Parliamentary Committees



Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018

Report No. 1, 56th Parliament
Legal Affairs and Community Safety Committee
March 2018

Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

ATSILS	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
BAQ	Bar Association of Queensland
Broadbeach SNP	Broadbeach CBD safe night precinct
COAG	Council of Australian Governments
Commonwealth Act	proposed Identity-matching Services Act 2018
Commonwealth Bill	Identity-matching Services Bill 2018
DJAG	Department of Justice and Attorney-General
DTMR / TMR	Department of Transport and Main Roads
DVS	Document Verification Service
FLP	Fundamental legislative principle
Games / Commonwealth	2018 Gold Coast Commonwealth Games
Gold Coast SNPs	Broadbeach CBD and Surfers Paradise CBD safe night precincts
IGA	Intergovernmental Agreement on Identity Matching Services
IMS	Identity Matching Services
Liquor Commissioner	Commissioner for Liquor and Gaming
LSA	*Legislative Standards Act 1992*
MCPEM	Ministerial Council for Police and Emergency Management
NDLFRS	National Driver Licence Facial Recognition System
NISS	National Identity Security Strategy
NFBMC	National Facial Biometric Matching Capability
OIC	Office of the Information Commissioner
OPOLS	One Person One Licence Service
PSAA	*Police Service Administration Act 1990*
QHA	Queensland Hotels Association
QLS	Queensland Law Society
QPS	Queensland Police Service
SNP	Safe night precinct
Surfers Paradise SNP	Surfers Paradise CBD safe night precinct
TORUM	*Transport Operations (Road Use Management) Act 1995*
TPCA	*Transport Planning and Coordination Act 1994*

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018.

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.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill and those who appeared at the public hearing. I also thank our Parliamentary Service staff and the Queensland Police Service, the Department of Transport and Main Roads and the Department of Justice and Attorney-General. There was only a very short time for this inquiry and I appreciate the effort of all involved to meet the deadlines.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety 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.[1]

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 Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 15 February 2018. The committee is to report to the Legislative Assembly by 2 March 2018.

1.2 Inquiry process

On 21 February 2018, the committee invited stakeholders and subscribers to make written submissions on the Bill. Nine submissions were received.

The committee received a public briefing about the Bill from the Queensland Police Service (QPS), the Department of Transport and Main Roads (DTMR) and the Department of Justice and Attorney-General (DJAG) on 21 February 2018 (see Appendix B for a list of officials).

The committee held a public hearing on 26 February 2018 (see Appendix C for a list of witnesses).

The committee received written advice from the QPS, DJAG and DTMR in response to matters raised in submissions.

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

1.3 Policy objectives of the Bill

The objectives of the Bill are to:

- provide a legislative framework to facilitate Queensland's participation in the Identity Matching Services (IMS)
- remove the requirement to obtain an access approval order for Queensland Police to access Queensland driver licence digital images for non-transport related offences
- remove the requirement for the DTMR to report annually to parliament via the Minister on access to Queensland's driver licence digital images
- overcome the current limitations in the Criminal Code in adequately addressing the threat of homemade explosives
- provide for extended liquor trading arrangements for the 2018 Commonwealth Games.

1.4 Government consultation on the Bill

The Attorney-General and Minister for Justice and Leader of the House (Attorney-General), the Minister for Innovation and Tourism Industry Development and Minister for the Commonwealth Games (Minister for the Commonwealth Games), the Gold Coast Mayor, the Chief Executive Officer of

[1] *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

Gold Coast Tourism, the Director-General of the Department of Justice and Attorney-General, and the Liquor Commissioner met to discuss matters relating to liquor service at the 2018 Commonwealth Games. In addition, the Attorney-General and the Minister for Commonwealth Games met and consulted with the heads of the Broadbeach CBD and Surfers Paradise CBD safe night precinct (SNP) Boards.[2]

The Queensland Privacy Commissioner was consulted in relation to Queensland's participation in the IMS[3] but was not consulted in relation to the draft Bill.[4]

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.

Recommendation 1

The committee recommends the Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018 be passed.

[2] Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018, explanatory notes, (explanatory notes), pp 11-12.

[3] Explanatory notes, p 11.

[4] Privacy Commissioner, public hearing transcript, Brisbane, 26 February 2018, p 10.

2 Examination of the Bill

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

2.1 Identity crime and identity checking

Identity crime is a key enabler of serious and organised crime, such as drug trafficking, money laundering and terrorism, and is estimated to cost Australia $2.2 billion annually. Australians convicted of terrorism offences have used false names to avoid detection when purchasing ammunition and chemicals to make explosives, and pre-paid mobile phones to allow them to communicate anonymously.[5]

Identity checking in Australia is typically focused on matching names and other biographical details across different sources. Name based checking remains vulnerable to identity fraud as it cannot detect instances where criminals have stolen someone's identity documents and substituted their own photograph. Detecting fraud of that nature requires the comprehensive matching of facial images to biographical information.

All Australian jurisdictions have recognised the growing need to address identity crime and have agreed on a comprehensive legislative response that utilises biometric facial recognition technology as the cornerstone for identity crime detection and prevention. The Bill proposes the legislative framework that will facilitate Queensland's initial participation in the Australia-wide Identity Matching Services (IMS).

2.2 The path to legislative reform[6]

On 13 April 2007, the Council of Australian Governments (COAG) entered into the Intergovernmental Agreement to a National Identity Security Strategy (NISS) to enhance nationally consistent processes for securing, verifying and authenticating identity and identity credentials.

The National Identity Security Coordination Group, chaired by the Commonwealth Attorney-General's Department and with all jurisdictions represented, is tasked with leading and coordinating whole-of-government implementation of the NISS, on behalf of COAG's Law Crime and Community Safety Council (now the Ministerial Council for Police and Emergency Management).

In 2009, the Document Verification Service (DVS) was established through the auspices of the NISS. The DVS is an online system that enables an organisation to verify identity documents against the records of the issuing agency.

In 2012, a National Biometrics Interoperability Framework was developed to facilitate greater collaboration between agencies using biometric systems across government, and to provide a platform for participating jurisdictions to exchange and compare facial biometrics.

In April 2015, COAG agreed to implement a recommendation from the Martin Place Siege: Joint Commonwealth – New South Wales Review which recommended that government agencies which issue documents relied upon as primary evidence of identity should strengthen their name-based identity checking processes and explore greater use of biometrics, including using IMS through the National Facial Biometric Matching Capability (NFBMC).

On 5 October 2017, at the Special Meeting of COAG on Counter-Terrorism, all First Ministers agreed to establish the IMS and signed the Intergovernmental Agreement on Identity Matching Services (IGA) The IGA is an agreement to share and match identity information (such as driver licence images and associated data held by States and passport and immigration images held by the Commonwealth) to support law enforcement, national security, road safety, community safety and identity assurance

[5] Explanatory notes, p 1.

[6] QPS Briefing to the Legal Affairs and Community Safety Committee – Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018, pp1-2.

outcomes.[7] Under the IGA, each jurisdiction is required to ensure that their legislative framework supports the collection, use and disclosure of facial images and identity information between participating entities.

2.3 What is IMS?

Key features of the IMS include:

- the Face Verification Service (enables an image to be compared to confirm identity)
- the Face Identification Service (to enable an image of an unknown person to be matched to an individual)
- the One Person One Licence Service (OPOLS) (to ensure that an individual is not issued with multiple licences of the same type across jurisdictions)
- the National Driver Licence Facial Recognition System (NDLFRS) (to enable cross-jurisdictional matching of driver licence images).

2.4 The Bill

Current Queensland legislation constrains the ability of the State to participate in the IMS due to limitations on the disclosure and use of personal information.

The Bill proposes to amend various pieces of transport and policing legislation to create a legislative framework that will facilitate and support Queensland's participation in the IMS.

The Bill provisions would:

- allow identity information to be disclosed to an entity that maintains/hosts the IMS under agreement (the hosting entity)
- allow identity information to be disclosed to entities that the State has entered into an agreement with as part of the IMS
- authorise the use, collection and further disclosure of identity information by the hosting entity to other entities that Queensland has entered into an agreement with, as required for the operation of the IMS
- authorise DTMR to collect and use data from the hosting entity and other entities that are parties to an agreement as required for the operation of the IMS.[8]

2.4.1 Transport legislation amendments

Driver licence information retained by DTMR is currently shared through the DVS under the *Transport Operations (Road Use Management) Act 1995* (TORUM). TORUM facilitates the operation of the DVS by allowing verification of driver licences and industry accreditation documents, but similar DTMR documents such as photo identification cards are not able to be verified through the DVS. To address this legislative anomaly the Bill moves provisions that support the DVS to the *Transport Planning and Coordination Act 1994* (TPCA) to allow *any* prescribed authority, such as a driver licence or marine licence, issued by DTMR to be verified using the DVS.

In addition, the TPCA currently enables the use and release of personal information and digital images collected by DTMR for limited purposes. It does not however currently allow disclosure to entities for the purposes envisaged under the IMS. Clause 24 of the Bill inserts a new Part 4D (National identity matching services) into the TPCA to enable DTMR to participate in the IMS.

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[7] See: *Intergovernmental Agreement on Identity Matching Services,* 5 October 2017, https://www.coag.gov.au/sites/default/files/agreements/iga-identity-matching-services.pdf.

[8] Explanatory notes, p 5.

2.4.2 Police legislation amendments

The *Police Service Administration Act 1990* (PSAA), division 1A, currently contains provisions governing the disclosure of information by the QPS to external agencies. These existing provisions do not authorise the disclosure of information to the Commonwealth. To create a specific legislative framework to facilitate QPS participation in the IMS, the Bill proposes amendments to the PSAA that will expressly authorise the QPS to disclose information to the Commonwealth for the purposes of the IMS. The Bill also makes provision for the on-disclosure of that information to government agencies with whom a participation agreement has been signed.

Currently, chapter 7, part 5A of the *Police Powers and Responsibilities Act 2000* (PPRA) and s 28ED(4) of the TPCA restrict police access to a person's driver licence photo to when police are exercising a power under certain transport Acts, a dangerous operation of a motor vehicle offence (s 328A of the Criminal Code), and where authorised under the PPRA.

The PPRA currently requires the authority of a justice to access DTMR driver licence digital images for non-transport law enforcement purposes. Implementation of the IMS will however enable other jurisdictions to access the images for non-transport law enforcement purposes without the requirement for an authority from a justice of the peace. This could result in the incongruous outcomes that the QPS will not have the same accessibility to Queensland DTMR images as other jurisdictions and, in a continuation of the current situation, that the QPS will be able to directly access DTMR images to investigate traffic offences but not to investigate more serious offences such as terrorism or murder.

To address these anomalous outcomes, amendments to the PPRA and the TPCA under the Bill will remove the requirement that police must obtain access approval orders from a justice before obtaining DTMR images for non-transport related offences. The amendments intend that information provided directly by DTMR to QPS is treated consistently to that shared via the IMS. Clauses 16 and 23 will require a police officer be given access to a digital photo for any *permitted purpose*, thereby expanding the circumstances under which DTMR can disclose photos to police to be consistent with the kind of access that will be permitted under the IMS.

2.4.3 Stakeholders' views and QPS response

2.4.3.1 Access to DTMR images for non-transport related offences

Several stakeholders raised concerns regarding the removal of the requirement that the QPS obtain approval from a justice before having access to DTMR digital images for non-transport related offences.

The Queensland Council for Civil Liberties (QCCL) expressed its misgivings, noting:

> *When drivers licenses with photographs were implemented some 10 years ago, the then Labor government accepted that the photographic database represented a store of highly significant personal information which should be the subject of special protections. One of those protections, was that police should not be able to access the database without a warrant except when investigating offences under transport legislation.*
>
> *The Identity-Matching Services Bill, Commonwealth, contains no requirement that police obtain a warrant prior to accessing the database. The Commonwealth Bill, contemplates that access to the database will be regulated by other legislation. The removal of that requirement by this Bill, will mean that Queensland police will no longer require a warrant to access the database when investigating non transport related offences. We are not aware of any legislative requirement of the Commonwealth Parliament that would require Federal or State police to obtain a warrant. As a consequence, once this Bill is passed the Queensland Police will no longer need a warrant.*
>
> *In our submission the application of basic privacy principles requires that the police should not have access to these type of databases, without first obtaining a warrant except when the offence they are investigating relates to the purposes for which the data was collected. In the case of drivers licenses that would include offences listed in proposed section 197E. We would*

also accept that it would be legitimate for police officers to have access to the database to assist in identifying the victims of natural disasters and the like.[9]

The Bar Association of Queensland (BAQ) submitted that:

The risk of inappropriate use of the system is not adequately managed if, as proposed, QPS is able to access the driver licence images for non-transport law enforcement purposes without either judicial oversight or rigorous reporting obligations.[10]

Particularly concerned with the likelihood of 'function creep', the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS) noted that:

No Queensland driver has consented to the use of their photo or biometric data captured on that photo for any purpose other than identification for a drivers licence. For it to be used for other purposes, the law as it currently stands requires Queensland Police to obtain an access approval order to obtain Queensland driver licence digital images for purposes unrelated to traffic offences. Additionally, Parliament exercises oversight of the exceptional use of those images in the form of an annual report provided to the Parliament by the Department of Main Roads and Transport.

Under the proposed legislation, those protections are to be lost and in their place are only weak mechanisms to protect the misuse of the data.[11]

The QPS response to public submissions noted that, regarding submitter concerns over the removal of oversight on QPS access to DTMR photographs:

- This has been removed as, under the IMS, QPS will have direct access to driver licence images for the permitted purposes, from all the participating jurisdictions without the need to obtain an access order.
- Removal of the existing requirement for the QPS to obtain the authority of a justice of the peace to access images for non-transport law enforcement purposes will ensure that information provided directly by DTMR to QPS is treated consistently to that shared via the IMS.
- Access to DTMR images by the QPS will need to be for one of the permitted purposes as defined in clause 24 of the Queensland Bill.
- The amendment proposed in the Queensland Bill overcomes the potentially perverse outcomes of the QPS not having the same access to DTMR images as enforcement agencies in other jurisdictions and (in a continuation of the current situation) the QPS being able to directly access DTMR images for traffic offences but not for more serious offences such as terrorism or homicide.

2.4.3.2 Removal of requirement to table annual report on database access

The BAQ expressed concern regarding the removal of the requirement that annual reports of access to digital DTMR photographs be tabled in Parliament, submitting:

Such transparent reporting obligations provide the opportunity for public scrutiny and departmental accountability. The Association considers that annual reporting requirements of access to identity information (including digital photographs) ought to continue to be prepared for the Minister and tabled in Parliament.[12]

9 Submission 4, p 1.

10 Submission 8, p 2.

11 Submission 7, p 2.

12 Submission 8, p 2.

The QPS response noted that the repeal of s 37A of the TPCA which requires a report to be tabled each year on the number of times DTMR digital images are accessed, ensures that the QPS can access DTMR images on the same basis as other agencies participating in the IMS. The QPS noted that the IMS will have in-built system controls to restrict access to information, as well as maintaining a continuous audit trail of information access and use, with it being considered that such mechanisms are far more robust than reporting the number of images accessed. The QPS briefing to the committee stated that the current s 37A requirement will become impractical with the advent of the IMS given the number of agencies involved that may be accessing the relevant images and the frequency of this access.

2.4.3.3 Concerns regarding use of IMS data for evidentiary purposes

The Office of the Information Commissioner (OIC) noted that, although the explanatory notes for the Bill stipulate that outputs from the IMS will not be used for evidentiary purposes, this was not specifically provided for in the legislation.[13] The explanatory notes state that:

> *Regarding concerns about errors in usage, the outputs from the IMS will not be used for evidentiary purposes. That is, it will be one of many investigative tools police will have available to them, but they will need to compile further admissible evidence to lay charges against an individual.*

The OIC expressed the view that:

> *While the Explanatory Notes for the Queensland bill stipulate that outputs from the identity matching services will not be used for evidentiary purposes, this is not entrenched in the legislation. The statement in the Explanatory Notes reflects only that, to date, such identity matching has not been used for evidentiary purposes. However its use in this way is likely, if not inevitable, especially as technology improves. This assumption in the Explanatory Notes also fails to recognise that IMS outputs will inevitably be used for gaining/executing search warrants and making arrests.*[14]

Conversely, the BAQ submission expressed concern that outputs from IMS would not be admissible as evidence. If the data was inadmissible, its validity and the mode of its use in the investigation would not be subject to cross-examination and testing at trial even though it might have been a principal investigative tool for a particular investigation. The BAQ stated:

> *The outputs from the IMS are not to be used for evidentiary purposes. The Association is concerned that this may be an attempt to limit judicial discretion in relation to disclosure orders and defence options at trial. Where such information has been accessed in the course of QPS investigations, the Association submits that all investigative strategies and information systems ought to be subject to the usual disclosure and testing by cross-examination in relevant proceedings.*

In relation to the uses for IMS outputs, the QPS responded that:

> *IMS outputs are nothing more or less than an investigative tool that will be used in conjunction with other technologies and traditional policing methodologies to generate evidence capable of substantiating identity. It is not intended to be used as a definitive form of identification in criminal prosecutions. IMS outputs do not replace the investigative work that needs to be done prior to police action being taken.*
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> *In the context of a criminal investigation where police were matching a CCTV image through the IMS – once a person of interest was identified from the IMS – further investigative work would be undertaken to formally identify that the matched person was in fact the person in the CCTV footage.*

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13 Submission 5, p 4.

14 Submission 5, pp 4-5.

The QPS response did not directly address the concerns regarding admissibility raised by the Bar Association and the OIC.

Committee comment

The committee appreciates that, as the early adoption jurisdiction, there are some details regarding usage of the IMS that will only become clarified once the IMS is fully operational.

The committee does however note the concerns of submitters regarding the removal of access safeguards, the potential for 'function creep', the removal of the requirement to report annually on database access levels, and a level of uncertainty regarding whether or not IMS outputs will be admissible as evidence at trial.

The committee notes that clause 29 of the Commonwealth Bill requires a review of the operation of the Commonwealth Act and provisions of the IMS to be started within five years of commencement and a report on such review tabled. The committee further notes that the QPS response to submissions suggested that, given the projected timeframe for operation of the national system, conducting a review 12 months after commencement as suggested by some submitters might be too early for a meaningful assessment of the operation of the system, as it is considered unlikely that sufficient data would be available to inform a review so soon after commencement.

The committee considers that oversight of the use of IMS data may address areas of concern raised by submitters regarding the removal of access safeguards, the removal of existing usage reporting requirements and the risk of 'function creep'. The committee considers that the Public Interest Monitor would be a suitable statutory officer to undertake such oversight.

The committee recommends that a review of the changes made by this legislation be conducted two years after its commencement to evaluate the frequency, purpose and type of identity matching services used, the users, the error rates and any incidences of service expansion.

Recommendation 2

The committee recommends that a review of the changes made by this legislation be conducted two years after its commencement to evaluate the frequency, purpose and type of identity matching services used, the users, the error rates and any incidences of service expansion.

2.5 Liquor trading hours extension

The Bill proposes to amend the *Liquor Act 1992* to automatically authorise licensees in the Broadbeach CBD safe night precinct (Broadbeach SNP) and the Surfers Paradise CBD safe night precinct (Surfers Paradise SNP) (the Gold Coast SNPs) to sell liquor for consumption on premises for an extra hour each night of the 2018 Gold Coast Commonwealth Games.[15]

2.5.1 Rationale for the proposed amendments

The amendments are intended to 'help enhance tourism and hospitality experiences for Commonwealth Games participants and attendees, without compromising the integrity of the harm minimisation objectives of the *Liquor Act 1992* … or the Government's *Tackling Alcohol-Fuelled Violence Policy.'*[16]

The Minister elaborated on the reason for the amendments and the benefits that are expected:

> *The Commonwealth Games in April represents a once-in-a-lifetime event that will demonstrate to the world the great things Queensland has to offer. In particular, the Palaszczuk government recognises that the Commonwealth Games presents a significant opportunity for restaurants, pubs, clubs, bars and nightclubs to showcase their exceptional hospitality to visitors from around*

[15] Explanatory notes, p 4.

[16] Explanatory notes, p 4.

the world. The government also recognises that, due to the massive influx to the Gold Coast in particular, demand for these services will be high.

That is why the bill amends the Liquor Act to create the Commonwealth Games Extended Liquor Trading Hours Authority. … This change will allow Commonwealth Games visitors extra time to enjoy a meal with a liquor service or attend entertainment venues after the conclusion of evening sporting events.[17]

2.5.2 Effect of the proposed amendments

There are 232 liquor licences in total in the Broadbeach and the Surfers Paradise SNPs. One hundred and eighty-five of the licences enable trading until midnight and 47 licences permit post-midnight trading. Thirty-one of the 47 post-midnight licences allow liquor trading until 3:00am.[18]

The proposed amendments would authorise licensees in the Surfers Paradise and Broadbeach SNPs to sell liquor under a 'games authority' during each extended trading hour that falls within the Games period.[19] A licensee's extended trading hour would start at the end of their current trading hours for the day. For example, if a licensee's usual trading hours are from 10:00am until 3:00am, the licensee would be permitted to sell liquor until 4:00am during the Commonwealth Games.[20] There would be no additional fees imposed on licensees in relation to the additional hour of trading.[21]

In addition, the Bill waives application fees for extended hours permits used during the Games period if the licensee's licensed premises is in the Gold Coast SNPs.[22] A licensee may choose to use one or more of their six extended hours permits which would allow them to sell liquor for a further hour after the extended hour.[23]

The proposed amendments would not change a licensee's photo ID scanning obligations. If a licensee is currently required to scan patrons ID, the licensee would be required to scan patrons ID during the additional hour of liquor trading. If a licensee is not currently required to scan patrons ID, the licensee would not be required to do so during the additional hour.[24]

2.5.3 Measures to minimise potential risks

The committee received evidence of various measures intended to minimise the potential risks of alcohol-related violence and public disorder associated with extended liquor trading hours during the Games.

The QPS advised that it had been consulted on the draft Bill and was satisfied that the amendments strike the right balance between protecting the public and enhancing the experience of those visiting the Gold Coast for the Games.

We were consulted in the lead-up to the development of the bill. We raised issues around the capacity of the QPS to manage the business-as-usual side of the Gold Coast, which includes the safe night precincts, should significant extensions be allowed. We think that the bill strikes a reasonable balance for the many tourists who are going to be on the coast and particularly many

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17 Queensland Parliament, Record of Proceedings, 15 February 2018, pp 87-88.

18 Commissioner for Liquor and Gaming, public briefing transcript, Brisbane, 21 February 2018, p 5.

19 Clause 9, proposed new s 235C. A 'games authority' is a Commonwealth Games extended trading hours authority.

20 Clause 9, proposed new s 235C.

21 Clause 9, proposed new s 235E; explanatory notes, p 4.

22 Clause 9, proposed new s 235F; explanatory notes, p 4. The fee is $67.70 a day: Commissioner for Liquor and Gaming, public briefing transcript, Brisbane, 21 February 2018, p 6. See Division 4 (Extended hours permit) of Part 4A (Permits) of the *Liquor Act 1992* for more information about extended hours permits.

23 Commissioner for Liquor and Gaming, public briefing transcript, Brisbane, 21 February 2018, p 6.

24 Clause 9, proposed new s 235D.

of the athletes themselves who, no doubt when they have finished their program, will want to enjoy the many great entertainment venues on the coast, but at the same time provide enough in terms of policing services so that there is still that separation between the day and the night-time economies, which you hinted at around that early morning process.

In the past, that was quite challenging but, so that the committee is fully informed, as part of our strategic planning for the games we have not taken officers from the Gold Coast to utilise them in terms of the games roster, if that makes adequate sense to you. On top of that, we have a ban on leave during the Commonwealth Games period and in the lead-up. That gives us about 16 per cent more capacity for the officers who are currently on the coast. We think we will have adequate to deal with the, I think, reasonably sensible arrangement that has come to pass after the consultation process and we will work with all of the stakeholders, particularly those licensed venues who will apply without doubt.

We will know about all of that in advance. We will have the ability to also talk to Liquor Gaming around any extra requirements on those permits. So we are quite comfortable that we will have sufficient resources to deal with it.[25]

The Commissioner for Liquor and Gaming (Liquor Commissioner) advised that a requirement for the approval process for extended hours permits is that the QPS be consulted and its views 'are very much predominant in the decision that the commissioner makes.'[26] Also, conditions may be placed on extended hours permits, such as conditions relating to security or noise.[27] The Liquor Commissioner further stated that the department would work with the Gold Coast SNPs 'to ensure that they have in place the necessary circumstances that provide for community safety.'[28]

In addition, the Bill proposes to amend the Liquor Act to enable the Liquor Commissioner to issue a public safety restriction notice to a licensee to restrict liquor trading in a licensed premises.[29]

2.5.4 Public safety restriction notices

The Bill proposes to amend the Liquor Act to create a power for the Liquor Commissioner to issue a public safety restriction notice to a licensee if the Liquor Commissioner considers it necessary to deal with violence or behaviour mentioned in a report from the Police Commissioner or Assistant Police Commissioner.[30]

The notice may:

- revoke the licensee's authority to sell liquor for an additional hour each night of the Games
- reduce the ordinary hours during which the licensee is authorised to sell liquor
- vary the licensee's licence by imposing a new condition, amending a condition or revoking a condition
- suspend the licensee's licence.[31]

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25 Queensland Police Service, public briefing transcript, Brisbane, 21 February 2018, p 6.

26 Public briefing transcript, Brisbane, 21 February 2018, p 6.

27 Public briefing transcript, Brisbane, 21 February 2018, p 6.

28 Public briefing transcript, Brisbane, 21 February 2018, p 6.

29 Hon Mark Ryan MP, Minister for Police and Minister for Corrective Services, Queensland Parliament, Record of Proceedings, 15 February 2018, p 88.

30 Clause 9, proposed new ss 235G, 235H; Hon Mark Ryan MP, Minister for Police and Minister for Corrective Services, Queensland Parliament, Record of Proceedings, 15 February 2018, p 88.

31 Clause 9, proposed new s 235H(2).

The notice has effect for the specified period, no later than the end of the Games.[32]

The Liquor Commissioner may revoke the notice or amend the notice if the Liquor Commissioner stops being satisfied an action stated in the notice is necessary to deal with violence or behaviour mentioned in the police report.[33]

There is no review of the Liquor Commissioner's decision[34] and no compensation is payable in respect of a notice.[35] Regarding this, the Liquor Commissioner advised:

> *These restriction notices can only be issued in very circumscribed circumstances and can only apply for the duration of the games or a lesser period if determined by the commissioner. There is a potential breach of fundamental legislative principles in this, because these restriction notices have no right of appeal attached to them. However, given the constraints on the commissioner in issuing them and their very short-term nature, this is perceived as being a fair balance.*[36]

2.5.5 Stakeholders' views and DJAG's response

The Queensland Hotels Association (QHA) supported the amendments to the Liquor Act that automatically allow licensees to serve liquor during the Commonwealth Games for an additional hour beyond their ordinary trading hours, and also the amendments that waived the fees for extended trading hours permits during the Commonwealth Games. QHA recommended, however, that the amendments be extended to all licensed venues in the Gold Coast Local Government area. In addition, QHA recommended that any applications for extended trading hours during the Commonwealth Games period should be excluded from counting towards any of a venue's six applications per year.[37] The QHA explained its position:

> *Considering that the Commonwealth Games event venues and increased visitor accommodations span the length of the Gold Coast, including locations such as Coolangatta, Currumbin, Robina, Nerang, Southport, Carrara, Runaway Bay and Coomera, the extended trading hours should be applied more broadly than just the two safe night precincts of Surfers Paradise and Broadbeach.*
>
> *…*
>
> *To expect the Surfers Paradise and Broadbeach SNPs alone to accommodate these numbers is unrealistic and exacerbates safety and transport concerns. The extended trading hours should therefore apply to all licensed venues in the Gold Coast local government area, which is clearly defined and offers ease of enforcement. …*[38]

As regards safety in areas of the Gold Coast outside the SNPs, such as at Coolangatta, the QHA stated:

> *Obviously there are a range of venue trading hours outside SNPs. They have the opportunity to trade up to a maximum of 2 am. Many venues would already be trading past midnight. Each venue would have, and does have, specific liquor licence conditions on their liquor licence. Those conditions have been determined based on risk and they are conditions which a venue would continue to comply with. They have a general and ongoing obligation under the Liquor Act to provide a safe environment. Venues certainly outside SNPs can do that and do do that and could*

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32 Clause 9, proposed new s 235H(5).

33 Clause 9, proposed new s 235H(6).

34 Clause 9, proposed new s 235I. This provision is discussed in relation to fundamental legislative principles in Part 3 of this report.

35 Clause 9, proposed new s 235J. This provision is discussed in relation to fundamental legislative principles in Part 3 of this report.

36 Public briefing transcript, Brisbane, 21 February 2018, p 5.

37 Submission 2; public hearing transcript, Brisbane, 26 February 2018, pp 4-5.

38 Public hearing transcript, Brisbane, 26 February 2018, p 4.

simply continue on with their existing trading conditions, which often have no ratios for crowd controllers or CCTV or what have you.[39]

In response to a question from the committee about QHA's position with respect to extending trading hours in all Queensland SNPs during the Commonwealth Games, the QHA advised:

The QHA would absolutely support any further expansion that was deemed appropriate—and you correctly identify that it is much broader than just the Gold Coast. There would certainly be no objection but, rather, unfettered support for any other expansion of trading hours or opportunities to see those tourism opportunities in those other areas you mentioned.[40]

The Department of Justice and Attorney-General (DJAG) did not support QHA's recommendation that the proposed additional hour of trading be extended to all licensed premises in the Gold Coast local government area. DJAG was of the view that to do so would significantly increase the risks of harm, could place a strain on police resources and would create inequity between Gold Coast SNP licensees required to scan patron IDs and licensees on the Gold Coast outside the SNPs who would not be required to scan patron IDs. DJAG further stated that SNPs are best placed to address the increased safety risks associated with late night liquor trading.[41]

With respect to QHA's recommendation that extended hours permits issued to licensees in the Gold Coast SNPs during the Commonwealth Games not count towards the statutory limit of six per year, DJAG advised that the proposal is beyond the scope of the Bill. Nevertheless, DJAG provided advice that the extended hours permit framework is intended to strike a balance between late night liquor trading for 'special occasions' and minimising the risk of harm. DJAG considered that 'widespread 5am late-night liquor trading could potentially result in a significant increase in the number of high risk sites open throughout the highest risk times' and may require police capacity that could otherwise be used elsewhere on the Gold Coast for the Commonwealth Games.[42]

The Queensland Law Society (QLS) expressed concern that the Bill does not permit QCAT to review a decision by the Liquor Commissioner to take action in relation to a police report. The QLS considered this to be a denial of natural justice.[43] The Bar Association was also concerned about this provision, stating that an appeal to QCAT is 'far more accessible to citizens' than judicial review.[44]

DJAG acknowledged that the exclusion of a QCAT review provision for decisions relating to a public safety restriction notice may breach fundamental legislative principles by not providing for natural justice but that any potential breach is justified on the basis of public interest.[45] DJAG asserted:

Ensuring public safety during the 2018 Commonwealth Games, which constitutes a significant security challenge for Queensland government agencies, should take greater precedence over the commercial interests of licensees for the limited period in which a restriction notice could be in effect (i.e. 3 April – 17 April 2018). It is imperative for the Commissioner for Liquor and Gaming to be able to take necessary action in the event public safety is at risk. However, this action is not unilateral, and may only be taken upon recommendation and evidence from the most senior ranks of the Queensland Police Service.

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39 Public hearing transcript, Brisbane, 26 February 2018, p 5.

40 Public hearing transcript, Brisbane, 26 February 2018, p 4.

41 Queensland Police Service, correspondence dated 27 February 2018, pp 10-13.

42 Queensland Police Service, correspondence dated 27 February 2018, pp 13-15.

43 Submission 6, p 3.

44 Submission 8.

45 Queensland Police Service, correspondence dated 27 February 2018, p 15.

Further, as the restriction notice can only have effect for a very limited duration, it would be unlikely that a hearing could be brought to QCAT, and an outcome handed down, prior to the conclusion of the 2018 Commonwealth Games period.

Therefore, due to the unique operating environment of the 2018 Commonwealth Games, and the significant harm that could occur given the expected volume of people, it is considered necessary to allow for action to be taken against a licensee without ordinary natural justice processes applying, to protect public safety. It is also important to note that the Bill does not exclude judicial review.[46]

Committee comment

The Committee notes the concerns raised by submitters that there is no review by QCAT of a decision of the Liquor Commissioner in relation to public safety restriction notices. Whilst judicial review is still available to aggrieved licensees, this option could be cost prohibitive.

Nevertheless, given the limited duration of the notice and the fact that the Liquor Commissioner makes the decision on the basis of a report from the Police Commissioner or an Assistant Commissioner, the Committee is satisfied with the amendment.

The committee notes QHA's concerns and also the advice provided in relation to these by the department, particularly with respect to the scanning of a patron's ID if the extended hour of liquor trading were to be extended to include areas outside the Gold Coast SNPs. The committee considers that the anomalies that would result weigh against adding further areas to the extended hours trading.

Overall, the committee supports the proposed amendments to the Liquor Act. We consider that the amendments appear to provide for those who wish to dine or party late into the night during the Commonwealth Games without substantially increasing the risk of alcohol-fuelled violence and other potential problems associated with the late closing of premises selling alcohol.

2.6 Criminal Code – Explosive Offences

2.6.1 Background

The making, storage and use of explosives, including highly volatile homemade explosives, poses a considerable potential risk to community safety. There is also a direct threat to the personal safety of emergency services personnel whose jobs take them into situations where they may be exposed to explosives of varying degrees of stability. The Bill amends the Criminal Code offence provisions dealing with explosives offences, s 470A (Unlawful deposition of explosive or noxious substances) and s 540 (Preparation to commit crimes with dangerous things), to ensure that these offences are responsive to the danger posed by highly volatile homemade explosives.[47]

Section 470A makes it an offence to wilfully and unlawfully throw, leave down or otherwise deposit any explosive or noxious substance in any place whatsoever under circumstances where it may cause injury to any person or damage to property of any person. Section 540 makes it an offence to make or knowingly possess an explosive substance with intent to commit a crime by using it or enabling its use by another person.

2.6.2 Outline of proposal

The current maximum penalties of two years imprisonment for s 470A and three years imprisonment for s 540 are considered to be inadequate to reflect the seriousness of explosives offences and to deter offending. The Bill therefore increases the maximum penalties for both s 470A and s 540 to seven years imprisonment to address this concern.

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[46] Queensland Police Service, correspondence dated 27 February 2018, pp 15-16.

[47] Explanatory notes, p 3.

In addition, the existing Criminal Code offences do not cover the manufacturing or possessing of an explosive in circumstances that may cause injury to a person or property. Under the Bill, the existing s 470A (Unlawful deposition of explosive or noxious substances) is replaced with a new s 470A (Unlawful dealing with explosive or noxious substances). The new s 470A extends the application of the offence to the wilful and unlawful making or possession of an explosive in circumstances that may injure a person or damage property.[48]

2.6.3 Stakeholder views

Broadening of scope may criminalise trivial conduct

Under the Bill, the scope of s 470A will be broadened to not only refer to the unlawful deposition of an explosive but to include the making and possession of an explosive or noxious substance. The QLS expressed concern that expanding the s 470A offence to include the unlawful possession of an explosive will criminalise trivial conduct:

> *The Bill changes the offence of depositing explosives to include mere possession of explosives. Potentially, this will make possession of an expired marine safety flare, a firework or a shotgun cartridge a crime punishable by up to seven (7) years imprisonment*.[49]

In regard to these concerns, the QPS responded as follows:

> *In order to establish the offence in section 470A, any possession of an explosive or noxious substance must be unlawful, that is, that the possession is not authorised, justified or excused by law.*
>
> *Marine flares, as a form of distress signal are specifically exempted from the licensing requirements of the* Explosives Act 1999*. That being so, it is not unlawful to possess them.*
>
> *Similarly, with shot gun shells a person who is licenced under the* Weapons Act 1990 *may lawfully possess them. In the event that an unlicensed person possesses shotgun shells, they will only fall foul of section 470A if they possess them in circumstances that may cause injury to a person or damage to property. Therefore, the section would apply where the possession of shotgun shells was linked to circumstances where damage could be done to property or injury could be caused to a person. An example would be where a quantity of shotgun shells were rigged together as an improvised explosive device. It is appropriate under these circumstances for this offence provision to apply.*[50]

Increase of penalty leads to removal of summary jurisdiction

In its submission and during the public hearing, the QLS also raised concerns about the increase of the maximum penalties in ss 470A and 540, from two years and three years respectively to seven years, resulting in more minor transgressions of the provisions not being able to be dealt with summarily.[51]

Regarding the proposed changes to s 470A in this regard, the QLS noted:

> *Another effect is that increasing the maximum penalty changes the charge of the offence from one that must be heard summarily (section 552BA(4)(b)(a)) to one that must be determined upon indictment. Since the offence applies to circumstances both trivial and extremely serious, there ought to be a mechanism for the less serious instances to be determined summarily.*[52]

In response to these concerns, the QPS responded as follows:

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48 Explanatory notes, p 3. See also clauses 5 and 6 of the Bill.

49 Submission 6, p 2.

50 Queensland Police Service, correspondence dated 27 February 2018, p 17.

51 Submission 6, p 3; public hearing transcript, Brisbane, 26 February 2018, pp 2-3.

52 Submission 6, p 3; public hearing transcript, Brisbane, 26 February 2018, p 2.

Contrary to the QLS's assertion, the increase in the maximum penalty from two years to seven years imprisonment for the section 470A offence will not change the current position with regard to summary disposition of the offence.

Section 552BA of the Criminal Code mandates the summary disposal of certain indictable offences (relevant offences).

Currently section 470A, with its maximum penalty of two years imprisonment is a relevant offence pursuant to section 552BA(4)(a) of the Criminal Code, in that it has a maximum sentence of under three years imprisonment. Whilst the penalty increase to seven years imprisonment will mean that the offence no longer falls under s.552BA(4)(a), it will be a relevant offence pursuant to section 552BA(4)(b) as it will be an offence under Chapter 6 with a maximum penalty exceeding three years imprisonment.[53]

Regarding the proposed changes to s 540, the QLS noted in its submission that the offence in s 540 applies to circumstances both trivial and extremely serious and suggested that there should be a mechanism by which the less serious instances can be determined summarily.[54]

In regard to these concerns in the context of s 540, the QPS responded as follows:

Currently the section 540 offence must be dealt with summarily as it falls within section 552BA(4)(a) of the Criminal Code (given its maximum penalty of three years imprisonment). The change in maximum penalty from three years to seven years imprisonment for the section 540 offence will necessitate charges being heard on indictment.

It is the view of the Department of Justice and the Attorney-General (DJAG) that offending against this section represents serious criminal conduct that is of significant concern to the community. It is on this basis that it has been determined that such matter should proceed upon indictment.

It is also pertinent to note that section 540 offences cannot be described as prevalent, with only two prosecutions under section 540 for the four-year period of July 2013 to June 2017.[55]

<u>*Increase of penalty may lead to unintended consequences*</u>

Since 2008, s 540 of the Criminal Code has included a reference to the term 'dangerous things'. In its submission, the QLS suggested that the lack of definition of 'dangerous things' coupled with the increase in maximum penalty may have the unintended consequence of the offence being charged in preference to the offence in s 69 (Going armed so as to cause fear) which carries a maximum penalty of only two years imprisonment:

Clause 6 of the Bill increases the maximum penalty from three (3) to seven (7) years. This may have unintended consequences.

For example, in relation to section 69 of the Criminal Code which deals with "going armed so as to cause fear". Section 69(1) states that, 'any person who goes armed in public without lawful occasion in such a manner as to cause fear to any person is guilty of a misdemeanour, and is liable to imprisonment for 2 years.' The effect of clause 6 is that a police officer could charge an individual with the more serious offence in section 540 of the Criminal Code. Section 540 deals with, 'preparation to commit crimes with dangerous things' which carries a maximum penalty of seven (7) years and is a crime.[56]

In regard to these concerns, the QPS responded as follows:

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53 Queensland Police Service, correspondence dated 27 February 2018, p 18.

54 Submission 6, p 3.

55 Queensland Police Service, correspondence dated 27 February 2018, pp 19-20.

56 Submission 6, p 3.

Sections 69 and 540 of the Criminal Code contemplate very different conduct and are not, as suggested, readily interchangeable.

Section 69 of the Criminal Code makes it an offence to go armed in public without lawful occasion. The concept of 'armed' has been held to mean possessing an object which is available and capable of causing terror.[57] *In practice, the section is applied to instances involving an item that is brandished as some form of weapon e.g. sword, replica pistol.*

Section 540 makes it an offence for a person to make or possess an explosive substance or other dangerous or noxious thing with intent to commit a crime. The term dangerous thing is not specifically defined.

The textual canon of noscitur a sociis, provides that the meaning or interpretation of a word can be gathered from the context or by reference to the meaning of the words associated with it. In section 540, the phrase, 'explosive substance or other' contextualises dangerous or noxious thing. Overall this has the effect of focussing the offence on items that are hazardous or capable of combustion.[58]

Overlap with Explosives Act 1999

The QLS also noted in its submission that the explanatory notes make no reference to the existing offences in the *Explosives Act 1999*. In the view of the QLS, the existing offences in the *Explosives Act 1999* will overlap with the amended Criminal Code provisions of ss 470A and 540.[59]

In regard to these concerns, the QPS responded as follows:

Simple and indictable offences covering the same/similar elements is not a unique position in the criminal law. For example, the unauthorised taking of a motor vehicle may be charged as an offence of unlawfully entering or using a motor vehicle pursuant to section 25 of the Summary Offences Act 2005, or unlawful use of a motor vehicle pursuant to section 408A of the Criminal Code.

The Guidelines issued by the Director of Public Prosecutions pursuant to section 11(1)(a) of the Director of Public Prosecutions Act 1984 (Qld) provide guidance on this issue. Guideline 13 of the Guidelines updated by the Director of Public Prosecution on 15 June 2011 provides that where the same criminal act could be charged either as a summary or an indictable offence, the summary offence should be preferred unless the conduct could not be adequately punished other than as an indictable offence having regard to:

- *the maximum penalty of the summary charge;*
- *the circumstances of the offence; and*
- *the antecedents of the offender.*

The QPS has adopted those guidelines at s 2.4 (Determining which provision is appropriate) of the QPS Prosecution Reference Notes.

Further it should be noted that as distinct from the Criminal Code, the Explosives Act 1999 is recognised as an industry based legislative instrument that is primarily focused on regulating the persons and corporations working within the explosives profession.[60]

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57 *R* v. *Ashcroft* (1989) 38 A Crim R 327.

58 Queensland Police Service, correspondence dated 27 February 2018, p 19.

59 Submission 6, p 3.

60 Queensland Police Service, correspondence dated 27 February 2018, pp 20-21.

Liability for citizen's arrest

The QLS also expressed a concern that the amendments to s 470A would result in an offender becoming liable to citizen's arrest by virtue of s 546 of the Criminal Code.[61]

In regard to these concerns, the QPS responded as follows:

> *Clause 5 reclassifies the offence in section 470A from a misdemeanour to a crime. As a crime, this will mean that offenders may be arrested without warrant and that section 546 (Arrest without warrant generally) of the Criminal Code will apply.*
>
> *This however does not alter the status quo with regards to power of arrest.*
>
> *In its current form, as a misdemeanour, section 470A specifically states (at section 470A(2)) that the offender may be arrested without warrant. Therefore, section 546 of the Criminal Code currently applies to the provision.*[62]

[61] Submission 6, p 2.

[62] Queensland Police Service, correspondence dated 27 February 2018, pp 17-18.

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 and brings the following to the attention of the Legislative Assembly.

3.1.1 Clauses 5 and 6 - Significant increases to maximum penalties for explosives offences

Clauses 5 and 6 each increase the current maximum penalty for an offence under the Criminal Code.

Clause 5 provides for a replacement s 470A of the Criminal Code (Unlawful deposition of explosive or noxious substances), which includes an increased penalty maximum penalty from 2 years to 7 years imprisonment.

Clause 6 increases the maximum penalty for the offence under s 540 of the Criminal Code (Preparation to commit crimes with dangerous things) from 3 years to 7 years imprisonment.

These provisions expose individuals to significantly longer jail terms than previously, potentially impacting on rights and liberties.

Proportion and relevance

Consequences imposed by legislation should be proportionate and relevant to the actions to which the consequences are applied by the legislation. The 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'.

Penalties

A penalty should be proportionate to the offence. The OQPC Notebook states, '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'.

The explanatory notes state that the existing penalties are 'inadequate to reflect the seriousness of the conduct and provide appropriate deterrence'[63] and:

> *The amendment is justified to appropriately reflect the seriousness of the offence and the risk it poses to the community. The amendment operates prospectively and will only apply to offenders who commit the offence on, or after, the date upon which the amendments commence.*[64]

Committee comment

The committee considers the new maximum penalties are proportionate and justified in the circumstances.

3.1.2 Clause 9 – Longer trading hours and increased regulatory powers for Commonwealth Games

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:

[63] Explanatory notes, p 6.

[64] Explanatory notes, p 9.

- makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review
- is consistent with principles of natural justice
- allows the delegation of administrative power only in appropriate cases and to appropriate persons.[65]

Clause 9, by inserting proposed s 235H, provides for the issue, by the Liquor Commissioner, of a 'public safety restriction notice' regarding certain licensed premises (those in the Gold Coast SNPs).

Any notice is to deal with the effects of violence or behaviour mentioned in a report to the Liquor Commissioner by the Police Commissioner or an Assistant Police Commissioner. In turn, such a report must be based on a belief that alcohol-related violence or other anti-social behaviour is happening at or near the premises, set out the basis for that belief, and may recommend the Liquor Commissioner take stated action under s 235H.

The effects of a notice vary. It can revoke the 'games authority' issued for the licence, vary the trading hours, or impose conditions on, or suspend, the licence. Action taken need not be that recommended by the police.

A notice must be amended or revoked if the Liquor Commissioner is satisfied it is no longer needed. The effective period of any notice cannot extend beyond the end of the Games period, that is, 17 April 2018. The relevant legislative provisions expire on 18 April 2018.

Any notice is effective upon being given to the licensee, and the process of issue of a notice does not involve any 'show cause' element.

Proposed s 235I expressly provides that there can be no QCAT review of any decision made under s 235H.

Further, proposed s 235J provides that no compensation is payable regarding any actions of the Police Commissioner or Liquor Commissioner under these provisions.

Potential FLP issues

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Regarding the former, the OQPC Notebook states:

> *Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision.*[66]

Regarding the need for appropriate review, the Notebook states:

> *Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits based review is the most appropriate type of review.*[67]

Generally, powers should be delegated only to appropriately qualified officers. The OQPC Notebook provides that the appropriateness of a delegation depends on all the circumstances including the

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65 *Legislative Standards Act 1992*, s 4(3)(a)-(c).

66 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 15.

67 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 18.

nature of the power, its consequences, and whether its use appears to require particular expertise or experience.[68]

Committee comment

The issue of a restriction notice, the absence of a review mechanism, and the absence of any entitlement to compensation all abrogate existing rights and raise FLP concerns.

Any removal of rights may, however, be justified by the overriding significance of the objectives of the legislation.

The criteria for any decision to issue a restriction notice can be regarded as adequately defined. The power is delegated to and vested in high level officers. In this instance, the committee considers that the absence of any review process and of any entitlement to compensation are warranted, in light of the policy objectives of ensuring public safety and security and in the context of the Commonwealth Games, including that any restriction notice would be of short duration (3-17 April 2018 at most).

3.1.3 Clauses 18 and 26 – Retrospective operation

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament. Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.[69]

Clauses 18 and 26 both contain provisions that provide for a transitional regulation-making power. Further, these permit retrospective operation.

Clause 18 provides for a transitional regulation-making power in the *Police Service Administration Act 1990*, for the purposes of the new identity and biometric capability provisions. Clause 18(2) states:

> *A transitional regulation may have retrospective operation to a day not earlier than the day of commencement.*

Clause 26 provides for a similar transitional regulation-making power in the *Transport Planning and Coordination Act 1994*, again for the purposes of the new identity and biometric capability provisions. Clause 26 is in like terms to clause 18, and clause 26(2) similarly states:

> *A transitional regulation may have retrospective operation to a day not earlier than the day of commencement.*

Potential FLP issues

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

As noted above, any transitional regulation would be subject to sunset clauses:

> *(4) A transitional regulation may only be made within 2 years after the commencement.*
>
> *(5) This division and any transitional regulation expire 3 years after the day of commencement.*

The content of any provisions with retrospectivity in this case is not explicit – the committee does not know what provisions would be in any transitional regulation and therefore intended to be

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68 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 33.

69 *Legislative Standards Act 1992*, s 4(4)(a).

retrospective, other than that they are limited to transitional provisions as contemplated by clauses 18 and 26, that is:

> *matters for which it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of [the principal Act] as it was in force immediately before the commencement to the operation of [the principal Act] as amended by the Police and Other Legislation (Identity and Biometric Capability) Amendment Act 2018*

and for which the latter Act does not make provision or sufficient provision.

The explanatory notes acknowledge the retrospectivity issue, stating:

> *This regulation making power also applies amendments retrospectively to the commencement of the provision where necessary. However, given the nature of the provisions, the retrospective application does not impose obligations or sanctions on individuals.*[70]

Comment

The committee notes this potential for retrospectivity in future subordinate legislation.

3.1.4 Clauses 11 and 23 – Accessing digital images and related information

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

Clause 11 proposes to amend the *Police Powers and Responsibilities Act 2000* (PPRA) to omit existing Chapter 7, Part 5A, 'Accessing registered digital photos and other information'. Those current provisions provide a system to enable the QPS to access the Department of Transport and Main Road's digital images and other related information, including information stored electronically on smartcard transport authorities.

The current provisions apply where a police officer considers it reasonably necessary to access a registered digital photo for the investigation, prosecution or enforcement of the criminal law. The police officer may apply to a justice for an order authorising access (access approval order). 'Access' includes obtaining a copy. The provisions also provide for emergency access and for the use and destruction of the registered digital photo.

Clause 12 proposes to amend the PPRA to insert new s 197E 'Accessing information stored electronically on smartcard transport authorities'. This clause retains existing provisions in Part 5A.

Additionally, cl 23 proposes to amend s 28E of the *Transport Planning and Coordination Act 1994* (TPCA), 'Restricted access to a digital photo and digitised signature', to expand the circumstances where the chief executive must allow a police officer to access a person's digital photo to include any 'permitted purpose' under proposed new s 28EP(2). Clause 23 also clarifies that such access is not subject to any requirement under the proposed IMS provisions in cl 24.

Potential FLP issues

Reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals. This includes the reasonableness and fair treatment of an individual's personal information and a regard for a person's right to privacy.

Clause 11 proposes to remove the existing requirement for a police officer to apply to a justice for an access approval order to access Queensland driver licence digital images for non-transport related offences. Clause 23 proposes to expand the circumstances where the chief executive must allow a police officer to access a person's digital photo.

According to the explanatory notes, the Bill removes Part 5A of the PPRA:

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[70] Explanatory notes, p 10.

… to ensure that QPS access to TMR's images and information is no more restrictive than other jurisdictions' access under the IMS.[71]

The explanatory notes further advise:

… the IMS will enable other jurisdictions to access the images for non-transport law enforcement purposes without the requirement for an authority from a justice of the peace. This will result in the potentially perverse outcome of the QPS not having the same access to TMR images as other jurisdictions and the continuation of the current situation where the QPS can directly access TMR images for traffic offences but not for more serious offences such as terrorism or murder.[72]

In relation to the above proposed amendments to the PPRA and TPCA, the explanatory notes advise:

Currently, police can access TMR images to investigate traffic offences but are unable to do so without recourse to an order by a justice for the investigation of more serious offences such as murder and terrorism.

The Bill removes the current requirement for police to obtain the approval of a justice prior to accessing a digital photo held by TMR for a non-transport related purpose.

This is a potential breach of the fundamental legislative principle that legislation have sufficient regard to the rights and liberties of individuals as it relates to privacy and the treatment of personal information.

However, any potential breach is justified on the basis that the IGA provides other mechanisms for ensuring police access to photographs is appropriate and QPS access to identity information will be consistent with other enforcement agencies Australia wide.[73]

Comment

The committee considers that the potential infringement of individuals' right to privacy is justified in order to facilitate the successful implementation of the IMS Australia wide and so that Queensland police officers are not subject to greater restrictions than their colleagues from other jurisdictions.

3.1.5 Clauses 17 and 24 – National identity matching services

Clause 17 proposes to insert new Part 10, division 1AA, 'National identity matching services', into the *Police Service Administration Act 1990* (PSAA). The clause includes various information sharing provisions.

Proposed s 10.2FC, 'Disclosure of identity information by commissioner', gives the Commissioner of Police authority to disclose any 'identity information' lawfully in the Commissioner's possession, for a purpose related to the operation of an 'identity matching service'. Such disclosure can be made to the 'host agency' or a 'participating entity' for the service.

Proposed s 10.2FD, 'Collection and use of identity information by commissioner', authorises the Commissioner to collect and use identity information obtained as a result of the operation of an identity matching service. The Commissioner may collect the information from the host agency or a participating entity.

Proposed s 10.2FE, 'Collection, use and disclosure by host agency', prescribes what the host agency of an identity matching service may do with identity information for purposes related to the operation of the identity matching service, including collection, use and disclosure of that information.

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71 Explanatory notes, p 17.

72 Explanatory notes, p 3.

73 Explanatory notes, p 9.

Proposed s 10.2FF, 'Disclosure, use or collection must be for permitted purpose', restricts the disclosure, collection or use of identity information under the above three proposed sections. The restriction limits the disclosure, use or collection to the following 'permitted purposes':

- preventing, detecting, investigating or prosecuting crimes involving fabricated, manipulated, stolen or otherwise assumed identities or other offences against Commonwealth or State laws
- conducting investigations or gathering intelligence for purposes related to national security
- promoting the security of a participating entity's assets, facilities or personnel
- identifying individuals who are at risk of, or have experienced, physical harm
- improving road safety, including the detection of unlicensed and disqualified drivers and individuals who hold multiple licences
- verifying an individual's identity with the individual's consent or as authorised or required by law.

Clause 24 proposes to insert new Part 4D, 'National identity matching services', into the TPCA. The proposed sections predominately mirror those proposed to be included as Part 10, division 1AA, 'National identity matching services', into the PSAA (which have been summarised immediately above).

Potential FLP issues

Reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to rights and liberties of individuals. This includes the reasonableness and fair treatment of an individual's personal information and a regard for a person's right to privacy.

Parts 5 and 7, including the proposed provisions included in clauses 17 and 24, propose amendments facilitating the use and disclosure of information for the IMS.

According to the explanatory notes, the proposed clauses provide for an expansion of existing use and disclosure arrangements:

> *Consequently, it raises a potential breach of the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals.*
>
> *Any potential breach of fundamental legislative principles is considered justified given that the underlying rationale for the proposed amendments is to enhance interagency information sharing in the interests of national security, law enforcement and community safety.*[74]

The explanatory notes state that the privacy of individuals is also protected in the following ways:

- *The disclosure and use of the identity information must be in accordance with the permitted purposes defined in the Bill (Clauses 17 and 24).*
- *The sharing of information is also constrained by the IGA [Intergovernmental Agreement on Identity Matching Services] and associated participation agreements which are legally binding. The use of the information in the IMS is recorded and auditable to ensure accountability.*
- *Clause 24 of the Bill creates a new offence provision for the collection, use or disclosure of identity information for a purpose other than a permitted purpose.*
- *The disclosure of information by the QPS is already governed by a rigorous legislative framework. Specifically, section 10.1 of the PSAA (Improper disclosure of information), provides offences for the unlawful disclosure of information that has come to the officer's*

[74] Police and Other Legislation (Identity and Biometric Capability) Amendment Bill 2018, Explanatory notes, p 8.

> *knowledge through the exercise or use of any power. Depending on the individual circumstances of the disclosure, the officer may also be dealt with for misconduct in relation to public office or computer hacking and use under the Criminal Code.*[75]

Committee comment

The committee considers that the potential infringement of individuals' right to privacy is justified in order to facilitate the successful implementation of the IMS Australia wide and to promote the objectives of enhancing interagency information sharing in the interests of national security, law enforcement and community safety.

On balance, and in consideration of the various restrictions and justifications identified by the explanatory notes, the committee considers that the potential breach of fundamental legislative principles is justified.

3.1.6 Clause 25 – National scheme legislation

Clause 25 proposes to omit existing s 37A, 'Annual report about access to digital photos', from the TPCA. The clause will omit the requirement for DTMR to prepare a report for the Minister, and for the Minister to lodge the report in Parliament annually about access to digital photos.

Potential FLP issues

Although the proposed clause might not seek to limit the sovereignty of the Queensland Parliament, it does propose to remove a reporting requirement. As such, it might be considered to potentially breach the fundamental legislative principle requiring sufficient regard to the institution of Parliament.

The explanatory notes state:

> *This requirement will become impractical with the advent of the IMS given the number of agencies that may be accessing the relevant images, and the frequency of this access.*[76]

Committee comment

The committee considers that the loss of the reporting requirement might be justified given the anticipated impracticality of reporting on the type of access that the Bill seeks to promote, being the increased flow of information between entities in various jurisdictions as part of the facilitation of the IMS.

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 contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[75] Explanatory notes, p 8.

[76] Explanatory notes, p 3.

Appendix A – Submitters

Sub #	Submitter
001	Mr A J Dalton
002	Queensland Hotels Association
003	Dr Monique Mann
004	Queensland Council for Civil Liberties
005	Office of the Information Commissioner
006	Queensland Law Society
007	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
008	Bar Association of Queensland
009	Australian Criminal Intelligence Commission

Appendix B – Officials at public departmental briefing

Queensland Police Service

- Commissioner of Police Ian Stewart
- Senior Sergeant Andrew Wilson, Legislation Branch, Policy and Performance
- Mr Andrew Ross, Acting Director, Strategic Policy Branch, Policy and Performance

Department of Transport and Main Roads

- Mr Andrew Mahon, General Manager, Transport Regulation Branch

Gaming and Fair Trading Division – Department of Justice and Attorney General

- Mr David Ford, Deputy Director-General
- Ms Nina Starling, Manager

Department of Justice and Attorney-General

- Ms Jo Hughes, Principal Legal Officer, Strategic Policy

Appendix C – Witnesses at public hearing

Queensland Law Society

- Mr Ken Taylor, President
- Ms Brittany White, Criminal Law Committee
- Ms Binny De Saram, QLS Acting Advocacy Manager

Queensland Hotels Association

- Mr Damian Steele, Industry Engagement Manager

Office of the Information Commissioner

- Mr Philip Green, Privacy Commissioner
- Ms Skye Downey, Acting Principal Policy Officer

Statement of Reservation

Statement of Reservation

Non-government members of the Committee do not oppose the Bill, but believe there were some missed opportunities.

These relate to changes regarding the *Liquor Act 1992* and its application during the Commonwealth Games.

We believe the Queensland Hotels Association raised some common sense suggestions that have been ignored by the Palaszczuk Labor Government.

The Commonwealth Games is going to be the biggest event that Queensland has ever hosted and it's important that we can maximise the opportunities for our state.

Ensuring that visitors can come and enjoy a safe experience and spend money at local businesses will boost tourism, the retail and hospitality sector and create job opportunities in the short and long-term.

As the Minister noted in his introductory speech:

"…the Palaszczuk government recognises that the Commonwealth Games presents a significant opportunity for restaurants, pubs, clubs, bars and nightclubs to showcase their exceptional hospitality to visitors from around the world. The government also recognises that due to the massive influx to the Gold Coast in particular, demand for these services will be high."

We think there are some missed opportunities and that Government should have been more receptive to suggestions put forward by the industry stakeholders, specifically:

- That the extended hours for the Commonwealth Games trading period not be deducted from the standard usual 6 day allocation given to licensees;
- To expand extended trading hours to encompass all licensed venues in the entire Gold Coast local government area; and
- That the Safe Night Precincts (SNPs) across the State where other Commonwealth Games events occur be afforded the same extended hours as the Gold Coast SNPs.

These seem to be common sense suggestions that spread the benefits of these changes much wider than intended by the Bill.

As the explanatory notes detail, the consultation on changes regarding the *Liquor Act 1992* wasn't widespread and almost seemed to suggest there was a pre-determined outcome. It seems that there was no consultation undertaken with broader industry and tourism stakeholders, such as Clubs Queensland, the Queensland Hotels Association or Restaurant and Catering Australia.

That would indicate the extent that this was a missed opportunity and could have been explored if the government had done their homework properly.

James Lister MP	Jim McDonald MP	Stephen Andrew MP
Member for Southern Downs	Member for Lockyer	Member for Mirani