



# **Personalised Transport Ombudsman Bill 2019**

**Report No. 17, 56<sup>th</sup> Parliament**  
**Transport and Public Works Committee**  
**March 2019**

## **Transport and Public Works Committee**

|                     |   |
|---------------------|---|
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## Abbreviations

|                 |  |
|-----------------|--|
| LSA             | <i>Legislative Standards Act 1992</i>                                    |
| the committee   | Transport and Public Works Committee                                     |
| DA              | driver authorisation   |
| Department/DTMR | Department of Transport and Main Roads                                   |
| FAA             | <i>Financial Accountability Act 2009</i>                                 |
| FLP             | Fundamental legislative principle  |
| FTE             | Full Time Equivalent   |
| OA              | operator accreditation   |
| OQPC            | Office of the Parliamentary Counsel                                      |
| OPTO            | Office of the Personalised Transport Ombudsman                           |
| PTIRG           | Personalised Transport Industry Reference Group                          |
| PTO             | Personalised Transport Ombudsman   |
| PWUC            | Former Public Works and Utilities Committee, 55 <sup>th</sup> Parliament |
| QCU             | Queensland Council of Unions   |
| QIRC            | Queensland Industrial Relations Commission                               |
| RSDAA           | Ride Share Drivers' Association of Australia                             |
| RTI Act         | <i>Right to Information Act 2009</i>                                     |
| TCQ             | Taxi Council of Queensland   |
| TLO Qld         | Queensland Taxi License Owner's Association Incorporated                 |
| TOPTA           | <i>Transport Operations (Passenger Transport) Act 1994</i>               |
| TWU             | Transport Workers Union  |

## Chair's foreword

This report presents a summary of the Transport and Public Works Committee's examination of the Personalised Transport Ombudsman Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee heard evidence from stakeholders highlighting their concerns and requesting changes to the Bill. The committee has made eight recommendations which seek to address those concerns.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Transport and Main Roads.

I commend this report to the House.

A handwritten signature in black ink that reads "Shane King". The signature is written in a cursive, slightly slanted style.

Shane King MP  
Chair

## Recommendations

### **Recommendation 1** **4**

The committee recommends the Personalised Transport Ombudsman Bill 2019 be passed.

### **Recommendation 2** **10**

The committee recommends the Minister for Transport and Main Roads consider amending the Bill to remove the time period a potential candidate has been absent from the industry and only exclude current industry participants.

### **Recommendation 3** **13**

The committee recommends the Minister for Transport and Main Roads reconsider the Personalised Transport Ombudsman's ability to make binding decisions.

### **Recommendation 4** **13**

The committee recommends the Minister for Transport and Main Roads clarify in the second reading of the Bill whether representative bodies will be able to access the services of the Personalised Transport Ombudsman on behalf of their members.

### **Recommendation 5** **15**

The committee recommends the Minister for Transport and Main Roads amend the Bill to include a requirement that the Personalised Transport Ombudsman publicly report on systemic issues and complaints statistics.

### **Recommendation 6** **17**

The committee recommends the Minister for Transport and Main Roads reconsider the proposed funding arrangements to ensure that sufficient resources are made available for the Personalised Transport Ombudsman to undertake all aspects of the role efficiently and effectively.

### **Recommendation 7** **18**

The committee recommends the Minister for Transport and Main Roads ensure that the Personalised Transport Ombudsman reports directly to the Minister.

### **Recommendation 8** **32**

The committee recommends the Minister for Transport and Main Roads clarify in the second reading of the Bill how allowing a regulation to prescribe matters that a court must take into account in considering a claim has sufficient regard not only to the institution of Parliament but also to the institution of the courts.





## 1 Introduction

### 1.1 Role of the committee

The Transport and Public Works Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility are:

- Transport and Main Roads
- Housing, Public Works, Digital Technology and Sport.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

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

The Personalised Transport Ombudsman Bill 2019 (Bill) was introduced into the Legislative Assembly and referred to the committee on 13 February 2019. The committee is to report to the Legislative Assembly by 29 March 2019.

### 1.2 Inquiry process

On 15 February 2019, the committee invited stakeholders and subscribers to make written submissions on the Bill. Submissions closed on 4 March 2019. Nine submissions were received. Refer Appendix A for a list of submissions.

The committee received a public briefing about the Bill from the Department of Transport and Main Roads (department/DTMR) on 25 February 2019. A transcript is published on the committee's web page. Refer Appendix B for a list of officials.

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 13 March 2019. Refer Appendix C for a list of witnesses.

The submissions, correspondence from the department, and transcripts of the briefing and hearing are available on the committee's webpage.

### 1.3 Policy objectives of the Bill

The explanatory notes detail that the purpose of the Bill is:

- To establish the Personalised Transport Ombudsman (PTO) to help resolve complaints relating to personalised transport services
- Support the protection of fare revenue under the new ticking solution
- Clarify and improve the enforceability of existing provisions of the *Transport Operations (Passenger Transport) Act 1994* (TOPTA)

### 1.4 Consultation on the Bill

Consultation was undertaken on the three separate aspects of the Bill.

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<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

### 1.4.1 Personalised Transport Ombudsman

The explanatory notes state that extensive community and industry consultation regarding the personalised transport reforms were undertaken as part of the 'Opportunities for Personalised Transport Review' and by the former Public Works and Utilities Committee (PWUC) – Refer section 2.1 below.

The department also undertook consultation on the proposed PTO with a range of industry stakeholders both during the policy development phase and the drafting of the Bill.

The explanatory notes identify that:

*...some industry representatives further advocated for the establishment of an independent commission for the personalised transport industry, which would be responsible for licensing, compliance and enforcement, and policy development. This proposal was not supported by the government as it would duplicate existing functions of the Department, did not meet the Queensland Government's Public Interest Map test and would significantly increase implementation and ongoing administration costs for industry and government.<sup>2</sup>*

The department advised that one of the concerns raised during the consultation process was the prospect of reprisals against participants who make a complaint. The department advised that, in response to this issue, additional reprisal protections were included in the Bill.

The department also advised that feedback received during the consultation suggested that the PTO should be able to make binding decisions or recommendations. This suggestion was not agreed to with the department advising:

*...if the bill gave the Personalised Transport Ombudsman power to make binding decisions, participants would be more likely to need legal representation which would significantly increase the cost to participants.<sup>3</sup>*

These issues will be discussed further in the relevant sections of this report.

A number of stakeholders detailed their concerns regarding the consultation process undertaken in relation to the Bill. The Transport Workers Union (TWU) advised that they made extensive submissions but those submissions had been largely ignored.<sup>4</sup> The TWU advised:

*The proposal now being made concerning a "Personalised Transport Ombudsman ("PTO") was not made or supported by any party making a submission on the Bill. It is a proposal of the Department of Transport and Main Roads. The TWU doesn't support the proposal...<sup>5</sup>*

Reasons cited by the TWU for not supporting the Bill include:

- industry does not have ownership of the proposal
- it does not include statutory powers to arbitrate disputes
- it does not include statutory powers to arbitrate working conditions
- eligibility for appointment to the PTO position.<sup>6</sup>

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<sup>2</sup> Explanatory notes, p 8.

<sup>3</sup> Public briefing transcript, Brisbane, 25 February 2019, p 2.

<sup>4</sup> Submission 1, p 1.

<sup>5</sup> Submission 1, p 1.

<sup>6</sup> Submission 1, pp 1-2.

The Queensland Council of Unions (QCU) also did not support the Bill advising:

*The QCU opposes the creation of an Ombudsmen position to deal with matters pertaining to workplace disputes, which is essentially what driver complaints amount to. Tribunals such as the QIRC or Fair Work Commission are already in existence and are independent and have expertise in the field of dispute resolution in workplaces. To create other positions or offices that purport to deal with workplace complaints has the potential to undermine the existing institution.<sup>7</sup>*

The Taxi Council of Queensland (TCQ) advised that they had previously supported the concept of a PTO believing that a PTO would take a holistic approach for the regulation of the personalised transport sector and could discharge its responsibilities more effectively than the department. TCQ advised they have a number of concerns with the Bill including:

- the appointment of the PTO will be after the industry transitions to a new regulatory environment
- the PTO will not handle complaints associated with breaches of legislation/regulation and so will be unable to assist sector participants to cope with issues such as illegal activities of booked-hire drivers or overcharging by drivers as these responsibilities will remain with DTMR
- the PTO will not deal with complaints about DTMR or its activities
- the PTO will only operate as an avenue for escalation of mediation (but not arbitration)<sup>8</sup>

TCQ advised:

*...the Bill presents as establishing a PT Ombudsman that may become a “toothless tiger”. With the role being so restricted in scope, it risks being of diminished utility for stakeholders in the Personalised Transport sector. Of concern for TCQ and our members, many of the substantive and pressing issues for the sector appear to be outside the purview proposed for the PT Ombudsman.<sup>9</sup>*

The Ride Share Drivers’ Association of Australia (RSDAA) advised:

*It is a very poorly drafted piece of legislation. I have stated publicly elsewhere that this legislation is nothing more than a smokescreen and a waste of taxpayer funds. The person appointed to this role will have no real power to adjudicate a satisfactory outcome, nor will he or she have the power to make persons or corporations comply with the legislation.<sup>10</sup>*

In response to the issue of industry ownership of the proposal, the department advised:

*The personalised transport industry, through the Personalised Transport Industry Reference Group (PTIRG), was consulted during the development of the PTO proposal.*

*The PTO is consistent with the intent of recommendations from the former Public Works and Utilities Committee of the Queensland Parliament (and subsequent Government Response), following its consideration of the Transport and Other Legislation (Personalised Transport Reform) Amendment Bill 2017. The personalised transport reforms are now in Stage 3, which is about monitoring and evaluating the changes that have been introduced earlier in the reforms. Stage 3 will be delivered in consultation with industry, including through the PTIRG.<sup>11</sup>*

<sup>7</sup> Submission 5, p 2.

<sup>8</sup> Submission 8, pp 1-2

<sup>9</sup> Submission 8, p 2.

<sup>10</sup> Public hearing transcript, Brisbane, 13 March 2019, p 5.

<sup>11</sup> Correspondence from DTMR dated 18 March 2019, p 1.

#### 1.4.1.1 *Committee comment*

The committee wishes to highlight that the recommendation of PWUC was that ‘*an ombudsman, or equivalent entity, is allocated responsibility for dealing with disputes in the industry in a timely manner*’. Whilst the committee is satisfied that the Personalised Transport Ombudsman is to be established, it is clear to the committee that the proposal, as included in the Bill, is not as recommended by PWUC.

Refer section 2.1.1 of this report for further discussion.

The committee also notes that the PWUC also made additional recommendations which address some of the issues raised by stakeholders as follows:

#### *Recommendation 12:*

*The committee recommends the Minister:*

- *facilitate development of an industry standard for driver conditions in the personalised transport industry in consultation with the Personalised Transport Industry Reference Group*
- *commit to a review of driver working conditions 18 months after the removal of the legislative requirement for bailment agreements to ensure current standards are being maintained, and*
- *report to Parliament on the review findings in relation to whether the independent contractor and bailment arrangements have upheld appropriate industrial conditions.*<sup>12</sup>

#### **1.4.2 New ticketing solution**

The explanatory notes the department undertook consultation, in relation to the new ticketing solution, with relevant industry stakeholders. The explanatory notes state:

*Key stakeholders across industry and government were also consulted during the procurement phase of the new ticketing solution, which included specification design and market sounding.*

*Although direct, specific consultation with public transport customers and industry stakeholders was constrained by probity restrictions, general insights were obtained and applied through customer research, focus groups and panel surveys to ensure that the technical specifications of the new ticketing solution would meet customer needs.*<sup>13</sup>

#### **1.5 Should the Bill be passed?**

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders’ views, and information provided by the department, the committee recommends that the Bill be passed.

#### **Recommendation 1**

The committee recommends the Personalised Transport Ombudsman Bill 2019 be passed.

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<sup>12</sup> Public Works and Utilities Committee, Report No 37, 55<sup>th</sup> Parliament – Transport and Other Legislation (Personalised Transport Reform) Amendment Bill 2017, May 2017, p 65.

<sup>13</sup> Explanatory notes, pp 8-9.

## 2 Examination of the Bill

This section discusses issues raised during the committee’s examination of the Bill.

### 2.1 Background

#### 2.1.1 Personalised Transport Ombudsman

Personalised transport reform in Queensland commenced in October 2015 when the Queensland Government commissioned an independent review of personalised transport services. A white paper on ‘*The future of Queensland’s personalised transport industry*’ was published in July 2016. In August 2016, the government released ‘*Queensland’s Personalised Transport Horizon – Five Year Strategic Plan for Personalised Transport Services 2016-2021*’ (Strategic Plan).

The Strategic Plan involves the development of a new framework in order to ensure ‘Queenslanders have safe, reliable and affordable personalised transport services and a sustainable and competitive industry to deliver them.’<sup>14</sup>

The government committed to introducing a new framework with the following time frame:



Source: Department of Transport and Main Roads, Queensland’s Personalised Transport Reform Framework, A new framework for the personalised transport industry, <https://personalisedtransport.tmr.qld.gov.au/a-new-framework-for-the-personalised-transport-industry>

The explanatory notes state that the government has delivered stages 1 and 2 of the Strategic Plan with most reforms implemented through the *Transport and Other Legislation (Personalised Transport Reform) Amendment Act 2017*.

In March 2017, the Transport and Other Legislation (Personalised Transport Reform) Amendment Bill 2017 was introduced into the Legislative Assembly. That Bill was considered by PWUC. PWUC tabled its report in May 2017, making 16 recommendations.<sup>15</sup> The government supported 15 of the 16 recommendations. The bill was passed, with amendment on 24 May 2017.

Recommendation 16 in the PWUC report was that:

*...that in order to ensure suitable administrative arrangements and independent oversight of the regulation of the personalised transport industry the Minister:*

- *ensure that an ombudsman, or equivalent entity, is allocated responsibility for dealing with disputes in the industry in a timely manner*

<sup>14</sup> Department of Transport and Main Roads, Queensland’s Personalised Transport Reform Framework, A new framework for the personalised transport industry, <https://personalisedtransport.tmr.qld.gov.au/a-new-framework-for-the-personalised-transport-industry>

<sup>15</sup> Public Works and Utilities Committee, Report No 37, 55<sup>th</sup> Parliament – Transport and Other Legislation (Personalised Transport Reform) Amendment Bill 2017, May 2017

- *create a senior position within the Department of Transport and Main Roads dedicated solely to the administration of the industry, and*
- *ensure appropriate mechanisms are in place for referring administrative disputes between parties in the industry to the Queensland Civil and Administrative Tribunal.*<sup>16</sup>

In its response to the report, the Government supported the recommendation and committed to:

*...establishing an ombudsman, or equivalent entity, to provide complaint monitoring, advisory and referral services to parties in the personalised transport industry, including customers and industry participants such as booking entities, licence holders, operators and drivers.*

*The establishment of this role and associated functions is a significant undertaking which requires comprehensive amendments to primary legislation. Due to the timeframes requiring that provisions of this Bill commence prior to 9 June, it has not been possible to include amendments in the Bill. However, the Government appreciates the importance of such an entity to certain parties in the industry and commits to introducing another Bill by the end of this year.*<sup>17</sup>

### **2.1.2 New ticketing solution**

In June 2018, the Minister for Transport and Main Roads, Hon Mark Bailey MP, announced that funding of \$371.1 million had been allocated to roll out a new integrated ticketing system to enable commuters to be able to use their contactless debit or credit cards, smart phones and smart watches to pay for public transport trips in addition to the existing *go card* and paper ticket system. The roll out will include new readers, quicker fare gates and system equipment, an updated app platform and real-time and new ticketing equipment on urban buses.<sup>18</sup>

The Minister also advised that the current *go card* operator, Cubic, had been selected as the successful tenderer following a competitive global procurement process.<sup>19</sup>

The new ticketing system will be implemented in the metropolitan south east and 18 regional areas including: Cairns, Innisfail, Townsville and Magnetic Island, Bowen, Airlie Beach and Proserpine, Mackay, Yeppoon, Rockhampton, Gladstone, Bundaberg, Maryborough, Hervey Bay, Gympie, Sunshine Coast hinterland, North Stradbroke Island, Kilcoy/Woodford to Caboolture, Toowoomba and Warwick.<sup>20</sup>

## **2.2 Personalised Transport Ombudsman**

The department advised:

*The bill proposes a comprehensive framework to establish the office of the Personalised Transport Ombudsman including its functions, powers and responsibilities. Importantly, the amendments in the bill will ensure the Personalised Transport Ombudsman can operate independently in helping to resolve complaints relating to personalised transport services from anyone. The Personalised Transport Ombudsman is considered the most effective way to help resolve complaints relating to personalised transport services. Other options considered to*

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<sup>16</sup> Public Works and Utilities Committee, Report No 37, 55<sup>th</sup> Parliament – Transport and Other Legislation (Personalised Transport Reform) Amendment Bill 2017, May 2017, p 81.

<sup>17</sup> Queensland Government, Response to Public Works and Utilities Committee, Report No 37, 55<sup>th</sup> Parliament, May 2017, p. 8

<sup>18</sup> Hon Mark Bailey MP, Minister for Transport and Public Works, ‘Palaszczuk Government adopts hi-tech transport payment across Queensland’, 20 June 2018.

<sup>19</sup> Hon Mark Bailey MP, Minister for Transport and Public Works, ‘Palaszczuk Government adopts hi-tech transport payment across Queensland’, 20 June 2018.

<sup>20</sup> Hon Mark Bailey MP, Minister for Transport and Public Works, ‘Palaszczuk Government adopts hi-tech transport payment across Queensland’, 20 June 2018.

achieve these policy objectives included self-regulation, a complaints helpline and an independent regulator with complaints functions. The establishment of an independent regulator was not supported by the former committee.

The Personalised Transport Ombudsman framework has been designed to deliver a low-cost model readily accessible to all industry participants. However, as is the case in other jurisdictions, Queensland's personalised transport industry continues to adjust, innovate and evolve in response to the new regulatory framework. For this reason, the volume and nature of complaints the Office of the Personalised Transport Ombudsman may receive is difficult to estimate. However, the bill includes provisions that require the Personalised Transport Ombudsman to be reviewed within three years of its establishment. This review will be an important opportunity to ensure the role, scope and function of the ombudsman is effective and that its establishment is delivering good outcomes for industry participants and customers.

Reflective of the new and evolving industry environment, in addition to the complaints resolution and mediation functions the Personalised Transport Ombudsman will also be able to provide advisory services to stakeholders. Advisory services may involve advice or referrals, depending on the issues and which government service or entity can best assist with a matter. Additionally, the minister may ask the Personalised Transport Ombudsman to review and report on matters about personalised transport services. The Personalised Transport Ombudsman may also decide to report to the minister about systemic issues it has identified. Any advice given to the minister by the Personalised Transport Ombudsman may lead to a policy or regulatory response by government.<sup>21</sup>

### 2.2.1 Commencement

Under 2 of the Bill, provisions relating to the PTO will commence on Royal Assent. The department confirmed that they have allowed a minimum of six months following passage or consideration of the legislation to establish the office and anticipate the office would be operational in early 2020.<sup>22</sup>

### 2.2.2 Appointment

The Bill provides that the PTO will be appointed by the Governor in Council, on terms decided by the Governor in Council, for a term of not more than three years. However, the PTO may be re-appointed but for a total period of not more than 10 years. The explanatory notes state:

*To ensure the PTO's independence, the employment terms contained in the Public Service Act 2008 will not apply. In line with section 25 of the Acts Interpretation Act 1954, the PTO's appointment may also be terminated by the Governor in Council.*<sup>23</sup>

However, the Bill allows for the preservation of public service employment rights, if a person is appointed as the PTO is eligible to those rights. The explanatory notes state this provision is consistent with similar approaches in other statutory appointment instruments, to ensure the recognition of service remains while the person is appointed outside the *Public Service Act 2008*.<sup>24</sup>

The Bill (Clause section 12) sets out the grounds on which a person can be disqualified from becoming, or continuing as, the PTO. These disqualifications include if the person:

- a) has a conviction, other than a spent conviction, for an indictable offence
- b) is an insolvent under administration

<sup>21</sup> Public briefing transcript, Brisbane, 25 February 2019, p 2.

<sup>22</sup> Public briefing transcript, Brisbane, 25 February 2019, p 6.

<sup>23</sup> Explanatory notes, p 10.

<sup>24</sup> Explanatory notes, pp 11-12.

- c) is disqualified from managing corporations under the Corporations Act, part 2D.6
- d) is a member of the Parliament of the State, another State or the Commonwealth
- e) holds office as the mayor or a councillor of a local government
- f) holds an office in another State equivalent to an office mentioned in paragraph (e)
- g) holds, or has held within the previous 5 years, a personalised transport licence
- h) is an employee, member or representative of an advocacy group, peak body or trade union that is involved in personalised transport services
- i) has been, within the previous 5 years, an employee, member or representative of an advocacy group, peak body or trade union that was involved in personalised transport services when the person was an employee, member or representative
- j) is an executive officer of a corporation, or a trustee of a trust, that holds or has held within the previous 5 years, a personalised transport licence.

The explanatory notes state that:

*The objective of having grounds for disqualification is to ensure the integrity of the PTO by preventing a person with criminal charges, insolvency, corporate disqualification or a conflict of interest from being the PTO.<sup>25</sup>*

The TWU highlighted their concern with this provision stating:

*Clause 12 of the Bill is clearly directed at preventing the appointment of “outsiders” from the public service. In one egregious example, any union official, peak council representative or advocacy member involved in personalised public transport in the last 5 years is ineligible for appointment. A cursory glance down the rest of clause 12 reveals similar exclusions designed to inhibit a merit based appointment and promote public service cronyism.<sup>26</sup>*

QCU advised:

*...clause 12 has the effect of excluding union officials, members and advocates from appointment as the Ombudsmen. Despite our opposition to the position we have grave concerns with such a discriminatory provision existing in any legislation.*

...

*Presumably the exclusion of a union official can only be considered a “conflict of interest” in this list of attributes in which case this is a complete misuse of the term. Having an understanding of an industry or workplace disputes does not constitute a conflict of interests.<sup>27</sup>*

QCU confirmed:

*...a conflict of interest is where you or someone close to you would benefit personally from whatever decision you make. That is quite distinct from someone who may have spent their career advocating a position. That is what concerns us the most ... if that is the purpose of it, that is not a conflict of interest.<sup>28</sup>*

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<sup>25</sup> Explanatory notes, p 11.

<sup>26</sup> Submission 1, p 2.

<sup>27</sup> Submission 5, p 2.

<sup>28</sup> Public hearing transcript, Brisbane, 13 March 2019, p 3.



This issue was also identified by the RSDAA who advised:

*The first major flaw with the proposed legislation is outlined in Section 12 on page 11, reading the subsection of this piece it is very apparent that any person who has had any involvement in the industry is completely barred from holding office. As an office bearer in an Association involved in representing drivers working in the “Booked Hire” area of the industry it is deeply concerning that a person who has no understanding of the industry is placed into a position where he or she is expected to hear complaints that could affect the livelihood of drivers.<sup>29</sup>*

However, Stephen Lacaze, held an alternative view, advising:

*...there was a suggestion that the ombudsman should necessary have industry experience. I will be the lonely voice here: I do not share that opinion. I think that distance could well be the saving of this office. Fresh eyes seeing the situation and applying, for want of a better term, the pub test to it might actually be what gets the office to in fact achieve anything, given the hobble that the legislation seems to be.<sup>30</sup>*

In relation to training of office holders relating to anti-corruption matters, the department advised:

*The Crime and Corruption Act 2001 applies to the Personalised Transport Ombudsman (the Ombudsman) and persons employed by the Office of the Personalised Transport Ombudsman (the Office of the Ombudsman).*

*Training requirements for a person employed by the Office of the Ombudsman may be determined by the Ombudsman, having regard to the person’s role and responsibilities. Specific training – including in relation to anti-corruption – for the Ombudsman, and persons employed by the Office of the Ombudsman, will be considered further as part of the implementation of the Ombudsman.*

*The Personalised Transport Ombudsman Bill 2019 (the Bill) includes provisions for ensuring the integrity of the Ombudsman. Clause 12 of the Bill aims to ensure the integrity of the Ombudsman by disqualifying a person with criminal charges, insolvency, corporate disqualification or a conflict of interest from being the Ombudsman. In addition, clause 102 of the Bill requires the Ombudsman to provide the Integrity Commissioner and the Minister a statement about the Ombudsman’s interests.<sup>31</sup>*

#### 2.2.2.1 Committee comment

The committee noted the concerns of stakeholders regarding 5 year exclusion period for employees, members or representatives of an advocacy group, peak body or trade union that was involved in personalised transport services when the person was an employee, member or representative. The committee considers this period to be unwarranted.

The committee considers that the selection process should seek to attract the best possible candidates, whether they have industry experience or not, and clarify that the candidate is not partisan in any way. The committee considers the legislation should preclude candidates who are current industry participants.

<sup>29</sup> Submission 3, p 2.

<sup>30</sup> Public hearing transcript, Brisbane, 13 March 2019, p 4.

<sup>31</sup> DTMR, correspondence dated 1 March 2019, p 3.

**Recommendation 2**

The committee recommends the Minister for Transport and Main Roads consider amending the Bill to remove the time period a potential candidate has been absent from the industry and only exclude current industry participants.

**2.2.3 Functions and powers**

Proposed section 17 of the Bill sets out the functions of the PTO as follows:

- a) to receive personalised transport complaints;
- b) to investigate personalised transport complaints and facilitate resolution of the complaints, including by using alternative dispute resolution;
- c) to give information or advice about resolving personalised transport complaints;
- d) to identify, and report to the Minister about, systemic issues arising from personalised transport complaints received by the ombudsman;
- e) to monitor the outcome of personalised transport complaints dealt with by other entities;
- f) to provide advice, or make recommendations, to the Minister about ways to prevent, minimise or resolve personalised transport complaints;
- g) to promote public awareness of the ombudsman’s functions;
- h) another function conferred on the personalised transport ombudsman under this Act or another Act.<sup>32</sup>

**2.2.4 Types of complaints to be considered by the Personalised Transport Ombudsman**

A number of submitters expressed concern regarding the powers proposed for the PTO.<sup>33</sup>

The RSDAA highlighted their concern that the PTO will ‘have no real power other than reporting back to the Minister’.<sup>34</sup> The RSDAA advised:

*...it is suffice to say that the whole of the legislation is flawed because the Ombudsman will have no real powers to compel parties to be bound to any results.<sup>35</sup>*

Whilst welcoming the establishment of the PTO, the Queensland Taxi License Owner’s Association Incorporated (TLO Qld) advised:

*...it would seem that the proposed Bill deprives that office of the ability to even investigate grievances that arise from actions of government and results of policy implementation.*

...

*It is our position, that notions of “Industry wide fairness” including the much referred to “level playing field” or “same job same rules” should be well within the scope of such an office to hear, investigate and report on.<sup>36</sup>*

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<sup>32</sup> Personalised Transport Ombudsman Bill 2019, clause 17.

<sup>33</sup> Refer submission nos 1, 2, 3, 4, 5, 6, 7, 8 and 9.

<sup>34</sup> Submission 3, p 3.

<sup>35</sup> Submission 3, p 4.

<sup>36</sup> Submission 4, p 2.

The QCU also highlighted their concern that the PTO will not have any power to intervene in the relationship between drivers and their principals. They advised:

*...low pay and unsafe working conditions continue to exist as a feature of the industry. Unfortunately this unacceptable position does not appear to be likely to be rectified without a regulator that has any power to intervene in the relationship between drivers and their principal.<sup>37</sup>*

Another submitter advised:

*The effectiveness of the Ombudsman is likely to be inappropriately restricted by the legislated limited authority of the Ombudsman – eg non-binding reports, limited penalties for non-cooperation with investigations, uncertainties regarding effectiveness of warrants to gather information from entities that have been reported to use complex Information Technology methods to avoid compliance with authorities and to hide information from scrutiny.<sup>38</sup>*

TCQ advised that in their view:

*...the Government would get better value for taxpayers and stakeholders in the Personalised Transport sector by expanding the purview of the PT Ombudsman to address a wider range of matters.<sup>39</sup>*

At its public hearing, TCQ advised:

*We recognise that there are limitations on the role of the ombudsman. Some of those limitations make sense to us in terms of efficiency, but others risk impeding the ombudsman going about and serving the industry in a worthwhile and useful way. ...our advice to the government is that the money could be better spent elsewhere, but if the money is to establish an ombudsman then we would like the very best ombudsman the sector can get. In that regard, we would like to see the ombudsman focused on the real issues as opposed to possible, theoretical issues that can be dealt with elsewhere.<sup>40</sup>*

TCQ also highlighted their concern that:

*We worry that, as currently constructed, the ombudsman will conduct an investigation and then there will be many people who do not participate in it simply because they do not see it going anywhere.<sup>41</sup>*

#### 2.2.4.1 Vexatious complaints

The committee sought advice from the department regarding the issue of drivers defending themselves against vexatious passenger complaints. The department responded that the PTO would make a preliminary assessment of the complaint and if they decided that the complaint was vexatious or frivolous, the PTO will have sufficient power to make a decision not to proceed further with the complaint, including the power to refuse to investigate.<sup>42</sup>

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<sup>37</sup> Submission 5, p 1.

<sup>38</sup> Submission 6, p 2.

<sup>39</sup> Submission 8, p 2.

<sup>40</sup> Public hearing transcript, Brisbane, 13 March 2019, p 8.

<sup>41</sup> Public hearing transcript, Brisbane, 13 March 2019, p 8.

<sup>42</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

The RSDAA noted that:

*Many drivers are very unfairly “deactivated” from ride share platforms on the vexatious complaints of riders, who’s [sic] privacy is protected by the operator. No natural justice is afforded to the accused. This is a very real situation affecting ride share drivers and this Act will do nothing to alleviate that situation.*<sup>43</sup>

#### 2.2.4.2 Conciliation and arbitration of disputes

The TWU advised that they see no utility in creating the position of a PTO, stating:

*Not giving the PTO any statutory powers to arbitrate disputes is totally unsatisfactory. Large multi-national companies such as UberX and other local taxi entities are unlikely to make bone [sic] fide offers to settle matters if the PTO can be safely ignored once conciliation is over.*<sup>44</sup>

The TWU consider:

*...the only means of addressing the malaise is to make provision for independent conciliation and arbitration of disputes, as well as the ability to set reasonable minimum conditions for rideshare and bailee taxi drivers.*<sup>45</sup>

Submitter, Stephen Lacaze, highlighted his concerns regarding a number of areas where the PTO will have limited powers including:

- complaints by workers in the industry to raise matters where ‘Booking Entities’ fail to comply with legislated or regulated requirements
- complaints by workers in the industry for workplace conditions, including appropriate access to risk management strategies and documentation
- complaints by workers in the industry in regard to disciplinary processes, practices or outcomes by Booking Entities, including financial penalties, withdrawal of access and/or imposition of access fees
- complaints by workers about remuneration<sup>46</sup>

The RSDAA advised:

*The Ombudsman needs the power to provide the adjudication on a complaint, and also the power to fine, or withdraw operating licences if complaints are found to breach the legislation.*<sup>47</sup>

In its response to this issue, the department advised:

*The PTO will have discretion to investigate a wide range of complaints, including complaints from drivers about working conditions or the allocation of jobs by a booking entity. To address concerns about a booking entity refusing to re-affiliate a driver who makes a complaint, reprisal protections have been included in the Bill in clauses 55 and 56. The protections aim to encourage aggrieved persons to make complaints to the PTO without the risk of being penalised for making a complaint. An example of a reprisal would be refusing to provide work to a person because the person makes a complaint to the PTO.*<sup>48</sup>

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<sup>43</sup> Submission 2, p 3.

<sup>44</sup> Submission 1, p 1.

<sup>45</sup> Submission 1, p 2.

<sup>46</sup> Submission 2, p 2.

<sup>47</sup> Submission 3, p 4.

<sup>48</sup> DTMR, correspondence dated 18 March 2019, p 2.

### 2.2.4.3 *Committee comment*

The committee noted stakeholders' concerns regarding the PTO's inability to make binding decisions and how this may impact the PTO's ability to effectively undertake the role, as outlined in the objectives of the Bill.

#### **Recommendation 3**

The committee recommends the Minister for Transport and Main Roads reconsider the Personalised Transport Ombudsman's ability to make binding decisions.

The committee was also unclear regarding the ability of representative bodies to access the PTO's services for their members.

#### **Recommendation 4**

The committee recommends the Minister for Transport and Main Roads clarify in the second reading of the Bill whether representative bodies will be able to access the services of the Personalised Transport Ombudsman on behalf of their members.

### 2.2.5 Reporting

The department advised that the Bill enables the PTO to provide a report on systemic issues to the Minister and that the Minister can specifically request the PTO to advise on particular matters.<sup>49</sup>

Clause 21 provides that the Minister may refer a matter relevant to the PTO's functions to the PTO and ask the PTO to review and give the Minister a written report about the matter that includes, for example, advice or recommendations about the matter. Clause 21(2) provides that the PTO must comply with the request.

The TLO Qld advised:

*To have faith in the independence of the office and its efficacy, it would seem that a prescribed reporting regime, dealing quite specifically with the number of received complaints, and subsequent actions, especially, rejections and "fail to proceeds" would be a worthwhile inclusion in the legislation.*<sup>50</sup>

Limousine Action Group (Queensland) Inc recommended that complaint data received by the PTO be outlined and explained in an annual report that is accessible to both industry bodies and the public.<sup>51</sup>

TLO Qld suggested that key performance indicators need to be built into the Bill to ensure there is public disclosure available to the public that show the complaints received, how they were dealt with, and the outcomes of those complaints.<sup>52</sup>

<sup>49</sup> Public briefing transcript, Brisbane, 25 February 2019, p 4.

<sup>50</sup> Submission 4, p 2.

<sup>51</sup> Submission 9, p 5.

<sup>52</sup> Public hearing transcript, Brisbane, 13 March 2019, p 9.

In response to the committee's questions regarding the publication of reports to the Minister, the department advised:

*Clause 17(d) of the Personalised Transport Ombudsman Bill 2019 provides that a function of the Personalised Transport Ombudsman is to identify, and report to the Minister about, systemic issues arising from personalised transport complaints received.*

*The Right to Information Act 2009 (RTI Act) would apply to documents held by the Personalised Transport Ombudsman. In this regard, a person could request a copy of a report given to the Minister about systemic issues, subject to the requirements of the RTI Act.*

*Further, the Personalised Transport Ombudsman may decide to publish a report about systemic issues subject to any confidentiality requirements.<sup>53</sup>*

In response to the committee's questions regarding annual reporting requirements, the department confirmed:

*Section 63 of the Financial Accountability Act 2009 (FAA) provides for the requirement to prepare and table an annual report in accordance with a financial and performance management standard.*

*During the drafting of the Personalised Transport Ombudsman Bill 2019, the Office of the Queensland Parliamentary Counsel advised that a general provision about preparing and tabling annual reports was not required, because Section 63 of the FAA applies to the Personalised Transport Ombudsman.*

*In addition, legislation establishing similar complaints bodies, including the Training Ombudsman, the Health Ombudsman and the Queensland Ombudsman, does not specify that annual reports must include information or statistics about complaints.*

*The Personalised Transport Ombudsman may include relevant information or statistics about complaints in an annual report in accordance with the FAA.<sup>54</sup>*

TWU advised:

*The introduction of a PTO is unlikely to make any headway into the problems facing the industry.<sup>55</sup>*

In its response to this issue, the department advised:

*The PTO will be responsible for helping to resolve complaints relating to the personalised transport industry in a timely and cost-effective way by providing, for example, a mediation service. If the PTO were to make binding decisions, including through arbitration processes, it would likely significantly increase the cost to participants of participating in the process and increase the time taken to resolve disputes. For example, if the PTO's decisions were binding participants to dispute resolution would probably need legal representation.*

*In addition, empowering the PTO to conciliate or arbitrate disputes would unhelpfully duplicate the functions of other independent bodies, including the following bodies in particular:*

- *the Fair Work Ombudsman or Fair Work Commission – employment issues;*
- *the Office of Fair Trading, Australian Competition and Consumer Commission or the Federal Court – unfair contract provisions; and*

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<sup>53</sup> DTMR, correspondence dated 1 March, 2019, p 2.

<sup>54</sup> DTMR, correspondence dated 1 March 2019, p 4.

<sup>55</sup> Submission 1, p 7.

- *the Queensland Civil and Administrative Tribunal – contractual disputes.*<sup>56</sup>

#### 2.2.5.1 *Committee comment*

The committee considers that reports prepared by the PTO about systemic issues should be published as a matter of course and individuals should not be required to utilise the RTI process in order to access this information.

The committee is of the view that further consideration is necessary regarding the reporting requirements in respect of the PTO's functions and powers.

#### **Recommendation 5**

The committee recommends the Minister for Transport and Main Roads amend the Bill to include a requirement that the Personalised Transport Ombudsman publicly report on systemic issues and complaints statistics.

#### **2.2.6 Grounds for refusal to investigate a complaint**

Clause 35 of the Bill outlines when the PTO must refuse to investigate, or continue to investigate, a personalised transport complaint. These include if the PTO reasonably believes the complaint relates to any of the following:

- the content of legislation or government policies
- a decision made by or made to implement a decision of Cabinet, a Minister or a chief executive officer
- an administrative action of an agency within the meaning of the *Ombudsman Act 2001*
- a matter that is or has been the subject of a proceeding.

In addition, the PTO must refuse to investigate or a continue to investigate a personalised transport complaint if the PTO reasonably suspects a matter raised in the complaint may constitute an offence under a transport Act and the PTO decides not to refer the matter to a chief executive (transport).

Clause 36 of the Bill outlines when the PTO may refuse to investigate, or continue to investigate, a personalised transport complaint. Whilst not limiting the grounds on which the PTO may refuse to investigate or continue to investigate, the grounds for refusal include if the PTO reasonably believes the following:

- a) the complaint is frivolous, vexatious or has not been made in good faith or is trivial or lacks substance or has been resolved or otherwise finalised by the ombudsman or another appropriate entity.
- b) the complainant does not have a sufficient interest in the matter raised in the complaint.
- c) the complainant has not made a reasonable attempt to resolve the matter raised in the complaint with the person who is the subject of the complaint and it would be reasonable in the circumstances to require the complainant to attempt to resolve the matter before the ombudsman investigates, or continues to investigate, the complaint.
- d) the complainant has a right of appeal, reference review or another remedy in relation to the complaint that has not exhausted, and it would be reasonable in the circumstances to require the complainant to exhaust the right or remedy before the ombudsman investigates, or continues to investigate, the complaint.

<sup>56</sup> DTMR, correspondence dated 18 March 2019, pp 1 – 2.

- e) the matter raised in the complaint may be or has been dealt with by another agency of the State or an agency of another state or the commonwealth that has the power to deal with the complaint.
- f) the circumstances giving rise to the complaint happened more than 12 months before the complaint was made.
- g) that, having regard to all the circumstances, it is unnecessary or unjustifiable to investigate, or continue to investigate the complaint.

The department advised that the PTO will have full discretion to refuse to investigate a complaint.<sup>57</sup> However, the department also advised that a key objective of the Bill is to ensure the Personalised Transport Ombudsman does not duplicate the functions of other entities, and for this reason, the PTO must refuse to investigate certain complaints—for example, complaints about legislation, or government policies or offences which occur under a transport act.<sup>58</sup>

In relation to commencement of the 12 month time limit referred to in clause 36(f). The department confirmed that the time limit refers to when the matter occurred.<sup>59</sup> However, the department advised that if the PTO believes that a matter warrants further investigation, they will still have the power to investigate.<sup>60</sup>

The department also confirmed there is no right of appeal provisions included in the Bill if the PTO refuses to investigate a complaint.<sup>61</sup>

### **2.2.7 Office structure and funding**

The explanatory notes state that additional costs will be incurred in the implementation and ongoing operation of the PTO and that these costs will provide for the PTO, the Office of the PTO (OPTO) and other associated resources such as office accommodation and information technology.<sup>62</sup>

With regard to the anticipated staffing structure of the PTO's office, the department advised:

*We are estimating that when it is first set up it will have up to four FTEs who will man the office, but it is really up to the ombudsman to make a call. Beyond that, if the volume of work is higher than that, they do have flexibility to increase or decrease subject to volumes.*<sup>63</sup>

The committee sought additional information from the department regarding the anticipated makeup of the staffing complement. The department advised that the finer details had yet to be worked through with the PTO and the Public Service Commission. However, they advised that the initial indicative funding allocations were based on an AO8 as a manager, supported by an AO7 and an AO6 and an AO3 or AO4 as administrative support staff.<sup>64</sup>

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<sup>57</sup> Public briefing transcript, Brisbane, 25 February 2019, p 2.

<sup>58</sup> Public briefing transcript, Brisbane, 25 February 2019, p 2.

<sup>59</sup> Public briefing transcript, Brisbane, 25 February 2019, p 7.

<sup>60</sup> Public briefing transcript, Brisbane, 25 February 2019, p 7.

<sup>61</sup> Public briefing transcript, Brisbane, 25 February 2019, p 7.

<sup>62</sup> Explanatory notes, p 3.

<sup>63</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>64</sup> Public briefing transcript, Brisbane, 25 February 2019, p 4.



The department also advised it is intended that the PTO would access a model of shared corporate support. The department advised:

*There would be an arrangement in place also for the ombudsman to be able to access some of that corporate support from the department – whether it is finance, HR systems and the like. Rather than replicating them, they would be able to access them.*<sup>65</sup>

The department confirmed that the initial budget allocation is approximately \$1.5 million annually.<sup>66</sup> However, further details are yet to be developed.<sup>67</sup>

A number of stakeholders raised the issue of resourcing for the PTO.<sup>68</sup> In response to this issue, the department advised:

*Funding has been allocated for a three-year term, with the Bill requiring the Minister to review the effectiveness of the Bill within three years after the commencement of the Bill. Support services, such as human resources, payroll, information technology and document management systems will be provided by the Department of Transport and Main Roads. This approach is similar to other entities, such as the Training Ombudsman.*<sup>69</sup>

#### 2.2.7.1 Committee comment

The committee is concerned that the budget available to the PTO may not be sufficient to provide appropriate resourcing to enable the PTO to perform the role in an efficient and effective manner. The committee notes the department's advice regarding the ability to access departmental support services; however, the committee considers the PTO should have stand-alone funding.

#### **Recommendation 6**

The committee recommends the Minister for Transport and Main Roads reconsider the proposed funding arrangements to ensure that sufficient resources are made available for the Personalised Transport Ombudsman to undertake all aspects of the role efficiently and effectively.

#### **2.2.8 Independence**

The committee sought assurance regarding how public perception of independence would be maintained. The department advised:

*Clause 20 of the Personalised Transport Ombudsman Bill 2019 (the Bill) provides that the Personalised Transport Ombudsman (the Ombudsman) is not subject to direction by any person – including the Minister – regarding the way the Ombudsman performs its functions, or the priority given to investigations. Clause 28 of the Bill provides that an officer of the Office of the Personalised Transport Ombudsman (the Office of the Ombudsman) is not subject to outside direction. This means that any person employed by the Office of the Ombudsman is only subject to direction by the Ombudsman or other employees. Further, persons employed by the Office of the Ombudsman must comply with the Public Sector Ethics Act 1994, including the ethics principles of integrity and impartiality.*

<sup>65</sup> Public briefing transcript, Brisbane, 25 February 2019, p 4.

<sup>66</sup> Public briefing transcript, Brisbane, 25 February 2019, p 5.

<sup>67</sup> Public briefing transcript, Brisbane, 25 February 2019, pp 5-6.

<sup>68</sup> Refer submission nos 1, 2, 5, 6 and 8.

<sup>69</sup> DTMR, correspondence dated 18 March 2019, p 5.

*Additionally, although full-time equivalent positions will be made available for use by the persons employed by the Ombudsman, recruitment for these positions will be based on merit. If the Ombudsman considers resourcing levels to be insufficient to effectively perform its functions, the Ombudsman may seek additional resource allocations from government.*<sup>70</sup>

The TLO Qld suggested the industry would like to see the Bill include provision for an ombudsman who is independent and has the ability to investigate government action.<sup>71</sup>

In response to this issue, the department advised:

*The PTO will not consider complaints about government policy as policy is the responsibility of the relevant Minister or Parliament. Further, it is the role of other bodies like the Queensland Civil and Administrative Tribunal or the Queensland Ombudsman to investigate administrative decisions of TMR.*<sup>72</sup>

#### 2.2.8.1 Committee comment

The committee noted the concerns of stakeholders regarding the independence and reporting arrangements of the PTO and considers that the PTO should report directly and solely to the Minister.

#### **Recommendation 7**

The committee recommends the Minister for Transport and Main Roads ensure that the Personalised Transport Ombudsman reports directly to the Minister.

#### **2.2.9 Workload**

A number of submitters expressed concern with the anticipated work load of the PTO. TCQ noted:

*The PT Ombudsman may deal with complaints from consumers about personalised transport services that are not breaches of regulation – however TMR apparently has no estimate of how many complaints of this kind there may be...*<sup>73</sup>

....

*The PT Ombudsman may deal with complaints between sector actors – however, again TMR apparently has no estimate of how many complaints of this kind there may be or indeed whether there will be any such complaints...*<sup>74</sup>

With regard to the anticipated workload of the PTO's office, the department advised:

*...it is difficult to predict what the volume of work will be for the ombudsman's office. We have done a lot of investigation in terms of equivalent or similar entities. It is similar to the Training Ombudsman and we have used that as a bit of a benchmark.*<sup>75</sup>

The department confirmed that it is not the intention the PTO will have a situation where the office is understaffed and cannot handle their workload.<sup>76</sup>

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<sup>70</sup> DTMR, correspondence dated 1 March 2019, p 1.

<sup>71</sup> Public hearing transcript, Brisbane, 13 March 2019, p 10.

<sup>72</sup> DTMR, correspondence dated 18 March 2019, p 5.

<sup>73</sup> Submission 8, p 1.

<sup>74</sup> Submission 8, p 2.

<sup>75</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>76</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

### 2.2.10 Protections from reprisals

The department advised that one concern raised during the consultation process was the prospect of reprisals against participants who make a complaint. They advised that an example of a reprisal would be refusing to provide work to a person because they had made a complaint. The department advised:

*In response to this, the bill includes reprisal protections for aggrieved persons to encourage them to make complaints to the Personalised Transport Ombudsman. These protections have been modelled on similar provisions in the Guardianship and Administration and Other Legislation Amendment Bill 2018 and the Public Interest Disclosure Act 2010.<sup>77</sup>*

### 2.2.11 Review

Clause 96 provides that:

- (1) The Minister must complete a review of the effectiveness of the Act and the operation of the office within 3 years after the commencement.
- (2) The Minister must table in the Legislative Assembly a report on the outcome of the review as soon as practicable after the review is complete.

TCQ recommended that:

*The Personalised Transport Ombudsman must be provided with clearly defined measures to ensure the objectives are being achieved. We recommend defining a regular review process of the performance of the Ombudsman based on objective measures. This will give personalised transport industry participants and passengers confidence in the office and ensures that the office will provide value for its funding. It will also give the Ombudsman clear direction in the role. The proposed Bill is very vague on details.<sup>78</sup>*

The department confirmed the Bill requires the Minister to review the effectiveness of the Bill within three years after the commencement of the Bill.<sup>79</sup>

### 2.2.12 Other issues raised by stakeholders

A number of other issues were raised by stakeholders which were outside the scope of the Bill. In response to these issues, the department advised that as part of Stage 3 of the personalised transport reforms, they will undertake a review of driver conditions in the personalised transport industry and that the personalised transport industry will be consulted on driver conditions through the PTIRG.<sup>80</sup>

#### 2.2.12.1 Committee comment

As noted previously, the PWUC previously made recommendations which address some of the issues raised by stakeholders.

## 2.3 New ticketing solution

The policy objective, as detailed in the explanatory notes, is to support the long-standing government policy of protecting fare revenue by enforcing fare evasion and ensuring only people entitled to a concession fare can access the benefit of the concession fare.<sup>81</sup>

<sup>77</sup> Public briefing transcript, Brisbane, 25 February 2019, p 2.

<sup>78</sup> Submission 9, p 4.

<sup>79</sup> DTMR, correspondence dated 18 March 2019, p 5.

<sup>80</sup> DTMR, correspondence dated 1 March 2019, pp 2-3.

<sup>81</sup> Explanatory notes, pp 1-2.

The explanatory notes state that the objective of the government policy is to reduce the overall impact of public passenger transport subsidies on the State's budget, ensuring the quality and sustainability of public passenger transport. The explanatory notes also state that part of this policy has also been to use unclaimed credit on dormant *go cards* to further improve public passenger transport.<sup>82</sup>

The amendments are designed to protect fare revenue by:

- relocating fare evasion and related offences to a regulation to provide greater flexibility to make changes to the regulation as ticketing technology develops
- providing continued support for the sharing of information to verify a person's entitlement to a concession in line with current practice
- providing evidentiary aids for fares and revenue protection devices
- making consequential amendments to provide for the continued use of unclaimed credit on unclaimed credit on dormant passenger accounts.<sup>83</sup>

The department advised:

*The new smart ticketing solution responds to customers' desire for more choice on how they pay for public transport. Once fully implemented, we will have a consistent ticketing system across South-East Queensland and 18 regional urban centres. The new system is being developed to ensure greater flexibility for the government to respond to changing technology and customer behaviour. The new smart ticketing solution will mean customers can pay for travel using contactless debit and credit cards, smart phones and wearable devices as well as continue to use current payment methods including existing go card and cash.*<sup>84</sup>

The department confirmed that the TOPTA must be updated to reflect both the new ticketing system and provide flexibility to make further amendments as the system matures. The Bill creates a head of power for making regulations relating to payment of fares to enable flexibility to respond to emerging ticketing technologies in the future.<sup>85</sup>

The department advised that the current legislation refers to tickets specifically, which enables paper and smart card, but does not capture credit or debit cards, wearables and mobile phones, under the definition of 'ticket'. The proposed changes are to enable customers to have payment choice whilst enabling revenue protection officers to check the means of payment.<sup>86</sup>

Submitter, Stephen Lacaze, advised:

*The abrogation of powers to regulation rather than encapsulation in legislation is a disturbing thread throughout TOPTA. It would seem that this Bill unnecessarily continues that theme. There would seem to be no particularly pressing timeline in regard to this matter that the appropriate attention of the House should be averted. By way of example, perhaps the Bill should prescribe a reporting regime for the PTO, addressing such things as refused complaints and failures to proceed.*<sup>87</sup>

This issue is further discussed in section 3.1.4 of this report.

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<sup>82</sup> Explanatory notes, p 2.

<sup>83</sup> Explanatory notes, p 2.

<sup>84</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>85</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>86</sup> Public briefing transcript, Brisbane, 25 February 2019, p 6.

<sup>87</sup> Submission 2, p 2.

### 2.3.1 Unclaimed credit on passenger accounts

The department advised that the Bill makes consequential amendments to existing provisions relating to unclaimed credit on passenger accounts to allow the continued use of unclaimed credit under the new smart ticketing solutions. The department confirmed the changes will not impact an account holder's right to request a refund at any time.<sup>88</sup>

### 2.3.2 Privacy implications

The department advised that the proposed amendments will facilitate continued practice of information-sharing arrangements with relevant entities to determine whether a person is entitled to a concession fare. They confirmed that:

*...the existing protections under the current legislation on the disclosure and use of personal information will continue to apply under the new smart ticketing solution.*<sup>89</sup>

## 2.4 Miscellaneous amendments

The explanatory notes detail that the Bill clarifies and improves the enforceability of existing provisions in TOPTA by:

- clarifying the public passenger services for which operator accreditation (OA) and driver authorisation (DA) are required
- reducing the penalty for failing to hold the proper category of OA or DA, reflecting the less serious nature of these offences
- providing evidentiary aids for establishing whether, at a particular time, a person holds or does not hold a category of OA or DA
- providing that in a proceeding for an offence against relevant transport legislation about a public passenger service, the defendant bears the evidential burden of proving the service is excluded from the definition of public passenger service
- clarifying an existing power of an authorised person to require information from certain persons
- changing the period for determining the maximum consumer price index percentage increase for the taxi industry security levy to better align with the timing of the department's annual fees and charges regulation
- removing the ability of a holder of a taxi service licence to request that the department transfer the holder's licence to another taxi service area, ensuring licence transfers occur through a formalised process that treats all licence holders fairly
- allowing a driving sanction to be imposed when a person driving a taxi, booked hire vehicle or limousine commits an offence against a provision prescribed by regulation
- providing evidentiary aids for the categories and descriptions of motor vehicles
- making other minor consequential amendments.<sup>90</sup>

<sup>88</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>89</sup> Public briefing transcript, Brisbane, 25 February 2019, p 3.

<sup>90</sup> Explanatory notes, pp 2-3.

### 3 Compliance with the *Legislative Standards Act 1992*

#### 3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

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

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

It is considered that clauses 22, 53, 54, 87, 90, 95, 114, 124, 125, 130 and 131 raise issues of fundamental legislative principle. The Bill also includes 14 offence or penalty provisions (clauses 16, 23, 50, 51, 55, 65, 82, 84, 88, 89, 93, 94, 118 and 121).

##### 3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

###### 3.1.1.1 Right to privacy regarding personal information – criminal history

Clause 12 provides that a person is disqualified from becoming or continuing as the PTO if the person has a conviction (other than a spent conviction) for an indictable offence.

In the dictionary in Schedule 1 to the Bill this definition appears:

**Spent conviction** means a conviction –

(a) for which the rehabilitation period under the *Criminal Law (Rehabilitation) of Offenders) Act 1986* has expired under that Act; and

(b) that is not revived as prescribed by section 11 of that Act.

Clause 16 provides that if a person appointed as the PTO is disqualified from continuing as the PTO, they must immediately advise the Minister, absent a reasonable excuse. A failure to so notify attracts a maximum penalty of 100 penalty units.

Clause 22 allows the Minister to ask the police commissioner for a written report (including a brief description of the circumstances of a conviction) about the criminal history of a person, to determine if a person is disqualified from becoming or continuing as a board member. By virtue of clause 22(5), a criminal history excludes spent convictions.

The person must have given their prior consent before the Minister can seek a report. Any report must be destroyed as soon as practicable after it is no longer needed for the purpose for which it was given (clause 23).

The notice must include information about when the offence was committed, details adequate to identify the offence, and the sentence imposed. A failure to so notify attracts a maximum penalty of 100 penalty units.

Clause 23 addresses confidentiality issues regarding criminal history information by making it an offence for a person who possesses such a report or information to make an unauthorised disclosure of the report or information. An unauthorised disclosure can attract a penalty up to 100 penalty units.

Clause 22 raises an issue of fundamental legislative principle relating to the rights and liberties of individuals (section 4(2)(a) of the LSA), particularly regarding an individual’s right to privacy with respect to their personal information.

The explanatory notes address this issue:

*This provision may breach a person's privacy rights. However, the potential FLP breach is considered justified as criminal history checking is appropriate to maintain the integrity of the position of the PTO.<sup>91</sup>*

In considering similar provisions in Bills, committees have considered whether adequate safeguards are included in the Bill, such as whether:

- *the criminal history ... can only be obtained with their consent*
- *there are strict limits on further disclosure of that information*
- *the criminal history information must be destroyed when it is no longer required for the purpose for which it was obtained.<sup>92</sup>*

Consideration has also been given in the past to the extent of information covered by the term 'criminal history', including for example, whether the term extends to charges that do not result in convictions, and to 'spent' convictions, and convictions that are quashed or set aside, and convictions which are 'not recorded'.

Here the following can be noted:

- a person's criminal history can only be obtained with their consent
- there are limits on disclosure, and an offence for unauthorised disclosure
- there is a requirement for destruction as soon as practicable after the information is no longer needed
- the convictions included in a criminal history do not extend to charges (without conviction) nor to spent convictions.

In relation to the imposition under clause 16 of a penalty for any failure, without reasonable excuse, by a PTO to disclose to the Minister if they are disqualified from continuing as the PTO, the explanatory notes state that the 'offence is essential to maintain the integrity of the position'.<sup>93</sup>

In theory, there can be a number of reasons why a PTO might become disqualified, given the disqualifying factors listed at clause 12. Some of those factors do not of themselves involve a negative element. Clause 16 does not require disclosure to the Minister of the particular basis on which a disqualification arises. Notification to the Minister of the fact of disqualification itself would therefore seem to not raise any issue of disclosure of confidential or private information.

Clause 23 prohibits a person from disclosing a criminal history report unless certain exemptions apply. The maximum penalty for the offence is 100 penalty units. This offence supports the FLP about privacy by protecting a person's criminal history.

#### Committee comment

The committee is satisfied there are sufficient protections for the privacy of the individual.

#### 3.1.1.2 Right to privacy regarding personal information – Information sharing arrangements

Clause 53 allows the PTO to enter into information sharing arrangements with government entities. These arrangements are limited to information about whether a party to the arrangement is dealing, or has dealt, with a matter raised in a personalised transport complaint.

<sup>91</sup> Explanatory notes, p 7.

<sup>92</sup> See for example, Transportation and Utilities Committee, report No. 13, 55<sup>th</sup> Parliament, *Plumbing and Drainage and Other Legislation Amendment Bill 2015*, March 2016, p 24.

<sup>93</sup> Explanatory notes, p 5.

Regarding clause 53, the explanatory notes state:

*These provisions are justified as they will promote efficient investigations by the PTO and prevent unnecessary duplication of effort among government entities. Clause 95 is designed to minimise the impact on the privacy of persons involved in PTO matters and would apply to a person who gains information about a person through any information sharing arrangement.<sup>94</sup>*

Clause 130 inserts new section 148BB to allow the chief executive to enter into an information sharing arrangement to determine whether a person is entitled to a concession fare.

In relation to clause 130, the explanatory notes justify any breach of fundamental legislative principle:

*The information will only be disclosed to assess a person's eligibility for a concession fare and to prescribed relevant entities, ensuring only people eligible for a concession fare receive the benefit. The potential FLP breach is justified as a concession fare is not a statutory right and it ensures, consistent with longstanding government policy, that only people entitled to a concession fare can access the benefit of the concession fare. This will help maintain the quality and sustainability of public passenger transport. Further, the existing legislation prohibits the disclosure and use of information for purposes that are not authorised, and this protection will continue to apply for the new ticketing solution.<sup>95</sup>*

#### Committee comment

The committee is satisfied that any breaches of fundamental legislative principle involved in the information sharing provisions are justified.

#### 3.1.1.3 Offences and penalties

The Bill introduces 14 new offence provisions, with maximum penalties ranging from 20 penalty units (\$2,611) to 160 penalty units (\$26,110). These are set out in detail in Appendix D.

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation. A penalty should be proportionate to the offence. The Office of the Parliamentary Counsel (OQPC) Notebook states:

*...the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy ... 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.<sup>96</sup>*

The explanatory notes provide the following broad justification regarding the imposition of penalties:

*The new offences are considered justified to both ensure confidence in the OPTO [Office of the Personalised Transport Ombudsman] and provide for the effective operation of the PTO. The levels of the penalties are also considered appropriate as they are broadly consistent with similar provisions in other legislation that establishes ombudsmen in Queensland or with TOPTA [Transport Operations (Passenger Transport) Act 1994].<sup>97</sup>*

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<sup>94</sup> Explanatory notes, p 7.

<sup>95</sup> Explanatory notes, p 7.

<sup>96</sup> Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 120.

<sup>97</sup> Explanatory notes, p 5.



The explanatory notes provide further justification for the offences relating to the investigation and enforcement of PTO offences:

*These offences and penalties are justified as they are necessary to enforce compliance with PTO-related offences in the Bill and are consistent with established precedents.<sup>98</sup>*

Some of the specific justifications for offences and penalties offered in the explanatory notes (at pages 5 and 6) are set out below:

*Clauses 50 and 51 give the PTO powers to require a person to provide information or to attend a meeting and answer questions. Parties must comply with the requirements unless they have a reasonable excuse. The maximum penalty varies depending on whether a person is an individual or corporation and are set at a level to ensure the PTO can undertake the PTO's key function of investigating and helping to resolve personalised transport complaints.*

*Clause 55 creates a new offence for taking detrimental action against a person in reprisal for making a complaint, or giving information about a complaint, to the PTO. Although a range of offences under the Criminal Code Act 1899 (Criminal Code) may apply to a reprisal action, depending on the nature of the action, other actions may be taken which could severely impact on a person that are beyond the scope of the Criminal Code (for example, a passenger may be denied access to a personalised transport service or a personalised transport driver may not be allocated work by a booking entity). The new offence is necessary to encourage aggrieved persons to make complaints to the PTO with reduced risk of reprisal. The proposed maximum penalty of 75 penalty units is significantly lower than the maximum penalty for similar offences in the Local Government Act 2009 and Public Interest Disclosure Act 2010, reflecting the broad scope of matters that may be dealt with by the PTO.*

*In addition, the Bill includes offences relating to the investigation and enforcement of PTO related offences. These offences and penalties are justified as they are necessary to enforce compliance with the PTO-related offences in the Bill and are consistent with established precedents.*

*Clause 65 requires an authorised officer to return the officer's identity card to the PTO within 21 days of the officer ceasing office. The maximum penalty of 30 penalty units is the same penalty for a similar offence, which applies to authorised persons, in section 112 (Identity cards) of TOPTA. The new offence is necessary as it ensures a person who is no longer an authorised officer cannot pretend to be an authorised officer, supporting the public's trust in the authority of officers.*

*Clause 82 makes it an offence to contravene a help requirement. A help requirement is a standard enforcement power that allows an authorised officer to exercise their general powers and the maximum penalty is consistent with a similar provision in section 124 (General powers in relation to places and vehicles) of TOPTA.*

*Clause 84 makes it an offence to contravene an information or attendance requirement. Such requirements are standard enforcement powers and are necessary to allow an authorised officer to undertake enforcement activities. The maximum penalties are consistent with similar provisions in other Acts.*

*Clause 88 makes it an offence to obstruct an authorised officer in the exercise of the officer's powers. This offence is a standard enforcement provision and is necessary to ensure an authorised officer can exercise their powers effectively.*

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<sup>98</sup> Explanatory notes, p 5.

*Clause 89 makes it an offence to impersonate an authorised officer. This offence is a standard enforcement provision. The maximum penalty for the offence is consistent with a similar provision in section 136 (Impersonating authorised person) of TOPTA. The provision is necessary to ensure the public's trust in the authority of officers and that the public cannot be misled into thinking a person who is not an authorised officer is an authorised officer.*

*Clause 93 makes it an offence to give false or misleading information, with a maximum penalty of 100 penalty units. This offence is necessary to ensure any information provided to the PTO can be relied on by the PTO.*

*Clause 94 prohibits the disclosure of confidential information, subject to certain exemptions. The maximum penalty varies depending on whether a person is an individual, corporation or official. The new offence is necessary to protect confidential information, supporting the FLP regarding privacy.<sup>99</sup>*

#### Committee comment

The committee is satisfied that, on balance, the offences and associated penalties in the Bill are proportionate and relevant to the objectives of the Bill.

#### **3.1.2 Onus of proof**

Section 4(3)(d) of the LSA requires legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

Clause 90 provides for a number of 'evidentiary aids' to apply in legal proceedings under the Act (ie, the Act for which this is the Bill)

Clause 90(2) provides:

*The authority of the following to do anything under this Act must be presumed unless a party to the proceeding, by reasonable notice, requires proof of it—*

- (a) the personalised transport ombudsman;*
- (b) an officer;*
- (c) an authorised officer.*

Clause 90(3) allows for the issuing of certificates for certain evidentiary matters allowing a court to presume certain matters:

*A certificate purporting to be signed by the personalised transport ombudsman and stating any of the following matters is evidence of the matter—*

- (a) a stated document is 1 of the following things made or given under this Act—
  - (i) an appointment or decision;*
  - (ii) a notice or requirement;*
  - (iii) a report, or an extract from a report;**
- (b) a stated document is a copy of a thing mentioned in paragraph (a);*
- (c) on a stated day, a stated person was given a stated notice under this Act;*
- (d) on a stated day, a stated requirement was made of a stated person.*

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<sup>99</sup> Explanatory notes, pp 5-6.

Clause 114 also contains evidentiary provisions. It provides for amendments to section 153B of the *Transport Operations (Passenger Transport) Act 1994* (TOPTA) extending the scope of areas covered by evidentiary provisions already contained in that section, such that a certificate purporting to be signed by the chief executive stating any of the following matters is evidence of the matter:

- at a particular time, a person did, or did not, hold operator accreditation;
- at a particular time, a person did, or did not, hold driver authorisation;
- at a particular time, a person did, or did not, hold operator accreditation to provide a particular kind of public passenger service;
- at a particular time, a person did, or did not, hold driver authorisation to drive a vehicle to provide a particular kind of public passenger service;
- at a particular time, a particular compliance plate was, or was not, on a motor vehicle.

Clause 114 also inserts section 153B (1A) in that Act, to provide:

*In a proceeding for an offence against relevant transport legislation relating to the provision of a public passenger service, the defendant bears the evidential burden of proving the service is a public passenger service excluded from this Act by regulation under the definition public passenger service.*

The combined effect of clauses 114(2) and (3) is to place on a defendant the evidentiary burden of proving that a particular service is a public passenger service which has been excluded from TOPTA by regulation.

Clause 131 similarly adds to existing lists of matters that can be the subject of evidentiary certificates signed by the chief executive to be proof of the matter, by adding matters such as:

- At a particular time, a stated authorised person was trained and authorised to use a revenue protection device.
- At a particular time, a stated ticket or other item was electronically read or scanned by a revenue protection device, and a stated document is a record or report of the reading or scan.
- At a particular time, a stated amount was the fare payable for the use of a relevant public passenger service for a stated journey.

Additionally, it would provide:

- A certificate purporting to be signed by the chief executive stating that, at a particular time, a stated motor vehicle had a particular characteristic or other attribute is evidence of the matter, and, in the absence of evidence to the contrary, is proof of the matter.
- A document purporting to be a record of a matter stated on a compliance plate is evidence of the matter and, in the absence of evidence to the contrary, is proof of the matter.

Clauses which allow for the use of evidentiary certificates effectively reverse the onus of proof by placing the onus on a defendant to rebut the presumption established by the certificate. They therefore involve a breach of section 4(3)(d) of the LSA which provides that legislation should not reverse the onus of proof in criminal matters without adequate justification.

Propose section 153B(1A) goes further, *expressly* providing that a defendant bears the onus in certain matters.

Legislation should not provide that it is the responsibility of a defendant in court proceedings to prove innocence.

For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidentiary means and where the defendant would be particularly well positioned to disprove guilt.<sup>100</sup>

The explanatory notes acknowledge the issue of fundamental legislative principle involved. In relation to the clauses regarding evidentiary certificates (clauses 90, 114(1) and 131), the explanatory notes state:

*The evidentiary aids are designed to ensure efficient court proceedings, without relying on expert witnesses, in matters relating to the PTO, the new ticketing solution and other offences under TOPTA. These evidentiary matters are all administrative in nature and unlikely to be controversial and so are appropriate for certificate evidence. None of the evidentiary aids impact a defendant's right to provide evidence to the contrary in a court proceeding.*<sup>101</sup>

Regarding clauses 114(2) and (3), the explanatory notes provide the following justification:

*The definition of a public passenger service contains multiple negative elements prescribed by regulation (for example, a service was not a service provided by the Australian Defence Force or a service was not an ambulance service). The prosecution may need to prove that each of these negative elements do not apply to a public passenger service before commencing a proceeding for any offence relating to the service. Given such matters are particularly within the defendant's knowledge and that the defendant has a general privilege against self-incrimination, the potential breach is considered justified.*<sup>102</sup>

#### Committee comment

The committee is satisfied that, on balance, the various instances of reversal of the onus of proof are justified in the circumstances.

#### **3.1.3 Immunity from proceedings**

Section 4(3)(h) of the *Legislative Standards Act 1992* requires legislation does not confer immunity from proceeding or prosecution without adequate justification.

Clause 54 applies where a person, acting honestly, gives information to the personalised transport ombudsman or an officer in relation to a personalised transport complaint. It provides that such a person is not liable, civilly, criminally or under an administrative process, for giving the information. This includes:

- No contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person.
- In a proceeding for defamation, the person has a defence of absolute privilege for publishing the information.
- If the person would otherwise be required to maintain confidentiality about the information under an Act, oath or rule of law or practice, the person does not contravene the Act, oath or rule of law or practice by giving the information, and is not liable to disciplinary action for giving the information.

Clause 95 provides that the PTO does not incur civil liability for an act done, or omission made, honestly and without negligence under the Act. It also provides that where this prevents a civil liability attaching to the PTO, the liability instead attaches to the State.

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<sup>100</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

<sup>101</sup> Explanatory notes, p 7.

<sup>102</sup> Explanatory notes, p 8.

Legislation should not confer immunity from proceeding or prosecution without adequate justification.<sup>103</sup> The OQPC Notebook states:

*...a person who commits 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. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.*<sup>104</sup>

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding, conferral of immunity is appropriate in certain situations.<sup>105</sup> It may be more acceptable if a provision does not extinguish liability entirely, but instead shifts liability to the State. The latter is the case with clause 95.

In relation to clause 54, the explanatory notes state that any potential breach of fundamental legislative principle:

*...is justified to encourage persons to give information to the PTO and participate in resolving complaints in good faith, provided the persons act honestly. The Bill ensures complaints are managed confidentially and any recommendation made by the PTO will be nonbinding, so the impact on another party as a result of the immunity will be limited.*<sup>106</sup>

Regarding clause 95, the explanatory notes state:

*It is not considered appropriate for the PTO to be made personally liable because of carrying out his or her responsibilities under the legislation in good faith. The potential FLP breach is justified as it attaches civil liability to the State and it only applies to acts done honestly and without negligence.*<sup>107</sup>

#### Committee comment

The committee is satisfied that, on balance, the breaches of fundamental legislative principle are justified in the circumstances.

#### **3.1.4 Institution of Parliament – delegation of legislative power**

Section 4(4)(a) of the *Legislative Standards Act 1992* requires that the delegation of legislative power only be allowed in appropriate cases and to appropriate persons. This involves a consideration of the level at which delegated legislative power is used.

Clause 124 effects amendments to the TOPTA. It effectively replaces the current section 143AB, which provides for what amounts to fare evasion, with a new section 143AB which allows for a regulation to provide for matters relating to payment of fares, including prescribing fare evasion offences. As a consequence, clause 125 omits section 143AC (the current fare evasion offence) from the Act. The clauses move provisions currently in principal legislation to subordinate legislation.

<sup>103</sup> *Legislative Standards Act 1992*, s 4(3)(h).

<sup>104</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

<sup>105</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64; Alert Digest 1998/1, p 5.

<sup>106</sup> Explanatory notes, p 7.

<sup>107</sup> Explanatory notes, p 6.

Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

Any regulation would come before a portfolio committee for its consideration and will be subject to possible disallowance by the Legislative Assembly.

The explanatory notes offer this justification for matters being moved to regulation:

*The Bill supports the protection of fare revenue under the new ticketing solution by ... relocating fare evasion and related offences to a regulation to provide greater flexibility to make changes to the regulation as ticketing technology develops.*<sup>108</sup>

And also regarding clause 24:

*The matters to be regulated are largely technical in nature and this approach will ensure sufficient flexibility to respond effectively to changes in technology and emerging insights about system functionalities and enforcement issues. This flexibility will help ensure the sustainability of public passenger transport.*<sup>109</sup>

As recorded in the explanatory notes, a number of consequential amendments also raise similar concerns.<sup>110</sup>

Any regulation made under these provisions is subject to scrutiny of the Legislative Assembly through the usual processes.

As highlighted in section 2.3 of this report, this issue was also identified by submitter, Stephen Lacaze.<sup>111</sup>

#### Committee comment

The committee is satisfied that, on balance, the clauses have sufficient regard to the institution of parliament given the nature of the proposed change and the fact that any regulation will be subject to scrutiny of the Legislative Assembly through the usual processes.

#### **3.1.5 Institution of Parliament – courts and judicial independence**

Section 4(4)(a) of the *Legislative Standards Act 1992* requires that the delegation of legislative power only be allowed in appropriate cases and to appropriate persons and should not interfere with the institutional integrity of the courts and judicial independence.

Clause 87 provides that a person may claim compensation from the State if the person incurs loss because of the exercise, or purported exercise, of a power by or for an authorised officer. Applications for compensation are to be made to a court, and clauses 87(4) and (5) provide:

- (4) *In considering whether it is just to order compensation, the court must have regard to any relevant offence committed by the complainant*
- (5) *A regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.*

In short, clause 87(5) allows a regulation to prescribe matters that a court may, or must, have regard to in making determinations on such compensation claims.

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<sup>108</sup> Explanatory notes, p 2.

<sup>109</sup> Explanatory notes, p 4.

<sup>110</sup> See Explanatory notes, p 4.

<sup>111</sup> Submission 2, p 2.

As noted earlier, section 4(4)(a) of the LSA provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons.

Clause 87(5) allows the executive to specify matters (which are not set out or limited in the Act as amended as proposed) that a court *must* take into account in considering a compensation matter. It could be argued that it is inappropriate for such matters to be provided for in regulation.

In the past, clauses such as this have been considered, from a technical scrutiny point of view, in the context of the fundamental legislative principle that the delegation of legislative power should be allowed only in appropriate cases and to appropriate persons.

It is arguably worth considering such a clause in the context of determining if there is any inappropriate interference with the institutional integrity and independence of the judiciary.

The explanatory notes do not refer to any issue of fundamental legislative principle arising in relation to clause 87. As such there is no indication as to why this aspect has been left to regulation, and as to why the provision includes a 'mandatory' element.

It appears that clauses allowing a regulation to prescribe matters a court must take into account are relatively common in Bills in Queensland – particularly in this context of claims for compensation. It also appears that no such regulation has actually been promulgated.

The OQPC has discussed a range of issues regarding the impact of legislation on the institutional integrity of courts and judicial independence in a chapter of its on-line *Principles of good legislation: OQPC guide to FLPs*.<sup>112</sup> On occasion, legislation is held to be invalid on constitutional grounds.

As noted in that publication:

*Even if legislation is not necessarily likely to be considered invalid, parliamentary committees may express concern about it if they consider it may affect or interfere with judicial independence and judicial process. The types of legislation about which parliamentary committees have commented on this basis include legislation that:*

- *affects sentencing discretion by, for example, requiring mandatory minimum sentences*
- *abolishes, or changes the constitution of, particular courts or tribunals*
- *affects judicial entitlements*
- *changes the law applicable in pending litigation.*<sup>113</sup>

The present case is certainly not within any of those categories.

An important consideration is the degree of discretion courts are able to exercise.<sup>114</sup>

<sup>112</sup> See *Principles of good legislation: OQPC guide to FLPs - Institutional integrity of courts and judicial independence* available at:

[www.legislation.qld.gov.au/file/Leg\\_Info\\_publications\\_FLP\\_Institutional\\_integrity\\_of\\_courts.pdf](http://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Institutional_integrity_of_courts.pdf)

<sup>113</sup> Footnote 26, at p 3.

<sup>114</sup> In the context of confiscation orders, it has been said that the decisions suggest:

*It would impair the courts' institutional integrity if the effect of the legislation were to render them mere intermediaries through which the wishes of the executive government were carried out. However, if the legislative regime in question allows for a genuine exercise of judicial process, including the ability to examine evidence and form independent conclusions, the High Court has generally found they do not offend the Kable principle.*

See footnote 26, at p 7.

In the present case, the clause is providing for the prescription by regulation of matters that a court must take into account. On the face of it, there would appear to still be discretion on the part of the court as to how it takes any such matter into account. That might depend upon the actual content of the prescribed matter. Conceivably, such content could be worded so as to dramatically narrow the discretion of the court.

A committee is able to consider the content of any specific regulation promulgated in reliance on such a provision, as part of its role of considering the application of the fundamental legislative principles to subordinate legislation.

It is relevant here to have regard to the concept of the separation of powers. Where a provision is in primary legislation, it is a creature of the legislature. Where a regulation is promulgated, it is a creature of the executive.

There is generally no difficulty with a legislative provision stipulating matters that a court must take into account. Any such provision might be considered to be unobjectionable if it were in principal legislation, but inappropriate for inclusion in subordinate legislation, as is contemplated here.

#### Committee comment

Given that the explanatory notes are silent on this issue, the committee requests the Minister provide comment on this issue in the second reading of the Bill.

#### **Recommendation 8**

The committee recommends the Minister for Transport and Main Roads clarifies in the second reading of the Bill how allowing a regulation to prescribe matters that a court must take into account in considering a claim has sufficient regard not only to the institution of Parliament but also to the institution of the courts.

### **3.2 Explanatory notes**

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and generally contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.



**Appendix A – Submitters**

| <b>Sub #</b> | <b>Submitter</b>  |
|--------------|---|
| 001          | Transport Workers' Union of Australia – Queensland Branch |
| 002          | Stephen Lacaze  |
| 003          | Ride Share Drivers' Association of Australia              |
| 004          | Queensland Taxi License Owner's Association Incorporated  |
| 005          | Queensland Council of Unions                              |
| 006          | Name suppressed   |
| 007          | Cecilia Hooper  |
| 008          | Taxi Council of Queensland                                |
| 009          | Limousine Action Group (Queensland) Inc.                  |

## **Appendix B – Officials at public departmental briefing**

### **Department of Transport and Main Roads**

- Mr Matthew Longland, Deputy Director-General, TransLink
- Ms Suzanne Rose, Executive Director (Service Policy), TransLink
- Ms Sarah Capstick, Project Director (Strategy and Customer), TransLink
- Mr Nigel Ellis, Executive Director (Transport Access and Use), Transport Regulation Branch

## **Appendix C – Witnesses at public hearing**

### **Transport Workers Union**

- Mr Lee Norris, Legal Officer

### **Queensland Council of Unions**

- Dr John Martin, Research and Policy Officer

### **Ride Share Drivers Association of Australia**

- Mr Les Johnson, Secretary
- Mr Ross Allen, Treasurer

### **Qld Taxi License Owner's Association Incorporated**

- Mr Paul Scaini, Chief Executive Officer

### **Taxi Council of Queensland**

- Mr Blair Davies, Chief Executive Officer

### **Limousine Action Group (Queensland) Inc**

- Ms Jacqui Shephard, Chairperson

### **Individuals**

- Mr Stephen Lacaze
- Ms Cecilia Hooper
- Name withheld

## Appendix D – Proposed New or Amended Offence Provisions

[NOTE: ONE PENALTY UNIT = \$130.55]

| Clause | Offence  | Proposed maximum penalty       |
|--------|--|--------------------------------|
| 16     | <p><b>Notice of disqualification</b></p> <p>If a person appointed as the personalised transport ombudsman is disqualified under section 12 from continuing as the personalised transport ombudsman, the person must immediately give the Minister notice of the disqualification unless the person has a reasonable excuse.</p> <p>Maximum penalty—100 penalty units</p> | \$13,055                       |
| 23     | <p><b>Criminal history information confidential</b></p> <p>(2) The person must not, directly or indirectly, disclose to anyone else the report or information unless the disclosure is permitted under subsection (3).</p> <p>Maximum penalty—100 penalty units</p>  | \$13,055                       |
| 50     | <p><b>Power to require information</b></p> <p>(2) A person of whom a requirement is made under subsection (1) must comply with the requirement unless the person has a reasonable excuse.</p> <p>Maximum penalty—</p> <p>(a) for an individual—40 penalty units; or</p> <p>(b) for a corporation—100 penalty units.</p>  | <p>\$5,222</p> <p>\$13,055</p> |
| 51     | <p><b>Power to require attendance</b></p> <p>(3) A person of whom a requirement is made under subsection (1) must comply with the requirement unless the person has a reasonable excuse.</p> <p>Maximum penalty—</p> <p>(a) for an individual—40 penalty units; or</p> <p>(b) for a corporation—100 penalty units</p>  | <p>\$5,222</p> <p>\$13,055</p> |
| 55     | <p><b>Protection from reprisal</b></p> <p>(1) A person must not take detrimental action against another person in reprisal for a personalised transport complaint.</p> <p>Maximum penalty—75 penalty units.</p>  | \$9,971.25                     |

| Clause | Offence  | Proposed maximum penalty                                      |
|--------|--|---|
| 65     | <p><b>Return of identity card</b></p> <p>If the office of a person as an authorised officer ends, the person must return the person’s identity card to the personalised transport ombudsman within 21 days after the office ends unless the person has a reasonable excuse.</p> <p>Maximum penalty—30 penalty units.</p>   | \$3,916.50  |
| 82     | <p><b>Offence to contravene help requirement</b></p> <p>(1) A person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse.</p> <p>Maximum penalty—75 penalty units</p>  | \$9,791.25  |
| 84     | <p><b>Offence to contravene information or attendance requirement</b></p> <p>(1) A person of whom a requirement is made under section 83(2)(a) must comply with the requirement unless the person has a reasonable excuse.</p> <p>Maximum penalty—</p> <p>(a) for an individual—40 penalty units; or</p> <p>(b) for a corporation—100 penalty units</p> <p>(3) A person of whom a requirement is made under section 83(2)(b) must not fail, without reasonable excuse, to—</p> <p>(a) attend as required by the notice; and continue to attend as required by the authorised officer until excused from further attendance; and</p> <p>(b) answer a question the person is required to answer by the officer; and (d) produce a document the person is required to produce by the notice.</p> <p>Maximum penalty—</p> <p>(a) for an individual—40 penalty units; or</p> <p>(b) for a corporation—100 penalty units</p> | <p>\$5,222</p> <p>\$13,055</p> <p>\$5,222</p> <p>\$13,055</p> |
| 88     | <p><b>Obstructing authorised officer</b></p> <p>(1) A person must not obstruct an authorised officer exercising a power, or someone helping an authorised officer exercising a power, unless the person has a reasonable excuse.</p> <p>Maximum penalty—75 penalty units.</p>  | \$9,791.25  |

| Clause | Offence   | Proposed maximum penalty                       |
|--------|---|--|
| 89     | <p><b>Impersonating authorised officer</b></p> <p>A person must not impersonate an authorised officer.<br/>Maximum penalty—75 penalty units.</p>  | \$9,791.25                                     |
| 93     | <p><b>Giving false or misleading information</b></p> <p>(1) A person must not, in relation to the administration of this Act, give the personalised transport ombudsman, an officer or an authorised officer information the person knows is false or misleading in a material particular.<br/>Maximum penalty—100 penalty units</p>  | \$13,055                                       |
| 94     | <p><b>Confidential information not to be disclosed</b></p> <p>(2) The person must not—</p> <ul style="list-style-type: none"> <li>(a) make a record of the confidential information; or</li> <li>(b) whether directly or indirectly, disclose the confidential information to another person; or</li> <li>(c) use the confidential information.</li> </ul> <p>Maximum penalty—</p> <ul style="list-style-type: none"> <li>(a) for a person other than an official— <ul style="list-style-type: none"> <li>(i) if the person is an individual—40 penalty units; or</li> <li>(ii) if the person is a corporation—100 penalty units;</li> </ul> </li> <li>or</li> <li>(b) for an official—200 penalty units</li> </ul> | <p>\$5,222</p> <p>\$13,055</p> <p>\$26,110</p> |
| 118    | <p><b>118 Replacement of s 15 (Duty of operator)</b></p> <p>Section 15—<br/><i>omit, insert—</i></p> <p><b>15 Operator must hold operator accreditation</b></p> <p>(1) A person must not provide, as an operator, a public passenger service unless the person holds operator accreditation for the service.<br/>Maximum penalty—</p> <ul style="list-style-type: none"> <li>(a) if the person does not hold operator accreditation—160 penalty units; or</li> <li>(b) if the person holds operator accreditation to provide a public passenger service other than the public passenger service provided by the person—20 penalty units.</li> </ul>   | <p>\$20,888</p> <p>\$2,611</p>                 |

| Clause | Offence  | Proposed maximum penalty  |
|--------|--|---|
| 121    | <p><b>Replacement of s 27 (Driver must hold appropriate authorisation)</b></p> <p>Section 27—<br/><i>omit, insert—</i></p> <p><b>27 Driver must hold driver authorisation</b></p> <p>(1) A person must not drive a vehicle to provide a public passenger service unless the person holds driver authorisation for the service.</p> <p>Maximum penalty—</p> <p>(a) if the person does not hold driver authorisation—</p> <p>(i) for a first offence—100 penalty units;</p> <p>or</p> <p>(ii) for a second or later offence—200 penalty units;</p> <p><i>Note—</i></p> <p><i>See sections 150B and 150C in relation to the application of the penalty for this subsection.</i></p> <p>(b) if the person holds driver authorisation to provide a public passenger service other than the public passenger service provided by the person—20 penalty units.</p> <p><b>27A Person must use drivers that hold driver authorisation</b></p> <p>(1) A person must not provide a public passenger service unless the person uses a driver who holds driver authorisation for the service.</p> <p>Maximum penalty—</p> <p>(a) if the driver does not hold driver authorisation—160 penalty units; or</p> <p>(b) if the driver holds driver authorisation to provide a public passenger service other than the public passenger service provided by the driver—20 penalty units</p> | <p>\$13,055</p> <p>\$26,110</p> <p>\$2,611</p> <p>\$20,888</p> <p>\$2,611</p> |

## STATEMENT OF RESERVATIONS

### **LNP Members of the Transport and Public Works Committee with respect to the Personalised Transport Ombudsman Bill 2019**

The Explanatory Notes at page 1 states the main policy objective of the Bill is to establish a Personalised Transport Ombudsman (the PTO) to help resolve complaints relating to personalised transport services. The other policy objectives are to support the protection of fare revenue under the new ticketing solution and to clarify and improve the enforceability of existing provisions of the *Transport Operations (Passenger Transport) Act 1994* (TOPTA).

Our initial concern is that the constraints placed on the newly created position mean that there appears to be limited scope available to the Ombudsman to effectively resolve complaints relating to personalised transport services. It will not investigate certain matters including complaints about government policy, or legislation or alleged offences under relevant transport legislation.

Therefore, as described by the stakeholders who expressed their concerns in submissions and public presentations to the Committee about this matter, it will be a “toothless tiger”. We would like to acknowledge the contribution made by these stakeholders who are obviously not confident in the proposals contained in the Bill.

It is recognised that the emergence of the gig economy has brought about changes to customer expectations and related business models, giving rise to a host of enforcement issues that were not contemplated a few years ago. However, it is our view that these issues should be resolved by the Government agencies working together with the industry rather than attempting to shift the responsibility for finding a solution to the Ombudsman.

Furthermore, there will be a duplication of effort in that both the industry, as well as Transport and Main Roads, including Translink already have the capacity, as well as the responsibility, to address complaints relating to personalised transport services. For example, complaints about the cleanliness of a vehicle or a driver’s working conditions can be investigated by the existing agencies. We are therefore of the view that the expenditure related to



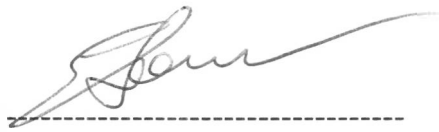
establishing the new Office will be wasted and better invested in something with which industry can support.

In terms of the protection of fare revenue, we note the growing trend in fare evasion and associated anti-social behaviour on our public transport system. Our concerns are that while the amendments contained in the Bill attempt to clarify the enforceability of existing provisions in **TOPTA**, overall they will still fall short of what is needed.

### **STAKEHOLDER VIEWS**

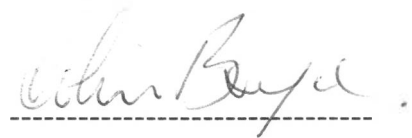
Finally, although acknowledging that the Department undertook consultation on the Bill with relevant industry stakeholders, the limited support or outright rejection of the proposal by these same stakeholders must be of concern to the Committee.

**DATED:** 20 March 2019

A handwritten signature in black ink, appearing to read 'Ted Sorenson', written over a horizontal dashed line.

Ted Sorenson

Member for Hervey Bay

A handwritten signature in black ink, appearing to read 'Col Boyce', written over a horizontal dashed line.

Col Boyce

Member for Callide