



Legislation Alert

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 has 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* and the *Statutory Instruments Act 1992*:

<i>Legislative Standards Act</i>	<i>Statutory Instruments Act</i>
<ul style="list-style-type: none"> • Meaning of ‘fundamental legislative principles’ (section 4) • Explanatory notes (part 4) 	<ul style="list-style-type: none"> • Meaning of ‘subordinate legislation’ (section 9) • Guidelines for regulatory impact statements (part 5) • Procedures after making of subordinate legislation (part 6) • Staged automatic expiry of subordinate legislation (part 7) • Forms (part 8) • Transitional (part 10)

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

Rights and liberties of individuals	Bills and subordinate legislation	
	<ul style="list-style-type: none"> • make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review • are consistent with the principles of natural justice • don't reverse the onus of proof in criminal proceedings without adequate justification • confer power to enter premises, and search for and seize documents or other property, only with a warrant issued by a judicial officer • provide adequate protection against self-incrimination • do not adversely affect rights and liberties, or impose obligations, retrospectively • do not confer immunity from proceeding or prosecution without adequate justification • provide for the compulsory acquisition of property only with fair compensation • have sufficient regard to Aboriginal tradition and Island custom • are unambiguous and drafted in a sufficiently clear and precise way 	
Institution of Parliament	Bills	Subordinate legislation
	<ul style="list-style-type: none"> • allow the delegation of legislative power only in appropriate cases and to appropriate persons • sufficiently subject the exercise of delegated legislative power to the scrutiny of the Legislative Assembly • authorise the amendment of an Act only by another Act 	<ul style="list-style-type: none"> • is within the power that allows the subordinate legislation to be made • is consistent with the policy objectives of the authorising law • contains only matter appropriate to subordinate legislation • amends statutory instruments only • allows the subdelegation of a power delegated by an Act only – <ul style="list-style-type: none"> – in appropriate cases to appropriate persons – 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/tailedPapers).

PART 1 – BILLS EXAMINED

1. CRIMINAL CODE (HONESTY AND INTEGRITY IN PARLIAMENT) AMENDMENT BILL 2009

Date introduced: 19 August 2009

Member: Mr J-P H Langbroek MP, Leader of the Opposition and Shadow Minister for the Arts

Nature of bill: Private member's bill

ISSUES ARISING FROM EXAMINATION OF BILL

- | |
|---|
| 1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to clause 5 which may be ambiguous. |
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BACKGROUND

2. The bill would insert an offence into the Criminal Code, making it an offence for any person to knowingly give a false answer while being examined by the Legislative Assembly or one of its committees. It would also withdraw from the Legislative Assembly's contempt jurisdiction proceedings regarding conduct giving rise to the proposed offence.
3. The Criminal Code (Truth in Parliament) Amendment Bill 2008, introduced as a private member's bill in the 52nd Parliament, was in similar terms.¹ That bill failed to pass.

LEGISLATIVE PURPOSE

4. The bill is intended to change the current position established by the *Criminal Code Amendment Act 2006* whereby the Legislative Assembly has exclusive jurisdiction to deal with a person who provides false evidence to it or to one of its committees.²
5. Therefore, the bill would amend the:
 - Criminal Code; and
 - *Parliament of Queensland Act 2001*.

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 3 and 5** may appear to have insufficient regard to rights and liberties of individuals.

¹ The committee's examination of the 2008 bill was reported in *Alert Digest* 09/08, 9-13; see also 10/08, 23-25. The committee's examination of the 2008 bill was assisted by advice received by Professor G Carney. That advice has assisted also the committee's examination of the Criminal Code (Honesty and Integrity in Parliament) Amendment Bill 2009.

² Regarding the Criminal Code Amendment Bill 2006, see *Alert Digest* 06/06, 1.

8. Currently, the Assembly has exclusive jurisdiction to deal, by way of its powers and privileges, with those who provide false evidence to it or one of its committees. Sections 56 to 58 of the Criminal Code were repealed by the *Criminal Code Amendment Act 2006*. Until enactment of that Act, section 57 of the Criminal Code had provided that any person who knowingly gave false evidence in the course of an examination before the Legislative Assembly or a committee of the Legislative Assembly would be guilty of a crime and liable to seven years' imprisonment.
9. Clause 3 would again insert a section 57 into the Criminal Code to make it an offence for any person to knowingly give a false answer while being examined by the Legislative Assembly or by one of its committees.

Clause	New section	Offence	Proposed maximum penalty
Criminal Code			
3	57	Providing false evidence before Parliament	Seven years' imprisonment

10. The new section 57, in almost identical terms to the section 57 repealed by the *Criminal Code Amendment Act 2006*, states:

57 False evidence before Parliament

(1) A person who, during an examination before the Legislative Assembly or a committee of the Legislative Assembly, knowingly gives a false answer to a lawful and relevant question put to the person during the examination commits a crime.

Maximum penalty – 7 years imprisonment.

(2) The offender can not be arrested without warrant.

(3) A person can not be convicted of the offence defined in this section on the uncorroborated testimony of 1 witness.

11. Clause 5 would then withdraw from the contempt jurisdiction of the Legislative Assembly the ability to 'proceed against' a person who has committed an offence under the proposed section 57 of the Criminal Code. Clause 5 would achieve this by inserting a new section 47(3) into the *Parliament of Queensland Act*. It would provide that if a person's conduct were both a contempt of the Assembly and an offence under section 57 of the Criminal Code, proceedings must be brought for the offence only.
12. The combined effect of clauses 3 and 5 would be to transfer from the Legislative Assembly to the courts the exclusive jurisdiction to punish a member and a non-member for contempt where either person provided false evidence in answering a question posed by the Assembly or one of its committees. Therefore, the bill would reverse the current position of the Assembly having exclusive jurisdiction to deal with those who provide false evidence to it or one of its committees.
13. Examination of whether the legislation has sufficient regard to rights and liberties of individuals involves consideration of:
 - the Assembly's power to punish an individual for contempt; and
 - safeguards of individual liberty.
14. The Assembly possesses the power to investigate any person for contempt (whether a member or not), to make findings against any person of being in contempt of the House, and to impose punitive and non-punitive measures against that person. Punitive measures include exclusion from the House, the imposition of a fine, and the arrest and imprisonment of a person.
15. These powers to deal with contempt now derive from section 39(1) of the *Parliament of Queensland Act* which provides that the Assembly has the same power as that of the United Kingdom House of Commons as at the establishment of the Commonwealth. The power to fine for contempt is, however, expressly provided in section 39(2) in order to remove doubt whether the UK House of Commons retained the power in 1901. Given the unrestricted adoption of the contempt power of the UK House of Commons by section 39(1), the power to imprison those found in contempt appears not to be conditional on the non-payment of a fine.

16. There are effectively no legal safeguards to protect individuals from unfair or unscrupulous exercise of the contempt power by a House and the courts have very limited jurisdiction to review the exercise of the power. They have no jurisdiction to review findings of fact or the reasonableness of any penalty imposed. Nor do they appear to have the power to review a finding of contempt where no basis for the finding is contained within the resolution of the House. The jurisdiction of the courts is, for all practical purposes, confined to deciding whether the House possesses the power it purports to exercise, and whether it has complied with any statutory restrictions on its contempt power.
17. When reporting on its examination of the Criminal Code Amendment Bill 2006, the committee of the 51st Parliament expressed concern that the bill may not have sufficient regard to individual rights and liberties in so far as it vested in the Legislative Assembly exclusive jurisdiction to deal with the contempt of providing false evidence to the Assembly or one of its committees. In respect of individuals proceeded against by way of the contempt power of the Assembly, the committee warned that³:
- the exclusive jurisdiction of the [Legislative Assembly] leaves them vulnerable to punitive punishment with little if any scope for judicial review.*
18. The committee recommended 'that the Assembly's power to imprison be clarified (by amendment of the *Parliament of Queensland Act*) to clearly confine it to the situation when a fine is first imposed and remains unpaid after the due date' and that procedural fairness be accorded before imprisonment was ordered. Neither recommendation was acted upon.
19. Consistent with previous recommendations of the committee, it is noted that clauses 3 and 5 which would vest in the courts rather than the Legislative Assembly the jurisdiction to prosecute false evidence given in parliamentary proceedings have sufficient regard to rights and liberties of individuals. Indeed, clauses 3 and 5 may have greater regard to rights and liberties than the current legislation.

Clear meaning

20. 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.
21. **Clause 5** would insert a section 47(3) into the *Parliament of Queensland Act* and may be ambiguous in one respect.
22. Currently, section 47 states:
- 47 Other proceedings**
- (1) If a person's conduct is both a contempt of the Assembly and an offence against another Act, the person may be proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct.
- (2) The Assembly may, by resolution, direct the Attorney-General to prosecute the person for the offence against the other Act.
23. The new section 47(3) would provide that 'the person may only be proceeded against for the offence' under the proposed section 57 of the Criminal Code. It is intended to operate as an exception to the qualified dual jurisdiction provided by section 47(1).
24. Uncertainty may arise from the phrase, 'proceeded against'. As worded, it may not be clear whether section 47(3) would prevent the Legislative Assembly from taking:
- action against a person after a finding that he or she had provided false evidence; or
 - a range of steps which precede final action against a person after such a finding, such as undertaking an inquiry as to whether false evidence was provided to the Assembly or one of its committees and the making of a finding at the conclusion of such an investigation.

³ See: *Alert Digest* 06/06, 4.

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25. To provide an example of uncertainty that may arise from the new section 47(3) as drafted, it may not be clear whether it would permit a hearing by the Members' Ethics and Parliamentary Privileges Committee as to whether or not a contempt had occurred.
26. In respect of whether clause 5 of the 2008 bill was unambiguous and drafted in a sufficiently clear and precise way, the then Leader of the Opposition provided the committee of the 52nd Parliament with the following information:
- I note that the Committee has raised the question of clause 5 of the Bill and whether it limits the Legislative Assembly from taking any action after a finding that a person has knowingly given a false answer while being examined by the Legislative Assembly or one of its Committees.*
- The intent of clause 5 was simply to clear up the issue regarding how to prosecute a person who is believed to have committed the offence under the proposed section 57 of the Criminal Code.*
- This clause is simply meant to clarify that where the contempt amounts to an offence under the proposed section 57 of the Criminal Code then it should be proceeded with by way of a court prosecution.*
- Given the contempt of providing false evidence would be judged by the independent judiciary, then the Legislative Assembly should be guided by the outcome of the proceedings. It would be inappropriate for the Legislative Assembly to also pass judgment once the matter has proceeded by way of court prosecution as this would be duplicitous.*
27. Nevertheless, the committee suggests that uncertainty regarding clause 5 might be resolved, for example, if the new section 47(3) were to be confined to proceedings for the imposition of punitive measures against a witness found to be in contempt.

Sufficient regard to the institution of Parliament

Institution of Parliament

28. 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*.
29. **Clause 5** would withdraw from the contempt jurisdiction of the Legislative Assembly the ability to 'proceed against' a person who has committed an offence under the proposed section 57 of the Criminal Code. This may appear to undermine the institution of Parliament.
30. However, it is arguable that a transfer of jurisdiction to the courts over the specific form of contempt with which the bill is concerned might serve to enhance the reputation of Parliament. The imposition or non-imposition of penalties by an elected legislature can arouse suspicion of political interference and cronyism, particularly if, given the limited capacity for judicial review of any such proceedings, a parliamentary penalty were imposed without sufficient regard to the requirements of procedural fairness.
31. One traditional justification for parliamentary chambers retaining a contempt jurisdiction is the need for efficient response to violations of dignity to ensure capacity to function as a legislative chamber. One example is when the proceedings of a chamber are disrupted. However, a similar speedy response is not needed where a witness before a chamber or one of its committees is suspected of providing false evidence or where such a suspicion later arises. While the chamber or the committee is entitled to make its own assessment of the veracity of the witness's testimony and the weight it is to be given, it is not essential for the effective functioning of parliamentary proceedings that such a witness be prosecuted by the chamber. Indeed, a court may be better equipped to judge the veracity of and weight to be given to a witness's testimony.
32. Finally, the committee addresses what may appear to be a difficulty were clause 5 to be read on its own; namely, if the Legislative Assembly resolved that a person had provided false evidence to it or to one of its committees but neither the Attorney-General nor the Director of Public Prosecutions prepared to instigate a prosecution. However, section 47(2) of the *Parliament of Queensland Act* authorises the Assembly by resolution to direct the Attorney-General to prosecute any person for an offence.

2. PROSTITUTION AND OTHER ACTS AMENDMENT BILL 2009

Date introduced: 18 August 2009
Responsible minister: Hon N Roberts MP
Portfolio responsibility: Minister for Police, Corrective Services and Emergency Services

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 7 and 8** which would extend existing legislative restrictions on advertising of prostitution and social escort services;
 - **clauses 7, 8, 16, 17 and 21** which would create new offences or amend existing offences;
 - **clauses 8 and 19** which may impose an evidential burden on a person wishing to raise a defence to liability for an offence; and
 - **clause 18** which would amend section 229J of the Criminal Code to extend the immunity conferred by that section.

BACKGROUND

2. Following a review by the Crime and Misconduct Commission of the viability of legalising outcall prostitution services, the bill is to effect reforms to prostitution law.⁴

LEGISLATIVE PURPOSE

3. The bill is intended to (explanatory notes, 1):

amend the Prostitution Act 1999 (the Act) to create a framework to regulate the manner in which social escort services can advertise for business and the Criminal Code to create new offences for carrying on the business of enabling illegal prostitution.
4. Therefore, the bill would amend the:
 - *Prostitution Act*;
 - Criminal Code; and
 - *Child Employment Act 2006*.

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 7 and 8**, which would extend existing legislative restrictions on advertising of prostitution and social escort services, may infringe rights and liberties of individuals. Clause 5 would amend the definition of 'publish' in section 92 of the *Prostitution Act* to include the publishing of advertisements on the internet, whether the source of the internet publication was in Queensland or elsewhere.

⁴ Crime and Misconduct Commission, *Regulating Outcall Prostitution* (2006).

7. The explanatory notes suggest (at 4) that the clauses ‘restrict free speech by imposing advertising regulations on a legal industry’. However, the committee has stated in the past that, while the right to freedom of expression has long been observed in Australia, it is not an absolute right and may be subject to restrictions (*Alert Digest* 13/96, 17-18). This is reflected clearly in article 19 of the International Covenant on Civil and Political Rights, which states in paragraphs 2 and 3:

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others;*

(b) *For the protection of national security or of a public order (ordre public) or of public health and morals.*

8. The committee has noted also that Parliament may restrict rights and liberties of individuals, provided it does so in clear terms. The courts will apply a protective presumption against the modification or abolition of fundamental rights:⁵

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

9. Accordingly, in respect of clauses 7 and 8, the committee notes that a clear intention is manifested by the provisions themselves and by the explanatory notes. In respect of whether the provisions have sufficient regard to rights and liberties of individuals, the latter states (at 4-5):

Social escorts and social escort services will be restricted in the manner in which they advertise, closing a loophole that allows illegal prostitution providers to advertise as social escorts. Research undertaken by the CMC in the outcall prostitution report revealed that the small number of legitimate social escort providers already comply with the proposals contained in the Submission. Further, illegal prostitution providers who publish provocative advertisements to give the appearance of advertisements for prostitution impact upon the continued viability of the legal prostitution industry.

10. **Clauses 7, 8, 16, 17 and 21** may affect rights and liberties of individuals as they would create new offences or amend existing offences.

11. Clauses 8, 17 and 21 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
<i>Prostitution Act</i>			
8	96A	Advertising social escort services	<ul style="list-style-type: none"> • If internet site established for advertisement – <ul style="list-style-type: none"> – 70 penalty units (\$7,000) if establishment cost is \$1,000 or less; or – 10 times the commercial cost of establishing the site if establishment cost is more than \$1,000; and • Otherwise – <ul style="list-style-type: none"> – 70 penalty units (\$7,000) if publishing cost is \$1,000 or less; or – 10 times the commercial cost of publishing the advertisement is more than \$1,000.

⁵ *Coco v The Queen* (1994) 179 CLR 427 at 437.

Clause	New section	Offence	Proposed maximum penalty
8	96B(1)	As an employee of a social escort provider, arranging to provide a social escort service without clearly informing a person that the service does not include the provision of prostitution	70 penalty units (\$7,000)
8	96B(2)	Providing a social escort service without clearly informing a person that the service does not include the provision of prostitution	70 penalty units (\$7,000)
8	96B(3)	As a social escort provider, entering into an arrangement for the provision of a service if the person has not been clearly informed (by the provider, an employee or the social escort) that the service does not include the provision of prostitution	70 penalty units (\$7,000)
Criminal Code			
17	229HB	Carrying on business of providing unlawful prostitution	Imprisonment for seven years; or 14 years' imprisonment where to the offender's knowledge a person who is not an adult or a person with an impairment of the mind is engaged in the provision of the prostitution
17	229HC(1)	Engaging in prostitution through an unlawful prostitution business	<ul style="list-style-type: none"> • For a first offence – imprisonment for three years; • For a second offence – imprisonment for five years; and • For a third or subsequent offence – imprisonment for seven years.
17	229HC(2)	Obtaining prostitution through unlawful prostitution	<ul style="list-style-type: none"> • For a first offence – imprisonment for three years; • For a second offence – imprisonment for five years; and • For a third or subsequent offence – imprisonment for seven years.
Child Employment Act			
21	8B	Requiring or permitting a child to work as a social escort	100 penalty units (\$10,000)

12. Information regarding each of the offences to be inserted in the *Prostitution Act* by clause 8 is included in the explanatory notes (at 8-9):

New penalty provisions associated with a breach of section 96A have been tiered to take into account the actual costs associated with establishing an internet website for an advertisement or publishing an advertisement through any other means. Where the cost of publishing is \$1000 or less the maximum penalty remains at the current 70 penalty units. Where the cost of publishing is greater than \$1000 the maximum penalty has been increased to 10 times the commercial cost of establishing the internet website for an advertisement or 10 times the cost of publishing the advertisement where the advertisement is published through any other means...

Section 96B(1) provides that an employee of a social escort provider must not arrange a social escort service unless the employee has clearly informed the client that prostitution is not provided. The maximum penalty for failing to inform under this provision is 70 penalty units.

Section 96B(2) provides that a social escort must not provide a social escort service unless the social escort has clearly informed the client that prostitution is not provided. The maximum penalty for failing to inform under this provision is 70 penalty units.

Section 96B(3) creates an offence for a social escort provider to arrange for the provision of a social escort or provide a social escort without either an employee of the social escort service, the social escort or social escort provider clearly informing the client that prostitution is not provided as part of the social escort service. The maximum penalty for failing to inform under this provision is 70 penalty units.

13. In respect of clause 17 and the new offences to be inserted in the Criminal Code, the explanatory notes (at 5) suggest consistency with fundamental legislative principles:

New section 229HC creates offences which will apply to the sex workers and clients of an unlawful prostitution enterprise. The offences are based on 'reasonable suspicion'. The penalties and inclusion of the element of 'reasonable suspicion' are justified to ensure consistency with existing section 229I which provides an offence for a person found in a place reasonably suspected of being used for prostitution.

14. Regarding clause 21, the following information is provided (explanatory notes, 14):

Clause 21 inserts a new section '8B Prohibition on work as social escort to provide that an employer must not require or permit a child under 18 years of age to work as a social escort as defined in schedule 4 of the Prostitution Act 1999. A maximum penalty of 100 penalty units is provided.

15. In respect of clause 21, the recommendation of the Crime and Misconduct Commission was (recommendation 10, Report, xii):

That the regulations to the Child Employment Act 2006 prohibit the employment of minors as social escorts.

16. However, the committee notes with approval that, consistent with fundamental legislative principles requiring that subordinate legislation contain only matter appropriate to subordinate legislation, the offence has been included in the Act rather than the regulations. It is appropriate that an offence of this nature, with a maximum penalty of 100 penalty units (\$10 000) be included in the Act.

17. Clauses 7 and 16 would amend existing offences. The amendment in clause 7 is outlined in the table below.

Clause	Section amended	Offence	Existing maximum penalty	Proposed maximum penalty
<i>Prostitution Act</i>				
7	93	Advertising prostitution	70 penalty units (\$7,000)	<ul style="list-style-type: none"> • If internet site established for advertisement – <ul style="list-style-type: none"> – 70 penalty units (\$7,000) if establishment cost is \$1,000 or less; or – 10 times the commercial cost of establishing the site if establishment cost is more than \$1,000; and • Otherwise – <ul style="list-style-type: none"> – 70 penalty units (\$7,000) if publishing cost is \$1,000 or less; or – 10 times the commercial cost of publishing if the advertisement is more than \$1,000.

18. Regarding clause 7, the explanatory notes provide the following information (at 8) regarding the proposed increase in maximum penalties:

The penalty provisions have been amended to take into account the actual costs associated with establishing a website or publishing an advertisement in another manner. Where the cost of publishing the advertisement is \$1000 or less the maximum penalty will remain at the current 70 penalty units (\$7000). However, where the cost of publishing is greater than \$1000 the maximum penalty has been increased to 10 times the commercial cost of establishing the internet website that is the advertisement or 10 times the cost of publishing the advertisement in another manner.

19. Clause 16 would effect 11 amendments to the offence of knowingly participating in the provision of prostitution (section 229H of the Criminal Code), as detailed in the explanatory notes (11-12). The amendments are to give effect to the following recommendation of the Crime and Misconduct Commission (recommendation 23, Report, xiii):

That section 229H of the Criminal Code be amended to create an exception for:

- *people who engage in actions necessary to ensure the safety of sole operators (e.g. being told where the sole operator is attending an outcall and when he or she will be back, remaining in telephone contact with a sole operator while they are attending an outcall, and disseminating information about dangerous clients), but only if they act for one sole operator, and only if they are not current sex workers themselves*
- *people who act as receptionists or drivers for sole operators but only if they act for one sole operator and only if they are not current sex workers themselves.*

Onus of proof

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

21. Legislation provides for the 'reversal of the onus of proof', for example, when it declares the proof of a particular matter to be a defence.

22. Clauses 8 and 19 would:

- in new section 96B of the *Prostitution Act*, create derivative liability for an offence (new section 96B(3)) and impose upon a person the burden of adducing evidence in his or her defence (new section 96B(4)); and
- insert two evidentiary provisions –
 - new section 96C of the *Prostitution Act*; and
 - new section 229M of the Criminal Code.

23. The proposed offence provision in new section 96B(3) is outlined in paragraph 11. New section 96B(4) would create a defence for a social escort provider who could prove that:

- appropriate instructions regarding the obligation to inform had been provided to employees of the social escort service and social escorts and all reasonable precautions had been taken to ensure employees were aware of the obligation;
- the offence was committed without the provider's knowledge; and
- with the exercise of reasonable diligence, the provider could not have prevented the commission of the offence.

24. The explanatory notes suggest (at 4) that new section 96B(4) is consistent with fundamental legislative principles:

The obligation to clearly inform is complementary to the proposed advertising restrictions and will have no impact on the activities of legitimate social escort providers who currently inform prospective clients that sexual services are not provided. Introducing an offence provision for not clearly informing creates a disincentive for illegal prostitution providers and reduces the attractiveness of advertising illegal prostitution as social escorts. Additionally, police investigating illegal prostitution will be better able to distinguish those who are presenting themselves as legitimate social escort providers and those who are not.

To balance the new offence provisions, a defence is available for social escort providers where it can [be] proven the offence was committed without the knowledge of the social escort provider and that despite all reasonable precautions the commission of the offence could not have reasonably been prevented.

25. New section 96C of the *Prostitution Act* would allow an advertisement or statement published in relation to a social escort service to be considered evidence of carrying on a business of a social escort service.

26. New section 229M(1) of the Criminal Code would allow the carrying on of a business to be inferred from records of employment, business records, telephone records, advertisements 'and other relevant

factors and circumstances'. However, under new section 229M(2), evidence of condoms and other material for safe sex practices would not be admissible against a defendant.

27. In respect of the proposed evidentiary provisions in clauses 8 and 19, the committee notes that under neither proposed provision would the evidence identified be conclusive – in each case, it would be subject to evidence to the contrary, including evidence adduced by the accused. Nor would the effect of the evidentiary provision be determinative as the prosecution must establish beyond reasonable doubt the commission of the offence.
28. Further, the committee notes that in each case the evidentiary provision mirrors a provision in the existing legislation:
 - new section 96C mirrors the provision in section 96 of the *Prostitution Act* applying to the advertising of licensed brothels (explanatory notes, 9); and
 - new section 229M(1) mirrors the provision in section 229N of the Criminal Code.
29. However, unless an evidentiary provision is drawn with precision and clarity, it will have no evidentiary effect.⁶ In this regard, the committee notes that inclusion of the general words 'and other relevant factors and circumstances' in section 229M(1) may reduce the evidentiary effect of the provision.

Immunity from proceeding or prosecution

30. 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.
31. **Clause 18** would confer immunity from prosecution. It would amend section 229J of the Criminal Code to extend the immunity conferred. Currently, the Criminal Code confers immunity regarding offences in section 229I (Persons found in places reasonably suspected of being used for prostitution etc.). Clause 18 would extend the immunity conferred to an 'unlawful prostitution offence', defined in new section 229J(1) to an offence against new section 229HC(1) or (2).
32. The explanatory notes suggest (at 5) that clause 18 is justified:

The Bill confers immunity from prosecution. Clause 18 of the Bill extends the current certificate of discharge provisions contained in section 229J of the Criminal Code. Sex workers and clients who engage in or obtain prostitution through an unlawful prostitution business may obtain a certificate of discharge in return for evidence that can be used against the person carrying on the business. Such an extension of section 229J is justified to facilitate the identification and prosecution of those ultimately controlling unlawful prostitution enterprises.

⁶ JD Heydon (ed), *Cross on Evidence* (2004), [7105].

3. VICTIMS OF CRIME ASSISTANCE BILL 2009

Date introduced: 21 April 2009
Responsible minister: Hon CR Dick MP
Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
 - **clauses 64-9, 74-7, 114, 133, 136 and 194 and schedule 3** as they have the potential to affect individual rights to privacy of personal information;
 - **clauses 72, 80-2, 103-4, 175-6, 179 and chapter 6 generally** which would affect the entitlements of victims to assistance;
 - **clauses 140 and 141** which would create new offences;
 - **clauses 80-2** which may not be sufficiently defined or subject to appropriate review;
 - **clause 143(1)** which would confer immunity from civil liability upon officials; and
 - **clause 26**, defining who is a primary, secondary, parent secondary, witness secondary or related victim for the purposes of the legislation, and which may raise issues regarding consistency with Aboriginal tradition and Island custom.
2. The committee invites further information from the minister regarding:
 - the approach adopted by the legislation to the consent of a relevant person to the disclosure of information where the information relates to an individual under 18;
 - whether clauses 80-2 make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - whether the definitions in clause 26 are consistent with Aboriginal tradition and Island custom.
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 85(2)(c) and 147-8** which may authorise the amendment of an Act other than by another Act.

BACKGROUND

4. Following a review of the current legislative scheme under which criminal injury compensation is provided to victims of crime, the bill declares and implements principles of justice for victims of crime and establishes a new scheme to give financial assistance to certain victims.

LEGISLATIVE PURPOSE

5. The purposes of the legislation are to provide (clause 3):
 - fundamental principles of justice which are to underlie the treatment of victims by certain entities dealing with them;
 - a mechanism to implement the principles and processes for making complaints about conduct inconsistent with the principles; and
 - a scheme to give financial assistance to certain victims of acts of violence.

6. Therefore, clause 149 would repeal the *Criminal Offence Victims Act 1995*. Chapter 7 would also amend the:
- *Corrective Services Act 2006*;
 - Criminal Code;
 - *Evidence Act 1977*;
 - *Juvenile Justice Act 1992*;
 - *Penalties and Sentences Act 1992*;
 - *Personal Injuries Proceedings Act 2002*; and
 - *State Penalties Enforcement Act 1999*.

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 64-69, 74-77, 114, 133, 136 and 194 and schedule 3** have the potential to affect individual rights to privacy of personal information. The clauses are outlined below, with like provisions grouped together.
9. A preliminary matter relevant to disclosure of information is what is meant under the legislation by the consent of a 'relevant person' to the disclosure of information. The dictionary in schedule 3 defines the term 'relevant person' for the purposes of consent requirements.
10. The committee notes that under the definitions in schedule 3, consent to the disclosure of information regarding a person under the age of 18 is to be given by a parent or other guardian, not by the child or young person. However, the committee notes that sufficient regard for rights of children, teenagers and young persons requires generally that they should be able to express views on any decision affecting their well-being and to have the views taken into account in light of age, maturity, level of understanding and capacity. The committee invites further information from the minister regarding the approach adopted by the legislation to the consent of a relevant person to the disclosure of information where the information relates to an individual under 18.
11. In respect of the other clauses with potential to affect individual rights to privacy of personal information, first, clause 64 would make access to financial assistance under the legislation contingent upon an applicant:
- providing further requested information to a government assessor (clause 64(1)(a)); or
 - consenting to the government assessor obtaining further information (clause 64(1)(b)).
12. The explanatory notes indicate (at 5):
- The consent is required to enable the government assessor to gather all relevant information to decide the application. The applicant is only required to fill in an application form, attaching a medical certificate, any supporting documentation and the relevant consents.*
13. Second, clauses 69, 74 and 77(1) would provide for disclosure of certain information to a government assessor with the consent of the relevant person:
- clause 69 would allow the police commission to provide a written report about a victim's criminal history (see explanatory notes, 5-6);
 - clause 74 would allow a 'designated person' under the *Health Services Act 1991* to provide medical information about an applicant for victim assistance (see explanatory notes, 6); and

- clause 77 would allow the insurance commissioner under the *Motor Accident Insurance Act 1994*, the police commissioner and the Workers' Compensation chief executive to provide information about relevant payments (see explanatory notes, 6).

14. In respect of whether clauses 69, 74 and 77(1) have sufficient regard to rights and liberties of individuals, the explanatory notes state (at 6-7):

In summary all three breaches are justified and are advantageous to victims who are seeking to access financial assistance under the scheme. The information which is the subject of the consent is necessary to decide the application and the provision of consent upfront facilitates a faster application process. The philosophy of the scheme is that victims can access assistance quickly, and the requirements in clauses 69, 74 and 77(1) enable this to happen. Rather than requiring the victim to delay making the application while they gather relevant information to support the application, the victim can apply immediately by filling in the approved form and can access interim assistance in appropriate circumstances, whilst the government assessor gathers the relevant information to make a decision.

In addition, under clause 140 there is a safeguard on further disclosure of the information by the government assessor. Clause 140 provides that any prescribed person, who has acquired information or gained access to a document about someone else in the course of administering the Act or because of an opportunity provided by involvement in administering the Act, must not disclose the information to anyone else. The maximum penalty is 100 penalty units or 2 years imprisonment. The disclosure is only permitted if: the person consents; it is in connection with the performance of a function under the Act; or as required or authorised under an Act or law.

The victim is given an opportunity under clause 88 to make submissions to the government assessor about any intended refusal or reduction of assistance as a result of information accessed under these clauses. This makes the potential breach less objectionable.

In addition, an applicant for assistance under the scheme has a right to see a review (both internally and externally) of a decision of the government assessor to refuse to grant the assistance; or if the assistance is granted, about the amount of assistance.

15. Third, clauses 65-68 and 75-77 would provide for disclosure of certain information to a government assessor without the consent of the relevant person, allowing as follows:

- clause 65 – the police commissioner to provide information about an act of violence (see explanatory notes, 7);
- clause 66 – relevant police officials to provide copies of witness statements, or information about particular conduct, in relation to an act of violence (see explanatory notes, 7-8);
- clause 67 – the director of public prosecutions to provide information about a prosecution (see explanatory notes, 8-9);
- clause 68 – the chief executive (corrective services) to confirm release or discharge dates (see explanatory notes, 9);
- clause 75 – the chief executive (child protection) to provide information about a child's injuries or needs (see explanatory notes, 9);
- clause 76 – the principal registrar of the Queensland Civil and Administrative Tribunal to provide information about a person with impaired capacity (see explanatory notes, 9);
- clause 77(2) – the chief executive (corrective services) to provide information about relevant payments (see explanatory notes, 9-10); and
- clause 77(3) – a director under the *Dispute Resolution Centres Act 1990* to provide information about agreements reached under the Act and relevant payments (see explanatory notes, 10).

16. Fourth, clauses 114, 133, 136 and 194 would provide for disclosure of certain information to the scheme manager without the consent of the relevant person, allowing as follows:

- clauses 114 and 194 – the registrar of a court to provide information from the court (see explanatory notes, 10); and
- clauses 133 and 136 – a scheme manager to give information to a corresponding scheme manager (see explanatory notes, 10-11).

17. In respect of the third and fourth groups of proposed provisions, the explanatory notes provide (at 11-12) a summary of justification for any breach of fundamental legislative principles:

In summary these provisions potentially breach the FLP that legislation has sufficient regard to the rights and liberties of individuals on the basis that it invades the privacy of individuals. The breaches are justified as this information is necessary to decide the application and consent is not practical or desirable to be obtained from the person.

In addition, for clauses 67, 68, 75, 77(2) and (3), the disclosure is limited by the person giving the information to the government assessor (for example the Director of Public Prosecutions under clause 67) having to first be satisfied that the information is necessary to decide the application. For clause 136 the disclosure is limited to circumstances where the scheme manager is reasonably satisfied that the person who is to receive the information needs it for deciding whether or not to apply for a review of a government assessor's decision on the person's application, or for making submissions for a review of the decision. Under clause 133, the disclosure is limited by the scheme manager first being satisfied that the information is necessary for the corresponding scheme manager to decide the application. This is not a requirement for clause 76 as this information is necessary to decide the application.

In addition, under clause 140 there is a safeguard on further disclosure of the information by the government assessor. The maximum penalty is 100 penalty units or 2 years imprisonment. The disclosure is only permitted if: the person consents; it is in connection with the performance of a function under the Act; or as required or authorised under an Act or law. Clause 136(4) provides for a safeguard on further disclosure of the information by the government assessor under this clause. The maximum penalty for unauthorised disclosure is 100 penalty units or 2 years imprisonment. Further disclosure is only permitted if: the other person consents; it is for the purpose mentioned in subsection (2); or it is required or authorised under an Act or law.

The victim is given an opportunity under clause 88 to make submissions to the government assessor about any intended refusal or reduction in assistance as a result of information accessed under these clauses. This makes the potential breach less objectionable.

In addition, an applicant for assistance under the scheme has a right to seek a review (both internally and externally) of a decision of the government assessor to refuse to grant the assistance; or if the assistance is granted, about the amount of assistance.

18. **Clauses 72 and 104** would affect the entitlements to assistance of victims who fail to make an application or amend an application once notified of an opportunity to apply for assistance. Applications following the expiry of the relevant period would be limited to the pool remaining at that time.

19. In respect of consistency of clauses 72 and 104 with fundamental legislative principles, the explanatory notes provide the following information (at 12):

This limit potentially breaches the FLP that legislation should have sufficient regard to the rights and liberties of individuals because the legislation does not provide for fair and equal treatment between victims. A person who would otherwise have been entitled to a greater proportion of an assistance limit is prevented from obtaining that greater proportion, or obtaining any assistance at all if the assistance limit of the pool has been exhausted. The breach is justified as there needs to be finality in respect of access to the pool. Victims are given a reasonable opportunity to apply for assistance, and the statutory scheme (in the absence of which no persons/victims would be able to access any assistance) only provides a limited pool for certain categories of victims.

20. **Clauses 80-82** would exclude a person from eligibility under the financial assistance scheme in specified circumstances:

- clause 80 – where an act of violence was committed against a person because of his or her involvement in criminal activity;
- clause 81 – if an act of violence was not reported; and
- clause 82 – if reasonable assistance was not given to a police investigation of the act of violence or the arrest or prosecution of the person alleged to have committed the act of violence.

21. The explanatory notes acknowledge possible inconsistency of clause 80 with fundamental legislative principles but state that the clause has sufficient regard to rights and liberties of individuals (at 12-13):

This clause potentially breaches the FLP that legislation should have sufficient regard to the rights and liberties of individuals because it implies that otherwise eligible victims will be treated unequally. The potential breach is exacerbated for related victims and family members because the activities of the primary victim could affect the related victims' and family members' entitlement to assistance, irrespective of the injury suffered by them.

It is not considered appropriate for government funds to be used to provide assistance to victims whose own actions bring about the act of violence from which they have suffered injury. A person's criminal history can be

accessed to decide whether the person is involved in a criminal activity. Criminal histories will not be accessed for every victim. It will be accessed in cases where the materials before the government assessor (for example, the police brief) indicate involvement in a criminal activity.

The victim is given an opportunity under clause 88 to make submissions about the government assessor exercising discretion under this clause. This makes the potential breach less objectionable.

22. **Clause 103** would allow a government assessor to consider fresh evidence when determining an application for an amendment to a grant of assistance. The assessor may then reduce the grant of assistance provided. The possible effect upon rights and liberties of individuals is described in the explanatory notes (at 14):

This may potentially breach the FLP that legislation has sufficient regard to the rights and liberties of individuals because the victim may have relied upon the assistance being granted and it may be reduced through no fault of their own.

23. Justification for any breach of fundamental principles is provided (at 14):

However, under clause 104(2) the government assessor may only decrease the amount of assistance granted if: the applicant asks for the decrease; the expenses have not been incurred and therefore the assistance has not already been granted; or the decrease relates to expenses or loss of earnings where the applicant's circumstances have changed. This makes the potential breach less objectionable because it links the decrease to the applicant's circumstances changing, rather than the government assessor having a fresh look at whether the original decision on the person's application for assistance was correct.

24. **Clauses 175-176, 179 and other provisions of chapter 6 generally** are transitional provisions which may alter entitlements from those which exist under the *Criminal Offence Victims Act*.

25. The bill has the purpose of giving assistance to certain victims of acts of violence, including for required services not currently provided under the existing legislation. New categories of secondary and related victims are to be created. The transitional arrangements are regarding these changes. Accordingly, clauses 175 and 176 provide for 'mixed applications' by dependents and family members – applications made by some people under *Criminal Offence Victims Act* and by some under the new legislation. Under clauses 175 and 176, related victims would be treated differently.

26. In respect of these provisions, the explanatory notes indicate (at 18):

If all related victims of the same kind apply after the commencement, they are entitled to a pool of \$100,000, and up to \$50,000 each within that pool.

If one or more related victims apply before the commencement (in which case they are entitled to a pool of only \$39,000), and other later related victims apply after commencement, the other later related victims are only eligible for the remainder of that pool of \$39,000.

A related victim's entitlement is therefore dependant on the actions of other related victims. Under COVA, the State would have tried to contact all related victims under the repealed Act, and any related victim who applies after a decision is made is restricted to the remainder of the pool.

On the other hand, allowing a related victim access to the assistance limit under the new scheme would disadvantage related victims who have already had their applications decided because they could only have obtained a maximum of \$39,000 between them, and the new applicant could obtain up to \$50,000, within the total pool of \$100,000.

Given the above, the potential FLP breach is justified. The Bill adopts the approach that is considered to cause the least disadvantage.

27. Enactment of clause 179 would remove the availability of an extension of time in relation to a personal offence under *Criminal Offence Victims Act*. Clause 179 would provide instead for out of time approval by the scheme manager of an application for assistance.

28. More generally, chapter 6 would alter a person's entitlements under the legislation. Currently, under the *Criminal Offence Victims Act*, a person is entitled to criminal injury compensation. Under the bill, the entitlement would be to assistance.

29. Extensive justification for the effect upon individual rights and liberties of chapter 6 provisions is set out in the explanatory notes at pages 16 to 18.

30. **Clauses 140 and 141** 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
140(2)	Unauthorised disclosure of information	100 penalty units (\$10,000) or two years' imprisonment
141(1)	Stating to an official information known to be false or misleading	100 penalty units (\$10,000)
141(2)	Providing to an official information known to be false or misleading	100 penalty units (\$10,000)

Administrative power

31. 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.
32. **Clauses 80-82**, which would exclude a person from eligibility under the financial assistance scheme in specified circumstances, may not be sufficiently defined or subject to appropriate review.
33. The standard of proof required for these matters is the balance of probabilities, to the satisfaction of the government assessor. Although review would be available under the *Judicial Review Act 1991*, no internal or external review would be available in respect of decisions made under these proposed provisions. Clause 124 provides that a person aggrieved by a decision in schedule 1 may apply to the scheme manager for a review of the decision, but clauses 80 to 82 are not included in schedule 1. Clause 125 then provides for external review by the Queensland Civil and Administrative Tribunal of internal review decisions.
34. No information is provided in the explanatory notes regarding reasons for internal and external review being unavailable regarding these decisions, although it is noted (at 59 and 60) that under clause 88 a person would have an opportunity to make submissions regarding the exercise of discretion by the government assessor in these circumstances.
35. In respect of clause 80, the committee further notes apparent uncertainty about the scope of the discretion conferred upon the government assessor. Clause 80 provides that a government assessor cannot grant assistance where an act of violence was committed against a person because of his or her involvement in criminal activity. The example of the operation of clause 80 provided in the explanatory notes appears to extend beyond the scope of the proposed provision. The explanatory notes state (at 13):
- For example, a person is the member of a street gang that engages in criminal activity on an ongoing basis, and as retaliation for an attack by the person's gang on another gang, the other gang assaults the person.*
36. The committee observes that membership of a street gang that engages in criminal activity does not, of itself, constitute a criminal offence. For clause 80 to have application, a person who is:
- a primary victim of the act of violence must have had 'previous involvement' in criminal activity or involvement in a criminal activity when the act of violence to have occurred (clause 80(1)); and
 - not the primary victim of the act of violence, it must be the case that the only reason or main reason the act of violence was committed against the primary victim was the involvement of the primary victim in criminal activity in circumstances in which the person was or ought reasonably to have been aware of the primary victim's involvement in the criminal activity (clause 80(2)).
37. The committee invites the minister to provide information regarding whether clauses 80 to 82 make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Immunity from proceeding or prosecution

38. 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.
39. **Clause 143(1)** would confer immunity from civil liability upon an official for an act done, or omission made, honestly and without negligence under the Act. Clause 432(2) would provide for civil liability to attach to the State instead.
40. The committee generally observes, in respect of provisions such as clause 143 that one of the principles which underlie a parliamentary democracy based on the rule of law is that all people should be equal before the law.
41. In justification for any inconsistency with fundamental legislative principles, the explanatory notes state (at 15):

Clause 143 confers immunity from civil liability on persons involved in administering the Bill. Conferral of immunity potentially breaches the FLP that legislation should have sufficient regard to the rights and liberties of individuals, including not conferring immunity from proceeding without adequate justification. The immunity is justified because it is limited to acts or omissions that are made honestly and without negligence. Also, any potential liability instead attaches to the State. This follows the usual approach in Queensland.

Aboriginal tradition and Island custom

42. Section 4(3)(j) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.
43. **Clause 26** may raise issues regarding Aboriginal tradition and Island custom. It provides a definition of who is a primary, secondary, parent secondary, witness secondary or related victim for the purposes of the legislation.
44. Neither clause 26 nor the explanatory notes provide information about consistency of the definitions with Aboriginal tradition and Island custom regarding familial structures and child-rearing practices. To assist examination of whether the legislation has sufficient regard to rights and liberties of individuals, the committee seeks information from the minister in this regard.

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

45. 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.
46. **Clauses 85(2)(c) and 147-8** may authorise the amendment of an Act other than by another Act.
47. Clause 85(2)(c) would allow a regulation to be made to extend the matters that may be considered by a government assessor when deciding the quantum of assistance to be granted. In respect of clause 85(2)(c), the explanatory notes state (at 15):

These matters may result in a reduction of the assistance that would otherwise be payable to the person. This potentially breaches the FLP that legislation have sufficient regard to the institution of Parliament because it delegates legislative power to the Governor-in-Council, and effectively allows the Governor-in-Council to amend this section.

48. Clause 147(1) states:
A regulation (a temporary regulation) may prescribe a matter that a temporary regulation may prescribe under a provision of this Act.
49. Clause 147(3) provides that such a temporary regulation must expire one year after its commencement.

50. Clause 148(1) would allow a transitional regulation to make provision about the preservation of a right or benefit a person had under the *Criminal Offence Victims Act*, either by allowing for the right or benefit to continue under the new legislation, including with alteration in the right or benefit, or by continuing a repealed provision of the *Criminal Offence Victims Act*.
51. 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.
52. In January 1997, the committee reported to the Parliament on Henry VIII clauses.⁷ 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.
53. 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.
54. Clauses 85(2)(c), 147(1) and 148(1) may be regarded as Henry VIII provisions and it is questionable whether each falls within one of the excusable categories. In relation to whether the provisions appropriately delegate legislative power, the committee notes that some justification is provided in the explanatory notes regarding each proposed provision.
55. In respect of clause 85(2)(c), it is stated (at 15):
- This regulation-making power is necessary to ensure flexibility to add new matters that the government assessor may need to consider as they are identified. It will also allow the regulation to include matters for specific types of applications or specific circumstances. The regulation will be subject to disallowance by Parliament.*
56. In respect of clause 147(1), the explanatory notes indicate (at 15-6):
- Clause 147 allows a regulation to be made to amend the Bill and therefore potentially breaches the FLP that legislation should have sufficient regard to the institution of Parliament. The breach is justified because the effect of the clause is that regulations can only be made where they benefit individuals because they either increase the types of victims who can seek assistance (by adding to the list of offences that are a 'prescribed offence' under clause 25(8)) or increase the amount of assistance a victim may receive (by moving an act of violence into a higher category under schedule 2, item 3).*
- The temporary regulation is to be used where it is necessary for the department to respond quickly to a policy change. Because the regulation has a life of only 1 year, requires the department to seek an amendment of the Act within that year.*
57. Regarding clause 148(1), the following justification is provided (at 16):
- Clause 148 allows a transitional regulation to amend the Bill and therefore potentially breaches the FLP that legislation should have sufficient regard to the institution of Parliament. However, the regulation is directed at preserving a person's existing rights under the Criminal Offence Victims Act 1995 (COVA) and the Criminal Code, chapter 65A, and is therefore beneficial. In addition, the transitional regulation-making power, and any transitional regulation made under it, is given a limited life of 2 years after the commencement of the clause.*

⁷ Report no 3, *The Use of 'Henry VIII Clauses' in Queensland Legislation*, available at www.parliament.qld.gov.au/slc.

PART 2 – SUBORDINATE LEGISLATION EXAMINED**SUBORDINATE LEGISLATION TABLED: 5 AUGUST TO 18 AUGUST 2009**

(Listed in order of sub-leg number)

SLNo 2009	SUBORDINATE LEGISLATION	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
163	Gas Supply Amendment Regulation (No. 1) 2009	7/08/2009	28/10/2009	18/08/2009	29/10/2009
164	Rural and Regional Adjustment Amendment Regulation (No. 3) 2009	7/08/2009	28/10/2009	18/08/2009	29/10/2009
165	Integrated Planning Amendment Regulation (No. 3) 2009	7/08/2009	28/10/2009	18/08/2009	29/10/2009
166	Nature Conservation (Koala) Amendment Conservation Plan (No. 1) 2009	7/08/2009	28/10/2009	18/08/2009	29/10/2009
167*					
168	Tow Truck Regulation 2009	14/08/2009	28/10/2009	18/08/2009	29/10/2009
169	Transport Operations (Passenger Transport) Amendment Regulation (No.1) 2009	14/08/2009	28/10/2009	18/08/2009	29/10/2009
170	Wine Industry Regulation 2009	14/08/2009	28/10/2009	18/08/2009	29/10/2009

* not tabled on 18 August.

SUBORDINATE LEGISLATION UNDER CONSIDERATION**4. BUILDING FIRE SAFETY AMENDMENT REGULATION (NO. 1) 2009****Date tabled:** 4 August 2009**Disallowance date:** 8 October 2009**ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION**

- | | |
|----|---|
| 1. | The committee seeks information from the minister regarding whether sections 6 to 8 , which effected significant increases in fees, have sufficient regard to rights and liberties of individuals. |
|----|---|

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES**Sufficient regard to rights and liberties of individuals****Rights and liberties**

- 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*.
- Sections 6 to 8** of the Building Fire Safety Amendment Regulation (No. 1) 2009 significantly increased fees imposed under the Building Fire Safety Regulation 2008, as detailed in the table below.

Section	Section amended	Nature of fee	Previous fee/s	New fee/s
6	74	Preliminary meeting fee for proposed building development application	\$266.39	\$327.65
7	75	Fee for fire safety report for a building	\$67.02	\$82.40

Section	Section amended	Nature of fee	Previous fee/s	New fee/s
8	Sch 2, part 1	Fees for assessment and inspection of required special fire services – related to area of stated building work	\$692.35 \$1,246.88 \$1,525.36 \$1,670.64 \$1,743.33 + \$13.34/100m ² over 2000m ²	\$851.60 \$1,533.70 \$1,876.20 \$2,054.90 \$2,144.30 + \$16.40/100m ² over 2000m ²
8	Sch 2, part 3	Additional assessment and inspection fees for fire engineering briefs (research, consultation and meeting fees)	\$677.96 \$1,113.79 \$2,227.58 \$2,130.73 \$266.39 \$692.35	\$833.90 \$1,396.95 \$2,739.95 \$2,620.80 \$327.65 \$851.60
8	Sch 2, part 4	Other assessment and inspection fees (reassessment, general inspection and reinspection fees)	\$266.39 \$266.39 \$532.68 \$266.39	\$327.65 \$327.65 \$655.20 \$327.65

4. The fee increases are well in excess of the consumer price index. In this regard, the Office of Economic and Statistical Research provides the following data for the annual change to the end of the June quarter:⁸

Headline CPI inflation change (annual):

Brisbane 2.0%

Australia 1.5%

Market sector goods and services (core CPI) inflation change (Australia):

Quarter 0.5%

Annual 2.0%

5. Increases in fees of this magnitude affect rights and liberties of individuals. However, as no explanatory notes were prepared in respect of the amendment regulation, no information is available regarding whether the legislation has sufficient regard for rights and liberties of individuals. The minister is invited to provide information in this regard.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

6. The committee notes that, given the magnitude of the increases in fees, the amendment regulation may be 'likely to impose appreciable costs on the community or a part of the community'.⁹ If so, under provisions of the *Legislative Standards Act* and *Statutory Instruments Act*, requirements regarding explanatory notes and regulatory impact analysis may have applied to the amendment regulation. However, neither explanatory notes nor a regulatory impact statement was available to assist the committee's examination of the amendment regulation.

⁸ www.oesr.qld.gov.au/queensland-by-theme/economic-performance/prices/briefs/cpi/cpi-200906.pdf

⁹ Under the *Legislative Standards Act* and *Statutory Instruments Act*, this is effectively the threshold test as to whether explanatory notes must be prepared.

5. PLUMBING AND DRAINAGE LEGISLATION AMENDMENT REGULATION (NO.1) 2009

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee seeks information from the minister regarding whether **section 4**, which effected significant increases in fees, has sufficient regard to rights and liberties of individuals.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

2. 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*.
3. **Section 4** of the Plumbing and Drainage Legislation Amendment Regulation (No. 1) significantly increased application fees imposed under the Plumbing and Drainage Regulation 2003, as detailed in the table below. In addition, section 4 amended schedule 4 to introduce a fee of \$50.00 for the cost of processing an application for a licence.

Section amended	Application fee	Previous fee/s	New fee/s
Sch 4, item 1(c)	Restricted licence	\$48.00	\$65.00
Sch 4, item 1(e)	Renewal of licence, for each year of renewal	\$30.00	\$55.00
Sch 4, item 1(g)	Restoring a licence	\$30.00	\$55.00

4. The fee increases are well in excess of the consumer price index, as indicated by the data provided in the previous chapter.¹⁰
5. Increases in fees of this magnitude affect rights and liberties of individuals. However, as no explanatory notes were prepared in respect of the amendment regulation, no information is available regarding whether the legislation has sufficient regard for rights and liberties of individuals. The minister is invited to provide information regarding the fee increases.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

6. The committee notes that, given the magnitude of the increases in fees, the amendment regulation may be 'likely to impose appreciable costs on the community or a part of the community'.¹¹ If so, under provisions of the *Legislative Standards Act* and *Statutory Instruments Act*, requirements regarding explanatory notes and regulatory impact analysis may have applied to the amendment regulation. However, neither explanatory notes nor a regulatory impact statement was available to assist the committee's examination of the amendment regulation.

¹⁰ www.oesr.qld.gov.au/queensland-by-theme/economic-performance/prices/briefs/cpi/cpi-200906.pdf

¹¹ Under the *Legislative Standards Act* and *Statutory Instruments Act*, this is effectively the threshold test as to whether explanatory notes must be prepared.

6. STATUTORY INSTRUMENTS AMENDMENT REGULATION (NO.1) 2009

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee does not identify any issues regarding the application of fundamental legislative principles.
2. The committee notes that the amendment regulation contains a repeat exemption from expiry of the Stock Regulation 1988. On 19 August, the minister tabled a report required under 56A(4) of the *Statutory Instruments Act*. It contains information regarding the exemption from expiry.

OPERATION OF CERTAIN STATUTORY PROVISIONS**Staged automatic expiry of subordinate legislation**

3. Section 56A of the *Statutory Instruments Act* allows for exemption from expiry under part 7. The exemption is by regulation and must be on the ground that the Act or provision is under review. Each exemption extension lasts for one year but may be repeated. Section 56A does not limit the number of extensions.
4. When an extension regulation is made, the minister must table a report stating how the Act is subject to review and when the minister expects the review to end. The report is to be tabled within seven sitting days after the extension regulation is made (section 56A(4)) but failure to comply does not affect the validity of the extension regulation.
5. When made, the Statutory Instruments Regulation 2002 exempted the Stock Regulation 1988 from expiry. A further exemption has been given to the Stock Regulation each year since 2002.
6. On 19 August 2009, the minister tabled a report regarding the exemption contained in the amendment regulation tabled on 4 August 2009. The report advised that drafting of a Biosecurity Bill, to repeal the *Stock Act 1915* and Stock Regulation, had commenced and that the new statute was to be underpinned by new subordinate legislation. Accordingly, in respect of the matters about which information is required by section 56A(4) of the *Statutory Instruments Act*, the minister's report stated:

This new subordinate legislation, to be developed in 2009-10 and, subject to the passage through Parliament of the new Biosecurity Bill, is likely to be submitted to the Governor in Council in mid-2010, and amongst other matters, will replace provisions of the current Stock Regulation.

However, until the new subordinate legislation is ready, there is a need for a further extension of the Stock Regulation – hence the proposal to exempt it from expiry for a further 12 months pending development of the new Biosecurity Bill.

7. TOW TRUCK REGULATION 2009

Date tabled: 18 August 2009

Disallowance date: 29 October 2009

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee seeks information from the minister regarding whether **section 9** has sufficient regard to rights and liberties of individuals.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES**Sufficient regard to rights and liberties of individuals****Rights and liberties**

2. 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*.
3. Section 9(1) provides that before deciding an application for a tow truck driver's certificate, the chief executive may, by written notice to an applicant, require him or her to:
 - undertake a written or oral or driving test decided by the chief executive; or
 - be medically examined by a doctor.
4. Section 9(2) then requires an applicant medically examined by a doctor to provide the chief executive with a medical certificate from the doctor. Under section 9(3), the chief executive may require the applicant to obtain the medical certificate, or a further medical certificate, from a doctor decided by the chief executive.
5. Explanatory notes were not prepared in respect of the Tow Truck Regulation 2009. To assist examination of whether section 9 has sufficient regard to rights and liberties of individuals, the committee invites relevant information from the minister.

8. URBAN LAND DEVELOPMENT AUTHORITY (VEGETATION MANAGEMENT) BY-LAW 2009

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the legislation has sufficient regard to rights and liberties of individuals, the committee seeks information from the minister regarding whether **sections 27 – 28** make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Administrative power

2. 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.
3. **Sections 27 and 28** of the legislation confer power on an authorised person to give an 'oral compliance direction', and provide that it is an offence to fail to comply with an oral compliance direction. Accordingly, sections 27 and 28 make rights and liberties, or obligations, dependent on administrative power. The administrative power is exercisable, in the first instance, by way of an oral direction. In the absence of a reasonable excuse, failure to comply with the direction gives rise to an offence with maximum penalty of 20 penalty units (\$2,000).
4. An 'authorised person' is an employee or agent of the Urban Land Development Authority who has, under section 123 of the *Urban Land Development Authority Act 2007*, been issued with an identity card still in force (schedule).
5. Section 27(1) requires that, prior to giving an oral compliance direction, an authorised person have a reasonable belief that a person is engaging in conduct that is in contravention of a condition of the person's permit or a provision of the by-law. The oral direction may be for the person to stop the conduct or to take stated action within a stated period to remedy the contravention (section 27(2)). An authorised person is also to warn that failure to comply with the direction may be an offence (section 27(4)).
6. While section 27(3) requires an authorised person, as soon as practicable, to confirm the oral direction by notice in writing and to provide an information notice for the decision to give the direction, failure to do so would not void the liability for the offence in section 28 of the person receiving the direction. Nevertheless, it is noted that absence of written notice or an information notice may assist proof of a 'reasonable excuse'.
7. No explanatory notes were produced in relation to the making of the by-law.
8. To assist examination of the by-law, the committee invites the minister to provide information regarding whether the legislation has sufficient regard to rights and liberties of individuals.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS**9. CRIMINAL CODE AND OTHER LEGISLATION (MISCONDUCT, BREACHES OF DISCIPLINE AND PUBLIC SECTOR ETHICS) AMENDMENT BILL 2009**

Date introduced:	2 June 2009
Responsible minister:	Hon AM Bligh MP
Portfolio responsibility:	Premier
Date passed:	4 August 2009
Committee report on bill:	04/09; at 1 - 3
Date Ministerial response received:	19/08/09 (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 12, 17, 35, 36 and 43** which may affect information privacy rights of individuals;
 - **a number of clauses** which may affect employment-related rights and liberties of individuals who have worked in the public sector; and
 - **clause 4** which would insert two new offences into the Criminal Code.

MATTERS IDENTIFIED BY COMMITTEE

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

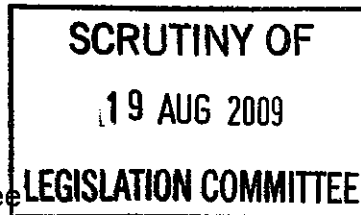


Premier of Queensland

For reply please quote: LJP/SF – TF/09/17194 – DOC/09/75144
Your reference: B24.09.01

18 AUG 2009

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



B24.09

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Thank you for your letter of 15 June 2009 concerning the Scrutiny of Legislation Committee's Legislation Alert No. 04 of 2009, and the Committee's comment on the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 (the Bill).

I note the committee has identified a number of issues arising from examination of the Bill, specifically:

- clauses 12, 17, 35, 36 and 43 which may affect information privacy rights of individuals
- a number of clauses which may affect employment-related rights and liberties of individuals who have worked in the public sector and
- clause 4 which would insert two new offences into the Criminal Code.

In relation to the committee's concerns, my responses are as follows:

Clauses 12, 17, 35, 36 and 43

As contained in the Explanatory Notes to the Bill, I consider the potential impacts on individual's rights are justified because there is an overwhelming public interest in upholding and maintaining the ethical standards of government employees. It is therefore essential that this information be made available to Chief Executive Officers to maintain public confidence in government agencies.

I would also re-emphasise the information contained at pages 6–7 of the Explanatory Notes, which you have included at paragraph 8 on page 2 of the Legislation Alert.



Queensland
Government

Clauses 17, 18, 20, 39, 47, 59, 62, 63, 68 and 72

I acknowledge the committee considers that the above sections of the Bill may affect employment-related rights and liberties of individuals who have worked in the public sector.

Again, I consider the potential impact of individual's employment-related rights and liberties are justified in the Bill as there is a public interest in ensuring that everyone who holds public office in Queensland adheres to appropriate standards of behaviour and where individuals do not meet the standard expected by the public they will not be able to escape scrutiny.

These amendments may be seen to adversely affect the rights and liberties of individuals, however, they are justified as they are an important measure in ensuring that such officers are not able to avoid disciplinary action for breaches of discipline, simply because they have retired, changed or ceased their employment.

The Bill ensures that appropriate appeal mechanisms will be available to individuals who may wish to appeal findings made by their former employer following an investigation.

Clause 4 which inserts two new offences into the Criminal Code

The committee considers that the new offences would have potential to affect rights and liberties of individuals.

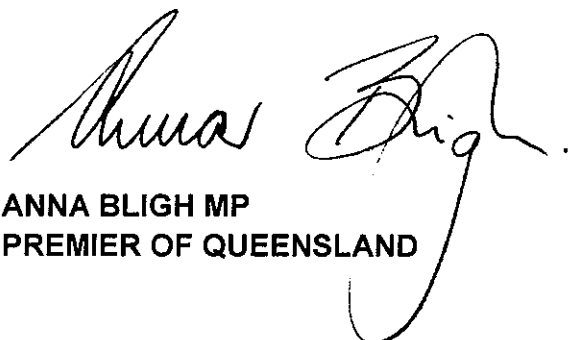
The creation of these offences is justified as it is in the public interest to ensure that public officials are properly penalised for serious abuse or breach of public trust.

The new offences have been created in response to recommendations made by the Crime and Misconduct Commission and they will complement the existing suite of offences in the Criminal Code which relate to misconduct.

I consider the Bill will help to further improve public sector ethics in Queensland.

I thank the committee for its careful consideration of the Bill and for its comments.

Yours sincerely



ANNA BLIGH MP
PREMIER OF QUEENSLAND

10. JUVENILE JUSTICE (SENTENCING PRINCIPLES) AMENDMENT BILL 2009

Date introduced:	3 June 2009
Responsible member:	Mr L Springborg MP
Portfolio responsibility:	Shadow Attorney General and Shadow Minister for Justice (including Juvenile Justice)
Committee report on bill:	04/09; at 11 - 13
Date response received:	17/08/09 (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 4 to 6** which would, in respect of sentences imposed for offences, affect the rights and liberties of young people subject to the *Juvenile Justice Act*.

MATTERS IDENTIFIED BY COMMITTEE

2. The committee thanks the Member for the information provided in his letter.
3. The committee makes no further comment regarding the bill.



SCRUTINY OF
17 AUG 2009
LEGISLATION COMMITTEE

B25.09

LAWRENCE SPRINGBORG MP

MEMBER FOR SOUTHERN DOWNS

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14 August 2009

To the Chair of the Scrutiny of Legislation Committee

Dear Ms Miller

Re: Committee response to Juvenile Justice (Sentencing Principles) Amendment Bill 2009

Thank you for your letter dated the 15th of June 2009 enclosing relevant pages of the Scrutiny of Legislation Committees Alert Digest Number 04/09.

I want to thank the Committee for allowing me the opportunity to respond to the concerns that it has raised in regards to the Juvenile Justice (Sentencing Principles) Amendment Bill 2009.

The introduction of the Juvenile Justice (Sentencing Principles) Amendment Bill forms one part of the LNP's response to youth offending.

The guiding principle of the Bill is to remove the restrictive nature of which detention as a last resort is impeding sentencing options for young offenders.

Positive rehabilitation and reform of young offenders is the goal of any intervention and youth detention should be a sentencing option based on the crime committed and the need for rehabilitation, not as a last resort.

Under the current sentencing guidelines youth detention has become a revolving door with statistics showing young offenders who do make it to detention, through the last resort policy do so for very short periods of time, often between 1 and 3 months and a majority of young offenders in detention have been there more than once.

It is these types of statistics that have led the LNP to seek to insert the words into the Act - 'where appropriate and for a time that is justified in the circumstances.'

Sentencing should be reflective of the crime, and not scaled as some sort of progression as is currently in operation under the Juvenile Justice Act.

I acknowledge the concerns raised by the Committee with regards to whether the amendments affect the rights and liberties of young people subject to the Juvenile Justice Act, but these are not just young people, they are young offenders, who have committed crimes and there are victims involved. Where is the protection of the rights and liberties of victims of young offenders?

This Bill is designed to strengthen sentencing options for young offenders and I make no apologies for this.

Justice is a balancing act that must be maintained and this Bill seeks to restore that balance in recognising that young offenders do commit serious crime and the punishment must be justified in the circumstances and detention is an option if all the circumstances warrant such a sentence, and not just because it is a last resort.

Regards

A handwritten signature in black ink, appearing to read 'L. Springborg', with a large, stylized flourish at the end.

Lawrence Springborg
Deputy Leader of the Opposition
Deputy Leader of the LNP
Shadow Attorney General
Member for Southern Downs