Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

Chair:	Mrs Jo-Ann Miller MP, Member for Bundamba
Deputy Chair:	Mr Peter Wellington MP, Member for Nicklin
Members:	Ms Peta-Kaye Croft MP, Member for Broadwater
	Ms Vicky Darling MP, Member for Sandgate
	Dr Alex Douglas MP, Member for Gaven
	Ms Grace Grace MP, Member for Brisbane Central
	Mr Andrew Powell MP, Member for Glass House
Research Director:	Mrs Julie Copley
A/Principal Research Officer:	Mr Jason McNeil
Executive Assistant:	Ms Tamara Vitale

Contact Details:	Scrutiny of Legislation Committee Level 6, Parliamentary Annexe Alice Street Brisbane Qld 4000
Telephone:	+61 7 3406 7671
Fax:	+61 7 3406 7500
Email:	scrutiny@parliament.qld.gov.au
Web:	www.parliament.qld.gov.au/slc
Index of bills examined:	Use above web link and click on the 'Index of bills examined' link in the menu bar

Table of Contents

COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

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

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

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

REPORT

Structure

This report follows committee examination of:

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

Availability of submissions received

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

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

PART 1 – BILLS EXAMINED

1. EDUCATION LEGISLATION AMENDMENT BILL 2009

Date introduced: 16 September 2009

Responsible minister: Hon G Wilson MP

Portfolio responsibility: Department of Education and Training

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 5 and 6** affecting rights and liberties of individuals who operate child care services and which may affect rights to privacy of personal information;
   - **clause 40** which may operate retrospectively to affect rights and impose obligations relating to university fees; and
   - **clause 10** which would confer on the State or a person acting on behalf of the State protection against specified actions for defamation or breach of confidence.
2. The committee invites the minister to provide information regarding **clause 40** and its achievement of the objective stated in the explanatory notes.

BACKGROUND

3. The legislation is to amend four Acts within the Education and Training portfolio for a number of specified purposes.

LEGISLATIVE PURPOSE

4. The bill has four objectives. They are to:
   - enable the publication of information about child care services provided in contravention of the legislation;
   - allow students at overseas schools who are studying Queensland syllabuses to be eligible for Queensland senior school qualifications;
   - confer the Queensland Studies Authority with additional functions regarding kindergarten guidelines; and
   - extend by one year the expiry date of two university statutes which expired on 1 September 2009.
5. Therefore, the bill would amend the:
   - *Child Care Act 2002*;
   - *Education (General Provisions) Act 2006*;
   - *Education (Queensland Studies Authority) Act 2002*; and
   - *University of Queensland Act 1998*.

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 5 and 6** may affect rights and liberties of individuals who operate child care services and may have the potential to affect rights to privacy of personal information.

8. New section 50C of the *Child Care Act*, to be inserted by clause 5, would require the chief executive to publish information about a non-school age child care service in specified circumstances. The information, identified in new section 50D, must be published on a department website accessible to the public if, in respect of the licence of the service, the chief executive:

- refuses to renew the licence under section 21;
- amends the licence under section 42 (other than section 42(5));
- urgently amends the licence under section 43;
- suspends or revokes the licence under section 45 (other than section 45(7); or
- urgently suspends the licence under section 46.

9. In respect of both centre based and home based child care services, new section 50D would require the publication of the:

- address of the centre and the name by which it is known;
- action taken by the chief executive; and
- the reasons for the action being taken.

10. New section 50D(3) requires publication of additional information relevant to the action taken by the chief executive; for example, if under section 46 the chief executive urgently suspends a licence, new section 50D(3)(e) would require publication of the day on which the suspension took effect and the day on which it ended.

11. New section 50C(3) provides that the requirement to publish information is subject to section 50E. This new section states that the chief executive must not publish the required information until the end of the period within which a licensee may seek review of a decision of a chief executive to act in respect of a licence. Where a review is sought, the chief executive must not publish the information until the review is finalised. Information published must be consistent with the decision on review. Further, new section 50F would operate where a suspension or urgent suspension of a licence was lifted. It would require the chief executive to amend published information to include advice that the suspension had been lifted and the day on which it was lifted.

12. Clause 6 would insert new sections 143A and 143B into the *Child Care Act*. These new sections 143A and 143B would also require publication of information in specified circumstances; that is, where the specified circumstances relate to an authorised officer who is reasonably satisfied there has been non-compliance with a notice given under section 142 of the *Child Care Act*. New sections 143A and 143B are in similar terms to new sections 50C and 50D but would have application to all child care services. The requirement to publish information would be subject to new section 143C, prohibiting publication until completion of any review of the decision of the chief executive. New section 143D would require amendment of published information in specified circumstances.

13. In respect of whether clauses 5 and 6 have sufficient regard to rights and liberties of individuals who are licensed to operate child care services, the explanatory notes provide information (at 8-9) indicating that the proposed provisions strike an appropriate balance between competing rights:

The publication of information about operators of child care services may have a detrimental effect on the operator's rights and liberties, given the potential for this to negatively impact their business reputation. However, it is considered that publication of the information is justified given parents' legitimate interest and expectation in being provided with information relating to enforcement actions taken against a child care service that is providing, or will potentially provide, a service to their child. The parents' right to secure the wellbeing and safety of their child at that service is considered to be greater than the right of operators of child care services to protect their business reputation.

14. Regarding whether clauses 5 and 6 have sufficient regard to individuals' rights to privacy, the explanatory notes provide information at pages 13 (clause 5) and 17 (clause 6). At page 13, the explanatory notes indicate:

[S]ubsection 50D(2) makes it clear that if the address of a home based service is also the home address of a carer in the service, then the chief executive must not publish the address of the home based service. This is to ensure that an individual carer's privacy is not compromised, where the carer resides at the same address as the home based service (in other words, it is their private residence).

Retrospective operation

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

16. **Clause 40** may operate retrospectively to affect rights and impose obligations relating to university fees. It would insert a new part 8, division 3 in the *University of Queensland Act*. The likely operation of clause 40 is discussed further under 'Clear meaning'.

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

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

18. In this regard, the committee observes that people enrolled in University of Queensland courses in semester 2, 2009 will have assumed that legislation allows the university to impose and collect fees. The committee observes also that the retrospective operation of the legislation to 1 September 2009 would affect the rights of, and impose fee-related obligations on, a significant number of people.

19. In respect of the fundamental legislative principle issues raised by any retrospective operation of clause 42, the explanatory notes state (at 9):

> *The amendment to the* University of Queensland Act 1998 *breaches fundamental legislative principles because it retrospectively revives the fees statute, thus retrospectively obliging students to pay any fees imposed under the fees statute between the time it originally expired (1 September 2009) and the commencement of the provision reviving it. However, the retrospective application of the amendment is necessary to address a legislative void which would otherwise be created between the time of expiry of the fees statute, and the making of any new fees statute by the University Senate. Such a legislative void would have unintended negative financial consequences for the University. More importantly, it would unfairly advantage some students by making the University legally unable to refuse to:*
>
> *(i) enrol a person until all fees payable by the person under the fee scheme are paid; or*
>
> *(ii) change the enrolment status of a student, where a proposed change in enrolment incurs an additional fee under the fee scheme and the student has not paid the additional fee.*

Immunity from proceeding or prosecution

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

21. **Clause 10** would insert a new section 171A of the *Child Care Act* to confer on the State or a person acting on behalf of the State protection against actions for defamation or breach of confidence.

22. The new section would apply where information was published pursuant to a belief that the publication was required by section 50C or section 143A, discussed above. New section 171A(2) would provide that no related action for defamation or breach of confidence would lie against the State or a person acting on behalf of the State.

23. The committee draws the attention of the Parliament to provisions, such as new section 171A, which are inconsistent with the element of the rule of law that all people are equal before the law. However, the committee notes also that the explanatory notes indicate (at 9) that adequate justification exists for clause 10:

> *The Bill also includes a safeguard to protect the State, or a person acting on behalf of the State, from actions for defamation or breach of confidence, because of publishing the information. If this safeguard was not in place, the Government could face serious limitations with respect to the information that it could publish. The safeguard is considered to be necessary and justified, as it is considered that parents' and guardians' right to know information about the child care service that is providing, or will potentially provide, a service to their child outweighs any constraint that is provided by the Bill with respect to the ability to bring an action for defamation or breach of confidence against the Government.*

Clear meaning

24. 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.

25. **Clause 40** may be not be drafted in a sufficiently clear and precise way to achieve the objective stated in the explanatory notes (at 2). That objective is to:

> *… make a technical amendment to the* University of Queensland Act 1998 *to extend the expiry date for two university statutes by one year, to 1 September 2010.*

26. The intended effect of the amendment to the *University of Queensland Act* to be made by clause 40 is described in the explanatory notes (at 3-4):

> *On 3 June 1999, the University of Queensland Senate made the* University of Queensland Statute No.5 (Awards) 1999 *(the awards statute) and the* University of Queensland Statute No.6 (Fees) 1999 *(the fees statute). The awards statute provides for the conferral of higher education awards of the university by the Senate, including the surrender and revocation of awards and the procedure for conferring honorary awards. The fees statute provides that the Senate may make university rules to establish a scheme of fees to be paid by students for examinations, attendance at lectures and classes and the use of university facilities. The statute also provides that students must pay fees under the scheme and that enrolment is subject to the payment of all fees payable under the scheme.*
>
> *In accordance with section 54 of the* Statutory Instruments Act 1992 *(SIA), these statutes expired on 1 September 2009. However, due to a clerical error, which was only identified after the expiry date, the Government's records had always indicated the statutes were due to expire a year later on 1 September 2010. Consequently, action was not taken to make new statutes, or to make a regulation under section 54(1)(b) of the SIA to exempt the statutes from expiring on 1 September 2009.*
>
> *The expiry of the awards statute would leave the University Senate unable to confer any awards in accordance with the general award rules. This would adversely impact any students who are currently entitled to receive their awards. The expiry of the fees statute creates a situation in which the University is unable to impose and collect fees. These fees are normally payable under a scheme (the fee scheme), which is established by the University rules made under the statute. This would have a detrimental financial impact upon the University. In addition, the University would not be able to legally refuse to:*
>
> *(i) enrol a person until all fees payable by the person under the fee scheme are paid; or*
>
> *(ii) change the enrolment status of a student, where a proposed change in enrolment incurs an additional fee under the fee scheme and the student has not paid the additional fee.*
>
> *In order to ensure that the Senate can continue to confer awards and that any fees imposed on students after 1 September 2009 can be legally collected, it is necessary to retrospectively amend the* University of Queensland Act 1998 *to provide that, despite the provisions of the SIA about automatic expiry, the awards statute and the fees statute did not expire on 1 September 2009.*

27. Clause 40 provides:

> **40 Insertion of new pt 8, div 3**
>
> Part 8—
>
> *insert—*
>
> **'Division 3 Expiry of statutes**
>
> **'72 Expiry of statutes**
>
> '(1) This section applies to the following statutes—
>
> - *University of Queensland Statute No. 5 (Awards) 1999*
> - *University of Queensland Statute No. 6 (Fees) 1999*
>
> '(2) Despite the *Statutory Instruments Act 199*2, section 54, each statute—
>
> (a) is taken not to have expired on 1 September 2009; and
>
> (b) expires on 1 September 2010 unless it is repealed before that day.'.

28. The committee's examination of clause 40 has been assisted by legal advice sought from Emeritus Professor Dennis Pearce, Special Counsel, DLA Phillips Fox. It is reproduced in full on the following pages.

29. The committee invites the minister to provide information regarding clause 40 and its achievement of the objective stated in the explanatory notes.

DLA PHILLIPS FOX

55 Wentworth Avenue
Kingston ACT 2604
GPO Box 172
Canberra ACT 2601
Australia
DX 5724 Canberra
Tel +61 2 6201 8787
Fax +61 2 6230 7848
www.dlaphillipsfox.com

Our ref: MJW:DCP: 0480647
Your ref: B45.09.09

30 September 2009

Mrs Julie Copley
Research Director
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

By email : julie.copley@parliament.qld.gov.au

Dear Mrs Copley

Education Legislation Amendment Bill 2009

Background

1 On 16 September 2009 the Minister for Education introduced the Education Legislation Amendment Bill 2009 into the Legislative Assembly of the Queensland Parliament. Clause 40 of that Bill inserts a new section 72 into the *University of Queensland Act 1998*. The proposed section reads:

> **72 Expiry of statutes**
>
> (1) This section applies to the following statutes—
>
> • *University of Queensland Statute No. 5 (Awards) 1999*
>
> • *University of Queensland Statute No. 6 (Fees) 1999*
>
> (2) Despite the *Statutory Instruments Act 1992*, section 54, each statute—
>
> (a) is taken not to have expired on 1 September 2009; and
>
> (b) expires on 1 September 2010 unless it is repealed before that day.

2 The reason for the inclusion of the new section arises from an oversight of the application of section 54 of the *Statutory Instruments Act 1992* to the two Statutes of the University of Queensland (**UQ**) referred to in the section. The effect of section 54 was to cause the Statutes to expire on 1 September 2009. It had been thought that the Statutes did not expire until 2010.

3 Put briefly, the Statutes provide respectively for the award, surrender and revocation of certain degrees and for the making of rules establishing a scheme of fees relating to examinations, attendance at classes and use of university facilities. A student must pay fees under the scheme and may not be enrolled in the University until all appropriate fees are paid.

4 The Explanatory Memorandum relating to the Bill sets out the consequences for both students and the University that flow from the expiry of the Statutes.

Advice sought

5 You have asked for our advice regarding:

(a) the legal effect of the expiry of the relevant university statutes; and

(b) whether the Bill will achieve the objective stated at pages 2-4 of the explanatory notes to the Bill.

Short Answer

(a) The legal effect of the expiry of the UQ Statutes is that, in the absence of validating legislation, no action can lawfully be taken under those Statutes after 1 September 2009. The effect of the expiry is that the Statutes are no longer in force.

(b) We have substantial doubts whether the proposed section 72 to be inserted in the UQ Act will have the effect set out in the explanatory notes of restoring UQ to the position that existed prior to 1 September. We think that the position is more complex than the section recognises. We suggest that greater detail should be spelled out of the effect of the negation of the expiry of the Statutes in respect of:

- action taken under those Statutes after they have expired; and
- the rules made under the Fees Statute establishing the fees scheme.

Relevant legislation

6 Section 54 of the Statutory Instruments Act provides:

> **54 When subordinate legislation expires**
>
> (1) Subordinate legislation expires on 1 September first occurring after the 10th anniversary of the day of its making unless--
>
> (a) it is sooner repealed or expires; or
>
> (b) a regulation is made exempting it from expiry.
>
> (2) Subordinate legislation exempted from expiry under a regulation under this Act expires when the exemption ends.

7 The UQ Statutes had not previously expired or been repealed and no regulation relating to their expiry had been made. They both commenced operation on 2 July 1999. It is accepted that the section applied to the Statutes with the effect

that they expired on 1 September 2009 as the 10th anniversary of their making had passed.

8 There is no provision in the Statutory Instruments Act as to the effect of expiry on the operation of subordinate legislation. However, sections 19, 20 and 20A of the *Acts Interpretation Act 1954* relating to the effect of the repeal of legislation provides that 'repeal' includes 'expiry'. This means that the expiry of a piece of subordinate legislation pursuant to section 54 of the Statutory Instruments Act does not revive any legislation that it repealed. It also means that actions taken under the expired legislation continue to be effective and rights arising before the legislation expired may be exercised and obligations enforced.

9 The Scrutiny of Legislation Committee of the Queensland Parliament is established by section 80 of the *Parliament of Queensland Act 2001*. Its area of responsibility is stated in section 103 of that Act to be, among other things, to consider the application of fundamental legislative principles to particular Bills and particular subordinate legislation.

10 The fundamental legislative principles of relevance to the Committee's consideration of the provisions of the Education Legislation Amendment Bill are the principles set out in section 4 of the *Legislative Standards Act 1992*. A primary requirement is that the legislation must have sufficient regard to rights and liberties of individuals. In determining whether legislation meets this requirement, subsection 4(3) sets out examples of circumstances that should be considered. Those relevant in the present context are that the legislation:

> (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
>
> (k) is unambiguous and drafted in a sufficiently clear and precise way.

Proposed s 72

11 Section 72 provides that the each UQ Statute 'is taken' not to have expired. The 'is taken' formula is to be treated in the same way as the use of the word 'deemed': *Loizos v Carlton and United Breweries Ltd* (1994) 94 NTR 31 at 32; *Martinez v Minister for Immigration and Citizenship* (2009) 256 ALR 32 at 42.

12 'Deeming provisions are to be construed strictly and only for the purpose for which they are resorted to....It is improper ...to extend by implication the express application of such a statutory fiction': per Fisher J in *FCT v Comber* (1986) 64 ALR 451 at 458 followed in *East Finchley Pty Ltd v FCT* (1989) 90 ALR 457 at 478.

13 It is therefore necessary in the present context to look carefully at what the 'is taken' formula achieves. It will not be given an extended meaning by a court if it comes before it in regard to action taken under the UQ Statutes.

14 Section 72 will not come into effect until the commencement of the Education Legislation Amendment Act which will be the date on which it receives the Royal Assent (*Acts Interpretation Act 1954*, section 15A). It will not be until that date, albeit with effect from 1 September, that the UQ Statutes will be deemed not to have expired.

15 We have two concerns about this. First, what is the effect on actions taken between 1 September 2009 and the commencement of the Act? Second, what is the effect of the expiry of the Fees Statute on 1 September on the scheme of fees contained in the rules made under the Statute?

16 There is a discussion by Samuels J in *Woodlock v Commissioner of Land Tax (NSW)* (1974) 2 NSWLR 411 that is significant in this context. It was pointed out there that it must not be overlooked that the fiction created by a deeming provision is generated by a true, as opposed to a fictitious, state of affairs. The presence of the deeming provision must not divert attention from the consideration that the facts on which the provision is to operate have to exist before the fictitious treatment of those facts takes over.

17 The facts here are that the Statutes have expired. The fiction that section 72 creates is that they have not. However, this does not mean that on 1 September 2009 the Statutes did not expire. On that day they ceased to have effect because of the operation of section 54 of the Statutory Instruments Act. While at some time in the future section 72 will say that the expiry is to be taken legally not to have occurred, the fact that the Statutes did expire cannot be denied. The effect of this is that certain events are likely to happen between that expiry and the commencement of the Education Legislation Amendment Act. Degrees will be conferred or refused. Fees will be levied; failure to pay them will be penalised. These are real events that depend for their legal effect on the existence of legislation. There will not be such legislation in existence between 1 September 2009 and the commencement of section 72.

18 We have a concern whether a mere statement that the relevant enabling legislation is to be deemed to have been in existence at the time when action is taken is sufficient, without more, to make actions that were not lawful at the time thereupon lawful.

19 For example, if a person's degree was revoked and as a result the person was dismissed from employment resulting in damage, the action taken by the UQ would not necessarily be validated by the retrospective deeming provision such as to prevent the University being sued for the exercise of a power that it did not have at the time when the damage was caused. Likewise, if a student incurs a debt to pay fees levied by the University when the University has no power to levy such fees for the services it provides, it seems to us that the University could be vulnerable to legal action. Would a court be prepared to hold that the deeming provision is sufficient to protect the University in such cases? We are not convinced that providing only for the negation of the expiry of the power to revoke degrees or to levy fees would be sufficient to provide such protection.

20 In short, what we are suggesting is that the simple device of stating that the Statutes are to be taken not to have expired may well not be sufficient to restore the UQ to its original position. We think that additional provisions need to spell out explicitly what the effect of the deeming provision is to be in regard to actions taken in the interim period between the expiry and its retrospective cancellation.

21 We are even more concerned about the effect of the expiry of the Fees Statute on the fees scheme contained in the rules made under that Statute. The Fees Statute

is the source of the power to make the rules establishing the scheme. When the Statute ceases to be in existence, so do the rules made under it. This means that from 1 September 2009 the scheme no longer exists. It is dependent upon rules that are made by the Senate. We think that there is real doubt whether the revival of the Statute carries with it the revival of the rules previously made under the Statute.

22 Again, we think that the wiser course would be to deal with this expressly rather than leave it to the possibility of uncertain outcome following a challenge in a court.

23 We think that this is more than a case of being abundantly cautious. We are of the view that there are credible arguments that can be mounted that UQ will not be adequately protected from action by the terms of section 72 as presently drafted.

24 Even if this conclusion is not correct, it would, at the very least, be desirable to set out the intended effect of section 72 on actions taken after the expiry of the Statutes for the information and understanding of the public and the courts.

25 We consider that these concerns attract paragraph (k) of section 4(3) of the Legislative Standards Act and are appropriate for the Committee to comment on.

26 We also point out that the effect of section 72 is to impose obligations retrospectively. The Statutes have expired. Section 72 is directed to restoring their effect from 1 September 2009. Whether the Committee considers this is appropriate is a matter for it. However, it does appear as if the legislative principle set out in section 4(3)(g) is relevant as rights are retrospectively affected.

27 If you wish to discuss this advice further, please do not hesitate to contact me.

Yours sincerely

Professor Dennis Pearce
Special Counsel
Direct +61 2 6201 8787
dennis.pearce@dlaphillipsfox.com

2. STATE PENALTIES ENFORCEMENT AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 16 September 2009

Responsible minister: Hon C R 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:

   - **clause 12** which would confer power to suspend a person's driver licence for unpaid amounts relating to non-motor vehicle offences;
   - **clause 13** which would confer power to immobilise the vehicle of a person who has unpaid amounts;
   - **clauses 7 and 13 and 20-1 and 56** regarding offence provisions;
   - **clauses 30, 48, 51-2, 57-8 and 61-5** which may affect privacy rights of individuals;
   - **clause 66** which may affect rights regarding rehabilitation, privacy, paid employment and participation in the community as a volunteer;
   - **clause 214** which would extend the transitional period regarding restrictive practices;
   - **clauses 10 and 13** which may make rights and liberties of individuals dependent on administrative power which may not be subject to appropriate review;
   - **clause 32** which would exclude the operation of the *Judicial Review Act 1991* in respect of specified decisions of a registrar;
   - **clauses 120 and 178** which may be inconsistent with principles of natural justice;
   - **clause 33** which would amend an existing evidentiary provision in the *State Penalties Enforcement Act*;
   - **clauses 9, 10 and 13** which would confer powers to enter premises and post-entry powers;
   - **clause 18** which would be a statutory exception to the right to silence;
   - **clause 38** which would provide for an amendment to the *Industrial Relations Act* to have retrospective operation; and
   - **clause 66** which would confer immunity for use of criminal history information; and
   - **clauses 87-8** which would extend immunities currently conferred by the *Queensland Civil and Administrative Tribunal Act*.

2. The committee invites the minister to provide information regarding **clauses 218, 226 and 234** and their achievement of the respective objectives stated in the explanatory notes.

3. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:

   - **clause 66** which would delegate legislative power regarding the definition of a key term in the *Police Service Administration Act* to Queensland and Commonwealth entities;
   - **clause 160** which may delegate legislative power regarding a matter which might more appropriately be addressed in primary legislation;
   - **clause 29** which would allow a registrar to issue guidelines which would not be subject to parliamentary scrutiny and disallowance; and
   - **clause 13** which would allow the scope of operation of the *State Penalties Enforcement Act* to be affected by subordinate legislation.

BACKGROUND

4. The bill would amend a number of Acts within the portfolio responsibilities of the Attorney-General and Minister for Industrial Relations; in particular, it would confer additional powers upon the State Penalties Enforcement Registry.

LEGISLATIVE PURPOSE

5. The objectives of the bill are to (explanatory notes, 1-2):

- strengthen the compliance and enforcement capabilities of the State Penalties Enforcement Registry (chapter 2);
- enable participation by Queensland in a national exchange of criminal history information regarding people working with children chapter 3);
- confer additional jurisdiction on the Queensland Civil and Administrative Tribunal and make legislative corrections to allow the Tribunal to operate as intended (chapter 4);
- ensure that, despite recent machinery of government changes, Office of Fair Trading officers may be appointed as inspectors under classification Acts (chapter 5, parts 1-3);
- extend by 9 months the transitional period for restrictive practices (chapter 5, part 4);
- expand the powers of judicial registrars regarding bail (chapter 4 part 2);
- ensure that a person may apply to the Guardianship and Administration Tribunal for a review of the appointment of an administrator (chapter 5, part 5);
- clarify the operation of certain provisions in the right to information and privacy legislation (chapter 5, parts 6-7); and
- make it clear that, as a regulated superannuation fund, the QSuper Board of Trustees is within the regulatory reach of the Australian Prudential Regulation Authority and the Australian Securities and Investment Commission and provide for the appointment of a deputy chairperson of the QSuper Board (chapter 5, part 8).

6. Therefore, the bill would amend the:

- *State Penalties Enforcement Act 1999*;
- *Industrial Relations Act 1999*;
- *Transport Operations (Road Use Management) Act 1995*;
- *Education (Queensland College of Teachers) Act 2005*;
- *Police Service Administration Act 1990*;
- Police Service Administration Regulation 1990;
- *Queensland Civil and Administrative Tribunal Act 2009*;
- *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009*;
- *Adoption Act 2009*;[1]
- *Body Corporate and Community Management Act 1997*;
- *Child Protection Act 1999*;
- *Crime and Misconduct Act 2001*;
- *Fisheries Act 1994*;
- *Food Act 2006*;
- *Integrated Resort Development Act 1987*;
- *Local Government Act 2009*;
- *Nursing Act 1992*;
- *Pest Management Act 2001*;
- *Plumbing and Drainage Act 2002*;
- *Police Powers and Responsibilities Act 2000*;
- *Private Health Facilities Act 1999*;
- *Property Agents and Motor Dealers Act 2000*;

[1] This Act received assent on 26 August 2009. It will commence on a day fixed by proclamation (section 2).

- *Public Health (Infection Control for Personal Appearance Services) Act 2003*;
- *Queensland Building Services Authority Act 1991*;
- *Radiation Safety Act 1999*;
- *Retail Shop Leases Act 1994*;
- *Sanctuary Cove Resort Act 1985*;
- *Taxation Administration Act 2001*;
- *Veterinary Surgeons Act 1936*;
- *Classification of Computer Games and Images Act 1995*;
- *Classification of Films Act 1991*;
- *Classification of Publications Act 1991*;
- *Disability Services Act 2006*;
- *Guardianship and Administration Act 2000*;
- *Information Privacy Act 2009*;
- *Right to Information Act 2009*; and
- *Superannuation (State Public Sector) Act 1990*.

7. The committee notes, however, that although part 9 of the bill is to amend the 'Health and Other Legislation Amendment Act 2009', the Health and Other Legislation Amendment Bill 2009 introduced on 23 April 2009 has not yet been enacted by the Queensland Parliament.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

9. **Clause 12** may affect rights and liberties of individuals. It would amend section 104 of the *State Penalties Enforcement Act* to confer power to suspend a person's driver licence for unpaid amounts relating to non-motor vehicle offences. Enforcement by way of suspension could then occur in respect of any unpaid amount, although currently enforcement by way of driver licence suspension is limited to unpaid amounts for motor vehicle related offences.

10. The explanatory notes state (at 35):

This expansion brings Queensland into line with the other States and Territories (other than the Australian Capital Territory). This amendment commences on assent.

11. **Clause 13** may affect rights and liberties of individuals who are unpaid debtors under the *State Penalties Enforcement Act*. It would insert into that Act a new part 5, division 7A, to allow enforcement of a state penalty by way of the immobilisation of a vehicle. A vehicle able to be immobilised would be 'a motor vehicle that has wheels' and 'a trailer, including a caravan, built to be attached to a motor vehicle that has wheels', but would not include a motorised wheelchair, a recreational device or a vehicle used wholly or primarily by a person with a disability or his or her carer.

12. The explanatory notes acknowledge that clause 13 may represent a breach of fundamental legislative principles but state that sufficient regard is had to rights and liberties of individuals (at 12-3):

The proposal to immobilise a debtor's vehicle and seize and sell it or other real and personal property may be considered to have insufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992, section 4(2)(a).

The immobilisation and seizure and sale initiative is targeted at debtors who have accumulated large amounts of unpaid monetary penalties and who have steadfastly refused SPER's attempts to work with them to find ways to pay their debt.

The proposal is justified in this context because the affected individuals have:

(a) committed offences for which penalties have been applied;

(b) not taken any action to dispute the offences (or unsuccessfully disputed the offences);

(c) failed to pay the penalties within the initial "time to pay" period;

(d) failed to respond to an enforcement order issued by SPER or defaulted under a compliance arrangement (eg an instalment plan); and

(e) failed to pay the amount or enter into compliance after other applicable enforcement action has been taken (eg driver licence suspension, fine collection order, enforcement warrant).

The debt recovery process under the State Penalties Enforcement Act 1999 (SPEA) provides debtors with ample opportunity to pay the debt in full or where this is not possible, negotiate a manageable form of compliance. This includes part payment arrangements under an instalment plan, direct debit or deduction from Centrelink payments from as little as $5-$10 a week for low income earners.

The proposed immobilisation process will take account of the debtor's personal circumstances (e.g. whether they are homeless or at risk of homelessness) and the potential impact of immobilisation on the person's work and family responsibilities. Through the issue of an initial notice of intention to immobilise, the process provides the debtor with ample opportunity to work with SPER to pay their debt in full or by instalments or convert it to unpaid community service under a fine option order, before their vehicle is actually clamped, seized and sold. Further, the proposed amendments ensure the debtor is given notice of each step of the process, as it escalates towards immobilisation, seizure and sale.

The proposed amendments respond to community expectation that people who receive a monetary penalty for breaking the law repay their debt in full.

13. **Clauses 7 and 13** would insert new offences into the *State Penalties Enforcement Ac*t and have the potential to affect rights and liberties of individuals. The proposed offences and respective maximum penalties are set out below.

Clause	New section	Offence	Proposed maximum penalty
State Penalties Enforcement Act			
7	68A	Concealing, selling, transferring or otherwise dealing with property subject to seizure	200 penalty units ($20,000) or three years' imprisonment
13	108X(1)	Concealing, selling, transferring or otherwise dealing with vehicle with intent to avoid the issue of an immobilisation warrant for the vehicle	200 penalty units ($20,000) or three years' imprisonment
13	108X(2)	Concealing, selling, transferring or otherwise dealing with vehicle with intent to avoid the enforcement of an immobilisation warrant for the vehicle	200 penalty units ($20,000) or three years' imprisonment
13	108Y	Interfering with or removing immobilised vehicle	200 penalty units ($20,000) or three years' imprisonment
13	108Z	Tampering with or removing immobilising device or immobilising notice	50 penalty units ($5,000)

14. **Clauses 20, 21 and 56** would amend existing offences, as set out below.

Clause	Section amended	Effect of proposed amendment	Maximum penalty
State Penalties Enforcement Act			
20	116	Offence of obstructing enforcement officer expanded to include threatening an enforcement officer	50 penalty units ($5,000) or one years' imprisonment
21	117	Penalty for offence of defacing or removing seizure tags to be increased	Currently 10 penalty units ($1,000), 50 penalty units ($5,000) proposed

Clause	Section amended	Effect of proposed amendment	Maximum penalty
Education (Queensland College of Teachers) Act			
56	283	Unauthorised disclosure of information acquired under the legislation to be extended to include unauthorised disclosure of interstate information	40 penalty units ($4,000)

15. **Clauses 30, 48, 51-2, 57-8 and 61-66** may affect privacy rights of individuals.

16. Clause 30 would insert a new section 151A into part 9, division 2 of the *State Penalties Enforcement Act*, enabling the registrar to advise the commissioner of police that an immobilisation warrant has been issued and to provide information regarding its enforcement. In respect of clause 30, the explanatory notes state (at 50-1):

This provision complements the information exchange currently permitted under section 151 of the SPEA…. This information exchange will assist in ensuring that SPER's immobilisation operations do not compromise major police investigations and will enable immobilisation warrant information to be flagged in QPRIME. It is possible that enforcement officers may need to call the police for assistance during an immobilisation operation. The proactive information exchange permitted under this provision will assist QPS to allocate policing resources to respond to these situations. The information provided by the SPER registrar under this provision may only be used by the QPS in relation to the enforcement of the warrant and not for general policing purposes.

17. Clause 48 would insert a new section 12A in the *Education (Queensland College of Teachers) Act* to ensure that the Queensland College of Teachers meets requirements of a Council of Australian Government' agreement to facilitate the inter-jurisdictional exchange of criminal history information for people working with children. Clauses 51 and 52 are related provisions, conferring relevant administrative power regarding the obtaining of criminal histories. Clauses 57-8 and 61-69 (in the latter case, amending the *Police Service Administration Act* and the Police Service Administration Regulation) would expand current information sharing arrangements with the commissioner of police to include information required or permitted to be given to the College of Teachers under the new arrangements. The committee notes, however, that the arrangements would allow the sharing of information regarding alleged criminal offences and would constitute a statutory exception to the presumption of innocence.

18. Justification for breach of fundamental legislative principles is provided in the explanatory notes (at 54-5 and 58-9). Additionally, the explanatory notes specifically acknowledge possible inconsistency with fundamental legislative principles but state (at 17) that the legislation is justified:

The rights implications are particularly acute when the CHI is untested information in the form of pending charges and withdrawn charges, or acquittals.

However, the potential breach is justified given the objective of making the information available to child related employment screening units; namely, to safeguard children from sexual, physical and other abuse.

The potential breach is also ameliorated to the extent that COAG has insisted on strict "participation requirements" on the use of the information, given its sensitivity and potential to affect individuals adversely.

19. **Clause 214** will affect the rights and liberties of individuals by extending by nine months a transitional period regarding legislative provision for restrictive practices made in the *Disability Services Act*.

20. It will amend the definition of 'transitional period' in section 241(1) of the *Disability Services Act*, thereby making 1 October 2010 the new date when a disability service provider using a restrictive practice must meet all of the legislative requirements.

21. In respect of clause 214, the explanatory notes state (at 25-6):

The proposal to extend the transitional period for restrictive practices may be considered to have insufficient regard to the rights and liberties of individuals – Legislative Standards Act 1992*, section 4(2)(a). The proposed amendment to the* Disability Services Act 2006 *will extend the 18 month transitional period for a further 9 months. The amendment will allow a disability service provider a further 9 months to comply with all of the requirements of the full scheme. In the meantime, they can continue to use a restrictive practice during the transitional period if they meet a set of transitional requirements, aimed at safeguarding the individual. A consequential amendment is also made to the* Guardianship and Administration Act 2000 *– which will extend the transitional period during*

which a guardian (appointed before the commencement of the transitional period) may continue to make decisions for an adult about the use of restrictive practices.

Overall the aim of the restrictive practices scheme, together with the renewed focus on positive behaviour support, is intended to drive cultural change in the disability sector- through the provision of services that promote an improved quality of life and the reduction or elimination of the use of restrictive practices. The extension of the transitional period will allow disability service providers enough time to conduct a thorough assessment and prepare a comprehensive plan that best meets the needs of the individual – in line with best practice and the full legislative requirements. This will lead to better informed decision making, which is ultimately in the individual's best interests. For these reasons, it is considered the potential breach of the fundamental legislative principle is justified. At the same time, the proposal maintains existing safeguards to ensure appropriate protection for the individual subject to the restrictive practice. In particular, for the Disability Services Act 2006*, these include:*

- *the disability service provider must act honestly and without negligence;*
- *use of the restrictive practice is necessary to prevent harm and is the least restrictive way of ensuring the safety of the adult or others;*
- *either consent of an authorised guardian or an assessment of the adult is required; and*
- *the disability service provider must keep and implement a policy and procedures on the use of the restrictive practice (including information on monitoring and reviewing the restrictive practice).*

For the amendment to the Guardianship and Administration Act 2000*, the safeguard for the adult is that the guardian was authorised to make decisions around restrictive practices before the commencement of the transitional period, and the appointment is subject to review by the Guardianship and Administration Tribunal.*

Administrative power

22. 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.

23. **Clauses 10 and 13** may make rights and liberties of individuals dependent on administrative power which may not be subject to appropriate review.

24. In respect of clause 10 (to insert new sections 73A-73K in the *State Penalties Enforcement Act*), the explanatory notes outline (at 14-5) the effect upon rights and liberties of individuals:

Clause 10 of the Bill inserts new provisions to strengthen SPER's existing powers to seize and sell real and personal property. They include provisions which set out the process by which property seized under an enforcement warrant must be sold. This process includes the ability for debtor to apply to SPER registrar for a direction that property be sold privately rather than by public auction (new section 73F) or for the sale to be postponed (new section 73I).

25. Regarding whether the administrative power is subject to appropriate review, the explanatory notes state (at 15):

Whilst there is no appeal from the registrar's decision, judicial review has not been excluded. This approach reflects the need to bring finality to the enforcement process.

26. In respect of clause 13 (to insert new section 108E in the *State Penalties Enforcement Act*), the explanatory notes indicate (at 14) that review provided would be appropriate:

New section 108E enables a person claiming an interest in a vehicle that is or is about to be immobilised under an immobilisation warrant to apply to the SPER registrar for part or all of the warrant to be cancelled, suspended or varied. This is no appeal from the registrar's decision, but judicial review is not excluded. This is consistent with the approach taken under section 64 of the SPEA which provides a corresponding process in respect of enforcement warrants issued under Part 5, division 2 of the Act. This approach reflects the need to bring finality to the enforcement process.

27. Further, it is acknowledged (at 16) that 'the proposed immobilisation process may be considered to adversely affect an individual's rights and liberties by exposing their vehicle to a greater than normal risk of damage or theft'. However, it is suggested (at explanatory notes, 16) that clause 13 sufficiently defines the power conferred:

The proposed immobilisation process may be considered to adversely affect an individual's rights and liberties by exposing their vehicle to a greater than normal risk of damage or theft – Legislative Standards Act 1992*, section 4(2)(a). To minimise this risk, new section 108H provides very clear guidance about where a vehicle can and can*

not be immobilised. Vehicles can not be immobilised in places where the vehicle would impede traffic or pose a safety risk or in places where the safety of the driver and any occupants may be compromised e.g. in isolated locations with limited access to public transport. These provisions will be supported by administrative guidelines issued under section 150B of the SPEA, as amended by clause 29. These guidelines will provide direction to enforcement officers about how to plan and conduct immobilisation operations in a way that minimises the risk of the vehicle being damaged or stolen while immobilised. The justification outlined above in relation to the "hardship" guidelines also applies to this mechanism.

Further, the proposed amendments operate to prevent an insurance company from refusing a claim under a vehicle insurance policy for an event (e.g. theft or damage) that occurred while the vehicle was immobilised, merely because the vehicle was immobilised under the SPEA.

28. **Clause 32** (amendment of section 155 of the *State Penalties Enforcement Act*) would similarly confer administrative power which may not be subject to appropriate review. It would exclude the operation of the *Judicial Review Act 1991* in respect of a decision of a registrar to issue:

- a notice of intention to issue an immobilisation warrant (new section 108C); or
- an immobilisation warrant (new section 108D).

29. Where legislation purports to oust the inherent and statutory jurisdiction of the Supreme Court to review the legality of decisions and actions, the committee considers carefully whether the legislation has sufficient regard to individual rights and liberties or obligations. Generally, the committee adopts the general view that privative clauses should rarely be contemplated and even more rarely enacted. They represent a parliamentary attempt to deny the courts a central function of their judicial role, preventing courts pronouncing on the lawfulness of administrative action.

30. In given circumstances, it is possible that removal of rights to access to courts and tribunals may be justified by significant legislative objectives. However, the committee notes that Australian courts have resisted parliamentary attempts to limit their powers and have given a restrictive interpretation to privative clauses. Principles to be taken into account by a court will include:

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

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

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

32. In respect of clause 32, the explanatory notes identify a possible inconsistency with fundamental legislative principles and provide information in that regard (at 14):

It is proposed that the Registrar's decision to issue a notice of intention to issue an immobilisation warrant under new section 108C or an immobilisation warrant under new section 108D will not be reviewable – section 155 SPEA, as amended by clause 32 Having regard to the potential impact of the immobilisation process on an individual's rights and liberties, the absence of a review process may be considered to breach fundamental legislative principles – Legislative Standards Act 1992*, section 4(3)(a).*

Firstly, this aspect of the proposal is consistent with the current approach under the SPEA in respect of the Registrar's decision to take other forms of enforcement action. The Registrar's decisions to issue an enforcement order, an enforcement warrant, a fine collection notice, notice of intention to suspend a driver licence or an arrest and imprisonment warrant are not reviewable. Driver licence suspension has very similar consequences to vehicle immobilisation; the consequences of an arrest and imprisonment warrant are much more significant. This approach reflects the need to bring finality to the enforcement process.

Further, as noted above, the immobilisation, seizure and sale initiative targets high value debtors who have refused to co-operate with the many opportunities SPER provides to enter into compliance. The immobilisation process itself provides further opportunities for the debtor to pay in full or negotiate compliance before their vehicle is actually clamped, seized and sold. There is also capacity to reconsider hardship considerations during the immobilisation period. For these reasons, it is not proposed to provide a right of review in respect of the Registrar's decision to issue an intent notice or an immobilisation warrant.

Natural justice

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

34. **Clause 120** may be inconsistent with principles of natural justice. It would insert a new part 14A into the *Adoption Act 2009* to make provision for proceedings before the Queensland Civil and Administrative Tribunal. New sections within part 14A would affect the rights of parties to procedural fairness as:

- children would not be required to attend a hearing to give evidence or produce a statement, document or other thing (new section 307J);
- only tribunal members, legal representatives and a child's lawyer, separate representative and support person may be present when a child gives evidence or expresses views to the tribunal (new section 307L);
- a child who gives evidence or expresses views to the tribunal may not be cross-examined (new section 307M);
- a tribunal may make confidentiality orders (new section 307N);
- access to the tribunal's register and record of proceedings may be limited (new sections 307O and 307P); and
- prescribed information may not be published (new section 307Q).

35. In respect of new part 14A of the *Adoption Act*, the explanatory notes state (at 21-2):

New part 14A replicates and continues part 3A of the Adoption of Children Act 1964 *which was inserted into that Act by the* Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009*.*

Where the Bill departs from fundamental legislative principles, this occurs in the context of the tension between the rights of individuals as safeguarded by the Legislative Standards Act 1992 *and the competing rights of children and young people to participate in review processes in a way which protects them from distress and harm which may occur through a strictly adversarial review process.*

New section 307J provides that children cannot be compelled to give evidence in a proceeding for a reviewable decision under the Adoption Act 2009 *and specifically overrides the* Queensland Civil and Administrative Tribunal Act 2009 *so that children must not be required to attend a hearing of a proceeding to give evidence or produce a statement, document or other thing to the tribunal.*

New section 307L provides that where children are giving evidence or expressing their views to the tribunal only the constituting members, the lawyer, the separate representative and the child's support person may be present.

New section 307M prohibits the cross-examination of children who give evidence or express their views to the tribunal.

While it will be rare that a particular child is the subject of a reviewable decision under the Adoption Act 2009*, it is possible. These provisions are considered necessary to ensure their views and wishes are heard and to reduce the stress for children and young people who choose to give evidence. The children involved in these proceedings may be very vulnerable and should not be required to give evidence and be cross-examined. The restriction on cross-examination is also justified given this review occurs in an administrative proceeding as opposed to a court environment. Further, as the primary focus of the tribunal in these proceedings is to make the best possible decision in the interests of the child about whom the reviewable decision has been made, the protection is considered appropriate and the departure from fundamental legislative principles warranted.*

New section 307N gives the tribunal the power to make confidentiality orders in relation to documents produced, or evidence given to the tribunal. The effect of such an order is to prohibit or restrict the disclosure of the document or evidence to the parties in the proceedings. This power is considered necessary to ensure that very sensitive information about a child or prospective adoptive parent is not released that could result in harm to a child or young person, or jeopardise the safety of another person or unduly interfere with the privacy or a child or another person.

36. **Clause 178** may be inconsistent with principles of natural justice also as it would allow for expedited hearings of domestic building disputes. It would amend section 95 of the *Queensland Building Services Authority Act* to enable the Queensland Civil and Administrative Tribunal to deal with a domestic building dispute between a building owner and a building contractor or a review of a decision of the Queensland Building Services Authority by way of an expedited hearing in specified circumstances.

37. The explanatory notes provide the following information (at 23-4):

Under section 83 of the Queensland Building Services Authority Act 1991 *if a proceeding about a building dispute is commenced in or transferred to the Commercial and Consumer Tribunal (QCAT from 1 December), the tribunal has management of the dispute. The QBSA must not act further in relation to the dispute. This amendment is proposed to address instances where certain building contractors commence proceedings with the purpose only of delaying QBSA assistance to building owners, for example, by way of issuing a direction or providing assistance under the Queensland Home Warranty Scheme.*

Under the Queensland Civil and Administrative Tribunal Act 2009 *expedited hearings are to be conducted in the way stated in the rules (section 94(2)) and a party to a proceeding conducted by way of an expedited hearing does not have an automatic right to cross-examine or re-examine witnesses (section 95(2)(c)). However, under section 28 the tribunal must act fairly, observe natural justice and ensure all relevant material is disclosed to QCAT to enable it to decide the proceeding with all the relevant facts. Further, the proposed amendment provides that an expedited hearing for the dispute or review may be conducted only if the tribunal considers a building owner will suffer "undue hardship" and that the dispute or review may be properly decided by way of an expedited hearing.*

Onus of proof

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

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

40. **Clause 33**, to amend an evidentiary provision in section 157 of the *State Penalties Enforcement Act*, may have insufficient regard to rights and liberties of individuals:[2]

Clause 33 amends section 157 of the SPEA to enable the SPER registrar to issue a certificate that a notice of intention to issue an immobilisation warrant or an immobilisation warrant was served on a stated person on a stated day. The certificate is evidence. This reverses the onus of proof - Legislative Standards Act 1992*, section 4(3)(d).*

41. Where legislation infringes the fundamental legislative principle regarding reversal of the onus of proof, the committee considers information provided regarding justification of the reversal of the onus. In respect of clause 33, the explanatory notes state (at 16):

This is consistent with the current approach under section 157 in relation to evidence of the broad range of compliance and enforcement actions taken under the Act.

Power to enter premises

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

43. **Clauses 9, 10 and 13** would confer powers to enter premises and post-entry powers upon enforcement officers additional to those currently conferred under the *State Penalties Enforcement Act*.

44. Clause 9 would amend section 72 to give an enforcement officer 'power to do anything else reasonably necessary to be done that is incidental to searching for and seizing any property the enforcement officer may seize under an enforcement warrant':[3]

This will include the power for an enforcement officer to direct a tow truck operator to enter a place, including a debtor's private property, where a vehicle has been immobilised under an immobilisation warrant, in order to tow the vehicle under a direction issued by the enforcement officer under new section 73B.

2 Explanatory notes at 16.

3 Explanatory notes, 31-2.

45. Clause 10 would insert new sections 73A-73K. The effect of the provisions is outlined at pages 32 to 35 of the explanatory notes which indicate that the powers to be conferred are justified:[4]

[A]lthough SPER already has power to issue an enforcement warrant to seize and sell real and personal property, SPER has not used these powers to date because it has had neither the resources nor systems necessary to regularly seize, store and sell property. The proposed amendments will strengthen SPER's seizure and sale powers and align them with the powers and process for enforcing money orders under the Uniform Civil Procedure Rules 1999.

This aspect of the Bill will facilitate both the wheel clamping initiative and a separate two year pilot in the Brisbane metropolitan area using Magistrates Court bailiffs to enforce seizure and sale warrants against debtors who owe $1000 or more.

46. Clause 13 would insert a new part 5, division 7A to confer powers regarding vehicle immobilisation.[5] New section 108I, in particular, would confer an enforcement officer with powers to enter and re-enter premises occupied by a debtor or someone other than a debtor. In respect of the premises occupied by a debtor, consent would not be necessary. The explanatory notes acknowledge that the power to enter without a warrant or consent would be a breach of fundamental legislative principles, but provide justification (at 15-6):

The immobilisation warrant provides authority for an enforcement officer to immobilise a vehicle without further notice to the debtor. A copy of the immobilisation warrant must be served on the debtor. It is anticipated that some debtors will attempt to avoid immobilisation by hiding or moving their vehicles. This is why the suite of powers proposed in new section 108I and section 114 of the SPEA, as amended by clause 18, is justified. They are supported by power to seek and enforce an immobilisation search warrant issued by a magistrate or a justice of the peace (magistrates court) under new sections 108L and 108M.

It should be noted that:

(a) enforcement officers will carry identity cards, as currently provided under section 10 of the SPEA;

(b) the power of entry to any premises occupied by the debtor is consistent with the existing power of entry under section 70 of the SPEA (which limits entry to part of premises used only for residential purposes with the occupier's consent or under a search warrant);

(c) entry to any other premises (other than a public place) is subject to the occupier's consent or a search warrant;

(d) it is not intended that enforcement officers will use force when exercising these powers;

(e) the power to require the debtor to answer questions under section 114 of the SPEA, as amended by clause 18, is subject to reasonable excuse;

(f) enforcement officers are required to provide the debtor with a notice identifying what property is seized under an enforcement warrant;

(g) the debtor will be given reasonable access to vehicle while it is immobilised;

(h) if the debtor's vehicle or other property is damaged by an enforcement officer exercising powers under the immobilisation process, provision is made for notice to be given to the debtor and for the debtor to seek compensation for the cost of repairing or replacing the damaged property.

Protection against self-incrimination

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

48. **Clause 18** would abrogate protections against self-incrimination and, in particular, it would infringe an individual's right to silence. Clause 18 would require a person to answer a question asked of an enforcement officer enforcing an immobilisation warrant. Justification for breach of fundamental legislative principles is provided in the explanatory notes (at 49):

Clause 18 amends section 114 to give an enforcement officer enforcing an immobilisation warrant power to require a person the enforcement officer reasonably believes to be the debtor named in the warrant to answer a question that is relevant to the warrant or the exercise of powers under the SPEA because of the warrant. The enforcement officer is required to warn the person that failure to comply with the requirement is an offence, unless the person has a reasonable excuse. The clause also amends section 114 to require an enforcement officer to

4 Explanatory notes, 8.

5 See explanatory notes, 35-49.

show their identity card before they exercise a power under subsection 114(1) or (5). This amendment supplements the additional powers set out in new section 108I that an enforcement officer may exercise under an immobilisation warrant.

Retrospective operation

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

50. **Clause 38** would amend the *State Penalties Enforcement Act*, with retrospective effect, regarding particular orders made under the *Industrial Relations Act*.

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

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

52. In this regard, the explanatory notes indicate (at 16-7) that the legislation would:

… enable and retrospectively validate the referral of, and registration and enforcement by SPER of orders for the payment of unpaid wages, tool allowance, unpaid superannuation contributions and fees charged illegally by private employment agents made under the Industrial Relations Act*. These orders are currently enforceable under the* Justices Act 1886 *as an order for payment of money made under that Act or can be recovered by the employee from the employer as a debt. The proposed amendments will formally establish referral to SPER as an alternative and less costly method of enforcing these orders. For this reason, it is not considered that the proposed retrospective validation adversely affects the rights and liberties of individuals* - Legislative Standards Act 1992*, section 4(3)(g).*

Immunity from proceeding or prosecution

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

54. **Clause 66** would confer immunity on any person acting honestly and without negligence where that person used a information exchanged under an inter-jurisdictional exchange of criminal history information for people working with children. Clause 66 would insert a new section 10.2V in the *Police Service Administration Act* to provide that the person would not be liable civilly, criminally or under an administrative process, for using the history. Justification for breach of fundamental legislative principles is provided in the explanatory notes (at 58-9).

55. **Clauses 87 and 88** would respectively amend sections 237 and 238 of the *Queensland Civil and Administrative Tribunal Act* to confer upon a broader class of persons the current immunities provided.

56. Clause 87 would amend section 237 to include in the definition of 'principal registrar' a person performing a function of the principal registrar delegated to the person under section 210(2). The amendment is to be consequential to an amendment to section 210 permitting the principal registrar to delegate functions to a registry staff member or a Magistrates Court staff member.

57. Clause 88 would amend section 238 to include in the definition of 'official' a Magistrates Court staff member performing a function of the principal registrar delegated to the person under section 210(2). The amendment is similarly consequential to the amendment to section 210.

58. In respect of the immunities to be conferred by clauses 87 and 88, the explanatory notes state (at 20-1):

The proposed amendment to section 237 extends the protection and immunity that section confers to also cover a tribunal registry staff member or a Magistrates Court staff member performing a function of the principal registrar that has been delegated to the member under section 210 (as amended) and that is mentioned in subsection (6). It is appropriate that a person acting as part of a judicial process should be free of personal attack on the basis of

illegal or negligent action when performing their roles. The immunity will ensure that these persons can act with appropriate confidence in carrying out their roles in the community interest. Such roles would be difficult to carry out if the office holders involved in the proceeding were subject to allegations and litigation taken against them personally for their actions in the office or proceeding.

The proposed amendment to section 238 extends the immunity from civil liability that the section confers on a Magistrates Court staff member performing a function of the principal registrar that has been delegated to the member under section 210 (as amended). The immunity is for acts or omissions done or made honestly and without negligence under the Queensland Civil and Administrative Tribunal Act 2009 *or an enabling Act. Any potential liability attaches instead to the State.*

Clear meaning

59. 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.

60. **Clauses 218, 226 and 234** may not be drafted in a sufficiently clear and precise way to achieve their respective objectives, as stated in the explanatory notes.

61. In respect of clause 218 (new section 268 of the *Guardianship and Administration Act*), the explanatory notes state (at 24):

It is proposed to amend section 29 of the Guardianship and Administration Act 2000 *to correct an oversight that was made upon commencement of the* Disability Services and Other Legislation Amendment Act 2008 *(amending Act) that commenced on 1 July 2008. Prior to the commencement of the amending Act, section 29 provided the authority for certain persons to make an application for the review of an appointment of a guardian and/or administrator. The amending Act amended section 29 to also provide for the review of a guardian appointed for a restrictive practice matter under chapter 5B. However, when drafting the new section 29, the reference to the review of the appointment of an administrator was inadvertently omitted.*

Since 1 July 2008 any applications that have been lodged with the Guardianship and Administration Tribunal seeking a review of the appointment of an administrator under section 29 have been made and also considered by the Tribunal without the proper authority.

62. The explanatory notes indicate (at 24) that, although clause 218 provides for the retrospective operation of clause 216, sufficient regard is had to rights and liberties of individuals:

Given that the omission of the reference to a review of an administration appointment was an oversight, the retrospective operation of this amendment is justified to correct the unintended consequences of this oversight.

63. In respect of clauses 226 and 234, the explanatory notes indicate (at 24-5):

It is proposed to amend the Right to Information Act 2009 *and* Information Privacy Act 2009 *to rectify issues identified since commencement of the new legislation. The amendments, which clarify the internal review delegation powers of principal officers and Ministers require retrospective effect to ensure the validity of any internal review delegations executed prior to commencement of the amendments. The proposed amendments to clarify that a decision to issue a notice neither confirming nor denying the existence of certain types of prescribed information is a reviewable decision will ensure that the review rights of applicants are maintained. The amendments will therefore not adversely affect the rights of liberties of individuals.*

64. The committee notes that clause 216 confers the Guardianship and Administration Tribunal with jurisdiction to review the appointment of an administrator for an adult and would commence upon assent. New section 268 is intended to cure, retrospectively, an absence of jurisdiction since 1 July 2008. It states:

268 Declaration and validation concerning particular reviews under s 29

(1) During the transitional period, section 29 is taken always to have applied in relation to a review of an appointment of an administrator for an adult as if the amendment of that section by the State Penalties Enforcement and Other Legislation Amendment Act 2009, section 216 had commenced on 1 July 2008.

(2) In this section—

transitional period means the period starting at the beginning of 1 July 2008 and ending at the end of the day before the commencement of the amendment.

65. Similarly, the amendments to be effected by clauses 226 and 234 are to have retrospective operation and use the words, 'is taken'. However, these provisions seek to clarify – it may not be necessary for them to be curative.

66. The effect of the words, 'is taken', is discussed in a legal advice sought for the committee regarding the Education Legislation Amendment Bill 2009. That advice suggested to the committee that the words are a deeming provision and 'are to be construed strictly and only for the purpose for which they are resorted to'. Accordingly, 'the presence of the deeming provision must not divert attention from the consideration that the facts on which the provision is to operate have to exist before the fictitious treatment of those facts takes over'.

67. In this context, the committee draws the attention of the Parliament to clause 218. As drafted, it may not be sufficient to correct a past defect in the jurisdiction of the Guardianship and Administration Tribunal.

68. In addition, the committee notes that clauses 226 and 234 also may not be sufficient to correct past deficiencies in administrative power, but may be sufficient to clarify the intended conferral of power under the relevant Acts.

69. The committee invites the minister to provide information regarding clauses 218, 226 and 234 and their achievement of the respective objectives stated in the explanatory notes.

Sufficient regard to the institution of Parliament

Delegation of legislative power

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

71. **Clause 66** (new section 10.2S of the *Police Service Administration Act*) may allow the definition of a term affecting the scope of operation of new part 10, division 1B of the *Police Service Administration Act* to be set by way of delegated legislative power. The legislative power would be delegated to both Queensland and Commonwealth jurisdictions.

72. New section 10.2S would define the terms 'approved agency', 'child-related employment screening', 'criminal history' and 'interstate screening unit' for the new part of the *Police Service Administration Act* allowing exchange of criminal history information for the purposes of screening for child-related employment. In respect of the definition of 'interstate screening unit', the new section would state that:

> **interstate screening unit** means an entity, established under a law of another State or the Commonwealth, that is—
>
> (a) prescribed under a regulation; or
>
> (b) prescribed under the *Crimes Act 1914* (Cwlth), section 85ZZGB, 85ZZGC or 85ZZGD.

73. The committee generally does not regard a provision which would allow the extension of a definition to be an 'Henry VIII' provision (see, 'Amendment of Act other than by another Act'). However, the committee examines whether the provision would inappropriately delegate legislative power.

74. The explanatory notes indicate (at 19) that the regulation-making power in the Commonwealth jurisdiction would be conferred in a proposed amendment to the *Commonwealth Crimes Act 1914* to be effected by the Crimes Amendment (Working With Children-Criminal History) Bill 2009. The explanatory notes (at 19-20) further indicate that any breach of fundamental legislative principles would be justified:

> *The definition might be considered to breach the fundamental legislative principle that there be sufficient regard to the institution of Parliament by allowing the delegation of legislative power only in appropriate cases*—Legislative Standards Act*, section 4(4)(a). The potential breach represented by paragraph (a) above is ameliorated somewhat by Parliament being asked to endorse as part of this Bill the regulation that has been prepared for this purpose. See Chapter 3, Part 3 (Amendment of Police Service Administration Regulation 1990). Further, while the Executive can of course add to, or take away from, that regulated list afterwards, under the proposed ECHIPWC intergovernmental agreement a government can only nominate a screening unit for participation in the exchange if the screening unit satisfies COAG's participation requirement safeguards. Accordingly, Queensland's regulation will refer to an interstate screening unit only if the unit is proposed for listing in the intergovernmental agreement. The proposed intergovernmental agreement will provide for screening units to be added in the future, but only if other jurisdictions agree the units comply with the participation requirements.*

Paragraph (b) above is ameliorated by proposed section 85ZZGE of the Commonwealth bill to which reference is made above. Proposed section 85ZZGE provides that, before a regulation is made, the Commonwealth Minister must be satisfied that the screening unit complies with a list of matters that replicate COAG's participation requirements. The delegation of legislative power is considered desirable to modify or add to the list of interstate units in a responsive way.

The delegation of legislative power is considered desirable to modify or add to the list of interstate units in a responsive way.

75. **Clause 160** may delegate legislative power in respect of a matter which might more appropriately be addressed in primary legislation.

76. It would insert a new chapter 6, part 5, division 4 in the *Local Government Act* regarding equality of employment opportunity. New section 201A would delegate the power to make subordinate legislation about administrative and operational equality of employment opportunity (EEO) matters for local governments. New section 201A(2) states that the chief executive may refer a local government's non-compliance with the regulation to the Queensland Civil and Administrative Tribunal for investigation and report.

77. The explanatory notes state (at 22-3):

The approach taken in section 201A, which enables a regulation to be made to govern operational and administrative EEO matters, is consistent with the principles-based framework of the new Local Government Act 2009 *as foreshadowed in the explanatory notes to the Local Government Bill 2009. The explanatory notes state that the Act would be supplemented by regulations that govern essential but subordinate operational and administrative issues. Accordingly, Parliament was fully informed of the policy intent to build these regulation-making powers into the Act, and as such, any concern about potential breach of fundamental legislative principles in this regard have been addressed.*

Parliamentary scrutiny of delegated power

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

79. **Clause 29** would amend section 150B of the *State Penalties Enforcement Act* to allow the registrar to issue guidelines for the purposes of new sections 108B, 108C, 108D, 108H, and 108P of that Act.

80. Guidelines made in this way would not be 'subordinate legislation' and would not be subject to parliamentary scrutiny and disallowance. The explanatory notes (at 13-4) state that clause 29 has sufficient regard to the institution of Parliament:

The use of administrative guidelines is justified in this context as section 150B of the SPEA, as amended by clause 29, establishes the broad scope of this aspect of the guidelines. Hardship can only be determined having regard to the individual circumstances of each case. This mechanism provides the flexibility required to accommodate the range of situations in which hardship may arise. The guidelines must be publicly available, including on the SPER website.

Amendment of Act other than by another Act

81. 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.

82. **Clause 13** (new section 108A of the *State Penalties Enforcement Act*) would allow for the scope of operation of the *State Penalties Enforcement Act* to be affected by subordinate legislation. It states, in part:

108A Criteria for vehicle immobilisation

A vehicle may be immobilised under this division if—

…

(c) the amount owing by the enforcement debtor is at least the amount prescribed under a regulation;

83. The explanatory notes acknowledge that new section 108A may represent a breach of fundamental legislative principles (at 13):

New section 108A sets out the criteria for immobilisation. These include that the debtor has failed to pay amounts totalling the threshold amount prescribed by regulation. It is intended to prescribe an amount of $5,000 for this purpose. It is acknowledged that this construction is a "Henry VIII clause" that breaches fundamental legislative principles by authorising the amendment of an Act by subordinate legislation – Legislative Standards Act 1992, section 4(4)(c).

84. 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.

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

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

86. 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.

87. New section 108A(c) may be an Henry VIII provision and would not clearly fall within one of the excusable categories. In relation to whether the provision appropriately delegates legislative power, the committee notes that justification is provided in the explanatory notes (at 13):

Although this mechanism relates to a threshold criterion for this new form of enforcement action, its use is justified as it provides the necessary flexibility to adjust the threshold amount having regard to the impact of the economic climate on debtors, from time to time.

The proposed immobilisation process will incorporate an assessment of whether immobilisation, or continued immobilisation, will cause severe and unusual hardship to the debtor, the debtor's family or a third person who relies on the vehicle but has no ability to ensure the debt is paid. The SPER Registrar will make this assessment before issuing an immobilisation warrant and may do so again during the immobilisation period – see clause 13 (new sections 108D & 108P) and clause 29.

The "hardship" assessment will be made having regard to guidelines issued by the SPER Registrar, which will assist in identifying situations in which immobilising a vehicle could cause severe and unusual hardship. The Registrar will make this assessment having regard to information obtained during SPER's preliminary investigations of the debtor and through contact with the debtor after the initial intent notice is issued.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

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

89. The bill would amend the *Education (Queensland College of Teachers) Act* and *Police Service Administrative Act* and related subordinate legislation to ensure that the Queensland College of Teachers meets requirements of a Council of Australian Government' agreement to facilitate the inter-jurisdictional exchange of criminal history information for people working with children. Information regarding the national agreement and the resulting amendments to be made by the bill is provided in the explanatory notes (at 54-5 and 58-9).

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

3. TRADE MEASUREMENT LEGISLATION REPEAL BILL 2009

Date introduced: 15 September 2009

Responsible minister: Hon P Lawlor MP

Portfolio responsibility: Minister for Tourism and Fair Trading

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 14 and 16** which may affect rights to privacy of personal information.

BACKGROUND

2. To facilitate a national system of trade measurement, the legislation repeals two Queensland Acts and allows for transition to the national system.

LEGISLATIVE PURPOSE

3. The policy objectives of the bill are stated in the explanatory notes (at 1):

   The objectives of the Bill are to repeal the Trade Measurement Act 1990 *and the* Trade Measurement Administration Act 1990 *(the Trade Measurement Acts) and to introduce transitional measures for a seamless transfer of the State responsibility for administration and enforcement of trade measurement to a national regime (so as to minimise any adverse impacts on the community or the market in the process).*

4. The bill would effect consequential amendments to Acts and subordinate legislation; namely the:

   - *Agricultural Standards Act 1994*;
   - Agricultural Standards Regulation 1997;
   - *Fair Trading Act 1989*;
   - *Fisheries Act 1994*;
   - Fisheries (Coral Reef Fin Fish) Management Plan 2003;
   - *Petroleum and Gas (Production and Safety) Act 2004*;
   - *State Penalties Enforcement Act 1999*;
   - State Penalties Enforcement Regulation 2000;
   - *Statutory Instruments Act 1992*;
   - Statutory Instruments Regulation 2002;
   - *Transport Operations (Road Use Management) Act 1995*; and
   - Transport Operations (Road Use Management–Mass, Dimensions and Loading) Regulation 2005.

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 14 and 16** may affect rights to privacy of personal information.

7. Clause 14 would allow the chief inspector to disclose to the National Measurement Institute information obtained about a 'continuing matter'. For the purpose of the administration or enforcement of the Commonwealth law, the chief inspector may:

   - disclose information (clause 14(2)); or
   - allow inspection where the information relates to a seized thing mentioned in clause 12 (Seized measuring instruments and other things).

8. Clause 16, to commence upon assent, would provide for the transfer of information associated with administration of trade measurement to the National Measurement Institute.

9. The explanatory notes to the bill identify possible inconsistency with fundamental legislative principles but indicate that clauses 14 and 16 are justified (at 7):

   To facilitate the seamless transition of trade measurement administration and enforcement to the Commonwealth it will be necessary to provide the NMI with information relating to trade measurement licensees and regulated traders. This will include personal information.

   Clause 14 of the Bill provides for the provision of information to the NMI, after the repeal of the Trade Measurement Acts, about administrative and enforcement matters yet to be finalised at the time of the repeal. Such matters include disciplinary proceedings, infringement notice offences, proceedings for offences against either of the repealed Acts, reviews of decisions made under the Trade Measurement Act 1990*, unpaid trade measurement fees and instruments or other things seized by trade measurement inspectors in the performance of their duties under the* Trade Measurement Act 1990*.*

   Clause 16 of the Bill provides for the transfer of information prior to the repeal of the Trade Measurement Acts, including information from the register containing the particulars of current licences, as well as information obtained by the chief inspector as the administering authority or licensing authority.

   Enabling the supply of information held by Queensland trade measurement authorities, including about licensees and regulated traders, to the Commonwealth may impact on requirements under the Legislative Standards Act 1992 *that legislation shall have sufficient regard to the rights and liberties of individuals, including privacy. However, any potential breach of such a fundamental legislation principle is considered reasonable and necessary. The only information provided will be that information obtained in the lawful administration of the repealed Trade Measurement Acts. As administration of trade measurement will be transferred to the Commonwealth, this information will be necessary to ensure the ongoing efficient administration and enforcement of trade measurement. The provision of the register relating to licences will have beneficial impacts for current Queensland licensees as it will enable the recognition of their licenses by the Commonwealth, without the need for them to apply again under the Commonwealth scheme.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

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

11. Currently, Queensland and other States and Territories have joint responsibility for the administration of trade measurement. In accordance with the Uniform Trade Measurement Legislation and Administration Agreement of 1990, each jurisdiction has in place uniform legislation.

12. The explanatory notes identify the uniform and complementary nature of the bill (at 8):

   [I]n accordance with the Uniform Trade Measurement Legislation and Administration Agreement of 1990, each jurisdiction has implemented substantially uniform trade measurement legislation. Similarly, under the COAG agreement, each State and Territory will be introducing similar transition and repeal bills to transfer State and Territory responsibility for administration and enforcement of trade measurement to a national regime…

13. Under section 51 of the Commonwealth Constitution, the Commonwealth Parliament may make laws with respect to 'weights and measures'. The explanatory notes provide detailed information regarding the proposed national legislation and related administrative arrangements (at 3):

   On 13 April 2007, COAG agreed to establish a national system of trade measurement funded and administered by the Commonwealth, meaning the Commonwealth will assume full responsibility for both administration and enforcement. The agreement provides for Commonwealth enforcement of trade measurement to begin on 1 July 2010.

On 8 December 2008, the Federal Parliament passed the National Measurement Amendment Act 2008*, which amends the* Commonwealth National Measurement Act 1960 *(NMA). This provides the basis for the Commonwealth legislative regime and includes a commencement date of 1 July 2009 and a 'transition day' of 1 July 2010. The transition day will be the time when the Commonwealth begins enforcing the trade measurement law across Australia.*

The National Measurement Institute (NMI), in the Commonwealth Department of Innovation, Industry, Science and Research, will have responsibility for the ongoing operation of the national trade measurement regime.

The national agreement involves the Commonwealth using existing State and Territory staff and infrastructure to continue performing trade measurement duties. State and Territory staff will be employed by the Commonwealth to operate under Commonwealth legislation. The agreement includes maintaining continuity of the level of service and service standards. Commonwealth, State and Territory officials are working together on the transitional arrangements.

The COAG agreement includes a requirement that each State and Territory repeal its trade measurement law to take effect 1 July 2010. The Bill progresses Queensland's commitment to the agreement. It also introduces a small number of savings provisions necessary for the transition to a national regime.

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 15 SEPTEMBER 2009

(Listed in order of sub-leg number)

SL No 2009	SUBORDINATE LEGISLATION	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
185	Proclamation commencing certain provisions	4/09/2009	25/11/2009	15/09/2009	26/11/2009
186	Mines and Energy Legislation Amendment Regulation (No.2) 2009	4/09/2009	25/11/2009	15/09/2009	26/11/2009
187	Education (Accreditation of Non-State Schools) Amendment Regulation 2009	4/09/2009	25/11/2009	15/09/2009	26/11/2009
188	Education and Training Legislation Amendment Regulation (No.1) 2009	4/09/2009	25/11/2009	15/09/2009	26/11/2009
189	Nature Conservation (Protected Areas) Amendment Regulation (No.2) 2009	4/09/2009	25/11/2009	15/09/2009	26/11/2009
190	Workplace Health and Safety (Codes of Practice) Amendment Notice (No.2) 2009	2/09/2009	25/11/2009	15/09/2009	26/11/2009
191	Building Amendment Regulation (No.3) 2009	11/09/2009	25/11/2009	15/09/2009	26/11/2009
192	Plumbing and Drainage Legislation Amendment Regulation (No.2) 2009	11/09/2009	25/11/2009	15/09/2009	26/11/2009
193	State Development and Public Works Organisation Amendment Regulation (No.2) 2009	11/09/2009	25/11/2009	15/09/2009	26/11/2009
194	Transport Operations (Road Use Management - Road Rules) Regulation 2009	11/09/2009	25/11/2009	15/09/2009	26/11/2009
195	Proclamation commencing certain provisions	11/09/2009	25/11/2009	15/09/2009	26/11/2009

SUBORDINATE LEGISLATION UNDER CONSIDERATION

4. JUSTICE LEGISLATION (FEES) AMENDMENT REGULATION (NO.1) 2009 SL181.09

Date tabled: 1 September 2009

Disallowance date: 12 November 2009

Responsible minister: Hon CR Dick MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee seeks information from the minister regarding whether **section 3**, 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 3 of the Justice Legislation (Fees) Amendment Regulation (No. 1) 2009 significantly increased fees imposed under the Births, Deaths and Marriages Registration Regulation 2003, as detailed in the table below.

Section	Section amended	Nature of fee	Previous fee/s	New fee/s
3	20	Application to register a change of name	$99.00	$135.00
3	20	Application for a certificate or information about an event that is, or may be, in a register kept by the registrar	$27.00	$34.00

4. Section 3 of the Justice Legislation (Fees) Amendment Regulation (No. 1) 2009 significantly increased fees imposed under the Legal Profession Regulation 2007, as detailed in the table below.

Section	Section amended	Nature of fee	Previous fee/s	New fee/s
3	7	Application for admission to the legal profession	$428.00	$465.00
3	7	Application for approval of academic qualifications attained in a foreign country	$87.00	$94.00
3	7	Application for approval of legal training requirements completed in another country	$175.00	$190.00
3	7	Notice of traineeship	$43.00	$46.50
3	7	Fee for board examination	$125.00	$135.00

Section	Section amended	Nature of fee	Previous fee/s	New fee/s
3	7	Statement of results obtained in board examinations	$38.00	$41.00
3	7	Application to enter into articles of clerkship	$43.00	$46.50

5. Whilst the above increases are significant, a fee for application for admission to the legal profession has increased from $246.00 in July 2007, a substantial increase across the approximate two-year period.

6. All fee increases identified above 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:[7]

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%

7. 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.

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

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

5. GAMBLING AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 3 September 2009
Responsible minister: Hon P Lawlor MP
Portfolio responsibility: Minister for Fair Trading and Tourism
Committee report on bill: 08/09; at 9 - 14
Date response received: 23/09/09 (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, 20, 62, 92, 96-7 and 112** as they have the potential to affect rights to privacy of personal information;
   - **the large number of clauses** inserting new offence provisions into and amending existing offence provisions in the various Acts to be amended by the bill; and
   - **clause 48** which would allow amendments to the *Gaming Machine Act* to have retrospective operation.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **the large number of clauses** allowing the minister to make 'rules' regarding gaming which would not be subject to the scrutiny of the Legislative Assembly.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trad

Ref: OGR-02194 / MN=106487

SCRUTINY OF
23 SEP 2009
LEGISLATION COMMITTEE
B43.09

21 SEP 2009

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

Dear Mrs ~~Miller~~ Jo Ann

Thank you for your letter of 14 September 2009 concerning the *Gambling and Other Legislation Amendment Bill 2009*.

I refer to your comments in the committee's Legislation Alert number 08 of 2009. The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Bill have sufficient regard to the rights and liberties of individuals and sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor MP
Minister for Tourism and Fair Trading

Level 26
111 George Street Brisbane
GPO Box 1141 Brisbane
Queensland 4001 Australia
Telephone +61 7 3224 2004
Facsimile +61 7 3229 0434
Email tourism@ministerial.qld.gov.au
ABN 65 959 415 158

Response to Scrutiny of Legislation Committee Legislation Alert Number 08 of 2009

Gambling and Other Legislation Amendment Bill 2009.

In response to the matters raised in the Scrutiny of Legislation Committee's *Legislation Alert No. 8 of 2009*, I wish to provide the following information:

Issue: Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals.

1. ***'Clauses 4, 20, 62, 92 and 112 may affect rights and liberties of individuals as they have the potential to affect rights to privacy of personal information.'***

Response:

As stated in the explanatory notes:

'Ensuring probity of licensed persons is a key regulatory strategy in maintaining the integrity of the gaming industry in Queensland. Criminal history checks ensure the suitability of persons in the gaming industry. They are currently conducted on an application for a new licence, or renewal of an existing licence under any of the Gaming Acts.

The chief executive can seek criminal checks on currently licensed persons under the various Gaming Acts. In the past, the chief executive had access to the Queensland Police Service (QPS) database which enabled criminal history checks to be conducted easily. On 1 June 2007, the chief executive's access to the QPS crime reporting database was removed.

It is imperative that the criminal history of relevant persons (i.e. licensed persons, associates, and departmental gaming officers) is monitored to maintain the integrity of the gaming industry. The Gaming Acts provide for action to be taken against licensed persons if they are indicted on particular criminal charges. The Gaming Acts also place an onus on licensees and other persons involved in gaming to advise the department of convictions for indictable offences, however many fail to report adverse changes to their criminal history.

To ensure the chief executive is aware of changes to the criminal history of relevant persons QPS recommended the chief executive amend the Gaming Acts, excluding the Charitable Act, to require the Commissioner of Police to notify the chief executive when the criminal history of a gaming person of interest changes.'

Considerable consultation was undertaken with other Government agencies on the relevant amendments, including the Department of Justice and the Attorney-General (DJAG), Office of the Queensland Parliamentary Counsel (OQPC) and the Queensland Police Service (QPS). As a result of this consultation, a decision was made that the amendments are justifiable on the basis that:

- The provisions do not broaden the powers of the chief executive who already for probity purposes, under the Gaming Acts, may request information on changes to criminal history, including charges, from QPS for gaming persons of interest. The provisions merely allow QPS to enable their systems to proactively alert the chief executive of a change rather than wait for a request to be lodged by the chief executive.

- QPS has previously proactively provided the chief executive with information on changes to criminal history without requests through the Crimtrac database, but as the chief executive no longer has direct access to the Crimtrac database, QPS advised that the chief executive requires statutory authority for them to provide this information without a request.

- QPS also advised that their current systems are set up to notify changes to criminal history when a person is charged as well as when they are convicted. Notification on convictions alone (while excluding charges) would need to be done manually, and resources are not available for this.

- Legalised gaming involves the movement of large amounts of money. It is essential that the highest level of probity is ensured for those involved in the conduct of gambling to preserve the integrity of gaming in Queensland. The chief executive must be rapidly provided with information of changes to relevant persons' criminal history to ensure that they remain appropriate for that role.

- While a charge will create a change in the criminal history and activate a notification, this does not mean the charged person will necessarily be deemed unfit for a role in gaming. The chief executive will monitor the person's record and if they are convicted then their fitness for their role in gaming will be examined and action taken if the nature of the conviction requires it under legislation. Any action taken against a person as a result of information provided by QPS will be sanctioned by existing legislative provisions in the relevant Gaming Acts.

- Any information provided by QPS will remain confidential and will be managed by the chief executive's Compliance Division, which has a wide range of processes and safeguards to ensure that information is not accessed inappropriately by unauthorised persons.

Issue: Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals.

2. ***'Clauses 96-97 may affect rights and liberties of individuals as they have the potential to affect rights to privacy of personal information.'***

Response:

As stated in the Explanatory Notes:

To assist the control bodies to protect the integrity of the Queensland racing industry, it is proposed to give the control bodies the power to obtain information from the holder of a race information authority.

The information may only be used by the control body for the purpose of monitoring wagering activity relevant to the race information authority to detect and investigate possible breaches of the rules of racing and if necessary, prosecute licensees responsible for those breaches.

Currently, the control bodies can only require this information from wagering operators that they license, by imposing a condition on the licence. The Queensland control bodies cannot require interstate and international wagering operators (that are not licensed by the control bodies) to provide this information.

The Daubney-Rafter Report of the Queensland Thoroughbred Racing Inquiry identified the need for access to information about who is placing wagers and the need to analyse wagering markets as a vital tool for racing control bodies. This information is crucial to identifying possible manipulation of race results and putting together a case against those licensees who may be party to corrupting race results or wagering markets.

Amendments are therefore required to be made to the Racing Act to give control bodies the power to obtain information from the holder of a racing information authority and to require the holder of an authority to be subject to a wagering monitoring system.
I note the issue raised by the Committee however, the proposed amendment is required to ensure that any instances of suspicious wagering activity is able to be investigated effectively by racing control bodies.

The proposed amendments will result in the same information access regime that applies to Queensland based wagering operators becoming applicable to interstate wagering operators that elect to conduct wagering on Queensland racing product.

The proposed amendment is required not only for operational investigatory activities but also gives effect to outcomes from the Daubney-Rafter Report which identified the need for access to information about who is placing wagers and the need to analyse wagering markets as a vital integrity related tools.

Issue: Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals.

3. ***'A large number of clauses would insert new offences in the Acts to be amended.' These clauses are 6, 8, 10, 31, 41, 43, 44, 53, 54, 57, 59, 83, 91, 109, 110, 111.***

Response:

Offence provisions across multiple Gaming Acts

The GOLAB proposes to amend ten different Acts. Of the ten Acts proposed to be amended, seven are Gaming Acts (*Casino Control Act 1982, Charitable and Non-Profit Gaming Act 1999, Gaming Machine Act 1991, Interactive Gambling (Player Protection) Act 1998, Keno Act 1996, Lotteries Act 1997* and the *Wagering Act 1998).*

To ensure consistency in the regulation of gambling, a number of amendments which insert new offences are paralleled across multiple Gaming Acts. These offences relate to:

- The failure of a gambling operator to make a copy of gaming rules available to the public.
- Distributing promotional or advertising material about a gambling venue to a person who the licensee knows, or should reasonably know, is excluded from that venue.
- Participation of a minor in gambling activities.

A justification for these amendments is outlined below.

Failure of a gambling operator to make a copy of gaming rules available

New offences for gambling operators who fail to make a copy of gaming rules available to the public is to ensure that there is an appropriate level of transparency for gaming rules. Amendments in the GOLAB propose to remove the gaming rules from subordinate legislation. Gaming rules are primarily developed and initiated by gaming operators as terms and conditions for engaging in conduct of the gaming. It is therefore essential for

persons who wish to engage in gaming to have access to these terms and conditions. To ensure this access, clauses 6, 53, 57, and 109 make it an offence for a gambling operator to fail to make a copy of the rules available.

Distributing promotional or advertising material about a gambling venue to a person who the licensee knows, or should reasonably know, is excluded from that venue

As stated in the explanatory notes:

'To protect vulnerable persons, a new offence is proposed to be created for gambling operators who distribute, or cause a person to distribute, advertising and/or promotional material to a known excluded person. The intention is to ensure that persons excluded either by the venue for problem gambling or who are subject to a self-exclusion will not receive advertising and/or promotional material from the venue.'

The Premier announced on 17 April 2008 that the Government would take a zero tolerance approach to licensees that directed promotional material related to gambling to persons that were known to be excluded from the licensee's venue. Consistent with Government policy, clauses 10, 44, 54, 59, and 110 make it an offence for a gambling operator to distribute advertising or promotional material to a person known to be excluded from that operator's venue.

Participation of a minor in gambling activities

Gambling activities have the potential to cause harm in the community if not appropriately regulated. It is essential to protect the vulnerable, such as minors, from such harm. Providing clear consequences for participation in potentially harmful behaviour is an effective means of minimising the number of persons participating in this behaviour.

Accordingly, the *Gaming Machine Act 1991* (Gaming Machine Act), *Casino Control Act 1982* (Casino Control Act), *Keno Act 1996* (Keno Act) and *Interactive Gambling (Player Protection) Act 1998* (Interactive Act) contain provisions making it an offence for minors to gamble. The onus is placed on the minor not to gamble by penalising a minor who is found to be gambling. However, the maximum penalty for this offence differs across these Acts. In addition, the *Lotteries Act 1997* (Lotteries Act) and *Wagering Act 1998* (Wagering Act) contain no corresponding offence provisions for minors who participate in gambling activities under these Acts.

A consistent approach to the regulation of gambling offences related to minors is desirable to aid the awareness of industry and the community as to what constitutes unacceptable behaviour and the consequences of non-compliance with the offence provisions. To rectify inconsistencies between the Gaming Acts, it is proposed to amend the Lotteries Act and the Wagering Act making it an offence for minors to participate in gambling activities. It is also proposed to amend the Casino Control Act and the Keno Act to align the maximum penalty for a minor who gambles with the penalty for the same offence under the Gaming Machine Act (25 penalty units). Clauses 11, 60, 91 and 111 provide for these amendments.

Offence provisions inserted in the *Liquor Act 1992* (Liquor Act)

An issue is identified with clause 83 of the GOLAB, with a reference made to the insertion of new offence provisions relating to the presence of an approved manager at licensed premises. However, these offences are not created by the GOLAB. They are currently provided for in section 155AD(2) and 155AD(3) of the Liquor Act, with a maximum penalty of 50 penalty units. The amendment provides for approved managers to be not present

during early extended trading hours, and amends the definition of reasonably available. There is no change to the existing offence provisions.

Offence provisions in the Gaming Machine Act related to the club gaming machine cap and reallocation scheme

As stated in the explanatory notes:

'Prior to 16 April 2008, clubs were subject to a cap of 280 gaming machines per site. However there was no State-wide cap on club gaming machine numbers (only hotels were subject to a State-wide cap prescribed in legislation). On 17 April 2008 a moratorium on the release of additional club gaming machines was introduced, to apply from 16 April 2008 until at least 30 April 2010, effectively capping the number of gaming machines in Queensland clubs during this period. On 16 November 2008, the Government announced that the moratorium would be permanent and club gaming machines would be capped at 24,705 across the State.

The cap on club gaming machines allows for tighter regulatory control over the growth and spread of gaming machines in order to minimise their harm on individual gamblers and society in general. It provides for a balanced approach to regulating gaming machines in clubs, by allowing clubs to benefit from the revenue provided by gaming machines, but ensuring that gaming machines numbers to do not exceed a certain level.

To facilitate the implementation of the cap (and an associated reallocation scheme) the concept of entitlements has been created. An entitlement is the right to install or operate a gaming machine in a Queensland club, and the total number of entitlements will equal the cap number. Therefore, in addition to having the initial approval for a gaming machine, the licensee will need to acquire an entitlement in order to install and operate the gaming machine. The initial entitlement allocation will be limited to clubs with current approval to install and operate gaming machines, and clubs that made applications before 16 April 2008, and were subsequently approved. Following the initial allocation, entitlements will only be able to be obtained through a prescribed reallocation scheme or authorised sale.'

To ensure the maintenance of the State-wide cap on club gaming machines and the effective regulation of the reallocation scheme, a number of new offences are proposed to be inserted in the Gaming Machine Act. These penalties are:

- Three new offence provisions inserted through Clause 41, with a maximum penalty of 200 penalty units. These offence provisions ensure the integrity of the State-wide cap by providing significant consequences for persons that operate or attempt to obtain more gaming machines than they have entitlements. The maximum penalty of 200 penalty units aligns with the maximum penalty that currently is provided for in section 80B and 109C, which relate to hotel licensees that operate or attempt to obtain more gaming machines than they have operating authorities (which are the right to install or operate gaming machines in a Queensland hotel).

- A number of offences with lesser penalties relating to the maintenance of the cap and the regulation of the club gaming machine reallocation scheme are also inserted through clause 41 in the Gaming Machine Act. These offence provisions impose obligations on licensees that will enable the chief executive to effectively administer the cap and scheme and ensure compliance from licensees.

Mandatory Responsible Service of Gambling Training

Staff can play an important role in reducing the potential harm of gambling in the community by being able to identify problem gambling, and by understanding its causes and the most effective means of managing it within their work environment. For this reason, the Premier announced on 17 April 2008 that responsible service of gambling training would be made mandatory for persons who carry out employment roles related to the conduct of gambling in hotels and clubs.

Clause 43 gives effect to mandatory responsible service of gambling (RSG) training for hotel and club staff in gambling related employment roles by placing an onus both the licensee and the employee to complete training within three months of commencing the relevant employment role. To enable compliance to be effectively monitored, clause 43 also provides for a licensee to maintain a register on licensed premises which records details of staff RSG training. The GOLAB inserts four new offence provisions, each with a maximum penalty of 40 penalty units, to ensure that there are appropriate consequences for persons that fail to comply with the provisions relevant to RSG training.

Issue: Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals.

4. ***Clause 98 provides for the offence in Section 113 of the Racing Act 2002 to be an indictable offence rather than a summary offence.***

Response:

As stated in the Explanatory Notes:

Section 113C of the Racing Act makes it an offence for a licensed wagering operator to use Queensland race information without a race information authority, with a maximum penalty for a second or subsequent offence of five years imprisonment or 4000 penalty units. An offence under section 113C is currently a summary offence. Pursuant to section 552H of the Criminal Code 1899 (Criminal Code), a person convicted summarily of an indictable offence is only liable to a maximum period of imprisonment of three years. Accordingly, the existing provision does not reflect the requirements of the Criminal Code. Also, prosecutions under section 113C are likely to be complex in nature and may involve licensed wagering operators that are large corporations that may operate outside of Queensland, including outside Australia. An amendment is therefore proposed to be made to the Racing Act to make it an indictable offence for a licensed wagering operator to use Queensland race information without a race information authority.

It is already an offence for a licensed wagering operator to use Queensland race information without a race information authority. The amendments do not change the level of penalties that may be imposed for an offence under the provisions. Rather than being a summary offence it will be an indictable offence, which reflects the requirements of the Criminal Code.

Issue: Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals.

5. ***Clause 48 allows amendments to the Gaming Machine Act to have retrospective operation.***

Response:

As stated in the explanatory notes:

'Amendments to the Gaming Machine Act provide for the allocation of entitlements, which enable the cap to be set in place and allow for the reallocation scheme. Allocation of entitlements will be based on the date of commencement of the moratorium on the release of club gaming machines on 16 April 2008. Consequently, under the new transitional provisions, entitlements will not be allocated for gaming machines that are approved from applications received by the chief executive on or after 16 April 2008. Clubs that have approval for gaming machines from such applications cannot install or operate gaming machines until they obtain entitlements either through the reallocation scheme or an authorised sale, which will not be made available until the commencement of the relevant provisions contained in this Bill.

Therefore, while the provisions that allow for the initial allocation of entitlements do not commence retrospectively, their application has a retrospective effect by preventing clubs from installing or operating gaming machines that they received approval for prior to commencement of provisions providing for the reallocation scheme and authorised sales. This is a potential inconsistency with fundamental legislative principles. Under section 4(3)(g) of the Legislative Standards Act 1992, legislation should not adversely affect rights and liberties or impose obligations retrospectively. However the public announcement on 17 April 2008 to impose the club gaming machine moratorium made clubs aware of this situation. As a result, the impact of the retrospective effect of the amendments has been greatly reduced.

Applications received on or after 16 April 2008 are being processed by the department and decided upon by the Commission. However, a provision (section 456) is included that provides a safeguard that no action may be taken against the State, departmental officer or commissioner as a result of action or non-action regarding an application for a new category 2 licence, additional premises or increase in approved gaming machines for a category 2 premises.'

The retrospective operation of amendments related to the club gaming machine cap is necessary to ensure the effective implementation of announced Government policy. The cap was introduced by the Government in response to community concern regarding the growth of gaming machines in Queensland and evidence that showed a slighter higher rate of gaming machines per capita than other States. If the Government had implemented the moratorium and subsequent cap with advance notice to the club industry, the effectiveness of introducing the cap would be reduced by clubs attempting to make applications before the cap took effect.

Additionally, a gaming machine cap places a value on the ability to operate a gaming machine, and requires the creation of a tradable commodity that can be redistributed within the cap. If the amendments that give effect to the cap do not operate retrospectively, licensees would have an opportunity to lodge speculative applications with a view to profiteering from the future reallocation scheme.

Issue: Sufficient regard to the institution of Parliament

6. ***'A large number of clauses (6, 16, 19, 21, 23, 24(1), 25-39, 41-3, 45-6, 48, 52-3, 56-7, 88-9 and 108- 9) would allow the minister to make rules regarding gaming. Although rules made in exercise of the power must be published in the Gazette, they would not be 'subordinate legislation' and would not be subject to parliamentary scrutiny. Currently, however, the relevant matters are regulated by way of subordinate legislation.'***

Response:

As stated in the explanatory notes:

'The gaming rules, once removed from subordinate legislation, will not be subject to Parliamentary scrutiny. In the past, the Scrutiny of Legislation Committee has commented adversely on provisions allowing matters, which it might reasonably be anticipated would be dealt with by regulation, to not be processed through the tabling and disallowance provisions of the Statutory Instruments Acts 1992.

However, it is considered that the divesting of the rule-making power to the Minister is an appropriate authorisation. The rules which will be removed from subordinate legislation primarily contain matters of a commercial and technical nature that are developed and initiated largely by gaming operators as terms and conditions for engaging in the conduct of gaming. These are not matters that would normally be contained in legislation and are difficult to draft into legislative form. Queensland, the Northern Territory and Western Australia are the only Australian jurisdictions that currently have rules as sub-ordinate legislation.

Reference can therefore be made to section 4(5)(c) of the Legislative Standards Act 1992 which states subordinate legislation should only contain matters 'appropriate to subordinate legislation'. Given that, as outlined above, the contents of the rules which are intended to be removed from subordinate legislation are not appropriate for subordinate legislation, the removal of these matters from subordinate legislation is considered an action consistent with the Legislative Standards Act 1992.

Importantly, it should be noted that rules relating to the objectives of the Gaming Acts, policy objectives of Government, and matters that are of such significance as to be in the public interest will not be included in the new version of the rules (which will not be subordinate legislation) and instead will be incorporated into other instruments of subordinate legislation (regulations). These matters will be identified as part of a review of gaming rules, currently being undertaken. The amendments to remove the rules will commence on proclamation, only after matters deemed to be appropriate to subordinate legislation have been made as a regulation. It is intended that the new version of rules (which will not be subordinate legislation) will only consist of commercial and technical matters regarding the conduct of gaming.'

The Queensland Government has identified a need to continue improving on the delivery of Government services and reduce red tape to address business sector and broader community concerns. This led to the establishment of the former Service Delivery and Performance Commission (SDPC). A key recommendation of the SDPC in its paper entitled 'Review of Legislative/Regulatory Reform Initiatives in the Queensland Governments – Phase 1' suggests each government agency assess the functional arrangements for administering, developing and reviewing legislation within their agency. The former Office of Liquor, Gaming and Racing (now part of the Department of Employment, Economic Development and Innovation) prioritised a review of rules for the

conduct of gaming (rules) in Queensland with a view to removing rules from subordinate legislation as a key strategy to improve service delivery and reduce red tape.

The removal of rules from subordinate legislation will also support the recommendation of the former Department of State Development that all Queensland Government departments consider alternatives to prescriptive regulation in its paper entitled 'Guidelines on Alternatives to Prescriptive Regulation'. It is also consistent with the 10 February 2006 Council of Australian Governments agreement on regulatory reform which included strengthening gate-keeping requirements for new legislation, undertaking annual targeted reviews to reduce the level of existing regulation, and adopting a common framework for benchmarking, measuring and reporting on the regulatory burden across government.

Considerable consultation was undertaken with other Government agencies regarding the removal of rules from subordinate legislation, including the Department of the Premier and Cabinet, the Treasury Department and OQPC. These agencies supported the proposed amendments as consistent with the Queensland Government's commitment to reduce unnecessary regulatory processes.

6. PERSONAL PROPERTY SECURITIES (COMMONWEALTH POWERS) ACT 2009

Date introduced: 1 September 2009
Responsible minister: Hon P Lawlor MP
Portfolio responsibility: Minister for Fair Trading and Tourism
Date passed: 17/09/09
Committee report on bill: 08/09; at 15 - 23
Date response received: 15/09/09 (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 Legislative Assembly to:

   - **clause 6(1)** as it may refer legislative power to enact legislation which –
     - affects rights to privacy of personal information;
     - inappropriately delegates legislative power; and
     - shifts the onus of proof; and
   - **clauses 3 and 6(1)** which may not be drafted in a sufficiently clear and precise way.

2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Legislative Assembly to:

   - **clause 6(2) to (4)** as it may delegate legislative power regarding referral of State legislative power to the Commonwealth Parliament regarding specified matters; and
   - **clauses 2 and 7(1)** which would authorise the amendment of an Act by subordinate legislation; and
   - **clause 6(1)** as it may refer legislative power to enact legislation authorising the amendment of an Act by subordinate legislation.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

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

Hon Peter Lawlor MP
Member for Southport

Ref: MN106443

15 September 09

SCRUTINY OF
15 SEP 2009
LEGISLATION COMMITTEE

B40-09

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

Queensland Government

Minister for Tourism and Fair Trad

Dear Ms Miller

Thank you for your letter of 14 September 2009 concerning the *Personal Property Securities (Commonwealth Powers) Bill 2009* (the Referral Bill).

I refer to your comments in the committee's Legislation Alert number 08 of 2009.

The committee has drawn the Legislative Assembly's attention to concerns about whether aspects of the Referral Bill have sufficient regard to the rights and liberties of individuals.

The committee has also drawn the Legislative Assembly's attention to concerns about whether aspects of the Referral Bill have sufficient regard to the institution of Parliament.

The attached document addresses each of these concerns in turn.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor.

PETER LAWLOR
Minister for Tourism and Fair Trading

Level 26
111 George Street Brisbane
GPO Box 1141 Brisbane
Queensland 4001 Australia
Telephone +61 7 3224 2004
Facsimile +61 7 3229 0434
Email tourism@ministerial.qld.gov.au
ABN 65 959 415 158

Response to Scrutiny of Legislation Committee Legislation Alert Number 08 of 2009

Personal Property Securities (Commonwealth Powers) Bill 2009

The rights and liberties of individuals - privacy

The committee has concerns about clause 6(1) referring legislative power to enact legislation which may affect rights to privacy of personal information. These concerns relate to the personal property securities register (PPS Register) and storage and searching of personal information about grantors contained on the register.

Privacy issues have been carefully considered in the development of the new register. The intention is to develop a system which ensures the minimum amount of personal information is recorded on the register and available to the public when searching the register.

For a consumer grantor—that is, an individual who puts up personal property as security to obtain finance—the only identifiers to be included on the PPS Register will be their name and date of birth.

The Commonwealth Attorney-General's Department has advised that (i) the search functions in the PPS Register will work on an exact match basis and (ii) for individual grantors searchers will be required to input the grantor's name and date of birth. This will ensure that no additional personal information can be obtained from the register than that already known to the searcher.

Where consumer collateral is to be described by serial number, for example in the case of a motor vehicle which is to be described by its vehicle identification number, the grantor's personal details would not be included on the register at all.

Where the grantor is not an individual, the entity will be described using one of the following: their Australian Company Number (ACN); their Australian Registered Body Number (ARBN); or their Australian Registered Scheme Number (ARSN). Other types of trading entities, such as partnerships, may be identified using their Australian Business Number (ABN), or the organisation name as it appears on the organisation's constitution.

Privacy will be further protected by civil penalty provisions in the Commonwealth's *Personal Property Securities Bill 2009* (Cth PPS Bill). Searches will only be permitted for authorised purposes, and any data returned from conducting a search of the register can only be used for the purpose authorised under the Commonwealth Act.

An unauthorised search of the PPS Register or the use of an individual's personal information recorded on the PPS Register would also constitute an act interfering with the privacy of an individual for the purposes of section 13 of the Commonwealth *Privacy Act 1988*. Such a search could also give rise to a claim for damages under the Cth PPS Bill.

The rights and liberties of individuals – delegation of power

As the committee has noted, the Senate Standing Committee for the Scrutiny of Bills (Cth) sought information from the Commonwealth Attorney-General regarding the need and justification for the discretion to be conferred by clauses 147 and 197 of the Cth PPS Bill. The following information is relevant to the committee's consideration of this issue.

Subclause 147(3) of the Cth PPS Bill allows the Registrar to keep the PPS Register in any form he or she considers appropriate. This is based on section 1274(1) of the *Corporations Act 2001*, which allows the Australian Securities and Investments Commission to 'keep such registers as it considers necessary in such form as it thinks fit'. Subclause 147(3) intends to make clear the Cth PPS Bill focuses on the outcomes that the Registrar must deliver, rather than the manner in which the obligations are discharged. The intention is to make the Cth PPS Bill technology neutral, so it will not constrain the Registrar as to the kind of technology he or she may employ to discharge his or her obligations under the Cth PPS Bill. For example, it will allow the Registrar to accept documents in hard copy form, over the internet through a web browser, or over the internet using XML messaging technologies.

Clause 197 allows the Registrar to delegate his or her powers to persons who may, or may not, be engaged under the Commonwealth *Public Service Act 1999*. A delegate may be required to exercise their powers under the direction or supervision of the Registrar, Deputy Registrar or a person engaged under this Act.

The powers conferred on the Registrar under the Bill fall into three broad classes.

First, the powers required to operate the register. It is expected the Registrar will ordinarily exercise these powers through automated systems without delegation to any person. It is nevertheless preferable for the Registrar to have a power of delegation to cover those circumstances requiring manual processes. The volume of transactions processed by the register would make it impractical for the Registrar to exercise all of his or her powers personally.

Secondly, the power to undertake investigations or commence or intervene in legal proceedings. The Commonwealth Attorney-General's Department advises it is expected the Registrar would ordinarily exercise these powers personally. When the powers are delegated, it is expected the delegation would be in relation to a particular matter, and under the supervision of the Registrar. This power of delegation is necessary to provide the Registrar with flexibility in the administration of the register, so that the Registrar will have

the capacity to exercise the power personally in relation to significant matters and to delegate to a more junior officer in relation to less significant matters.

Third, the power to make a range of routine decisions, such as:
- in relation to applications made to the Registrar for a report;
- in relation to the amendment demand process; and
- approve arrangements for the payment of fees.

The Commonwealth Attorney-General's Department advises it is expected that matters within this third class would ordinarily be exercisable by junior officers working at a telephone contact centre, under the direction and supervision of more senior officers. The volume and nature of these matters will make it inappropriate for these discretions to be exercisable by the Registrar.

The rights and liberties of individuals – onus of proof

The committee has noted that the Senate Standing Committee for the Scrutiny of Bills (Cth) has sought information from the Commonwealth Attorney-General regarding the need and justification for clause 299 of the Cth PPS Bill which shifts the onus of proof. The following information is relevant to this issue.

A number of the provisions in the Cth PPS Bill (particularly those in Part 2.5) allow a person to acquire property free of a security interest provided certain conditions are satisfied. The Cth PPS Bill provides the person may not take the property free of the security interest if:
- the purchaser had actual or constructive knowledge that the acquisition constituted a breach of the security agreement that provides for a security interest in the personal property;
- the purchaser had actual or constructive knowledge of a security interest in the personal property; or
- value was not given by the transferee for the interest acquired.

The onus of proving that the security interest is extinguished is on the person claiming that they have taken the property free of the security interest.

Clause 299 of the Cth PPS Bill requires the buyer must prove these matters beyond reasonable doubt when the seller and buyer are members of the same household, associated corporate entities, or a corporation and one of its directors. This standard of proof is used in current State and Territory legislation such as Queensland's *Motor Vehicles and Boats Securities Act 1986* (section 27) dealing with security interests, which the Cth PPS Bill would replace.

A number of referring States requested that the higher standard should be retained so as to continue to offer the same level of protection for finance companies against fraudulent transactions as their current legislative schemes. The higher standard of proof is necessary to maintain the reputation and integrity of the loan market. The civil standard of proof ('on the

balance of probabilities') would not give lenders sufficient incentive to finance ordinary consumers without additional checks. This is because use of the civil standard would make it harder to set aside fraudulent transactions.

The rights and liberties of individuals – clear meaning

The committee has noted that, due to the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs, a consequential amendments bill may be debated cognately with the Cth PPS Bill to take effect immediately after the commencement of the Cth PPS Bill.

The Commonwealth PPS Bill will be enacted in the same form as tabled in the New South Wales Legislative Assembly. The Commonwealth Attorney-General's Department has advised that amendments will subsequently be made in a cognate "consequentials" Bill currently being drafted. The "consequentials" Bill is expected to be introduced into the Commonwealth Parliament later this year. This Bill will be debated in the Senate cognately with the PPS Bill. The amendments will only take effect after the PPS Bill is enacted.

The Queensland Referral Bill contains an amendment reference, to be commenced upon proclamation. As the first state to pass its referral legislation, New South Wales has agreed to proclaim its amendment reference so that one state has referred amendment powers to the Commonwealth.

As all state referral legislation is based on a model referral bill, Queensland will also have to proclaim its amendment reference for the Commonwealth's amendments to take effect in Queensland. The Commonwealth Attorney-General's Department has advised that the amendments to the PPS Bill will be drafted to commence at a time after referring states have commenced their amendment references, thereby avoiding the need for states to revisit their referral legislation.

The use of the amendment reference contained in the Referral Bill to implement the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs will help ensure both that the Commonwealth's personal property securities legislation is the best that can be devised but also that the industry and the community is provided with as much time as is reasonably possible to prepare for the changes.

As indicated in the explanatory notes, the reforms will require substantial changes to industry IT systems and finance and security documentation, require new manuals and new procedures, and extensive staff training. Banks, financiers and other affected businesses will also benefit from a substantial lead time to implement the operational and procedural functions and training required to be ready for commencement of the new scheme and to spread the implementation costs over a longer period. The benefits include greater certainty, greater opportunities for business to obtain finance and lower costs for financing.

The institution of Parliament – delegation of legislative power

The committee has noted that the amendment reference in the Referral Bill can be utilised without returning to Parliament. The scope of these references is limited given that they are exceptions to the broader referral of power.

The benefits to the community of a national personal property security scheme, as noted above, are substantial. The explanatory notes describe the alternative ways in which this policy objective could be achieved. It is suggested that referral by way of a text reference provides greater certainty to State Parliaments over the coverage of the proposed national scheme. The alternative ways of achieving this objective also raise this concern. For example, nationally agreed 'template' laws (such as the uniform *Consumer Credit Code*) also involve, by their nature, a high level of cooperation and coordination between jurisdictions.

Another way of achieving the objective would be the use of a 'subject' reference. The Referral Bill provides some control over future amendments to the national law by reference to defined subject matter. Additionally, the Inter-Governmental Agreement underpinning the scheme requires the agreement of at least three jurisdictions before the Commonwealth Government progresses amendments to the Commonwealth Act. The explanatory notes address this issue in some detail and as noted above, the great benefits of the scheme to the community must also be carefully considered.

The institution of Parliament – amendment of the Act other than by another Act

The explanatory notes to the Referral Bill which are reprinted in the committee's Legislation Alert address in some detail the issue of concern. The Legislation Alert also notes that the Senate Standing Committee for the Scrutiny of Bills (Cth) raised concerns about 'Henry VIII' clauses on the Cth PPS Bill. The following information is relevant to the concerns identified by the Senate Standing Committee and the Queensland committee.

These clauses are required to ensure the Commonwealth personal property security scheme will work efficiently and effectively. These clauses will enable the Cth personal property security law to bring into and out of the Act complex financial market transactions created over time, and whose nature changes over time that would be otherwise excluded.

The Commonwealth law will allow regulations to be made modifying how the State or Territory land law applies to the enforcement of security interests in personal property to use land laws to enforce a security interest in personal property where the security interest also covers land.

These clauses will also help provide certainty about the concurrent operation of the Commonwealth personal property security laws with other Commonwealth, State and Territory laws as noted in pages 5 and 6 of the

explanatory notes to the Referral Bill. For example, the Cth PPS Bill will allow inconsistencies between it and other Commonwealth, State or Territory legislation to be resolved by the making of a regulation which will displace a provision of the Cth PPS Bill or modify its operation so that no inconsistency arises. It provides a mechanism to resolve inconsistencies that would otherwise affect the regulatory responsibilities of participants in the national personal property security scheme. A similar mechanism is included in the *Corporations Act 2001* and Corporations Agreement 2002.

7. 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
Committee report on bill: 07/09; at 5 - 10
Date response received: 21/09/09 (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 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.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

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

Honourable Neil Roberts MP
Member for Nudgee

Queensland Government

Minister for Police, Corrective Servic
and Emergency Services

QPS Ref: 804 F20 LT

SCRUTINY OF
21 SEP 2009
LEGISLATION COMMITTEE

16 SEP 2009

B37.09

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

Dear Ms Miller

Thank you for the comments provided by the Scrutiny of Legislation Committee relevant to the *Prostitution and Other Acts Amendment Bill 2009* (the Bill). In the report, the Committee raised a number of questions with respect to the Bill having sufficient regard to the rights and liberties of individuals. I have considered the comments of the Committee.

Clauses 7 and 8 extend existing legislative restriction on advertising of prostitution and social escort services. The additional restrictions on advertising are necessary given the proliferation of advertising prostitution via the internet. This is coupled with the requirement that advertisements by social escort services must clearly state they do not provide sexual services and be consistent with the size currently prescribed for licensed brothels. These clauses are considered to have sufficient regard to the rights and liberties of individuals.

Clauses 7, 8, 16, 17 and 21 create new offences or amend existing offences. Where the actions of social escort services reflect the truth of the advertising, then they will not commit an offence and incur any penalty under the new provisions. The restrictions on social escort advertising are to be sufficiently high in order to deter illegal prostitution providers masquerading as social escort services.

Clause 16 also confers protection from prosecution on the holder of a current crowd controller licence, issued under the *Security Providers Act 1993,* to act as a driver for a sole operator sex worker. The clause also provides that a person who assists a sole operator as a bodyguard or a driver, as allowed under the provisions, may not work for or assist another person who is engaged in prostitution. The clause provides for an improved safe working environment for sole operator sex workers. This clause is considered to be justified.

Level 24 State Law Building
50 Ann Street Brisbane 4000
PO Box 15195 City East
Queensland 4002 Australia
Telephone +61 7 3239 0199
Facsimile +61 7 3221 9985
Email police@ministerial.qld.gov.au
ABN 65 959 415 158

Clause 17 creates an offence where a person engages in prostitution through a business, suspected of providing unlawful prostitution. Furthermore, the section creates an offence where a person obtains prostitution through a business suspected of providing unlawful prostitution. The penalties for this provision have been tiered with a maximum penalty of three years imprisonment for a first offence, five years imprisonment for a second offence and seven years imprisonment for a third and subsequent offence. The creation of the offence and the tiered penalty approach acts as a disincentive for those who engage in unlawful prostitution and those who partake of it. This clause is considered to be justified.

Clause 21 provides for the offence of an employer requiring or permitting a child less than 18 years of age to work as a social escort. A penalty of 100 penalty units applies. The clause is supported by section 9 (Other restrictions on work performed by children) of the *Child Employment Act 2006*, which came into operation on 1 July 2006 and prohibits an employer from requiring a child to perform work prescribed under the *Child Employment Regulation 2006*. This clause is considered to be justified.

Clause 8 and 19 may impose an evidential burden on a person wishing to raise a defence to liability of an offence. In practice, under clause 8, the evidential burden remains with the prosecution. It is the covert operatives who will record the omission by the employer or employees and that recording will be available in court should charges be laid.

Nonetheless, a safe guard is found in subsection (4) for a defence for a social escort provider where an offence has been committed under subsection 3, where the social escort provider can prove appropriate instructions were given to employees and social escorts regarding their obligation to inform; all reasonable precautions were taken to ensure employees and social escort complied with their obligation to inform; the offence was committed without the provider's knowledge; and that despite reasonable due diligence, the provider could not have prevented the commission of the offence. This clause is considered to be justified.

Clause 19 creates the evidentiary provision of carrying on a business. The outcall prostitution report argued that existing provisions in the *Criminal Code* Chapter 22A (Prostitution) target illegal brothels, that is, activity occurring at identifiable places or premises. It is argued that these offences do not sufficiently cover illegal prostitution providers, masquerading as escort agencies that provide outcall prostitution services, because there may not be an identifiable place or premises being used for prostitution by two or more prostitutes.

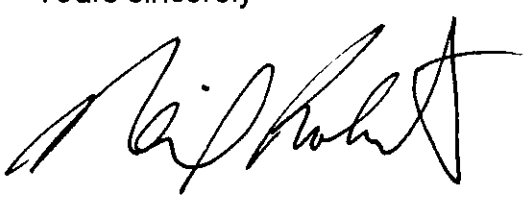
It is understood illegal outcall service providers often rent premises that are used as both an office and a call centre. However, these premises are not used by workers to engage in the provision of prostitution. Consequently, it is almost impossible to prosecute these illegal providers. Therefore, Clause 19(1) provides that carrying on a business may be inferred from records of employment, business records, telephone records, advertisement and any other factors or circumstances that are relevant.

Safeguards are found in Clause 19(2) which clarifies that condoms and other safe sex materials are not admissible as evidence for an offence of carrying on a business of providing unlawful prostitution. This clause is considered to be justified.

Throughout this legislation, the rights of the individual have been balanced against the protection of licensed brothels from damage to the legal prostitution industry caused by illegal prostitution services masquerading as escort agencies.

I appreciate the opportunity to comment on the Committee's report and trust my comments have been of assistance.

Yours sincerely



Neil Roberts MP
Minister for Police, Corrective Services and Emergency Services

PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

8. CASINO CONTROL AMENDMENT REGULATION (NO.1) 2009 SL121.09

Date tabled: 4 August 2009
Disallowance date: 8 October 2009
Responsible minister: Hon PJ Lawlor MP
Committee report on bill: 06/09; at 15
Date response received: 17/09/09 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the legislation has sufficient regard to the institution of Parliament, the committee draws the attention of the Legislative Assembly to **section 6** which may contain matter inappropriate to subordinate legislation.

CORRESPONDENCE RECEIVED FROM MINISTER

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

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

Hon Peter Lawlor MP
Member for Southport

Our Ref: OGR-02110
MN=105551

SCRUTINY OF
17 SEP 2009
LEGISLATION COMMITTEE
SL121.09

Queensland Government

Minister for Tourism and Fair Trading

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

Dear Mrs Miller Joann

Thank you for your letter of 18 August 2009 regarding the Scrutiny of Legislation Committee's Report on the *Casino Control Amendment Regulation (No.1) 2009.* Can I begin by apologising for the delay in responding to this matter.

In response to the matter raised in the relevant pages of the Scrutiny of Legislation Committee's *Legislation Alert No. 06 of 2009*, I wish to provide the following information:

Issue

Section 6 Replacement of part 4 (Fees, taxes and levies)

In relation to whether the legislation has sufficient regard to the institution of Parliament, the committee draws the attention of the Legislative Assembly to section 6 which may contain matter inappropriate to subordinate legislation. (Paragraph 1)

... the committee notes that the prescribed rates significantly increase rates previously paid under Casino Agreements and may be matter inappropriate to subordinate legislation. (Paragraph 6)

Response

Tax increase
The amendments proposed under section 6 will:

- increase casino tax rates applicable to casino gross revenue for electronic gaming machines (EGMs) from 10 per cent to 20 per cent at the Breakwater Island Casino and the Reef Hotel and Casino, and from 20 per cent to 30 per cent at the Conrad Jupiters Casino and Conrad Treasury Casino from 1 July 2009; and

Level 26
111 George Street Brisbane
GPO Box 1141 Brisbane
Queensland 4001 Australia
Telephone +61 7 3224 2004
Facsimile +61 7 3229 0434
Email tourism@ministerial.qld.gov.au
ABN 65 959 415 158

- abolish the 2 per cent concessional tax rate for premium junket revenue play (currently table play) at the Breakwater Island Casino and the Reef Hotel and Casino from 1 July 2009.

The 10 per cent increase in gross casino tax rates for EGMs, and the removal of the concessional tax rate for premium junket revenue, formed part of the Queensland Government's Budget initiatives announced on 9 December 2008 in the *Major Economic Statement 2008-09*.

As stated on page 21 of the *Major Economic Statement 2008-09*, casino tax rates for EGMs were increased due to the tighter fiscal conditions resulting from the global economic downturn. The increase in gross casino tax rates for EGMs and the removal of the 2 per cent concession for premium junket play will provide an additional $36 million in revenue for the 2009-10 financial year. As stated in *the Budget Measures 2009-10*, this additional revenue will increase to $38 million in 2010-11, to $40 million in 2011-12, and to $42 million in 2012-13.

Furthermore, the 10 per cent increase in gross casino tax rates for EGMs is not considered to be a significant increase when compared with tax rates applicable to EGMs in large clubs and hotels. The casino tax increase will serve to reduce the disparity between the tax rates applicable to EGMs in casinos compared to those in large clubs and hotels.

I note the *Fuel Subsidy Repeal and Revenue and Other Legislation Amendment Act 2009* abolished the 1 per cent Community Benefit Levy previously payable by Queensland casinos to the chief executive, as a measure to mitigate some of the impact of the tax increases.

Consultation was also undertaken by the Treasurer with each of the casino representatives regarding the impact of tax rate increases on the casino industry.

Inclusion of casino tax increase in subordinate legislation

The increase to gross casino tax for EGMs and the removal of the 2 per cent concession for premium junket revenue was originally intended to be achieved by including amendments of the respective Casino Agreement Acts in the *Fuel Subsidy Repeal and Revenue and Other Legislation Amendment Act 2009*.

The Office of the Queensland Parliamentary Counsel (OQPC) advised that, rather than amending each of the Casino Agreement Acts, it would be preferable to prescribe the new casino tax rates in a regulation by relying on the existing regulation-making power contained in section 51(4) of the *Casino Control Act 1982* (Casino Control Act). Section 51 could then be amended, as necessary, to protect the State from any potential compensation claims or challenges to the tax rates.

Accordingly, section 51 of the Casino Control Act was amended under the *Fuel Subsidy Repeal and Revenue and Other Legislation Amendment Act 2009* to provide that no compensation is payable by the State because of a regulation made under this section. To prevent the Casino Agreements overriding the regulation amendment, section 51 was also amended to provide that the regulation applies despite the Casino Agreement Acts and the Casino Agreements.

OQPC advised that section 51 was the relevant provision to amend given that it:

- states the obligations for a casino tax to be paid, in relation to a casino licence;
- states to whom the tax is to be paid;
- allows for a GST deduction; and
- caters for negative casino gross revenue and negative premium junket revenue.

It was also noted that the Casino Agreements were subject to the provisions in the Casino Control Act, in particular section 51. This was confirmed by the fact that the provisions in the Casino Agreements dealing with casino tax are stated to be subject to the provisions of the Casino Control Act, and that the terms used in the clauses in the Casino Agreements are defined by reference to definitions of the terms in the Casino Control Act.

I appreciate the opportunity to comment on the committee's report and trust that my comments have been of assistance.

Yours sincerely

Peter Lawlor.

Peter Lawlor MP
Minister for Tourism and Fair Trading

17 SEPTEMBER 2009

9. PLUMBING AND DRAINAGE LEGISLATION AMENDMENT REGULATION (NO.1) 2009 SL153.09

Date tabled: 4 August 2009

Disallowance date: 8 October 2009

Responsible minister: Hon S J Hinchliffe MP

Committee report on bill: 07/09; at 21

Date response received: 10/09/09 (copy commences following page)

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.

CORRESPONDENCE RECEIVED FROM MINISTER

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

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

Hon Stirling Hinchliffe MP
Member for Stafford

Queensland Government

Minister for Infrastructure and Planning

Your ref: SL153.09

- 9 SEP 2009

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

Dear Jo-Ann

Thank you for your letter of 31 August 2009 in relation to the *Plumbing and Drainage Legislation Amendment Regulation (No.1) 2009* (the Regulation).

The Scrutiny of Legislation Committee has requested information regarding whether section 4 of the Regulation which has introduced increases in fees has sufficient regard to rights and liberties of individuals. Thank you for your comments in relation to the Regulation and I take the opportunity to respond to the matters you have raised.

Significant consultation occurred with the Queensland Office for Regulatory Efficiency (QORE) before the Regulation was finalised and considered by Governor in Council. QORE advised on 24 June 2009 that a Regulatory Impact Statement (RIS) was not required as the amendments would not impose appreciable costs on the community, or part of the community. I have attached the advice from QORE confirming that no RIS was required (Attachment 1). Explanatory notes were not prepared as the amendments were not complex from an implementation perspective and the fee increases had been announced in the State Budget papers.

The Department of Infrastructure and Planning has administrative responsibility for the *Plumbing and Drainage Act 2002* (PDA) and regulations. The PDA covers plumbing policy matters, such as standards for plumbing work, standards for plumbing and drainage systems, greywater reuse, on-site sewerage, blackwater treatment trials, model approvals and plumbing approval systems. The PDA also covers more operational matters, such as regulating licensing and the behaviour of licensees. In recent years a range of contemporary plumbing policy matters have expanded significant areas of work for plumbers in water efficiency and savings, greywater re-use, sub-metering, energy efficiency and fire safety systems. This has led to increased areas of responsibility for the Department of Infrastructure and Planning and extra compliance activities for the Plumbers and Drainers Board (the Board).

Level 12 Executive Building
100 George Street Brisbane
PO Box 15009 City East
Queensland 4002 Australia
Telephone +61 7 3224 4600
Facsimile +61 7 3224 4781
Email infrastructure.planning@ministerial.qld.gov.au
ABN 65 959 415 158

Further, the introduction of an administrative processing fee was intended to align Queensland's current fee structure more closely to those in other comparable jurisdictions. Despite the increases, Queensland's license fees remain lower than other comparable jurisdictions, namely Victoria and New South Wales. Aligning the fees more closely with these jurisdictions will allow for:

- increase recovery of costs of administering the licensing regime;
- enhance training, monitoring and enforcement capacity for officers of the Department of Infrastructure and Planning to respond to increasing requests for training, advice and compliance work, along with extra capacity to effectively deal with complaints from industry and the general public regarding non-compliance; and
- provide closer alignment with other Departments, State and Territories occupational licensing fees.

To undertake plumbing or drainage work in Queensland, a plumber must hold a licence. A typical Queensland plumbing business is a small business with possibly one apprentice. The impact of a $50 administrative processing fee and the renewal fee increase to $55 per annum on a plumbing business with annual earnings of $100,000 would be less than 0.00075%, even where the administrative fee is not proportioned over a 5 year period. These licence fees are also tax deductible, further minimising the impact on the business and community.

Actions that the current revenue supports includes granting plumbing and drainage licenses, hearing complaints, investigating alleged breaches by plumbers, and disciplining licensees. An Intergovernmental Agreement on the National Licensing System has been developed and was signed by the Council of Australian Governments on Wednesday, 30 April 2009. In addition, the number of skilled migrants in this important area is increasing and the considerable costs associated with assessment and investigation of overseas documentation are not recovered.

Work in this area is expected to expand rapidly over the coming months with new initiatives such as the phase out of electric hot water heaters, the installation of 200 000 solar and heat pump hot water heaters, and the development of a national licensing system for the plumbing trade.

The Government is also implementing a number of sustainable housing policy issues which is impacting on the plumbing industry. Issues such as climate change and implementing key policy initiatives will require a greater interaction with industry to ensure a smooth transition. Increased revenue from licence fees will assist with implementation of these important policy initiatives.

Further, the Board has considered the fee increases and key industry Board members the Master Plumbers Association of Queensland and the Communications, Electrical and Plumbing Union indicated strong support for the fee increases. They supported the increase on the basis that it is important for the plumbing trade sector to maintain a strong industry specific body and making Queensland's licensing fees more consistent with other jurisdictions would provide essential revenue to enhance the Board's service delivery.

In summary, the revenue generated from the proposed increase in licensing fees will allow for cost recovery in the processing of licences and facilitate enhancements for service delivery to industry and the general public. Enhanced service delivery to licence holders will include an increased regional and rural presence through the delivery of training programs to ensure new technology and policy addressing the affects of climate change is understood. It will also facilitate the delivery of support materials such as handbooks, guidelines, and training materials.

It should be noted that industry and the general public have become significantly more proactive in reporting plumbing non-compliance issues in recent years. With the expanding use of recycled water it is imperative that industry and community maintain confidence that non-compliance will be investigated and resolved.

I trust this information is of assistance.

Yours sincerely

Stirling Hinchliffe MP
Minister for Infrastructure and Planning

Daniel Oliver

From: amanda.yee@treasury.qld.gov.au
Sent: Wednesday, 24 June 2009 3:19 PM
To: Sharon Gillard
Cc: Daniel Oliver; Megan Woods; Michael McGuinness
Subject: RE: Plumber and Drainers Board Licensing Fee

Hi Sharon,

Thank you for this additional information.

I note that QORE provided advice that no RIS was required to your original RIS enquiry RE111/0609 on 17 June 2009. Following this, you advised that additonal amendments to the Standard Plumbing and Drainage Amendment Regulation were being proposed including administrative amendments and amendments to several licensing fees.

Based on the information provided, it would appear that the additional amendments will not impose appreciable costs on the community, or part of the community. As such, a RIS will not be required for the proposed amendments to the above regulation, including those to increase the licensing fees.

Regards
Amanda

Amanda Yee
Principal Policy Officer
Qld Office for Regulatory Efficiency/Queensland Treasury Executive Building, 100 George Street, Qld 4001
Phone: 07 3224 2927 Fax: 07 3033 0099

"Sharon Gillard" <Sharon.Gillard@dip.qld.gov.au>

24/06/2009 01:59 PM

To <amanda.yee@treasury.qld.gov.au>

cc "Michael McGuinness" <Michael.McGuinness@dip.qld.gov.au>, "Daniel Oliver" <Daniel.Oliver@dip.qld.gov.au>, "Megan Woods" <Megan.Woods@dip.qld.gov.au>

Subject RE: Plumber and Drainers Board Licensing Fee

Hi Amanda,
Thanks for the discussion earlier today. Michael McGuiness (Manager Plumbing Legislation and Standards Branch at BCQ) has sourced some earlier policy reasons and data for us.

The reasons for the fee increases are mainly to introduce an administrative processing

fee and to be closer to the fee structures in other States for existing fees.

Currently, the administrative costs of processing licences are not offset by the actual licensing fees. Queensland does not currently charge an application fee and, where licences are refused, refunds application fees after significant processing time.

It was proposed to introduce an administrative processing fee of $50 for each licence application to:

* increase recovery of costs of administering the licensing regime;
* provide closer alignment with other Departments, States and Territories occupational licence fees;and
* enhance training and enforcement capacity of the Branch to respond to increasing complaints from industry and the general public regarding non-compliance on behalf of the Board.

Queensland's licensee fees are among the lowest nationally. With the proposed increase in fees announced in the Budget Papers, Queensland's fees will still be below other comparable jurisdictions of Victoria and New South Wales. It is a priority to implement a fee structure which:

a) recovers actual costs to Government of running the licensing system; and
b) is closer aligned with other States and Territories occupational licence fees

before the proposed COAG national licence model is finalised as part of the national trade licence reforms.

Other than the $50 administration processing fee which may only be payable every 5 years if a licence is registered for up to 5 years, the largest fee increase is an additional $25 to restore a licence if the licence has not been renewed in time.

For the current financial year to date, there were 3,124 applications to restore a licence. This is expected to decrease in future following recent increased compliance checks of the holding of appropriate licences by practitioners in the field and due to the ongoing impact of the global financial crisis making individuals more savings conscious.

A typical Queensland plumbing business is a very small business with possibly one apprentice. The impact of a $50 administration processing fee and the renew a licence fee increase of $15 per annum on a plumbing business with an annual turnover of $100,000 would be less than 0.0007% even when the administration processing fee is not apportioned over the possible 5 year period. In relation to the fee increase for a restricted licence this may be apportioned over 5 years. The additional $17 will only be payable by currently 906 registrants in total.

Most of the fees should also be tax deductible further minimising the impact on the business.

It is also extremely difficult to determine the appreciable costs of the fee increases (largest increase being in most cases $65 per practitioner per annum) across approximately 1.6 million Queensland households. There are 14,923 registrants with licenses. The average cost per Queensland household is far less than $1 per annum.

The employer and employee representative associations (Master Plumbers' & Mechanical Services Association of Australia and Communications, Electrical and Plumbing Union) have indicted support for the fee increases. Both organisations have indicated support for increases that make Queensland's licensing fees more consistent with other jurisdictions. Also they support revenue generation to enhance service delivery by the Plumbers' and Drainers' Board.

Please let me know if you have any further queries if possible before COB today.

Kind regards Sharon
Sharon Gillard
Manager Legislative Services
Building Codes Queensland
Department of Infrastructure and Planning
Queensland Government

tel +61 7 3405 6165
post PO Box 15009 City East Qld 4002
visit Level 3 63 George Street Brisbane

sharon.gillard@dip.qld.gov.au
www.dip.qld.gov.au

-----Original Message-----
From: amanda.yee@treasury.qld.gov.au [mailto:amanda.yee@treasury.qld.gov.au]
Sent: Tuesday, 23 June 2009 3:15 PM
To: Sharon Gillard
Subject: Fw: Plumber and Drainers Board Licensing Fee

Sharon,

Please find attached the mention of the fee increase in the budget papers.

As discussed, can you please provide me an email detailing the reasons for the fee increase, the expected impact (ie. number of plumbers not affected, etc) and any consultation undertaken. I will ensure the revised RIS enquiry is assessed and provide our advice as soon as possible.

Cheers
Amanda

----- Forwarded by Amanda Yee/TO/QTreasury on 23/06/2009 03:12 PM -----

Vincent Hickey/TO/QTreasury	
To	Amanda Yee/TO/QTreasury@QTreasury
23/06/2009 02:23 PM	
cc	Catherine Baldwin/TO/QTreasury@QTreasury, Madeline Veenstra/TO/QTreasury@QTreasury, Bernice Manickam/TO/QTreasury@QTreasury
Subject	Plumber and Drainers Board Licensing Fee

Hi Amanda,

Please find attached a copy of the 2009-10 Budget Outcome pertaining to the Plumber and Drainers Board licensing fee, for your records.

Regards,
Vincent Hickey
Treasury Analyst
Transport, Infrastructure & Government Services Queensland Treasury
Phone: 07 3225 1408

(See attached file: img175.jpg)

10. TOW TRUCK REGULATION 2009 SL168.09

Date tabled: 18 August 2009
Disallowance date: 29 October 2009
Responsible minister: Hon R G Nolan MP
Committee report on bill: 07/09; at 23
Date response received: 16/09/09 (copy commences following page)

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.

CORRESPONDENCE RECEIVED FROM MINISTER

2. The committee thanks the minister for the information provided in her letter.

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

Hon Rachel Nolan MP
Member for Ipswich

Queensland Government

Minister for Transport

Our ref: MC44075

14 SEP 2009

SCRUTINY OF
16 SEP 2009
LEGISLATION COMMITTEE
SL168.09

Mrs Jo-Ann Miller MP
Chair
Scrutiny of Legislation Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Mrs Miller Jo-Ann

Thank you for your letter of 31 August 2009 to the Honourable Craig Wallace MP, Minister for Main Roads, about the *Tow Truck Regulation 2009* (the Regulation) which is the subject of the committee's Legislation Alert No. 07 of 2009. As the Regulation falls under my portfolio responsibilities, I shall provide the committee with the requested information.

The *Tow Truck Act 1973* and the supporting Regulation together set up a scheme for licensing the tow truck industry. The legislation, among other things, deals with the issue of tow truck licences and certificates to persons involved in the industry, prescribes conditions and minimum standards of conduct for industry participants, sets minimum specifications for vehicles operating as tow trucks and prescribes maximum tow truck charges.

It should be noted that potential breaches of the legislation can have serious implications in terms of public safety and consumer protection, at times when members of the public at the scene of a motor vehicle incident may be most vulnerable.

Part 2, Division 2, of the Regulation outlines the procedural requirements for a person wishing to apply for either a Tow Truck Operator's Licence, Tow Truck Driver's Certificate or Tow Truck Assistant's Certificate.

Section 9(1) and (4) of the Regulation provides that before approving an application, the chief executive may, by written notice, require the applicant to either a) undertake a written or oral test or a driving test or b) be medically examined by a doctor.

As the committee correctly notes section 9(2) then requires that an applicant, who is given notice under section 9(1)(b), give the chief executive a medical certificate signed by a doctor and stating minimum particulars. Finally, section 9(3) permits the chief executive to require the applicant to obtain the medical certificate, or further medical certificate from a doctor.

The ability of the chief executive to be able to require, where the need arises, an applicant to undertake a test or be medically examined is considered necessary to properly assess suitability of a person to perform a role in the tow truck industry.

Capital Hill Building
85 George Street Brisbane 4000
PO Box 2644 Brisbane
Queensland 4001 Australia
Telephone +61 7 3237 1111
Facsimile +61 7 3224 4242
Email transport@ministerial.qld.gov.au
ABN 65 959 415 158

I am advised that the chief executive does not routinely make a section 9 request, rather, such a request is only made where an applicant may have declared in their application that they are suffering from a medical condition that may adversely impact on their ability to perform the role. Further, the chief executive may require an applicant to undertake a test where the applicant admits to or shows a significant lack of appreciation for the roads rules.

In addition, the chief executive may by written notice request for a further medical certificate, if it is found that insufficient or contradictory information about an applicant's medical condition has been provided, or where that information does not correlate with departmental records.

The ability of the chief executive to require the applicant to be medically examined is also important to ensure the person is physically capable of performing their duties (for example loading and unloading damaged vehicles on to/from a tow truck). It must also be remembered that a tow truck driver or assistant may be the first, or early responder, at a motor vehicle incident where there is a need to provide immediate assistance to persons or property. Accordingly the community must be able to maintain trust and confidence in the persons that occupy these positions.

I trust this information is of assistance to the committee in examination of the Regulation.

Yours sincerely

RACHEL NOLAN MP
Minister for Transport