has the tendency to undermine the institution of Parliament by effectively delegating the making of Queensland law to outside bodies. AD 2003/7, pp. 17–19, paras 23–37.

## 6.6 An informed Parliament

### 6.6.1 *FLP issue*

The institution of Parliament is enhanced by Parliament being better informed about the nature and effect of proposed primary legislation which it is debating and of subordinate legislation which has been laid before it. AD 2003/10, p. 20, para. 11.

### Scrutiny Committee

*Private property impact studies* The Scrutiny Committee considered that a proposed reform providing for the preparation of private property impact studies for new primary and subordinate legislation, to the extent the reform would have the effect of better informing the Parliament, had sufficient regard to, and would indeed enhance, the institution of Parliament. AD 2003/10, p. 20, para. 12.

*Commercially sensitive information not disclosed to Parliament* The Scrutiny Committee has noted there is an inherent tension between a need to maintain the confidentiality of commercially sensitive information and the need for executive government to be accountable to Parliament. The Scrutiny Committee has noted this tension without objection in the following matters—

- Toll roads AD 2005/13, pp. 21–22, paras 3–10.

## 6.7 Information about Parliament

### 6.7.1 *FLP issue*

The institution of Parliament is enhanced by legislative provisions facilitating the dissemination of parliamentary proceedings. AD 2003/2, p. 13, paras 5 and 7.

#### Scrutiny Committee

The Scrutiny Committee has considered that a Bill to facilitate the broadcasting of parliamentary proceedings, including broadcasts via the internet, would enhance the institution of Parliament. AD 2003/2, p. 13, paras 6–7.

## Chapter 7: Other fundamental legislative principles

### Scope of chapter

Chapters 2 to 6 were concerned with fundamental legislative principles about the rights and liberties of individuals and the institution of Parliament. This chapter examines other fundamental legislative principles not necessarily about those matters.

### Background

The basic definition of fundamental legislative principles provided by the *Legislative Standards Act 1992* is set out in section 4(1), namely, that they are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. All other definitions of the principles in the Act are inclusory only and do not limit the concept of fundamental legislative principles.

## 7.1 Independence of the judiciary

7.1.1 *FLP issue*                      Legislation should not prejudice the independence of the judiciary.

### Scrutiny Committee

The Scrutiny Committee has recognised that an independent judiciary is an essential element of a parliamentary democracy based on the rule of law, a cornerstone of our democratic system of government. AD 2005/6, p. 12, para. 13; AD 2003/11, p. 17, para. 5.

7.1.2 *Administration of the judiciary*

### Scrutiny Committee

*Transfer system* The Scrutiny Committee has referred to Parliament, without express objection, a proposed system dealing with transfers of magistrates from 1 place to another for consideration of whether the system had sufficient regard to the independence of the judiciary. AD 2003/11, pp. 17–18, paras 3–15.

7.1.3 *Non judicial  
instruction or oversight of  
judicial decision making*

**Scrutiny Committee**

*External Instruction* The Scrutiny Committee has expressed the view that compulsory instruction of the judiciary from a non judicial source, with a view to ensuring ‘community’ input into judicial decision making, could be said to place fairly direct strains on judicial independence. AD 2005/6, pp. 11–12, para. 13

*Oversight, monitoring by external body* The Scrutiny Committee has expressed the view that external oversighting or monitoring of judicial decision making by a non judicial body, with a view to ensuring ‘community’ input into judicial decision making, may place fairly direct strains on judicial independence depending on the precise nature of the body’s role. AD 2005/6, p. 11, para. 13.



# *Appendixes*

## Appendix A: Legislative Standards Act 1992, section 4

### 4 Meaning of *fundamental legislative principles*

- (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.<sup>1</sup>
- (2) The principles include requiring that legislation has sufficient regard to—
  - (a) rights and liberties of individuals; and
  - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
  - (a) makes rights 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 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

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1. Under section 7 (Functions of office), a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

- (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.

## Appendix B: Parliament of Queensland Act 2001, section 103

### 103 Area of responsibility of Scrutiny of Legislation Committee

- (1) The Scrutiny of Legislation Committee's area of responsibility is to consider—
  - (a) the application of fundamental legislative principles<sup>1</sup> 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).

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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.

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