Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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COMMITTEE RESPONSIBILITY

Section 103 of the *Parliament of Queensland Act 2001* confers the committee with a responsibility that has two parts: examination of legislation and monitoring of the operation of certain statutory provisions.

As outlined in the explanatory notes to the *Parliament of Queensland Act* (at 43):

[T]he committee's role is to monitor legislation. The committee may raise issues (such as breaches of fundamental legislative principles) with the responsible Minister, or with a Member sponsoring a Private Member's Bill, prior to pursuing issues, where appropriate, in the Assembly.

1. Examination of legislation

The committee is to consider, by examining all bills and subordinate legislation:

- the application of fundamental legislative principles to particular bills and particular subordinate legislation; and
- the lawfulness of particular subordinate legislation.

Section 4 of the *Legislative Standards Act* states that 'fundamental legislative principles' are 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. They include that legislation have sufficient regard to:

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

Section 4 provides examples of 'sufficient regard': see the diagram on the opposite page.

2. Monitoring the operation of statutory provisions

The committee is to monitor generally the operation of specific provisions of the *Legislative Standards Act 1992* and the *Statutory Instruments Act 1992*:

Legislative Standards Act	*Statutory Instruments Act*
• Meaning of 'fundamental legislative principles' (section 4) • Explanatory notes (part 4)	• Meaning of 'subordinate legislation' (section 9) • Guidelines for regulatory impact statements (part 5) • Procedures after making of subordinate legislation (part 6) • Staged automatic expiry of subordinate legislation (part 7) • Forms (part 8) • Transitional (part 10)

Fundamental legislative principles require, for example, legislation have sufficient regard to:

<table>
<tr><td rowspan="2">Rights and liberties of individuals</td><td colspan="2">Bills and subordinate legislation
make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review
are consistent with the principles of natural justice
don’t reverse the onus of proof in criminal proceedings without adequate justification
confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer
provide adequate protection against self-incrimination
does not adversely affect rights and liberties, or impose obligations, retrospectively
does not confer immunity from proceeding or prosecution without adequate justification
provide for the compulsory acquisition of property only with fair compensation
have sufficient regard to Aboriginal tradition and Island custom
are unambiguous and drafted in a sufficiently clear and precise way</td></tr>
<tr><td>Institution of Parliament</td><td>Bills
allow the delegation of legislative power only in appropriate cases and to appropriate persons
sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly
authorise the amendment of an Act only by another Act</td><td>Subordinate legislation
is within the power that allows the subordinate legislation to be made
is consistent with the policy objectives of the authorising law
contains only matter appropriate to subordinate legislation
amends statutory instruments only
allows the subdelegation of a power delegated by an Act only –
in appropriate cases to appropriate persons
if authorised by an Act.</td></tr>
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REPORT

Structure

This report follows committee examination of:

- bills (part 1);
- subordinate legislation (part 2); and
- correspondence received from ministers regarding committee examination of legislation (part 3).

Availability of submissions received

Submissions received by the committee and authorised for tabling and publication are available:

- on the committee’s webpage (www.parliament.qld.gov.au/SLC); and
- from the Tabled Papers database (www.parliament.qld.gov.au/view/legislativeAssembly/tabledPapers).

PART 1 – BILLS EXAMINED

1. ADOPTION BILL 2009

Date introduced: 22 April 2009

Responsible minister: Hon P Reeves MP

Portfolio responsibility: Minister for Child Safety and Minister for Sport

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to the rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 8, 76 and 157** which would directly affect rights and liberties of specific individuals who wished to adopt – in the best interest of a child, the operation of the *Anti-Discrimination Act 1991* might be overridden;
   - **clauses 39 and 175** of the bill which would enable an adoption order to be made without the consent of a parent;
   - **clauses 116, 116 and 121** of the bill which have the potential to affect rights to privacy of personal information;
   - **clause 36** of the bill which would exclude obligations to accord natural justice;
   - **clause 272** which would require a person charged with an offence to prove certain matters in his or her defence;
   - **clause 343** which would be a transitional provision regarding objections to contact lodged by birth parents of persons adopted prior to 1 June 1991 and would retrospectively alter a person's expressed objection to the release of identifying information to another person associated with the same adoption;
   - **clause 321** which would confer immunity from civil liability in connection with the exercise of functions under the Act;
   - **clauses 32 and 253** which use terms which may not be sufficiently clear in meaning to enable the legislation to be interpreted with sufficient certainty.

2. In relation to whether the bill has sufficient regard to the rights and liberties of individuals, the committee draws the attention of the Parliament to **clause 276** which would permit the chief executive to obtain or disclose non-identifying medical information and to make certain decisions regarding the disclosure or non-disclosure of such information.

BACKGROUND

3. The bill is intended to finalise a reform process, commenced in 2001, regarding the adoption of children in Queensland and access to information about parties to adoptions.

LEGISLATIVE PURPOSE

4. The main object of the bill, as provided in clause 5, is to provide for the adoption of children in Queensland, and for access to information about parties to adoptions in Queensland, in a way that:
   - promotes the wellbeing and best interests of adopted persons throughout their lives;
   - supports efficient and accountable practice in the delivery of adoption services; and
   - complies with Australia's obligations under the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the Hague convention).

5. The bill would repeal the Adoption of Children Act 1964. It would amend the:
   - *Births, Deaths and Marriages Registration Act 2003;* and
   - *Child Protection Act 1999.*

6. The bill would also effect consequential amendments to a further six Acts.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

7. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

8. **Clauses 8, 76 and 157** may affect rights and liberties of individuals as these provisions of the bill would expressly override the operation of the *Anti-Discrimination Act 1991.*

9. First, clause 8 (Act applies despite *Anti-Discrimination Act 1991*) would override the operation of the *Anti-Discrimination Act 1991* to allow discrimination on the basis of attributes in that Act to be lawful, particularly in relation to recruitment and selection of prospective adoptive parents. Clause 8 would provide:

   (1) Despite the *Anti-Discrimination Act*, a person may make a decision or do another act that is necessary to comply with, or is specifically authorised by, this Act.

   (2) Without limiting subsection (1), a person may make a decision or do another act under this Act to comply with the main guiding principle under section 6(1).

10. The guiding principles in clause 6(1) include that:

    This Act is to be administered under the principle that the wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life, are paramount.

11. The explanatory notes acknowledge (at 25):

    Discrimination on the basis of things such as the state of a person's health, their relationship status, pregnancy, parental status, age, race and sexuality are also likely in relation to decisions required to be made or actions required to be taken under the Act.

    For example, when the chief executive is selecting a couple to be the adoptive parents of a child, consideration must be given to any preferences expressed by the child's birth parents for the child's upbringing. If the child's birth parents have expressed a preference for the child to be brought up in a particular religious faith or by adoptive parents of a particular age-range, the chief executive must have regard to that preference when selecting the child's adoptive parents, unless the selection is likely to be contrary to the child's wellbeing and best interests. Discriminating between people in this way is otherwise unlawful under the Anti-Discrimination Act 1991*. However, in this case the discrimination must be allowed*

to occur because the chief executive must respect the birth parent's wishes about the child's upbringing as far as possible.

A further example relates to the chief executive's obligation to have regard to the child's particular needs in selecting prospective adoptive parents for a child. If a child has a particular ethnic or cultural background, the chief executive may give preference to selecting prospective adoptive parents who have a similar background or who have previously adopted a child from a similar background. This would also be unlawful discrimination, either direct or indirect, under the Anti-Discrimination Act 1991.

Therefore, the Anti-Discrimination Act 1991 *must be overridden to enable many of the requirements of the adoption laws to be correctly fulfilled and administered in a way that gives paramouncy to the wellbeing and best interests of the child.*

12. Second, two additional proposed provisions which would displace the operation of the *Anti-Discrimination Act* are clauses 76 and 157.

13. The bill would reform the eligibility to lodge expressions of interest in adoption, with eligibility no longer confined to married couples. However, clause 76 (Eligibility for inclusion in register) which would provide for the expanded eligibility nevertheless deems certain classes of people to be ineligible. These include:

- pregnant women;
- people participating in fertility treatment;
- same sex couples; and
- single people.

14. Further, the process for the selection of adoptive parents for a particular child could, as provided under the bill, entail discrimination against people in order to accord with preferences of a birth parent. Clause 157(1) would require the chief executive to have regard to any preferences of the child's birth parents including, for example, preferences about the:

- child's religious upbringing;
- characteristics of the child's adoptive parents and adoptive family; or
- degree of openness in the adoption.

15. However, clause 157(2) would state that the chief executive need not have regard to a preference expressed by a birth parent where he or she considered it likely to be contrary to the child's wellbeing or best interests.

16. In respect of clauses 8, 76 and 157 collectively, the explanatory notes to the bill indicate (at 15):

Overriding the Anti-Discrimination Act 1991 *in this way clearly breaches fundamental legislative principles. However, the breach is justified because the imposition of discriminatory processes, particularly in relation to the recruitment and selection of prospective adoptive parents, is essential to safeguard the wellbeing and best interests of children who need adoptive placements. This paramount principle must be complied with above the rights of any person wishing to adopt a child, including any rights they may otherwise have under the* Anti-Discrimination Act 1991 *not to experience discrimination.*

17. Therefore, clauses 8, 76 and 157 would directly impact upon rights and liberties of individuals who wished to adopt. Following its enactment, the bill would determine who may adopt and be recognized as the parent of a child. However, in this determination, as provided in clause 8 and the guiding principle in clause 6(1), the wellbeing and best interests of an adopted child are to be paramount, even where a determination made in the best interests of a child would be otherwise unlawful under the *Anti-Discrimination Act* or would infringe upon individual rights and liberties.

18. In this respect, the committee observes that a report of the New South Wales Law Reform Commission recommended that legislation support flexibility and adaptability in agency decision-making, rather than restricting the types of adoptive parents able to be considered by decision-

makers.[1] Similarly, courts in Canadian provinces have determined a number of challenges to legislation and administrative decisions regarding adoption based on the principle of equal benefit and protection of the law without discrimination, protected by section 15 of the *Canadian Charter of Human Rights and Freedoms 1982*. Due to these decisions and related legislative amendments, while the best interests of the child involved remains the overriding principle, same sex couples for example, are no longer excluded from adoption.[2]

19. However, the committee notes that the law in Australian jurisdictions has not moved in the same direction as the law in Canada.

20. In relation to whether the bill has sufficient regard to rights and liberties of individuals in this context, the committee received a submission from the Commissioner of the Anti Discrimination Commission Queensland. The committee has noted the submission and has authorised its tabling and publication.

21. **Clause 39 and 175** of the bill would enable an adoption order to be made without the consent of a parent.

22. Clause 175(2) of the bill would provide that the court may make an adoption order for a child only if satisfied each of a child's parents had consented to the adoption at least 30 days before the making of the order.

23. Clause 175(4) to (6) would provide exceptions to the operation of clause 175(2); namely, where:

- an interim order is in place and a final order is to be made;
- consent has been given by a parent under the law of another State; and
- the adoption would be an intercountry adoption.

24. The explanatory notes state in relation to clause 175 (at 15):

… there are circumstances in which a parent's consent may not be able to be obtained, and, for the child's adoption to proceed, it is necessary to dispense with the requirement for the parent to consent.

25. Accordingly, clause 39 of the bill would enable the Childrens Court to make an order dispensing with the need for a parent's consent to the adoption of his or her child in circumstances such as:

- where it was impossible to establish the parent's identity, or to locate the parent after making all reasonable enquiries;
- the parent was a lineal relative of the child's mother;
- the child's conception was a result of an offence committed by the parent (for example, incest or rape);
- there would be an unacceptable risk of harm to the child or mother if the parent were made aware of the child's birth or proposed adoption;
- the parent did not have the capacity to give consent to the adoption;
- there were other special circumstances; and

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1 NSW Law Reform Commission, Report 81, *Review of the Adoption of Children Act 1965*, 1997, Chapter 6, available at: www.lawlink.nsw.gov.au/lrc.

2 Danny Sandor, 'Same Sex Couples can Adopt in Ontario: The Canadian Case of *Re K* and its Significance to Australian Family Law', *Australian Journal of Family Law*, vol. 11, March 1997, 38; and Tanya Canny, 'Same Sex Couple Adoption: The Situation in Canada and Australia', Research Note 29, 11 April 2000, Parliament of Australia Parliamentary Library, available at: www.aph.gpv.au/library.

- where a parent was unreasonably withholding consent or refusing to discuss the giving of consent, if the court was satisfied the parent was not, and would not be, willing and able to protect the child from harm or to meet the child's need for long-term stable care.

26. In this regard, the explanatory notes state (at 16) that:

[T]he court will only be able to dispense with a parent's consent if satisfied that it would be in the child's best interests for arrangements for his or her adoption to continue to be made. Also, the court will not be able to make a dispensation order if there is reason to believe there is a current application before another court seeking a declaration of paternity for the child, or a parenting order for the child under the Family Law Act 1975 *(Cwth)…*

The dispensation of a parent's consent overrides their ordinary right to make decisions about arrangements for their child's future care and upbringing. However, there is a need to balance the wellbeing and best interests of the child with any right of the child's parent to make decisions about the child's long-term care. Given this, and given the limits within which the court must exercise its power, the provision enabling the court to make an order dispensing with the need for a parent's consent is considered to be justified.

27. The committee notes that a determination to dispense with parental consent to adoption involves, in the context of adoption proceedings consideration of the right to family life and protection. In respect of an application under section 35 of the *Adoption Act 1993* (ACT) seeking dispensation from the consent of a birth father to the adoption of his young child, In the Matter of an Adoption of D [2008] ACTSC 44 (at [7] to [8]), Refshauge J considered section 11 of the *Human Rights Act 2004* (ACT) which 'amounts to a right to family life' and noted the international jurisprudence on the issue:

As was said by the European Court of Human Rights in considering art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (slightly differently worded but to the same effect) in Scozzari and Gunta v Italy *(13 July 2000, Applications Nos 39221/98 and 41963/98) at [148]:*

… it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child.

The seriousness is underlined by the consequences of an adoption order which has the effect of severing the existing legal parent/child relationship and substituting a new legal parent/child relationship: Re Adoption of SS (2002) 167 FLR 238 at [7].

Such an approach does not, of course, mean that adoption is inconsistent with the rights of children to have respected the right to protection including the protection of the family.

Indeed, as the UN Human Rights Committee stated in its General Comment No 17 made in its Thirty-fifth session (1989) on art 24 of the International Covenant on Civil and Political Rights (which is the source of s 11(2) of the Human Rights Act 2004: see schedule 1 of that Act):

… in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his (sic) family when circumstances so require.

In this context, art 21 of the Convention on the Rights of the Child 1989 recognises that adoption is a means for appropriate protection of children in proper circumstances. It also sets standards against which adoption practice is appropriately assessed: B v G *[2002] 3 NZLR 233 at [43].*

28. In addition, in respect of proceedings in the absence of the relevant parent, principles regarding natural justice may arise. However, as indicated in the explanatory notes to the bill, the committee notes a determination is to be made by the Childrens Court which must take into account the various matters identified in clause 39. Moreover, clause 41 would enable a relevant parent or the chief executive to apply to the court for the discharge of an order dispensing with the need for the relevant parent's consent if a copy of the application was not served on the relevant parent.

29. **Clauses 116, 117 and 121** of the bill have potential to affect rights to privacy of personal information.

30. When determining a person's suitability to be an adoptive parent, the chief executive would be:

- required to consider whether the person or any member of the household would pose an unacceptable risk of harming an adopted child and, in particular, the criminal, domestic violence and traffic history of the person and any adult members of the household (clause 121);
- required to access the person's criminal and domestic violence history, and any relevant investigative information, including charges and convictions spent under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (clause 116); and
- able to obtain information about the person's traffic history (clause 117).

31. The explanatory notes to the bill provide specific justification regarding these clauses (at 18):

The disclosure of information about charges and spent convictions is generally objectionable on the basis that is infringes a person's rights given the presumption of innocence and desirability for the rehabilitation of offenders. However, the proposal is considered reasonable in that it provides an appropriate balance between a person's right to privacy and the need to ensure the lifelong care environment selected by the Department of Child Safety ensures children who require an adoptive placement are kept safe from risks that can be ascertained.

The chief executive (transport) must comply with a request to provide traffic information about a person, despite section 77 of the Transport Operations (Road Use Management) Act 1995 *which would otherwise prevent the release of the information to the Department of Child Safety.*

However, the information relates to a person's attitudes towards road safety and is therefore vital for the chief executive's deliberations about whether a person is suitable to be an adoptive parent. Note that a person's traffic history may also be obtained under the Child Protection Act 1999*.*

It should also be noted that the Bill allows for a review of decisions by the Children Services Tribunal about a person's suitability to be an adoptive parent that were made based on a person's police information or traffic information.

32. The committee notes that clauses 116, 116 and 121 of the bill have the potential to affect the privacy rights of individuals. However, justification for inconsistency with fundamental legislative principles is provided in the explanatory notes; namely, that the provisions seek to safeguard privacy while nevertheless ensuring children who require an adoptive placement are kept safe from risks that can be ascertained.

Natural justice

33. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

34. **Clauses 36 and 38** may be inconsistent with principles of natural justice.

35. Clause 36 of the bill would enable the court to dispense with a requirement to serve a copy of an application for a dispensation order on a relevant parent. The court must be satisfied:
(a) the applicant can not establish the relevant parent's identity, after making all reasonable enquiries; or
(b) the applicant cannot locate the relevant parent, after making all reasonable enquiries; or
(c) the relevant parent is a lineal relative of the child's mother [that is, the child's conception was the result of incest]; or
(d) the child's conception was a result of an offence committed by the relevant parent; or
(e) there would be an unacceptable risk of harm to the child or mother if the relevant parent were made aware of the child's birth or proposed adoption; or
(f) there are other special circumstances.

36. In respect of clause 36, the explanatory notes state (at 17):

Dispensing with this requirement to serve the relevant parent with a copy of the application has the effect of not making them a respondent in the proceeding. Consequently, the parent is denied the opportunity to contest the application for the court to make an order dispensing with their consent. However, this is considered necessary and reasonable to protect the interests of the child and the child's other parent's right to make decisions about the child's long-term care in the circumstances stated above. In addition,

after the court has made a dispensation order, clause 41 of the Bill enables the relevant parent to apply to the court for a discharge of that order.

37. The explanatory notes do not address any breach of the fundamental legislative principle by clause 38 which would allow the court to hear and decide an application for dispensation with requirements for parental consent in the absence of the relevant parent. However, a court may proceed in the absence of the parent only if the relevant parent has been given reasonable notice of the hearing and failed to attend or continue to attend the hearing or the court dispenses with the requirement to serve a copy of the application on the relevant parent.

Onus of proof

38. Section 4(3)(d) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

39. **Clause 272** would require a person charged with an offence to prove certain matters in his or her defence. It would provide that a person commits an offence if:

(a) the person knows that another person has given the chief executive a contact statement stating that the second person does not wish to be contacted by the first person; and

(b) the contact statement is current; and

(c) the second person is an adopted person, or a birth parent of an adopted person, for an adoption that happened before 1 June 1991; and

(d) the first person does any of the following in relation to another person, knowing that the other person is the second person or a relative of the second person-

(i) contacts or attempt to contact the person; or

(ii) arranges or attempts to arrange contact with the other person; or

(iii) procures someone else to contact or arrange contact with the other person.

40. The proposed maximum penalty to be prescribed by the section is 100 penalty units or two years' imprisonment.

41. Proposed section 272(2) provides that it would be a defence for a person charged under clause 272(1) to prove:

(a) the person had contact with the other person before the person acquired the knowledge referred to in subsection (1)(a) and (d); and

(b) the contact is a continuation of, or equivalent to, the previous contact.

42. Where legislation infringes the fundamental legislative principle regarding reversal of the onus of proof, the committee refers to the explanatory notes for information regarding justification of the breach. In respect of new section 272, the explanatory notes do not make any comment.

Retrospective operation

43. Section 4(3)(g) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

44. **Clause 343** would operate retrospectively.

45. Clause 343 would be a transitional provision regarding objections to contact lodged by birth parents of persons adopted prior to 1 June 1991. The explanatory notes provide the following information regarding the current legislative provision (at 18):

In relation to persons who were adopted prior to 1 June 1991, section 39AA of the Adoption of Children Act 1964 *enables the birth parent of an adopted person, or an adopted person who is at least 17 years and 6 months old, to object in writing to contact being made and also to the disclosure of identifying information about themselves to other parties to the same adoption.*

46. Clause 343 would operate to allow an objection under section 39AA of the *Adoption of Children Act* to continue to have effect, but only as an expression of the person's wish not to be contacted; that is, as a contact statement under part 11 of the bill. Following the commencement of clause 343, an objection under section 39AA of the *Adoption of Children Act* would cease to prevent the release of identifying information.

47. Accordingly, clause 343 proposes to retrospectively alter a person's expressed objection to the release of identifying information to another person associated with the same adoption that occurred before 1 June 1991.

48. The committee examines legislation that could have effect retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

- the retrospective operation would be adverse to persons other than the government; and
- individuals have relied on the legislation and would have legitimate expectations based on the existing legislation.

49. The explanatory notes to the bill provide lengthy justification in this regard (at 18-19):

[The retrospective operation] will adversely affect the person's right (as expressed in their objection) to preserve their anonymity from others associated with the same adoption, by keeping their identifying information confidential. This is necessary to promote the rights of adopted people to obtain information about the identity of their birth parents and for birth parents to obtain information about the post-adoption identity of their child who was adopted, which was previously denied to them by another person's information objection.

The consultation conducted about this proposed reform demonstrated that the concerns of people who have lodged objections relate to being contacted by another person associated with the adoption and the consequences of such contact if it results in their family and friends learning of the adoption. However, people were generally not concerned that the person receiving the information would behave in a criminal or problematic way.

A range of measures have been included in the Adoption Bill to reduce the likelihood that a person who lodged an objection to the release of information under part 4A of the Adoption of Children Act 1964 *will experience unwanted contact by another person associated with the same adoption.*

The proposal to retrospectively remove a person's previous objection to the release of identifying information is considered reasonable in light of the fundamental right of other parties to an adoption to know their family history and heritage. The proposal also ensures all adopted people and birth parents have the same right of access to identifying adoption information, regardless of whether a person was adopted before or after 1 June 1991. In addition, converting information objections to expressions of a person's wish not to be contacted, coupled with the safeguards described above will ensure respect for the privacy of a person who had previously lodged an objection to the release of identifying information.

50. The committee notes that clause 343 would affect rights of individuals who objected to contact being made. As indicated in the explanatory notes, those people would have legitimate expectations based on section 39AA of the *Adoption of Children Act.* However, the committee notes statements of the then Minister for Family Services and Aboriginal and Islander Affairs, the Hon AM Warner MP, in her second reading speech to the Adoption of Children Act Amendment Bill 1990 regarding the proposed legislative change to be effected by that bill. In particular, the committee notes the information provided regarding the nomination of the arguably arbitrary date of 1 June 1991:[3]

3 *Queensland Parliamentary Debates (Hansard)*, 10 May 1990, 1351-3.

Experience shows that most adopted persons become anxious for information about their birth and adoption. This anxiety for information often grows during the adolescent struggle to establish an individual identity, or may be sparked by a life crisis, such as the birth of their own child. Research has shown that adopted people lack intangible things which most people take for granted such as a physical, mental, temperamental or aptitudinal likeness to parents and a place within the heritage and history of a family. Adopted people can suffer insecurity, poor self-image, depression and a failure to establish lasting relationships as a result.

The welfare and interests of the adopted person should be the primary concern in any adoption system. Adopted people argue they have a right to their birth information as have other adults, and that, as they were not party to the decision that information would remain secret, they do not feel bound by it.

The situation of relinquishing parents has changed. The Status of Children Act *has long since abolished the notion of illegitimacy, legally equating the relationship between an ex-nuptial child and its parents to that of a nuptial child and its parents. As well, the social shame of giving birth to a child outside marriage has now largely dissipated. Research has shown that relinquishing parents suffer long-term negative effects, especially the grief of loss.*

During long-term consultation by officers of my department, many adoptive parents have expressed support for these measures. The concerns of some adoptive parents about the opening of adoption information appear to be based on the fear that a birth parent will disrupt the life of the adoptive family. As well, some adoptive parents may believe that the adopted person's search for knowledge constitutes rejection of the adoptive family. Those fears are not supported by research and experience, which shows that the relationship between the child and the adoptive parent appears not to be supplanted or adversely affected.

The firm principle on which this Bill is based is that all adult persons have the right to know their identity or the identity of their child. That is, while individuals have a right to privacy, they do not have the right to prevent people from knowing about their identity. This Bill will give people the right to object to any attempt at contact, but not the right to exclude another person from that knowledge. This legislation is not a radical departure from the principles which govern adoption in other States of Australia and in other countries around the world…

During the six-month period commencing on 1 September 1990, adopted persons and birth parents will be allowed to register an objection to contact. The provisions allowing the disclosure of identifying information will commence on 1 March 1991. Objections to contact may be lodged after that date. A person who contacts or attempts to contact a birth relative, despite their objection to contact, will commit an offence against the Act.

The Bill further provides that, for all adoptions occurring after 1 March 1991, no objections to contact can be lodged after the adopted person attains the age of majority.

51. The committee notes also that the question whether clause 343 has sufficient regard to rights and liberties of individuals was addressed by the Minister in his second reading speech to the bill.[4] Further, a letter dated 17 February 2009 from the previous Minister provided further information and advised that (at 2):

…this change is necessary to promote the rights of adopted people to obtain information about the post-adoption identity of their birth parents and for birth parents to obtain information about the post-adoption identity of their child who was adopted, which was previously denied to them by another person's information objection.

52. The committee has, in accordance with section 50(2) of the *Parliament of Queensland Act*, authorised the tabling and publication of the letter. Copies are available from the committee's webpages.

Immunity from proceeding or prosecution

53. Section 4(3)(h) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

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4 Hon P Reeves MP, Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 22 April 2009, 73-76.

54. **Clause 321** would confer immunity against the civil liability of officials for acts done, or omissions made, honestly and without negligence under the Act. Instead of civil liability attaching to the official, in such circumstances the liability would attach to the State.

55. The committee recognises that one of the fundamental tenets of the law is that everyone is equal before the law. Consistent with this principle, the committee considers that legal liability should be the same for the government, its officials and its entities as for private citizens.

56. In respect of clause 321, however, the committee notes that civil liability may instead attach to the State.

Clear meaning

57. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

58. **Clauses 32 and 253** may be ambiguous, or not drafted in a sufficiently clear and precise way.

59. Clause 32 of the bill states that:

If the chief executive does not know the identity and location of the child's father, the chief executive must take reasonable steps to establish those matters.

60. The term 'reasonable steps' is not defined in the bill and its meaning may not be sufficiently clear.

61. Clause 253 of the bill would apply if:

(a) the chief executive is required to give a particular document to a person in response to a request under division 2 or 3; and

(b) the document contains information (restricted information) that the chief executive must not give the person because of another provision of this Act to which division 2 or 3 is subject.

Subsection (2) provides that the chief executive may give the document to the person after altering it so the restricted information cannot be read.

62. The term 'restricted information' is not defined in the bill.

63. The committee notes that the definition of 'restricted information' in clause 253 may be sufficiently uncertain in meaning as to lead to ambiguity.

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Delegation of legislative power

64. Section 4(4)(a) of the *Legislative Standards Act* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

65. **Clause 276** of the bill would permit the chief executive to obtain or disclose non-identifying medical information, and to make certain decisions regarding the disclosure or non-disclosure of such information. The explanatory notes provide an outline of its operation (at 137):

Subsection (1) specifies that the chief executive may contact a biological parent of an adopted person for the purpose of obtaining information about the medical history of a biological relative of the adopted person.

Subsection (2) specifies that the chief executive may disclose, to an adopted person, information about the medical history of a biological relative of the adopted person.

Subsection (3) provides that the chief executive may disclose, to a biological relative of an adopted person, information about the adopted person's medical history that relates to a condition that may have been inherited from a biological relative.

Subsection (4) provides that the chief executive may disclose information to a person under subsection (2) or (3) that is likely to identify an adopted person or biological relative only if -

(a) the chief executive could give the information to the person on a request under this part, and the chief executive has not been asked by the biological relative or adopted person not to disclose the information; or

(b) the chief executive is satisfied there is an unacceptable risk that a person's health may be significantly adversely affected if the information is not given or there are other exceptional circumstances in which the disclosure of the information is justified.

66. The committee notes that clause 276 seeks to put in place a mechanism to allow a determination to be made as to competing, sensitive issues regarding health and privacy. Nevertheless, the powers to be conferred upon the chief executive pursuant to clause 276 would be significant and discretionary. Legislation could alternatively confer the power to make a determination of this nature upon a court or an administrative tribunal.

2. AUDITOR-GENERAL BILL 2009

Date introduced: 22 April 2009

Responsible minister: Hon AM Bligh MP

Portfolio responsibility: Premier and Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 44, 46 to 48 and 50 to 53** which contain proposed offences;
   - **clause 46** which would confer powers of entry and post-entry powers on authorised auditors;
   - **clauses 46 to 48** which would remove protections against self-incrimination; and
   - **clauses 46 to 48 and 55** which would confer immunity against proceeding and prosecution.

BACKGROUND

2. Following a review of the *Financial Administration and Audit Act 1977* by the Treasury Department, new public sector financial management legislation is proposed. Accordingly, it is proposed that two new statutes replace the *Financial Administration and Audit Act*:
   - the Financial Accountability Bill 2009 (see chapter 7); and
   - the Auditor-General Bill 2009, as audit specific legislation (currently contained in parts 5 and 6 of the *Financial Administration and Audit Act*).

LEGISLATIVE PURPOSE

3. The bill is intended to replace parts 5 and 6 of the *Financial Administration and Audit Act.* Clause 5 of the bill states that the main objects of the legislation are to:
   - establish the position of the Queensland Auditor-General and the Queensland Audit Office;
   - confer on the Queensland Auditor-General and the Queensland Audit Office the functions and powers necessary to carry out independent audits of the Queensland public sector and related entities;
   - provide for the strategic review of the Queensland Audit Office;
   - provide for the independent audit of the Queensland Audit Office.

4. The policy objective of the bill is to (explanatory notes at 1):
   - further emphasise and enhance the independence of the Queensland Auditor-General;
   - address a number of operational issues to improve the ability of the Queensland Audit Office to carry out its functions; and
   - consolidate audit provisions contained within other parts of the *Financial Administration and Audit Act* and the *Government Owned Corporations Act 1993* into one piece of legislation and make further miscellaneous amendments.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

6. **Clauses 44, 46, 47, 48 and 50 to 53** would contain offences, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

Clause	Offence	Proposed maximum penalty
44(3)	Failure, without reasonable excuse, to return identity card	10 penalty units ($1000)
46(4)	Failure, without reasonable excuse, to provide reasonable assistance to auditor authorised to access documents and property	40 penalty units ($4000)
47(2)	Failure, without reasonable excuse, to provide information	40 penalty units ($4000)
48(7)	Failure, without reasonable excuse, to provide evidence	40 penalty units ($4000)
50	False or misleading statement to auditor	80 penalty units ($8000)
51(1)	Obstruction of auditor	80 penalty units ($8000)
52	Impersonation of auditor	80 penalty units ($8000)
53(2)	Failure to maintain confidentiality of protected information	200 penalty units ($20 000) or imprisonment for one year

Power to enter premises

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

8. **Clause 46** would confer powers of entry and post-entry powers on authorised auditors. To facilitate the exercise of powers conferred on authorised auditors by part 3 of the bill, clause 46 would confer powers such as to:

- enter, at any reasonable time and without consent or warrant, a place occupied by –
  - a public sector entity or other entity subject to audit; or
  - a financial institution with which a public sector entity, or other entity subject to audit, maintains an account (clause 46(3)(a));
- access fully and freely all relevant documents and property (clause 46(1) and (2));
- inspect, examine, photograph or film anything in a place entered (clause 46(3)(b));
- copy documents in a place entered (clause 46(3)(c)); and
- take into a place entered persons, equipment and materials reasonably required (46(3)(d)).

9. As in its consideration of clause 46 above, the committee notes that the powers of entry and post-entry powers are contained in the current legislation.

10. The explanatory notes suggest that clause 46 has sufficient regard to rights and liberties of individuals (at 3):

Clause 46 also confers entry and post-entry powers for authorised auditors to enter premises without a duly issued warrant. These powers are considered necessary for the Auditor-General to carry out his or her operational responsibilities. The Bill is considered to contain sufficient safeguards to protect the rights and liberties of individuals through, for example, identity cards for authorised auditors (clause 44), compensation (clause 49) and confidentiality (clause 53).

Protection against self-incrimination

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

12. Section 10 of the *Evidence Act 1977* preserves the common law privilege against self-incrimination.

13. The common law privilege provides that:[5]

No one is bound to answer any question or produce any document if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime.

14. **Clauses 46 to 48** require production of information, evidence and provision of access to documents or property. The clauses state in clear terms that self-incrimination does not provide an excuse for failing to comply with a statutory requirement.

15. Division 2 of part 3 of the bill would confer authorised auditors with powers to conduct audits, including of performance management systems (clause 38), consolidated fund accounts (clause 39), public sector entities (clause 40) and expenditure for ministerial offices (clause 41). To facilitate the exercise of powers by authorised auditors, provisions in part 3 of the bill would require people to provide information and evidence to investigation officers. It is proposed that it be an offence to fail to comply (see clauses 46(4), 47(2) and 48(7) outlined in paragraph 6).

16. In respect of each offence, a related provision would erode the privilege against self-incrimination:

- clause 46(5) – a requirement regarding access to documents or property;
- clause 47(3) – a requirement regarding provision of information; and
- clause 48(8) – a requirement regarding provision of evidence.

17. The privilege against self-incrimination is inherently capable of applying to executive inquiry, such as inquiry by authorised auditors:[6]

Historically, the rule has assumed greatest importance in proceedings before judicial tribunals, for these are empowered by inherent or expressly conferred jurisdiction to compel parties and witnesses to produce documents, to answer questions and to perform other acts. A feature of modern society has been the readiness of the legislature similarly to endow non-judicial officers, such as the Commissioners of Taxation, the Australian Competition and Consumer Commission, company investigators and police officers. Before such persons there are practical difficulties in the way of resolving claims to privilege when the inquiry is non-judicial and not on oath. In court, a witness will normally make a claim to privilege on oath and depose to an apprehension that the evidence will entail self-jeopardy. The judge will then rule on the claim forthwith. These procedures are not readily available when the question is asked as part of an executive inquiry before a person without legal training, and without power to perform this judicial task.

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5 JD Heydon, *Cross on Evidence*, 7th ed, LexisNexis Butterworths, [25065].

6 JD Heydon, *Cross on Evidence*, 7th ed, LexisNexis Butterworths, [25085].

18. However, the High Court has held that the Parliament can abrogate the privilege expressly or by necessary implication:[7]

Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms. In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear. The courts will hold that the presumption has not been overcome unless the relevant legislation expressly abolishes, suspends or adversely affects the right, freedom or immunity or does so by necessary implication.

19. In respect of consistency with the fundamental legislative principle, the explanatory notes to the bill indicate (at 2-3):

Clauses 46(5), 47(3) and 48(8) of the Bill have been carried over from the FA&A Act and provide that self-incrimination is not a reasonable excuse for failing to provide information requested by an authorised auditor.

These clauses seek to ensure that authorised auditors retain the power to access documents, information or evidence relevant to an investigation, while also protecting the interests and liberties of the individual. While the provisions could be considered to infringe Fundamental Legislative Principles, they are considered to be justified in this instance as the questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and would be difficult or impossible for the Crown to establish by any alternate evidentiary means.

Immunity from proceeding or prosecution

20. Section 4(3)(h) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

21. **Clause 55** would confer immunity from proceedings and **clauses 46 to 48** would confer immunity from proceedings and prosecution.

22. Clause 55 would protect an authorised auditor from civil liability for acts or omissions done honestly and without negligence. Liability would attach instead to the State. In respect of clause 55, the explanatory notes state (at 3):

Clause 55 provides for the protection of an authorised auditor from civil liability for acts or omissions done honestly and without negligence. Liability would instead attach to the State. While the provision could be considered to infringe Fundamental Legislative Principles, this is a standard clause in Queensland legislation where there is a need to protect a public official from personal liability. The protection only applies for actions taken honestly and without negligence in the course of the official's duties, and continues to provide an avenue of redress for any affected individuals by providing that liability attaches to the State.

23. The other three provisions relate to the admissibility in criminal proceedings of evidence provided to auditors acting under the authority of the legislation:

- clause 46(6) – any information, document or thing obtained by an auditor exercising powers under clause 46 (Access to documents and property) would not be admissible in a criminal proceeding against the person who provided them, other than in a proceeding relating to the falsity of the answer;
- clause 47(4) – any information, document or thing obtained as a consequence of a person providing information requested by an authorised auditor under clause 47 (Obtaining information) would not be admissible in a criminal proceeding against the person, other than in a proceeding relating to the falsity of the answer; and

[7] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

- clause 48(9) – any information, document or thing obtained as a consequence of a person providing information requested by an authorised auditor under clause 48 (Obtaining evidence) would not be admissible in a criminal proceeding against the person, other than in a proceeding relating to the falsity of the answer.

24. In respect of these provisions, the explanatory notes indicate (at 3):

> [C]*lauses 46(6), 47(4) and 48(9), which have also been carried over from the FA&A Act, provide immunity in relation to any information obtained as a direct or indirect consequence of the information that the Auditor-General has obtained during an investigation. The breach of fundamental legislative principles is considered justified on the basis that the power is designed to encourage appropriate cooperation with the Auditor-General, which is necessary to allow the Auditor-General to perform his or her operational responsibilities.*

25. The fundamental legislative principle regarding conferral of immunity relates to a fundamental tenet of the law is that everyone is equal before the law. In this context, the committee draws to the attention of Parliament any difference in legal liability for the government, its officials and its entities from the liability of individuals. The committee notes, therefore, that clauses 46(6), 47(4), 48(9) and 55 depart from the fundamental principle. However, in each case:

- the provision replicates a provision in the current legislation; and
- the explanatory notes provide justification for any breach of fundamental legislative principles.

3. CHARTER OF BUDGET HONESTY BILL 2009

Date introduced: 22 April 2009

Responsible minister: Honourable Andrew Fraser MP

Portfolio responsibility: Treasurer and Minister for Employment and Economic Development

ISSUES ARISING FROM EXAMINATION OF BILL

1. The committee does not identify, for the consideration of the Parliament, any matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions.

BACKGROUND

2. The proposed legislation requires preparation and publication by the Under Treasurer of certain financial information. The proposed legislation has two parts:
   - part 2 (Pre-election economic and fiscal outlook report); and
   - part 3 (Cost of election commitments).

3. The Pre-Election Budget Honesty Bill 2003, similar in many respects to the Charter of Budget Honesty Bill, was introduced as a private member's bill by the then Leader of the Opposition, Mr LJ Springborg MP. It failed to pass on 20 August 2003.

LEGISLATIVE PURPOSE

4. The bill is intended to address two objectives (explanatory notes at 1):
   - provision of a framework for the conduct of Government fiscal policy; and
   - improvement in fiscal policy outcomes by facilitating public scrutiny of fiscal policy and performance.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Institution of Parliament

5. Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of Parliament. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

6. **Part 3** would have sufficient regard to the operation of the institution of Parliament. A costing of a policy proposal provided during the caretaker period, as provided in part 3, would not constitute a Government commitment to expenditure. First, the Parliament must appropriate the funds necessary

to satisfy any obligation undertaken by the Crown.[8] Second, a policy proposal made by a political party during an election period would not, in any event, constitute an obligation undertaken by the Crown.

[8] *New South Wales v Commonwealth* (1931) 46 CLR 155, per Rich and Dixon JJ at 176.

4. CORONERS AND OTHER ACTS AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: Honourable Cameron Dick MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 13, 18, 19, 23, 26 and 60** which may affect rights to bodies after death and to excised body parts and tissue;
   - **clause 47** which would amend a section of the *Coroners Act* regarding rights of owners entitled to the return of property held by a coroner as 'physical evidence';
   - **clauses 15, 16, 20, 25, 41, 42, 44 and 53** which seek to safeguard privacy while meeting forensic imperatives;
   - **clause 44** which would insert a new offence in the *Coroners Act* and would reverse the onus of proof;
   - **clause 15** which would modify an existing statutory exception to the right to silence; and
   - **clauses 5 and 8** which would operate by reference to broadly defined terms.

BACKGROUND

2. Following an operational review of the coronial regime established by the *Coroners Act 2003*, the bill would effect reforms directed to improved operational efficiency and clarification of the scope and operation of the *Coroners Act*.

LEGISLATIVE PURPOSE

3. The explanatory notes to the bill indicate that its main objective is to amend the *Coroners Act* to improve operational efficiency in the coronial regime.

4. The bill would amend the:
   - *Births Deaths and Marriages Registration Act 2003*;
   - *Coroners Act*; and
   - Cremations Act 2003.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

6. **Clauses 13, 18, 19, 23, 26 and 60** may affect rights and liberties of individuals as the amendments would alter rights to bodies after death and to excised body parts and tissue.

7. 'Body' is defined in schedule 2 of the *Coroners Act* as a human body or part of a human body. In turn, 'human body' is defined as including the body of a stillborn child. Further, 'tissue' is defined as meaning:

   - an organ, blood or part of a body or foetus; or
   - a substance extracted from an organ, blood or part of a body or foetus.

8. In Alert Digest 11/08, the committee of the 52nd Parliament examined the Coroners and Other Acts Amendment Bill 2008. The 2008 bill lapsed on the dissolution of the 52nd Parliament. In respect of the equivalent clauses to clauses 13, 18, 19, 23, 26 and 60, the previous committee identified a number of ways in which individual rights and liberties might be affected by the proposed amendments:

   - clause 13(2) (new section 13(3) of the *Coroners Act*) would clarify the powers of a coroner investigating a death, allowing a coroner to authorize a doctor or nurse to take a sample of a deceased person's blood for testing for the purposes of coronial investigation (see explanatory notes at 8);
   - clause 18 (new section 18A) would address arrangements for assessing the suitability of a body for the removal of tissue for the *Transplantation and Anatomy Act* (see explanatory notes at 9-10);
   - clause 19 (to replace existing section 2) would would provide for attendance at autopsies to observe and participation, by certain persons, in autopsies (see explanatory notes at 10);
   - clause 23 would amend existing section 24 which provides for removal of human tissue for testing, its retention and review of the retention – the amendments seek to clarify the operation of section 24 in three respects –
     - the 'tissue' to which section 24 relates;
     - requirements regarding release of a body from which tissue has been removed; and
     - release of tissue to a 'family member' (see explanatory notes at 11);
   - clause 26 would amend existing section 26 – currently, section 26(1) provides that, except where a person's death is reported after burial, the coroner gains control of a person's body when the coroner starts investigating the person's death – to insert a new section 26(2) to identify the point at which the coroner ceases to have control of a person's body (at 12, the explanatory notes stated that the aim of the amendments is to allow another coroner to release a body where appropriate and necessary);
   - clause 60 would replace the existing definition of 'family member' in schedule 2, to 'ensure that documentary evidence of the deceased person's wishes as to whom should be the 'family member' for the purposes of the Act can be taken into account' (explanatory notes at 17).

9. The committee of the 52nd Parliament provided information regarding common law recognition of rights to bodies after death and to excised body parts and tissue and noted that in respect of a body, body parts and tissue, the provisions of the 2008 bill constituted a statutory attempt to balance:[9]

- any right of relatives to possession for burial or cremation;
- rights where body parts or tissue of a deceased person are to be used for purposes other than burial or cremation; and
- statutory authority for a coroner to investigate specified deaths, including by way of removing body parts and tissue.

10. In a response to the committee's consideration of the 2008 bill (received by the previous committee on 14 November 2008 and tabled in Alert Digest 13/08), the then Attorney-General and Minister for Justice stated:

The Bill does not alter the rights to bodies after death or to the excised body parts and tissue which are established under the existing framework of the Coroners Act 2003 *(the Act).*

The philosophy underpinning the Act, and coronial legislation in other Australian jurisdictions, is that certain deaths must be reported to, and investigated by, the coroner, and that as part of this process, the coroner must take control of the body.

The Act strikes a careful balance between the competing rights and interests which are noted by the Committee in paragraph 33.

The Bill does not alter the current balance of rights and interests but simply makes amendments for the purpose of clarification or procedural efficiency consistent with philosophy underpinning the current regime.

11. **Clause 47** would amend section 60 of the *Coroners Act* regarding rights of owners entitled to the return of property held by a coroner as 'physical evidence'.

12. Currently, section 60(1) requires a coroner to order that physical evidence be returned to its owner as soon as the coroner decides the evidence is no longer required. Section 60(2) contains an exception; namely, where it is not lawful for the owner to possess the physical evidence. Clause 47 would provide a further exception in section 60(2); that is, 'if under the guidelines issued by the State Coroner, it is not desirable that the physical evidence be returned to its owner because of its nature, condition and value'. Clause 47 provides an example of such physical evidence, 'a cracked safety helmet that a deceased person was wearing when killed'.

13. In respect of the equivalent proposed provision in the 2008 bill (clause 48), the Minister informed the committee of the 52nd Parliament:

The existing section 61(1)(b) already provides for the forfeiture to the State of physical evidence if "the coroner does not order the return of the physical evidence to the owner because given the nature, condition and value of the physical evidence it is not desirable that the physical evidence be returned to its owner"*. Section 61(1)(b) provides as an example of such physical evidence* "a cracked safety helmet that a deceased person was wearing when killed"*.*

Accordingly, clause 48 does not affect the rights of owners otherwise entitled to the return of property held by a coroner. The clause simply clarifies the linkage between section 60 and 61 which operate together to provide a regime for dealing with physical evidence. Clause 48 achieves this by replicating the language of section 61(1)(b) in section 60(2).

14. **Clauses 15, 16, 20, 25, 41, 42, 44 and 53** have the potential to affect rights to privacy of personal information. The effects of the proposed amendments would be to:

- empower the coroner to compel the giving of information relevant to the coronial investigation unless a person has a reasonable excuse (clause 15, see explanatory notes at 9);

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9 L Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws' (2002) 22 *Legal Studies* 102, 115-122.

- provide for disclosure of information to the Coroners Court if legislation allows for the release to a court of confidential information of a party to a proceeding in a court (clause 16, see explanatory notes at 9);
- allow a coroner or doctor to require provision of certain medical evidence, including after the conduct of an autopsy (clause 20, see explanatory notes at 10);
- require a doctor who conducts an autopsy to provide both the autopsy notice and autopsy certificate to the coroner who ordered the autopsy (clause 25, see explanatory notes at 11);
- allow provision of information about test results to an applicant, clarifying an ambiguity in existing section 52(1)(c) (clause 41, see explanatory notes at 14);
- allow access to documents -
  - during an investigation if the State Coroner considers it appropriate, having regard to the importance of the research and the public interest; and
  - on an ongoing basis for research (clause 42, see explanatory notes at 14-15);
- allow the State Coroner to enter into arrangements with 'prescribed tissue banks' to provide access to reports of deaths by police officers to the coroner (clause 44, see explanatory notes at 15); and
- in the annual report of the State Coroner, require inclusion of the names of genuine researchers given access to investigation documents (clause 53, see explanatory notes at 16).

15. The committee notes that, potentially, clauses 15, 16, 20, 25, 41, 42, 44 and 53 would affect the privacy rights of individuals. However, justification for any inconsistency with fundamental legislative principles is provided in the explanatory notes; generally, the provisions seek to safeguard privacy while nevertheless meeting forensic imperatives.

16. **Clause 44** would insert a new offence in the *Coroners Act*. The proposed offence and maximum penalty are set out below.

Clause	New section	Offence	Proposed maximum penalty
44	54AA(7)	Unlawful disclosure of information in reports of deaths by police to the coroner	100 penalty units ($10 000)

Natural justice

17. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

18. **Clauses 33 and 35** may appear to be inconsistent with principles of natural justice. However, the committee has considered advice received from the former Minister regarding the equivalent provisions in the 2008 bill and suggests that, in this respect, the legislation has sufficient regard to rights and liberties of individuals.

19. Clause 33 would amend section 36 of the *Coroners Act* which provides that a person considered by the Coroners Court to have a sufficient interest in an inquest may appear, examine witnesses and make submissions at an inquest. An example is 'a specialist advocacy group with particular expertise in a matter on which a coroner may comment under section 46(1)'.

20. New section 36(2) and (3) would then provide that if the Coroners Court considered a person had a sufficient interest only because it was in the public interest for him or her to have the right to appear etc, that person:

- would not be entitled to examine witnesses at the inquest without leave; and

- may make submissions only on matters on which the coroner had power to comment (see section 46(1)).

21. Clause 35 would amend section 43 to extend the coroner's power to make an exclusion order regarding a pre-inquest conference.

22. In respect of the equivalent proposed provisions in the 2008 bill (clauses 34 and 36), the former Minister provided lengthy information, tabled by the committee of the 52nd Parliament:

With respect to the Committee, I do not consider clauses 34 or 36 raise issues regarding inconsistency with the principles of natural justice.

There are three main principles of natural justice. The first principle is that something should not be done to a person that will deprive the person of some right, interest or legitimate expectation of a benefit without the person being given an adequate opportunity to present the person's case to the decision maker. The second principle is that the decision maker must be unbiased. The third principle is procedural fairness.

It should be noted firstly that the Coroners Court is an inquisitorial Court. The coroner is expressly prohibited from including in the findings any statement that a person is, or may be, guilty of an offence or civilly liable for something. The Act also removed the previous power of Queensland coroners to commit a person for trial.

Clause 34 relates to the granting of standing to public interest interveners in a coronial hearing.

As outlined in the explanatory notes, it is strongly arguable that such persons would not qualify for standing under the current "sufficient interest test" in section 36(1)(a).

The Act does not define what is meant by a person with "sufficient interest". However, in the 2006 Victorian Parliament Law Reform Committee Report on the Coroners Act 1985 *(pages 258 -263), the Committee considered this issue and noted the comments of Beach J in* Barci v Heffey *(Unreported Victorian Supreme Court of Victoria 1 February 1995) where His Honour stated this was a question of fact to be determined after a consideration of the circumstances surrounding the death. He identified the following persons as having sufficient interest:*

- *Persons closely related to the person whose death is being investigated.*
- *Any person whose actions may have caused or contributed to the death, where there is a reasonable prospect that the coroner may make a finding adverse to the interest of that person*

This accords with the traditional approach to standing in coronial inquests.

The effect of Clause 34 is firstly to expressly recognise a right to appear for public interest interveners. Such persons would probably not fall within the traditional groups identified above. At the same time, the Bill provides that, this right to appear is a limited right to appear. The explanatory notes identify this as raising a possible issue regarding fundamental legislative principles. The explanatory notes state that these restrictions on the right to standing can be justified on the basis that it is in the public interest that hearings are not unnecessarily protracted and the purpose of granting standing to public interest interveners is appropriately served by the right to make submissions on the areas in which they have special expertise.

In addition, because in the past, there have been cases where some coroners have given a liberal interpretation to the "sufficient interest" test in order to grant standing to such persons with specialist knowledge or expertise, there may be persons whom the court has already determined to have standing in a particular matter who have not yet exercised their rights. There is therefore an issue regarding restriction of their right to standing. Transitional provisions ensure that the new provisions will not apply to a person whom the court may have already considered has a sufficient interest in a particular inquest, but who has not yet exercised the person's right to appear.

Clause 36 amends section 43 and relates to the power of the Coroners Court to exclude a person from a pre-inquest conference, in the same way a person can already be excluded from the Coroners Court, if the court considers it is in the interest of justice, the public or a particular person to do so. This is clearly justified as necessary for the effective conduct of the pre inquest proceedings. I do not consider this amendment involves any inconsistency with the principles of natural justice.

Onus of proof

23. Section 4(3)(d) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

24. A provision provides for the 'reversal of the onus of proof' where it declares the proof of a particular matter to be a defence or when it refers to acts done without lawful justification or excuse, the proof of which lies on the accused.

25. **Clause 44** would reverse the onus of proof, providing that proof of certain matters would be a defence.

26. New section 54AA(7) and (8) would provide:

> (7) A person who has been given access to a document under this section must not directly or indirectly disclose information in the document.
>
> Maximum penalty—100 penalty units.
>
> (8) A person does not contravene subsection (7) if the disclosure—
>
> (a) is made in the performance of a function under the *Transplantation and Anatomy Act 1979*, including as a person acting for a prescribed tissue bank under the arrangement; or
>
> (b) is permitted or required under this or another Act.

27. To the extent that proof of the matters identified in new section 54AA(8) would be a defence to the offence in section 54AA(7), clause 44 would reverse the onus of proof. Where legislation infringes the fundamental legislative principle regarding reversal of the onus of proof, the committee considers any justification provided regarding the breach of fundamental legislative principles. In respect of new section 54AA, the explanatory notes provide justification (at 5):

> *The purpose of providing for such an offence is to safeguard the right to privacy. The section provides that a person does not contravene the provision if disclosure is made in the performance of a function under the Transplantation and Anatomy Act 1979 or is permitted or required under this or another Act. The reversal of the onus of proof in relation to the offence is justified in that a person who discloses the information for these purposes would have peculiar knowledge of these facts and would be best positioned to disprove guilt.*

28. In respect of the offence provision proposed in the clause 45 of the 2008 bill (clause 44 of the current bill), the former Minister informed the committee of the 52nd Parliament:

> *Clause 45 makes it an offence for a person to directly or indirectly disclose information in a document accessed under section 54AA. The purpose of providing for such an offence is to safeguard the right to privacy. The section provides that a person does not contravene the provision if disclosure is made in the performance of a function under the* Transplantation and Anatomy Act 1979 *or is permitted or required under this or another Act. The reversal of the onus of proof is justified in that a person who discloses the information for these purposes would have peculiar knowledge of these facts and would be best positioned to disprove guilt.*

Protection against self-incrimination

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

30. **Clause 15** would modify an existing statutory exception to the right to silence. It would amend section 16 of the *Coroners Act* which confers a coroner with the power to compel the giving of information relevant to a coronial investigation unless a person has a reasonable excuse. The amendment in clause 15 is to confer power to require the production of a document or thing.

31. At common law, the right to remain silent and to refuse to answer if questioned by police is a basic right. The common law right is subject to exceptions found in Queensland legislation, including statutory requirements to provide personal information or answer certain questions.

32. In a response to the consideration of the 2008 bill by the committee of the 52nd Parliament, the then Attorney-General and Minister for Justice provided the following information regarding clause 15 (in the same terms in both bills):

Clause 15 amends section 16 which currently provides that a coroner investigating a death may require a person to give the coroner information that is relevant to the investigation. The Committee notes that the current section 16 is a statutory exception to the right to silence.

The amendment ensures that the duty to provide help to the coronial investigation extends to giving a "document or anything else" relevant to the investigation. In so far as the amendment impacts on the right to silence, the same justification as for the current section applies. That is, the public interest in the effective conduct of the coronial investigation justifies the exception to the right to silence. The section is no wider than is necessary in that it provides that a person does not have to give the coroner information, a document or anything else if the person has a reasonable excuse. Under current section 16(b), a reasonable excuse includes that the information would tend to incriminate the person. Accordingly there is an appropriate protection against self-incrimination.

Clear meaning

33. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

34. **Clauses 5 and 8** would operate by reference to broadly defined terms.

35. Currently, section 8(3)(d) of the *Coroners Act* provides that a death is a 'reportable death' if 'the death was not reasonably expected to be the outcome of a health procedure'. The explanatory notes refer to matters regarding the current provision raised in the report of the Queensland Public Hospitals Commission of Inquiry (the Davies Report)[10] and by the State Coroner:[11]

The Davies Report identified specific aspects of the current section 8(3)(d) which make it difficult to apply in practice and which could contribute to the under-reporting of medical deaths. The State Coroner has also raised issues regarding the language and interpretation of the section. In particular, the Davies Report commented on the difficulty in identifying "whose expectation" is relevant in determining whether a death would be reasonably expected and to what standard the outcome must have been unreasonable.

36. A need for reform was identified in the Davies Report in the following way (at [7.30]):

In my view, the present position under s8(3)(d) of the Coroner's Act 2003 *whereby, in effect, a single medical practitioner decides whether a death, particularly one arising from elective surgery in a public hospital, was a reasonably expected outcome of a health procedure, is in need of amendment. Obviously, deaths which are, or might be caused or contributed to by medical error or neglect, should be investigated by a coroner and … at present the reporting of such deaths may be able to be avoided.*

37. Accordingly, clause 5 of the bill would replace section 8(3)(d) to require reporting if 'the death was a health care related death'. Clause 8 would insert a new section 10AA (Health care related death defined), providing a lengthy definition of a 'health care related death'. The proposed definition is explained in the following way in the explanatory notes (at 8):

The new definition provides that a death will be a health care related death if a person dies at any time after receiving health care that either caused or was likely to have caused, or contributed or was likely to have contributed to the death and immediately before receiving the health care an independent person would not have reasonably expected that the health care would cause or contribute to the person's death.

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10 See: Hon Geoffrey Davies AO, *Queensland Public Hospitals Commission of Inquiry Report*, November 2005, 530-533, available at: www.qphci.qld.gov.au/.

11 At 7-8 and see also 2.

*An independent person is an independent person appropriately qualified in the relevant area of health care who has had regard to all relevant matters. These include the deceased person's state of health as it was thought to be when the health care was started or sought and the clinically accepted range of risk associated with the health care. The section also expressly captures not only the provision of health care, but failure to provide health care where the failure either caused or is likely to have caused, or contributed to, or is likely to have contributed to the death. "Health care" is broadly defined to mean "*any health procedure or any care, treatment, advice, service or goods provided for, or purportedly for, the benefit of human health*".*

38. The definition of 'health care' is provided in clause 8 (new section 10AA(5)).

39. When considering the Coroners and Other Acts Amendment Bill 2008, the committee of the 52nd Parliament noted that, as the relevant provisions of the *Coroners Act* may affect rights and liberties of individuals, it considered whether clauses 5 and 8 of the bill were unambiguous and drafted in a sufficiently clear and precise manner. In this context, the committee noted the definition of 'health care' in proposed section 10AA(5) was broad in scope. While 'health procedure' is defined in schedule 2 to the *Coroners Act*, other terms general in meaning used in the second limb of the definition were not. Further, the committee of the 52nd Parliament noted that while clause 8 would require a nexus between relevant health care and a death, the scope of the proposed meaning of a 'health care related death' would extend to a death that occurred 'at any time' after a person sought or received health care.

40. The committee has had the benefit of reading a letter from the then Attorney-General and Minister for Justice received by the previous committee and tabled in Alert Digest 13/08. To assist the Parliament, the committee reproduces information received from the Minister regarding clauses 5 and 8 of the 2008 bill, replicated as clauses 5 and 8 of the current bill:

Clause 5 replaces current section 8(3)(d) which requires reporting of a death "not reasonably expected to be the outcome of a health procedure" with a new requirement to report "a health care related death". Clause 8 defines a "health care related death".

The proposed section 10AA definition directly addresses and removes the specific ambiguities in the current section 8(3)(d) which were identified in the report of the Queensland Public Hospitals Commission of Inquiry (the Davies Report) and by the State Coroner.

*The Davies Report did not recommend removal of section 8(3)(d) but did recommend the insertion of an additional category of reportable death "*a death that happens within 30 days of an elective health procedure*". On 12 March 2008, I informed the Parliament of the reasons why the Government did not support a Private Members Bill which sought to implement this specific Davies Report recommendation (i.e. the insertion of this additional "within 30 days" category). Those reasons included that "*any prescribed time frame is arbitrary. Any distinction between an elective and a non-elective health procedure is artificial. It will not necessarily capture every death warranting coronial scrutiny but will certainly capture a significant number that do not and will cause families unnecessary distress and unfounded concern*".*

The Bill adopts a focussed approach to reporting of medical deaths through the detailed definition of "health care related deaths" which clarifies the ambiguities in the current section 8(3)(d) identified by the Davies Report.

*The Committee has noted the breadth of the definition of "health care". The definition is an exhaustive definition which carefully circumscribes what will constitute health care for the purposes of section 10AA. The exhaustive definition will effectively remove doubt or ambiguity as to what is covered and what is not. It is intentionally wider in scope than the current "health procedure" to ensure that the reporting obligation is not avoided through arguments that deaths resulting from error, neglect or misconduct in the provision of health care are not reportable because the form of health care provided is not strictly a "health procedure". This is consistent with the statement in the Davies Report that "*Reforms need to be broad enough and robust enough to capture all cases of medical errors, neglect and misconduct leading to death by health care practitioners*". While the definition contains a number of terms general in meaning, the generality of these terms is qualified and constrained by the requirement that they must be "*for or purportedly for the benefit of human health*" and accordingly, are specific in their application.*

*The Committee has commented that the scope of "health care related death" would extend to a death that occurred "any time" after receiving health care. However, as noted by the Committee, the clause requires a nexus between the relevant health care and the death. A death will only be caught if the health care provided either "*caused or is likely to have caused the death, or contributed or is likely to have contributed

to the death*", or if health care was sought and the health care or a particular form of health care failed to be provided, the failure either "*caused or is likely to have caused the death, or contributed or is likely to have contributed to the death*". Accordingly, the definition is specific in its application and will only capture those deaths which should properly be subjected to coronial scrutiny.*

5. CORRECTIVE SERVICES AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 22 April 2009

Responsible minister: Honourable Neil Roberts MP

Portfolio responsibility: Minister for Police, Corrective Services and Emergency Services

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 7 and 14** which contain proposed offences;
   - **clauses 15 to 22**, regarding visitors to a corrective services facility;
   - **clause 38(3)** which would extend the time for commencement of proceedings for a summary offence in either 28F(1) or (5) of the *Corrective Services Act*; and
   - **clause 39** which would insert transitional provisions and would have retrospective operation.

BACKGROUND

2. Amendments to be effected by the bill would address issues in the interpretation and operation of the *Corrective Services Act 2006* that have been identified since its commencement.

LEGISLATIVE PURPOSE

3. The bill would amend provisions of the *Corrective Services Act* regarding –
   - resettlement and reintegration leave of absence;
   - prisoner artwork;
   - visitors to a corrective services facility; and
   - timeframes for parole board decision-making.

4. In addition, the bill would effect related amendments to the:
   - *Penalties and Sentence Act 1992*; and
   - *Police Powers and Responsibilities Act 2000*.

5. It would repeal the *Sporting Bodies Property Holding Act 1975*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

6. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act*.

7. **Clauses 7 and 14** would create new offences, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

Clause	New section	Offence	Proposed maximum penalty
7	28A(1)	Restricted dealing with prisoner's artwork	40 penalty units ($4000)
	28E	Consideration asked or accepted for prisoner's artwork	40 penalty units ($4000)
	28F(1)	Unauthorised disposal of prisoner's artwork by person holding artwork	40 penalty units ($4000)
	28F(5)	Consideration asked or accepted for prisoner's artwork by person holding artwork	40 penalty units ($4000)
14	96C	Failure to comply with conditions for mutual assistance approval	6 months' imprisonment

8. **Clauses 15 to 22** would affect rights and liberties of individuals, including individuals detained in relation to the commission of a criminal offence, their families, friends and others such as legal representatives.

9. Clauses 15 to 22 would amend provisions of the *Corrective Services Act* regarding the process by which a person may be approved to visit a corrective services facility and the conditions under which he or she may visit. They would amend or insert provisions for:

- prescription of people who would not be required to apply for approval to access correctional facilities (clause 15);
- approval of interim access granted to a personal visitor prior to a final access decision (clause 17, new section 156A);
- approval of urgent access granted to a commercial visitor for the purposes of maintenance (clause 17, new section 156B);
- exemption from requirements to submit an application form and for assessment under section 156(2) conferred on law enforcement, child safety, emergency services officers (clause 15);
- a legal practitioner to apply for access without the requirement of assessment against factors listed in section 156(2) of the *Corrective Services Act* (clause 16(1));
- suspension by the chief executive of access approval in specified circumstances for a period of up to one year (clause 18);
- amendment or revocation of access approval (clause 19); and
- requirements that adult visitors undergo biometric identification at each visit (clause 20).

10. The explanatory notes to the bill do not provide specific information as to whether clauses 15 to 22 have sufficient regard for rights and liberties of individuals. In respect of the bill generally it is stated (at 5):

The Bill has been drafted with due regard to the Fundamental Legislative Principles (FLPs) as outlined in the Legislative Standards Act 1992 *(the LSA). Section 4(2) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.*

11. The information provided regarding the reasons for the bill indicates that, in respect of the interpretation and operation of current provisions of the *Corrective Services Act* regulating visitors to a corrective services facility, issues to be addressed are (at 3):

- *Compliance with the formal requirements in sections 155 and 156 is time consuming and is not possible when urgent access must be facilitated eg to repair a burst water pipe;*

- *The scrutiny of a visitor's application against their criminal history and whether they have been involved in escapes from prison is not necessary for all visitors who are currently subject to section 156(2);*
- *The power to suspend access approval does not allow for effective management of visitors who pose a risk to the security and good order of a facility. A power to cancel access and set a period of time during which a new application will not be considered is required; and;*
- *Biometric scanning to verify identification is used to assist with the processing of visitors. Corrective Services' power to impose this requirement needs to be clarified to ensure that all visitors can be compelled to participate in the system.*

12. Accordingly, clauses 15 to 22 of the bill raise issues regarding the rights and liberties of people detained in corrective services facilities and of the various people who visit corrective services facilities. Rights and liberties to which clauses 15 to 22 should have sufficient regard include:

- the right to privacy;
- the right to protection of families and children; and
- the right to humane treatment when deprived of liberty.

13. Recently, in relation to the rights and liberties of individuals detained in relation to the commission of a criminal offence,[12] the committee of the 52nd Parliament observed that, in a free and just society offenders should be treated humanely.[13] Section 3 of the *Corrective Services Act* recognises that every offender should be treated humanely and with dignity and that:

[E]very member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.

14. In this context, the committee notes that clauses 15 to 22 seek to balance the need to maintain the safety and security of corrective services facilities with rights and liberties of individuals. The committee notes that, while clauses 15 to 22 would have an impact upon individual rights and liberties, they contain also provisions safeguarding rights and liberties. New section 157A(2) (clause 19) would require that, in making a decision to amend or revoke a visitor's access approval, the chief executive must consider the effect of the proposed amendment or revocation on a child given approval to accompany the visitor.

15. The committee notes that, in respect of the Corrective Services and Other Legislation Amendment Bill (No. 2) 2008, the committee of the 52nd Parliament received a submission regarding clause 20 from the Queensland Council for Civil Liberties.[14] The submission questioned the justification for the significant infringement of individual rights and liberties to be imposed by clause 20 and suggested that the *Corrective Services Act* does not sufficiently protect personal information to ensure the privacy of biometric data collected for the purposes of clause 20 (see Alert Digest 01/09 at 23).

16. **Clause 38(3)** may affect rights and liberties of individuals as it would extend the time for commencement of proceedings for a summary offence in either 28F(1) or (5) of the *Corrective Services Act* (Person holding prisoner's artwork for prisoner).

17. Clause 38 would amend section 350 (Proceedings for offences) of the *Corrective Services Act*. A new section 350(3) would, in respect of offences under section 28F(1) and (5) regarding dealings

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12 See: AD 6/2008.

13 Article 10 of the International Covenant on Civil and Political Rights guarantees the right of all persons deprived of their liberty to be treated with humanity and respect for their inherent dignity.

14 In accordance with section 50(2) of the *Parliament of Queensland Act*, the committee authorised the tabling and publication of the submission. Copies are available at: www.parliament.qld.gov.au/view/legislativeAssembly/tabledPapers.asp.

with the artwork of prisoners, allow for a prosecution to be commenced more than one year after the offence is committed but within 6 months of it coming to the knowledge of the complainant.

18. The explanatory notes to the bill indicate (at 23):

Prisoners may give their artwork to a person to hold on their behalf many years before their release. An offence against the prisoner artwork provisions may not be discovered until the prisoner is released. Under the existing section 350 there is a risk that prosecutions for these offences would be out of time. The amendment therefore allows for a prosecution to be commenced more than 1 year after the offence is committed but within 6 months of it coming to the knowledge of the complainant. This will ensure that offences under this section can be effectively prosecuted.

19. In respect of whether clause 38 has sufficient regard to rights and liberties of individuals, the explanatory notes state (at 5):

It is arguable that the Bill may breach the FLPs in that it provides in Division 1A in relation to offences related to dealing in artwork, that there will be an extension of the limitation of time for prosecuting summary offences.

A proceeding for an offence under section 28A may start at any time but, if started more than 1 year after the commission of the offence, must start within 6 months after the offence comes to the complainant's knowledge.

The extension to the limitation of time is justified in that the offence of dealing with prisoner artwork may not be discovered until the prisoner is released. This may be many years after the offence was committed. Without an extension of the limitation of time prisoners and recipients of artwork will be able to escape prosecution.

20. **Clause 47** may appear likely to affect rights and liberties of individuals. It would repeal the *Sporting Bodies' Property Holding Act 1975*, enacted to provide a vehicle for unincorporated sporting bodies to hold property through trusts.

21. In his second reading speech to the bill, the Minister said, 'the Bill repeals an obsolete piece of sporting legislation'.[15]

22. In respect of the equivalent provision in the Corrective Services and Other Legislation Amendment Bill (No. 2) 2008, the issue of the sufficiency of regard had to rights and liberties of individuals was addressed by the then Minister in her second reading speech:[16]

…the bill makes a minor change to sports legislation and repeals the Sporting Bodies' Property Holding Act 1975. The act was established to provide a vehicle for unincorporated sporting bodies to hold property through trusts.

Since the enactment of the Associations Incorporation Act 1981, all relevant bodies in Queensland have become incorporated under either State or Commonwealth law.

The Department of Local Government, Sport and Recreation is confident that all relevant sporting bodies are using this legislation.

Further, legal advice received from Crown Law on 6 March 2006 indicated that the repeal of the act would not affect the legal ability for these affiliates to own land acquired under the act, or to divest it in the future, as the original land acquisition was undertaken in accordance with the law of the day.

The act is therefore redundant and may be repealed.

23. The committee notes that rights and liberties of individuals would not be affected by clause 47.

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15 Hon NS Roberts MP, Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 22 April 2009, 70.

16 Hon JC Spence MP, Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 25 November 2008, 3678.

Retrospective operation

24. Section 4(3)(g) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

25. **Clause 39** would insert transitional provisions and would have retrospective operation.

26. Clause 39 would insert a new chapter 7A, part 4 into the *Corrective Services Act*. The new part would contain transitional provisions for the *Corrective Services and Other Legislation Amendment Act 2008* to ensure (explanatory notes at 24):

- resettlement leave of absence programs approved prior to the commencement of the amending legislation could continue but that a new program could not be approved (see clauses 10 to 13);
- orders granting reintegration leave prior to the commencement of the amending legislation would continue in force but that new grants of leave could not be made;
- the validity of parole board decisions made after 1 July 2001 taken more than 120 days after receipt of an application;
- the validity of anything done or omitted to be done regarding the automatic cancellation of parole under section 209 prior to its amendment by the amending legislation or under the repealed *Corrective Services Act 2000* where a sentence of imprisonment 'to the rising of the court' was imposed (see clause 29); and
- the validity of prior dealings in relation to prisoner trust accounts, as per compliance with the new sections 311 and 311A (see new section 490).

27. The committee examines legislation that could have effect retrospectively to evaluate whether rights or liberties would be adversely affected or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

- the retrospective operation would be adverse to persons other than the government; and
- individuals have relied on the legislation and would have legitimate expectations based on the existing legislation.

28. The committee notes that these matters have been addressed in the explanatory notes to the bill, which state (at 5) generally that, 'There may be an argument that the transitional provisions for certain amendments breach section 4(3)(g) of the LSA in that they provide for retrospective operation.'

29. More specifically, the explanatory notes provide justification for the retrospective operation of the latter three elements of the proposed transitional provisions (at 5-6):

The amendment to section 209 will ensure that sentences of imprisonment to the rising of the court do not automatically cancel a parole order. The provision currently requires that parole be automatically cancelled when this sentence is imposed. The fact that a sentence to the rising of the court was ordered was not always provided to Queensland Corrective Services as this sentence does not require supervision. Given that there has been inconsistent application of this provision some clarification of its commencement and how it affects past decisions is required.

The amendment will be deemed to have commenced with the Act on 28 August 2006. It will also be provided that past action to automatically cancel a parole order for a sentence of imprisonment to the rising of the court is valid. Equally, where action was not taken to automatically cancel the parole order this will also be deemed valid. This will provide certainty for offenders and ensure that it is not necessary to review past decisions.

For parole board decision making a provision is included to the effect that past decisions made by the parole boards, under both the Corrective Services Act 2006 *and the* Corrective Services Act 2000*, are valid. This will ensure that past decisions to release offenders or refuse parole made more than 120 days after the application was received will not be able to be called into question. This will provide certainty for offenders who have been released to parole where the decision was made more than 120 days after their*

application was received. However, where a court has made a ruling as to the validity of a parole board decision this will not be affected.

The amendment to prisoner trust accounts also has a retrospective operation. Action taken by the chief executive on or after 20 June 2008 will be taken to be valid as if it were done under the new sections 311 and 311A. This will ensure that action taken by Queensland Corrective Services to manage trust accounts in accordance with the procedure that commenced on 20 June 2008 is valid.

An amendment is being made to section 199 to ensure that prisoners with a parole release date who receive exceptional circumstances parole prior to that date are not then required to be issued with a court ordered parole order. If the prisoner is on exceptional circumstances parole it is unnecessary for another parole order to be issued.

If the prisoner has been returned to custody after having the exceptional circumstances parole suspended or cancelled the prisoner will only be released as determined by a parole board. In making this amendment it is necessary to deem that the parole release date is a parole eligibility date for the purposes of the Act only. This will allow the prisoner to apply for parole if exceptional circumstances parole is cancelled.

This amendment changes the nature of the date set by the court in order to ensure the safety of the community. If the prisoner has been released to parole, which is then cancelled or suspended, the prisoner must have been considered to pose an unacceptable risk to the community. Any subsequent release should only occur once they are assessed by a parole board as being suitable for parole.

30. Further, in respect of the removal of resettlement and reintegration leave of absence from the *Corrective Services Act*, the explanatory notes provide (at 3-4):

The Bill amends the Act to remove both forms of leave of absence. Prisoners with programs of resettlement leave that have already been approved will be permitted to complete the program. The power to issue individual resettlement leave of absences will be preserved in relation to these programs. No new programs will be able to be approved. Where an order granting reintegration leave of absence has been issued that order continues to have effect. No new orders will be able to be issued.

6. CRIME AND MISCONDUCT AND SUMMARY OFFENCES AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: Hon CR Dick MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to the rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 17** which would reverse the onus of proof and create an absolute offence; and
   - **clause 14** which operates retrospectively.

BACKGROUND

2. The bill is to remedy the effect of the recent Supreme Court decision in *Scott v Witness C (2009) QSC 35*[17] and introduce an offence of endangering the safe use of a vehicle by throwing an object, or similar activity.

LEGISLATIVE PURPOSE

3. The primary objectives of the bill are twofold:
   - to validate the Crime and Misconduct Commission's past, present and future use of general 'umbrella' referrals for major crime investigations and subject general referrals to periodic review to ensure they remain appropriate over time; and
   - to provide for a specific offence applying to rock throwing and other specified conduct which endangers the safe use of vehicles.

4. Therefore, the bill would amend the (see explanatory notes at 4-6):
   - *Crime and Misconduct Act 2001* to resolve the impact of *Scott v Witness C (2009) QSC 35* and give effect to the intended operation of the crime referral mechanism, by –
     (a) generalising the reference to 'particular cases of major crime' in section 5(2);
     (b) reframing the crime referral provisions to deal expressly with specific and general referrals;
     (c) clarifying that a referral may relate to any circumstances implying or any allegations that criminal activity referenced in the current definition of 'major crime' may have been, may be being, or may in the future be committed;
     (d) clarifying that the public interest considerations under section 28 apply to all referrals, whether requested by the Police Commissioner or the Assistant Commissioner, Crime or initiated by the Crime Reference Committee (CRC);

[17] In this decision, it was held that a hearing undertaken by the CMC pursuant to a reference that referred only to classes of criminal acts without identifying any particular activity requiring investigation was not part of an investigation the Commission was authorised to undertake. The respondent was held not to be in contempt of the presiding officer when he refused to answer questions at the hearing.

(e) requiring the Assistant Commissioner, Crime, to notify the CRC as soon as practicable when a particular investigation is commenced under an existing general referral; and

(f) requiring the CRC, in respect of a notification given by the Assistant Commissioner, Crime, that an investigation has commenced under an existing general referral, to consider as soon as practicable, whether directions are required in respect of that particular investigation under section 29;

(g) subjecting general referrals to periodic review by the CRC to ensure they remain appropriate over time ; and

(h) retrospectively validate –

(i) 'umbrella' referrals made by the former QCC or CMC and the current CRC prior to commencement;

(ii) crime investigations conducted under these umbrella referrals; and

(iii) the use of information and evidence obtained by a crime investigation conducted under these umbrella referrals by the former QCC or the CMC for the performance of any QCC or CMC function or the performance of a function of a law enforcement agency or prosecuting authority to which the QCC or CMC has provided the information or evidence; and

- *Summary Offences Act 2005* to insert an offence which applies to a person who unlawfully throws an object at a vehicle that is in the course of travelling; places an object in or near to the path a vehicle is using or may use in the course of travelling; or directs a beam of light from a laser at or near a vehicle that is in the course of travelling, in a way that endangers or is likely to endanger the safe use of the vehicle. The maximum penalty for this offence is 2 years imprisonment.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

Onus of proof

6. Section 4(3)(d) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

7. **Clause 17** would reverse the onus of proof. Clause 17 inserts a new part 2, division 5 in the *Summary Offences Act 2005* entitled 'Endangering the safe use of a vehicle by throwing an object or by a similar activity'. It includes an offence provision, new section 26, with maximum penalty of 2 years imprisonment.

8. The committee notes that the offence in new section 26(1) is an absolute offence, imposing liability for a breach of the statutory offence regardless of intention or knowledge that conduct will constitute a breach.

9. The explanatory notes do not address this potential breach of fundamental legislative principles.

Retrospective operation

10. Section 4(3)(g) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

11. **Clause 14** would operate retrospectively. Clause 14 inserts a new chapter 8, part 7 into the *Crime and Misconduct Act 2001* to validate the past use of umbrella referrals made by the CRC and the former QCC management committee;[18] investigations conducted by the CMC and the former QCC under these referrals[19] and the use of any information or evidence obtained by these investigations for the performance of a function of the former QCC, CMC or other law enforcement agency or prosecuting authority that has been given the information or evidence by the QCC or CMC.[20]

12. The explanatory notes provide the following justification for this retrospectivity (at 7):

> *The validation may be considered to retrospectively affect the rights and liberties of individuals … who have been the subject of investigations not properly authorised under existing umbrella referrals. The breach, though arguably tenuous, is justified given the validation gives effect to Parliament's original intention that the CRC and the former QCCMC have discretion to make umbrella referrals.*

[18] New section 386.

[19] New section 389.

[20] New section 390.

7. FINANCIAL ACCOUNTABILITY BILL 2009

Date introduced: 22 April 2009

Responsible minister: Honourable Andrew Fraser MP

Portfolio responsibility: Treasurer and Minister for Employment and Economic Development

ISSUES ARISING FROM EXAMINATION OF BILL

1.	In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to **clauses 46 and 47** which contain proposed offences.

BACKGROUND

2. Following a review of the *Financial Administration and Audit Act 1977* by the Treasury Department, new public sector financial management legislation is proposed. Two statutes are to replace the *Financial Administration and Audit Act*:

   - the Financial Accountability Bill 2009; and
   - the Auditor-General Bill 2009, as audit specific legislation (see chapter 2).

LEGISLATIVE PURPOSE

3. The bill is intended to modernise existing financial management legislation and to update references in other Acts, including the *Government Owned Corporations Act 1993*. The explanatory notes to the bill state (at 1):

   The objective of the Bill is primarily to change the focus of Queensland's public sector financial legislation to principles-based, with accountabilities and outcomes prescribed rather than processes. The Bill also removes the provisions relating to the Auditor-General.

4. The bill would amend the *Government Owned Corporations Act 1993*. It would effect consequential and minor amendments to a large number of Acts, as provided in schedule 1.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

5. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is in section 4(2) of the *Legislative Standards Act.*

6. **Clauses 46 and 47** contain proposed offences and have the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

Clause	Offence	Proposed maximum penalty
46	Giving the Treasurer a document containing information known to be false or misleading in a material particular	50 penalty unit ($5000)
47	Giving the Treasurer information known to be false or misleading in a material particular	50 penalty unit ($5000)

7. In Alert Digest 01/09, the committee of the 52nd Parliament examined the Financial Accountability Bill 2008. The 2008 bill subsequently lapsed on the dissolution of the 52nd Parliament. However, the committee has had the benefit of reading a letter from the Treasurer of Queensland received by the previous committee on 18 February 2009. To assist the Parliament, the committee provides the information received from the Treasurer regarding clauses 46 and 47 of the 2008 bill, replicated as clauses 46 and 47 of the current bill:

Clauses 46 and 47 of the Financial Accountability Bill 2008 have sufficient regard to the rights and liberties of individuals in accordance with section 4(2)(a) of the Legislative Standards Act 1992*.*

Clauses 46 and 47 create offences where a person is found liable of giving the Treasurer a document or information known to be false or misleading in a material particular, in relation to an application for the Treasurer's approval under sections 41 and 42 of the Bill. The clauses impose a civil penalty of 50 penalty units ($5,000). Given the nature of the penalties imposed, the offences may be dealt with under the provisions of the Justices Act 1886*.*

The maximum penalties imposed by clauses 46 and 47 are proportionate to the nature and seriousness of the offences. The offences relate to the granting of an approval by the Treasurer for a department or statutory body to exercise a power under the Bill. The powers for which approval may be granted include significant financial matters such as the formation of a company or the making of an investment. The Treasurer relies on the correctness and accuracy of the information or documents provided by a person in determining if it is appropriate to grant an approval for the proposed exercise of power. If an approval is granted by the Treasurer on an incorrect basis, it may pose a serious financial and legal risk to the State.

The offences and associated penalties under clauses 46 and 47 are consistent with the current offences and penalties imposed under sections 105H and 105I of the Financial Administration and Audit Act 1977*. They are also consistent with section 75 of the* Statutory Bodies Financial Arrangements Act 1982*. This section imposes a maximum penalty of 50 penalty units where a person gives information which they know is false or misleading to the Treasurer in relation to the Treasurer's granting of approval for the exercise of a power by a statutory body under the Act.*

Clauses 46 and 47 adequately prescribe the acts which may give rise to liability. Liability may only be imposed upon a person where the person has the necessary knowledge that the information or document given to the Treasurer is false or misleading in a material particular.

8. HEALTH AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: Hon P Lucas MP

Portfolio responsibility: Deputy Premier and Minister for Health

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 42, 48 to 50, 83, 144, 159, 160, 162, 163 and 165** as they have the potential to affect rights to privacy of personal information;
   - **clause 10 and a number of similar clauses** inserting new offence provisions in the various health Acts to be amended by the bill;
   - **clause 180** reversing the onus of proof; and
   - **clause 2** providing for retrospective commencement.

2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to references in **part 22** to a possible exercise of legislative power not subject to the scrutiny of the Legislative Assembly.

BACKGROUND

3. The bill is to amend a number of health portfolio Acts.

4. In addition, a new offence of smoking in a motor vehicle carrying a child under 16 years of age is to be inserted in the *Police Powers and Responsibilities Act 2000* and the *Workers' Compensation and Rehabilitation Act 2003* is to be amended to enable nurse practitioners to issue workers compensation medical certificates for minor injuries.

LEGISLATIVE PURPOSE

5. The bill is intended to amend the following Acts to achieve the identified policy objectives (explanatory notes at 1-2):
   - *Health Quality and Complaints Commission Act 2006* – to implement a recommendation of the Health Quality and Complaints Commission Select Committee requiring an impact assessment to be undertaken when the Health Quality and Complaints Commission (HQCC) develops standards;
   - Health Services Act 1991 –
     - to enable confidential information under the Act to be released for the protection, safety or wellbeing of a child; and
     - to assist the Director-General and Queensland Health's lawyers to effectively carry out their responsibilities;
   - *Medical Practitioners Registration Act 2001* – to increase protection of the public by enhancing the Medical Board's ability to identify instances of serious misconduct by doctors;

- *Physiotherapists Registration Act 2001* – to assist in addressing the shortage of physiotherapists in Queensland;
- *Police Powers and Responsibilities Act 2000* – to enable enforcement of the new offence of smoking in a motor vehicle with a child under 16 years of age;
- *Public Health Act 2005* – to address a number of operational concerns identified following implementation of the Act in relation to the disclosure of health information held by Queensland Health for research purposes and to help prevent or minimise transmission of notifiable conditions;
- 13 Health Practitioner Registration Acts, *Health Practitioners (Professional Standards) Act 1999* and *Nursing Act 1992* – to help the Health Practitioner Registration Boards and the Queensland Nursing Council perform their functions more effectively and efficiently
- *Tobacco and Other Smoking Products Act 1998* – to protect children and the community from the harmful effects of environmental tobacco smoke; and
- *Workers' Compensation and Rehabilitation Act 2003* – to help medical workforce resources be more effectively used, particularly in rural and remote areas.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

6. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

7. **Clauses 42, 48 to 50, 83, 144, 159, 160, 162, 163 and 165** may affect rights and liberties of individuals as they have the potential to affect rights to privacy of personal information. The relevant provisions, together with information provided in the explanatory notes as to whether sufficient regard is had to rights and liberties of individuals are set out in the table below.

Clause	Section to be amended	Effect of amendment	Information from explanatory notes (page)
42	*Health Practitioners (Professional Standards) Act*, s 392	Allow confidential information obtained under Act to be disclosed to Queensland Nursing Council and Nursing Tribunal	
48	*Health Services Act*, new s 62IA	Allow confidential information to be disclosed by a designated person for the protection, safety or well-being of a child	*While it is always preferable to obtain the patient's consent, (under section 62C of the* Health Services Act 1991*), before the confidential information is disclosed, obtaining consent may not always be possible. The provision enables the designated person to provide the information where it is necessary for the protection, safety or wellbeing of a child, even in circumstances where a patient refuses to consent to the disclosure or it is not possible to obtain consent* (18; see further 18-19).
49	*Health Services Act*, new s 62KA	Allow information to be disclosed to chief executive to achieve objects of section 4 of	*The amendments overcome the current situation where a designated person is technically in breach of their duty of*

Clause	Section to be amended	Effect of amendment	Information from explanatory notes (page)
		Act.	*confidentiality if they provide information to the chief executive. As the chief executive is also a designated person and is bound by the duty of confidentiality in section 62A(1) of the* Health Services Act 1991*, section 62KA(2) enables the chief executive to disclose information if the disclosure is for a function of the chief executive under section 7 of the* Health Services Act 1991. *The amendment will enable the chief executive to provide information where it is necessary for the performance of these functions. In addition, the existing provision in section 62Q of the* Health Services Act 1991 *will enable information to be provided that is necessary or incidental to a disclosure made by the chief executive. This existing provision enables support staff to provide the information from the chief executive* (19).
50	*Health Services Act*, new s 62PA	Provide that chief executive can disclose confidential information to a lawyer in relation to a matter for which the lawyer is representing the State.	*The circumstances may include release of information about a person:* • *who is not a party to the litigation, but may be relevant to the matter in dispute, and advice is needed as to whether the information would be admissible evidence and should be relied upon in the litigation;* • *where the information may relate to a different incident or illness, but a causal connection is suspected and advice is needed as to whether the information should be relied upon (i.e. a person sues QH for malpractice arising from a fracture, however the person's mental health records are assessed to determine whether they may be relevant to the matter).* *To ensure the effective operation of this provision, it is anticipated that the chief executive will delegate this power to appropriately qualified people such as medical records staff, Health Information Managers, Freedom of Information Officers* (19-20).
83	*Nursing Act*, s 139	New subsection (2B) to provide an additional exception to a confidentiality obligation	*The new provision allows protected documents or protected documents about a health professional to be disclosed to the health professional's board if necessary for the board to perform its functions* (24).
144	*Police Powers and Responsibilities Act*, s 42	Allow police to ask a person for their age in relation to the offence of 'smoking in a motor vehicle with a person under the age of 16 years'	*This information is important for deciding whether another person in the vehicle is contravening the offence provision.* *This clause also provides protection for a passenger that refuses to give their date of birth from a proceeding under section*

Clause	Section to be amended	Effect of amendment	Information from explanatory notes (page)
			791 if the alleged offender is not proved to have contravened the prescribed offence. Section 791 of the Police Powers and Responsibilities Act 2000 *provides that a person commits an offence for contravening a requirement or direction given by a police officer* (33).
159	*Public Health Act*, s 107	Allow information to be disclosed, with the verbal consent of the person to whom the information relates	*Currently, section 107 enables information to be disclosed: (a) in the performance of functions under the Act; or (b) with the written consent of the person to whom the information relates; or (c) to the person to whom the information relates; or (d) in a form that could not identify any person.* *The amendment will … address an operational discrepancy that has been identified since the introduction of the legislation. While a contact tracing officer can usually obtain verbal consent, it is not always possible for written consent to be obtained as required by section 107(b). This amendment will, for example, help address situations where a contact tracing officer identifies that an 'at risk' person is located in a rural or remote area of Queensland, or is travelling outside the State. Provided the verbal agreement of the person can be obtained, the contact tracing officer will be able to provide information to the person's nominated health care provider to ensure that they receive the necessary medical follow-up* (35).
160	*Public Health Act*, new s 108A	New exception to duty of confidentiality in section 105 of Act	*Section 108A sets out a new exception to the duty of confidentiality under section 105. Under this exception information may be provided to specified persons so that a person who has, or may have, contracted a notifiable condition can:* • *be provided with information to prevent or minimise transmission of the notifiable condition; or* • *seek medical examination or treatment.* *Specified persons who may be provided with information to assist such persons include a health practitioner (eg doctor, social worker, psychologist, etc) involved in the treatment or care of the person; a health practitioner nominated by the person; the parents of a child, a person's legal guardian, or an entity in another jurisdiction responsible for preventing or controlling the spread of communicable diseases; or another entity prescribed under regulation. As provided for by section 36 of the* Acts Interpretation Act 1954*, the reference to 'entity' includes a person and an unincorporated body.*

Clause	Section to be amended	Effect of amendment	Information from explanatory notes (page)
			While the Public Health Act 2005 *uses the defined term 'notifiable condition', this is not the case in all jurisdictions. Consequently, when specifying which entities in other jurisdictions may be provided with information, it was determined that it would be more appropriate to reference the more commonly used term "communicable disease"* (35-36).
162	*Public Health Act*, new s 279A	Allow disclosure of non-identifying health information	*This approach is consistent with disclosure arrangements within the Act and under other health portfolio legislation that enables 'confidential information' to be disclosed in a form that could not identify any person' (eg see sections 55, 79, 107, 177, 222 and 240 of the* Public Health Act*)* (36).
163	*Public Health Act*, new s 280A	State that part does not prevent health information being disclosed under any Act	*This section has been included to clarify the original policy intent concerning the application of chapter 6, part 4. Namely, that the research provisions should operate alongside, not over-ride, other legislative provisions that allow for health information held by Queensland Health to be disclosed.* *The amendment will ensure that the original intent of the provisions is realised by clarifying that part 4 does not prevent health information held by the department also being disclosed under other relevant provision in the* Public Health Act 2005 *(such as ss55, 79, 107 and 222), or another Act (such as Part 7 of the* Health Services Act 1991*)* (36).
165	*Public Health Act*, new s 284	Amendments to research provisions regarding health information	*Subsection 284(3) is to be amended in light of the new section 279A. As outlined above, this section has been inserted to clarify that the research provisions will only apply to health information held by the department if the information relates to an individual who could be identified from the information. Consequently, the reference to "information identifying a person" in subsection (3) is redundant.* *Subsection 284(8) has been inserted to clarify that when considering an application, the chief executive is not required to consult with individuals to whom the information relates before granting access to the information for research purposes. Following the commencement of the Act, it was suggested that a decision to grant a researcher access to potentially identifying health information is subject to the requirements of natural justice. If this were the case, the chief executive would be required to notify each person to*

Clause	Section to be amended	Effect of amendment	Information from explanatory notes (page)
			whom the information relates and give them an opportunity to respond. This would make the provision unworkable and would be contrary to the underlying policy objective of the legislation. Under subsection 284(2), the chief executive may only approve access to health information held by Queensland Health if satisfied "that the provision of health information held by the department is in the public interest, having regard to the opportunities the research will provide for increased knowledge and improved health outcomes and the privacy of individuals who supply health information to health providers" (37).

8. The explanatory notes to the bill provide specific justification regarding clause 48 (at 7-8):

The proposed amendment to the duty of confidentiality in the Health Services Act 1991 *(HSA) raises the FLP of whether legislation has sufficient regard to individual rights and liberties [section 4(2)* Legislative Standards Act 1992*]. The amendment will authorise health professionals to disclose information for the purposes of the protection, safety or wellbeing of a child. The underlying rationale is that the protection and care needs of children take precedence over the protection of an individual's privacy.*

Queensland Health's guidelines to Part 7 of the HSA will be updated and will require a health professional to note the reasons for the disclosure on the patient's file. Queensland Health Medico-Legal officers will be available to provide advice and assistance. It is considered that the proposed amendments appropriately balance patient confidentiality with the protection needs of children.

9. **Clause 10 and a number of further clauses** would insert new offence provisions in the various Acts to be amended by the bill. All are in the same terms as clause 10. It would amend the *Chiropractors Registration Act* by replacing existing section 210 with a new section containing a number of offences relating to materially false information or documents. The proposed offences in clause 10, together with respective maximum penalties, are set out below.

New section	Offence	Proposed maximum penalty
210(2)	Providing the registration board with information or a document that is known to be materially false	200 penalty units ($20 000)
210(3)	In connection with an application for registration, providing the registration board with information or a document that is known to be materially false	200 penalty units ($20 000) or 3 years' imprisonment
210(4)	Failing to convey to the board as soon as reasonably practicable relevant facts regarding materially false information or documents	200 penalty units ($20 000)
210(5)	Acting or practising as a registrant, or continuing to do so, following contravention of section 210(2) or (4)	200 penalty units ($20 000) or 3 years' imprisonment

Onus of proof

10. Section 4(3)(d) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

11. **Clause 180** would reverse the onus of proof as it:

- declares the proof of a particular matter to be a defence (new section 26VC); and
- refers to acts done without lawful justification of excuse, the proof of which lies on the accused (new section 26VE).

12. Clause 180 would insert a new part 2BA into the *Tobacco and Other Smoking Products Act*. New section 26VC would create the offence of smoking in a vehicle if a person in the vehicle is under the age of 16 years and the vehicle is on a road or road-related area. New section 26VD would provide a defence for the new offence in section 26VC where the person charged with the offence can prove, at the time of the offence, the person honestly and reasonably believed that no person in the vehicle was under 16 years of age.

13. Further, new section 26VE provides that a statement by a police officer in relation to the offence is evidence of the elements of the offence, being that:

- a person in the motor vehicle was under the age of 16 years;
- the thing was a smoking product;
- the thing was a motor vehicle;
- the place was a road.

14. New section 26VE would be an evidentiary provision and would cast an evidential burden on a person charged with the offence in new section 26VC. In a trial for the offence in section 26VE, the statement of the police officer must be accepted as proof of certain matters. However, the acceptance of the evidence as proof is subject to:

- the magistrate finding the belief of the police officer (that the person seen in the motor vehicle was under 16 years of age and that a smoking product was being smoked in the vehicle) to be reasonable; and
- there being no evidence to the contrary.

15. Where legislation infringes the fundamental legislative principle regarding reversal of the onus of proof, the committee considers information provided regarding justification of the breach. In particular, the committee considers the matters to which the evidentiary provision relates and whether the evidence would be conclusive.

16. In Alert Digest 13/08, the committee of the 52nd Parliament examined the Health and Other Legislation Amendment Bill 2008. The 2008 bill subsequently lapsed on the dissolution of the 52nd Parliament. However, the committee has had the benefit of reading a letter from the then Minister for Health received by the previous committee and tabled in Alert Digest 01/09. To assist the Parliament, the committee reproduces information received from the Minister regarding clause 180 of the 2008 bill, replicated as clause 180 of the current bill:

Section 26VD provides that it is a defence to a charge (of smoking in a vehicle with a person under 16 years of age) if the defendant can prove that they honestly and reasonably believed that no person in the vehicle was under the age of 16 years. A relevant example may be where a parent picks up their 17 year old child from sports practice and also gives a lift to the child's friend who is in the same-aged sports team. Parents will not be required to ask for proof of age, however the reversal of the onus of proof in section 26VD, means that the parent will be able to provide a defence where they can demonstrate that they honestly and reasonable believed that no person in the vehicle was under the age of 16 years.

The proposed provision is similar to the existing section 24 of the Tobacco and Other Smoking Products Act 2008*, which provides for a defence to a charge where the age of the person is material. As the proposed provisions are designed to protect children from the harmful effects of environmental tobacco smoke, they are necessary and justifiable.*

Retrospective operation

17. Section 4(3)(g) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

18. **Clause 2** provides for the retrospective commencement of new sections 163 and 165(2) of the bill, stating that these provisions are taken to have commenced on 16 January 2006.

19. These provisions relate to the research provisions of the *Public Health Act* and clarify that the provisions take effect (as intended) from the same date of the commencement of the original provisions (16 January 2006).

20. The committee examines legislation that would operate retrospectively to evaluate whether there would be any adverse effects on rights or liberties or whether obligations imposed retrospectively would be unduly onerous. When considering 'sufficient regard', the committee generally examines whether:

- the retrospective operation would be adverse to persons other than the government; and
- people have relied on the legislation and would have legitimate expectations based on the existing legislation.

21. In respect of the retrospective operation of new sections 163 and 165(2), the explanatory notes state (at 8):

The amendments to the research provisions in the Public Health Act 2005 *may raise an FLP, as they will be retrospective in operation [section 4(3)(g)* Legislative Standards Act 1992*].*

However, as the amendments are clarifying the original intent of the legislation it is not expected that the retrospective application of these amendments will cause disadvantage. The amendments will clarify that:

- *the chief executive is not required to consult with each individual before authorising the release of information for research;*
- *the research provisions are to work alongside, not over-ride, other provisions in the health portfolio legislation that enable information to be disclosed (e.g. HSA,* Private Health Facilities Act 1999 *and other parts of the PHA).*

The research provisions of the Public Health Act 1992 *require that a person must not use the information for a purpose inconsistent with the research for which the information is provided. Further, a person given health information held by the department under the research provisions must not disclose information in a way that identifies a person, unless with the written consent of the person to whom the information relates. These provisions provide sufficient safeguards to ensure patient confidentiality.*

22. The committee notes the justification provided for the proposed retrospective operation of clauses 163 and 165(2).

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Parliamentary scrutiny of delegated power

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

24. **Part 22** of the bill refers to a chief executive issuing a worker's compensation certificate protocol. This might be seen as an exercise of legislative power not subject to the scrutiny of the Legislative Assembly.

25. 'Legislative power' may be defined as the 'creation and promulgation of a general rule of conduct without reference to particular cases'.[21]

26. Part 22 of the bill would amend the *Workers' Compensation and Rehabilitation Act*. Clause 185 would amend section 132 of that Act, enabling a nurse practitioner to issue a workers' compensation medical certificate for minor injury where the nurse practitioner would be acting in accordance with a workers' compensation certificate protocol.

27. The workers' compensation certificate protocol is discussed in clause 187. This provision would amend the dictionary to the Act to include a definition of a 'workers' compensation certificate protocol'; namely, a document stating the circumstances or conditions under which a nurse practitioner may issue a certificate under section 132 (1)(a).

28. In respect of the protocol, the explanatory notes to the bill state (at 8-9):

> *The protocol will function as a safeguard by guiding nurse practitioners in their new role and facilitating implementation of this initiative. It is proposed the protocol will set any desirable restrictions, policies and procedures for nurse practitioners to issue workers compensation medical certificates. For example, the protocol may set training requirements for nurse practitioners to complete prior to issuing certificates. A working group, comprising key stakeholders including Q-COMP and Workcover Queensland, will develop the protocol.*
>
> *The amendments are also consistent with the approach taken in the Health (Drugs and Poisons) Regulation 1996 to give nurse practitioners prescribing rights, and the Radiation Safety Regulation 1999 to enable nurse practitioners to request x-rays. Both Regulations require that nurse practitioners undertake these roles in accordance with a protocol.*

29. The committee generally expresses concern about bills authorising the making of instruments of a legislative nature but declaring them to be something other than subordinate legislation. The workers' compensation certificate protocol to be issued under part 22 may be of this nature. It appears to be a general rule of conduct under which rights and duties may be affected.

30. As a 'protocol', the instrument referred to in part 22 would not fall within the definition of 'subordinate legislation' in section 9 of the *Statutory Instruments Act*. As only 'subordinate legislation' need be tabled in the Parliament, the protocol would not be subject to parliamentary scrutiny, including the possibility of disallowance under section 50 of the *Statutory Instruments Act*.

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[21] DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 6th ed., LexisNexis Butterworths, Australia, 2006, [1.2].

9. INDUSTRIAL RELATIONS AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: Hon Cameron Dick Bligh MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1.	The committee does not identify, for the consideration of the Parliament, any matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions.

BACKGROUND

2. The *Fair Work Act 2009* (Cth) is to commence on 1 July 2009. The Industrial Relations Amendment Bill anticipates the federal national industrial relations system to be effected by the *Fair Work Act*, in particular, to allow the Queensland Industrial Relations Commission to cooperate with the Australian Industrial Relations Commission and Fair Work Australia.

LEGISLATIVE PURPOSE

3. The bill is intended to achieve the following policy objectives (explanatory notes at 1-2):

- remove any impediments to the Queensland Industrial Relations Commission's (QIRC) ability to cooperate with the Australian Industrial Relations Commission (AIRC) and Fair Work Australia (FWA); and
- strengthen the administration of the QIRC by removing some ongoing confusion associated with the president and vice president having various administrative responsibilities; and
- ensure that the status and seniority of the president's position is appropriately acknowledged and the QIRC aligned with the administrative structure of industrial tribunals in most other jurisdictions; and
- clarify the role of the president and vice president within the commission without interfering with the independence of the QIRC, or changing the nature of the QIRC's powers or fettering their use; and
- insert a number of minor amendments to clarify the intention of provisions and correct drafting anomalies.

4. Therefore, the bill would amend the *Industrial Relations Act 1999*.

OPERATION OF CERTAIN STATUTORY PROVISIONS

EXPLANATORY NOTES

5. Section 23(1)(i) of the *Legislative Standards Act* requires that explanatory notes identify a bill which is substantially uniform or complementary with legislation of the Commonwealth or another State and provide a brief explanation of the legislative scheme.

6. The explanatory notes to the bill indicate that the bill has been introduced in anticipation of a national industrial relations system to commence on 1 July 2009.

10. LOCAL GOVERNMENT BILL 2009

Date introduced: 22 April 2009

Responsible minister: Hon Desley Boyle MP

Portfolio responsibility: Local Government and Aboriginal and Torres Strait Islander Partnerships

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 79 and other clauses** which provide for approximately 51 offences and have the potential to affect rights and liberties of individuals;
   - **clause 9** which may make rights and liberties or obligations dependent on administrative power which is insufficiently defined and not subject to appropriate review;
   - **clause 122** which would exclude, in respect of the removal of a councillor, obligations to accord natural justice;
   - **clauses 142 to 145** which would confer a local government worker with power to enter premises without a warrant and with some post-entry powers;
   - **clause 56** which would override protections against self-incrimination;
   - **clause 127** which would require people to provide information to authorised officers and would form a statutory exception to the right to silence recognised at common law;
   - **clauses 57 and 238** which would confer immunity from proceeding/prosecution;
   - **clause 9 and chapter 4, part 4** which may affect Aboriginal tradition and Island custom; and
   - **clauses 9 and 28** which provide in general and very wide terms for the general powers and law making powers of each local government.

2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clause 28** which confers the law-making power of a local government in general and very wide terms.

BACKGROUND

3. Within the wider scope of a Local Government Reform Program, the bill would replace existing local government legislation with less-prescriptive, principles-based legislation applying to all Queensland local governments.

LEGISLATIVE PURPOSE

4. Clause 3 of the bill states that the purpose of the legislation is to provide for:
   - the way in which a local government is constituted and the nature and extent of its responsibilities and powers; and
   - a system of local government in Queensland that is accountable, effective, efficient and sustainable.

5. The bill would repeal the:

   - *Local Government Act 1993*; and
   - *Local Government (Community Government Areas) Act 2004*.

6. It would amend a further 83 Acts, as provided in schedule 1.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

7. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

8. **Clause 79 and other clauses** provide for approximately 51 offences. The proposed offence provisions have the potential to affect rights and liberties of individuals.

9. The maximum penalties for the proposed offences would range from eight penalty units (eg, clause 135(3) regarding failure to assist an authorised person to exercise powers following entry to property) to 1000 penalty units (clause 79 regarding the addition of trade waste to a storm water drain).

10. In Alert Digest 12/08, the committee of the 52nd Parliament examined the Local Government Bill 2008. The 2008 bill lapsed on the dissolution of the 52nd Parliament. However, the committee has had the benefit of reading a letter from the then Minister for Main Roads and Local Government received by the previous committee and tabled in Alert Digest 01/09. To assist the Parliament, the committee reproduces information received from the Minister regarding the offence provisions in the 2008 bill, replicated as offence provisions in the current bill:

    Throughout the review of the Local Government Act 1993 *(1993 LGA), penalties were reviewed with a view to maintaining consistency with similar offence provisions across the statute book. It is important in local government regulation for there to be appropriate enforcement mechanisms, in the form of penalties. The use of penalties has been limited as far as possible.*

    A significant number of the penalty provisions contained in the Bill apply to local government owned corporations (LGOCs). As other corporations legislation does not apply to LGOCs, these penalties are consistent with the penalties for company directors under Commonwealth corporations legislation, to ensure a consistent legislative approach.

    Furthermore, a number of penalties from the 1993 LGA that were applicable to councillors have been removed. In reviewing these provisions, it was determined that in order to have regard to the rights and liberties of individuals it was more appropriate to have a maximum penalty of removal of a councillor for breaches of the Act committed as a councillor. This provides a better regard to individual rights as it does not impose a financial penalty for a councillor's breach of duty.

Administrative power

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

12. **Clause 9** would confer administrative power and delegated legislative power. Administrative power conferred may be insufficiently defined and may not be subject to appropriate review.

13. The powers of each local government are defined by clause 9 in general and very wide terms. Clause 9(1) provides a general power: 'A local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area'. The law-making power of a local government is defined in clause 28(1) in precisely the same terms.

14. The consistency of clauses 9 and 28 with fundamental legislative principles is examined in other respects in this chapter:

- whether the clauses are unambiguous and drafted in sufficiently clear and precise manner is examined in paragraphs 73 to 84; and
- the delegation of legislative power is examined in paragraphs 86 to 88.

15. The committee's examination of whether the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined is incorporated in its examination of clear meaning in paragraphs 73 to 84.

16. In relation to the conferral of administrative power on local governments, given that the opportunity for judicial review of decisions and actions in exercise of the wide powers conferred on local governments, sufficient regard to rights and liberties of individuals raises a need to ensure that the power is subject to appropriate review. In particular, the committee has examined the legislation to ensure the existence of review mechanisms apart from the ballot box at local government elections.

17. The current bill provides certain mechanisms of consultation and ministerial review.

18. First, consultation is required under clause 29(3) only with 'relevant government entities about the overall State interest'. No provision is made for prior public consultation. Clause 29(5) only requires the public to be informed of the making of a local law within one month after it is made, by notice in a local newspaper, in the gazette and on the local government's website.

19. Second, ministerial review is provided under clause 121 whereby the Minister is empowered to suspend or revoke any decision of a local government (including a local law) if the Minister reasonably believes the decision to be 'contrary to any of the Local Government Acts'.

20. To assist the Parliament, the committee reproduces information received from the former Minister for Main Roads and Local Government regarding whether the 2008 bill made rights and liberties, or obligations, dependent on administrative power only if the power was subject to appropriate review:

In paragraph 27 the committee suggested that "consultation is required under clause 29(3) only with relevant government entities about the overall State interest. No provision is made for prior public consultation." It should be noted that the local law making process under clause 29 is required to be consistent with the local government principles (clause 4) as well as other requirements under clause 29 such as consulting with relevant government entities. The local government principles include democratic representation, social inclusion and meaningful community engagement. Therefore, any local law making process under the Bill is required to include a community engagement process. Furthermore, it is implicit that public notification in accordance with clause 29(4) and (5) will have been preceded by a genuine community engagement process. However, as one size does not fit all, individual councils have the discretion under the Bill to determine the type/s of community engagement that best suit their particular communities.

Regarding paragraph 28 in which the committee referred to the power of the Minister to suspend or revoke any local government decision that is contrary to any of the Local Government Acts (clause 121), it is important to note that such a power is consistent with the constitutional responsibility of the State for local government. Furthermore, as the explanatory notes point out, any exercise of such power will be preceded by a show cause process to ensure transparency.

21. An additional matter respecting whether the legislation has sufficient regard to rights and liberties of individuals and, in particular, to section 4(3)(a) and 4(3)(k) of the *Legislative Standards Act* was raised in a submission to the committee received from the Cape York Land Council Aboriginal Corporation. The committee has noted the submission and authorised its tabling and publication so that it may be considered by the Parliament.

Natural justice

22. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

23. **Clause 122** would exclude, in respect of the removal of a councillor, obligations to accord natural justice.

24. The removal of a councillor under clause 122 is to be effected by a regulation made by the Governor in Council. The explanatory notes recognise that this effectively removes the decision from the scope of merits or judicial review (at 46). This leaves councillors vulnerable in so far as the Minister is able to remove them on the basis that the Minister reasonably believes they are 'incapable of performing their responsibilities' (clause 122(1)(b)) and can dispense with giving any prior notice on the basis that this 'would serve no useful purpose' (clause 120(2)(c)(ii)).

25. Clause 122 would, therefore, exclude obligations to accord natural justice. The explanatory notes indicate that sufficient regard is had to rights and liberties of individuals, however (at 3):

> *Of course, processes of the independent panels and the tribunal will comply with natural justice principles including show cause processes prior to any recommendation of dismissal. Further safeguards are provided by Parliament's involvement in the ratification of regulations for the dissolution of a council and the requirement for dismissal of an individual councillor by regulation made by the Governor in Council. The regulation will be tabled and therefore could be subject to a motion of disallowance and Parliamentary debate.*
>
> *Similar to arrangements for conduct review panels under the LGA and the equivalent process for State MPs, where the decision of the Parliament on the review of a MP's conduct and any penalty is final, panels and the tribunal deliberations are non-appealable. The system for dealing with behavioural breaches for councillors takes account of the fact that there is no equivalent system of party discipline in local government as at the State level.*

26. Natural justice requires the observance of standards and procedures regarding fairness and good administration in administrative decision-making. Breach of the required standards and procedures can lead to the invalidity of executive action.[22]

27. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 93, McHugh J observed that, 'The common law rules of natural justice … are taken to apply to the exercise of public power unless clearly excluded'. Accordingly, the legislature can exclude the obligation to accord natural justice. Express words are generally required.[23]

> *The committee noted that clause 122 provides a potential exemption for the obligations to accord natural justice when removing a councillor in two ways: by allowing the Minister to dispense with a show cause notice in certain circumstances, and also by excluding the decision from judicial review.*
>
> *The potential for the Minister to dispense with the show cause process in limited circumstances is included in the legislation to strike a balance between the principles of natural justice and the need for expediency of decision making where councillors, as elected representatives are concerned. The power for the Minister to remove a councillor and dispense with the show cause process is limited in its scope under clause 120. It is imperative that the Minister have the flexibility to act in an expedient way in these circumstances given the State's responsibility under the* Constitution of Queensland 2001 *for local governments.*
>
> *With respect to the exclusion from judicial review, the committee has noted in paragraph 78 that express wording is generally required in the legislation to do this. In 2007, the Queensland Supreme Court held that the statutory process for the dissolution of the former Johnstone Shire Council was a Parliamentary*

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22 See Robin Creyke, John McMillan & Rocque Reynolds, *Control of Government Action*, LexisNexis Butterworths, Australia, 2005, at [10.1.1].

23 *Commissioner of Police v Tanos* (1958) 98 CLR 383.

function rather than an administrative matter. As such, the outcome could be determined by the Minister based on policy considerations rather than factual circumstances.

Consequently the judge held that the principles of natural justice apply through the show cause process but also that the decision of the show cause process cannot be the subject of review under the Judicial Review Act 1991 *because of its parliamentary nature. Accordingly, the Bill provides clarity around this matter.*

Power to enter premises

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

29. **Clauses 142 to 145** would confer a local government worker with power to enter premises without a warrant. Some provisions would confer post-entry powers.

30. First, clause 142 would allow entry, with reasonable written notice, under a remedial notice. The explanatory notes state (at 57):

Where an owner or occupier of land has failed to perform work under a remedial notice, a local government worker may enter that land and perform that work, provided the local government has given at least seven days notice in writing (seven days notice is a component of the reasonable written notice as defined in clause 138.)

The local government can recover any costs it incurred in acting under this clause.

Generally, a remedial notice will pertain to a matter of public safety. As such there are justifiable grounds for a local government worker to enter a property even without permission in this circumstance as long as reasonable written notice is given to the owner.

31. Second, clause 143 would confer power to enter, with reasonable written notice, to take materials. In respect of clause 143, the explanatory notes say (at 57):

A local government worker may enter rateable land for the purpose of searching for materials that the local government may need to fulfil its responsibilities under local government legislation. This power can only be exercised if at least seven days written notice has been given to the owner and also the occupier, if the occupier is not the owner (seven days notice is a component of the reasonable written notice as defined in clause 138.)

Further, this clause does not authorise the exercise of this power where damage to any structure could occur - within 50 metres of a structure or works (for example, a house, a bridge, a dam, a jetty or a wharf).

32. Third, clause 144 would allow entry at reasonable times to plan, install, repair and maintain facilities, with the explanatory notes stating in respect of this provision (at 57):

A local government worker can enter property (except for a home) without giving notice or asking for permission if the reason for entry is to plan for, install or maintain facilities on the property that are to be, or were, installed by the local government.

This provision does not allow entry into a home on a property and is justified, not necessarily on public safety grounds, but on grounds that there is a necessity for local government facilities to be maintained.

33. Finally, clause 145 would confer a power of entry at any time for urgent action. The explanatory notes state (at 58):

For public health and safety reasons, should emergent conditions warrant it, the power of entry (other than to a home) on the property to carry out work may be exercised without giving notice if justified on public safety grounds.

34. In respect of clauses 142 to 145 of the 2008 bill, replicated as clauses 142 to 145 of the current bill, the former Minister advised the previous committee:

These clauses are consolidated from the existing powers of entry under the 1993 LGA and are necessary to ensure a local government can properly carry out its duties.

Clause 142 provides for entry under a remedial notice. The explanatory notes make it clear that this is a matter of public safety, where the owner or occupier has been given reasonable notice to remedy a situation and has failed to do so. Therefore the entry without permission does have justifiable grounds.

Clause 143 requires reasonable written notice and is intended to allow a local government to fulfil its requirements under legislation. The clause limits the exercise of power such that no damage could occur to any structure.

Clause 144 allows for entry to plan, install, repair and maintain local government facilities. The clause does not authorise entry to a home or structure on the property. These powers are modelled on the powers of an electricity worker under the Electricity Act 1994 *(Chapter 6, Part 1 Operational powers).*

Clause 145 provides for entry for urgent action. This clause would only be used if public health and safety concerns justified its use.

Protection against self-incrimination

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

36. Section 10 of the *Evidence Act 1977* expressly preserves the common law privilege against self-incrimination.

37. The common law privilege provides that:[24]

No one is bound to answer any question or produce any document if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime.

38. **Clause 56** would override protections against self-incrimination. It would prevent a person being excused from answering a question on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.

39. Clause 55 would enable the Attorney-General or a local government to apply to the District or Supreme Court for an order that the court will conduct an examination of people concerned with a corporate entity's management, administration or affairs. There must be a belief on reasonable grounds that a person may be capable of giving relevant information or that a person has been or may have been guilty of fraud or malpractice in relation to a corporate entity.

40. Clause 56(2) provides that failure by the person to be examined to take an oath or make an affirmation at the examination creates liability for an offence with maximum penalty of 200 penalty units or two years' imprisonment. Clause 56(3) requires a person to answer any question he or she is directed by the court to answer, with failure to do so an offence with maximum penalty of 200 penalty units or two years' imprisonment. Clause 56(4) and (5) provides:

(4) The person is not excused from answering a question because the answer might tend to incriminate the person or make the person liable to a penalty.

(5) However, if the answer might in fact tend to incriminate the person or make the person liable to a penalty, the person's answer is not admissible in evidence against the person in proceedings for an offence or the imposition of a penalty, other than proceedings for an offence—

(a) against this section; or

(b) in relation to the falsity of the person's answer.

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24 JD Heydon, *Cross on Evidence*, 7th ed, LexisNexis Butterworths, [25065].

41. The committee generally suggests that denial of the protection afforded by the privilege against self-incrimination may be potentially justifiable only if:[25]

- the questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and would be difficult or impossible for the Crown to establish by any alternate evidentiary means;
- the legislation prohibits use of the information obtained in criminal proceedings; and
- a person is not required to fulfil conditions, such as formally claiming the privilege.

42. Again, the committee has had the benefit of reading the letter from the then Minister for Main Roads and Local Government received by the previous committee. Relevant information received regarding clause 56 was that:

The removal of the right to silence or refusal to answer a question on a ground of self-incrimination is similar to the Government Owned Corporations Act 1993*, which applies sections 85-87 of the* Financial Administration and Audit Act 1977 *to Government Owned Corporations. Clause 56 similarly applies only to LGOCs. As discussed above, the provisions for LGOCs have been aligned, as much as possible, with those in other relevant Corporations legislation.*

A person may only be directed to be examined under clause 55 if that person is able to give particular information relating to a corporate entity's management, administration or affairs, or may be guilty of fraud or malpractice. In addition, clause 56 provides an indemnity against the use of any incriminating answers as evidence in any further proceedings. The only exception to this indemnity is for a proceeding against clause 56 or in relation to the falsity of the answer. There are no conditions which a person must fulfil in order to have this indemnity apply.

43. **Clause 127** would require people to provide information to authorised officers and would form a statutory exception to the right to silence recognised at common law.

44. Clause 127(3) of the bill would confer an 'authorised person' (appointed under the Act to ensure that members of the public comply with the *Local Government Acts*) with authority to ask a person to state his or her name and address. Authority would be conferred where an authorised person 'finds' the person committing, or suspects on reasonable grounds the person has committed, an 'infringement notice offence' (prescribed under the *State Penalties Enforcement Act 1999* to be an offence). Clause 127(5) would require a person to comply with a request made by an authorised person to provide his or her name and address. Failure to comply with new section 127(3) or (5) would, except if the person was proven not to have committed the infringement notice offence, create liability for an offence with maximum penalty of 35 penalty units ($3500).

45. In his letter to the committee of the 52nd Parliament, the then Minister provided the following information regarding clause 127:

… the committee noted that clause 127 would create a statutory exception to the common law right to silence. However, the committee also noted that this right has been modified in some respects by the Police Powers and Responsibilities Act 2000 *and some other Queensland Acts. Given public safety considerations clause 127 is another appropriate exception to the common law right to silence as for it to be invoked, the authorised officer must find the person committing an offence or suspect on reasonable grounds that an offence has been committed by the person. Furthermore, the requirement is only for the person to provide their name and address and no other particulars, and allows for the effective enforcement of the legislation. As such, the clause provides sufficient regard to individuals' rights whilst also allowing for the effective operation of the legislation.*

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[25] See also Queensland Law Reform Commission, *The Abrogation of the Privilege against Self-incrimination*, report no 59, December 2004, available at: www.qlrc.qld.gov.au.

Immunity from proceeding or prosecution

46. Section 4(3)(h) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

47. **Clauses 57 and 238** would confer immunity from proceeding/prosecution. Clause 57 would allow a court to relieve an employee of a corporate entity of liability for 'malpractice'. Clause 238 of the bill would protect from civil liability 'constituters of local government' and State and local government administrators who act honestly in the performance of duties.

48. In respect of provisions conferring immunity from legal proceedings or prosecution, the committee's basic premise is that one of the fundamental tenets of the law is that everyone is equal before the law.

49. Clause 57 would allow an employee of a corporate entity to be relieved from liability for 'malpractice'. That is, a court could relieve the employee of liability that would otherwise be incurred for negligence, default or breach where in the view of the court the person had acted honestly and ought fairly to be excused in the circumstances. The court may relieve the employee on terms considered appropriate.

50. The explanatory notes state (at 25):

This supports the natural justice principle that liability should not generally be strictly applied.

51. The information relevant to clause 57 provided by the previous Minister in his letter to the committee of the 52nd Parliament was that:

Clause 57 supports the natural justice principle that liability should not generally be strictly applied. While the wording and phrasing has been updated in accordance with modern drafting standards, it has the same intent as section 697 of the 1993 LGA.

When section 697 was originally inserted via the Local Government Legislation Amendment Act 1997*, the committee commented that it was:*

"…pleased to note that proposed s. 458IT gives the court power to grant relief from liability if it appears to the court that, although the person may be liable for the negligence, default or breach of trust/duty, the person acted honestly and ought fairly to be excused."

52. Clause 238 of the bill would protect from civil liability 'constituters of local government' and State and local government administrators who act honestly in the performance of duties.

53. In this context, the committee notes that clause 238 would take the place in the new Act of the current section 38A of the *Local Government Act*. The existing section was inserted by clause 12 of the *Local Government and Industrial Relations Amendment Act 2008*. In its consideration of the then Local Government and Industrial Relations Amendment Bill 2008, the committee expressed concern with the drafting of the proposed section 38A which was expressed to protect councillors from liability for any 'matter or thing done honestly' by a local government or any councillor; namely that the expression was ambiguous and did not expressly cover any omissions or failure to act on the part of councillors. The committee's concern appears to be alleviated by the terms of clause 238 which provide that a councillor is 'not civilly liable for an act done, or omission made, honestly'.

54. The information relevant to clause 238 provided by the previous Minister in his letter to the committee of the 52nd Parliament was that:

Clause 238 mirrors similar provisions in other statutes protecting, for example, employees of the Crown and members of Parliament from civil liability when performing their duties without negligence. In the 1993 LGA, there are a number of sections protecting councillors, council staff and other individuals from civil liability. As part of the streamlined structure of the Bill, these have been consolidated into one clause.

Aboriginal tradition and Island custom

55. Section 4(3)(j) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.

56. Section 36 of the *Acts Interpretation Act 1954* provides that, in an Act:

Aboriginal tradition *means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships; and*

Island custom*, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.*

57. **Clause 9 and chapter 4, part 4** may affect Aboriginal tradition and Island custom.

58. Issues regarding Aboriginal tradition and Island custom arise in respect of the provision made by the bill for:

- the powers of local governments generally; and
- the business of indigenous regional councils.

59. Clause 9 provides for the powers of local governments generally. Clause 9(3) states:

When exercising a power, a local government may take account of Aboriginal tradition and Island custom.

60. The explanatory notes indicate, in respect of clause 9(3) (at 8):

Recognising cultural diversity as part of the good rule and governance of a local government area, clause 9 provides for all local governments to take account of Aboriginal tradition and Torres Strait Island custom. This promotes greater consideration of cultural matters in all local government areas.

61. Chapter 4, part 4 provides for the business of indigenous regional councils. In particular:

- division 2 of part 4 provides for indigenous regional councils as trustees of land held as deed of grant in trust (DOGIT) and some contiguous land in their local government area;
- division 3 of part 4 relates to the establishment of a community forum for each indigenous regional council.

62. In respect of division 2, the explanatory notes state (at 29):

Indigenous regional councils are trustees of land held as a deed of grant in trust (DOGIT), and some contiguous land in their local government area. They manage these lands and any assets upon the land. This division sets out the requirements for these councils in their capacity as trustee councils.

Clause 82 states what this division is about and defines trustee council and trust land. It also clarifies that anything in this division will not affect the status of land under the Aboriginal Land Act 1991 *or the* Torres Strait Islander Land Act 1991 *and that the provisions are additional to provisions that already apply to the land under the* Land Act 1994 *(Land Act) or any other legislation.*

63. In respect of division 3, the explanatory notes provide (at 31):

To recognise and protect Torres Strait Island customs and Aboriginal culture and traditions, each indigenous regional council (including each division of an indigenous regional council) must have a community forum. Community forums give advice to indigenous regional councils. The community forums meet with the community to gain the community view on issues about trust land (as discussed in the previous division), planning, service delivery and culture and convey these views back to the indigenous regional councils.

As community forums are established under this legislation and the composition is set by regulation, this clause stipulates that no other body can be created to carry out a community forum's functions.

64. A number of matters respecting whether divisions 2 and 3 have sufficient regard to Aboriginal tradition and Island custom are identified for the consideration of the Parliament.

65. First, while the explanatory notes indicate the range of consultation undertaken regarding the bill, the consultation does not appear to have incorporated an inclusive consultation process with Aboriginal and Torres Strait Islander communities. However, the committee notes contemporary research regarding Indigenous community governance places emphasis on the importance of community consultation.[26] Recently, for example, the Northern Territory Emergency Response Review Board reported that crucial aspects of the NTER were not working because of the absence of prior community consultation.[27]

66. Second, under clause 85, a trustee council would be required to seek, via written notice, a community forum's advice and input on any 'trust change proposal' (defined in the clause), allowing the community forum 'reasonably sufficient time' to formulate its advice.

67. The committee notes that, given that land is often the most valuable asset of Aboriginal and Torres Strait Islander communities, general requirements as to 'written notice' and 'reasonably sufficient time' may not provide sufficient clarity as to requirements to be met by councils.

68. Third, clause 89 provides that an elected member of a community forum is not entitled to be remunerated. However, the indigenous regional council would be able to:

- authorise the payment of expenses incurred by elected members while performing their duties; or
- provide facilities for elected members to enable them to perform their duties.

69. Duties to be performed are set out in clause 87(2): meeting with the local community to discuss issues relating to land, service delivery and culture. Many dealings with the Queensland Government would fall within the issues to be discussed and, in accordance with community governance practices in Aboriginal and Torres Strait Islander communities, the forum meetings may require significant time and other commitments from forum members.

70. Finally, clause 88 does not appear to make provision for removal from office of a member of a community forum. The committee notes that, in certain circumstances, removal of one or more elected members before the completion of a term may be required.

71. In respect of the bill generally and whether it has sufficient regard to fundamental legislative principles, the explanatory notes state (at 3):

The Bill respects Aboriginal tradition and Island custom, particularly by allowing all local governments to consider Aboriginal tradition and Island custom when exercising their powers under the Bill.

72. These four issues were raised by the committee of the 52nd Parliament in its consideration of the equivalent provisions in the 2008 bill. In his response, the former Minister for Main Roads and Local Government stated:

With respect to the committee's comment in paragraph 43, the overall policy regarding Aboriginal and Torres Strait Island local governments has not changed from the 1993 LGA. When the relevant provisions were inserted into the 1993 LGA via the Local Government and Other Legislation (Indigenous Regional Councils) Amendment Act 2007 *(IRC Act), the committee noted:*

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26 See, for example: J Hunt and DE Smith, *Indigenous Community Governance Project: Year two research findings*, CAEPR Working Paper No. 36, 2007 - www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf.

27 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board*, October 2008. See http://www.nterreview.gov.au/docs/report_nter_review.

"Clearly, the bill has regard to Aboriginal tradition and Island custom. The committee considers that, generally, the provisions of the bill significantly enhance Aboriginal custom and Island tradition. It is noted that its provisions should ensure protection of Indigenous cultural values and allow Indigenous peoples in the Torres Strait and Northern Peninsula Area Regions to actively participate in local governance."

Extensive and specific consultation was undertaken with the affected Aboriginal and Torres Strait Island communities as part of the development of the IRC Act. The governance framework established by the IRC Act amendments has been operating since March 2008.

With respect to the committee's comment in paragraphs 44 and 45, further detail about the process for input in trust change proposals will be incorporated in regulations, as with other processes for local government operational and administrative matters.

With respect to the committee's comment in paragraph 46, the non-entitlement of remuneration for community forum members is in recognition that the community forum is an advisory body only. The decision was made in order to avoid creating a second tier of decision making, to maintain clarity about the different roles of the Indigenous Regional Councils and the community forums. This provision is consistent with that which was inserted into the 1993 LGA under the IRC Act.

With respect to the committee's comment in paragraph 48, the committee noted the lack of provision for removal from office of a member of a community forum. Due to the intent to streamline and create a more manageable local government Act, most process provisions are to be moved into regulations or more relevant legislation. In this case it is anticipated the community forum election provisions (currently contained in the Local Government (Community Forums) Regulation 2008*) will be incorporated into new local government electoral legislation to be developed during 2009.*

Clear meaning

73. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

74. **Clauses 9 and 28** provide for general powers and law making powers of each local government. The powers are defined in general and very wide terms.

75. The powers of each local government are defined by clause 9. Clause 9(1) provides a general power: 'A local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area'. Later, clause 28(1) defines the law-making power of a local government in precisely the same terms. A law made by a local government is defined as a 'local law' (s 26(2)).

76. The wording of clauses 9(1) and 28(1) may be so wide as to be interpreted as purporting to delegate to each local government for its local government area the entire law-making power of the Queensland Parliament. The general legislative power of the Queensland Parliament is expressed as a power 'to make laws for the peace, welfare and good government of the colony in all cases whatsoever'.[28]

77. A wide conferral of general power to each local government occurs under section 25 of the current *Local Government Act 1993* and has been in place under previous *Local Government Acts* in Queensland.[29] Its origins lie in legislation of the United Kingdom Parliament passed as far back as the early part of the 19th century.[30]

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28 *Constitution Act 1867* (Qld), s 2; referred to by *Constitution of Queensland 2001,* s 8.

29 *Local Government Act 1936* (Qld), s 30; *The City of Brisbane Act 1924* (Qld), s 36.

30 *The Municipal Corporations Act 1835* (5&6 Wm.IV c76).

78. In the *Local Government Act 1993*, however, there are express and implied restrictions on the wide power. These are continued in the present bill:

- clause 9(2) provides that 'a local government can only do something that the State can validly do';
- clause 9(4)(b)(i) only permits a local government to exercise its power beyond its local government area with the written approval of the Minister;
- clause 27(1) provides that a State law prevails over an inconsistent local government local law to the extent of the inconsistency;
- clause 27(2) provides that a local law does not bind the State; and
- clause 28(2) prohibits a local government from making a local law -
  - that sets a penalty of more than 850 penalty units for each conviction of failing to comply with a local law, including each conviction when there is more than 1 conviction for a continuing offence or repeat offence; or
  - that purports to stop a local law being amended or repealed in the future; or
  - about a subject that is prohibited under division 3. Division 3 prevents a local government from regulating telecommunications network connections (cl 35), election signs and the distribution of how to vote cards (cl 36), and alternative development processes (cl 37), and from including anti-competitive provisions in its laws (cl 38).

79. Apart from these express restrictions on the law-making power of each local government, it is not clear whether any exercise of power by a local government could be challenged judicially on the basis that it is not within the conferral of general power in clauses 9 and 28; namely, that it is not 'necessary or convenient for the good rule and local government of its local government area'. Courts have never been prepared to hold that a local law made by a local government was *ultra vires* or invalid because it was not, in the opinion of the court, 'necessary or convenient' for the good rule of that local government area. The phrase 'necessary or convenient' in clauses 9 and 28 is not included in section 25 of the *Local Government Act 1993* which simply provides:

Each local government has jurisdiction … to make local laws for, and otherwise ensure, the good rule and government of, its territorial unit.

80. The committee notes, however, that there is authority that suggests an exercise of the general law-making power of a local government must still be confined to matters of 'local government'. In *Lynch v Brisbane City Council* (1961) 104 CLR 353, Dixon CJ considered a similar power in section 36(2) of *The City of Brisbane Acts 1924-1959* (Qld):

The Council shall have full power and duty to make ordinances for promoting and maintaining the peace, comfort, … welfare, …convenience…of the City and its inhabitants…and for the general good government of the City and its inhabitants.

81. The Chief Justice interpreted this provision as conferring (at [6]):

a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government.

82. Section 36(3) of *The City of Brisbane Acts 1924-1959* did add a long enumeration of specific subjects – without limiting the generality of the power in subsection (2). This was also the position under section 30 of the *Local Government Act 1936* (Qld) about which Connolly J observed in *Boral Resources v Johnstone Shire Council* [1990] 2 Qd R 18 at 19:

A local authority is charged with the good rule and government of the whole or any part of its area. Although this grant of power resembles the formula for the plenary grant of power to say the legislature of a State, so detailed are the heads of power subsequently committed to local authorities that the power of a local authority when challenged is not ordinarily referred to the general grant.

83. The committee further notes that the conferring of very wide power on local governments may reduce the number of legal challenges to unpopular decisions and laws. In this context, it is observed that no express reference is found in clauses 9 and 28 to the 'local government principles' which by clause 4(1):

Parliament requires anyone who is performing a responsibility under this Act to do so in accordance with the local government principles.

84. Clause 4(2) defines these principles in terms of transparent and effective processes, sustainable development, democratic representation, good governance, and ethical behaviour. While clause 29(2)(a) requires the process of law-making to be consistent with these local government principles, the laws actually made are not required to be consistent. While these principles must be observed by the councillors who constitute a local government, it is not clear whether they are intended also to be observed by the local government itself.

85. The committee draws the attention of Parliament to the wide and general conferral of power in clauses 9 and 28, as opposed to the more specific requirement in clause 4 for regard to 'local government principles'. In this context, for example, the submission of the Cape York Land Council identifies the potentially very wide scope of a power to fees on residents of indigenous local government areas (clause 100). In this regard, the committee notes information received from the former Minister for Main Roads and Local Government regarding clauses 9 and 28 of the 2008 bill:

In paragraph 18 the committee observed that no express reference is found in clauses 9 and 28 to the "local government principles" that are articulated in clause 4(1). In paragraph 19 the committee noted that while the local government principles must be observed by the councillors who constitute a local government, "it is not clear whether they are intended also to be observed by the local government itself." Consequently, the committee referred the attention of Parliament to the wide and general conferral of power to local governments in clauses 9 and 28 of the Bill as opposed to the more specific requirement in clause 4 for regard to "local government principles".

In referring to the Bill's wide and general conferral of power to local governments the committee noted legislative, judicial and historical precedents for such conferral. It also noted the various caveats provided under the Bill which restrict the power of local governments. Such caveats constitute an important check and balance on the exercise of power by local governments and are consistent with community expectations with respect to accountability, transparency and personal integrity of public officials.

Clause 4 is a particularly important mechanism for ensuring accountability, transparency and personal integrity of elected local government representatives and local government employees. The intent of the Bill is for clause 4 to inform the making of any decision or discharging any responsibility (including a function) under the Bill such as with respect to general powers under clause 9 and law making powers under clause 28.

It is important to note that the purpose of principles-based legislation is to allow practitioners to focus on outcomes and develop their own operational procedures and processes. It does not mean that the Bill will be less enforceable. In fact, principles-based legislation is intended to achieve higher levels of compliance. By requiring entities to comply with the spirit rather than the letter of the law, they must come to terms with the reasons behind a law.

Clause 9 and 28, when read in conjunction with the Bill as a whole and the principles in clause 4, provide local governments with choices about processes to suit their size, location and administrative circumstances, as long as the processes are rational, justifiable and transparent. Local laws that are made in accordance with clause 28 will of necessity reflect the local government principles articulated under clause 4. A local law that is not made in accordance with the local government principles may be suspended or revoked by the Minister (clause 121).

In paragraph 14 the committee referred to clause 28 of the Bill which provides that a local government may make and enforce any local law that is "necessary or convenient" for the good rule and local government of its local government area. The committee subsequently noted that there is a body of case law and statutory interpretation around this particular phrase which essentially confines the exercise of the local law making power to "matters of local government". Certainly, the intent of the Bill is for the phrase to be interpreted in this respect.

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Delegation of legislative power

86. Section 4(4)(a) of the *Legislative Standards Act* provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill allows the delegation of legislative power only in appropriate cases and to appropriate persons.

87. **Clause 28** confers the law-making power of a local government in general and very wide terms, stating in clause 28(1) that:

> A local government may make and enforce any local law that is necessary or convenient for the good rule and local government of its local government area.

88. Clause 26(2) defines a 'local law' as a law made by a local government.

89. In paragraphs 73 to 84, the committee has examined the wording of clauses 9(1) and 28(1) and, in particular, whether it is so wide that it could be interpreted as purporting to delegate the entire law-making power of the Queensland Parliament to each local government for its local government area.

11. PARLIAMENT OF QUEENSLAND AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: The Honourable AM Bligh MP

Portfolio responsibility: Premier and Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1.	The committee does not identify, for the consideration of the Parliament, any matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions.

BACKGROUND

2. The bill forms part of a restructure of the parliamentary committee system.

LEGISLATIVE PURPOSE

3. The bill would amend the *Parliament of Queensland Act 2001*.

4. In addition, the bill would effect consequential amendments to the:
   - *Electoral Act 1992*;
   - *Financial Administration and Audit Act 1977*;
   - *Freedom of Information Act 1992*;
   - *Government Owned Corporations Act 1993*;
   - *Ombudsman Act 2001*; and
   - *Whistleblowers Protection Act 1994*.

12. PROPERTY LAW AND ANOTHER ACT AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: Honourable Cameron Dick MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1.	The committee does not identify, for the consideration of the Parliament, any matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions.

BACKGROUND

2. Power regarding financial matters arising from the breakdown of de facto relationships has been referred to the Commonwealth Parliament (*Commonwealth Powers (De Facto Relationships Act 2003 (Qld)*). The Commonwealth legislation (*Family Law Amendment (De Faction Financial Matters and Other Measures) Act 2009*) commenced on 1 March 2009.

3. The bill is to clarify, in a number of respects, the operation of relevant Queensland legislation and its relationship to Federal legislation.

LEGISLATIVE PURPOSE

4. The bill is intended to clarify, with reference to the *Family Law Act 1975* (Cth), the legislative operation of:

   - part 19 of the *Property Law Act 1974* (Qld); and
   - the *Duties Act 2001* (Qld).

5. In addition, the bill includes a provision to assist in the resolution of any dispute as to jurisdiction; that is, if there is a dispute as to whether the *Property Law Act* or the *Family Law Act* applies to a given circumstance.

6. The explanatory notes to the bill indicate (at 1):

   Up until 1 March 2009, de facto couples who separate in Queensland must access two different jurisdictions to have disputes resolved. Disputes about the division of property are dealt with in Queensland courts under Part 19 of the PLA and disputes about children are dealt with in Federal family law courts under the FLA. In addition, separating de facto couples in Queensland, do not have the opportunity to seek spousal (as contrasted to parental) maintenance, seek orders to divide superannuation or access the counselling and mediation services supporting the Federal family law jurisdiction.

7. Therefore, the bill would amend the:

   - *Property Law Act*; and
   - *Duties Act*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

8. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

9. **The bill** may affect rights and liberties of individuals who have been in a de facto relationship. In relation to the consistency of the bill with fundamental legislative principles, the explanatory notes to the bill indicate (at 3):

   There are minor differences between the provisions of the PLA and FLA that may amount to a slight reduction in the rights of Queensland de facto couples (for example, stricter procedural requirements to make a binding financial agreement and the distinction in the definition of 'child'). However, it is considered the significant advantages for de facto couples to access the Federal family law jurisdiction greatly outweigh these minor differences.

   Given that Part 19 of the PLA will continue to apply to those de facto relationships not covered by the amendments to the FLA, there will not be any reduction in the rights of Queenslanders.

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Institution of Parliament

10. Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of Parliament. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

11. **The bill** may appear to raise issues with respect to the institution of Parliament. However, for the purposes of providing the Parliament with clear information, the committee notes:

    - the bill does not effect any referral of power from the Queensland Parliament – the referral was effected by the *Commonwealth Powers (De Facto Relationships Act 2003*; and
    - the bill is not substantially uniform or complementary with legislation of the Commonwealth or another State.

13. SUPERANNUATION (STATE PUBLIC SECTOR) AMENDMENT BILL 2009

Date introduced: 23 April 2009

Responsible minister: The Honourable Andrew Fraser MP

Portfolio responsibility: Treasurer and Minister for Employment and Economic Development

ISSUES ARISING FROM EXAMINATION OF BILL

1.	The committee does not identify, for the consideration of the Parliament, any matters regarding the application of fundamental legislative principles or the operation of certain statutory provisions.

BACKGROUND

2. The bill would effect three changes regarding the State Public Sector Superannuation Scheme (QSuper).

LEGISLATIVE PURPOSE

3. The bill is to amend the *Superannuation (State Public Sector) Act 1990* to:
   - ensure purchasers of government assets are bound by QSuper requirements;
   - allow QSuper to accept employer contributions for any person with an account with the fund; and
   - permanently transfer Treasury staff currently employed by QSuper Limited under an Employment Services Agreement to QSuper Limited.

14. TELECOMMUNICATIONS INTERCEPTION BILL 2009

Date introduced: 22 April 2009

Responsible minister: Hon AM Bligh MP

Portfolio responsibility: Premier

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **the bill** allowing Queensland law enforcement agencies to be certified to exercise powers under the *Telecommunications (Interception and Access) Act* (Cth) - exercise of these powers may affect the rights and liberties of individuals;
   - **various clauses** putting in place legal provision for recording, reporting and inspection matters required by section 35(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) – these would affect the use, disclosure, storage and destruction of information which may include personal information;
   - **clauses 44, 46 to 48 and 50 to 53** which contain proposed offences;
   - **clauses 26 and 27** which would confer powers of entry and post-entry powers on an inspecting entity;
   - **clauses 28(1) and 35(1)** which would adversely affect the common law and statutory protection from self incrimination; and
   - **clauses 37(2) and 37(4)** which would confer immunity from proceeding.

2. The committee seeks further information from the Minister regarding the legislative objectives justifying **clause 38** which would provide that decisions made under the bill could not be subject to judicial review.

3. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clauses 12 and 24** which may limit parliamentary oversight of the legislative arrangements for Commonwealth and State cooperation regarding telecommunications interception.

THE BACKGROUND

4. The bill would enable the Queensland Police Service and the Crime and Misconduct Commission to apply for telecommunications intercept warrants to assist in the investigation of serious criminal offences.

LEGISLATIVE PURPOSE

5. Clause 5 identifies the legislative objective of the bill:

   (1) The main objective of this Act is to enable the use by the police service and the CMC of telecommunications interception as a tool for the investigation of serious offences.

   (2) The main objective is to be achieved by establishing a recording, reporting and inspection regime required under the Commonwealth Act for the Commonwealth Minister to be able to declare the police service and the CMC to be agencies under the Commonwealth Act.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Rights and liberties

6. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

7. **The bill** would allow Queensland law enforcement agencies to be certified to exercise powers under the *Telecommunications (Interception and Access) Act* (Cth). Exercise of these powers would affect the rights and liberties of individuals.

8. The explanatory notes acknowledge (at 4) that, 'Telecommunications interception will result in the infringement of the privacy of certain individuals.' More specifically, in the second reading speech to the bill, the Premier stated that telecommunications interception is:[31]

   … an investigative tool that is highly intrusive on the privacy rights of individuals. Applications for telephone interception warrants are made without the knowledge of the targeted person or the people with whom they are likely to communicate.

9. Justification for breach of the fundamental legislative principle by the bill generally is provided by the explanatory notes (at 4-5):

   [T]he potential breach of fundamental legislative principles is justified, given:

   • the utility of telecommunications interception powers; and

   • that the two objectives of the Bill are entirely directed towards addressing concerns about fundamental legislative principles; namely the provision of the recording, reporting and inspection safeguards required under the Commonwealth Act and the additional front-end safeguard of the PIM, discussed under the above heading 'Reasons for the objectives and how the objectives will be achieved'.

   The Commonwealth Act provides safeguards in addition to those referred to above. Most notably, applications for an interception warrant must be made to an independent issuing authority officer, namely an eligible Judge of the Federal Court or nominated member of the Administrative Appeals Tribunal.

   In issuing the warrant, the issuing authority must consider the matters set out in sections 46(2) and 46A(2) of the Commonwealth Act, including:

   • the privacy of persons likely to be affected;

   • the gravity of the offending conduct;

   • the probative value of the interception information for the investigation of the offence;

   • the extent to which other methods of investigation have been used or are available to the agency;

   • the degree of utility of other methods of investigating the offence; and

   • the degree to which other methods of investigation would be likely to prejudice the investigation, including through delay.

   In addition, interception warrants can only be granted for 'serious offences', defined extensively in section 5D of the Commonwealth Act to include:

   • murder, kidnapping, drug importation and terrorism offences;

   • offences punishable by a maximum period of at least seven years where the offence involves risk of loss of life or serious injury, serious damage to property in circumstances endangering a person's safety, serious arson, trafficking, serious fraud, serious loss of revenue to state or federal governments, bribery or corruption by a state or federal officer, or organised crime involving certain offences;

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31 Hon AM Bligh MP, Second Reading, *Queensland Parliamentary Debates (Hansard)*, 22 April 2009, 79.

• *child pornography; 'telecommunications offences'; slavery and people trafficking; money laundering; certain cybercrime offences;*

• *most serious drug offences under the Commonwealth Criminal Code;*

• *conspiracy and aiding or abetting relating to the commission of serious offences;*

• *theft of Commonwealth property or abuse of a Commonwealth position; and*

• *offences against the* Commonwealth Crimes Act 1914 *relating to perverting justice.*

10. The committee notes that freedom from surveillance and the interception of an individual's communications may be recognised as an element of the right to privacy. Article 17 of the International Covenant on Civil and Political Rights prevents arbitrary or unlawful interference with a person's 'privacy, family, home or correspondence' and unlawful attacks upon a person's 'honour and reputation'. It also recognises the right to the law's protection against these interferences or attacks. The term 'correspondence' used in article 17 covers all forms of communication at a distance: telephone, facsimile, electronic mail and other mechanical or electronic means. Protection of correspondence means respect for the secrecy of the communications and any interception of private correspondence constitutes interference. A common form of interference is surveillance secretly undertaken for the purpose of administering justice and preventing crime.[32]

11. The committee notes, however, that the bill would not itself confer on officers of Queensland law enforcement agencies powers to intercept telecommunications. Those powers would be exercised under the *Telecommunications (Interception and Access) Act* once the Federal Minister had, by legislative instrument, declared the Queensland Police Service and the Crime and Misconduct Commission to be agencies for the purposes of the *Telecommunications (Interception and Access) Act.*

12. In the Commonwealth jurisdiction, the *Privacy Act 1988* (Cth) regulates the use of personal data that relates to individuals. Commonwealth government agencies and certain private sector organisations must observe the Information Privacy Principles in the *Privacy Act* when collecting, storing, accessing and using personal information. The committee notes that the *Telecommunications (Interception and Access) Act* may leave little scope for the operation of the *Privacy Act*. However, the respective requirements regarding information privacy imposed by *Telecommunications (Interception and Access) Act* and the *Privacy Act* were considered recently by the Australian Law Reform Commission:[33]

73.19 It is possible that information intercepted or accessed under the Telecommunications (Interception and Access) Act *could constitute 'personal information' for the purposes of the* Privacy Act*. Accordingly, the handling of information under the* Telecommunications (Interception and Access) Act *also could be regulated under the* Privacy Act*.*

73.21 Most Australian Government law enforcement agencies, such as the Australian Federal Police, are subject to the Information Privacy Principles (IPPs) under the Privacy Act*. The acts and practices of these agencies in relation to the handling of personal information, therefore, are regulated by the* Telecommunications (Interception and Access) Act *and the* Privacy Act.

73.22 The handling of personal information in accordance with the Telecommunications (Interception and Access) Act *generally will fall within an exception to one of the IPPs, and therefore comply with the* Privacy Act. *For example, the use and disclosure of personal information pursuant to the* Telecommunications (Interception and Access) Act *will be a use or disclosure that is 'required or authorised by or under law' under IPP 10 and IPP 11—and the 'Use and Disclosure' principle under the model Unified Privacy Principles (UPPs). If a law enforcement agency engages in an act or practice that does not comply with the* Telecommunications (Interception and Access) Act*, the act or practice would not be 'authorised by or under law' and so may breach the privacy principles.*

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32 Inter-Parliamentary Union and Office of the United Nations High Commissioner for Human Rights, *Human Rights Handbook*, France, 2005, 104-105.

33 Australian Law Reform Commission, *Australian Privacy Law and Practice*, at [73.19] to [73.23], available at: www.alrc.gov.au.

73.23 Similarly, a telecommunications service provider that discloses personal information to ASIO or a law enforcement agency in a way that is authorised under the Telecommunications (Interception and Access) Act *will not be in breach of National Privacy Principle (NPP) 2. An act or practice engaged in pursuant to any of the exceptions under the* Telecommunications (Interception and Access) Act *is an act or practice that is 'authorised by or under law' for the purposes of NPP 2.*

13. In respect of the intrusions on the privacy rights of individuals to be facilitated by the bill, the committee notes the information provided in the explanatory notes regarding safeguards of individual rights and liberties to be contained in both the Queensland and Commonwealth legislation. These include, for example, the involvement of the public interest monitor (part 2), the recording, reporting and inspection safeguards (parts 3 and 4) and the requirement that a telecommunications intercept warrant be issued by a judge of the Federal Court or a nominate member of the Administrative Appeals Tribunal, following consideration of the privacy of persons likely to be affected by the issue of a warrant (sections 46(2) and 46A(2) of the *Telecommunications (Interception and Access) Act*). In addition, as outlined by the ALRC, protections in the *Privacy Act* may be additional to safeguards in the *Telecommunications (Interception and Access) Act*. Further, the committee notes that the utility of interception powers may provide justification for any breach of fundamental legislative principles regarding individual privacy.

14. **Various clauses** of the bill putting in place legal provision for recording, reporting and inspection matters required by section 35(1) of the *Telecommunications (Interception and Access) Act* would affect the use, disclosure, storage and destruction of information which may include personal information.

15. Relevant provisions of the bill include provisions regarding the:

- public interest monitor –
  - clause 7 (PIM must be notified) – an officer intending to apply for an interception warrant would be required to notify the public interest monitor and provide a copy of the written application and accompanying affidavit;
  - clause 8 (Full disclosure to PIM) – an officer must disclose fully to the public interest monitor all matters known by the officer, whether favourable or adverse to the issuing of the warrant;
  - clause 9 (PIM to be given further information) – an officer must give the PIM any further information the issuing authority requires of the officer under section 44 of the *Telecommunications (Interception and Access) Act*; and
  - clause 11 (Confidentiality obligations do not apply) – information required to be given to the PIM must be given even if there is an obligation imposed by legislation or a rule of law not to disclose it;

- eligible authorities –
  - clause 14 (Eligible authority to keep documents connected with issue of warrants);
  - clause 15 (Other records to be kept by eligible authority in connection with interceptions);
  - clause 16 (Documents to be given by eligible authority to State Minister);
  - clause 17 (Documents to be given by State Minister to Commonwealth Minister); and

- inspecting entities –
  - clause 22 (General functions and powers) – confers powers to inspect agency records;
  - clause 23 (Regular inspection of eligible authority's records); and
  - clause 24 (Reports to Minister).

16. The bill also contains safeguards of the privacy of personal information. Relevant provisions include:

- clause 34 (General confidentiality provision) – except in specific circumstances, a person must not disclose any information or record obtained by the person under the bill;
- clause 18 (Keeping of record by eligible authority) – requires the police service and the Crime and Misconduct Commission to store restricted records securely;

- clause 19 (Destruction of restricted records by eligible authority) – subject to clause 20 (Commonwealth Minister and inspecting entity to inspect restricted record before destruction) requires destruction of restricted records when they are not likely to be required for any further purpose under the State or Commonwealth legislation.

Natural justice

17. Section 4(3)(b) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

18. **Clause 38** would provide that decisions made under the bill could not be subject to judicial review. It is a privative clause, a parliamentary attempt to deny the courts a central function of their judicial role – an attempt to prevent courts pronouncing on the lawfulness of administrative action.

19. Where legislation purports to oust the inherent and statutory jurisdiction of the Supreme Court to review the legality of decisions and actions, the committee considers carefully whether the legislation has sufficient regard to individual rights and liberties or obligations. In given circumstances, it is possible that removal of rights to access to courts and tribunals may be justified by significant legislative objectives. However, the committee notes that Australian courts have resisted parliamentary attempts to limit their powers and have given a restrictive interpretation to privative clauses. Principles to be taken into account by a court will include:

- parliamentary supremacy which 'requires obedience to the clearly expressed wish of the legislature'; and
- preservation of rights to access the courts.

20. In *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633, Gaudron and Gummow JJ stated:

The operation of a State privative clause is purely a matter of its proper meaning ascertained in its legislative context.

21. The committee adopts the general view that privative clauses should rarely be contemplated and even more rarely enacted. In respect of clause 38, the explanatory notes to the bill do not identify a possible inconsistency with fundamental legislative principles. Accordingly, the committee seeks further information from the Minister regarding the legislative objectives justifying clause 38.

Power to enter premises

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

23. **Clauses 26 and 27** would confer powers of entry and post-entry powers on an inspecting entity.

24. Part 4 of the bill would confer an officer of an inspecting entity with powers to conduct inspections of an eligible authority, including powers to:

- clause 26 - enter premises after notifying the agency's chief officer, access and copy records, and require an agency officer to give information relevant to the inspection (An agency's chief officer would be required to ensure officers assisted an inspecting entity to perform its functions); and
- clause 27 - require, in writing, an officer to give information relevant to an inspection to the inspecting entity in writing or answer questions relevant to the inspection at a reasonable place and time.

Protection against self-incrimination

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

26. Section 10 of the *Evidence Act 1977* expressly preserves the privilege against self-incrimination.

27. The common law privilege provides that:

No one is bound to answer any question or produce any document if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime.

28. **Clauses 28(1) and 35(1)** would adversely affect the common law and statutory protection from self incrimination, a fundamental right recognised by the courts in respect of executive inquiry.

29. As indicated above, part 4 of the bill would confer an officer of an inspecting entity with powers to inspect an eligible authority's records and to obtain relevant information. To facilitate the exercise of part 4 powers:

- clause 28(1) would provide that a person must answer questions or give information or documents to the inspecting entity even if it would contravene a law, be contrary to the public interest, or tend to incriminate the person or make the person liable to a penalty; and
- clause 35 provides that it would be an offence (with maximum penalty of 20 penalty units or six months' imprisonment), to:
  - fail to comply with a direction of the inspecting entity made under section 27; or
  - obstruct a person in connection with the exercise of an inspecting entity's functions; or
  - give the inspecting entity false or misleading information.

30. Clauses 29 and 30 of the bill would allow further dissemination of information obtained by way of the exercise of part 4 powers:

- in relation to the information given under clause 28(3), an inspecting entity would be permitted to give the information to another inspecting entity or deal with the information despite any other law (clause 29); and
- an inspecting entity and Commonwealth Ombudsman would be permitted to exchange certain information in specified circumstances (clause 30).

31. In Alert Digest 01/2009, the committee noted that the High Court has held that the privilege against self-incrimination is inherently capable of applying to executive inquiry and may be described as a common law substantive right, although the availability of the privilege in respect of the exercise of any non-judicial power will fall to be determined upon the proper construction of the legislation conferring power.[34] The courts recognise the power of the Parliament to abrogate the privilege. However, they have indicated a reluctance to give a wide interpretation to provisions abrogating the privilege.

32. The explanatory notes to the bill do not address the matter of appropriate protection against self incrimination. However, the bill does contain certain safeguards of individual rights. Clause 28(2), for example, would provide that information provided under clause 28(1) and any information derived as a result of its provision would not be admissible in evidence against the person other than in a prosecution for an offence under clause 35.

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[34] AD 01/09 at 15-19.

33. The committee notes, therefore, that 28(1) and 35(1) would adversely affect the common law and statutory protection from self incrimination, a fundamental right recognised by the courts in respect of executive inquiry. The relevant provisions of the bill demonstrate a clear intention to interfere with the fundamental right. However, the committee notes also that the provisions eroding the privilege against self-incrimination are accompanied by safeguards of individual rights.

Immunity from proceeding or prosecution

34. Section 4(3)(h) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.

35. **Clauses 37(2) and 37(4)** would confer immunity from proceeding.

36. Clause 37(2) would protect an inspecting entity from civil liability if the inspecting entity's actions were honest and did not involve negligence. However, clause 37(3) would provide that the clause does not protect the State from civil liability in cases where the inspecting entity is protected.

37. Clause 37(4) would provide that an inspecting entity may not be called to give evidence or produce any document in any proceedings in relation to any matter coming to the inspecting entity's knowledge while performing functions under the bill.

38. A fundamental tenet of the law is that everyone is equal before the law. Consistent with this principle, legal liability should be the same for the government, its officials and its entities as for private citizens. The committee notes that clause 37 departs from the fundamental principle. However, the committee also notes that liability would instead attach to the State.

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Institution of Parliament

39. Fundamental legislative principles include requiring that legislation have sufficient regard to the institution of Parliament. This requirement is stated in section 4(2) of the *Legislative Standards Act.*

40. **Clauses 12 and 24** may limit parliamentary oversight of the legislative arrangements for Commonwealth and State cooperation regarding telecommunications interception. They would require certain reports regarding compliance with the bill and the *Telecommunications (Interception and Access) Act* be provided to the Parliamentary Crime and Misconduct Committee.

41. The bill would impose duties upon, and enable State executive powers to be exercised by, officers of Queensland law enforcement agencies, the public interest monitor and the parliamentary commissioner. The exercise of State administrative power in these respects is a pre-condition to officers of the Queensland Police Service and the Crime and Misconduct Commission being conferred with Commonwealth powers under the *Telecommunications (Interception and Access) Act*.

42. As for all legislative mechanisms for Commonwealth and State cooperation on a given matter, the committee notes that the bill may have a tendency to undermine the principle of responsible government in Queensland. Accordingly, the committee examines the opportunities available to the Parliament and its committees to scrutinise the exercise of the proposed legislative functions and powers. Relevantly, clauses 12 and 24 make provision for a role for the Parliamentary Crime and Misconduct Committee and, therefore, parliamentary oversight of the legislative arrangements for Commonwealth and State cooperation.

43. Part 2 (Notification to and appearance of PIM) would require the involvement of the public interest monitor in the interception warrant application process. Within part 2, clause 12(1) would enable the public interest monitor, 'whenever the PIM considers it appropriate', to give the Minister a report on the non-compliance of an eligible authority with the bill or the *Telecommunications (Interception and*

Access) Act. Clause 12(3) would require the public interest monitor to provide a copy of any report made under clause 12(1) to the:

- Parliamentary Crime and Misconduct Commissioner and the Parliamentary Crime and Misconduct Committee, where the report was regarding non-compliance by the CMC; or
- Police Minister, where the report was regarding non-compliance by the police service.

44. Clause 23 would require an inspecting entity (the public interest monitor or the parliamentary commissioner), at least twice each year, to inspect an agency's records to evaluate compliance with clauses 14 to 16 and 18 to 20. In addition, an inspection may be made at any time (clause 23(3)).

45. Then, clause 24(1) would require an inspecting entity to report annually to the State Minister about the results of inspections. In addition, clause 24(3) would provide that an inspecting entity may report to the Minister at any time about the results of an inspection and may be requested to do so by the Minister. Clause 24(2) states that an annual report must include:

- a summary of inspections conducted during the financial year under section 23;
- particulars of any deficiencies identified that would impact upon the integrity of the telecommunications interception regime established by the *Telecommunications (Interception and Access) Act*; and
- particulars of remedial action taken or proposed to be taken to address the deficiencies.

46. Clause 24(4) would require the inspecting entity to give the information in a report prepared under clause 24(1) or (3), other than interception warrant information or lawfully or unlawfully intercepted information, to the agency's chief officer and:

- if the agency was the CMC, to the Parliamentary Crime and Misconduct Committee;
- if the agency was the police service, to the Police Minister.

47. Clause 31 would require the State Minister to give the Commonwealth Minister copies of reports received by the Minister under clause 24(1).

48. The committee notes, in respect of clause 12, the large discretion to be conferred on the public interest monitor in respect of a decision to report on non-compliance with the Queensland or Commonwealth legislation. In respect of clauses 12 and 24, the committee notes that the bill provides only for the parliamentary committee to be provided with a copy of any report regarding the Crime and Misconduct Commission. The legislation does not itself confer the parliamentary committee with an investigative role to examine the objectives of the cooperative arrangements, the performance of the relevant agencies or the appropriateness of the intergovernmental arrangements.[35]

OPERATION OF CERTAIN STATUTORY PROVISIONS

MEANING OF 'FUNDAMENTAL LEGISLATIVE PRINCIPLES'

EXPLANATORY NOTES

49. Section 23(1)(i) of the *Legislative Standards Act* requires that explanatory notes identify a bill which is substantially uniform or complementary with legislation of the Commonwealth or another State and provide a brief explanation of the legislative scheme.

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35 See, for example: Campbell Sharman, 'Parliaments and Commonwealth-State relations' in JR Nethercote (ed), *Parliament and Bureaucracy*, Sydney, Hale and Iremonger, 1982, 281; and Gerard Carney, *The Constitutional Systems of the Australian States and Territories*, Melbourne, Cambridge University Press, 2006, 17-21.

50. As required by section 23 of the *Legislative Standards Act*, the explanatory notes to the bill outline the nature of the telecommunications interception scheme. The following information is provided regarding the way in which the bill relates to the *Telecommunications (Interception and Access) Act* (at 1-2):

> *Queensland law enforcement agencies do not have direct access to telecommunications interception powers…*
>
> *Telecommunications interception is governed by the federal regime set up in the Commonwealth Act. State law enforcement agencies cannot access interception warrants unless the federal Attorney-General makes a declaration under section 34 of the Commonwealth Act that they may do so. The declaration can only be made in relation to a state law enforcement agency if the law of that state makes satisfactory provision for the agency to comply with the recording, reporting and inspection obligations specified in section 35(1) of the Commonwealth Act.*
>
> *Accordingly, the Bill will achieve its first objective by providing for the recording, reporting and inspection regime required by the Commonwealth Act.*

51. In addition, the explanatory notes provide information regarding amendments required to the Commonwealth Act to allow the public interest monitor, appointed under the *Police Powers and Responsibilities Act 2000* (Qld) and the *Crime and Misconduct Act 2001* (Qld), to exercise powers conferred by the Commonwealth legislation (at 3):

> *Given that telecommunications interception is governed by the Commonwealth Act, Part 2 of the Queensland Bill will only be effective if it is supported by appropriate Commonwealth amendments. To this end, on 3 December 2008, the federal Attorney-General introduced the Telecommunications Interception Legislation Amendment Bill (No. 2) 2008 into the House of Representatives. The Commonwealth amendment Bill replicates aspects of this Bill's provisions concerning the PIM and further provides that nothing in the Commonwealth Act affects the operation of a law of Queensland authorising or requiring PIM involvement in the interception warrant application process. Queensland and Commonwealth officials worked closely together in developing the respective pieces of legislation.*

15. VEGETATION MANAGEMENT (REGROWTH CLEARING MORATORIUM) ACT 2009

Date introduced: 22 April 2009

Responsible minister: The Honourable Stephen Robertson MP

Portfolio responsibility: Minister for Natural Resources, Mines and Energy and Minister for Trade

Date passed: 23 April 2009

Date of assent: 30 April 2009

ISSUES ARISING FROM EXAMINATION OF BILL

1. The Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 was passed as an urgent bill and received assent on 30 April 2009.

2. The committee has not considered the application of fundamental legislative principles to the Vegetation Management (Regrowth Clearing Moratorium) Act 2009 as committee responsibility regarding a bill ceases upon assent.

BACKGROUND

3. The Act prevents the clearing of 'endangered regrowth vegetation' and 'riparian regrowth vegetation' (each defined in section 8) for a period of at least three months, but no more than six months. It is taken to have commenced on 8 April 2009 (section 2).

4. Following suspension of Standing Orders, the Vegetation Management (Regrowth Clearing Moratorium) Bill 2009 was passed as an urgent bill.

LEGISLATIVE PURPOSE

5. The purpose of the Act and its achievement are set out in section 3:

(1) The purpose of this Act is to protect—

(a) regrowth vegetation that is an endangered regional ecosystem in particular areas; and

(b) particular riparian regrowth vegetation in the Burdekin, Mackay Whitsunday and Wet Tropics catchments.

Note—

At the date of assent, a map showing the Burdekin, Mackay Whitsunday and Wet Tropics catchments can be inspected on the department's website at <www.derm.qld.gov.au>.

(2) The purpose is to be achieved mainly by restricting clearing of the endangered regrowth vegetation and riparian regrowth vegetation for a period of at least 3, but no more than 6, months while the State consults with stakeholders about the optimum way to regulate clearing of regrowth vegetation under the Vegetation Management Act.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

6. The committee has not considered the application of fundamental legislative principles to the Vegetation Management (Regrowth Clearing Moratorium) Bill 2009.

7. Section 103(1) of the *Parliament of Queensland Act 2001* confers the committee with responsibility to consider the application of fundamental legislative principles to particular bills and particular subordinate legislation.

8. A bill, although passed by Parliament at a third reading, is a bill only until it receives the Governor's assent. Upon receiving the Governor's assent, legislation becomes an Act. Accordingly, the committee's responsibility regarding the bill ceased upon assent.

PART 2 – SUBORDINATE LEGISLATION EXAMINED

16. TRANSPORT INFRASTRUCTURE (DANGEROUS GOODS BY RAIL) REGULATION 2008 SL 426

Date tabled: 11 February 2009

Disallowance date: 18 June 2009

Responsible Minister: Hon R Nolan MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1.	The committee seeks further information from the Minister regarding the wording contained in sections 92 to 94. It seeks clarification of the intended operation of these provisions.

BACKGROUND

2. The main objects of the regulation, as provided in section 3, are to:

(a) prescribe the obligations of persons involved in the transport of dangerous goods by rail; and

(b) reduce as far as practicable the risks arising from the transport of dangerous goods by rail; and

(c) give effect to the standards, requirements and procedures of the ADG Code as far as they apply to the transport of dangerous goods by rail; and

(d) promote consistency between the standards, requirements and procedures applying to the transport of dangerous goods by rail and those applying to other modes of transport.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clear meaning

3. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

4. **Sections 92 to 94** may be ambiguous/not be drafted in a sufficiently clear and precise way.

5. These sections impose duties on loaders, prime contractors, rail operators and drivers as regards transporting dangerous goods. The sections provide that such persons must not transport goods if they know, or 'ought reasonably to know', that the goods are too dangerous to be transported.

6. The words 'ought reasonably to know' are capable of various interpretations and their meaning may not be sufficiently clear. This could lead to difficulties in interpreting and applying the legislation in future, particularly in the event that a dispute might arise about a transporter's knowledge. Whether goods are considered safe or unsafe to transport could vary widely from person to person.

7. The committee notes that the wording 'ought reasonably to know' in sections 92 to 94 may be sufficiently uncertain in meaning as to lead to ambiguity.

17. PRIMARY INDUSTRIES AND FISHERIES LEGISLATION AMENDMENT (NO. 1) REGULATION 2009 SL 33

Date tabled: 22 April 2009

Disallowance date: 5 August 2009

Responsible Minister: Hon T Mulherin MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1.	The committee seeks further information from the Minister regarding the wording contained in new section 134R, to be inserted into the *Food Production (Safety) Regulation 2002.* It draws this drafting issue to his attention.

BACKGROUND

2. The main objects of the regulation are to:

a) amend the *Fisheries (Coral Reef Fin Fish) Management Plan 2003*;

b) amend the *Fisheries (East Coast Trawl) Management Plan 1999*;

c) amend the *Fisheries (Freshwater) Management Plan 1999*;

d) amend the *Fisheries Regulation 2008*; and

e) amend the *Food Production (Safety) Regulation 2002*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clear meaning

3. Section 4(3)(k) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

4. **New section 134R,** to be inserted into the *Food Production (Safety) Regulation 2002,* may be ambiguous/not be drafted in a sufficiently clear and precise way.

5. The section provides, inter alia:

134R Health and hygiene requirements

'(1) A seafood handler at seafood premises must, in the handling or supervision of the production of seafood at the premises, exercise personal hygiene and health practices that—

(a) are appropriate for managing the food safety hazards relevant to the production of the seafood; and

(b) do not adversely affect the acceptability of the seafood.

Maximum penalty—20 penalty units.

…

(4) An accreditation holder must take all reasonable measures to ensure a seafood handler at the holder's seafood premises exercises personal hygiene and health practices at the premises that—

(a) are appropriate for managing the food safety hazards relevant to the production of the seafood; and

(b) do not adversely affect the acceptability of the seafood.

Maximum penalty—20 penalty units.

6. The regulation does not specify what might be regarded as 'appropriate' personal hygiene and health practices for managing food safety hazards. This is of some concern, as individual understandings of what is appropriate may differ significantly. This may be sufficiently uncertain in meaning as to lead to ambiguity.

7. The maximum penalty for each offence is 20 penalty units, which would be a considerable amount for a seafood handler to pay for inadvertently utilising inappropriate personal hygiene and health practices.

SUBORDINATE LEGISLATION TABLED: 11 FEBRUARY TO 22 APRIL 2009

(Listed in order of sub-leg number)

SL No 2009	SUBORDINATE LEGISLATION	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
1	State Development and Public Works Organisation Amendment Regulation (No.1) 2009	30/01/2009	22/04/2009	11/02/2009	23/04/2009
2	Racing Amendment Regulation (No.1) 2009	30/01/2009	22/04/2009	11/02/2009	23/04/2009
3	Proclamation commencing remaining provisions	30/01/2009	22/04/2009	11/02/2009	23/04/2009
4	Births, Deaths and Marriages Registration Amendment Regulation (No.1) 2009	30/01/2009	22/04/2009	11/02/2009	23/04/2009
5	Justices of the Peace and Commissioners for Declarations Amendment Regulation (No.1) 2009	30/01/2009	22/04/2009	11/02/2009	23/04/2009
6	Public Trustee Amendment Regulation (No.1) 2009	30/01/2009	22/04/2009	11/02/2009	23/04/2009
7	Proclamation commencing remaining provisions	6/02/2009	22/04/2009	11/02/2009	23/04/2009
8	Dispute Resolution Centres Regulation 2009	6/02/2009	22/04/2009	11/02/2009	23/04/2009
9	Crime and Misconduct Amendment Regulation (No.1) 2009	6/02/2009	22/04/2009	11/02/2009	23/04/2009
10	Aboriginal Land Amendment Regulation (No.1) 2009	6/02/2009	22/04/2009	11/02/2009	23/04/2009
11	Contract Cleaning Industry (Portable Long Service Leave) Amendment Regulation (No.1) 2009	13/02/2009	4/08/2009	22/04/2009	5/08/2009
12	Energy Ombudsman Amendment Regulation (No.1) 2009	13/02/2009	4/08/2009	22/04/2009	5/08/2009
13	Superannuation (State Public Sector) Amendment of Deed Regulation (No.1) 2009	20/02/2009	4/08/2009	22/04/2009	5/08/2009
14	Workers' Compensation and Rehabilitation Amendment Regulation (No.1) 2009	20/02/2009	4/08/2009	22/04/2009	5/08/2009
15	Nature Conservation (Protected Areas Management) Amendment Regulation (No.1) 2009	20/02/2009	4/08/2009	22/04/2009	5/08/2009
16	Forestry and Nature Conservation Legislation Amendment Regulation (No.1) 2009	20/02/2009	4/08/2009	22/04/2009	5/08/2009
17	Building and Other Legislation Amendment Regulation (No.1) 2009	20/02/2009	4/08/2009	22/04/2009	5/08/2009
18	Mental Health Review Tribunal Rule 2009	27/02/2009	4/08/2009	22/04/2009	5/08/2009
19	Fisheries Legislation Amendment Regulation (No.1) 2009	27/02/2009	4/08/2009	22/04/2009	5/08/2009
20	Public Trustee Amendment Regulation (No.2) 2009	27/02/2009	4/08/2009	22/04/2009	5/08/2009
21	Lotteries Amendment Rule (No.1) 2009	18/03/2009	4/08/2009	22/04/2009	5/08/2009
22	Urban Land Development Authority Amendment Regulation (No.1) 2009	20/03/2009	4/08/2009	22/04/2009	5/08/2009
23	Liquor Amendment Regulation (No.1) 2009	20/03/2009	4/08/2009	22/04/2009	5/08/2009
24	Public Trustee Amendment Regulation (No.3) 2009	20/03/2009	4/08/2009	22/04/2009	5/08/2009

25	Disaster Management (Extension of Disaster Situation-Brisbane) Regulation 2009	20/03/2009	4/08/2009	22/04/2009	5/08/2009
26	Disaster Management (Further Extension of Disaster Situation-Brisbane) Regulation 2009	27/03/2009	4/08/2009	22/04/2009	5/08/2009
27	Motor Accident Insurance Amendment Regulation (No.1) 2009	27/03/2009	4/08/2009	22/04/2009	5/08/2009
28	Nature Conservation (Protected Plants Harvest Period) Notice 2009	1/04/2009	4/08/2009	22/04/2009	5/08/2009
29	Disaster Management (Further Extension of Disaster Situation-Brisbane) Regulation (No.2) 2009	3/04/2009	4/08/2009	22/04/2009	5/08/2009
30	Disaster Management (Further Extension of Disaster Situation-Brisbane) Regulation (No.3) 2009	9/04/2009	4/08/2009	22/04/2009	5/08/2009
31	Pest Management Amendment Regulation (No.1) 2009	17/04/2009	4/08/2009	22/04/2009	5/08/2009
32	Rurual and Regional Adjustment Amendment Regulation (No.1) 2009	17/04/2009	4/08/2009	22/04/2009	5/08/2009
33	Primary Industries and Fisheries Legislation Amendment Regulation (No.1) 2009	17/04/2009	4/08/2009	22/04/2009	5/08/2009
34	Proclamation commencing remaining provisions	17/04/2009	4/08/2009	22/04/2009	5/08/2009
35	Local Government Legislation Amendment Regulation (No.1) 2009	17/04/2009	4/08/2009	22/04/2009	5/08/2009
36	Disaster Management (Further Extension of Disaster Situation-Brisbane) Regulation (No.4) 2009	17/04/2009	4/08/2009	22/04/2009	5/08/2009

PART 3 – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

18. WORKPLACE HEALTH AND SAFETY REGULATION 2008 SL 283/08

Disallowance date: 27 November 2008

BACKGROUND

1. The committee considered this subordinate legislation on 24 November 2008.

2. The committee wrote to the Minister seeking clarification of section 135(4).

CORRESPONDENCE RECEIVED FROM MINISTER

3. In respect of the subordinate legislation, the committee received a letter dated 22 December 2008 from the Minister. A copy appears on the following page.

4. The committee thanks the Minister for the information provided in his letter.

5. The committee makes no further comment regarding the subordinate legislation.

19. COMMISSION FOR CHILDREN AND YOUNG PEOPLE AND CHILD GUARDIAN AMENDMENT REGULATION (NO. 2) 2008 SL 336/08

Disallowance date: 12 February 2009

BACKGROUND

1. The committee considered this subordinate legislation on 24 November 2008.

2. The committee wrote to the Minister requesting further information as to the rationale of section 3, and how it is intended to operate in practice.

CORRESPONDENCE RECEIVED FROM MINISTER

3. In respect of the subordinate legislation, the committee received a letter dated 9 February 2009 from the Premier. A copy appears on the following page.

4. The committee thanks the Premier for the information provided in her letter.

5. The committee makes no further comment regarding the subordinate legislation.