Parliamentary Committees

Penalties and Sentences and Other Legislation Amendment Bill 2012

Report No. 5

Legal Affairs and Community Safety Committee

July 2012

Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
BAQ	Bar Association of Queensland
Bill	Penalties and Sentences and Other Legislation Amendment Bill 2012
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
HPLC	Homeless Persons' Legal Clinic
IR Act	*Industrial Relations Act 1999*
QCCL	Queensland Council for Civil Liberties
QLS	Queensland Law Society
QNU	Queensland Nurses' Union
QPILCH	Queensland Public Interest Law Clearing House Incorporated
SPER	State Penalties Enforcement Registry
Standing Orders	*Standing Rules and Orders of the Legislative Assembly*
Together	Together Queensland Industrial Union of Employees
United Voice	United Voice, Industrial Union of Employees, Queensland

Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (the Committee) examination of the Penalties and Sentences and Other Legislation Amendment Bill 2012 (the Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had 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 lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this Report to the House.

Mr Ray Hopper MP

Chair

July 2012

Executive summary

The Penalties and Sentences and Other Legislation Amendment Bill 2012 (the Bill) was referred to the Legal Affairs and Community Safety Committee (the Committee) on 11 July 2012, and the Committee was required to report to the Legislative Assembly by Monday, 23 July 2012.

This Report examines the Bill in terms of policy considerations and the application of the fundamental legislative principles, namely, the rights and liberties of individuals and the institution of Parliament.

Recommendations

1 Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (the Committee) is a statutory portfolio committee of the 54th Parliament of Queensland established by motion of the House on 17 May 2012. The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Department of Police; and
- Department of Community Safety.

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 Penalties and Sentences and Other Legislation Amendment Bill 2012 (the Bill) was referred to the Committee on 11 July 2012, and the Committee was required to report to the Legislative Assembly by 23 July 2012.

1.2 Inquiry process

On 12 July 2012, the Committee wrote to the Department of Justice and Attorney-General (the Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions and issued a media release announcing its inquiry.

The Committee received written advice from the Department and received 19 submissions (see **Appendix A**).

1.3 Policy objectives of the Penalties and Sentences and Other Legislation Amendment Bill 2012

The objectives of the Bill are to:

- increase the value of a penalty unit from $100 to $110;
- introduce a nominal administration fee on criminal justice matters in the Supreme, District and Magistrates Courts where an offender is found guilty;
- address the expiry of certain rules of court;
- expand the definition of 'relationship' in section 67(7) of the *Civil Proceedings Act 2011*;
- facilitate the recovery of any overpayments and the transition loan paid to employees of Queensland Health or a Hospital or Health Service established under the *Hospital and Health Boards Act 2011*; and
- streamline the provisions of evidence to commissions of inquiry.

The Bill also makes minor and technical amendments to legislation within the justice portfolio.[1]

1.4 Consultation on the Bill

Given the overwhelming amount of commentary in submissions on the consultation carried out on this Bill, the Committee considers that it would be remiss if these matters were not brought to the attention of the House in this report.

[1] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 1.

In relation to consultation, the Explanatory Notes provide:

> *Consultation has occurred with all relevant government departments including the Queensland Audit Office. All departments have supported the proposed policy approach. In addition, consultation has occurred with heads of jurisdiction in relation to the amendments to the rules of court. The Commissioner of the Queensland Child Protection Inquiry has been consulted on the amendments to the* Commissions of Inquiry Act 1950*.*
>
> *In relation to the amendments contained in the* Industrial Relations Act 1999*, Unions have, through ongoing monthly meetings with Queensland Health, provided in-principle support for a recovery process.*
>
> *There has been no public consultation on the amendments in the Bill.*[2]

The Department provided:

> *The Commissioner of the Queensland Child Protection Inquiry, the Honourable Timothy Carmody SC, was consulted during the drafting of the amendments to the* Commissions of Inquiry Act 1950 *and in particular the confidentiality clauses. The Commissioner had no issues with the proposed amendments.*[3]

The Auditor-General provided a submission to the Committee clarifying his involvement as follows:

> *It has been a long held convention that the Auditor-General does not comment on the merits of policy objectives of the State. This requirement has been recently included in section 37A(5) of the* Auditor-General Act 2009 *in relation to the exercise of my performance audit mandate.*
>
> *In this respect I draw your attention to page 5 of the Explanatory Notes to the Bill. Under the heading "Consultation" there is reference to the Queensland Audit Office. My Office has not been consulted on all aspects of this Bill. In light of this, and given the above, I recommend to the Committee, as a general principle, such references be removed from future explanatory memorandum and other supporting documentation. Otherwise the risk remains that it will be perceived that I am endorsing government policy objectives, when I do not have a role in this regard.*[4]

While the Committee acknowledges that the comments from the Auditor-General apply generally to the processes of government and are not limited specifically to this Bill, the Committee takes this opportunity to bring the Auditor-General's comments to the attention of the House and in particular to all Ministers who will be tabling Explanatory Notes in the House at the time of introducing Bills into Parliament.

The Queensland Law Society (QLS) provided substantive commentary on the consultation of the Bill as follows:

> *While we acknowledge that the setting of reporting dates is not within the control of the Committee, we wish to note the Society's deep concern over the exceptionally short reporting timeframes. This Bill was introduced on 11 July 2012, reported in Hansard on 12 July 2012, with submissions due by 17 July 2012. Therefore, only four business days were provided for responses to this omnibus Bill which proposes amendments to several pieces of legislation. This is concerning especially because the Explanatory Notes to the Bill state that there has been no public consultation on the amendments in the Bill. In addition, we have*

2 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 5.

3 Letter from the Department, 13 July 2012, page 8.

4 Auditor-General of Queensland, Submission 14.

> *received reports that other legal practitioners would have been minded to make submissions, had the consultation timeframe been longer.*
>
> *The Society does not consider this to be proper consultation by any measure. In the Society's view, the appropriate time for consultation is prior to the introduction of legislation into the House, not after. The fact that the legislation has been drafted and presented to the House without any prior public consultation, and is then the subject of an unrealistically short period for scrutiny thereafter, must raise the question about whether proper consultation is intended at all.*
>
> *We note that the majority of this Bill does not involve the implementation of LNP election promises and is raising matters upon which there has been no previous public debate. In the interests of the democratic process, it is desirable that there should be, at least, some reasonable opportunity for the public to become aware and informed about the Government's policy agenda prior to it becoming law.*
>
> *Given that there is a severely truncated opportunity for review of the amending legislation, an in-depth analysis has not been possible. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. That is a common by-product of legislation that is hurriedly drafted, and then introduced and passed without proper public consultation and scrutiny.*[5]

Concerns regarding the shortened consultation timeframe were echoed in the following submissions, all of which endorsed the QLS submission, namely the Prisoners' Legal Service Inc, [6] the Queensland Association of Independent Legal Services Inc, [7] Catholic Prison Ministry,[8] and the Caxton Legal Centre Incorporated[9]

The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd also expressed concern at the time available to provide feedback stating – "[it] *is entirely possible that important considerations might have gone unidentified (or insufficiently fleshed-out). Given the potential significance of the proposed amendments – such is disappointing*."[10]

The shortened timeframe for consultation was also objected to by the Queensland Council of Unions highlighting that – "*Three working days is insufficient time to properly consult on the changes and prepare submissions on a matter that has had such a negative impact on the morale of the Queensland Health workforce.*"[11] The Council also registered its objection to the fact that no consultation had taken place with employees or their unions before the Bill was put to Parliament for consideration. The Council states the lack of consultation has not been well received by employees.[12]

The Together Queensland Industrial Union of Employees (Together) submitted:

> *… the measures being pursued through legislative amendment in the Bill have been subject to a singular lack of consultation with affected workforce. The actions of the Government in rushing through legislation in particular that deleteriously affects a particular class of people, without adequate justification and without adequate consultation, is grievously concerning.*

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5 Queensland Law Society, Submission 2, pages 1-2.
6 Prisoners' Legal Service Incorporated, Submission 4.
7 Queensland Association of Independent Legal Services Inc., Submission 9.
8 Catholic Prison Ministry, Submission 10.
9 Caxton Legal Centre Incorporated, Submission 19.
10 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 8.
11 Queensland Council of Unions, Submission 7, page 2.
12 Queensland Council of Unions, Submission 7, page 2.

> *We also wish to note the inadequate timeframes provided for feedback means we are unable to fully canvass members about the implications of the Bill. It is therefore possible that there are other as yet undetected challenges associated with the proposed recovery arrangements and transition loan proposal of which we are unable to make the Committee aware at this time.*[13]

These comments were supported by the Queensland Nurses' Union (QNU) which submitted:

> *We state at the outset our extreme concern and disappointment with both the new provisions to the Act and the manner in which this government introduced them into the Parliament ….*
>
> *For the past two years, the QNU has expended significant resources working co-operatively with Queensland Health to rectify the payroll system failure … We have withstood these pressures in a spirit of collaboration with Queensland Health because we share common ground in seeking to resolve the crisis. Yet at the first opportunity, and without consultation or notice, the Attorney-General and Minister for Justice, Hon Jarrod Bleijie, introduced a Bill to the Parliament to change an administrative process through legislation.*
>
> *These actions set a dangerous precedent for Queenslanders. The payroll system failure occurred through administrative incompetence and the introduction of ineffectual technology by the executive arm of government. The mechanisms for addressing this failure lie with the executive and the consultative processes enabled by industrial awards and agreements. They do not and should not lie with the legislature. The government's use of legislation to fix errors of process are indicative of an unfettered exercise of political power … .*
>
> *In this case we clearly see Queensland Health's complete disregard for the use of consultative mechanisms both in its approach to dealing with individual overpayment matters and its determination to pursue overpaid health workers through the weight of legislation.*[14]

The timeframe for consultation on the Bill, or, as expressed in its submission as the lack thereof, was also highlighted by the Queensland Council for Civil Liberties (QCCL). The QCCL notes in its submission:

> *… the Council was not consulted in relation to the proposals contained in the Bill. It seems from the explanatory memorandum neither the Law Society nor the Bar Association were consulted.*
>
> *The complete lack of consultation is further compounded by the fact that the Bill was introduced on 11 July 2012. We were advised of the inquiry at 3:17pm on 12 July 2012 and submissions closed on 17 July 2012.*
>
> *The Queensland Council for Civil Liberties is a purely voluntary organisation. Like all other voluntary organisations it does not have the resources to address complicated issues in such a short period of time.*
>
> *The Council raised the issue on lack of consultation on a number of occasions with the previous Government. However, that was a government that had been in office for a long period of time. Usually, consultation does not fall off until a government has been around*

[13] Together Queensland Industrial Union of Employees, Submission 11, page 5.

[14] Queensland Nurses' Union, Submission 12, pages 2-3.

> *for a while. It is in our submission a disturbing trend that the consultation is so poor, so early in the life of a government.* [15]

The lack of consultation was also highlighted by the Queensland Council of Unions who provided:

> *Firstly, we register our objection to the short timeframe provided to stakeholders to make submissions on this matter. Three working days is insufficient time to properly consult on the changes and prepare submissions on a matter that has had such a negative impact on the morale of the Queensland Health workforce.*
>
> *Secondly, we register our objection that no consultation has taken place with employees or their unions before the Bill was put before Parliament for consideration. This lack of consultation has not been well received by employees.* [16]

Similarly, the Bar Association of Queensland (BAQ) considered that an inadequate consultation period has been allowed to make submissions on the Bill. The BAQ stated that it had '*previously raised the question of proper consultation with the Committee, as well as the current and past Attorneys General*.'[17] The BAQ noted it is '*an organisation with members of the highest level of expertise in almost every area of law. By granting an adequate consultation period, the Parliament is granting itself the opportunity to take advantage of this expertise and experience.*'[18]

Committee comment

The Committee acknowledges the commentary contained in submissions relating to the consultation which has, or has not, occurred on the Bill and has taken this specific step to include the commentary in submissions into the body of the Committee's report.

It is clear that the array of matters being canvassed in the Bill will have significant and differing impacts on various sections of the community including health workers and some marginalised groups and will also increase the workload of various government agencies such as the State Penalties Enforcement Registry (SPER) and the various court registries. In fact, it would be realistic to say, the policies being implemented in the Bill may very well have an impact on all Queenslanders.

The Committee considered whether it was appropriate to specifically comment on the processes that have led to the making of the Bill (such as consultation) in addition to the contents of the Bill itself, noting the role of the Committee is to examine each Bill to consider the policy to be given effect by the legislation; and the application of fundamental legislative principles to the legislation.[19]

In addition, the *Standing Rules and Orders of the Legislative Assembly* (the Standing Orders) provide that the Committee shall examine the Bill and determine whether to recommend that the Bill be passed.[20]

Having regard to the Committee's role as it is set out in the *Parliament of Queensland Act 2001* and the Standing Orders, the Committee considers that in determining whether to recommend that the Bill be passed, and consider the policy to give effect by the Bill, it is within the Committee's scope to consider the processes which lead to the making of the Bill.

That being said, the Committee considers that the development of this Bill would have been greatly enhanced if there were public consultation and discussions with relevant stakeholders, prior to its introduction into the Parliament.

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15 Queensland Council for Civil Liberties, Submission 13, page 1.

16 Queensland Council of Unions, Submission 7, page 2.

17 Bar Association of Queensland, Submission 18, page 1.

18 Bar Association of Queensland, Submission 18, page 1.

19 *Parliament of Queensland Act 2001,* section 93(1).

20 *Standing Rules and Orders of the Legislative Assembly,* SO 132(1).

From the submissions received, it is difficult to reconcile the statement in the Explanatory Notes that:

> *… in relation to the amendments contained in the* Industrial Relations Act 1999*, Unions have, through ongoing monthly meetings with Queensland Health, provided in-principle support for a recovery process.*[21]

The Committee has highlighted the view of the Auditor-General (above) in relation to his role in the consultation process and accepts that this will be addressed by the Government in due course to ensure that the independence of his role is maintained.

In relation to the period for consultation which the Committee has been able to provide with stakeholders and members of the public, after the introduction of the Bill into the House - the Committee also considers that this process would have been enhanced if greater time was allocated for consultation.

The Committee acknowledges that although the period for consultation was short, stakeholders and other interested persons have had an opportunity to provide their views to the Committee and to the Parliament, and those stakeholders and others are placed on record as having done so.

The Committee brings these comments to the attention of the House to consider when motions are put before the House fixing shorter timeframes for committees to report on Bills.

Although the Committee considers that further consultation may have enhanced the Bill, the Committee considers that taking into account the recommendations contained in this Report and the contents of the submissions received, the Bill achieves the intended policy outcomes and should proceed to its Second Reading.

Recommendation 1

The Penalties and Sentences and Other Legislation Amendment Bill 2012 be passed.

[21] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 5.

2 Examination of the Penalties and Sentences and Other Legislation Amendment Bill 2012

This section discusses issues raised during the Committee's examination of the Bill. These issues are set out in the order appearing in the Bill.

2.1 *Childrens Court Act 1992*

The amendments to the *Childrens Court Act 1992* have been introduced to permit the use of approved forms and to address '*the unintended expiry of the Childrens Court Rules*'.[22]

In relation to the former, Clause 4 inserts a new section 30A (Approved forms) which provides that the President of the Childrens Court may approve forms for use under the Act.

In relation to the latter, Clause 8 includes a new Division in the Act which retrospectively applies the expired rules from the period when they expired until they are repealed and validates anything done or purported to be done under the rules after the date of expiry.

The Department provided:

> *Under the* Statutory Instruments Act 1992*, subordinate legislation automatically expires, unless exempted, on the tenth anniversary of the making of the subordinate legislation. Subordinate legislation includes rules.*
>
> *Section 118B of the* Supreme Court of Queensland Act 1991 *provides an exemption from this expiry for 'rules of court'. The Committee queried the reason for overlooking the expiration of the* Childrens Court Rules 1997 *and the* Land Court Rules 2000*. Prior to 2012, the long held view was that section 118B of the* Supreme Court of Queensland Act 1991 *applied to the* Childrens Court Rules 1997 *and the* Land Court Rules 2000*. It was identified recently however, that this was not the case and that the exemption in section 118B of the* Supreme Court of Queensland Act 1991 *only applies to the rules of the Supreme Court, the District Court and the Magistrates Court.*
>
> *It is desirable that there is consistency in relation to the expiry of rules of court and tribunals… .*[23]

On 17 July 2012, the Committee wrote to the Department seeking further detail on how the change in view on the exemption came about.

The Department responded to the Committee's request by letter dated 18 July 2012, confirming that as the result of a Departmental review of the *Childrens Court Rules 1997,* further legal advice was sought on the application of the exemption in section 118B. As a result of the legal advice the Department recommended the changes contained in the Bill.

Committee comment

The Committee considers there is a need to ensure consistency and certainty in the operation of all court rules and that if there is any doubt on the validity of the court rules, steps must be taken to remove such doubt. The Committee supports the amendments to ensure the validity of the operations of the court.

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22 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 2 and page 6.

23 Letter from the Department, 13 July 2012, page 3.

2.2 *Civil Proceedings Act 2011*

Clause 10 amends section 67 (Damages for spouse's benefit) to expand the definition of 'relationship' to include 'a registered relationship within the meaning of the *Acts Interpretation Act 1954*, section 36'. The Explanatory Notes provide:

> *Currently, the definition of 'relationship' in section 67(7) includes a marriage; or a de facto relationship within the meaning of section 36 of the* Acts Interpretation Act 1954*. A registered relationship is a type of domestic relationship and is to be included within the meaning of 'relationship' for the purposes of this section.*[24]

Further context is provided by the Hon. Mr Jarrod Bleijie MP, Attorney-General and Minister for Justice (Attorney-General):

> *Section 67(7) of the* Civil Proceedings Act 2011 *refers to claims by a spouse of a deceased person in dependency claims. This section provides that if the spouse enters into a subsequent relationship the financial benefits received by the spouse from that relationship are to be taken into account when assessing the spouse's claim for damages. Subsection (7) then defines relationship to be (a) a marriage or (b) a de facto relationship within the meaning of the* Acts Interpretation Act 1954*.*
>
> *The* Civil Proceedings Act 2011 *was passed immediately before the* Relationships Act 2011 *and was overlooked when making consequential amendments for the later Act. The Bill corrects this by providing for the section 67(7) definition of 'relationship' to include a reference to a 'registered relationship'.*[25]

Committee comment

The Committee notes the practical consequences of this amendment.

2.3 *Commissions of Inquiry Act 1950*

The purpose of this amendment is to '*streamline the process … for the chairperson of a commission of inquiry to obtain evidence regardless of any oath taken, affirmation made or a provision in any act that may afford a reasonable excuse to a person not to comply with the request*.'[26]

Clause 13 amends section 5 (Power to summons witness and require production of books etc) by inserting new sections 5(2A), (2B) and (2C).

The Explanatory Notes provide:

> *New section 5(2A) provides that despite any provision in an Act, a chairperson's writing made under section 5(1) takes precedence over any oath taken, affirmation made or provision of an Act that might provide reasonable excuse for not complying with the writing.*
>
> *New section 5(2B) provides that, for subsection (2A), the obligation to act as required by the oath, affirmation or provision is not a reasonable excuse; and the person bound by the oath, affirmation or provision who complies with the chairperson's writing: does not breach the oath, affirmation or commit an offence against the provision; and is not liable to disciplinary action.*

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[24] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 6-7.

[25] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, 11 July 2012, page 1132.

[26] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, 11 July 2012, page 1131.

New section 5(2C) provides that despite any provision in an Act, a person is competent and compellable to be summoned and comply with the requirements contained in a chairperson's writing under section 5(1) unless the person is not a person to whom the subsection applies.

Clause 14 inserts new sections 32A (Disclosure of particular information only if reasonable) and 32B (Confidentiality of information). New section 32A applies to information obtained as a result of the chairperson's writing that apart from sections 5(2A) to (2C) would not have been able to be disclosed to the chairperson (the protected information). Protected information must not be disclosed by the chairperson or anyone else who gains access to the information, for the purpose under this Act, unless the chairperson considers it is reasonable in the circumstances to disclose the information having regard to: the nature of the information; and the purposes of an inquiry under a commission.

New section 32B is a general confidentiality provision that applies to a chairperson, deputy chairperson, commissioner, deputy commissioner or anyone else who for the purposes of the inquiry under a commission has gained, gains, or has access to, confidential information. Confidential information includes information about a person's affairs but does not include information already publicly available unless further disclosure is prohibited by law; or statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates. Subsection (2) provides that a person is prohibited from disclosing the information to anyone or giving access to the information to anyone other than: for a purpose under the Act; or with the consent of the person to whom the information relates; or in compliance with lawful process requiring production of documents or giving of evidence before a court or tribunal; or as permitted or required by another Act. The maximum penalty for breach of the provision is 200 penalty units or 1 year's imprisonment.[27]

Clause 15 inserts a new section 35 which provides that section 5(2A) and (2C) apply to an oath taken, affirmation made or provision of an Act, whether taken, made or enacted before or after the commencement of new section 35.

The Department provided:

Under section 5(1)(a) of the Commissions of Inquiry Act 1950 *the Chairperson of the Inquiry may by writing, summons any persons to attend before the commission at any time to give evidence. Under section 5(1)(b) of the* Commissions of Inquiry Act 1950*, the Chairperson may also require any person to produce to the commission at a specified time or place such books, documents, writings and records or property or things of whatever description in the person's custody or control.*

Under section 5(2) a person is obliged to comply with any request made by the chairperson under section 5(1) or satisfy the chairperson that the person has a reasonable excuse for not complying. The maximum penalty for not complying is 200 penalty units or 1 year's imprisonment.

…

New section 5(2A) provides that despite any provision in an Act, a chairperson's writing made under section 5(1) takes precedence over any oath taken, affirmation made or provision of an Act that might provide a reasonable excuse for not complying with the writing.

[27] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 7-8.

New section 5(2B) provides that, for subsection (2A), the obligation to act as required by the oath, affirmation or provision is not a reasonable excuse; and the person bound by the oath, affirmation or provision who complies with the chairperson's writing: does not breach the oath, affirmation or provision who complies with the chairperson's writing: does not breach the oath, affirmation or commit an offence against the provision; and is not liable to disciplinary action. New section 5(2B) is similar to the current section 5(2A)(b).

Section 140 of the Commissioner for Children and Young People and Adult Guardian Act 2000 *contains provisions that state that a person is neither competent nor compellable to produce in compliance with a requirement under an act or legal process information that came to the notice of the person for the purposes of a Child Death Case Review Committee. Other legislation contains similar provisions. New section 5(2C) has been inserted to provide that despite any provision in an Act, a person is competent and compellable to be summoned and comply with the requirements contained in a chairperson's writing under section 5(1) unless the person is not a person to whom the subsection applies.*

Similar to the effect of a regulation made under to be repealed section 5(2A), new section 5(2A) to (2C) provide a chairperson with broad powers to obtain information that would otherwise be protected. The release of such information may infringe on a person's rights and liberties including privacy. Therefore two new confidentiality provisions; sections 32A (Disclosure of particular information only if reasonable) and 32B (Confidentiality of information) are to be inserted into the Commission of Inquiry Act 1950 *to moderate the release of information obtained during the course of an inquiry.*

New section 32A applies to information obtained as a result of the chairperson's writing that apart from sections 5(2A) to (2C) would not have been able to be disclosed to the chairperson (the protected information). Protected information must not be disclosed by the chairperson or anyone else who gains access to the information, for a purpose under the Commissions of Inquiry Act 1950*, unless the chairperson considers it is reasonable in the circumstances to disclose the information having regard to: the nature of the information; and the purposes of an inquiry under a commission.*

New Section 32B is a general confidentiality provision that applies to a chairperson, deputy chairperson, commissioner, deputy commissioner or anyone else who for the purposes of the inquiry under a commission has gained, gains, or has access to, confidential information.[28]

Committee comment

No submissions were received by the Committee on this aspect of the Bill. The Committee identified some issues, including the retrospective application of these provisions (as set out in Part 3 of this Report). The Committee considers the use of retrospective operation in these circumstances is necessary for the amendments to have the desired effect.

2.4 *Industrial Relations Act 1999* and Industrial Relations Regulation 2011

As stated by the Attorney-General:

The bill introduces new provisions to the Industrial Relations Act 1999 *which will enable Queensland Health to recover any wages overpaid to its employees in the future. The bill will also assist Queensland Health to make improvements to its payroll and rostering processes so that the department and its employees can have confidence in the future payment of wages and salaries. Since the new Queensland Health payroll system*

[28] Letter from the Department, 13 July 2012, pages 4-5.

> *commenced in March 2010, there have been significant issues associated with wage payments to Queensland Health staff. The majority of systems errors have since been rectified, but new overpayments continue to be generated through the payroll system at an average rate of $1.7 million every fortnight.*
>
> *…*
>
> *The amendments in the bill will permit Queensland Health to begin the automatic recovery of non-absence related overpayments as soon as possible.*
>
> *We also need to make sure the errors stop. To provide a more achievable time frame to process roster and pay adjustments prior to pay day, Queensland Health will change its pay date from three days to 10 days in arrears. The department will make a once-only transitional loan to its employees to help them to honour their financial commitments over the time of the transition to the new pay date. The new section of the Industrial Relations Act empowers Queensland Health to automatically recover this loan at the time that the employee ceases their employment.*[29]

Clause 19 inserts a new section 396A and 396B into the *Industrial Relations Act 1999* (IR Act). New section 396A (Recovery of health employment overpayments) provides that any health employer may recover an overpayment, that is, an amount paid to a health employee in relation to their employment or purportedly in relation to employment to which the employee is not entitled. New Section 396B will enable recovery of a health employment transition loan resulting from a change to existing pay date arrangements.

The Explanatory Notes provide:

> *Recovery may be achieved by subsequently making deductions from amounts payable to the health employee in relation to employment. Amounts in relation to employment are defined as including both wages and any other amount in relation to employment payable to the employee.*
>
> *Deductions may be made by a health employer even if the original overpayment was made by another health employer. For example, if an employee is overpaid while employed by Queensland Health and transfers to employment in a public hospital, deductions to recover the overpayment may still be made from the employee's payments by the public hospital.*
>
> *The provisions of the section are specific to health employers and health employees and are not limited by any other provision of this division. This section does not affect the operation of the existing section 396 in relation to payments made to health employees before the commencement of this section.*
>
> *To ensure all of the overpayments generated are able to be dealt with, deductions must be commenced within one year after the overpayment and may extend over a period of 6 years after the overpayment.*
>
> *A deduction to recover overpayments must not reduce the amount payable to the employee in relation to employment on any single occasion to less than the amount prescribed under a regulation.*
>
> *…*
>
> *Currently, the* Industrial Relations Act 1999 *limits allowable deductions from wages to those authorised by a relevant industrial instrument … or by written consent of the employee. In*

[29] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, page 1132.

> *respect of overpaid wages, an employer is currently only able to recover by deductions from wages an amount paid to an employee to which the employee is not entitled because of absence from work. These deductions must be commenced within one year after the payment, and may extend over a period of 6 years after the overpayment.*
>
> *New section 396B (Recovery of transition loans) provides that, at the end of their period as a health employee, deductions can be made from an employee's final payment equal to the amount of the transition loan that has not been repaid. Arrangements relating to agreed repayment of the transition loan during employment will be set out in a public service ruling (directive) under the* Public Service Act 2008*.*
>
> *A deduction from a health employee's final payment may be made by a health employer even if the original overpayment was made by another health employer.*
>
> *The provisions of the section are specific to health employers and health employees and are not limited by any other provision of this division.*[30]

Further explanation was provided by the Department:

> *The amendments in the Bill will permit the Queensland health employer to recover non-absence related overpayments without an employee's written consent. The amount of the deduction cannot reduce the amount paid to the employee to less than three quarters of the total amount payable on that occasion. This is no change from the existing limitation for deductions.*
>
> *In conjunction with the Bill, the Queensland health employer will make improvements to its payroll and roster processes, so that the department and its employees can have confidence in the payment of their wages and salaries.*
>
> *…*
>
> *The amendments do not permit the Queensland health employer to make deductions to recover the transition loan during employment. However the employer and employee may agree to the repayment of the transition loan during employment with Queensland health employer. Arrangements for this will be set out in a Directive made pursuant to the* Public Service Act 2008*.*
>
> *The amendments define amounts that can be recovered to be both wages and any other amount in relation to employment payable to the employee. This removes ambiguity on the ability to make deductions in relation to and from allowances.*[31]

The Committee received seven submissions in relation to this aspect of the Bill and has carefully considered these submissions in forming its recommendations. Key elements of these submissions are set out below.

In its submission, the QNU responded to the statement made by the Attorney General when he introduced the Bill:

> *We note that the* [Attorney-General] *has advised the Parliament that 'the Bill will also assist Queensland Health to make improvements to its payroll and rostering processes so that the department and its employees can have confidence in the future payment of wages and salaries'. … Queensland Health must restore its ability to pay its employees correctly through open, constructive dialogue with workers and their representatives, not through the heavy-handed use of legislation. At every turn, the QNU has demonstrated good faith in*

30 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 9-10.

31 Letter from the Department, 13 July 2012, pages 5-6.

> *pursuing an effective outcome of this debacle and we will continue to do so provided Queensland Health acts in a similar fashion.*[32]

In addition, the QNU submitted:

> *Any provision that allows an automatic recovery from an employee's wages reverses the onus of responsibility for the employer to correctly pay an employee. The Bill proposes legislation that will create an onus on individual employees to establish that they have not been overpaid prior to the employer exercising their unilateral right to withhold monies from an employee's pay.*
>
> *Employers have not had the ability to unilaterally take monies from an employee's pay under Queensland industrial law for the very reason that such a power is open to abuse. The linkage of this unilateral right to the current Queensland Health payroll debacle is totally unfair and unreasonable on Queensland Health employees. Queensland Health employees will be financially disadvantaged by the proposed change to this section of the* [IR Act]*. The experience of Queensland Health employees throughout the payroll debacle has been that considerable underpayment of wages has occurred and employees have been financially disadvantaged as a consequence.*
>
> *…*
>
> *The proposal contained in the Bill to give Queensland Health the right to automatically recover up to 25% of "an amount otherwise payable at the time" to an employee is not fair and reasonable as the error is totally beyond the control of the employee affected. The term referred to in the proposed amendment to the Regulation: "the amount that otherwise would be paid", (new regulation 12A) is not defined.*
>
> *An example that highlights how unfair and unreasonable an automatic recovery from wages could be is if the recovery of an overpayment were to occur in the pay of a nurse or midwife about to commence six weeks recreation leave (this being the annual entitlement to such leave for a nurse or midwife working continuous shift work).*
>
> *In this scenario, "the amount that otherwise would be paid" could be reasonably interpreted to be the full holiday pay, including leave loading. Clearly, Queensland Health could significantly disadvantage and financially embarrass such an employee by automatically withholding up to 25% of the employee's holiday pay. The employee would most likely* [sic] *be unaware that such a deduction had occurred until they had commenced their leave and tried to access funds from their bank account.* [33]

Similar concerns were also raised by the United Voice, Industrial Union of Employees, Queensland (United Voice).[34]

In relation to the concerns around lack of definition, the Department responded:

> *The proposed new section in the Industrial Relations Regulation 2011 is considered to be unambiguous and consistent with the current limitation on deductions in the Regulation which provide that deductions may not be made which reduces wages payable for a pay period to less than ¾ of the wages payable for the pay period.*
>
> *The proposed provisions provide that on each single occasion a health employee receives payment of an amount in relation to employment (i.e. wages or any other amount relating to employment), that deductions in relation to an overpayment may not reduce that*

32 Queensland Nurses' Union, Submission 12, page 3.

33 Queensland Nurses' Union, Submission 12, pages 4-5.

34 United Voice, Industrial Union of Employees, Queensland, Submission 5, page 1.

> *payment to less than ¾ of the amount otherwise payable. The provision has been drafted to take account of the inclusion of both wages and other amounts relating to employment as amounts that can be deducted and amounts from which deductions can be made. As a simple example if the amount payable is $800 then deductions may not reduce the amount to less than $600.*[35]

In relation to the statement made by the Attorney-General that 'new overpayments continue to be generated through the payroll system at an average rate of $1.7 million every fortnight',[36] the QNU responded:

> *The government claims that approximately $1.7 million of overpayments occurs each fortnight on average across Qld Health. Queensland Health has accepted that a large proportion of this amount is related to absences from work, such as sick leave, in the final days of a pay fortnight that are not being adjusted in the pay system prior to the close of the pay fortnight due to insufficient time to process such absences. Importantly, there currently exists a power under the* [IR Act] *which allows Queensland Health to recover these monies. Section 396 of the* [IR Act] *and Section 12 of the* [Industrial Relations Regulation 2011] *provide that Queensland Health can deduct up to 25% of an employee's wages to recover monies which the employee was overpaid because of an absence related payment.*
>
> *The QNU has been aware of absence related overpayments occurring since the early period of the payroll debacle commencing in 2010 and has proposed to Queensland Health on a number of occasions to establish a process consistent with the current provisions of the* [IR Act]*, to recover such overpayments in the following pay fortnights.*
>
> *For reasons unknown to the QNU Queensland Health has consistently declined to establish such a process. In our view, the adoption of this process would negate the need for the proposed changes to the* [IR Act]*.*[37]

In relation to the 'remaining errors', which QNU provide are related to the system or processing, the QNU submitted:

> *These errors are beyond the control of employees and not always obvious to an employee due to the poorly designed payslips and the fact that the majority of nurses are shift workers whose pay changes each fortnight. These errors are also often not immediately obvious to Queensland Health. It would not be unusual for Queensland Health payroll staff to discover such system or process errors in an employees' pay some time after the error, or errors, have occurred.*
>
> *In the QNU's view it is heavy handed to effect legislative change of a longstanding employee protection to deal with the small number of overpayments that are not absence related. We recognise that overpayments represent a problem for Queensland Health, but we are also point out that underpayments still occur particularly in the last weekend of the roster due to staff swapping shifts. Ongoing underpayments remain of great concern to members.*[38]

This analysis is also supported by Together, which submitted:

> *… the overwhelming majority of overpayments that occur each fortnight are not related to payroll system problems but are rather 'business as usual' overpayments that occur because of roster and attendance-related adjustments that occur in the final days of the roster and*

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35 Letter from the Department, 19 July 2012, pages 19-20.

36 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, page 1132

37 Queensland Nurses' Union, Submission 12, page 4.

38 Queensland Nurses' Union, Submission 12, pages 4-5.

> *cannot be accounted for in the pay. Under the previous payroll system these adjustments were automatically accounted for in the next pay as per the* [Queensland Health] *HR Policy. However,* [the SAP payroll system] *cannot distinguish between absence related overpayments, which can be automatically recovered, and non-absence related overpayments which cannot. This is what makes automatic reconciliation of over-payments and under-payments impossible under the present payroll system.*[39]

In its response, the Department acknowledged that '*the majority of overpayments appear now to be absence-related*'.[40] The Department also explained that all overpayments need to be included in an overpayment recovery process because the Queensland Health payroll system '*cannot immediately differentiate between what is an absence-related overpayment and an overpayment caused by another reason*'.[41] In addition, the Department also provided:

> *It is likely that a certain number of payroll issues will always occur in a large employer operating in a complex 24/7 environment such as Queensland Health.*
>
> *Most overpayments are not systems-related but rather adjustments from prior pay adjustments and a solution to recover all overpayments is required.*[42]

In relation to the change in pay date proposed and the recovery of the 'employment transition loans', the QNU submitted:

> *The change in pay date, if implemented, will allow the time needed between the end of the roster period and the pay date to enable the correct payroll data to be entered in the pay system and, therefore, obviate the need to automatically deduct overpayments.*
>
> *Members of the QNU have had their pays subjected to so much uncertainty since the failed implementation of the payroll system that we urge the Committee to consider evaluating the change in the pay date before proceeding with this proposal.*
>
> *…*
>
> *Moving the pay date for Queensland Health employees does not address the fundamental failing of the new system and will cause significant difficulties over and above any compensation through a transition loan.*[43]

In relation to the transitional loan arrangements, Together submitted:

> *While the Bill is concerned only with that aspect of the proposal that relates to the recovery of any unrepaid amount at the end of a health employee's period of employment, it is difficult to properly consider the detail of the amendments without full details of the proposed transition loan arrangements being available. The Explanatory Note states that other arrangements will be provided for a directive under the* Public Service Act 2008*. However, the majority of affected employees are not employed under the* Public Service Act 2008 *but rather the* Health and Hospitals Boards Act 2011*. It is assumed that the intention is to apply the ruling to these employees by regulation, but although this is possible it is clearly outside the intent of the* Public Service Act 2008 *to issue a ruling specifically for health employees.*[44]

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39 Together Queensland Industrial Union of Employees, Submission 11, page 3. This submission also included a useful illustration of the steps that occur in the processing of pays.

40 Letter from the Department, 19 July 2012, page 17.

41 Letter from the Department, 19 July 2012, page 18.

42 Letter from the Department, 19 July 2012, page 20.

43 Queensland Nurses' Union, Submission 12, pages 5-6.

44 Together Queensland Industrial Union of Employees, Submission 11, page 5.

The Queensland Council of Unions also considered the proposed changes unnecessary, and was concerned that these provisions could be misused:

> *These changes would not be necessary except for the fact the employer introduced a defective pay roll system in 2010 that could not cope with the existing processing regime.*
>
> *…*
>
> *The employer should be focusing on rectifying the faults with the computer system and the processing regime rather* [than] *making legislative amendments to address the outcomes of these ineffective systems…*
>
> *There is concern that these provisions can and will be misused by health employers particularly as the powers to recover are not limited to recouping overpayments that are attributable to errors caused by the payroll system and the processing regime. These provisions can be utilised to recover other overpayments such as an employee being placed on the wrong pay level upon appointment or upon promotion, neither of which are linked to the problems with the payroll system or the processing regime.*
>
> *…*
>
> *Should these changes proceed then the additional powers provided to the employer should be restricted to overpayments attributable to the payroll system and the processing regime.*
>
> *Also this additional power should not be ongoing but should be limited in time to the timeframe for fixing the current payroll problems the very ones caused by the actions of the employer in 2010.* [45]

The QLS made the following submission:

> *We consider that an amendment to Schedule 1,* Industrial Relations Act 1999 *to include "deductions to be made or proposed to be made from wages" as an 'industrial matter' for the purposes of the Act will make clear that an employee can access the dispute conciliation and arbitration provisions contained in the* Industrial Relations Act 1999*.*
>
> *The Society also considers that it is important to ensure that any deductions do not result in financial hardship for the employee involved. We consider that the operation of these provisions should be reviewed in 12 months to ensure that hardship is not occurring in practice by virtue of arbitrary deductions and further amendments to the legislation can be made at that time, if necessary.* [46]

The Prisoners' Legal Service,[47] Queensland Association of Independent Legal Services Incorporated,[48] and Catholic Prison Ministry[49] supported and endorsed the submission made by the QLS.

In response to the submission by the QLS to amend Schedule 1, the Department advised that it did not consider an amendment necessary:

> *It is considered that the definition of industrial matter at section 7 of the IR Act already adequately includes matters relating to deductions from wages. The definition does not feature an exhaustive list of particular issues to be included as an industrial matter. It is also noted that the definition allows for an issue to be an industrial matter if so decided by the Industrial Court of Commissioner.*

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45 Queensland Council of Unions, Submission 7, pages 2-3.

46 Queensland Law Society, Submission 2, page 2.

47 Prisoners' Legal Service Incorporated, Submission 4.

48 Queensland Association of Independent Legal Services Incorporated, Submission 9.

49 Catholic Prison Ministry, Submission 10.

> *It should also be noted that the proposed legislative amendments include provisions permitting recovery of the amount of the transition loan from a health employee's final payment that are separate and distinct from provisions permitting recovery of overpayments by subsequent deductions.* [50]

United Voice contends that these aspects of the Bill should be removed and stated:

> *United Voice holds concerns that the addition of proposed sections, 396A and 396B under Part 6, will give Health Employers an arbitrary right to recover wages and entitlements as they see fit without consultation with employees or their applicable trade unions.*[51]

United Voice also objected to the proposed amendments on the basis that they do not take into account individual circumstances of employees. It also considered that any '*amended process should ensure employee engagement, and allow the opportunity to review, make comment and, if necessary, object to any claims of overpayment being made by an employer*.'[52]

The Australian Workers' Union of Employees, Queensland, while expressing agreement that genuinely overpaid amounts must, as a matter of law, be repaid, outlined a number of issues with respect to the proposed amendments to the IR Act, including:

- no sunset provision;
- no intermediate parliamentary oversight;
- no provisions concerning the adequacy of proof required for the recovery of alleged overpayments; and
- no provision made with respect to financial hardship or distress.[53]

In relation to the last point above, the Committee acknowledges there is potential under the Bill for financial hardship and distress to occur with unilateral deductions from an employee's wages without notice. The Committee noted the following excerpt from a ministerial media statement made by the Minister for Health, the Hon. Lawrence Springborg MP regarding this.

The statement was issued in response to concerns listed by nurses in a written statement following the Minister's attendance at the Queensland Nurses' Union Convention on 13 July 2012:

> *Question: Any amount recovered from an employee's wages will be reasonable given the employee's financial circumstances.*
>
> *Response: Queensland Health has taken this into account – with overpayment plans commencing at 5% net pay, plus 2 years to pay back. Hardship will be considered on an individual basis.*
>
> *Question: After an adjustment has been processed and where an employee suffers personal hardship or other justifiable circumstances, Queensland Health will adjust the amount being recovered to give the employee necessary relief.*
>
> *Response: In such a situation the employee may apply for hardship consideration through their case manager and negotiate a new plan.*[54]

This ministerial media statement also made reference to an existing process, or policy. In its submission, Together made reference to a Queensland Health 'policy and procedure to govern the recovery of overpayments: QH HR Policy C48 'Overpayments' and submitted:

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50 Letter from the Department, 19 July 2012, pages 20-21.

51 United Voice, Industrial Union of Employees, Queensland, Submission 5, page 2.

52 United Voice, Industrial Union of Employees, Queensland, Submission 5, page 2.

53 The Australian Worker's Union of Employees, Queensland, Submission 3, pages 3-5.

54 Ministerial Media Statement, *Health Minister Listens and Acts on Nurse's Concerns*, 17 July 2012.

> *There is nothing that prevents the application of the HR Policy to absence and non-absence related overpayments alike. The main obstacle to recovery of overpayments since the inception of the new system has been the difficulty in validating alleged overpayments due to the high number of errors generated by the system, unreliable data and the complicating factor of unrectified underpayments made to employees over the same period of time.*[55]

In addition, Together also submitted:

> *Minister Springborg has outlined a process in various media statements in which health employees would first be notified of the overpayment and the intention to recover, and be provided with two pay cycles within which to dispute or investigate the overpayment before the deduction is made from their pay.*
>
> *In a similar vein the Explanatory Notes states on page 5 that "Queensland Health will be obligated to negotiate repayment strategies with affected employees in the first instance and will only be able to recover monies without the employee's consent as a last resort". None of these safeguards however appear in the Bill, leaving the power open to abuse.*[56]

The Department provided further information regarding financial hardship:

> *The process being implemented provides a fortnight's 'buffer' between the time the overpayment is identified (and employees notified) and the time the recovery process commences. This provides the employee the opportunity to raise any hardship or other issues prior to the commencement of the recovery process.*
>
> *Mechanisms are already in place (and will remain in place) to consider individual circumstances relating to hardship.*
>
> *However Queensland Health has been very clear with all stakeholders that the management of hardship matters will focus on repayment schedules and the 'write off' of overpayments is not an option.*[57]

In response to general process considerations, the Department provided:

> *It is acknowledged that concerns have been raised regarding information on pay slips since the implementation of the new pay system.*
>
> *There have been several enhancements implemented following input by unions and payslips are now generally easier to understand.*
>
> *The Government concurs with the AWU observation there should be a two week gap between when an overpayment is identified and when deductions commence to allow time for the employee to raise any concerns and this has already been incorporated in the proposed recovery process.*
>
> *The opportunity for employees to understand their overpayment prior to recovery will remain a feature of the overpayment recovery process.*[58]

Committee comment

It is clear to the Committee that all stakeholders, including the unions and Queensland Health, agree that the ongoing problems with the Queensland Health payroll system must be addressed as a priority. Further, the Committee acknowledges that no submission is advocating that any employee

55 Together Queensland Industrial Union of Employees, Submission 11, pages 2-3.
56 Together Queensland Industrial Union of Employees, Submission 11, page 4.
57 Letter from the Department, 19 July 2012, pages 16-17.
58 Letter from the Department, 19 July 2012, page 19.

who has been paid an amount to which they are not entitled should not have to pay that amount back to their employer.

The matter for consideration by the Committee is whether this problem ought to be resolved by way of specific legislative amendments applying solely to Queensland Health employees and if so, does the Bill do this in a satisfactory manner.

The Explanatory Notes state that no other options were considered as legislative amendment is the *only way* to achieve these outcomes.[59] Having considered the detailed submissions on this aspect of the Bill, the Committee does not accept that position. That being said, the recovery of overpayments through a legislative mechanism is clearly an option available to the Government to address the ongoing payroll problems.

Recovery of overpayments in other jurisdictions

The Committee notes that of those jurisdictions not covered by the national workplace relations system,[60] no other State has legislative provisions which would permit the unilateral deduction of overpayment of wages of public sector employees during their employment. New South Wales,[61] Western Australia[62] and South Australia[63] permit the recovery of an overpayment where the deduction has been authorised by the employee.

In the case of South Australia, provision exists for a deduction to be made in circumstances where an employee cannot make repayments during their employment with the public sector.[64] New South Wales[65] and Western Australia[66] also have guidelines which require an employer to take into account an employee's financial circumstances when determining how the amount is to be paid.

For those employment relationships covered by the national workplace relations system, section 324(1) of the *Fair Work Act 2009* (Cth) provides that an employer may deduct an amount from an amount payable to an employee if the deduction is authorised:

- in writing by the employee and is principally for the employees' benefit;
- by the employee in accordance with an enterprise agreement;
- by or under a modern award or a Fair Work Australia order; or
- by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

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59 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 3.

60 The national workplace relations system was established under the *Fair Work Act 2009* (Cth). From January 2010, Queensland, New South Wales, South Australia and Tasmania referred its industrial relations powers to the Commonwealth. All employment in Victoria, Northern Territory and the Australian Capital Territory was already under the national workplace relations system. State public sector and local government employees in Queensland, New South Wales, South Australia and Western Australia are not covered by the national workplace relations system.

61 Section 118(2) of the *Industrial Relations Act 1996* (NSW) provides that an employer can deduct and pay, on behalf of the employee, from the employee's remuneration any payments principally for the benefit of the employee that are authorised in writing by the employee to be deducted and paid.

62 Section 17D of the *Minimum Conditions of Employment Act 1993* (WA) states that employers may only make deductions from an employee's pay if the deduction is authorised by the employee.

63 Clause 6 of Commissioner for Public Sector Employment's Standard, *Responsive and Safe Employment Conditions, Remuneration – Allowances and Reimbursements*, 23 December 2010, provides repayment is to be effected by obtaining a written authorisation from the employee, at a rate not exceeding 10% of the employee's fortnightly pay.

64 Clause 6 of Commissioner for Public Sector Employment's Standard, *Responsive and Safe Employment Conditions, Remuneration – Allowances and Reimbursements*, 23 December 2010.

65 Clause 5-2.3.2 of the Personnel Handbook of the New South Wales Public Service Commission.

66 Clause 3.4 of the Guidelines for Public Sector Agencies.

In considering whether the provisions in the Bill are satisfactory or require some enhancement, the Committee notes the submission by the QLS suggesting an amendment the IR Act to facilitate access by employees to conciliation and arbitration. The Committee considers this addition would be beneficial as an intermediate step where a dispute exists, or where documentation was inadequate. The Committee considers that it would be beneficial for health employees for appropriate safeguards to be contained in the Bill.

Further to the Department's response to the QLS' submission to amend the IR Act, as detailed above, the Committee remains of the view that it would be beneficial for the IR Act to be amended to expressly capture deductions to wages.

Recommendation 2

The Bill be amended to include an amendment to Schedule 1 of the *Industrial Relations Act 1999* to include "deductions to be made or proposed to be made from wages", so that disputes in relation to deductions made under the proposed amendments can proceed to conciliation and arbitration under that Act.

Given that the purpose of the proposed amendments to the IR Act is to address a specific issue, namely Queensland Health payroll system errors, the Committee also considers that a review of the amendments to the IR Act be undertaken within 12 months of commencement to ensure the process is operating satisfactorily and providing additional oversight on the proposed amendments to the IR Act. The Committee welcomes the Department's response that '*Queensland Health will be establishing internal processes to monitor this process and this information will be shared with unions on an ongoing basis in its established consultative industrial forums*.' [67]

Recommendation 3

The Attorney-General and Minister for Justice review the implementation of the amendments to the *Industrial Relations Act 1999* relating to recovery of overpayments to health employees and report to Parliament on its operation within 12 months from commencement.

Fringe benefits tax

The QNU provided:

> *… the QNU understands the Australian Tax Office would consider such a 'loan' a fringe benefit that would attract Fringe Benefits Tax. This is potentially a significant cost that Queensland Health will have to meet.*[68]

Committee comment

The Committee notes the fringe benefits tax issue raised by the QNU in its submission. It is not clear in the Bill or the Explanatory Notes how the transition loans will be treated for taxation purposes and whether:

a. the State will incur further costs (Fringe Benefits Tax) payable to the Australian Government through the implementation of this scheme; or

67 Letter from the Department, 19 July 2012, pages 18-19.

68 Queensland Nurses' Union, Submission 12, page 6.

b. health employees will be adversely affected by the application of Fringe Benefits Tax.

The Department provided no further information addressing the potential taxation issues.

Recommendation 4

The Attorney-General and Minister for Justice clarify how the transition loans will be treated for taxation purposes in his reply to the Committee's report.

2.5 *Land Court Act 2000*

Similar to the amendment to the *Childrens Court Act 1992*, the Bill seeks to permit the use of approved forms [69] and address '*the expiry of the* [Land Court] *rules ... retrospectively … for the period of when they expired; and, to remove doubt, validate anything done or purported to be done under the rules after the dates of expiry*.'[70]

Clause 28 inserts a new section 93 (Validation provision for *Land Court Rules 2000*) to retrospectively apply to the expired rules from the period when they expired until they are repealed and validates anything done or purported to be done under the rules after the date of expiry.

The Department provided further information on this amendment as set out in section 2.1.

Committee comment

The Committee considers there is a need to ensure consistency and certainty in the operation of all court rules and that if there is any doubt on the validity of the court rules, steps must be taken to remove such doubt. The Committee supports the amendments to ensure the validity of the operations of the court.

2.6 *Penalties and Sentences Act 1992* and Penalties and Sentences Regulation 2005 and *Criminal Code Act 1899* and *Justices Act 1886*

As set out in the Explanatory Notes, the '*main purposes of the Bill are to implement the Government's election commitments by increasing the penalty unit value from $100 to $110; and introducing a nominal administration fee on criminal justice matters where an offender is found guilty*.'[71]

The next part of this Report will deal with each of these in turn.

Penalty unit

Clause 34 amends section 5 (Meaning of penalty unit) to replace $100 in subparagraphs (a), (b) and (d) with $110.

The following information was provided by the Department:

> *The penalty unit is the basic monetary value for most fines and penalty infringement notices (commonly called 'tickets'). Where legislation provides for an offence, it will also prescribe the penalty for the offence as a multiple of the base penalty unit. For example if the penalty for an offence is 10 penalty units the monetary penalty would be $1000.*
>
> *As the penalty unit value in Queensland is not indexed, the value of the penalty unit reduces over time, effectively reducing the level of punishment and deterrence effected by the imposition of fines. Increasing the value of the penalty unit provides a convenient way of*

[69] Penalties and Sentences and Other Legislation Amendment Bill 2012, Clause 26.

[70] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, 11 July 2012, page 1131.

[71] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 1.

updating the level of fines and infringement notices, without having to amend large volumes of legislation.

Legislative fines fall into two categories: court ordered fines and penalty infringement notices. For court ordered fines, penalties are generally prescribed in the legislation as maximum penalties. The increase in penalty units will increase the maximum fine that a judge or magistrate can impose on an offender. For fines imposed through the issuing of penalty infringement notices, the increase in the penalty unit will upon commencement increase the monetary value of the fine imposed through a 'ticket'.

The amendment increases the penalty unit value for monetary penalties for offences under most state laws. However, the penalty unit value for: the Work Health and Safety 2011*; the* Electrical Safety Act 2002*; the* Safety in Recreational Water Activities Act 2011*; or an infringement notice under the* State Penalties Enforcement Act 1999 *for an offence against those Acts; is not increased. This is because the penalties for these offences under these Acts have been established under a national agreement.*

As local laws are not affected by these changes, the Minister for Local Government will consult with local governments about the application of the penalty unit increase to local laws.[72]

The QLS did not support the increase in the value of a penalty unit in its submission stating:

While we understand that this a Government election commitment, no economic arguments for the increase have been provided in the Explanatory Notes to the Bill. We consider that this increase will have a negative impact on Queenslanders during this period of economic difficulty and uncertainty.[73]

In response to submissions, the Department provided:

Increasing the penalty unit value to $110 was one of the Government's election commitments outlined in 'The CANDO LNP Costings and Saving Strategy'.

The 10% increase in the penalty unit value equalises the Queensland penalty unit with the New South Wales penalty unit. This increase of $10 represents the increase in the consumer price index since the penalty unit was last increased in 2009. This increase is needed or over time the value of the penalty unit reduced relative to the Consumer Price Index, effectively reducing the level of punishment and deterrence.

Monetary fines fall into two categories, court ordered fines and fines imposed through the issuing if penalty infringement notices (for example, speeding tickets).

For court ordered fines, penalties are generally prescribed in the legislation as maximum penalties. While increasing the maximum fine that t judge or magistrate can impose on an offender, in ach particular sentencing matter the judge or magistrate will still have to take into account the offender's financial circumstances and how much of a burden the fine would be.

However, the increase in the penalty unit value will increase the value of a penalty infringement notice (commonly called 'tickets') issued for certain offences such as speeding offences and other similar traffic offences by ten percent/ A person may mitigate the impact

[72] Letter from the Department, 13 July 2012, pages 1-2.

[73] Queensland Law Society, Submission 2, page 3; these comments are also endorsed by: the Catholic Prison Ministry, Submission 10, page 1; the Prisoners' Legal Service Incorporated, Submission 4, page 1; and the Queensland Association of Independent Legal Service Incorporated, Submission 9, page 1; Caxton Legal Centre Incorporated Submission 19.

> *of any hardship from a fine imposed through the issuing of a 'ticket' by making an application to the State Penalties Enforcement Registry (SPER) to pay the fine in instalments under a Fine Option Order.*[74]

Committee comment

The Committee notes that the increase to the amount of a penalty unit is comparable to the value of a penalty unit used in other Australian jurisdictions.[75] The Committee notes the submission from the QLS, however considers that the value of a penalty unit has not increased in Queensland since 2008[76] when it was raised from $75 to $100. The Committee considers that an increase at this time is not unreasonable.

Offender levy

The purpose of this amendment is to introduce an 'offender levy'. As stated by the Attorney-General:

> *This offender levy will apply to criminal justice matters where an offender is found guilty. The amount of the levy for Supreme Court and District Court matters will be $300, and $100 for Magistrates Court matters. This initiative will ensure that offenders contribute to the justice system and to addressing the harm that their crimes cause.*[77]

Clause 37 inserts a new Part 10A (Offender levy) in relation to the offender levy. New section 179A provides that the purpose of Part 10A is to provide for a levy that is imposed on an offender on sentence to help pay for the cost of law enforcement and administration.

New section 179B (Definitions) includes a definition for the term 'sentence', which is defined widely to include *'any order made by a court to deal with the offender for an offence instead of passing sentence. This would, for example, capture an order of the court releasing an offender absolutely under section 19 of the* [Penalties and Sentences] Act*. Similarly, orders under sections 30, 31 and 32 would be captured by the definition*'.[78]

New section 179C (Imposition of offender levy) concerns the imposition of the offender levy.

The Explanatory Notes provide:

> *The offender levy, which will be automatically imposed at the time of sentence, is an administrative levy that is separate from any punishment imposed on the offender. To this end, new section 179C provides that the levy applies regardless of whether a conviction is recorded, is not a sentence (including punishment) and is in addition to any sentence imposed by the court for the offence.*
>
> *Pursuant to new section 179C(3), only one levy is payable if an offender is sentenced for multiple offences in the same sentencing proceeding. New section 179C(5) provides that the amount of the levy is to be set by regulation. New section 179C(6) provides that the offender levy does not apply to an offence under section 29 of the* Bail Act 1980*.*
>
> *New section 179D (Subsequent sentences) concerns subsequent sentences. The purpose of this section is to ensure that the offender levy is not applied to resentences. However, this section is not intended to apply where an offender is convicted and sentenced for a new*

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74 Letter from the Department, 19 July 2012, pages 1-3.

75 $110 - *Crimes Act 1914* (Cth) – section 4AA; $110 - *Crimes (Sentencing Procedure) Act 1999* (NSW) – section 17; $140 - *Monetary Units Act 2004* (Vic) – section 5; $120 - *Penalty Units And Other Penalties Act 1987* (Tas) – section 4; $141 - *Penalty Unit Act 2009* (NT).

76 Under the *Penalties and Sentences and Other Acts Amendment Act 2008.*

77 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, 11 July 2012, page 1130.

78 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 12.

> *offence as a result of contravening a previous sentence. For example, the offender levy would be payable by a person who is convicted of an offence under section 123 of the* Penalties and Sentences Act 1992 *for contravening a requirement of a community based order.*
>
> *New section 179E to 179H concern collection and enforcement of the levy. Under new section 179E (Payment of offender levy), if the particulars of the levy have been registered with the State Penalties Enforcement Registry under section 179F, the offender must pay the levy under the* State Penalties Enforcement Act 1999*. If the particulars of the levy have not been registered with the State Penalties Enforcement Registry, payment must be made to the proper officer of the court. New section 179F (Enforcement of offender levy by registration) facilitates registration of the levy under* State Penalties Enforcement Act 1999*. Pursuant to this section, the offender levy is taken to be an order of the court fining the offender for the amount of the levy so that it can be registered under section 34 of the* State Penalties Enforcement Act 1999*. In order to reflect that the offender levy is an administrative levy, new section 179F(3) operates to exclude fine option orders and imprisonment as enforcement options for the offender levy. New section 179G (Amounts to be satisfied before satisfying offender levy) prioritises payment of any unpaid compensation, restitution, damages and a fixed portion of a penalty ahead of payment of the offender levy. New section 179H (Effect of appeal against relevant convictions) deals with the effect of an appeal on the offender levy. Both sections 179G and 179H apply where the levy is paid to the proper officer of the court and is not registered under section 179F.*
>
> *…*
>
> *New section 224 (Retrospective application of section 179C in particular circumstances) retrospectively applies the offender levy to offences for which the offender is sentenced after commencement, even if the offence was committed, or offender charged or convicted but not sentenced before the commencement of new section 179C.*[79]

Clause 17 of the Bill amends the *Criminal Code Act 1899* to 'remove any doubt' that the offender levy is not a fee for the purposes of section 704(1) (no court fees in criminal cases).

The Department provided:

> *Consistent with the levy being an administrative levy that does not form part of the sentence, the Bill does not include any fee waiver provisions.*
>
> *…*
>
> *It is expected that in excess of $12M in revenue will be collected from the offender levy.*[80]

Sentencing

The QCCL provided:

> *… the Bill as drafted arguably gives judicial officers an interest in the outcome of cases because funds for the administration and enforcement of the laws are raised by the outcome of cases:*
>
> 1. *New provision in the preamble: society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration.*

[79] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 13-14.

[80] Letter from the Department, 13 July 2012, pages 2-3.

2. *New proposed Section 179A: the purpose of this part is to provide for a levy imposed on an offender on sentence to help pay generally for the cost of law enforcement and administration.*[81]

Queensland Advocacy Incorporated provided:

> *… the administration of justice and the enforcement of the law must be free of conflicts of interest – as far as is possible. Charging fees, even to convicted offenders, incentivises public servants to use law enforcement processes to raise revenues. Justice ought not be a money-making exercise. Secondly, charging fees to convicted offenders may only serve to exacerbate the very problems that led to the offending behaviour. It is well established that many petty offences are crimes of poverty, and exacting fees for offences of poverty such as shop stealing, begging, minor theft and public space offences only serves to perpetuate a cycle of disadvantage. People who spend much of their time in public spaces, such as homeless people, including many Aboriginal and Torres Strait Islander people, and many of whom have intellectual disabilities or suffer from various forms of mental illness or addiction, are precisely the sort of people who will be most affected by this sort of fee.*[82]

In its submission, the BAQ stated that it:

> *… opposes the proposed restrictions on the courts' power to take into account the offender levy in sentencing an offender and in considering their financial circumstances. Depriving a court of the power to consider all relevant circumstances is likely to result in injustice.*[83]

Cost considerations and distribution of the levy

The Supreme Court of Queensland provided:

> *The introduction of the 'Offender levy' will have resource implications for court registries. The proposed section 179F of the Penalties and Sentences Act requires the "proper officer of the court" to provide particulars in relation to the levy to the State Penalties Enforcement Registry.*
>
> *…*
>
> *The Offender levy is expected to generate substantial revenue for the State, but this will come at a cost in terms of human and other resources in our registries.*[84]

In response the Department provided that *'resourcing for this function will be a matter for consideration in the context of departmental allocations as part of the 2012-2013 State Budget'*.[85]

The QLS provided:

> *First, the Society notes that the proper funding of the administration of justice is the province of government and is one of the core tasks for which taxes are levied. Secondly, the Society does not support the levying of this tax to help pay for the cost of law enforcement. We consider that this will incentivise police officers to charge more people with more crimes in order to increase the likelihood that a person will be convicted of at least one offence, thereby securing the payment of the offender levy. The addition of more charges will only cause delay and increase court costs. Finally, we would be concerned if the public was not*

81 Queensland Council for Civil Liberties, Submission 13, page 4.
82 Queensland Advocacy Incorporated, Submission 16, page 2.
83 Bar Association of Queensland, Submission 18, page 3.
84 Supreme Court of Queensland, Submission 15, page. 1.
85 Letter from the Department, 19 July 2012, page 15.

> *made fully aware of the distribution of the offender levy. Therefore, we request clarification on exactly where these funds will be allocated.*[86]

Professor Heather Douglas, TC Beirne School of Law, The University of Queensland, provided:

> *If this levy does go ahead I hope it is placed into programs that will help to rehabilitate these offenders. Further assuming the levy is introduced the Government might also consider placing a levy on Police Prosecutions that must be paid in circumstances where charges are dismissed or individuals are found not guilty (this could operate aside from the costs orders that may also apply). This levy could be used to fund those rehabilitative programs, especially in communities where there are high numbers of Indigenous offenders, that are generally more appropriate than fines (eg Probation orders and Community service orders).*[87]

The BAQ also raised the '*lack of specificity in the Bill, the explanatory notes and the accompanying parliamentary speech regarding the use of the funds from an offender levy mean that issues surrounding use of the fund are not able to have been examined by the BAQ*' regarding the use of the funds.[88]

The Department provided the following information regarding the creation and distribution of the levy:

> *The 'offender levy' was part of the Government's election commitment and was initially outlined in 'The CANDO LNP Costings and Savings Strategy' (the Costings and Savings Strategy)… The levy amounts in the Bill … are the amounts reflected in this election commitment document.*
>
> *The Preamble to the* Penalties and Sentences Act 1992 *is amended by the Bill to provide that: 'Society is entitled to recover from offenders funds to help pay for the cost of law enforcement and administration.' The revenue collected through the offender levy will be returned to consolidated revenue. The Department notes the statements in the above policy document regarding where the levy is to be directed. However how this revenue is allocated is ultimately a matter for the Government.*[89]

In response to the issues raised in submissions, the Department provided:

> *The levy is modest and is based on the principle that offenders should make a contribution to the cost of law enforcement and administration.*
>
> *The levy once collected will be paid to the consolidated fund for allocation according to the Government's priorities from time to time.*
>
> *The Bill clarifies that the levy is not prohibited by section 704 of the Criminal Code.*
>
> *The Department does not consider the provisions are unconstitutional.*
>
> *The levy does not apply in relation to Commonwealth Offences.*
>
> [Removal of judicial discretion] *is consistent with the offender levy being an administrative levy and not forming part of the sentence.*[90]

In response to the amount of the levy being set by regulation, and that there is no upper limit on the amount that may be levied, the Department provided:

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86 Queensland Law Society, Submission 2, page 3.

87 Professor Douglas, TC Beirne School of Law, The University of Queensland, Submission 1, page 1.

88 Bar Association of Queensland, Submission 18, page 6.

89 Letter from the Department, 18 July 2012, pages 1-2.

90 Letter from the Department, 19 July 2012, pages 3-6.

It is common practice for fees and charges to be prescribed by regulation so that they can be subject to ongoing review, including for movements in the consumer price index.

Any regulated amount will be subject to review by a parliamentary committee and possible disallowance by the Parliament.[91]

Committee comment

The Committee notes the purpose of the New Zealand offender levy, on which this levy is based, is to ensure that offenders contribute to the harm their crimes cause to victims. This is enshrined in the *Sentencing (Offender Levy) Amendment Act 2009* (NZ), which established the levy.

The Committee notes the distinction between these approaches and that there is no specification contained in the Bill as to how this levy will be distributed.

Unintended consequences

The proposed levy will be imposed on an offender on sentence to help pay for the cost of law enforcement and administration.

Submitters raised concerns regarding the unintended consequences of this revenue raising, including impacts on individuals and other agencies, namely court registries and SPER.

Professor Heather Douglas, TC Beirne School of Law, The University of Queensland, provided:

This levy is likely to impact most significantly on the most vulnerable members of society. Indigenous offenders, already over represented in the criminal justice system, will inevitably be the hardest hit by the introduction of such a levy.[92]

The QLS stated:

The Society is concerned that this offender levy has the potential to disproportionately affect Aboriginal and Torres Strait Islander persons, given their historical over-representation in the criminal justice system. We also consider that this tax will impact on other marginalised and vulnerable groups such as people suffering from mental illness, the poor and regular users of public space. For example, homeless people or people at risk of experiencing homelessness who occupy public space are more likely to come into contact with the criminal justice system and will be negatively impacted by this offender levy.

In our view, the State Government is in effect causing more financial pressures to be placed on those who historically and statistically are least able to afford to pay the tax. This may then increase the recidivism of those disadvantaged and marginalised members.[93]

The QCCL provided:

It is clear that this change will fall most heavily on the poor in our community either because they were poor when they went to prison or because when they come out of prison they will be unemployed.

It is our view, simply not good public policy to impose financial penalties on people who are already poor. With so many barriers to those who have been through the criminal justice

91 Letter from the Department, 19 July 2012, page 14.

92 Professor Douglas, TC Beirne School of Law, The University of Queensland, Submission 1, page 1.

93 Queensland Law Society, Submission 2, page 4; these comments are also endorsed by: the Catholic Prison Ministry, Submission 10, page 1; the Prisoners' Legal Service Incorporated, Submission 4, page 1; and the Queensland Association of Independent Legal Service Incorporated, Submission 9, page 1.

> *system entering back into the community it would be our view that the proposal is unlikely to be cost effective nor in the interests of society as it will discourage rehabilitation.*[94]

In response to these submissions, the Department provided:

> *State Penalties Enforcement Registry (SPER), which will collect unpaid levies, has a community engagement team which specialises in dealing with identified disadvantaged and vulnerable debtors. The primary aim of the team is to assess the best options available for this cohort of debtors.*
>
> *The* State Penalties Enforcement Act 1999 *specifically provides for payment by instalments in the event of financial hardship.*
>
> *The views of Queensland Advocacy Incorporated about discrimination are noted.*[95]

Regarding the disproportionate nature of the levy to certain offences, the Department added:

> *The offender levy is a modest administrative levy that does not form part of the sentence. It would not be appropriate for the levy to reflect the gravity of the offence. The differing value in the levy between the Magistrates court and the High courts in itself reflects the differences in the nature of the offences dealt with in those jurisdictions.*[96]
>
> *The amounts of the levy reflect the increased complexity and nature of matters in the superior courts.*[97]

Regarding SPER, the Department provided:

> *If the levy is not paid on the day at the court registry, using existing SPER processes is a practical option.*[98]

The BAQ also considered that '*the offender levy is likely to operate most harshly on the disadvantaged*.'[99] In addition, BAQ stated:

> *The proposed offender levy attaches to the sentence, rather than the nature of the offence. The setting of a uniform offender levy for particular courts, regardless of the nature of the offence, will, in many instances, be disproportionate to the offence committed, and will result in mere revenue raising from those minor offenders who have the means to pay, rather than those serious or repeat offenders who arguably have a higher moral obligation to compensate society for their offending.*
>
> *…*
>
> *Where an offender is charged with a minor offence, the offender levy imposed upon conviction is in many cases likely to exceed, or at least equal the sentence to be imposed, particularly for first time offenders. Whilst the discount given on sentence to those who plead guilty serves as a powerful incentive to those charged with minor offences to plead guilty, where that incentive is largely removed by the automatic imposition of an offender levy following conviction, it is not unreasonable to expect an increase in the number of summary trials in the Magistrates Court.*[100]

The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd provided:

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94 Queensland Council for Civil Liberties, Submission 13, page 3.
95 Letter from the Department, 19 July 2012, page 6.
96 Letter from the Department, 19 July 2012, page 10.
97 Letter from the Department, 19 July 2012, page 12.
98 Letter from the Department, 19 July 2012, page 12.
99 Bar Association of Queensland, Submission 18, page 2.
100 Bar Association of Queensland, Submission 18, pages 4-5.

One immediate impact of such a levy will be a wider reluctance on the part of some defendants to plead guilty.

We also envisage a number of other issues in regard to the introduction of an Offender Levy in respect of our clients. Many of our clients are unemployed or low income earners and are therefore ill equipped to pay a levy for court proceedings.

…

… exemptions would go a long way towards ensuing … that the system does not disproportionately impact upon some of our most disadvantaged citizens.

…

The enforcement system (SPER) and the consequences of not engaging in it disproportionately impacts on Aboriginal and Torres Strait Islander peoples. Some of the reasons for this include the large number of people who are on Centrelink payments, the high number of people who are illiterate/innumerate, a large number of people with mental illness and who are homeless, the level of understanding of English and a higher likelihood of moving address. The consequences of these disadvantages and cultural differences mean that Aboriginal and Torres Strait Islander peoples may be less able to engage with SPER and are therefore more likely to have their licences suspended or even be imprisoned as a result.[101]

The Queensland Public Interest Legal Clearing House (QPILCH) provided:

The levy will disproportionately impact people who are homeless, who have an inability to pay, and will exacerbate their homelessness instead of providing a solution.

The HPLC [Homeless Persons' Legal Clinic] *proposes that the offender levy be waived where the defendant is experiencing homelessness, mental illness or has a cognitive or intellectual impairment.*

…

Moreover, the high incidence of mental illness, trauma and cognitive or intellectual impairments in people who are homeless renders them easily confused and agitated by police directions, leading to charges such as resist arrest and contravene a direction.

The irony of imposing a fine on people in poverty has been explored in many publications, and the proposed offender levy will increase this burden, adding to the already unsustainable SPER debt to homeless people.

…

The HPLC estimates that 70% of people experiencing long-term homelessness have a SPER debt, averaging $4000. According to the Community Engagement Team at SPER, accumulated debts of $15,000 to $50,000 are common for homeless people. THE HPLC has been working with SPER to enable people who are homeless to access more appropriate community-work options, but the current regime is unable to address these chronic debt levels, and homeless people are being incarcerated for failure to pay. Imposing an offender levy will increase these unsustainable debts.[102]

QPILCH ask that the proposed offender levy in the Magistrates Court for criminal matters be waived in circumstances where the defendant is homeless, mentally ill and intellectually or cognitively

101 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 8, pages 2-3.

102 Queensland Public Interest Law Clearing House Incorporated, Submission 6, pages 1-3.

impaired, suggesting diversion to the Special Circumstances Court where the Court does not impose incarceration or a monetary penalty for offenders who plead guilty.[103]

In response to QPILCH's submission, the Department provided:

> *SPER has a community engagement team which specialises in dealing with identified disadvantaged and vulnerable debtors. The primary aim of the team is to assess the best options available for this cohort or debtors.*
>
> *The* State Penalties Enforcement Act 1999 *specifically provides for payment by instalments in the event of financial hardship.*[104]

Committee comment

The Committee notes the potential unintended consequences of imposing an offender levy fee on marginalised individuals. The Committee considers QPILCH's suggestion is worthy of further consideration and, as such, recommends that in matters that are before the Special Circumstances Court, that court retain discretion to impose the offender levy.

Recommendation 5

The Bill be amended to allow the Special Circumstances Court to retain discretion in imposing the offender levy.

Tax or levy

In their submission, the QCCL raise several Constitutional and other legal issues regarding the validity of the offender levy.[105] QCCL provide:

> *… In cases where a Queensland Court is exercising jurisdiction in relation to a Commonwealth criminal charge or offences which involve both Federal and State charges would the attempt to impose this fee in those circumstances be invalid because of section 109 of the Constitution?* [106]

QCCL also raise questions about the levy being classified as a penalty or a tax, and ask whether the administrative levy also applies to regulatory offences.

In response to these issues, the Department provided that it does not consider the provisions are unconstitutional, and it confirmed that the levy will not apply to Commonwealth offences.[107]

Committee comment

The Committee notes the Constitutional and other legal issues raised by the QCCL in its submission, and the Department's response, but considers that these matters may warrant further consideration.

Recommendation 6

The Attorney-General and Minister for Justice address the Constitutional and other legal concerns of the Queensland Council for Civil Liberties in his reply to the Committee's report.

103 Queensland Public Interest Law Clearing House Incorporated, Submission 6, pages 2-4.
104 Letter from the Department, 19 July 2012, page 8.
105 Queensland Council for Civil Liberties, Submission 13, page 2.
106 Queensland Council for Civil Liberties, Submission 13, page 2.
107 Letter from the Department, 19 July 2012, page 6.

2.7 *State Penalties Enforcement Act 1999*

As explained by the Attorney-General:

> *The Bill also amends the* State Penalties Enforcement Act 1999 *to allow the State Penalties Enforcement Registry, which is currently responsible for the collection of court imposed fines, to collect the* [offender] *levy. Collection of the levy will be prioritised after the collection of reparation but before the collection of fines. Given that the offender levy is not a court imposed penalty, fine option orders and imprisonment have been excluded as enforcement options. However, the State Penalties Enforcement Registry will still be able to utilise fine collection notices - which enable the registry to garnishee wages and monies held in financial institutions - enforcement warrants and drive licence suspensions to recover amounts which remain outstanding. This initiative will ensure that offenders contribute to the administration of justice in Queensland.*[108]

Clause 44 inserts a new section 54A (Effect of appeal on enforcement order for offender levy) which applies where an offender appeals against all of the convictions that gave risk to the offender levy.

The Explanatory Notes provide:

> *Under this section, the appeal suspends all enforcement action pending the determination of the appeal. If all of the convictions that resulted in the imposition of the offender levy are quashed, the registrar must refund any amount paid to the State Penalties Enforcement Registry for the levy.*[109]

The QLS provided:

> *The Society is concerned that this regulatory burden will only be increased when administration of the offender levy is added to the State Penalties and Enforcement Register's list of duties. In consideration of this burden and the amount of the levy, we question whether the value of imposing an offender levy will be outweighed by the administration costs to the State Penalties and Enforcement Register. This administration cost will be increased when levies must be returned to individuals who have had their adverse decision overturned on appeal.*[110]

Queensland Advocacy Incorporated provided:

> *A flat rate court fee is inequitable and quite possibly a breach if anti-discrimination legislation. While offenders who have financially prospered through crime such as many white collar offenders and major property offenders will hardly be deterred or inconvenienced by a two or three hundred dollar fee, offenders for whom these fees represent up to a week's income or more will be disproportionately affected.*[111]

In response to these considerations, the Department provided:

> *The amounts of the levy reflect the increased complexity and nature of matters in the superior courts.*
>
> *If the levy is not paid on the day at the court the registry, using existing SPER processes is a practical option.*[112]

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108 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Transcript of Proceedings*, page 1131.

109 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 15.

110 Queensland Law Society, Submission 2, page 3.

111 Queensland Advocacy Incorporated, Submission 16, page 2.

112 Letter from the Department, 19 July 2012, page 12.

Committee comment

The Committee notes the Department response, and the adequacy of SPER processes to recover the graduating offender levy.

2.8 *Statutory Instruments Act 1992*

The Explanatory Notes provide:

> *Clause 49 amends section 46 (When preparation of regulatory impact statement unnecessary?) to provide that rules of court made under the* Childrens Court Act 1992*; the* Industrial Relations Act 1999*; the* Land Court Act 2000*; the* Mental Health Act 2000*; the* QCAT Act 2000*; and the* Sustainable Planning Act 2009 *are exempt from the requirement to prepare a regulatory impact statement.*
>
> *Clause 50 amends schedule 2A (Subordinate legislation to which part 7 does not apply) to provide that rules of court made under the* Childrens Court Act 1992*; the* Industrial Relations Act 1999*; the* Land Court Act 2000*; the* Mental Health Act 2000*; the* QCAT Act 2000*; and the* Sustainable Planning Act 2009 *are exempt from the provisions relating to automatic expiry of subordinate legislation.*[113]

The Department provided the following in relation to the *Queensland Civil and Administrative Tribunal Act 2000*:

> *The* Queensland Civil and Administrative Tribunal Act 2000 *(the QCAT Act) provides that the rules made under the QCAT Act are not subject to automatic expiry, therefore the amendments to the* Statutory Instruments Act 1992 *only exempts the rules made under the QCAT Act from the requirements relating to regulatory impact statements.*[114]

Committee comment

The Committee notes the need to ensure consistency and certainty in the operation of the QCAT rules.

2.9 Minor Amendments

The Explanatory Notes provide:

> *The Bill also makes minor and technical amendments to legislation within the justice portfolio.*[115]

Committee comment

The Committee notes the minor amendments contained in the Schedule to the Bill and considers they are necessary consequential amendments required to support the other amendments contained in the Bill.

113 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 15.

114 Letter from the Department, 13 July 2012, page 3.

115 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 1.

3 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* 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 House.

3.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals. In addition, section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively.

Expiry of rules of court

The amendments to the *Childrens Court Act 1992*, the *Land Court Act 2000* and the *Penalties and Sentences Act 1992* operate retrospectively.

The Explanatory Notes provide:

> *Retrospective application of the amendments to the* Childrens Court Act 1992*, and the* Land Court Act 2000 *is required to overcome the expiry of the Childrens Court Rules 1997 and the Land Court Rules 2000. Ensuring the retrospective operation of the provision is important to preserve the interests of those parties who have submitted their disputes to the jurisdictions of the courts in good faith. The continued operation of the rules is necessary for the effective operation of the courts and the efficient administration of justice.*[116]

Commissions of Inquiry Act 1950

The proposed new section 35 (transitional provision) to be introduced into the *Commissions of Inquiry Act 1950* by clause 15 operates retrospectively as it provides that sections 5(2A) and (2C) of that Act apply to an oath taken, affirmation made, or provision of an Act, whether taken, made or enacted before or after the commencement of new section 35.

The Explanatory Notes provide:

> *… amendments to the* Commissions of Inquiry Act 1950 *contain significant powers to inquire into a matter. The powers provided allow for any confidentiality or secrecy provisions that are contained in other legislation to be overridden. In view of the sensitive nature of the information that may be obtained under an inquiry, the amendments to the* Commissions of Inquiry Act 1950 *include two confidentiality clauses which moderate the disclosure of information that has been obtained during an inquiry. The amendments to the* Commissions of Inquiry Act 1950 *strike an appropriate balance between protecting an individual's right to privacy without impacting on the important work of an inquiry.*[117]

In addition, clause 14 imposes a new offence for the disclosure of confidential information in certain circumstances that attracts a maximum of 200 penalty units or 1 year's imprisonment.

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116 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 3.

117 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 4-5.

Recovery of overpayment of wages

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

Clause 19 of the Bill inserts a new section 396A and section 396B. New section 396A will permit a health employer to recover such an overpayment by deducting an amount or amounts in instalments from amounts payable to the employee by the health employer. Amounts in relation to employment are defined as including both wages and any other amount in relation to employment payable to the employee. New section 396B will enable recovery of a health employment transition loan resulting from a change to existing pay date arrangements.

The Explanatory Notes provide:

> *The* Industrial Relations Act 1999 *currently does not directly permit deductions from wages, except in the case of overpayments due to absence from work. The amendments conflict with fundamental legislative principles by making health employees uniquely liable to deductions from their wages or any other amount payable in relation to employment for a non-absence related overpayment, and to repay the transition loan up to the time of their final payment as a health employee.*
>
> *The introduction of provisions authorising deductions under these arrangements and their limitation to use only in specific circumstances related to Queensland Health payroll issues is considered a proportionate response to a possible recurring debt of $1.7 million per fortnight.*
>
> *In relation to deductions to recover overpayments, a limitation on the amount that may be deducted at any time is afforded by a new section in the Industrial Relations Regulation 2011 providing that amounts paid at any time must not be reduced to less than three quarters of the amount otherwise payable at the time. Queensland Health will be obliged to negotiate repayment strategies with affected employees in the first instance and will only be able to recover monies without the employee's consent as a last resort. In relation to deductions to recover the transition loan, health employers and employees will be able to enter into a range of repayment options by agreement prior to final payment so that recovery from the final payment will be a last resort.*[118]

The Department provided:

> *The amount that may be deducted at any time is limited by a new section in the* Industrial Relations Regulations 2011*, which provides that the amounts paid at any time must not be reduced to less than three quarters of the amount otherwise payable at the time.*[119]

Whereas new section 396A(5) provides a limitation on the amount that may be deducted at any time, no similar provision exists for proposed section 396B. However, the Explanatory Notes provide that:

> *Arrangements relating to the agreed repayment of the transition loan during employment will be set out in a public service ruling (directive) under the Public Service Act 2008.*[120]

The application of the *Public Service Act 2008* was however questioned by Together in its submission (discussed above in section 2.4 of this Report).

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118 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 4-5.

119 Letter from the Department, 13 July 2012, page 7.

120 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 10.

Committee comment

The Committee notes that new section 396B, as currently drafted, has the potential to cause significant hardship however this may be reduced through the operation of a directive provided it has the intended effect.

Offender levy

Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals. In addition, section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively.

The Bill introduces an offender levy payable upon sentencing for a criminal offence.

Clause 36 inserts a new section 48(3A) which states that, in considering the financial circumstances of the offender, the court must not take into account the offender levy imposed under section 179C of the *Penalties and Sentences Act 1992*. In addition, the Bill does not include any provisions enabling the levy to be waived. The Bill also provides that the offender levy will have retrospective application in particular circumstances.

The Explanatory Notes provide:

> *Legislation should be fair and reasonable in relation to any exemptions that an individual may rely upon. The Bill does not include any fee waiver provisions for the offender levy. This is justified on the basis that the* State Penalties Enforcement Act 1999 *includes provision for payment by instalments in the event of financial hardship.*[121]
>
> *The amendments to the* Penalties and Sentences Act 1992 *have limited retrospective application. Although there is not retrospective imposition of liability to pay the offender levy, a person may be liable to pay the offender levy as a result of criminal conduct that occurred prior to commencement. This retrospective application, which is consistent with the levy being an administrative levy that is imposed on sentencing, is justified on the basis that the community will benefit from collection of the levy from the widest possible class of offenders.*[122]

The QLS provided:

> *We consider that it is inappropriate to remove judicial discretion in the imposition of fines. The inability of the Court to take the offender levy into account on sentence is unjust (especially for those suffering under other economic burdens). This will have an unfair and economically devastating impact on some offenders which will only function to entrench these people in situations of economic uncertainty, disadvantage and poverty. In this regard, we note that this will negatively impact legally aided clients. This situation is concerning, especially due to the fact that there is no upper limit on the amount that can be levied.*
>
> *We propose that the offender levy be discretionary and allow learned judicial officers to decide on an individual case-by-case basis as to whether it would be in the interests of justice to impose the tax. At the very least, the Society strongly suggests that the Bill be amended to allow judicial officers to take the imposition of the mandatory offender levy into account when considering sentencing options.*[123]

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121 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 4-5.

122 Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 3.

123 Queensland Law Society, Submission 2, page 3.

The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd provided:

> *The retrospective application of the offender levy is … unfair. It does not comply with section 34 of the* Statutory Instruments Act 1992 *…*
>
> *It is difficult to suggest that the offender levy is capable of complying with section 34 of the* Statutory Instruments Act 1992*, or section 4 of the* Legislative Standards Act 1992 *in regard to fundamental legislative principles.*[124]

The BAQ recommended:

> *… if the government is determined to proceed with an offender levy, it should apply only to those offences where the initiating process (ie the arrest, notice to appear, summons etc) was commenced after the date of assent.*[125]

3.2 Institution of Parliament

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

Commissions of Inquiry Act 1950

Part 4 of the Bill amends section 5 (power to summon witness and require production of books etc.), by inserting new sections that provide that a chairperson's request takes precedence under any oath taken, affirmation made or provision of an Act that might provide reasonable excuse for not complying with the request.

The Department provided:

> *Section 5(2A) is a "Henry VIII clause" because it allows a regulation to override an Act of Parliament and as such does not have sufficient regard to the institution of Parliament as provided for by section 4(4)(c) of the* Legislative Standards Act 1992*.*
>
> *In 1998 in reviewing the* Commissions of Inquiry (Forde Inquiry – Evidence) Regulation 1998 *the then Scrutiny of Legislation Committee stated that section 5(2A) of the* Commissions of Inquiry Act 195*0 was 'objectionable' and should be removed from the Act.*
>
> *The Bill addresses these concerns by inserting new sections 5(2A) to (2C).* [126]

Committee comment

The Committee notes these amendments address the concerns raised by the then Scrutiny of Legislation Committee.

Offender levy

Clause 37 of the Bill inserts a new Part 10A into the *Penalties and Sentences Act 1992* to provide for the imposition and administration of an offender levy.

The Explanatory Notes provide:

> *The Bill includes an amendment to the* Penalties and Sentences Act 1992 *to allow the amount of the offender levy to be prescribed by regulation. While this may give rise to a delegation of legislative power, this amendment is justified on the basis that it is common*

124 Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 8, page 5.

125 Bar Association of Queensland, Submission 18, page 5.

126 Letter from the Department, 13 July 2012, page 4.

practice for fees and charges to be prescribed by regulation so that they can be subject to ongoing review.[127]

New clause 179F (enforcement of offender levy by registration) facilitates registration of the offender levy. As part of the administration of this levy, proposed section 179F(4) allows particulars to be subject to a regulation. A clause that makes a requirement imposed under a provision of an Act subject to regulation is a '*Henry VIII*' clause.

[127] Penalties and Sentences and Other Legislation Amendment Bill 2012, *Explanatory Notes*, p 4; Letter from the Department, 13 July 2012, pages 6-7.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
001	Professor Heather Douglas, TC Beirne School of Law, The University of Queensland
002	Queensland Law Society
003	The Australian Workers' Union of Employees, Queensland
004	Prisoners' Legal Service Incorporated
005	United Voice, Industrial Union of Employees, Queensland
006	Queensland Public Interest Law Clearing House Incorporated
007	Queensland Council of Unions
008	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
009	Queensland Association of Independent Legal Services Incorporated
010	Catholic Prison Ministry
011	Together Queensland Industrial Union of Employees
012	Queensland Nurses' Union
013	Queensland Council for Civil Liberties
014	Auditor-General of Queensland
015	Supreme Court of Queensland
016	Queensland Advocacy Incorporated
017	'Form' email from over 4000 members (or supporters) of the Queensland Nurses' Union[128]
018	Bar Association of Queensland
019	Caxton Legal Centre Incorporated

[128] Note – due to the reporting timeframe the Committee has been unable to individually log or verify the emails from individual submitters, however they are acknowledged as Submission 17.

Dissenting Report

I dissent from the recommendations contained in the Report put forward by the majority of the members of the Legal Affairs and Community Safety Committee (the Report).

As set out in the Report, I agree with the following statements of the Committee:

1. That the ongoing problems with the Queensland Health Payroll system must be addressed as a priority;

2. No submission is advocating that any employee who has been paid an amount to which they are not entitled, should not have to pay that amount back to the employer;

   The development of this Bill would have been greatly enhanced if there were public consultation and discussions with relevant stakeholders, prior to its introduction into the Parliament; and

4. From the submissions received, it is difficult to reconcile the statement in the Explanatory Notes that "in relation to the amendments contained in the *Industrial Relations Act 1999,* Unions have, through ongoing monthly meetings with Queensland Health, provided in principle support for a recovery process."

While there are parts of the Bill that I consider are not controversial and should proceed without question, there are other parts of the Bill, namely those parts dealing with the recovery of overpayments to health workers and the offender levy that I consider should be subject to further consultation.

After considering the detailed submissions received in the extremely short time allowed, I do not believe this problem of overpayment can only be solved by the legislative amendment: the subject of this investigation and I do not recommend that the Bill be passed.

It is my strongly held view that the matters raised in the responses received in the limited time available, justify this Bill being rejected, with further work to be done by the Government on investigating other ways of achieving a repayment of the money: the subject of this Bill.

Peter Wellington MP

Member for Nicklin

Deputy Chair