
# 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)<br>• Explanatory notes (part 4) | • Meaning of 'subordinate legislation' (section 9)<br>• Guidelines for regulatory impact statements (part 5)<br>• Procedures after making of subordinate legislation (part 6)<br>• Staged automatic expiry of subordinate legislation (part 7)<br>• Forms (part 8)<br>• Transitional (part 10) |

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

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

## 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. INFORMATION PRIVACY BILL 2009

**Date introduced:** 19 May 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 113 and 118(2)** which may affect rights and liberties of individuals as they would operate to override claims to legal professional privilege;
   - **clauses 127 and 128**, relating to vexatious applicants;
   - **clauses 184 to 188** which would create offences;
   - **clause 113** which would confer power to enter premises and post-entry powers; and
   - **clauses 179 to 183** which would confer immunity from proceeding and prosecution.
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 157(2)** which may authorise the amendment of an Act by way of gazette notice.

### BACKGROUND

3. The bill would establish in Queensland a legislative privacy regime, replacing an administrative public sector privacy regime. Together with the Right to Information Bill 2009, the bill would form a new legislative framework for public access to government information.

### LEGISLATIVE PURPOSE

4. The bill is intended to provide:[1]
   - safeguards for the handling of personal information held by government; and
   - a mechanism for people to access and amend their personal information.

### 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 38 and 40 to 42** may affect individual rights to information privacy.

1 Hon AM Bligh MP, *Queensland Parliamentary Debates (Hansard)*, 19 May 2009, 309

7. Clause 38 allows for the provision of information to Ministers about matters relevant to the Minister's responsibilities. The information provided might include personal information.

8. Clauses 40 to 42 provide rights to access and amend documents. To the extent that documents accessed and amended may contain other individuals' personal information, clauses 40 to 42 may affect rights and liberties of individuals.

9. The committee notes, however, that within the public sector environment the bill is directed to safeguarding the information privacy rights of all individuals. Accordingly, the bill contains protections of individual privacy, such as clause 56 (Disclosure of concern to third party).

10. **Clauses 113 and 118(2)** may affect rights and liberties of individuals as they would operate to override claims to legal professional privilege.

11. Clause 113 would allow the information commissioner to access the documents of an agency or Minister, including documents protected by legal professional privilege. Clause 118(2) states that legal professional privilege does not apply to the production of documents or the giving of evidence by a member of an agency or Minister for the purposes of external review.

12. The explanatory notes provide justification for any inconsistency with rights and liberties of individuals (at 5):

*The abrogation of the right to claim legal professional privilege is justified as being necessary to ensure the Information Commissioner has the ability to properly consider and determine external reviews. Obligations are placed on the Information Commissioner and the Commissioner's staff ensure such information is protected. Under clause 120 the Information Commissioner must ensure information or documents provided are not disclosed other than to specified persons and documents must be returned at the end of an external review. Additionally, under clause 120 the Information Commissioner must make such directions considered necessary to avoid disclosure to an access participant. Also, it is an offence under clause 188 for the Information Commissioner or a staff member to disclose information obtained in performance of functions under the Bill.*

13. **Clauses 127 and 128** in chapter 3, part 10, relating to vexatious applicants, have the potential to affect rights and liberties of individuals. Explanatory notes outline the operation of part 10 (at 5):

*Under the Bill, the Information Commissioner can make a vexatious applicant declaration which may include conditions that prohibit a person from making an access application, internal review application or external review application without the permission of the Information Commissioner.*

14. The explanatory notes suggest that clauses 127 and 128 have sufficient regard to rights and liberties of individuals (at 5-6). The information provided is in the same terms as the information provided in the explanatory notes to the Right to Information Bill regarding the equivalent clauses in that bill: see chapter 7, paragraphs 13-14 (page 44).

15. **Various clauses** 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 | Offence | Proposed maximum penalty |
|---|---|---|
| 184(1) | Giving a direction, either orally or in writing, to a person permitted to make a decision under this Act to make a decision the person believes is not the decision that should be made under this Act | 100 penalty units ($10000) |
| 184(3) | Giving a direction, either orally or in writing, to a person who is an employee or officer of the agency involved in a matter under this Act directing the person to act contrary to the requirements of this Act | 100 penalty units ($10 000) |
| 185 | Knowingly deceive or mislead a person exercising powers under this Act in order to gain access to a document containing another person's personal information | 100 penalty units ($10 000) |

| Clause | Offence | Proposed maximum penalty |
|---|---|---|
| 186(1) | Giving false or misleading information to the information commissioner or a member of their staff that the person knows is false or misleading in a material particular | 100 penalty units ($10 000) |
| 187(1) | Failing to produce documents or attend proceedings having received notice to do so without reasonable excuse | 100 penalty units ($10 000) |
| 188 | Disclosing information or taking advantage of that information to benefit himself or herself or another person | 100 penalty units ($10 000) |

**Power to enter premises**

16. 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.

17. **Clause 113** would, by implication, confer power to enter premises and post-entry powers. It would state:

> If an external review application is made, the information commissioner is entitled to full and free access at all reasonable times to the documents of the agency or Minister concerned, including documents protected by legal professional privilege.

18. In respect of clause 113 and the power to enter premises, the explanatory notes indicate (at 5):

> *Consistent with the Right to Information Bill, the Bill will provide enhanced powers of entry and search to the Information Commissioner and entitle the Commissioner to full and free access at all reasonable times to the records of an agency (clause 113). The exercise of these powers will be subject to Parliamentary scrutiny and is considered essential to ensure accountability and transparency in the administration of the Bill.*

19. Clause 113 is in similar terms to clause 100 of the Right to Information Bill. As for the latter clause, the committee has examined carefully clause 113. It would confer, without the need for a warrant or consent, powers to enter premises and further powers exercisable following entry. In relation to such provisions, the committee considers in particular whether safeguards of individual rights are provided in the legislation.

20. However, as for clause 100 of the Right to Information Bill, clause 113 does not state in clear terms the nature of the entry and post-entry powers to be conferred. Nor does it contain safeguards regarding the exercise of the powers. Further, clause 113 does not make clear who may exercise the powers, although clause 139 provides for delegation to any member of the staff of the Office of the Information Commissioner all or any of the commissioner's powers under the Information Privacy Bill.

21. Clause 113 may be compared to clause 46 of the Auditor-General Bill 2009. Apparently similar powers would be conferred by the Auditor-General Bill, for similar purposes, yet clause 46 of that bill contains far more prescription as to the powers to be exercised. The Auditor-General Bill also contains some safeguards to protect the rights and liberties of individuals. These include identity cards for authorised auditors (clause 44), compensation payable for loss or expense (clause 49) and duties of confidentiality (clause 53).

22. Therefore, although clause 113 would by implication confer power to enter premises and search for or seize documents, the powers to be conferred would not require a warrant issued by a judge or other judicial officer. While the powers would relate to documents in the public sector environment, the committee identifies, for the consideration of the Parliament when determining whether clause

113 has sufficient regard to rights and liberties of individuals, a possible lack of prescription regarding the:

- scope of the entry and post-entry powers to be conferred;
- the persons who would be able to exercise them; and
- safeguards of individual rights and liberties provided by the legislation.

**Immunity from proceeding or prosecution**

23. 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.

24. **Clauses 179 to 183** would confer immunity from proceeding and prosecution. The proposed provisions would operate to protect a range of institutions and people:

- clauses 179 (Access – protection against actions for defamation or breach of confidence) and 180 (Publication – protection against actions for defamation or breach of confidence) would provide immunity to the State, an agency, a Minister or an officer of an agency, the author of a document or another person;
- clauses 181 (Access – protection in respect of offences) and 182 (Publication – protection in respect of offences) would protect from criminal liability persons authorising access or publication and any other person concerned in the giving of access or publication; and
- clause 183 (Protection of agency, information commissioner etc. from personal liability) would provide immunity in respect of an act done or omission made honestly and without negligence under the Act, with liability to attach instead to the State.

25. In respect of consistency with fundamental legislative principles, the explanatory notes outline the immunities to be conferred then state (at 6):

*It is submitted that conferral of immunity as outlined above is appropriate for persons carrying out statutory functions.*

## SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

**Amendment of Act other than by another Act**

26. Section 4(4)(c) of the *Legislative Standards Act* states that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

27. **Clause 157(2)** may authorise the amendment of an Act by way of gazette notice. It would allow the information commissioner, by gazette notice, to waive or modify the privacy principles contained in the legislation. Clause 157(3) would require that any gazette notice issued under clause 157(2) be tabled in the Parliament and be subject to disallowance under section 50 of the *Statutory Instruments Act*.

28. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. The committee has defined an 'Henry VIII clause' to mean a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.

29. In January 1997, the committee reported to the Parliament on Henry VIII clauses.[2] While the committee has generally opposed the use of Henry VIII clauses in bills, the committee's report stated

2 Report no 3, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, available at www.parliament.qld.gov.au/slc.

that usually it did not consider provisions enabling definitions of terms to be extended by regulation to be Henry VIII clauses. Further, the committee stated that it considered Henry VIII clauses may be excusable, depending on the given circumstances, where the clause is to facilitate:

- immediate executive action;
- the effective application of innovative legislation;
- transitional arrangements; and
- the application of national schemes of legislation.

30. Where provisions fall within the scope of those considered 'Henry VIII' provisions, the committee then examines whether the provisions would represent inappropriate delegation of legislative power.

31. Clause 157, which would enable the information commissioner to waive or modify an agency's obligations to comply with the provisions of the Information Privacy Act, may be regarded as a Henry VIII provision. It could be argued that it would fall within the second of the categories regarded by the committee as unobjectionable; namely, that clause 157 would facilitate the effective application of innovative legislation.

32. Generally, when examining a possible Henry VIII provision, the committee considers also whether such provisions appropriately delegate legislative power. In this context, the committee notes that some justification is provided in the explanatory notes (at 6-7):

*Clause 157 provides that an agency may apply to the Information Commissioner to waive or modify the agency's obligation to comply with the privacy principles. Such approvals may be granted only if the Commissioner is satisfied that there is an overriding public interest in doing so. While an approval is in force, the agency to which it applies does not contravene the legislation in relation to the privacy principles if it acts in accordance with the approval. It is considered necessary that the Bill allow a mechanism for a waiver of privacy principle obligations to provide flexibility in balancing the interests of protection of individuals' personal information against other emerging public interests. The waiver process is similar to public interest determinations issued under privacy legislation in the Commonwealth, New South Wales, Tasmania and Northern Territory.*

*To ensure that this mechanism has sufficient regard to the institution of Parliament, the provision requires that the approval be publicly notified by gazette notice and tabled in the Legislative Assembly. This recognises the important role of Parliamentary scrutiny by ensuring that the notice is subject to the possibility of disallowance by the Parliament.*

## 2. JUVENILE JUSTICE AND OTHER ACTS AMENDMENT BILL 2009

**Date introduced:** 19 May 2009

**Responsible minister:** Hon KL Struthers MP

**Portfolio responsibility:** Minister for Community Services and Housing and Minister for Women

### 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 21 to 24** which would allow an arrest warrant to be issued in specified circumstances;
   - **clause 28** which would alter the period within which community service orders must be completed;
   - **clause 40** which may affect information privacy rights;
   - **clause 7** which would create a new offence of publishing information identifying a child victim;
   - **clause 2** providing for retrospective operation of part 2 of the bill; and
   - **clause 25** and invites the Minister to provide further information regarding clause 25 which would set at 20 years the minimum non-parole period for a young person sentenced for more than one offence of murder.

### BACKGROUND

2. Following a review of the *Juvenile Justice Act 1992*, the bill is to implement required legislative reforms.

### LEGISLATIVE PURPOSE

3. The bill is intended to amend existing juvenile justice legislation to (explanatory notes at 1-2):
   - *give courts specific powers to place curfews on juvenile offenders to reduce the chances of them reoffending and to ensure they are properly supervised;*
   - *widen court powers in relation to naming juvenile offenders, allowing orders to be issued allowing publication of identifying information if the court considers it to be in the interests of justice to do so;*
   - *increase the minimum mandatory detention period for young people convicted of multiple murders from 15 years to 20 years' imprisonment;*
   - *give police stronger powers to arrest and take to court young people who:*
     - *do not comply with youth justice conferencing requirements; or*
     - *contravene an agreement; or*
     - *fail to attend a drug assessment session;*
   - *require courts to consider setting a date for the transfer of offenders from youth detention to adult prison when sentencing young offenders to be detained beyond the age of 18;*
   - *automatically prohibit the publication of information which identifies a child victim;*
   - *contribute to reducing remand levels by:*
     - *requiring courts to consider the likely sentence when making bail decisions;*
     - *clarifying that if a young person is remanded in detention because of a threat of harm to their safety, the threat must arise from the circumstances of the alleged offence (such as a threat of retribution from a victim or a co-accused);*
   - *update the name of the* Juvenile Justice Act 1992 *to the* Youth Justice Act 1992*; and*
   - *make minor amendments (eg to give victims the right to bring more than one support person with them to a formal youth justice conference) to improve the workability of the relevant Acts.*

4. Therefore, the bill would amend the:

- *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*;
- *Child Protection Act 1999*;
- *Juvenile Justice Act*; and
- *Young Offenders (Interstate Transfer) Act 1987*.

5. In addition, the bill would effect consequential amendments to the Acts identified in the schedule.

## 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 21 to 24** would affect rights and liberties of young people as the proposed provisions would allow an arrest warrant to be issued in specified circumstances. The following provisions of the *Juvenile Justice Act* would be amended:

- clause 21 – section 164 (Powers of proper officer if indefinite referral is unsuccessful or if child contravenes agreement made on court's indefinite referral);
- clause 22 – section 165 (If an agreement is made on a referral by a court to a conference before sentence);
- clause 23 – section 166 (Court may take no further action if agreement is made); and
- clause 24 – section 174 (If child fails to attend drug assessment and education session).

8. The explanatory notes provide information as to whether clauses 21 to 24 have sufficient regard to rights and liberties of young people who may be affected by the amendments:

*Sections 164, 165, 166 and 174 are to be amended to allow a warrant for arrest to be issued for children who fail to appear at court following an unsuccessful conference, contravention of an agreement or failure to attend a drug assessment and education session. This may infringe on the rights and liberties of children subjected to such warrants.*

*However, the infringement is justified as the arrest warrant process is required to ensure that the child can be brought back to the court and resentenced as is intended by the JJA. Further, it will ensure consistency between the above circumstances and the process for dealing with a young person who has breached a term of a community based order.*

*An additional amendment will be made to require that a warning be given to children that an arrest warrant may be issued if the child fails to appear in court. This provides further protection of the child's liberty in these circumstances.*

9. **Clause 25** has the potential to affect rights and liberties of individuals as it would increase the minimum period of detention for a young person sentenced for more than one offence of murder.

10. Clause 25 would replace existing section 176(6) of the *Juvenile Justice Act* with the following subsection:

The Criminal Code, section 305(2) and (3) applies to a court sentencing a child to detention for life on a conviction of murder.

*Note—*

For the child's parole eligibility, see section 233 of this Act and the *Corrective Services Act 2006*, section 181.

11. Section 305 of the Criminal Code provides:

> **(1)** Any person who commits the crime of murder is liable to imprisonment for life, which cannot be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992*.
>
> **(2)** If the person is being sentenced—
>
> (a) on more than 1 conviction of murder; or
>
> (b) on 1 conviction of murder and another offence of murder is taken into account; or
>
> (c) on a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder;
>
> the court sentencing the person must make an order that the person must not be released from imprisonment until the person has served a minimum of 20 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.
>
> **(3)** Subsection (2)(c) applies whether the crime for which the person is being sentenced was committed before or after the conviction for the other offence of murder mentioned in the paragraph.

12. Subsections 305(2) and (3) were inserted into the Criminal Code by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997*. Under existing legislation, section 305(2) and (3) does not apply to young people to whom the *Juvenile Justice Act* applies.[3] Young people convicted of murder are sentenced under section 176(3) of the *Juvenile Justice Act* which provides for a sentence of a period up to and including the maximum of 'life'. Under the Criminal Code, adults convicted of murder are liable to 'imprisonment for life'.

13. In respect of both the *Juvenile Justice Act* and the Criminal Code, the operation of section 181(3) of the *Corrective Services Act 2006* means that the earliest time at which a person sentenced to 'life' may apply for parole is following 15 years' imprisonment. Currently, where section 305(2) applies to an adult, a sentencing court must order a minimum of 20 years' imprisonment before release on parole. Clause 25 would operate to extend the minimum parole period of 20 years to young people where section 305(2) applied.

14. In respect of clause 25, the explanatory notes suggest that justification exists for any breach of fundamental legislative principles (at 3-4):

> *The proposal to increase the mandatory minimum non-parole period from 15 to 20 years for multiple murders is a potential breach of fundamental legislative principles. Currently, a mandatory minimum period of 15 years applies for juveniles and adults convicted of murder. However, for multiple murders, only adults are subject to a minimum 20 year non-parole period.*
>
> *The potential to infringe on the rights and liberties of the individual subject to this provision is present in two respects. Firstly, it represents an increase in penalty. This is justified on the grounds of making the multiple murder provisions for juveniles consistent with the provisions relating to a single murder. The penalty reflects the seriousness of the offending. Parliament has previously determined that parity between juveniles and adults is appropriate for single murders where there is a life sentence and there appears to be no factors to justify a different principle being applied for multiple murders.*
>
> *Secondly, the amendment will prescribe a mandatory minimum sentence which potentially impacts on judicial independence by limiting the court's discretion. However, the amendment only applies to children sentenced to life imprisonment for multiple murders under section 176(3)(b) of the JJA, at which point the court will already have given consideration to the specific circumstances of the offence and determined that it is particularly heinous having regard to all the circumstances of the case. It is not intended to apply unless a life sentence is given for more than one of the murders and so achieves a balance between protection of the community and the rights of the person who may be subject to the order. The Parliament has previously decided that a mandatory minimum sentence is appropriate for a single murder and there appear to be no factors to justify a different approach being applied for multiple murders.*

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3 *Juvenile Justice Act*, s 121; as to mandatory sentencing, see *R v Glebow* [2008] 1QdR 465 and Sentencing Advisory Council (Victoria), *Sentencing Matters: Mandatory Sentencing* (2008).

15. Clause 25 demonstrates a clear parliamentary intention to increase to 20 years the minimum non-parole period. However, the committee notes that the explanatory notes provide little information regarding legislative provisions currently operating to set the maximum term of imprisonment (compared with the proposed mandatory minimum 20 years) to which young people may be sentenced in respect of multiple murders. To assist the Parliament, the committee invites the Minister to provide information about this matter.

16. **Clause 28** may affect rights and liberties of individuals. It would amend section 198 (community service to be performed within limited period) of the *Juvenile Justice Act* to alter the period within which community service orders must be completed.

17. The explanatory notes indicate the way in which rights and liberties of individuals might be affected (at 3):

*This could impact on the rights and liberties of the individual by making it more onerous to complete the order within the specified timeframe.*

18. Justification is provided for any breach of fundamental legislative principles (at 3):

*However, the amendment is intended to ensure that orders are completed in line with the Juvenile Justice Principle 11 which requires that a decision affecting a child should, if practicable, be made and implemented within a timeframe appropriate to the child's sense of time.*

*In stipulating the timeframe, the court will be required to consider what is reasonable in the circumstances of the case. Allowing the order to be completed in a more timely way will ensure that young people do not have the order 'hanging over their head' any longer than necessary.*

19. **Clause 40** may affect information privacy rights. It would insert a new section 289AA in the *Juvenile Justice Act* which would allow the chief executive to disclose confidential information, including personal information, to the commissioner of the police services. Clause 40(1) would require the chief executive to be satisfied the disclosure would be in the public interest.

20. The explanatory notes indicate (at 4):

*This amendment would have the effect of allowing information, such as possible further offending, to be passed on to the Queensland Police Service, thereby potentially impacting on the rights and liberties of the young person.*

*This is considered to be justified given the need to hold young people accountable for their offending in accordance with Juvenile Justice Principle 8 which states that a young person who commits an offence should be held accountable and encouraged to accept responsibility for the offending behaviour. It is also considered to be justified given the need to protect the public from the ongoing commission of offences.*

*As a safeguard, disclosure is only permitted by the Chief Executive of the Department of Communities who may only disclose the information to the Queensland Police Commissioner, and only where disclosure is in the public interest. In addition, the decision by the Chief Executive to disclose the information would be reviewable under the* Judicial Review Act 1991.

21. **Clause 7** would insert a new offence in the *Child Protection Act 1999*, with the potential to affect rights and liberties of individuals. The proposed offence and its maximum penalties are set out below.

| Clause | New section | Offence | Proposed maximum penalty |
|---|---|---|---|
| 7 | 194(1) | Publication of identifying information about a child victim | Individual – 100 penalty units ($10 000) or two years' imprisonment<br><br>Corporation – 1000 penalty units ($100 000) |

**Retrospective operation**

22. 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.

23. **Clause 2** would provide for the retrospective operation of part 2 of the bill. Clause 2(1) would state:

> Part 2 is taken to have commenced on 31 January 2009.

24. 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.

25. In this context, the committee notes that the explanatory notes indicate the purpose of the retrospective operation of clause 4, the substantive provision in part 2. The information provided (at 6) indicates that clause 2 is likely to have sufficient regard to rights and liberties of individuals:

> *Clause 4 amends section 60V* [of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* ] *to change the reporting period for the Island Industries Board* [from] *1 February to 31 January in the succeeding year.*
>
> *This amendment is to take effect on 31 January 2009 (retrospectively) to ensure that the Board is not required to recast its accounts for the 2008 operational year and make subsequent adjustments to its accounts for two financial years.*

## 3. MINES AND ENERGY LEGISLATION AMENDMENT BILL 2009

**Date introduced:** 19 May 2009

**Responsible minister:** Hon GJ Wilson MP

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

### 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 31, 66 and 82** which would allow a limited extension of the time in which proceedings for relevant offences may be commenced; and
   - **clauses 11, 32, 67 and 80** inserting new offence provisions regarding reprisals in the various Acts to be amended by the bill.
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 48** which would delegate legislative power to the Australian Energy Market Operator.

### BACKGROUND

3. For various purposes, the bill would amend nine statutes relating to mines and energy matters.

### LEGISLATIVE PURPOSE

4. The bill is intended to (explanatory notes at 1-2):
   - transfer responsibility for the economic regulation of the Mount Isa-Cloncurry electricity distribution network from the Queensland Competition Authority to the Australian Energy Regulator;
   - support the establishment of the Australian Energy Market Operator as the single energy market operator for both electricity and gas markets in eastern Australia;
   - align the workplace health and safety provisions in mining and petroleum Acts to recent amendments in the *Workplace Health and Safety Act 1995*;
   - implement some recommendations from a report of the Queensland Ombudsman, *The Regulation of Mine Safety in Queensland: A Review of the Queensland Mines Inspectorate*; and
   - clarify and improve the administration and operation of the petroleum regulatory framework.
5. Therefore, the bill would amend the:
   - *Coal Mining Safety and Health Act 1999*;
   - *Electricity Act 1994*;
   - *Electricity - National Scheme (Queensland) Act 1997*;
   - *Explosives Act 1999*;
   - *Gas Supply Act 2003*;
   - *Mineral Resources Act 1989*;

- *Mining and Quarrying Safety and Health Act 1999*;
- *Petroleum Act 1923*; and
- *Petroleum and Gas (Production and Safety) Act 2004*.

## 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 31, 66 and 82** may affect rights and liberties of individuals. Each clause would effect an amendment to allow a limited extension to the time in which proceedings for relevant offences may be commenced. The committee notes, however, that in each case the extension is to permit investigation to commence after coronial recommendation (see explanatory notes at 18, 27 and 32).

8. **Clauses 11, 32, 67 and 80** 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 |
|---|---|---|---|
| *Coal Mining Safety and Health Act* | | | |
| 11 | 275AA(1) | Reprisal or the taking of a reprisal | 40 penalty units ($4000) |
| *Explosives Act* | | | |
| 32 | 126A(1) | Reprisal or the taking of a reprisal | 40 penalty units ($4000) |
| *Mining and Quarrying Safety and Health Act* | | | |
| 67 | 254A(1) | Reprisal or the taking of a reprisal | 40 penalty units ($4000) |
| *Petroleum and Gas (Production and Safety) Act* | | | |
| 80 | 708C(1) | Reprisal or the taking of a reprisal | 40 penalty units ($4000) |

### SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

**Parliamentary scrutiny of delegated power**

9. 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.

10. **Clause 48** would delegate legislative power to the Australian Energy Market Operator. The new section 323(2)(a) of the *Gas Supply Act* would allow regulations to be made for:

> any matter that may, under the *National Gas (Queensland) Law*, be prescribed under jurisdictional gas legislation.

11. The committee's practice is to draw to the attention of the Parliament provisions of a bill which are to give effect to national scheme legislation and, in particular, elements of an intergovernmental legislative scheme which might undermine the institution of Parliament. The committee, in common

with the legislative scrutiny committees of the Parliaments of other Australian States and territories and the Commonwealth, generally warns of a possible perception of a reduced need for scrutiny of such legislation. Further, the committee draws attention to legislation that might allow the executive to formulate, manage and possibly alter such schemes to the exclusion of legislatures.

12. In *The Constitutional Systems of the Australian States and Territories*, Professor Gerard Carney provides a summary of relevant concerns:[4]

*A risk of many Commonwealth and State cooperative schemes is 'executive federalism'; that is, the executive branches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question. Thereafter, in an extreme case, the power to amend the scheme may even rest entirely with a joint executive authority. Other instances of concern include, for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority. Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government. A further concern is the availability of judicial review in respect of the decisions and actions of these joint authorities.*

*Certainly, political responsibility must still be taken by each government for both joining and remaining in the cooperative scheme. Some blurring of accountability is an inevitable disadvantage of cooperation – a disadvantage usually outweighed by the advantages of entering this scheme. But greater scrutiny is possible by an enhanced and investigative role for all Commonwealth, State and territory legislatures.*

13. The explanatory notes to the bill acknowledge that the bill, in respect of the proposed amendments to support the establishment of AEMO, may be inconsistent with fundamental legislative principles. Justification for any inconsistency is provided (at 7-8):

*In order to create a national market, delegation to a body under uniform legislation is required. Whilst this approach allows no significant opportunity for scrutiny by the Queensland Parliament and no opportunity to propose amendments, it should be noted Queensland participates in COAG discussions which have recognised effective operation of an open and competitive national energy market will deliver benefits to households, small business and industry.*

*Queensland actively participates in the policy development of all applied laws in co-operation with the other states and territories and amendments to the national laws must be approved unanimously by the MCE prior to introduction. The process for introducing amendments to jurisdictionally based legislation upon amendments to the NEL and NGL is the continuation of a well established legislative scheme agreed by COAG.*

*The formation of AEMO is expected to provide long-term benefits to Queensland energy consumers through effective operation of a single energy market operator without infringing customer rights or protection measures. It is considered these benefits and the need for a national market outweigh any concerns regarding Fundamental Legislative Principles.*

*Further, the NEL and NGL amendments to implement AEMO will simplify the legislative burden as AEMO will operate across national energy markets, consistent with the NEL and NGL objectives.*

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### EXPLANATORY NOTES

14. 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.

4 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) 17-21.

15. The explanatory notes to the bill outline two ways in which the bill seeks to give effect to national agreements:

- the transfer of responsibility for the economic regulation of the Mount Isa-Cloncurry network to the Australian Energy Regulator; and
- measures relevant to the establishment of the Australian Energy Market Operator.

16. In relation to the Australian Energy Regulator, the explanatory notes provide the following information is provided regarding the intergovernmental agreement (at 5, 2-3):

*The transfer of economic regulation responsibility to the AER will be achieved by amendments to the* Electricity – National Scheme (Queensland) Act 1997 *and the* Electricity Act 1994*.*

*Since 2001 the QCA has regulated both the Mount Isa Network and the national grid-connected distribution networks in Queensland in accordance with the National Electricity Rules (NER).*

*Under the Australian Energy Market Agreement (AEMA) responsibility for regulating Queensland's national grid-connected distribution networks will transfer from the QCA to the AER, commencing with the next regulatory period (1 July 2010 to 30 June 2015).*

*The AEMA is an intergovernmental agreement signed in 2004 (and amended in 2006) under which first Ministers of the Commonwealth and the States and Territories agreed to a range of reforms to the national energy markets including the economic regulation of the national electricity grid.*

*The Bill proposes amendments to transfer regulation of the Mount Isa Network to the AER at the same time as the national grid-connected networks to maintain consistency with the current arrangements. Separate regulation of the Mount Isa Network would be inefficient for both Ergon Energy and the regulators involved.*

*Furthermore, by ensuring common regulation with Ergon Energy's other distribution network assets, the Bill also simplifies future regulatory arrangements should the Mount Isa Network ever become interconnected with the national grid.*

17. In relation to the Australian Energy Market Operator, the information provided includes (at 5, 3-4):

*AEMO is to be implemented largely through amendments to the National Electricity Law (NEL) and NGL and associated Rules. Amendments to the NEL and NGL were introduced to the South Australian Parliament in May 2009. Following MCE approval, South Australia is the lead legislature for national energy legislation, following MCE approval.*

*The amendments to the national scheme legislation will be adopted in Queensland through the* National Gas (Queensland) Act 2008 *and the* Electricity – National Scheme (Queensland) Act 1997. *Minor consequential amendments will also be required to the* Electricity Act 1994 *and* Gas Supply Act 2003*, including the transfer of the Queensland Gas Market Retail Rules to become procedures under the national framework.*

*On 13 April 2007, the Council of Australian Governments (COAG) agreed to establish a single energy market operator for gas and electricity in order to strengthen the character of national energy market governance. This initiative is part of the Ministerial Council on Energy's (MCE) ongoing energy market reform program. The reforms have aimed to strengthen energy market governance, streamline regulatory arrangements and provide leadership in addressing the opportunities and challenges facing the energy sector.*

*COAG agreed AEMO will assume the functions of the National Electricity Market Management Company (NEMMCO), which operates the wholesale electricity exchange and retail market for the Queensland region of the National Electricity Market. AEMO will also assume the functions of various jurisdictional gas market operators, including Queensland's Gas Retail Market Operator.*

*Under this process the existing market operators will be absorbed by AEMO. In addition, it was agreed AEMO would adopt the following new functions: the National Transmission Planner for electricity; the gas market Bulletin Board operator; advisor to the National Gas Emergency Response Advisory Committee; and preparation of the proposed gas market Statement of Opportunities.*

*With regard to the transfer of the gas retail market operator functions, including the Queensland Gas Retail Market Operator (QGRMO), the MCE has agreed the entire framework will be established under a new national regime, replacing the various existing jurisdictional arrangements.*

*While jurisdiction-specific retail market rules will be maintained (at least initially), they will be applied as procedures under the national framework with the ability to form a common set of Retail Market Procedures (Retail Procedures) in the future. The Queensland Gas Market Retail Rules in Annexure A of the Queensland Gas Industry Code (the Queensland Code) will therefore be remade as the Gas Retail Market Procedures (Queensland) under the National Gas Law (NGL).*

*The consumer protection elements of the Queensland Code are to be retained within the Queensland regulatory framework.*

## 4. QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL BILL 2009

**Date introduced:** 19 May 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 rights and liberties of individuals, the committee has examined a large number of provisions. In each case, the explanatory notes provide detailed information and justification indicating sufficient regard to rights and liberties of individuals.

2. In relation to whether the bill has sufficient regard to the institution of Parliament:

   - the committee invites information from the Minister regarding whether clauses 175 and 176 might require the consent of a judge who is to be recommended for appointment; and
   - the committee has examined a further large number of provisions – again, in respect of these provisions, the explanatory notes provide detailed information and justification indicating sufficient regard to the institution of Parliament.

### BACKGROUND

3. In March 2008, the Queensland Government announced that it would establish a civil and administrative tribunal. The bill creates the tribunal, provides for its jurisdiction and related functions and the practices and procedures for proceedings before the tribunal. The bill also makes provision for tribunal membership and staffing.

4. The bill is a cognate bill with the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Bill 2009.

### LEGISLATIVE PURPOSE

5. The bill is intended to (explanatory notes at 1):

   - establish an independent tribunal to deal with matters for which it has jurisdiction;
   - ensure the tribunal deals with matters in a way that is accessible, fair, just, economical, informal and quick;
   - promote the quality and consistency of the tribunal's decisions
   - enhance the quality and consistency of original decision making
   - enhance the openness and accountability of public administration.

6. It would repeal the:

   - *Children Services Tribunal Act 2000*;
   - *Commercial and Consumer Tribunal Act 2003*;
   - *Misconduct Tribunals Act 1997*; and
   - *Small Claims Tribunals Act 1973*.

## 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 184 and 199** may affect rights of individuals. They would allow the Minister to obtain information from the Police Commissioner about the criminal history of a member or adjudicator or a person being considered for appointment as a member or an adjudicator. Schedule 3 defines 'criminal history' to include convictions that have become spent under the *Criminal Law (Rehabilitation of Offenders) Act 1986* and charges. In relation to prospective members or adjudicators, the request for information from the Police Commissioner may only be made with the consent of the relevant person (clauses 184(3) and 199(3)).

9. The explanatory notes indicate that clauses 184 and 199 have sufficient regard to rights and liberties of individuals (at 17-18):

> *These provisions are required primarily for the child protection jurisdiction of QCAT and mirror the criminal history screening provisions currently set out in section 17 of the* Children Services Tribunal Act 2000*. This section was originally justified on the basis that tribunal members, in reviewing decisions about vulnerable children in the child protection system, are likely to have direct or indirect contact with and access to personal details about children and young people. This power is consistent with the blue card provisions of the* Commission for Children and Young People and Child Guardian Act 2000*, although, unlike that Act, investigative information cannot be accessed. Because QCAT members and adjudicators could be expected to sit on a range of matters and may not be confined to sitting only on matters in a particular jurisdiction, it is necessary for all members and adjudicators to be subject to the same screening regime.*
>
> *The provisions also include the following safeguards:*
>
> - *the person to which the police information relates must be given the information and a reasonable opportunity to make representations to the Minister about the information before the Minister uses the information*
> - *the Minister must ensure the report containing the information is destroyed as soon as practicable after it is no longer needed for the purpose for which it was requested from the Police Commissioner.*

10. The provisions of the *Criminal Law (Rehabilitation of Offenders) Act* to be expressly excluded by the definition in schedule 3 relate to:

- section 5 – a conviction that is set aside, or quashed, is not to be included in a criminals history; and
- section 6 – non-disclosure of convictions upon expiration of the 'rehabilitation period' (defined in section 3).

11. Accordingly, the committee notes that the definition of 'criminal history' in schedule 3 may be compared with the *Criminal Law (Rehabilitation of Offenders) Act* definition of 'criminal history': 'in relation to any person, the convictions recorded against that person in respect of offences'. Therefore, clauses 184 and 199, extend the definition to past charges for offences, not merely convictions, as provided in the *Criminal Law (Rehabilitation of Offenders) Act*. The clauses also extend the definition to include convictions that have been set aside or quashed on appeal. It would be a statutory modification of the fundamental right to be presumed innocent until proven guilty.

12. **Clause 233** may affect rights to information privacy. Clause 233 would prohibit those performing functions under the Act from disclosing personal information obtained through performing the functions. Clause 233(3) identifies circumstances where disclosure would be lawful.

13. The committee notes that (explanatory notes at 18):

*These exceptions to the prohibition are standard exceptions in similar legislation and are aimed at facilitating performance of functions under the Act or an enabling Act, enabling access to de-identified information for the purpose of research, facilitating the investigation and prosecution of suspected offences and protecting others from harm or injury.*

14. **Clauses 255 and 267** may affect the rights of individuals who are parties to proceedings before tribunals or courts where, following commencement of the legislation, the proceedings will be heard by the Queensland Civil and Administrative Tribunal. The committee notes that justification for any adverse effect of clauses 255 and 267 is provided (explanatory notes at 19-20):

*While there will be changes to procedures and powers, many of these changes will be beneficial. For example, the QCAT Act appeal provisions will apply to matters that were formerly part of the Small Claims Tribunal and the Magistrates Court's minor debt claims jurisdictions where appeal rights were severely restricted or non-existent. Generally, the powers of QCAT and the final orders it can make under enabling Acts have not been altered to any significant extent. It would also not be practicable to continue the effect of the Acts establishing the former tribunals or conferring jurisdiction on former tribunals or other entities for the time period in which a person may start a proceeding, particularly in proceedings that will form part of QCAT's original jurisdiction, such as proceedings for breach of contract and debt claims where the limitation period is six years.*

*Subclause 255(6) states that this section does not apply to section 23A of the* Small Claims Tribunals Act 1973*. The* Small Claims Tribunals Act 1973 *will be repealed by this Act. Section 23A enables a party who has obtained an order from a Small Claims Tribunal for the payment of money which has not been satisfied to apply ex parte to the Tribunal for an order for an oral examination. Parties in the Small Claims Tribunal may also seek to enforce a Small Claims Tribunal order by filing a copy of the order in the Magistrates Court. Enforcement options in the Magistrates Court include an oral examination. QCAT will not have a similar power to order oral examinations. All enforcement of QCAT orders will be done by filing a copy of the order in the relevant court upon which the normal court enforcement options, including oral examinations, would apply. While section 23A of the* Small Claims Tribunals Act 1973 *currently provides parties with an additional forum in which to seek an oral examination, the removal of this power will not prevent a party who has obtained an order of the Small Claims Tribunal prior to commencement from seeking an order for oral examination in the Magistrates Court.*

15. **Clauses 213, 214, 216 and 217** 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 | Offence | Proposed maximum penalty |
|---|---|---|
| 213(1) | Contravention of a decision of the tribunal without reasonable excuse | 100 penalty units ($10 000) |
| 214(1) | Failure to attend a hearing of a proceeding or continue to attend as required by the tribunal without reasonable excuse | 100 penalty units ($10 000) |
| 214(2) | Failure to take an oath when required by the tribunal or failure to without reasonable excuse answer a question required by the tribunal or failure without reasonable excuse to produce a document or other thing required by a notice issued by the tribunal | 100 penalty units ($10 000) |
| 216(1) | Stating false or misleading information in a material particular to an official | 100 penalty units ($10 000) |
| 216(2) | Giving an official a document containing information the person knows to be false or misleading in a material particular | 100 penalty units ($10 000) |
| 217 | Improperly influence or attempt to improperly influence a person in relation to the person's participation in a proceeding | 100 penalty units ($10 000) |

**Administrative power**

16. 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.

17. **Clause 139(5)** would exclude from the operation of the *Judicial Review Act 1991* and all other avenues of review a tribunal decision regarding the reopening of a finalised proceeding.

18. 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. Generally, the committee adopts the general view that privative clauses should rarely be contemplated and even more rarely enacted. They represent a parliamentary attempt to deny the courts a central function of their judicial role, preventing courts pronouncing on the lawfulness of administrative action.

19. 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. In respect of clause 139(5), the explanatory notes identify a possible inconsistency with fundamental legislative principles and provide information in that regard (at 15):

*Chapter 2, part 7, division 7 of the Bill enables a party, in limited circumstances, to apply to the tribunal to re-open a matter which has been finally decided by the tribunal. If a matter is re-opened, it is heard afresh by the tribunal. The grounds for a re-opening are:*

- *the party did not appear at the hearing and had a reasonable excuse for not attending*
- *the party would suffer substantial injustice if the proceeding were not re-opened because significant new evidence has arisen that was not reasonably available at the hearing.*

*The purpose of this provision is to ensure fairness to a party absent from the hearing through no fault of their own and to avoid unnecessary costs to the parties and the tribunal involved in an appeal from the original decision where the ground could be more effectively or conveniently dealt with by a re-opening of the matter. These provisions are beneficial provisions designed to provide a cheaper alternative to an appeal in appropriate cases.*

*The breach of this principle is considered justified because:*

- *the re-opening provision provides an option for a party that is in addition to the party's right to appeal the original decision of the tribunal*
- *the parties' usual appeal rights from the original decision of the tribunal are not affected*
- *allowing an appeal or a review of the tribunal's decision on whether or not a matter should be re-opened will unnecessarily lengthen proceedings, duplicate the normal appeal process and result in additional costs to the party and to the tribunal contrary to the objects of the Bill.*

22. **Clauses 142 and 149** would prevent respectively appeals to the appeal tribunal and the Court of Appeal in respect of decisions of the principal registrar made under clause 35.

23. Clause 33 allows for applications to the tribunal. Clause 34 provides for matters to be referred to the tribunal by an enabling Act. In respect of applications and referrals, clause 35 would enable the principal registrar to reject an application or referral or place conditions on the acceptance of the application or referral on certain grounds. Under clause 35(4), a rejection or acceptance on conditions must be referred, on the request of the applicant, to the tribunal to review the decision.

24. In respect of clauses 142 and 149 excluding appeals from the tribunal's review of the decision of the principal registrar, the explanatory notes state (at 14-15):

> *The decision by the tribunal on review is not subject to appeal under chapter 2 part 8 of the Bill. It is considered appropriate for appeals from this decision to be truncated because the decision of the principal registrar has already been subject to review by the tribunal. In the interests of finality it was considered that restricting appeal rights in this instance was justified. Judicial review under the* Judicial Review Act 1991 *would be available if the decision involved jurisdictional error. While it is not expected that large numbers of applications will be rejected, it is possible that appeals from these decisions will impose an unnecessary impost on tribunal time and resources.*

25. Similar to clause 139, **clause 156** would exclude the application of parts 3 to 5 of the *Judicial Review Act* to decisions or conduct of the tribunal other than on the grounds of jurisdiction error. The explanatory notes provide justification for the privative clause (at 16):

> *Restriction of judicial review under the* Judicial Review Act 1991 *to jurisdictional grounds is warranted on the following bases:*
>
> - *The QCAT Bill provides substantial opportunities to appeal decisions of QCAT. For some jurisdictions, the appeal provisions in the Bill significantly expand current appeal rights. The Bill provides for a first step internal appeal to the QCAT appeal tribunal which will normally be constituted by judicial members. Appeals to the appeal tribunal may be made on questions of law and otherwise with leave of the appeal tribunal. An appeal from the decision of the appeal tribunal may then be made on a question of law to the Court of Appeal with leave of the Court.*
> - *In practice, a judicial review application is likely to be dismissed by the Supreme Court on the basis of the availability of the QCAT appeal processes. Section 13 of the* Judicial Review Act 1991 *provides that an application (under part 3 or part 5) must be dismissed where the court is satisfied, having regard to the interests of justice, that it should do so where provision is made by a law, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority, or person.*
> - *Judicial review is currently restricted or not available in relation to decisions and conduct of some of the entities whose jurisdiction is being transferred to QCAT: the Small Claims Tribunal, the Retail Shop Leases Tribunal, the Magistrates Court (minor debt claims and administrative appeals), the District Court (administrative appeals), the Supreme Court (administrative appeals), the Commissioner of State Revenue (reviews of certain decisions under revenue legislation) and the Minister responsible for gaming legislation (reviews of certain decisions under gaming legislation).*
> - *Judicial review will be available on the ground of jurisdictional error, which is a broad ground of review.*

**Natural justice**

26. 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.

27. **Clauses 22, 32, 139 and** may be inconsistent with principles of natural justice, although clause 28(3)(a) requires the tribunal to observe the rules of natural justice.

28. Clause 22 provides for the effect of a review application upon the decision being reviewed. Clause 22(3) allows the tribunal to make an order staying the operation of a reviewable decision and clause 22(5) states that the tribunal need not give a person whose interest would be affected an opportunity to make submissions if it is not practicable to do so because of urgency or for another reason.

29. In respect of clause 22, the explanatory notes provide justification for any breach of fundamental legislative principles (at 8):

*Clause 22(5) of the Bill potentially breaches the principle of natural justice that a decision should not be made that will deprive a person of some right, interest or legitimate expectation of a benefit without the person being given an adequate opportunity to be heard by the decision-maker.*

*Clause 22 empowers QCAT to stay the operation of an administrative decision which is the subject of an application for review. This provision enables the tribunal, in appropriate circumstances, to prevent the implementation of a decision until the tribunal has made its decision on the review application. This power would most often be utilised in circumstances where the implementation of the decision would place the applicant at a disadvantage either financially or in the proceeding before the tribunal and will usually occur in circumstances of urgency. Before making a stay order, the tribunal must consider the interests of any person that may be affected by the making of the stay order, the submissions of the decision-maker and the public interest. Subclause (5) clarifies that the requirement to consider the interests of a person that may be affected by the stay order does not require the tribunal to give the person an opportunity to make submissions. There may be multiple persons whose interests may be affected, minimally or more substantially, by the making of the stay order. These persons would not necessarily be parties to the review proceeding. They may also not be readily contactable. Given that stay orders will generally be sought in circumstances of urgency it would not be practicable or appropriate for the tribunal to adjourn a stay hearing in order to notify and receive submissions from non-parties, although this option is clearly open to the tribunal if it considers that the potential negative impact of a stay order on a person's interests was substantial. A blanket requirement for the tribunal to notify all persons who may potentially be affected and obtain submissions from them would generally defeat the purpose of a stay. The clause requires the tribunal to consider the submissions of the decision-maker which would include information about any significant negative impacts a stay would have on the interests of particular individuals and on the public interest.*

30. **Clauses 32 and 139** would allow the tribunal to conduct proceedings based on 'the papers' - the relevant documents - in the absence of parties, their representatives and witnesses:

- clause 32(2) provides for all or part of a proceeding entirely on the basis of documents; and
- clause 139(3)(b) provides for a decision regarding reopening a proceeding to be made entirely on the basis of documents (an application to reopen may be made under clause 138).

31. The explanatory notes suggest that clauses 32 and 139 have sufficient regard to rights and liberties of individuals (at 9-10):

*The purpose of this provision is to ensure fairness to a party absent from the hearing through no fault of their own and, in relation to the second ground, to avoid unnecessary costs to the parties and the tribunal involved in an appeal where the ground could be more effectively or conveniently dealt with by a re-opening of the matter. In most cases, it would not be necessary to have a hearing on these issues. The evidence should be able to be sufficiently identified in the submissions which the tribunal is required to consider.*

*However, in all cases, including when QCAT re-opens a matter, QCAT is bound to comply with the rules of natural justice. If, in a particular case, those rules would require parties to be given the opportunity to present their cases orally and to examine and cross-examine witnesses, the tribunal would be bound to conduct an oral hearing. A decision to conduct a hearing on the papers does not excuse the tribunal from its obligation under the rules of procedural fairness to ensure adequate notice of an application and reasonable time for a party to make written submissions is given. Given the wide variety of jurisdiction conferred on QCAT and the nature of a re-opening application, it is essential for QCAT to be able to operate flexibly to ensure the objectives of the Bill are met. If QCAT is required to conduct an oral hearing in every matter, including in those where no further information is needed other than what has been provided in submissions and other filed documents, the objective to provide quick and cost-effective justice would not be met.*

32. **Clause 43** would restrict the rights of parties to tribunal proceedings to be legally represented. This provision may be inconsistent with the fundamental legislative principle (explanatory notes at 10):

*This restriction potentially breaches the principles of natural justice that a person should be afforded procedural fairness. Clause 43 states that the general approach is that parties represent themselves unless the interests of justice require otherwise.*

33. Lengthy justification is provided by the explanatory notes (at 10-11):

*This provision generally reflects the current situation in most Queensland tribunals. It also must be considered in the context of the objective of the Bill to have the tribunal carry out its functions in a way that is accessible, fair, just, economical, informal and quick. A provision generally allowing representation may act as a barrier for many people in that it will tend to make proceedings more expensive. Legal representation may increase the length, formality and technicality of proceedings. The majority of matters before QCAT will be minor civil disputes which are currently dealt with by the Small Claims Tribunal or the Magistrates Court using the simplified procedures for minor debt claims. Representation in these jurisdictions is at the discretion of the Tribunal or not permitted. This is because these jurisdictions are meant to provide people, many of whom could not afford representation, with cheap and expeditious access to justice which may otherwise be beyond their means.*

*QCAT will be required under the Bill to comply with the rules of natural justice. In some cases, for example those that involve complex questions of fact and law or where another party is represented, the principles of natural justice may require the parties be allowed to be represented. However, the right to representation is not, in all cases, a necessary incident of natural justice.*

*The provision does recognise that there are certain types of matters and parties where natural justice would generally require an entitlement to representation. Consequently, the Bill provides that a party may be represented if the party is a child, a person with impaired capacity or a party to a disciplinary proceeding. A party may be represented if the enabling Act or the QCAT rules allow the party to be represented. A party may also be represented if the tribunal gives leave for the representation. When exercising its discretion to refuse or grant leave, the tribunal will be bound by the rules of natural justice. The power to make rules about representation will also enable the tribunal to determine what other general categories of matters or person should be entitled to representation in accordance with the principles of natural justice or in the interests of justice. The approach in clause 43 is considered to be most appropriate as it provides the tribunal with flexibility in the conduct of a diverse range of matters while ensuring parties are afforded procedural fairness.*

34. **Clause 59** would allow a tribunal to grant an injunction, including an interim injunction. Pursuant to clause 59(2), an injunction may be granted even if a person whose interests may be affected has not been given an opportunity to be heard. The breach of fundamental legislative principles is acknowledged by the explanatory notes which indicate that safeguards ensure sufficient regard to rights and liberties of individuals (at 11):

*This potentially breaches the principle of natural justice that requires a person whose interests may be affected by a decision to be given an opportunity to be heard. It is expected that the power to grant an interim injunction without notice to other persons affected would be used only in circumstances similar to those in which a court would hear an application for an interim injunction ex parte, that is, where the situation is urgent and the delay caused by hearing the application inter partes or by giving notice to a particular party would cause irreparable damage, destroying another party's rights or defeating the jurisdiction of the tribunal.*

*The clause contains the following safeguards:*

- *the tribunal may require an undertaking as to costs or damages from the party seeking the injunction*
- *the tribunal may provide for the lifting of the injunction if certain conditions are met*
- *an injunction may only be granted by a judicial member.*

35. **Clauses 66 and 90** may be inconsistent with principles of natural justice as they would allow respectively orders and directions for:

- non-publication of documents, evidence or identifying information (clause 60); and
- part or all of a hearing to be held in private (clause 90(2)).

36. Again, lengthy information suggesting that the provisions have sufficient regard to rights and liberties of individuals is provided in the explanatory notes (at 11-14). The committee has noted the information and refers the Parliament to those pages of the explanatory notes.

**Immunity from proceeding or prosecution**

37. 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.

38. **Clauses 237 and 238** would confer immunity from proceeding and prosecution. Clause 237 provides that the same protections and immunity that apply to a Supreme Court judge or Supreme Court proceedings apply to: members and adjudicators; the principal registrar when performing quasi-judicial functions; mediators; a person taking evidence on behalf of the tribunal; assessors; parties appearing before the tribunal and their representatives; witnesses and documents produced for a hearing.

39. The explanatory notes indicate that adequate justification exists for the immunities to be conferred by clause 237 (at 19):

> *It is appropriate that a person acting judicially or as part of a judicial process should be free of personal attack on the basis of illegal or negligent action when performing their roles. The immunity will ensure that these persons can act with appropriate confidence in carrying out their roles in the community interest. Such roles would be difficult to carry out if the office holders or others involved in the proceeding were subject to allegations and litigation taken against them personally for their actions in the office or proceeding.*
>
> *Given the nature of their roles, decisions are subject to supervision of appeal courts or to action by the tribunal for misbehaviour by parties or their representatives or may be subject to the offence provisions in relation to witnesses. This provision provides a similar level of protection currently provided to tribunals whose jurisdiction will become part of the jurisdiction of QCAT, for example, the Anti-Discrimination Tribunal, the Childrens Services Tribunal, the Commercial and Consumer Tribunal, the Guardianship and Administration Tribunal, the Legal Practice Tribunal, the Teachers Disciplinary Committee and the Veterinary Tribunal.*

40. Clause 238 would confer immunity from civil liability on certain people involved in the administration of the Act for acts or omissions done or made under this Act or an enabling Act. The committee notes that the explanatory notes again suggest sufficient regard for rights and liberties of individuals (at 19):

> *The immunity is limited to acts or omissions done or made honestly and without negligence. Also, any potential liability instead attaches to the State.*

## SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

**Institution of Parliament**

41. 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.*

42. **Clauses 175 and 176** may raise an issue with respect to sufficient regard to the operation of the institution of Parliament and, in particular, restrictions on State legislative power found in Chapter III of the Commonwealth Constitution.

43. Clauses 175 and 176 provide, respectively, for the appointment of a Supreme Court judge and a District Court judge as President and Deputy President. In Queensland, both the Supreme Court and the District Court are vested with federal judicial power. Accordingly, Chapter III of the Commonwealth Constitution provides these State courts with some measure of protection from State law. It guarantees the existence of the State Supreme Courts and it prevents legislative attempts to undermine the 'institutional integrity' of the State Courts vested with federal judicial power.[5]

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5 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) 356-360.

44. In *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [29], the High Court indicated in a joint judgment that:

> *[I]t is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of the structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal.*

45. Clauses 175 and 176 would provide for '*persona designata* appointments' of judges. The protection afforded by Chapter III in respect of such appointments is outlined by Professor Carney in *The Constitutional Systems of the Australian States and Territories* (at 364-5):

> *Where a judge of a State court vested with federal judicial power is appointed in a personal capacity (that is, persona designate) to a non-judicial body or is vested in a personal capacity with a non-judicial power, in each case this must be compatible with the exercise of federal judicial power.*
>
> *This requirement of compatibility was first established in relation to Commonwealth appointments which were permitted as an exception to the strictness of the* Boilermakers *principle. But, as McHugh J recognised in* Kable *[(1996) 138 ALR 577 at 116-17.], the same requirement must also extend as a restriction on State power to protect the independence and integrity of State courts. In addition to this requirement of compatibility is the requirement that the judges concerned must consent to their* persona designate *appointment. [See the criticism of the appointment of New South Wales District Court judges to the Gaming Tribunal and the Police Tribunal by Street CJ in* Lisafa Holdings Pty Ltd v Commissioner of Police *(1988) 15 NSWLR 1 at 5 and 6.]*

46. Accordingly, to assist the Parliament, the committee invites information from the Minister regarding whether clauses 175 and 176 might require the consent of a judge who is to be recommended for appointment.

**Parliamentary scrutiny of delegated power**

47. 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.

48. **Clause 102** would delegate legislative power to provide the costs that may be awarded against a party by the tribunal if the order is considered by the tribunal to be in the interests of justice. Clause 102(2) provides, however, that the only costs the tribunal may award in a minor civil dispute are the costs stated in the rules.

49. As indicated in the explanatory notes, prescription regarding the award of costs by existing tribunals and courts is made generally in Acts, not in subordinate legislation. The explanatory notes indicate that sufficient regard is had, nevertheless, to the institution of Parliament (at 20-21):

> *Minor civil disputes are disputes that are currently dealt with by a Small Claims Tribunal or by the Magistrates Court under the Uniform Civil Procedure Rules 1999 as a minor debt claim. The power to award costs in these matters is restricted to ensure these jurisdictions are low cost jurisdictions for the parties. The intention of incorporating small claims and minor debt claims as QCAT's minor civil dispute jurisdiction is to provide a single entry point for resolving these disputes while ensuring they remain low cost jurisdictions. It is intended that the current restrictions on the costs that may be awarded in a small claim under the* Small Claims Tribunals Act 1973 *and in a minor debt claim under the Uniform Civil Procedure Rules 1999 will be reflected in the tribunal rules. As with the Uniform Civil Procedure Rules 1999 and, in relation to other practices and procedures for minor civil disputes, it is considered appropriate for these detailed matters to be set out in the rules.*

50. In this context, the committee notes also that, as subordinate legislation, the rules would be required to be tabled in the Legislative Assembly and would be subject to disallowance procedures (*Statutory Instruments Act*, sections 49 and 50).

51. **Clause 225** would exempt the rules made under the legislation from the provisions of part 7 of the *Statutory Instruments Act*. The committee suggests that, as provided in the explanatory notes (at 22), clause 225 has sufficient regard to the institution of Parliament. The committee notes also that, following reviews of the rules, any re-made rules would be subject to parliamentary scrutiny by reason of sections 49 and 50 of the *Statutory Instruments Act*.

**Amendment of Act other than by another Act**

52. Section 4(4)(c) of the *Legislative Standards Act* states that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill authorises the amendment of an Act only by another Act.

53. **Clause 195** may appear to authorise the amendment of an Act other than by way of another Act. Clause 195 sets out the functions of adjudicators to hear and decide certain matters, including minor civil disputes. Clause 195(b) enables the QCAT Rules to state the types of non-contentious matters that an adjudicator may hear. Clause 195(d) enables the president to decide that an adjudicator may hear and decide another matter having regard to the nature and complexity of the matter and any special circumstances relating to the matter.

54. A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as an 'Henry VIII' clause. The committee has defined a 'Henry VIII clause' to mean a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.

55. In January 1997, the committee reported to the Parliament on Henry VIII clauses.[6] While the committee has generally opposed the use of Henry VIII clauses in bills, the committee's report stated that usually it did not consider provisions enabling definitions of terms to be extended by regulation to be Henry VIII clauses. Further, the committee stated that it considered Henry VIII clauses may be excusable, depending on the given circumstances, where the clause is to facilitate:

- immediate executive action;
- the effective application of innovative legislation;
- transitional arrangements; and
- the application of national schemes of legislation.

56. Clause 195 is perhaps equivalent to a provision enabling definitions of terms to be extended by regulation. In any event, where provisions fall within the scope of those considered 'Henry VIII' provisions, the committee then examines whether the provision would represent an inappropriate delegation of legislative power. In this context, the committee notes that justification for any breach fo fundamental legislative principles is provided in the explanatory notes (at 21):

*Clause 195 was included in the Bill to provide guidance about the types of matters adjudicators (as opposed to members) would hear and decide. It is not meant to be an exclusive list. It is appropriate for the rules to set out the non-contentious matters which an adjudicator may decide because the list of these matters may be lengthy and would not be practicable for inclusion in the primary legislation. The rules are subordinate legislation and will be subject to disallowance by the Parliament. It is also appropriate for the president to decide which other less complex matters an adjudicator would be competent to decide. This is consistent with the president's function under clause 165 to choose the member/s or adjudicator to constitute the tribunal for a particular matter. These provisions aid in ensuring flexibility and responsiveness in the organisation of the tribunal's business and in achieving the objectives of the Bill set out in clause 3.*

57. **Clause 224** is a provision enabling definitions of terms to be extended by regulation. It sets out the rule-making power for the QCAT Rules. Clause 224(3) states that the rules may provide that a person is disqualified from representing a party in circumstances where the person has been found guilty of a type of professional misconduct stated in the rules in a disciplinary proceeding of a type stated in the rules. The disciplinary proceeding must have occurred under a Queensland Act, a law of the Commonwealth or another State or the rules of a professional association or other body. Clause 43(4) provides that a party may not be represented by a person who, under the rules made under clause 224(3) is disqualified to be a representative of a party.

6 Report no 3, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, available at www.parliament.qld.gov.au/slc

58. Consistent with paragraph 71, the committee suggests that clause 224 has sufficient regard to the institution of Parliament.

59. In the same way, clauses 275 and 278 provide for transitional arrangements and have, it is suggested, sufficient regard to the institution of Parliament. Relevant information is included in the explanatory notes (at 22-23).

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### EXPLANATORY NOTES

60. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22 requires the tabling of explanatory notes with bills or significant subordinate legislation. Sections 23 and 24 respectively set out requirements as to the content of explanatory notes for bills and subordinate legislation.

61. In accordance with responsibilities identified on page ii, the committee considers explanatory notes to ensure:

- explanatory notes have been produced for all subordinate legislation which is 'significant'; and
- explanatory notes produced for bills and subordinate legislation comply with the content requirements in sections 23 and 24.

62. In addition, the committee's role to monitor the operation of certain statutory provisions includes considering the effectiveness and appropriateness of the part 4 mechanisms and recommending reform where necessary.[7]

63. In this context, the committee notes that its examination of the bill has been greatly assisted by the excellent and detailed nature of the explanatory notes produced for the bill.

7 In 2001, for example, the committee tabled report no 18, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*.

## 5. QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL (JURISDICTION PROVISIONS) AMENDMENT BILL 2009

**Date introduced:** 19 May 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 rights and liberties of individuals; and
   - the institution of Parliament;

   the committee has examined a large number of provisions, identified in the tables below. In each case, the explanatory notes provide detailed information and justification (relevant page numbers are provided) indicating sufficient regard.

### BACKGROUND

2. In March 2008, the Queensland Government announced that it would establish a civil and administrative tribunal. The bill relates to the jurisdiction of the tribunal, amending existing legislation to confer jurisdiction and to confer specialist powers and procedures where necessary.

3. The bill is a cognate bill with the Queensland Civil and Administrative Tribunal Bill 2009.

### LEGISLATIVE PURPOSE

4. The bill is intended to amend existing Acts and subordinate legislation to confer jurisdiction on the tribunal and to ensure that, where specialist procedures or powers are required for the tribunal to properly perform its functions under the legislation, provision is made for the powers and procedures.

5. Therefore, the bill would amend large number of Acts and subordinate legislation.

### 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.*

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Adoption of Children Act 1964* | | | |
| 11 | 36I | Children not to be compelled to give evidence | 6-8 |
| 11 | 36K | Children giving evidence or expressing views to tribunal – limit on people present | 6-8 |

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| 11 | 36L | Prohibition on the cross examining of children who give evidence or express their views to the tribunal | 6-8 |
| 11 | 36M | Prohibition or restriction on the disclosure of a document or evidence to parties in proceedings | 8 |
| *Child Protection Act 1999* | | | |
| 18 | 99T | Children not to be compelled to give evidence | 8-9 |
| 18 | 99V | Children giving evidence or expressing views to tribunal – limit on people present | 8-9 |
| 18 | 99W | Prohibition on the cross examining of children who give evidence or express their views to the tribunal | 8-9 |
| 18 | 99ZD | Prohibition or restriction on the disclosure of a document or evidence to parties in proceedings | 8-9 |
| *Commission for Children and Young People and Child Guardian Act 2000* | | | |
| 37 | 128G | Children not to be compelled to give evidence | 9-10 |
| 37 | 128H | Children giving evidence or expressing views to tribunal – limit on people present | 9-10 |
| 37 | 128I | Prohibition on the cross examining of children who give evidence or express their views to the tribunal | 9-10 |
| 37 | 128J | Child may refuse to be cross examined | 9-10 |
| Funeral Benefit Business Regulation 2000 | | | |
| 556 | 45 (omitted) | Reduction in period of time for application for review | 14-15 |
| 557 | 47 (omitted) | Reduction in period of time for application for review | 14-15 |
| Agricultural Chemicals Distribution Control Regulation 1998 | | | |
| 301 | 12 | Right to appeal to the Magistrates Court replaced with right to apply for review | 16 |
| *Guardianship and Administration Act 2000* | | | |
| 1439 | 7 | Inconsistencies with rights and liberties of individuals | 21-22 |
| 1440 | 9 | Inconsistencies with rights and liberties of individuals | 21-22 |
| 1445 | Chapter 6 | Inconsistencies with rights and liberties of individuals | 21-22 |
| 1446 | Chapter 7, part 1 | Information privacy rights affected | 22 |
| *Prostitution Act 1999* | | | |
| 1608 | Part 4 | Procedural rights affected by amendments | 25-26 |

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Weapons Act 1990* | | | |
| 1623 | 145 | Appellant allowed to carry on business pending appeal | 26 |
| *Transport Operations (Road Use Management) Act 1995* | | | |
| 1789 | 131 | Decision of QCAT on review is final | 28-29 |
| *Community Ambulance Cover Act 2003* | | | |
| 1841 | 148 | Evidentiary provision for statements of levy liability | 30 |
| *Taxation Administration Act 2001* | | | |
| 1890 | | Evidentiary provision for assessments | 32 |

**Administrative power**

7. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Disability Services Act 2006* | | | |
| 52 | 102 | No right of review of decision | 10-11 |
| 53 | 108 | No right of review of decision | 10-11 |
| *Fire and Rescue Service Act 1990* | | | |
| 103 | 69 | No rights of appeal regarding requisition by commissioner to reduce fire risk | 11-12 |
| *Legal Profession Act 2007* | | | |
| 1510 | 396 | Decisions non-reviewable | 24 |
| *Community Ambulance Cover Act 2003* | | | |
| 1840 | 139 | Decisions non-reviewable | 29-30 |
| *Taxation Administration Act 2001* | | | |
| 1888 | 76 | Decisions non-reviewable | 30-32 |

**Natural justice**

8. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Fire and Rescue Service Act 1990* | | | |
| 103 | 69 | Occupier not given opportunity to be heard prior to requisition | 11-12 |
| 104 | 104G | Occupier or owner not given opportunity to be heard prior to notice about obligations | 12-13 |
| 106 | 104KF | Occupier not given opportunity to be heard prior to notice | 13-14 |
| *Property Agents and Motor Dealers Act 2000* | | | |
| 707 | 529A | Tribunal may make order - to stop person contravening Act - without notice | 15-16 |
| *Liquid Fuel Supply Act 1984* | | | |
| 616 | 35AA | Exemption from requirement to provide QCAT information notice | 17-18 |
| *Health Practitioners (Professional Standards) Act 1999* | | | |
| 1041 | 59 | Registrant not provided with opportunity to be heard prior to suspension or imposition of conditions on registration | 20-21 |
| *Nursing Act 1992* | | | |
| 1122 | 67 | Registrant not provided with opportunity to be heard prior to suspension or imposition of conditions on registration | 20-21 |
| *Judicial Review Act* | | | |
| 1475 | Schedule 2, section 3(2) | Reasons for decisions not required | 23-24 |
| *Queensland Building Services Authority Act 1991* | | | |
| 1694 | 97B | Stop order may be made without notice | 27-28 |
| 1694 | 97C | Suspension order may be made without notice | 27-28 |

**Power to enter premises**

9. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Fire and Rescue Service Act 1990* | | | |
| 103 | 69 | Entry and post-entry powers to reduce fire risk | 11-12 |
| *Queensland Building Services Authority Act 1991* | | | |
| 1694 | 97B and 97C | Entry and post-entry powers to inspect a building or land relevant to a proceeding | 27-28 |

**Protection against self-incrimination**

10. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Property Agents and Motor Dealers Act 2000* | | | |
| 705 | 528BB | Person being examined at public examination must answer questions – abrogation of protection against self-incrimination | 15 |
| *Guardianship and Administration Act 2000* | | | |
| 1457 | 137 | Abrogation of protection against self-incrimination | 22-23 |

**Immunity from proceeding or prosecution**

11. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Guardianship and Administration Act 2000* | | | |
| 1468 | 246 | Protection for whistleblowers | 23 |
| 1470 | 248 | Protection from liability if acting honestly and not negligent | 23 |

**Clear meaning**

12. 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.

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| *Fire and Rescue Service Act 1990* | | | |
| 103 | 69 | Requirements stated in broad terms which may not be sufficiently defined | 11-12 |

## SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

**Institution of Parliament**

13. 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.*

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| Agricultural Chemicals Distribution Control Regulation 1998 | | | |
| 301 | 12 | Subordinate legislation, rather than an Act, providing review rights | 16-17 |
| 304 | 17 | Subordinate legislation, rather than an Act, providing review rights | 16-17 |
| 311 | 43 | Subordinate legislation, rather than an Act, providing review rights | 16-17 |
| Apiaries Regulation 1998 | | | |
| 342 | 18 | Subordinate legislation, rather than an Act, providing review rights | 17 |
| Marine Parks Regulation 2006 | | | |
| 888-895 | | Subordinate legislation, rather than an Act, providing review rights | 18-19 |
| Nature Conservation (Administration) Regulation 2006 | | | |
| 898-905 | | Subordinate legislation, rather than an Act, providing review rights | 18-19 |
| Medical Radiation Technologists Regulation 2002 | | | |
| 1117 | Part 4 | Subordinate legislation, rather than an Act, providing review rights | 19-20 |
| Psychologists Registration Regulation 2002 | | | |
| 1223 | Part 4 | Subordinate legislation, rather than an Act, providing review rights | 19-20 |

| Clause examined | Section amended or inserted | Issue of sufficient regard | Justification |
|---|---|---|---|
| Health (Drugs and Poisons) Regulation 1996 | | | |
| 1028 | 33 | Subordinate legislation, rather than an Act, providing review rights | 20 |

## OPERATION OF CERTAIN STATUTORY PROVISIONS

### EXPLANATORY NOTES

14. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22 requires the tabling of explanatory notes with bills or significant subordinate legislation. Sections 23 and 24 respectively set out requirements as to the content of explanatory notes for bills and subordinate legislation.

15. In accordance with responsibilities identified on page ii, the committee considers explanatory notes to ensure:

- explanatory notes have been produced for all subordinate legislation which is 'significant'; and
- explanatory notes produced for bills and subordinate legislation comply with the content requirements in sections 23 and 24.

16. In addition, the committee's role to monitor the operation of certain statutory provisions includes considering the effectiveness and appropriateness of the part 4 mechanisms and recommending reform where necessary.[8]

17. In this context, the committee notes that its examination of the bill has been greatly assisted by the excellent and detailed nature of the explanatory notes produced for the bill.

8 In 2001, for example, the committee tabled report no 18, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*.

## 6. RESORTS AND OTHER LEGISLATION AMENDMENT BILL 2009

**Date introduced:** 19 May 2009

**Responsible minister:** Hon SJ Hinchliffe MP

**Portfolio responsibility:** Minister for Infrastructure and Planning

### 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 43** which would allow forced transfer of a letting agents' management rights;
   - **clauses 30, 41, 43, 86, 101 and 102** which would insert new offence provisions;
   - **clause 63** which may be inconsistent with principles of natural justice; and
   - **clauses 27, 39 and 85** which would confer immunity from proceeding.

### BACKGROUND

2. As part of a broader program of modernisation of the *Sanctuary Cove Resort Act 1985* and the *Integrated Resort Development Act 1987*, interim amendments would be made by the bill. The *Iconic Queensland Places Act 2008* would also be amended to make it clear that the Act does not apply to building development applications.

3. In addition, amendments would be made to the *Liquor Act 1992* to allow authorisation of the sale of liquor outside ordinary trading hours by industrial canteens, commercial special facilities and low risk premises.

### LEGISLATIVE PURPOSE

4. The bill is intended to, first, to address immediate equity and procedural issues in the resorts legislation and related Acts, while introducing the resort communities to the concepts underlying a broader reform (explanatory notes at 2).

5. Second, it is to make clear the Parliament's intention regarding:
   - the application of *Iconic Queensland Places Act* to building development applications; and
   - the application of provisions of the *Liquor Act* regarding ordinary trading hours.

6. Therefore, the bill would amend the:
   - *Iconic Queensland Places Act*;
   - *Integrated Resort Development Act*;
   - *Liquor Act*;
   - *Mixed Use Development Act 1993*; and
   - *Sanctuary Cove Resort Act*.

## 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 43** may affect rights and liberties of individuals, as indicated in the explanatory notes (at 9):

*The provision enabling forced transfer of a letting agents' management rights is a powerful provision and potentially affects parties' rights under contracts and instruments of appointment.*

9. The explanatory notes to the bill indicate that clause 43, to insert a new part 8, division 5 and new part 8A, would have sufficient regard to rights and liberties of individuals:

*[T]his provision is limited to the mechanism, based on a similar model to the* Managed Investments Act 1998 *(Cth), to removal of an under-performing manager under certain conditions in a manner that is not destructive to the body corporate scheme and allows the manager to depart with a financial return for the business the manager has built up.*

10. The committee notes the justification provided in the explanatory notes.

11. **Various clauses** 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 |
|---|---|---|---|
| *Integrated Resort Development Act* | | | |
| 30, 41 | 133F, 168F | Wrongful exercise of proxy | 100 penalty units ($10 000) |
| 43 | 175O(3) | Failure to reasonably approve letting agent's choice of transferee | 50 penalty units ($5000) |
| *Sanctuary Cove Resort Act* | | | |
| 86, 101 | 47G, 91G | Wrongful exercise of proxy | 100 penalty units ($10 000) |
| 102 | 94L(3) | Failure to reasonably approve letting agent's choice of transferee | 50 penalty units ($5000) |

12. The proposed offences in clauses 30, 41, 86 and 101 were included in the Resorts and Other Legislation Amendment Bill 2008 which lapsed upon the dissolution of the 52nd Parliament. The committee notes the following information provided to the Chair of the committee of the 52nd Parliament by the then Minister:

*The penalty units proposed are equivalent to the enforcement provisions for proxy misuse at section 111,* Body Corporate and Community Management (Standard Module) Regulations 2008. *It is considered that the offences are equivalent and the penalties are a reasonable deterrent to the possible misuse of proxies at bodies corporate within resorts covered by the Bill, ensuring consistency with community management schemes covered by the* Body Corporate and Community Management (Standard Module) Regulations 2008.

**Natural justice**

13. 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.

14. **Clause 63** may be inconsistent with principles of natural justice. It would replace existing sections 7 and 8 of the *Sanctuary Cove Resort Act*.

15. The explanatory notes suggest a possible breach of fundamental legislative principles regarding the principles of natural justice. However, the following information is provided to indicate sufficient regard for rights and liberties of individuals (at 9-10):

> *As the* [Sanctuary Cove Resort Act] *does not provide a process to amend the Sanctuary Cove Resort approved plan (outlining the zones, uses and future development of Sanctuary Cove resort), amendments to legislation have been made in order to amend the plan to achieve intended development outcomes.*
>
> *Natural justice is not compromised as a process (equivalent to IRDA as much as possible) was undertaken by Sanctuary Cove Resort to consult lot owners and relevant local government regarding proposed approved plan amendments. In addition, Government has consulted as part of the legislative amendment process.*
>
> *The Bill introduces a new application process in the SCRA, equivalent to IRDA. To enhance natural justice, this amendment application process in the IRDA and SCRA now also requires mandatory 30 business days for consultation, placing a notice on potentially affected land and submission of certification of consultation within resort communities along with all comments received as part of the consultation.*

**Immunity from proceeding or prosecution**

16. 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.

17. **Clauses 27, 39 and 85** would confer immunity from proceeding. Clauses would confer protection for:

- executive committee members from civil liability for an act done or omission made in good faith and without negligence in performing the person's role as a member of the committee; and
- a body corporate and an executive committee for defamation in respect of matter in required material published for a general meeting.

18. 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. In respect of clauses 27, 39 and 85, the committee notes the following information provided in explanatory notes (at 10):

> *Protection from civil liability and defamation potentially affects a fundamental principle of law that everyone is equal before the law and should therefore be fully liable for one's acts or omissions, and potentially restricts a person's ability to seek compensation for being defamed.*
>
> *However, the protection under the Bill from civil liability for members of executive committees is limited to acts and omissions in good faith and without negligence and protection from liability for publishing defamatory material for particular motions for a general meeting on the basis that these persons are carrying out duties and making disclosures as per statutory functions, and about which they have no discretion.*

## 7. RIGHT TO INFORMATION BILL 2009

**Date introduced:** 19 May 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 100 and 106(2)** which may affect rights and liberties of individuals as they would operate to override claims to legal professional privilege;
   - **part 10** (clauses 114 and 115), relating to vexatious applicants;
   - **clauses 175 to 179** which would create offences; and
   - **clause 100** which would, by implication, confer power to enter premises and post-entry powers; and
   - **clauses 170 to 174** which would confer immunity from proceeding and prosecution.
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 132** which would provide the information commissioner with the power to issue a guideline.

### BACKGROUND

3. Together with the Information Privacy Bill 2009, the bill would form a new legislative framework for public access to government information.

### LEGISLATIVE PURPOSE

4. The bill is intended to give the public a right of access to information held by government agencies unless, on balance, it is contrary to the public interest to provide the information.

5. The bill would repeal the *Freedom of Information Act 1992*. It would amend the 32 Acts and the seven regulations identified in schedule 5.

### 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. **Clause 23** may affect individual rights to information privacy.

8. Clause 23 would provide a right to access documents of an agency and documents of a Minister. The documents to which a right of access would extend would include documents containing personal information.

9. The committee notes, however, that other provisions of the bill contain safeguards of individual privacy, such as clause 37 (Disclosure of concern to third party). It provides for consultation with a relevant third party (including an individual) where disclosure of information could reasonably be expected to be of concern. Clause 76 (Giving summary of personal information to applicant or intermediary) provides another example.

10. **Clauses 100 and 106(2)** may affect rights and liberties of individuals as they would operate to override claims to legal professional privilege.

11. Clause 100 would allow the information commissioner to access the documents of an agency or Minister, including documents protected by legal professional privilege. Clause 106(2) states that legal professional privilege does not apply to the production of documents or the giving of evidence by a member of an agency or Minister for the purposes of external review.

12. The explanatory notes provide justification for any inconsistency with rights and liberties of individuals (at 5):

*This abrogation of the right to claim legal professional privilege is justified as being necessary to ensure the Information Commissioner has the ability to properly consider and determine external reviews.*

*Obligations placed on the Information Commissioner and the Commissioner's staff ensure such information is protected. Under clause 107 the Information Commissioner must ensure information or documents provided are not disclosed other than to specified persons and documents must be returned at the end of an external review. Additionally, under clause 108 the Information Commissioner must make such directions considered necessary to avoid disclosure of legal professional privilege documents to an access participant. It is an offence under clause 179 for the Information Commissioner or a staff member to disclose information obtained in performance of functions under the Bill.*

13. **Part 10** (clauses 114 and 115), relating to vexatious applicants, has the potential to affect rights and liberties of individuals. The operation of part 10 is outlined in the explanatory notes (at 5):

*Under the Bill, the Information Commissioner can make a vexatious applicant declaration which may include conditions that prohibit a person from making an access application, internal review application or external review application without the permission of the Information Commissioner.*

14. The explanatory notes indicate further that part 10 has sufficient regard to rights and liberties of individuals (at 5-6):

*The right of a person to take legal action over a wrong is an essential common law right. The right of access to government-held information is a cornerstone of the Bill… The breaches of the fundamental legislative principles are considered to be justified to prevent an applicant from making repeated access or review applications that are vexatious in nature and unreasonably divert public resources. The Bill provides for safeguards against any potential loss of rights. Vexatious applicant declarations can only be made by the Information Commissioner when satisfied that the person has met the threshold test. It must be established that the person has made repeated applications that involve an abuse of process or a manifestly unreasonable action. The Information Commissioner cannot make a vexatious applicant declaration until the person has the opportunity to be heard. In addition, a person with a vexatious applicant declaration against him or her has the opportunity to apply to the Information Commissioner to vary or set aside the order. The Information Commissioner's declaration is reviewable by the Queensland Civil and Administrative Tribunal.*

15. **Various clauses** 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 | Offence | Proposed maximum penalty |
|---|---|---|
| 175(1) | Giving a direction, either orally or in writing, to a person to make a decision which the person believes is not the decision that should be made under this Act. | 100 penalty units ($10 000) |
| 175(3) | Giving a direction, either orally or in writing, to a person who is an employee or officer of the agency involved in a matter under this Act or an employee of the Minister involved in a matter under this Act directing the person to act contrary to the requirements of this Act. | 100 penalty units ($10 000) |
| 176 | Knowingly deceiving or misleading a person exercising powers under this Act in order to gain access to a document containing another person's personal information. | 100 penalty units ($10 000) |
| 177(1) | Knowingly giving false or misleading information in a material particular to the information commissioner or a member of their staff | 100 penalty units ($10 000) |
| 178 | Failing to produce documents or attend proceedings or attend before the information commissioner after receiving notice without reasonable excuse. | 100 penalty units ($10 000) |
| 179 | Disclosing information or taking advantage of that information to benefit himself or herself or another person otherwise than for the purposes of this Act. | 100 penalty units ($10 000) |

**Power to enter premises**

16. 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.

17. **Clause 100** would, by implication, confer power to enter premises and post-entry powers. It would state:

> If an external review application is made, the information commissioner is entitled to full and free access at all reasonable times to the documents of the agency or Minister concerned, including documents protected by legal professional privilege.

18. In respect of clause 100 and the power to enter premises, the explanatory notes indicate:

> *The RTI Bill will provide enhanced powers of entry and search to the Information Commissioner and entitles the Commissioner to full and free access at all reasonable times to the records of an agency (clause 100).*
>
> *The exercise of this power will be subject to Parliamentary scrutiny and the power is considered essential to ensure accountability and transparency in the administration of the Bill.*

19. The committee examines carefully legislation which would confer, without the need for a warrant or consent, powers to enter premises and further powers exercisable following entry. In particular, the committee considers whether the legislation contains safeguards of individual rights.

20. However, just as clause 100 does not state in clear terms the nature of the entry and post-entry powers to be conferred, it does not contain safeguards regarding the exercise of the powers. Further, clause 100 does not make clear who may exercise the powers, and clause 145 provides for delegation to any member of the staff of the Office of the Information Commissioner all or any of the commissioner's powers under the Act.

21. Clause 100 may be compared, for example, to clause 46 of the Auditor-General Bill 2009. Apparently similar powers would be conferred by the Auditor-General Bill, for similar purposes, yet clause 46 of that bill contains far more prescription as to the powers to be exercised. The Auditor-General Bill also contains some safeguards to protect the rights and liberties of individuals. These include identity cards for authorised auditors (clause 44), compensation payable for loss or expense (clause 49) and duties of confidentiality (clause 53).

22. Therefore, although clause 100 would by implication confer power to enter premises and search for or seize documents, the powers to be conferred would not require a warrant issued by a judge or other judicial officer. While the powers would relate to documents of government agencies, the committee identifies, for the consideration of the Parliament when determining whether clause 100 has sufficient regard to rights and liberties of individuals, a possible lack of prescription regarding the:

- scope of the entry and post-entry powers to be conferred;
- the persons who would be able to exercise them; and
- safeguards of individual rights and liberties provided by the legislation.

**Immunity from proceeding or prosecution**

23. 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.

24. **Clauses 170 to 174** would confer immunity from proceeding and prosecution. The proposed provisions would operate to protect a range of institutions and people:

- clauses 170 (Access – protection against actions for defamation or breach of confidence) and 171 (Publication – protection against actions for defamation or breach of confidence) would provide immunity to the State, an agency, a Minister or an officer of an agency, the author of a document or another person;
- clauses 172 (Access – protection in respect of offences) and 173 (Publication – protection in respect of offences) would protect from criminal liability persons authorising access or publication and any other person concerned in the giving of access or publication; and
- clause 174 (Protection of agency, information commissioner etc. from personal liability) would provide immunity in respect of an act done or omission made honestly and without negligence under the Act, with liability to attach instead to the State.

25. In respect of consistency with fundamental legislative principles, the explanatory notes state (at 6):

> *Clause 172 provides that a person concerned with the giving of access to a document under the Bill does not commit a criminal offence through giving, or authorising, access. Clause 173 provides a person concerned with publishing a document on a disclosure log, and the Information Commissioner in relation to publication of decisions, do not commit a criminal offence through publishing, or authorising publication. Clause 170 provides the State, an agency, Minister or an officer with protection from actions for defamation or breach of confidence where access to a document was required or permitted by the Bill. Likewise clause 171 provides persons concerned with publishing a document on a disclosure log and the Information Commissioner in relation to publication of external review decisions with protection against actions for defamation or breach of confidence where publication of a document was required or permitted by the Bill. Clause 174 provides an agency, principal officer, Minister, any staff acting under the direction of any of these, a decision-maker, the Information Commissioner or the Commissioner's staff protection from civil liability for acts or omissions under the Bill provided they were done honestly and without negligence. The liability will attach instead to the State. Whilst it is recognised that everyone is equal before the law and each person should be liable for their acts or omissions, it is considered that conferral of immunity as outlined above is appropriate for officers carrying out statutory duties. These clauses re-enact protections in the* Freedom of Information Act 1992 *with amendment to take account of the introduction of disclosure logs and the requirement that the Information Commissioner's external review decisions must be published.*

## SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

### Parliamentary scrutiny of delegated power

26. 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.

27. **Clause 132** provides the information commissioner with the power to issue a guideline about a matter for or in connection with any of the commissioner's functions. If 'legislative power' is defined as the 'creation and promulgation of a general rule of conduct without reference to particular cases',[9] the issue of guidelines under clause 132 might be seen as an exercise of legislative power not subject to the scrutiny of the Legislative Assembly.

28. 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 guidelines to be issued under clause 132 may be of this nature as they may constitute general rules of conduct under which rights and duties regarding access to public information may be affected.

29. However, 'guidelines' made under clause 132 would not fall within the definition of 'subordinate legislation' provided in section 9 of the *Statutory Instruments Act*. As only 'subordinate legislation' need be tabled in the Parliament, the guidelines would not be subject to parliamentary scrutiny, including the possibility of disallowance under section 50 of the *Statutory Instruments Act*.

9 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed., 2006), [1.2].

## 8. WATER AND ANOTHER ACT AMENDMENT BILL 2009

**Date introduced:** 20 May 2009

**Responsible minister:** Hon GJ Wilson MP

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

### ISSUES ARISING FROM EXAMINATION OF BILL

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

### BACKGROUND

2. The bill is to implement, in part, recommendations made in *Brokering Balance: A Public Interest Map for Queensland Government Bodies – An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*.[10] It would change the structure of the Queensland Water Commission, re-establishing the Commission with a single Commissioner.

### LEGISLATIVE PURPOSE

3. The bill would amend the *Water Act 2000* and the schedule would effect consequential amendments to the *Public Service Act 2008*.

10 S Webbe and P Weller, *Brokering Balance: A Public Interest Map for Queensland Government Bodies – An Independent Review of Queensland Government Boards, Committees and Statutory Authorities*, (2009).

# PART 2 – SUBORDINATE LEGISLATION EXAMINED

## SUBORDINATE LEGISLATION TABLED: 11 FEBRUARY TO 19 MAY 2009[11]

(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 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 2 | Racing Amendment Regulation (No.1) 2009 | 30/01/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 3 | Proclamation commencing remaining provisions | 30/01/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 4 | Births, Deaths and Marriages Registration Amendment Regulation (No.1) 2009 | 30/01/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 5 | Justices of the Peace and Commissioners for Declarations Amendment Regulation (No.1) 2009 | 30/01/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 6 | Public Trustee Amendment Regulation (No.1) 2009 | 30/01/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 7 | Proclamation commencing remaining provisions | 6/02/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 8 | Dispute Resolution Centres Regulation 2009 | 6/02/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 9 | Crime and Misconduct Amendment Regulation (No.1) 2009 | 6/02/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 10 | Aboriginal Land Amendment Regulation (No.1) 2009 | 6/02/2009 | 17/06/2009 | 11/02/2009 | 18/06/2009 |
| 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 |

[11] Subordinate legislation tabled 11 February to 22 April 2009 is included as some disallowance dates published in Legislation Alert 02/09 incorrectly reflected disallowance dates calculated at the time of tabling, subsequently affected by the election period.

| SL No 2009 | SUBORDINATE LEGISLATION | Date Of Gazettal | Tabling Date By | Date Tabled | Disallow Date |
|---|---|---|---|---|---|
| 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 | Rural 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 |
| 37 | Proclamation commencing remaining provisions | 24/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 38 | Fair Trading Legislation Amendment Regulation (No.1) 2009 | 24/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 39 | Motor Racing Events Amendment Regulation (No.1) 2009 | 24/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 40 | Proclamation commencing remaining provisions | 24/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 41 | Integrated Planning Amendment Regulation (No.1) 2009 | 24/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 42 | Legal Profession (Society Rules) Amendment Notice (No.1) 2009 | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 43 | Health Legislation Amendment Regulation (No.1) 2009 | 30/04/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 44 | Water Amendment Regulation (No.1) 2009 | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 45 | Building Amendment Regulation (No.1) 2009 | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 46 | Transport Operations (Marine Safety) Amendment Regulation (No.1) 2009 | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |

| SL No 2009 | SUBORDINATE LEGISLATION | Date Of Gazettal | Tabling Date By | Date Tabled | Disallow Date |
|---|---|---|---|---|---|
| 47 | Proclamation commencing remaining provisions | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 48 | Proclamation commencing remaining provisions | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 49 | Public Trustee Amendment Regulation (No.4) 2009 | 1/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 50 | Land Protection (Pest and Stock Route Management) Amendment Regulation (No.1) 2009 | 8/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 51 | Proclamation commencing certain provisions | 14/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 52 | Queensland Competition Authority Amendment (Postponement) Regulation 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 53 | Community Ambulance Cover Amendment Regulation (No.1) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 54 | Revenue Legislation Amendment Regulation (No.1) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 55 | Mineral Resources Amendment Regulation (No.1) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 56 | Transport Operations (Road Use Management-Vehicle Registration) and Another Regulation Amendment Regulation (No.1) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 57 | Transport Operations (Marine Safety) Amendment Regulation (No.2) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |
| 58 | Forestry (State Forests) Amendment Regulation (No.1) 2009 | 15/05/2009 | 18/08/2009 | 19/05/2009 | 19/08/2009 |

## PART 3 – MINISTERIAL CORRESPONDENCE – BILLS

### 9. ADOPTION BILL 2009

**Date introduced:** 22 April 2009
**Responsible minister:** Hon P Reeves MP
**Portfolio responsibility:** Minister for Child Safety and Minister for Sport
**Date passed:** Not passed to date

**Committee report on bill:** 02/09; at 1 - 11
**Date Ministerial response received:** 26/05/09 (copy commences following page)

### 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.

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

3. The committee thanks the minister for the information provided in his letter.

4. The committee makes no further comment regarding the bill.

**Hon Phil Reeves MP**
Member for Mansfield

Our Reference: CSM07952; ML/09/0987

26 MAY 2009

**Minister for Child Safety and Minister for Sport**

SCRUTINY OF
26 MAY 2009
LEGISLATION COMMITTEE

Bb.09.

Mrs Jo-Ann Miller MP
Member for Bundamba
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mrs Miller

Thank you for your letter of 18 May 2009 enclosing the pages of the committee's Legislation Alert No.02 of 2009 relating to the Adoption Bill 2009.

I thank the committee for its detailed consideration of the Bill and I note the committee draws the attention of Parliament to various clauses of the Bill in relation to the question of whether the Bill has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

As the committee has noted, the Explanatory Notes to the Bill discuss, and provide justification for, the majority of the matters identified by the committee. In addition, as mentioned in the Legislation Alert, further background information was provided to the committee by my colleague the Honourable Margaret Keech MP, the then Minister for Child Safety and Minister for Women, in her letter of 17 February 2009. I note the committee has also published that letter on its website under the 'Ministerial correspondence re Bills' section for the Legislation Alert No.02 of 2009. Therefore, and given that the committee has not requested any specific information from me about any aspect of the Bill, I do not propose to discuss again the greater part of the matters raised in the committee's report.

However, there are four matters raised by the committee that I would like to comment upon, and I have addressed them in the order raised in the committee's report, as follows.

Clause 272 – Reversal of the onus of proof

The committee notes that clause 272 of the Bill provides for a reversal of the onus of proof because it requires a person charged with an offence under that provision to prove certain matters in his or her defence in order to avoid a conviction (paragraphs 38 to 42 of the committee's report). The relevant offence is created only in relation to pre-June 1991 adoptions. An offence is committed if a person contacts, or attempts to contact, another person while knowing that the other person has given the chief executive a contact statement stating that they do not wish to be contacted by the first person.

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Queensland 4001 Australia
**Telephone** +61 7 3224 7477
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**Website** www.childsafety.qld.gov.au
ABN 65 959 415 158

The matters to be proved in defence are that the person had contact with the other person before the person acquired the knowledge mentioned in subsection 272(1)(a) and (d); and that the contact is a continuation of, or equivalent to, the previous contact.

The reversal of the onus of proof is justified in this instance because the facts of the defence are not likely to be known to the prosecution. It is the person charged with the offence who will be best positioned to know whether or not their contact with the other person took place before the first person acquired the knowledge mentioned. The examples contained in the clause illustrate this. For instance, the person will be best able to prove that they had contact with the other person in the course of their employment or in some other capacity, before they knew that the other person had given the chief executive a contact statement stating that they do not wish to be contacted by the first person.

Clause 32 – Clear meaning

The committee comments that the term 'reasonable steps' in clause 32 of the Bill may not be sufficiently clear (paragraph 60 of the committee's report). Clause 32 requires the chief executive to take reasonable steps to establish a birth father's identity and location, in order to obtain his consent to his child's adoption.

In the absence of a definition, it is considered that the steps to be taken in attempts to identify and locate a child's father should be what an ordinary person standing in the shoes of the decision maker would consider to be reasonable in the circumstances. This may differ from case to case and therefore it is difficult to define clearly what the reasonable steps are.

For the committee's information, the Department's Adoption Practice Manual provides detailed guidance to officers about the various steps to be undertaken when attempting to identify and/or locate a child's father. For instance, if the mother has provided only partial information about the father's identity, officers must firstly review the information to determine if it may be possible to identify the father, and conduct inquiries accordingly. If the father's identity is known, but his location is unknown, officers should conduct a search using publicly available means for tracing people such as electoral rolls, telephone listings, contacting his friends and/or family, attempting to contact him via his last known address and so on.

When undertaking searches to locate and notify a father, staff are also required to have due regard to the father's right to privacy. For example, if the Department has a telephone number for the father, that number can be called. However, if a person other than the person thought to be the father answers the call, discretion is to be used when leaving a message. For instance, the message should not reveal that the matter concerns adoption of a child, but should only advise that the matter is sensitive and leave a message requesting the person to return the call, without giving details that may divulge the call has come from Adoption Services Queensland.

It should also be noted that if the court is considering an application to dispense with the birth father's consent to his child's adoption, on the basis that his identity could not be established, or he could not be located after making all reasonable inquiries, the court must be satisfied of this – i.e. that all reasonable inquiries have been made (see clause 39(1)(a) of the Bill). In addition, the court must not give the dispensation unless it is satisfied it would be in the child's best interests for arrangements for the child's adoption to continue to be made (see clause 39(2) of the Bill).

If the court is not satisfied, it may adjourn the application and require the Department to make further efforts to identify and/or locate the father. Therefore, the absence of a definition of what are 'reasonable steps' will not prejudice a person's rights.

Clause 253 – Clear meaning

The committee states that the term 'restricted information', which is used in clause 253, is not defined in the Bill and that therefore its meaning may be sufficiently uncertain as to lead to ambiguity (paragraph 62 of the committee's report). If the chief executive is required to give a person a document in response to a request for particular information, clause 253 enables the chief executive to firstly alter the document to ensure that any restricted information cannot be read.

In accordance with current drafting practice, clause 253 uses the term 'restricted information' as a tag term to refer to information that the chief executive is not allowed to give to a person, because of a restriction on giving the information under division 2 or 3 of part 11 of the Bill. Therefore, the term does not need to be further defined in the Bill.

Clause 276 – Delegation of legislative power

The committee comments that the powers to be conferred on the chief executive by clause 276 will be significant and discretionary, and that these could alternatively be conferred upon a court or an administrative tribunal.

Clause 276 will enable the chief executive to contact biological parents and adopted persons for the purpose of providing either party with information about the medical history of the other party or a biological relative. The intention of clause 276 is to provide a mechanism whereby important medical history information can be passed on to parties to an adoption, to meet their desire for a more fulsome genetic history and to enable them to take proactive steps to better manage their own health, if it is the case that particular genetic conditions could have been inherited.

This will be a participatory process and there will be no compulsion on any person to either give, or receive, the medical history information (see clause 276(8)). Therefore, there will be no necessity to appeal a decision made by the chief executive to pass on a person's medical history information, because the information will not be passed on if the person refuses to give, or receive, it. The chief executive is also better placed to make contact with a biological parent or an adopted person, to ask them for information about their medical history, than would be a court or a tribunal. Given all of this, is, it is considered that the delegation of legislative power to the chief executive is appropriate.

I trust this information is of assistance and I thank the committee for its detailed examination of the Bill.

Yours sincerely

Phil Reeves

**Phil Reeves MP**
Minister for Child Safety
and Minister for Sport
Member for Mansfield

## 10. 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
**Date passed:** 21/05/09

**Committee report on bill:** 02/09; at 37 - 39
**Date Ministerial response received:** 21/05/09 (copy commences following page)

### 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.

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

2. The committee thanks the Attorney-General for the information provided in his letter.

3. The committee makes no further comment regarding the bill.

**Hon Cameron Dick MP**
Member for Greenslopes

Queensland Government

**Attorney-General**
**and Minister for Industrial Relatio**

In reply please quote: 520119/1, J/09/03346

SCRUTINY OF
21 MAY 2009
LEGISLATION COMMITTEE
B14·09.

21 May, 2009

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller Jo-Ann,

Thank you for your letter dated 18 May 2009 about the Crime and Misconduct and Summary Offences Amendment Bill 2009.

**Part 3 Amendment of *Summary Offences Act 2005***

The Committee notes that clause 17 inserts a new offence into the *Summary Offences Act 2005* of Endangering the safe use of a vehicle by throwing an object or by a similar activity. The Committee states that the new offence reverses the onus of proof and creates an offence of absolute liability regardless of intention or knowledge that conduct will constitute a breach.

In Queensland, criminal responsibility does not depend on *mens rea*. A person's motive in doing an act or a person's intention to cause a particular result is immaterial so far as regards criminal responsibility, unless expressly declared to be relevant in the offence.

Criminal responsibility is defined by Chapter 5 of the Code which applies to all Queensland criminal offences and which contains the 'excuse' provisions of the Code. A person cannot be convicted of a criminal offence unless the prosecution can negative, beyond a reasonable doubt, a Chapter 5 excuse raised on the evidence.

Section 23 of the Code is particularly relevant and provides that a person is not criminally responsible for an unwilled act (section 23(1) (a)) or an event that occurs by accident section 23(1) (b)).

The proposed new offence does not include a reversal of the onus of proof. In order to convict a person of the offence the onus is upon the prosecution to prove the following elements beyond a reasonable doubt:

- the defendant unlawfully (defined to mean unless authorised, justified or excused by law);

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- threw an object at a vehicle; or placed an object in or near to the path a vehicle is using or may use; or directed a beam of light from a laser at or near a vehicle; and

- such conduct endangered or was likely to endanger the safe use of the vehicle.

As discussed, all relevant excuses contained in Chapter 5 of the Code apply. Therefore, if the act of throwing the object was an unwilled act (s 23(1) (a)), or if the endangerment of the vehicle occurred by accident (s 23(1) (b)), the excuse of accident set out in section 23 of the Code would apply and excuse the defendant from criminal responsibility.

With regards to Queensland's criminal offences involving the causing of harm to a person, generally, 'intent' is not an element of the offence. An assault is unlawful unless it is authorised or justified or excused by law. The offences of common assault, assault occasioning bodily harm and serious assault do not contain an element of 'intent' (note, exception s 340(1) (a)). Section 320 of the Code provides the offence of Grievous bodily harm and applies to any person who unlawfully does grievous bodily harm to another. The offence carries 14 years imprisonment and does not contain an element of intent. Section 323 of the Code provides the offence of Wounding and applies to any person who unlawfully wounds another. The offence carries seven years imprisonment and does not contain an element of intent. Manslaughter which carries life imprisonment does not contain an element of 'intent'.

It should also be noted in this regard that Section 230 of the Code – common nuisance – currently provides an offence where no element of intent is required and the proof of a defence rests with the accused.

Further, the Committee is referred to section 329 of the Code which is particularly relevant to the proposed new offence. Section 329 applies to a person who endangers the safety of a person travelling by railway by any unlawful act or omission. The offence carries two years imprisonment and does not contain an element of intent. Also, analogous to the new offence is section 24 of the Summary Offences Act which prohibits a person at a sporting event from throwing an object that may injure a person, damage property or disrupt the event. The offence carries six months imprisonment and does not contain an element of intent.

The new offence of Endangering the safe use of a vehicle by throwing an object or by a similar activity, sets out specific conduct that is inherently dangerous. It is therefore appropriate that the offence does not contain, as an element of the offence, an intent to cause endangerment. As discussed, the offence is subject to the excuse provisions in Chapter 5 of the Code. The prosecution must negative the operation of any such excuse where it is raised on the evidence.

I thank the Committee for its consideration of this Bill.

Yours sincerely

**Hon Cameron Dick MP**
**Attorney-General**
**and Minister for Industrial Relations**

## 11. FINANCIAL ACCOUNTABILITY BILL 2009

| | |
|---|---|
| **Date introduced:** | 22 April 2009 |
| **Responsible minister:** | Hon AP Fraser MP |
| **Portfolio responsibility:** | Treasurer and Minister for Employment and Economic Development |
| **Date passed:** | 19/05/09 |
| **Committee report on bill:** | 02/09; at 41 - 42 |
| **Date Ministerial response received:** | 20/05/09 (copy commences following page) |

### 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. |

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

2. The committee thanks the Treasurer for the information provided in his letter.

3. The committee makes no further comment regarding the bill.

**Hon Andrew Fraser MP**
Member for Mount Coot-tha

Queensland Government

**Treasurer of Queensland**

TRX-09038

19 MAY 2009

SCRUTINY OF
20 MAY 2009
LEGISLATION COMMITTEE

B1.09.

Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Jo-Ann

Thank you for your letter of 18 May 2009 enclosing pages of the Committee's Alert Digest No. 2 of 2009 relating to the *Financial Accountability Bill 2009*.

My reply to the issues raised by the Committee is set out in the enclosed document.

I trust this information is of assistance.

Yours sincerely

ANDREW FRASER
Treasurer
Minister for Employment and Economic Development

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## RESPONSE TO SCRUTINY OF LEGISLATION COMMITTEE'S COMMENTS

### Financial Accountability Bill 2009

**Clause 46 - False or misleading documents and Clause 47 - False or misleading information**

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.

## 12. TELECOMMUNICATIONS INTERCEPTION BILL 2009

| | |
|---|---|
| **Date introduced:** | 22 April 2009 |
| **Responsible minister:** | Hon AM Bligh MP |
| **Portfolio responsibility:** | Premier |
| **Date passed:** | 21/05/09 |
| **Committee report on bill:** | 02/09; at 75 - 83 |
| **Date Ministerial response received:** | 20/05/09 (copy commences following page) |

### 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.

### EXAMINATION OF INFORMATION PROVIDED BY MINISTER

4. The committee thanks the Premier for the information provided in her letter.
5. The committee makes no further comment regarding the bill.

# Premier of Queensland

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For reply please quote: *LJP/DT – TF/09/14212 - DOC/09/56935*

SCRUTINY OF
20 MAY 2009
LEGISLATION COMMITTEE
B8.09.

Ms Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Miller

**Re: Telecommunications Interception Bill 2009**

Thank you for your letter of 18 May 2009 enclosing the relevant pages of the committee's Legislation Alert No. 02 of 2009 that relate to the Telecommunications Interception Bill 2009 (the Bill) and inviting my response to the committee's commentary on the Bill.

My Government values the ongoing oversight role of the committee in relation to proposed legislation and I thank the committee for its comments on the Bill.

I note that, in relation to the Bill in an overall sense, the committee, at paragraph 13 of the Alert, concludes that the utility of telecommunications interception powers as a tool for investigating serious offences 'may provide justification' for any breach of fundamental legislative principles regarding individual privacy.

The committee makes this conclusion after having summarised the structural safeguards that apply to the Queensland Police Service (QPS) and the Crime and Misconduct Commission (CMC) in relation to this intrusive power to intercept communications. The safeguards include that:

- warrants are to be issued by an eligible Judge of the Federal Court or nominated member of the Administrative Appeals Tribunal, who must apply legislative considerations concerning the justification of the use of the powers and privacy ramifications;
- the Judges and Administrative Appeals Tribunal members will be assisted in their deliberations by Queensland's Public Interest Monitor (PIM), who has a statutory entitlement to attend hearings for warrant applications, to represent the public interest;
- the QPS and CMC must consult the PIM before the hearing of any warrant application, and the applying officer must disclose fully to the PIM all matters of which the officer is aware; and

- the QPS and CMC will be subject to the strict record keeping, reporting and inspection safeguards required by the federal *Telecommunications (Interception and Access) Act 1979* (the Commonwealth Act) and provided in parts 3 and 4 of the Bill.

However, the committee makes some points about specific aspects of the Bill—how the Bill deals with judicial review, oversight by the Parliamentary Crime and Misconduct Committee (PCMC) and some other aspects. I address those points below, but in relation to each of them I make the following general point. By enacting this legislation, Queensland will be, in effect, signing up to a pre-existing, federal scheme, many of the parameters of which are stipulated in, or required by, the Commonwealth Act. If the provisions of the State Bill are to have effect constitutionally, they must accord with the restrictions imposed by the Commonwealth Act, including its section 63 restrictions on the disclosure of intercepted information and interception warrant information. Those restrictions are noted in the Bill's general confidentiality provision, clause 34.

In relation to specific aspects of the Bill, the committee at paragraph 21 seeks further information about the rationale for clause 38 of the Bill, which provides that decisions made under the Bill are not subject to judicial review. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides that judicial review does not apply to the Commonwealth *Telecommunications (Interception and Access) Act*. To the extent that there are any decisions made under the State Bill that are not captured by that pre-existing exemption from the Commonwealth judicial review regime, clause 38 seeks to exempt the decisions from the State judicial review regime, for the purpose of consistency. (Please also note that much of the substance of this Bill has been legislated into the Commonwealth Act under recent federal amendments.)

The committee also highlights references in the Bill to the Parliamentary Crime and Misconduct Committee (PCMC), which under the *Crime and Misconduct Act 2001* oversees the CMC's performance of its powers and responsibilities. The committee at paragraph 48 notes that the Bill does not itself confer upon the PCMC an investigative role to examine the performance of the CMC and QPS (in relation to telecommunications interception) or other matters.

I acknowledge this. Indeed, the Government had sought to draft the Bill to provide the PCMC with an explicit oversight function in relation to the CMC's use of interception powers. However, Queensland is constrained in what the Bill can validly provide in relation to the PCMC. Any explicit interception oversight function for the PCMC, or providing for the PCMC to receive full information for such a function, would be inconsistent with the Commonwealth Act, in particular that Act's section 63, and would be of no effect.

The Commonwealth Act does not refer to a parliamentary committee of any state. Nor does the telecommunications interception legislation of any other state refer to a state parliamentary committee.

In any event, I am satisfied that the safeguards in the Commonwealth Act and in the Bill are sufficient in providing a framework of accountability in relation to the QPS and CMC, to the extent of the restrictions imposed by the Commonwealth Act.

I have been in correspondence with the Chair of the PCMC and have informed that committee of the constraints faced by Queensland in providing for any role for the PCMC under the Bill and in providing for the PCMC's receipt of intercepted information or interception warrant information in that regard.

The committee also expresses concern about clause 28. Clause 28 relates to an inspection or questions from the independent inspecting entity under part 4 of the Bill. The clause provides that an officer of the QPS or CMC is not excused from giving information, answering a question or giving access to a document on certain grounds, including the ground that it might tend to incriminate the person.

Clause 28 reflects the public interest in providing that the inspecting entity has sufficient investigative powers to be fully informed about whether or not the QPS and CMC have complied with the telecommunications interception regime and the regime's restrictions on use of intercepted information. Ultimately, the clause enhances the protection of the privacy of persons about whom information has been collected under an interception warrant. It has been drafted in light of the Commonwealth Act, section 35(1)(h), which requires a State Bill to make satisfactory provision for regular inspections of intercepting agencies' records, for the purpose of ascertaining the extent of compliance with the Commonwealth Act, and by an independent entity that has sufficient powers to make proper inspection of the records for that purpose. As the committee notes, clause 28 has its own safeguards as set out in subclause (2).

I thank the committee for its noting of other discrete issues that it raises, and I trust that the information I have provided above is of assistance.

Yours sincerely

**ANNA BLIGH MP**
**PREMIER OF QUEENSLAND**