Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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Index of bills examined:	Use above web link and click on the ‘Index of bills examined’ link in the menu bar

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COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

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

Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly* instructs the committee that it is to include in the *Legislation Alert* compliance with requirements in part 4 of the *Legislative Standards Act* regarding explanatory notes.

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. BUILDING AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 29 October 2009

Responsible minister: Hon SJ Hinchliffe MP

Portfolio responsibility: Minister for Infrastructure and Planning

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals:
   - the committee draws the attention of the Parliament to **clauses 11, 20, 29 and 73** which would insert new offences in a number of Acts and **clauses 40, 43 and 44** which would amend existing offence provisions in the *Animal Management (Cats and Dogs) Act*; and
   - the committee invites the minister to provide information regarding whether **clause 29** and **part 8** have sufficient regard to rights and liberties of individuals.
2. The committee reports that part 4 of the *Legislative Standards Act* has not been complied with as the explanatory notes do not address consistency of the bill with fundamental legislative principles.

BACKGROUND

3. The bill would amend existing legislation to provide for more sustainable building practices and would amend other legislation within the infrastructure and planning portfolio.

LEGISLATIVE PURPOSE

4. The bill is intended to 'make amendments to a number of Acts relevant to sustainable building practices and other building and plumbing matters' (explanatory notes, 1).

5. Therefore, the bill would amend the:
   - *Building Act 1975*;
   - *Animal Management (Cats and Dogs) Act 2008*;
   - *Body Corporate and Community Management Act 1997*;
   - *Fire and Rescue Service Act 1990*;
   - *Land Title Act 1994*;
   - *Mixed Use Development Act 1993*;
   - *Plumbing and Drainage Act 2002*;
   - *Property Agents and Motor Dealers Act 2000*;
   - *Sustainable Planning Act 2009*;
   - *Transport Infrastructure Act 1994*; and
   - *Acquisition of Land Act 1967*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

7. **Clause 29** would insert new chapters 8A and 8B into the *Building Act* and may affect rights and liberties of individuals.

8. New section 246L sets out the purpose of part 2 of the new chapter 8A; namely, to regulate the effect of particular instruments on stated activities or measures likely to support the sustainability of houses, units and attached enclosed garages associated with certain houses. New section 246N(1) and (2) would then state:

   (1) This part applies to a relevant instrument—

   (a) even if it were made or entered into before 1 January 2010; and

   (b) despite any provision of an Act mentioned in section 246M, definition relevant instrument.

   (2) To remove any doubt, it is declared that this part applies to a relevant instrument even if it is registered or recorded under the *Land Act 1994* or *Land Title Act 1994*.

9. As new part 2 would apply to some provisions of certain existing 'relevant instruments' (defined in new section 246M), it may affect rights and liberties of some owners of houses and units, as indicated (at 24) in the information in the explanatory notes about new section 246L:

   Section 246N sets out the intended application of part 2. Part 2 does not apply for sustainable aspects of buildings specified as a prescribed matter for the part where a relevant instrument affecting a residential lot, including body corporate by-laws or a contract or agreement, had been entered into prior to commencement. For example, this section ensures the part's provisions apply regardless of the by-laws made by the body corporate for the Sanctuary Cove Resort that may restrict or prohibit the installation of solar hot water systems and photovoltaic cells. However, for other sustainable features covered, the part would not override any Sanctuary Cove Resort by-laws that were in force and binding for a lot and affected the use of these features prior to commencement.

   The section states that the part applies despite the instrument being registered on the certificate of title or recorded pursuant to the Land Act 1994*.*

10. However, the explanatory notes do not identify a possible inconsistency with section 4(2) of the *Legislative Standards Act*, nor do they provide reasons for the inconsistency. The committee invites the minister to provide information regarding whether clause 29 has sufficient regard to rights and liberties of individuals.

11. **Part 8**, which would amend the *Plumbing and Drainage Act* to replace the Plumbers and Drainers Board with a Plumbing Industry Council, may affect rights and liberties of individuals.

12. In particular, clause 63 would amend section 5 of the *Plumbing and Drainage Act* to replace the existing provision for the board with provision for the Plumbing Industry Council and clauses 64 and 65 would respectively allow the minister to appoint members and deputy members to the council. Currently, these offices are filled by appointments confirmed by the Governor in Council. Clause 69 would insert transitional provisions regarding the dissolution of the board, including new section 178(3) which states:

   No amount, whether by way of compensation, reimbursement or otherwise, is payable by the State for or in connection with the enactment or operation of subsection (1).

13. In relation to proposed legislation abolishing statutory offices, the committee generally expresses concern that statutory office holders may not receive remuneration for services to be performed during what was anticipated by them to be a lengthier term in office. In this context, legislation dissolving statutory offices may have insufficient regard to rights and liberties of individuals.

14. The explanatory notes provide the following information (at 44):

Section 178 provides for the dissolution of the board (former board) on commencement of the amendments. Former board chairperson, deputy chairperson, members and deputy members, and any members of a committee of the former board will go out of office. Despite these members ceasing to hold office, no financial disadvantage to an individual is anticipated, as a person is not prevented from being renominated for holding office with the council.

15. Again, however, the explanatory notes do not explicitly address consistency with section 4(2) of the *Legislative Standards Act*. Accordingly, the committee invites the minister to provide information as to whether part 8 has sufficient regard to rights and liberties of individuals.

16. **Clauses 11, 20, 29 and 73** would insert new offences in a number of Acts. The proposed offences, together with respective maximum penalties, are set out below.

Clause	New section	Offence	Proposed maximum penalty
Building Act			
11	88(2)	Providing approval documents without complying with section 86(1)	50 penalty units ($5000)
11	88(6)	Failure to keep written evidence of payment of fee	20 penalty units ($2000)
20	115(3)	Failure to comply with a performance requirement for a building	165 penalty units ($16 500)
29	246C(2)	Failure to have sustainability declaration	20 penalty units ($2000)
29	246D(2)	Failure to amend or replace a sustainability declaration	20 penalty units ($2000)
29	246F(1)	Advertising for the sale of a building without including required information	20 penalty units ($2000)
29	246F(2)	Failure to comply with section when giving a person a document advertising the sale of a building	20 penalty units ($2000)
29	246G(1)	Failure to comply with section when opening a building to the public for inspection	20 penalty units ($2000)
29	246(2)	Failure to comply with section when otherwise opening a building for inspection	20 penalty units ($2000)
29	246H	Failure to give copy of sustainability declaration	20 penalty units ($2000)
Property Agents and Motor Dealers Act			
73	373C(1)	Publication of relevant advertisement omitting information about availability of sustainability declaration	100 penalty units ($10 000)
73	373C(2)	Providing a document advertising the sale of a residential dwelling without copy of sustainability declaration if required	100 penalty units ($10 000)
73	373D(1)	Failure to comply with section when opening a building to the public for inspection	100 penalty units ($10 000)
73	373D(2)	Failure to comply with section when otherwise opening a building for inspection	100 penalty units ($10 000)
73	373E	Failure to provide copy of sustainability declaration	100 penalty units ($10 000)

17. **Clauses 40, 43 and 44** would amend existing offence provisions in the *Animal Management (Cats and Dogs) Act*, as indicated below.

Clause	Amended section	Offence	Maximum penalty
Animal Management (Cats and Dogs) Act			
40	24(1)	Implanting a PPID in a cat or dog less than 8 weeks old (redrafting of existing offence)	60 penalty units ($6000)
43	97	Failure to comply with permit condition (new condition included – notice of change of address)	75 penalty units ($7500)
44	98	Failure to comply with permit condition for declared menacing dog (new condition included – notice of change of address)	75 penalty units ($7500)

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

18. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative way to achieve the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State.

19. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

20. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislative Assembly with information regarding whether the notes:

- have been tabled by the member;
- are in clear and precise language; and
- contain the information required by section 23.

21. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language. Generally, the notes contain the information required by section 23 but they do not address the consistency of the bill with fundamental legislative principles nor, where inconsistency may arise, the reasons for the inconsistency.

2. COMMISSIONS OF INQUIRY (CORRUPTION, CRONYISM AND UNETHICAL BEHAVIOUR) AMENDMENT BILL 2009

Date introduced: 28 October 2009

Responsible minister: J-P H Langbroek MP

Portfolio responsibility: Leader of the Opposition and Shadow Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1. The committee does not identify, for the consideration of Parliament, any matters regarding the application of fundamental legislative principles nor the operation of certain statutory provisions.

BACKGROUND

2. The bill would require the Attorney-General to advise the Governor to establish a commission of inquiry into certain matters.

LEGISLATIVE PURPOSE

3. The bill is intended to amend the *Commissions of Inquiry Act 1950* for particular purposes.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to the institution of Parliament

Institution of Parliament

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

5. **Clause 3**, which would amend the *Commissions of Inquiry Act 1950* to require a minister to advise the Governor to establish a commission of inquiry into specified matters, may appear to raise concerns regarding the impact of the legislation on Executive prerogative power. However, the committee suggests that sufficient regard is had to the institution of Parliament.[1]

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

6. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

   - the policy objectives of the bill and reasons for them;
   - how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;

[1] In relation to the convention that the Governor acts on the advice of the ministry, for example, see: Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) ch 7; and in relation to the establishment of commissions of inquiry, for example, see: Australian Law Reform Commission, *Royal Commissions and Official Inquiries* (2009), ch 6.

- if appropriate, any reasonable alternative way to achieve the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State.

7. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

8. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislative Assembly with information regarding whether the notes:

- have been tabled by the member;
- are in clear and precise language; and
- contain the information required by section 23.

9. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language. With respect to the information required by section 23, although the notes do not expressly refer to consistency with fundamental legislative principles, the committee has received written advice from the Leader of the Opposition that this was an oversight, to be corrected by an erratum to be tabled on 10 November 2009.

3. CRIMINAL CODE (FILMING OR POSSESSING IMAGES OF VIOLENCE AGAINST CHILDREN) AMENDMENT BILL 2009

Date introduced: 28 October 2009

Member: Dr B Flegg MP

Shadow responsibility: Shadow Minister for 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:
   - **clause 3** which may affect rights and liberties of individuals by expanding existing offence provisions;
   - **clause 4** which confers significant administrative power on police officers and school principals which may not be sufficiently defined or subject to appropriate review; and
   - **clauses 3 and 4** which may not be drafted in a sufficiently clear and precise way.

BACKGROUND

2. The legislation would amend the Criminal Code to allow for the seizure of devices used to commit offences that involve bullying against 'children'.

LEGISLATIVE PURPOSE

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

   … protection for children who are the targets of cyberbullying through the confiscation of devices used by bullies. Because the aim of cyberbullying is the capture of the image of bullying, the confiscation of the device effectively stops the mode and the intent of the offence.

4. The bill would amend the Criminal Code.

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. **Clause 3** raises two issues that may affect rights and liberties of individuals. The first relates to the proposed expansion of the definition of 'child exploitation material' in the Criminal Code. The second concerns potential inconsistencies with similar provisions in chapter 22 (Offences against morality) of the Criminal Code.

7. Section 207A of the Criminal Code defines certain words and phrases for the purposes of chapter 22 (Offences against morality). 'Child exploitation material' is currently defined by section 207A to mean 'material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years - (a) in a sexual context, including for example, engaging in a sexual activity; or (b) in an offensive or demeaning context; or (c) being subjected to abuse, cruelty or torture.'

8. The definition currently applies to the offences of:

   - involving a child in the making of child exploitation material (maximum penalty 10 years' imprisonment (section 228A));
   - making child exploitation material (maximum penalty 10 years' imprisonment (section 228B));
   - distributing child exploitation material (maximum penalty 10 years' imprisonment (section 228C)); and
   - possessing child exploitation material (maximum penalty 5 years' imprisonment (section 228D)).

9. Clause 3 would amend the definition of 'child exploitation material' in section 207A by removing the words 'under 16 years'. This would effectively expand the definition to include material describing or depicting someone who is, or apparently is, under 18 years.

10. The explanatory notes explain that the amendment would mean 'all children of school age are covered under this definition.'

11. The committee notes that, under the *Education (General Provisions) Act 2006*, a child is of compulsory school age if the child is less than 16 years. The expanded definition would therefore cover a significant number of individuals who are no longer attending school.

12. The committee also notes that the extended definition would not only apply to the proposed section 228DA which would provide for the confiscation of devices used to commit offences that involve an element of bullying. It would also apply to the existing offences relating to child exploitation material, namely sections 228A, 228B, 228C and 228D of the Criminal Code. To expand the scope of these serious offences, primarily to allow for the confiscation of certain devices when the offence involves an element of bullying, may have a significant effect on the rights and liberties of individuals.

13. Clause 3 would also insert 'verbal or physical bullying' as an example of abuse in the definition of 'child exploitation material'. This has the potential to further expand the scope of the definition and consequently the existing offence provisions. The definition of 'child exploitation material' and the relevant offences were inserted into the Criminal Code by the *Criminal Code (Child Pornography and Abuse) Amendment Act 2005* in response to concerns about the growing incidence of child pornography. Expanding the definition of 'child exploitation material' to include verbal or physical bullying would significantly enlarge the reach of the current offence provisions and would significantly affect the rights and liberties of individuals.

14. The committee also notes that, because the current definition of 'child exploitation material' was inserted in response to concerns about the growth of child pornography, its application to children under 16 years is consistent with most other offences contained in chapter 22 of the Criminal Code, including indecent treatment of children (section 210) and carnal knowledge of children (section 215).

Administrative power

15. 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.

16. **Clause 4** would confer significant administrative power on police officers and school principals which may not be sufficiently defined or subject to appropriate review.

17. Clause 4 would give police officers and school principals the power to seize 'things' including mobile phones, computers, cameras and video recorders, that have just been used, or are being used, to commit an offence involving bullying under sections 228A, 228B, 228C or 228D of the Criminal Code.

18. Where police officers are to be conferred with powers of seizure, the powers are to be excised following relevant training and within a framework of wider experience that police officers have of exercising similar statutory and common law powers. School principals, however, do not have similar qualifications or experience regarding the exercise of powers of seizure.

19. Additionally, there is nothing in clause 4 that limits the exercise of the power of seizure by a school principal to 'things' used in an offence that occurs at the school managed by that principal.

20. Although the power of seizure could only be exercised when a police officer or school principal had a reasonable belief that the mobile phone, computer or other thing had just been used, or was being used, to commit an offence involving bullying under sections 228A, 228B, 228C or 228D of the Criminal Code, there are few other safeguards in respect of the exercise of the power conferred by clause 4. Most notably, the bill contains no procedures for dealing with 'things' once they have been seized. For example, there is no requirement that receipts be issued for the 'things' and no mechanisms for the seized items to be accessed or ultimately returned.

21. In relation to review of the powers to be conferred by clause 4, the committee notes that while the bill does not expressly exclude the right to seek review of decisions under the *Judicial Review Act 1991* it does not provide any form of merits review.

Clear meaning

22. 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.

23. **Clauses 3 and 4** may not be drafted in a sufficiently clear and precise way.

24. Although both clauses 3 and 4 refer to the concept of 'bullying', the bill does not define behaviour that would constitute 'bullying.' Nor does the Criminal Code. Given the subjective nature of bullying, the lack of statutory definition means the provisions may not be drafted in a sufficiently clear and precise way.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

25. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative way to achieve the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State.

26. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

27. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislative Assembly with information regarding whether the notes:

- have been tabled by the member;
- are in clear and precise language; and
- contain the information required by section 23.

28. Explanatory notes were tabled at the first reading of the bill. Although they are generally drafted in clear and precise language the explanatory notes do not contain all the information required by section 23. In particular, the explanatory notes:

- provide limited information about why the proposed way of achieving the policy objectives is reasonable and appropriate;
- provide a limited assessment of the consistency of the bill with fundamental legislative principles and the reasons for the acknowledged inconsistency;
- do not include information about the extent to which consultation was carried out in relation to the bill and do not provide a reason for not including this information.

4. CRIMINAL ORGANISATION BILL 2009

Date introduced: 29 October 2009

Responsible minister: Hon CR Dick MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:

   - **clauses 10, 18, 33 and 110** which may have insufficient regard to rights and liberties of individuals as they would require satisfaction of a lower standard of proof than the criminal standard;
   - **clause 10(2)(a)** requiring the Court to have regard to 'any conviction for current or former members of the organisation';
   - **clauses 10, 18, 19, 24, 28 and 33** allowing the court to consider evidence of past associations;
   - **clauses 19(1), 29(2) and 33** which may affect rights and liberties of individuals, including freedom of movement;
   - **clause 143** which would reverse the presumption in favour of bail;
   - **clause 12(1)** providing for a criminal organisation declaration to last for five years unless revoked or renewed;
   - **clauses 13, 15 and 22-3** which may affect rights to access the courts;
   - **clauses 90, 133 and 134** which have the potential to affect employment rights and liberties of individuals;
   - **clause 112** relating to criminal organisation orders regarding children and young people;
   - **part 5** which has the potential to affect property rights;
   - **clauses 24, 37-8, 56, 82, 100 and 120** which would create new offences in the Criminal Organisation Act;
   - **clauses 147-8 and 150-1** which would insert new offences and amend existing offences in the Criminal Code;
   - **clause 155** excluding decisions made under the Criminal Organisation Act from the operation of the *Judicial Review Act 1991*;
   - **part 7** conferring the criminal organisation public interest monitor with significant administrative powers and wide discretion as to the exercise of the powers;
   - **clauses 10(3), 18(4), 21, 64, 66, 70, 108, 109 and 125** which may be inconsistent with principles of natural justice;
   - **clauses 25, 37, 50, 118 and 162-6** conferring police officers with powers to enter premises and post-entry powers;
   - **clauses 119-20** which would override common law protections of the right to silence;
   - **clause 28** which would, in effect, have retrospective operation;
   - **clause 135(1)** which would confer officials with immunity from civil liability;
   - **clause 54(2)** which would provide for compulsory acquisition of property; and
   - **clauses 10, 18 and 151** 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 Parliament to **clause 64** which may raise concerns regarding interference with the independence and impartiality of the Supreme Court exercising powers under the legislation.

BACKGROUND

3. The legislation would provide for the Supreme Court to make declarations and orders for the purpose of disrupting and restricting the activities of organisations involved in serious criminal activity and of people who are members of or associate with the organisations.

LEGISLATIVE PURPOSE

4. The objects of the legislation are identified in clause 3:

(1) The objects of this Act are to disrupt and restrict the activities of—

(a) organisations involved in serious criminal activity; and

(b) the members and associates of the organisations.

(2) It is not the Parliament's intention that powers under this Act be exercised in a way that diminishes the freedom of persons in the State to participate in advocacy, protest, dissent or industrial action.

5. Therefore, the bill would amend the:

- *Bail Act 1980*;
- Criminal Code;
- *Evidence Act 1977*;
- *Judicial Review Act 1991*;
- *Legal Profession Act 2007*;
- *Parliament of Queensland Act 2001*; and
- *Police Powers and Responsibilities Act 2000*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES[2]

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.*

Standard of proof

7. **Clauses 10, 18, 33 and 110** may have insufficient regard to rights and liberties of individuals as they would require satisfaction of a lower standard of proof than the criminal standard.

8. Clause 110 states:

Standard of proof

A question of fact in proceedings under this Act, other than proceedings for an offence, is to be decided on the balance of probabilities.

9. Clause 10 would authorise the Supreme Court of Queensland to make a declaration that an organisation is a 'criminal organisation'. The expression 'criminal organisation' is further defined in clause 145.

10. Clause 10(1) provides that the Supreme Court can make an order if it is 'satisfied that', amongst other things, '(b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity'.

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2 The committee thanks Professor Patrick Keyzer for his valued legal advice regarding the bill.

11. The making of a declaration under clause 10 that an organisation is a criminal organisation may ultimately impact on the rights and liberties of individuals because it provides a factual basis for the court's power to make:

- a control order in respect of a person under part 3 (see clause 18(1)(a));
- a public safety order (clause 28(2)(b), together with clause 33); and
- a fortification removal order (clause 43(1)(b)(ii)).

12. Clause 10(1) would affect rights and liberties by lowering the burden of proof that is ordinarily applicable in proceedings with criminal and penal consequences below the 'beyond reasonable doubt' standard. Traditionally, the common law has drawn a distinction between the burden of proof required in civil cases and the burden of proof required in criminal cases. In *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481-2, Viscount Sankey, for the House of Lords, said:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt … If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner … the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

13. In *Thompson v The Queen* (1989) 169 CLR 1 at 12, Mason CJ and Dawson J of the High Court of Australia said:

The fundamental principle of our criminal law is that the accused's guilt must be established beyond reasonable doubt. The law requires that standard of proof of the commission of a criminal offence in order to eliminate or minimise the chance that an innocent person might be found guilty with all the grave consequences that such an erroneous condemnation would have for the accused, for our system of justice and for the community generally.

14. In *Brown v The King* (1913) 17 CLR 570, Isaacs and Powers JJ said at 595 (see also at 584-5 by Barton ACJ):

The gravity of the consequences in criminal cases requires that the higher, criminal standard of proof be applied in criminal cases. This conforms to the noble view of public justice that it is better that many guilty men should escape than that one innocent man should suffer.

15. It should be noted that the 'satisfaction' test, while lower than the criminal standard of proof, can be interpreted with regard to the serious consequences of the judicial order concerned. As Dixon J observed in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2, Dixon J:

[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

16. Dixon J later said, at 368:

[T]he importance and gravity of the question (may) make it impossible to be reasonably satisfied on the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact.

17. The principles enunciated by Dixon J in *Briginshaw* would almost certainly apply in proceedings under the Criminal Organisation Act. Nevertheless, clause 10(1) would require a lower standard of proof than is ordinarily applicable in criminal proceedings and may have insufficient regard to rights and liberties of individuals.

18. The explanatory notes provide (at 3-4) the following information regarding consistency with fundamental legislative principles of the proposed criminal organisation declarations:

The central mechanism in the Bill is that the Supreme Court, on a civil application, can declare an organisation to be a criminal organisation. The declaration has no immediate criminal effect upon the organisation but provides the footing for an application for a control order.

The declaration is made by an independent and impartial tribunal, the Supreme Court, exercising its full discretion. The court may only make a criminal organisation declaration if satisfied the members of the organisation associate for the purpose of engaging in or conspiring to engage in, serious criminal activity and that

the organisation is an unacceptable risk to the safety, welfare or order of the community. The court is assisted in its determination by the COPIM. The declaration can be appealed to the Court of Appeal.

19. Clauses 18 and 33 would also require a lower standard of proof than the criminal standard.

20. Parts 3 and 4 would respectively authorise the Supreme Court to make control orders and public safety orders. Under part 3, the Supreme Court would be authorised to make control orders (clause 18) imposing conditions on individual members or former members of criminal organisations (clause 19). Provision is also made for 'interim control orders' (clause 21). Part 4 would authorise the Supreme Court to make public safety orders (clause 33).

21. Clauses 18 and 33 would require the Supreme Court be 'satisfied' the matters raised in the provision had been proven. Accordingly, as for clause 10, clauses 18 and 33 provide for a lower burden of proof than the criminal standard.

22. The consistency of clauses 18 and 33 with fundamental legislative principles is addressed in the explanatory notes (at 4, see below also under 'Restrictions on liberty').

Evidence considered by Court

23. **Clause 10(2)(a)** would require the Court to have regard to 'any conviction for current or former members of the organisation' when it makes a declaration under clause 10. The declaration of a criminal organisation could then have consequences for all members, including current, former or prospective members (note the contrast between this provision and clause 18(5)) and for people who associate or have associated with them. (As to the width of the concept of 'members', see Clear meaning.)

24. Clause 10(2)(a)(ii) raises three issues regarding rights and liberties of individuals within the meaning of s 4(2)(a) of the *Legislative Standards Act*.

25. First, in ordinary criminal proceedings, evidence of the general bad character of an accused is ordinarily inadmissible (*Attwood v R* (1960) 102 CLR 353 at 359, 362) unless that person attempts to establish his or her good character (*R v Perrier* [1991] 1 VR 697; *Lowery v The Queen* [1974] AC 85). The unanimous High Court said in *Attwood* (at 360) that even though such evidence might be relevant to an issue it is excluded because 'although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety nine'. Reversal of the common law rule of evidence has the potential to affect the rights and liberties of individuals.

26. Second, inflicting further restrictions on the liberty of individuals based on their past offences (restriction might be by way of a control order or public safety order following on from a clause 10 order) gives rise to the spectre of double punishment which is contrary to the common law (*Carroll v The Queen* (2002) 213 CLR 635 at 640) and international law (Article 14(7) of the *International Covenant on Civil and Political Rights*).

27. Third, clause 10(2)(a)(ii), by allowing a court to have regard to past convictions of former members, or current members who may never have associated with a person subjected to a control order under clause 18, replaces freedom of association with guilt by association. Clause 10(2)(a) (iii) and (iv) would enable the Supreme Court to have regard to past criminal activity in making a declaration under clause 10.

Evidence of past associations

28. **Clauses 10, 18, 19, 24, 28 and 33** would allow the court to consider evidence of past associations and may infringe rights and liberties of individuals.

29. Clause 10(4) would allow the Court to be satisfied that members of an organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity irrespective of whether:

- all members associate for that purpose or only some of the members;
- members associate for that purpose for the same serious criminal activities or different ones; and
- members also associate for other purposes.

30. Accordingly, clause 10(4) explains that the requisite degree of satisfaction in clause 10(1) might be met by a court even in circumstances where 'only some of the members' associate 'for the purpose of engaging in, or conspiring to engage in, serious criminal activity' (clause 10(4)(a)). However the members associating for the identified purposes must (clause 10(5)):

> constitute a significant group within the organisation, either:
>
> (a) in terms of their numbers; or
>
> (b) in terms of their capacity to influence the organisation or its members.

31. As a general rule, a guilty mind is regarded to be an essential ingredient of a crime (*R v Prince* (1875) LR 2 CCR 154; *R v Tolson* (1889) 23 QBD 164) and an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a person is indicted an innocent act, is a good defence (*R v Tolson* at 181). However the legislation would largely remove any defence for innocent association (see clause 24(5), but note the limited exception contemplated by clause 24(6) and (7)).

32. Together with clause 10(2)(a) and clauses 19, 24 and 28, clause 10(4) would limit the freedoms of movement and association enshrined in Articles 12(1) and 22 of the ICCPR. Further, clause 10 presumes that an individual will necessarily be or become involved in criminal activity because he or she is a member of an organisation that has engaged in criminal activity in the past, or where he or she associates with people who have been or are guilty of criminal activity. In this way, clause 10(2)(a) and 10(4) reverse the presumption of innocence and create the foundation for a series of contravention offences (in clauses 24 and 38 in particular) that contemplate guilt by association.

33. Clause 19(3) indicates that an anti-association provision in clause 19(2)(a) would have application:

> in relation to association with any person who is a member of a criminal organisation at the time of the association –
>
> (a) whether the person is a member of a criminal organisation when the order is made or becomes a member at a later time; and
>
> (b) whether the criminal organisation is a criminal organisation when the order is made or is declared to be a criminal organisation at a later time.

34. The provisions would reverse the presumption of innocence that would ordinarily attend associating with another individual. That presumption would be replaced with a presumption of guilt by association. Clause 19(3)(b) is drafted sufficiently widely to catch people who behave innocently today but find themselves subject to penal consequences tomorrow for behaviour that was lawful today. Clause 19(4) has a similar operation and similar observations can be made about it.

35. Clause 24(5) indicates that:

> for a contravention of a non-contact condition, it does not matter –
>
> (a) what was the purpose of the person associating with another person in contravention of the condition; or
>
> (b) whether the association related to the commission or potential commission of an offence.

36. This provision also raises issues of guilt by association. Similarly, clause 28(2) would require the Court to have regard to past associations when determining whether to grant a public safety order under clause 33 in part 4.

37. Clauses 18 and 33 would raise two further issues regarding rights and liberties of individuals.

38. Clause 18(2) would authorise the Supreme Court to make a control order for an individual if the court is satisfied that the respondent:

> (a) engages in or has engaged in, serious criminal activity; and
>
> (b) associates with any member of a criminal organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity.

39. Clause 28 states that in considering whether or not to make a public safety order the court must have regard to, amongst other things:

> (a) the respondent's criminal history and any previous behaviour of the respondent that posed a serious risk to public safety or security;

(b) whether the respondent -

(i) is or has been a member of a criminal organisation; or

(ii) is or has been the subject of a control order or registered corresponding control order; or

(iii) associates, or has associated, with a member of a criminal organisation or a person who is the subject of a control order or registered corresponding control order.

40. First, these clauses leave open the possibility that a person who has been tried and convicted of a serious criminal offence, who has already served any sentence of imprisonment for that offence may, by dint of their membership of a declared criminal organisation, be subjected to a control order that is almost certain to contain conditions restrictive of his or her common law rights and liberties even though he or she may not have engaged in any criminal activity within that organisation, or even associated with any member of that organisation that has done so. This raises the 'guilt by association' point and subverts the presumption of innocence.

41. Second, the common law maxim *nemo debet bis vexari pro una et eadem causa* is that a person should be put in jeopardy or punished twice for one and the same offence. Article 14(7) of the ICCPR is to the same effect. Imposing restrictions on the rights and liberties of individuals based on their previous crimes is contrary to this principle.

42. Clause 18(3) provides that the Supreme Court, in considering whether or not to make an order, must have regard to:

(a) information about the following before the court:

(i) the respondent's criminal history;

(ii) the criminal history of a person whose association with the respondent is relied on in the application to support the making of the order;

(iii) any activity or behaviour of the respondent at any time that tends to prove a matter of which the court must be satisfied under subsection (1) or (2); and

(b) anything else the court considers relevant.

43. As noted above, ordinarily evidence relating to a person's criminal history cannot be led in a criminal trial. However, clause 18(3)(b) may ameliorate the effect of this to some extent by enabling a court to consider anything else it considers relevant, which could conceivably include other evidence or information that leads to inferences that are contrary to inferences that might be drawn from evidence of a person's criminal history.

Restrictions on liberty

44. **Clauses 19(1), 29(2) and 33** may affect rights and liberties of individuals, including freedom of movement.

45. Clause 19 would allow the court to impose conditions it considered 'appropriate' on a respondent. Subject to clause 19(5), clause 19(2) sets out a non-exhaustive list of possible controls. A control order could prohibit a person from:

- associating with any person who is a member of a criminal organisation;
- associating with any other controlled person or with a stated person or a person of a stated class;
- possessing … (ii) a stated thing or a thing of a stated class (the sub-clause does not limit 'things' to illegal 'things', which may affect the right of the individual to hold and enjoy personal property, a right acknowledged in Article 17 of the Universal Declaration of Human Rights); or
- entering or being in the vicinity of a stated place or a place of a stated class (affecting freedom of movement and displacing the presumption of innocent movement).

46. Accordingly, the list of controls would include measures having significant impact on the rights and liberties.

47. Public safety orders under part 4 would contemplate similar restrictions on freedom of movement (see clauses 29(2) and 33), although provision is made in clause 30 for the *Peaceful Assembly Act 1992* to

have continued application. Public safety orders contemplate significant powers to stop and search a person or his or her property without a warrant (see Powers of entry).

48. In *Trobridge v Hardy* (1955) 94 CLR 147 at 152, Fullagar J said that a mere interference with a person's liberty is 'a grave infringement of the most elementary and important of all common law rights'. Approving this statement in *Williams v The Queen* (1986) 161 CLR 278 at 292, Mason and Brennan JJ said:

Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and has never been abridged by the laws … without sufficient cause.

49. In the explanatory notes, justification is provided regarding control orders, indicating (at 5) that the legislation would have sufficient regard to rights and liberties of individuals:

The Supreme Court, on a civil application, can impose a control order against a person, restricting activities of the controlled person. The effect of such orders is to significantly curtail the rights and liberties of the controlled person.

Balancing against the infringement of rights and liberties is the fact that the control order is made by an independent and impartial tribunal, the Supreme Court, exercising its full discretion. This affords the highest level of supervision of the power. Before making a control order the court must be satisfied that the respondent is or has been a member of the criminal organisation, engages in or has engaged in serious criminal activity and is associating with another person for the purpose of engaging in or conspiring to engage in serious criminal activity. The order may also be imposed on any person who has engaged or is engaging in serious criminal activity and who associates with any member of a criminal organisation for the criminal purpose as stated. Further, the court is assisted by the COPIM acting in a role akin to an amicus curiae. Orders can be appealed to the Court of Appeal.

A control order remains in effect until revoked. Whilst this would appear to afford an indefinite term to such orders it must be noted that a control order may only be made in reliance on the person's membership of a declared criminal organisation or the person's association with a member of a declared criminal organisation. The Bill provides that control orders will end when the relevant declaration expires or is revoked. A controlled person may seek to have the control order revoked if at least two years have passed after the order was made.

50. In respect of public safety orders, the explanatory notes provide (at 5-6):

The Supreme Court may make a public safety order prohibiting an individual or group from entering specified premises, areas or events. Such an order impacts on rights and liberties.

An order may only be made where the presence of the respondent at the particular place poses a serious risk to public safety or security and making the order is appropriate in the circumstances. The Supreme Court supervises the use of such a power. The COPIM is present for the hearing of such applications (apart from urgent phone applications). Such orders can be appealed to the Court of Appeal.

51. **Clause 143** would also affect rights to liberty. It would amend section 16(3) of the *Bail Act* to reverse the presumption in favour of bail (a presumption related to the presumption of innocence). It would apply in relation to offences in the bill and the Criminal Code:

- clause 24 – contravention of control order;
- clause 38 – contravention of public safety order;
- section 359 Criminal Code (as amended by clause 150) – threats, when circumstance of aggravation is alleged.

52. The explanatory notes provide (at 9-10) justification for the proposed amendments to the *Bail Act*:

The Bill amends the Bail Act 1980 *to displace the presumption in favour of bail for offences of contravention of a control order or a public safety order and for an offence against the Criminal Code, section 359 with a circumstance of aggravation. The displacement of the presumption is justified on the following grounds:*

In order to impose a control order upon an individual, the Supreme Court must be satisfied that the individual is or has engaged in serious criminal activity and is associating with certain persons for the purpose of engaging in or conspiring to engage in serious criminal activity. The purpose of a control order is to reduce the capacity of members of criminal organisations and their associates to carry out activities that may facilitate serious criminal behaviour. A breach of a control order is a serious matter which warrants requiring the individual to show cause why bail is justified;

In order to impose a public safety order upon a respondent, the Supreme Court must be satisfied that the respondent poses a serious risk to public safety or security. In circumstances where it is alleged that the respondent has defied the order and attended or attempted to attend the particular place in question, it is appropriate that the respondent is required to show cause why bail is justified;

With respect to an accused charged with the aggravated form of 'Threats' under section 359 of the Criminal Code, the allegation will be that the person has threatened a law enforcement officer or a person helping a law enforcement officer, when or because the officer is investigating the activities of a criminal organisation. In order to ensure the protection of the officer or person subject to the threat it is appropriate that the accused is required to show cause why bail is justified.

Duration of criminal organisation declaration

53. **Clause 12(1)** would provide for a criminal organisation declaration made by the Supreme Court to last for five years unless revoked or renewed.

54. Noting that opportunities to revoke an order are limited (as to which see clauses 13 and 15, considered further below), under clause 12(1) a criminal declaration order could continue in circumstances in which a member may have repudiated his or her membership. In turn, the order could provide a basis for a control order under clause 18 or a public safety order under clause 33.

55. It is an established maxim of the common law that *cessante ratione legis cessat ipsa lex* – 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself' (*Davis v Powell* (1738) Willes 46 at 51; *Gowdy v Duncombe* (1847) 1 Exch 430). The purpose of the legislation, as stated in clause 3, is to disrupt and restrict the activities of organisations involved in serious criminal activity and the members and associates of those organisations. It may therefore be considered contrary to the rights and liberties of individuals that a solemn declaration by a member repudiating membership accompanied by action to that end (such as full cessation of contact with the organisation and its members) should not thereby remove them from the operation of control orders or public safety orders under the legislation.

56. Section 9(7) of the *Communist Party Dissolution Act 1950* (Cth), an Act designed to destroy communism in Australia, allowed communists to make a declaration that they were no longer communist, immunising them from restrictions on their rights and liberties under the Act.

57. Under clause 12(2), it may be possible for an individual to continue to be subject to the consequences of a clause 10 order, including restrictions on freedoms (particularly pursuant to clauses 18 and 33), even though he or she may have repudiated membership of the criminal organisation. It therefore raises the question of sufficient regard to the rights and liberties of individuals as provided in section 4(2)(a) of the *Legislative Standards Act*.

Access to the courts

58. **Clauses 13, 15 and 22-3** may affect rights to access the courts.

59. Clause 13 contemplates that a criminal organisation declaration (clause 10) may be revoked on the application of the Commissioner of Police or 'the criminal organisation or a member of the criminal organisation', subject to clause 15.

60. Clause 15 would then limit the number and timing of applications for revocation that could be made by a criminal organisation or a member of a criminal organisation. It would limit the:

- number of applications to 'not more than 2 during the first 5 years after the declaration is made' (clause 15(2)); and
- timing of applications 'until at least 3 years after the declaration is made' (clause 15(1)).

61. The significant consequences that could flow from a criminal organisation declaration have been outlined above. Accordingly, it is notable that the criminal organisation and/or its members would have limited access to the courts to seek revocation of a declaration.

62. There is a common law presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied (*Hockey v Yelland* (1984) 157 CLR 124 at 130; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633). This presumption is especially strong in circumstances where an order of a court may affect the liberty of an individual.

63. Clause 15 would deprive individuals of rights to access the courts. Given that penal consequences can flow from a clause 10 order (via clauses 18 and 33, together with clauses 24(1) and 38), the combined operation of clauses 13 and 15 indicate that sufficient regard may not be had to rights and liberties of individuals.

64. Clause 22(2)(b) provides that an application for variation of a control order may be made by the controlled person 'if at least 12 months have passed after the order was made or the last application for a variation was made by the controlled person'. Clause 23(2)(b) provides that an application for revocation of a control order may be made by the 'the controlled person, if at least 2 years have passed after the order was made'. Further extensions of the time during which a member of a criminal organisation may not make an application for revocation of a control order are contained in:

- clause 23(3) - the person must not have been a member of any criminal organisation for at least two years; and
- clause 23(10) - prison terms would not be counted towards this period.

Matters relating to employment

65. **Clauses 90, 133 and 134** have the potential to affect rights and liberties of individuals in the practice of their professions as lawyers, legal representatives and security providers.

66. Clause 90 would prohibit the COPIM (including a past COPIM) from acting as a lawyer for certain organisations or individuals. A failure by a lawyer to comply with these restrictions would be capable of constituting unsatisfactory professional conduct or professional misconduct under the *Legal Profession Act 2007*.

67. Clause 133 would prohibit a person who had been a police officer from acting as a legal representative for certain organisations or individuals. A failure by a lawyer to comply with these restrictions would be capable of constituting unsatisfactory professional conduct or professional misconduct under the *Legal Profession Act 2007*. A failure by a legal representative, other than a lawyer, to comply with these restrictions would be a suitability matter for section 9 of the *Legal Profession Act 2007*.

68. Clause 134 would prohibit a person who was a police officer (including a former police officer) from acting as a security provider under the *Security Providers Act 1993* for certain organisations or individuals. A failure by a person to comply with these restrictions would be capable of constituting evidence that the person was not an appropriate person to hold a licence under the *Security Providers Act 1993*.

69. The explanatory notes provide little justification for the restrictions imposed by these clauses.

Rights of children and young people

70. Clause 112 envisages that criminal organisation orders may be made regarding children and young people and provides specified safeguards. Clause 112(1) provides that the section applies if a criminal organisation order is made, varied or revoked on the Commissioner's application and if the respondent to that application is a 'child' (as defined in schedule 4 of the *Juvenile Justice Act 1992*).

71. Clause 112(2) would require the Commissioner to provide a copy of that order as soon as reasonably practicable to the chief executive of child safety and to the parent of the child if the parent of the child could be found by the Commissioner. Clause 112(3) would provide that an order or variation of an order would have no effect against a child until a police officer personally serves a copy of the order or variation on the child and clause 112(4) that subsection (3) would apply despite any provision of the legislation that permitted service by public notice.

Property rights

72. **Part 5** would allow the Commissioner to apply to the Supreme Court for a fortification removal order against a person or an organisation and has potential to affect common law and other statutory property rights.

73. The explanatory notes indicate that the legislation has sufficient regard to rights and liberties of individuals, stating (at 6):

The Bill provides for the removal of excessive fortifications at premises used in connection with serious criminal activity or premises owned or habitually occupied or used by a criminal organisation or a member or associate of a criminal organisation. Such fortifications pose a significant obstacle in the execution of search warrants. Where a fortification removal order is not complied with, an authorised police officer may cause the fortification to be removed or modified to the extent required under the order. The Commissioner may forfeit to the State any fortification removed. Any 'innocent' owner is compensated but a 'responsible person' is not. 'Responsible person' is defined to mean the respondent to the application and any other person who participated in causing the fortification to be made and was the occupier of the fortified premises when the order was made.

The Supreme Court has a discretion to impose a fortification removal order if satisfied the premises has a fortification and the extent or nature of the fortification is excessive for any lawful use of that type of premises. Importantly, the Supreme Court can not impose such an order unless satisfied the premises are linked to serious criminal activity or occupied or used by a criminal organisation or one of its members or associates. The court retains a full discretion as to whether to make such an order and in the event an order is made, must fix the time or the period within which the fortification must be removed or modified. The compulsory acquisition of the fortifications without compensation is enlivened in the event the respondent does not comply with the Supreme Court order.

Offence provisions

74. **Clauses 24, 37-8, 56, 82, 100 and 120** of the Criminal Organisation Bill would create new offences, with the potential to affect rights and liberties of individuals. The proposed offences, together with respective maximum penalties, are set out below.

Clause	Offence	Proposed maximum penalty
24	Contravention of control order or registered corresponding control order	3 years imprisonment for the first offence; 5 years imprisonment for each later offence
37(6)	Contravention of a direction given by a police officer entering a public safety place to search for a person for whom a public safety order has been made	40 penalty units ($4000)
38	Contravention of public safety order	1 year's imprisonment
56	Hindering removal or modification of a fortification	5 years' imprisonment
82	Unlawful disclosure of criminal intelligence or information in information affidavit	85 penalty units ($8500) or 1 year's imprisonment
100	Recruiting persons to become member of criminal organisation	5 years' imprisonment
120	Failure to comply with personal details requirement	40 penalty units ($4000)

75. Although offences under clauses 24, 56 and 100 would be indictable offences, clause 115 would enable such offences to be dealt with summarily at the election of the prosecution. Clause 116(3) provides that the maximum penalty that may be imposed on a summary conviction of an indictable offence is 100 penalty units ($10 000) or three years' imprisonment or the maximum prescribed for the offence, whichever is the lesser.

76. **Clauses 147-8 and 150-1** would insert new offences into the Criminal Code and amend existing offence provisions in the Criminal Code, as outlined in the table below.

Clause	New section	Offence	Maximum penalty
147	86(1)	Obtaining secret information about the identity of informant (new section)	10 years' imprisonment
147	86(2)	Disclosure of secret information about the identity of informant (new section)	10 years' imprisonment
148	119B(1B)	Retaliation against, or intimidation of, judicial officer, juror, witness etc in relation to a proceeding before a court under the *Criminal Organisation Act 2009* (new subsection providing a circumstance of aggravation)	10 years' imprisonment

Clause	New section	Offence	Maximum penalty
150	359(2)	Threats when a law enforcement officer is investigating the activities of a criminal organisation (new subsection providing circumstances of aggravation)	10 years' imprisonment
151	359E(4)	Unlawful stalking of an officer investigating the activities of a criminal organisation (new subsection providing a circumstance of aggravation)	10 years' imprisonment

77. The explanatory notes (at 6-8) provide the following information regarding proposed offences and proposed maximum penalties:

The Bill creates a new offence of contravention of control order or registered corresponding control order – the offence carries a maximum penalty of three years imprisonment for a first offence and five years for each later offence.

The equivalent Northern Territory offences in the Serious Crime Control Bill 2009 (NT) carries a maximum penalty of five years imprisonment as does the offence provided in the Serious and Organised Crime (Control) Act 2008 (SA).

The offence requires proof to an objective standard that the controlled person knowingly contravened the order. The maximum penalties must be sufficient to deter contravention of the order. The maximum penalty provided is consistent with the other jurisdictions and is justified given the criteria the court must be satisfied of before imposing a control order.

The Bill creates a new offence of contravention of public safety order – the offence carries a maximum penalty of one year imprisonment.

The equivalent Northern Territory and South Australian offences carry five years imprisonment.

Before imposing a public safety order the court must be satisfied that the presence of the respondent at the area or premises poses a serious risk to public safety or security. In order to protect the public the maximum penalty must be sufficient to deter contravention of the order.

The Bill creates a new offence of hindering removal or modification of a fortification - the offence carries a maximum penalty of five years imprisonment.

The equivalent Northern Territory offence carries three years imprisonment. The Western Australian offence contained in the Corruption and Crime Commission Act 2003 carries a maximum penalty of five years imprisonment.

A fortification removal order may only be imposed if the court is satisfied the premises is connected to serious criminal activity or is owned or used by a criminal organisation or a member of associate of such an organisation. The court must be satisfied the fortification is excessive for any lawful use of that type of premises. Fortifications can impede the execution of search warrants. Where the respondent fails to comply with such an order, it is important that police can cause the fortification to be removed or modified in accordance with the court order without the fear or concern they will be prevented or obstructed from doing so. The maximum penalty is consistent with the penalties in the other jurisdictions and will act as a deterrent.

The Bill creates a new offence of unlawful disclosure of criminal intelligence or information in informant affidavit – the offence carries a maximum penalty of one year's imprisonment.

The offence applies where criminal intelligence information (including information that is or has been the subject of a criminal intelligence application) or information in an informant's affidavit is disclosed without lawful authority or unless a person is required to disclose under the Bill or where disclosure is necessary to perform the person's functions under the Bill. The Bill provides for a number of defences to the offence. Given that disclosure of such information may endanger a person's life or physical safety it is vital that unauthorised disclosure is appropriately sanctioned.

The Bill creates a new offence of obtaining of or disclosure of secret information about the identity of informant – two new offences are inserted into the Criminal Code, both offences carry a maximum penalty of 10 years imprisonment.

The first offence applies to a person who, without lawful justification or excuse, obtains or attempts to obtain secret information (as defined) in the possession of a law enforcement agency or officer about the identity of a criminal organisation informant (as defined). The second offence is a mirror provision directed at persons who publish or communicate such secret information.

The disclosure of the identity of such an informant risks endangering his or her life or physical safety. This justifies the creation of the offence and the maximum penalty.

The Bill inserts new circumstances of aggravation into a number of offences in the Criminal Code – the amendments are necessary to deter tactics of intimidation and violence towards potential witnesses and law enforcement investigators.

Administrative power

78. 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.

79. **Clause 155** would exclude decisions made under the Criminal Organisation Act from the operation of the *Judicial Review Act*.

80. 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 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.

81. In given circumstances, it is possible that removal of rights to access courts and tribunals may be justified by significant legislative objectives. However, the explanatory notes provide no justification for the exclusion of the proposed Criminal Organisation Act from the operation of the *Judicial Review Act*.

82. **Part 7** would provide for the appointment of a criminal organisation public interest monitor (COPIM) and for the conferral of relevant administrative powers.

83. The COPIM is to be appointed under division 1 of part 7. Division 2 of part 7 confers statutory functions on the appointee. A large number of provisions of the legislation would confer the COPIM with administrative powers and discretions:

- clauses 8(6), 13(8), 16(5), 22(8), 23(8), 31(6), 36(7), 41(6), 63(5), 74(4) would provide for the COPIM to be provided with, in accordance with arrangements decided by the COPIM, copies of applications and documents regarding applications for (or varying or revoking) criminal organisation declarations, control, public safety and fortification removal orders and criminal intelligence declarations;
- clause 62 would make part 6 regarding criminal intelligence subject to COPIM provisions;
- clause 66 allows notice of a criminal intelligence application to be given to the COPIM and –
  - clause 70(2) allows the COPIM to attend the *ex parte* hearing; and
  - clause 71(1) allows the COPIM to cross-examine a police officer who is not an informant;
- clause 77(3) allows the COPIM to inspect secure intelligence and –
  - clause 78(2) to attend a special closed hearing for consideration of the intelligence; and
  - clause 80(1) to cross-examine a police officer who is not an informant;
- clause 86 confers functions on the COPIM of monitoring applications to courts and testing and making submissions to the court about the appropriateness and validity of the application;
- clause 87 allows for the delegation of COPIM functions to the public interest monitor or a deputy public interest monitor under the *Police Powers and Responsibilities Act* or the *Crime and Misconduct Act 2001*;
- clause 88 requires an applicant to provide the COPIM with all material given to the court;
- clause 89 allows the COPIM to question an applicant, examine and cross-examine any witness for the purpose of testing the appropriateness and validity of an application and to make submissions to the court;
- clause 108 provides that a hearing cannot proceed without the COPIM appearing before the court unless the court decides otherwise and for a COPIM to attend a closed hearing; and
- clause 135(3)(c) protects the COPIM from civil liability.

84. Accordingly, the legislation would provide the COPIM with a potentially significant role. However, little specification is provided in the legislation regarding 'arrangements' to be made by the COPIM for the exercise of the administrative power concerned.

Natural justice

85. 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.

86. **Clauses 10(3), 18(4), 21, 64, 66, 70, 108, 109 and 125** may be inconsistent with principles of natural justice.

87. Clause 10(3) states that a 'declaration may be made whether or not the respondent is present or makes submissions'. *Prima facie*, this clause is inconsistent with common law principles of natural justice. It has long been a rule that no one is to be condemned, punished, or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard (*audi alteram partem, Kioa v West* (1985) 159 CLR 550 at 582).

88. As Chief Justice Erle observed in *Re Brook* [1864] 16 CBNS 403 at 416, it is:

> *an indispensable requirement of justice that the party who has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him.*

89. The common law principles of natural justice can be abrogated by statute (*Bonaker v Evans* (1851) 16 QB 162 at 171). However the abrogation of those principles affects rights and liberties within the meaning of s 4(2)(a) and specifically s 4(3)(b) of the *Legislative Standards Act*.

90. It is arguable that the bill meets common law natural justice standards to some extent by providing people or organisations potentially affected by a clause 10 declaration 'be served with' notice of the proceedings under clause 8(5)(c) (see *Bessell v Wilson* (1853) 1 E & B 489 and *R v Jones* [2003] 1 AC 1).

91. Clause 18(4) provides that a control order 'may be made whether or not the respondent is present or makes submissions'. As for clause 10, it may be noted that the respondent must be served on the respondent by personal service or by public notice (clause 16(4)(c)). Accordingly, this provision may contemplate the infringement of the common law principle of natural justice.

92. Clause 66 would allow the Supreme Court to hear an application for a declaration relating to 'criminal intelligence' on an *ex parte* basis, particularly in circumstances where such information is relied on in a substantive proceeding under the legislation.

93. The effect of these clauses would be that a member of an organisation or a person who associated with a member (taking into account the width of the term 'member' in schedule 2), who may well be affected by an order under clause 10, (and, consequently, part 3 or part 4) would not be allowed to attend and hear, to adapt the words of Erle CJ in *Re Brook*, what is urged against him or her. The ICCPR recognises the right of a person to be tried in his or her presence.

94. Clause 70(1) similarly provides that the hearing of an application under part 6 regarding criminal intelligence is a special closed hearing. Clause 70(2) then provides for the application to be an *ex parte* application – only those people identified can remain in the Court during the hearing of the application.

95. It is a fundamental principle of the common law that judicial proceedings should be public (*Daubeny v Cooper* (1829) 1 B & C 237 at 240; *Scott v Scott* [1913] AC 417 at 438). This is reflected in Article 14 of the ICCPR. Article 14, like the common law, indicates that there may be exceptions to this rule.

96. However, the committee notes that, where the evidence of an informant is to be considered, safeguards are required to eliminate the risk of disclosure of the informant's identity. Ordinarily evidence from an informant is heard by the Court in a *voir dire*, a closed trial within an open trial. The rights of the accused are protected by the presence of a legal representative and by the judge, each of whom has an opportunity to cross-examine informants.

97. In relation to the consistency of the limitations on access to criminal intelligence information, the explanatory notes provide the following information (at 3):

The respondent to an application will be denied access to criminal intelligence information. Also, the court and COPIM can not call an informant or operative for the purpose of testing the veracity of the informant's evidence.

Such an approach is necessary to protect the identity of the informant/operative and the viability of the informant as a continuing source of criminal intelligence information.

However, where the Commissioner seeks to rely on information provided by an informant or operative as part of the criminal intelligence, an affidavit from the police officer that handles the informant/operative must be filed with the court. That affidavit must contain the following information regarding the informant/operative:

- *details of the full criminal history (including any charges pending) of the informant/operative;*
- *details of any allegations of professional misconduct made against the informant/operative;*
- *details of any inducement or reward that has been offered or provided to the informant/operative in return for their assistance; and*
- *the grounds for the police officer's honest and reasonable belief that the information provided by the informant/operative is reliable.*

The police officer who swears the affidavit must be available for examination or cross examination.

Further, when seeking to rely on criminal intelligence, including informant information, the Police Commissioner must provide the court with information outlining the Queensland Police Service (QPS) internal classification process for intelligence and the classification that was assigned to the intelligence in issue with respect to the intelligence's reliability and credibility.

Further, the court retains full discretion to determine what weight to give any evidence before it, including informant evidence.

98. Clause 21 would allow for the making of interim control orders if the application for a control order under clause 16 had been served on the respondent under clause 16(4). Clause 21(3) contemplates that an interim control order can take effect in circumstances in which a person has had no notice of any proceedings relating to its making. This raises natural justice issues within the meaning of s 4(3)(b) of the *Legislative Standards Act*.

99. Clause 64 deals with evidence provided to the Commissioner of Police or his or her delegate by an informant (clause 64(1)). Clause 64(2) provides that the 'informant can not be called to give evidence'. As noted above, it is a fundamental principle of natural justice that one must have the power to face one's accusers. Clause 64(2) would not make provision for this right. Clause 64(2) is examined further under Institution of Parliament.

100. Clause 108 would further affect natural justice requirements by limiting the right to attend court to only one individual member of an organisation (clause 108(2)(a)).

101. Clause 109 would limit access to records of a hearing and court transcripts. It would provide in clause 109(1) that a person could not be provided with access to a record of a hearing or to a transcript of a record, other than as provided for under the legislation. Provision is then made in clause 109(2) to (6) for identified persons to have access in the circumstances specified.

102. Finally, clause 125 would allow only one appeal to the Court of Appeal from a criminal organisation declaration or an order of the court varying or refusing to vary or revoke such a declaration.

Power to enter premises

103. 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.

104. **Clauses 25, 37, 50, 118 and 162-6** would confer police officers with power to enter premises and/or post-entry powers:

- clause 25 – certain search and seizure powers exercisable within the first seven days after a control order or registered corresponding control order is served on a person;

- clause 37(1) – entry of a public safety place without warrant to search for a person against whom a public safety order has been made and for the purposes of serving a copy of the order on the person;
- clause 37(2) – powers to stop, detain and search a vehicle approaching in or leaving a public safety order on a person;
- clause 37(3) – powers to stop a person or persons entering public safety places and to remove a person or persons from such a place;
- clause 37(5) – powers to make any direction or use of force reasonably necessary to exercise a power under clause 37(1) to (3);
- clause 50(2) – entry and other powers for purposes of fortification removal or modification; and
- clause 50(3) – use of force reasonably necessary to remove a person from fortified premises;
- clause 118 – power to enter and search premises and vehicles without a warrant in order to effect service of anything for the purposes of the legislation on a person, group or organisation named in an order; and
- clauses 162 to 166 – amendments to the *Police Powers and Responsibilities Act* to confer powers to apply for a warrant to enter and search a place to find criminal organisation control order property.

105. These provisions contemplate significant powers exercisable by police and contrary to the common law principle that a warrant is required before a search can be conducted (*Entick v Carrington* (1765) 19 How S Tr 1029).

106. The explanatory notes indicate that the legislation has sufficient regard to rights and liberties of individuals (at 8):

A power of entry is provided to a police officer to enter premises occupied by the person named in a control order and search for and seize items prohibited by the control order, without warrant. This power is similar to that found in section 610 'Police actions after domestic violence order is made' of the Police Powers and Responsibilities Act 2000*.*

The Supreme Court controls the use of this power and it can only be used once in relation to a premises occupied by the controlled person. The control order is made against a person who has been determined to be involved in serious criminal activity. In this light, the person cannot be relied upon to surrender the prohibited items.

Protection against self-incrimination

107. 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.

108. **Clauses 119-120** would override protections against self-incrimination. In particular, they would override the common law protection of the right to silence.

109. Justification for any breach of fundamental legislative principles is provided in the explanatory notes (at 9):

The legislation authorises police to require personal details of persons in particular circumstances.

The police officer may only require such personal details if the officer finds the person committing an offence against this Bill or reasonably suspect the person has just committed an offence against this Bill. The power also applies where the officer is exercising powers under the Bill in relation to the person. Such a power is necessary to ensure the effective operation of the Bill.

Retrospective operation

110. 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.

111. **Clause 28** would, in effect, have retrospective operation.

112. The principle *nova constitution futuris formam imponere debet, non praeteritis* (a new law ought to be prospective, not retrospective, in its operation) is ancient in origin, and can be traced to Roman law. At common law it was regarded to be unfair to prosecute a person tomorrow for something that was lawful today (*Phillips v Eyre* (1868) LR 6 QB 1 at 23). This principle is also reflected in Article 15 of the ICCPR (see also *Maxwell v Murphy* (1957) 96 CLR 261 at 267). Imposing restrictions on a person based on past membership of a legal organisation infringes this principle. Accordingly, clause 28 may have insufficient regard to rights and liberties of individuals.

Immunity from proceeding or prosecution

113. 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.

114. **Clause 135(1)** would confer officials acting honesty and without negligence under the legislation with immunity from civil liability. Clause 135(2) provides that liability would instead attach to the State.

115. In respect of clause 135, the explanatory notes state (at 9):

> *The Bill provides immunity from civil liability for officials (defined in the Bill) acting honestly and without negligence. This is necessary to ensure the effective operation of the Bill. Civil liability attaches instead to the State.*

Compulsory acquisition of property

116. Section 4(3)(i) 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 for the compulsory acquisition of property only with fair compensation.

117. **Clause 54(2)** may require compulsory acquisition of property. It would provide that a removed fortification becomes the property of the State and may be dealt with by the Commissioner as the Commissioner considers appropriate, subject to section 4.6 of the *Police Service Administration Act 1990*.

Clear meaning

118. 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.

119. **Clauses 10 and 18** may not be drafted in a sufficiently clear and precise way.

120. Clause 10 contemplates that declarations may be made depending in part on proof of matters relating to the activities of 'members' (see, for example, clause 10(1)(b), (2)(a)(ii), (iii), (iv), (4) and (5)).

121. Schedule 2 defines members of a criminal organisation to include:

(a) if the organisation is a body corporate - a director or officer of the body corporate;

(b) a member, associate member or prospective member, however described, of the organisation;

(c) a person who identifies himself or herself, in some way, as belonging to the organisation;

(d) a person who is treated by the organisation as if he or she belongs to the organisation;

(e) a person who associates with a member of the organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity'.

122. It should be noted that the schedule 2 definition would not apply to control order applications (see clause 18(5)). However, the width of the definition of 'member' would increase the potential for individuals who would ordinarily be entitled to the presumption of innocence to be treated as guilty by association when they associate with other people.

123. This raises the potential for an incursion on rights and liberties within the meaning of s 4(2)(b) of the *Legislative Standards Act*. In addition, the ambiguity of concepts such as 'prospective' member within schedule 2 raises an issue under s 4(3)(k) of the *Legislative Standards Act*.

124. Clause 18 is concerned also with proof of matters relating to 'members' of criminal organisations. Clause 18(5) may indicate an intention to restrict the ambit of control orders to actual members of criminal organisations. However it should be noted that control orders can be made against former members of criminal organisations (clause 18(1)(a)), raising the issue about repudiation of membership.

125. **Clause 151** may not be drafted in a sufficiently clear and precise way. The clause would amend section 359E of the Criminal Code which provides for the punishment of unlawful stalking. The new section 359E(4) would provide a maximum penalty of imprisonment of 10 years 'if any of the acts constituting the unlawful stalking are done when or because the officer is investigating the activities of a criminal organisation.'

126. As drafted, it may not be sufficiently clear under proposed section 359E(4) whether 'the officer' is the person doing the stalking or the person being stalked. However, it is noted that the explanatory notes state (at 8):

The bill inserts new circumstances of aggravation into a number of offences in the Criminal Code – the amendments are necessary to deter tactics of intimidation and violence towards potential witnesses and law enforcement investigators.

Sufficient regard to the institution of Parliament

Institution of Parliament

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

128. **Clause 64** may raise concerns regarding interference with the independence and impartiality of the Supreme Court exercising powers under the legislation.

129. Clause 64 deals with evidence provided to the Commissioner of Police or his or her delegate by an informant (clause 64(1)). Clause 64(2) provides that the 'informant can not be called to give evidence'. As noted above, it is a fundamental principle of natural justice that one must have the power to face one's accusers. Clause 64(2) would not make provision for this right.

130. Ordinarily the evidence of an informer is given in closed court on a *voir dire*. However, clause 64(2) would remove the power of the Supreme Court to hear directly from a witness whose evidence might be pivotal in judicial proceedings with possible penal consequences. The committee draws to the attention of the Parliament a possible interference with the independence and impartiality of a court contrary to the *Kable* principle (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51).

131. Clause 64(2) may be compared with the scheme set out in the *Serious and Organised Crime Control Act 2008* (SA). Section 14(1) of that Act stated that:

The Court must, on application by the Commissioner, make a control order against a person (the "defendant") if the Court is satisfied that the defendant is a member of a declared organisation.

132. Section 14(1) was struck down by a majority of the Supreme Court of South Australia in *Totani v South Australia* [2009] SASC 301. The fatal defect in section 14(2) lay in the fact that a prerequisite to the making of a control order was the existence of a declaration by the Attorney-General (an administrative function) in relation to the organisation in question. Other provisions of the Control Act prevented the Court from examining the basis for this declaration. As such, the effect of section 14(1) was to graft:

non-judicial powers onto the judicial process in such a way that the outcome is controlled to a significant and unacceptable extent, by an arm of the Executive Government which destroys the court's integrity as a repository of Federal Jurisdiction.

133. It is arguable that clause 64(2) similarly interfers with the independence and impartiality of the Supreme Court. Clause 64(2) would prohibit the Court from 'going behind' an affidavit containing informant testimony. Reliance upon the evidence contained within such an affidavit is not an essential pre-requisite to a declaration of criminal intelligence by the Court, but if it were to be relied upon, clause 64(2) would dictate that the Court must accept the affidavit as presented by the Commissioner.

134. Clause 72 would allow the Court to 'have regard to whether matters mentioned in clause 60(a)(i) to (iii) outweigh any unfairness to a respondent'. It may be insufficient to remedy this defect because it would do nothing to overcome the totality of the exclusion established by clause 64(2). The Court would have no discretionary power to call informants as witnesses in the interests of fairness – it must either accept the evidence or reject it. Thus, if evidence were ever accepted under clause 64(2) then, notwithstanding clause 72, it might be considered by a court reviewing the constitutional validity of the legislation to involve an inappropriate grafting of non-judicial functions (in this case the gathering of evidence by law enforcement) on the judicial process. In accordance with principles enunciated in *Kable*, our constitutional arrangements require that legislation of the Queensland Parliament allows the Supreme Court of Queensland to remain independent of the Executive.

135. The explanatory notes indicate (at 3) that the legislative provision for use of secret 'criminal intelligence' evidence is consistent with fundamental legislative principles:

> *The Bill provides for the use of 'criminal intelligence' in civil proceedings which involves withholding admitted evidence from another party to a proceeding and hence raises substantial issues about the principles of natural justice.*
>
> *The use of criminal intelligence is necessary on the basis that the disclosure of such information could reasonably be expected to: prejudice a criminal investigation; lead to the identity of confidential informants or covert police officers; or endanger a person's life or physical safety.*
>
> *Significant safeguards are included in the Bill to address the necessary abrogation of natural justice being: the Supreme Court determines whether certain information should be treated as 'criminal intelligence' and is afforded full discretion in making such a determination; in the event the court declares information to be 'criminal intelligence' and the evidence is admitted, it is a matter for the court as to the weight placed upon such evidence; the Criminal Organisation Public Interest Monitor (COPIM) will be present at all hearings under the Bill and has access to all the information before the court (except to the extent that the material discloses an informant's name, current location, where the informant resides or position held within an organisation). The COPIM's role is in the nature of* amicus curiae *and will assist the court in making a decision as an independent and impartial tribunal.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

136. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative of achieving the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- a bill substantially uniform or complementary with legislation of the Commonwealth or another State.

137. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

138. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislation Assembly with information regarding whether the notes:

- have been tabled by the member;
- are in clear and precise language; and
- contain the information required by section 23.

139. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and contain the information required by section 23.

5. FAIR WORK (COMMONWEALTH POWERS) AND OTHER PROVISIONS BILL 2009

Date introduced: 27 October 2009

Responsible minister: Hon CR Dick MP

Portfolio responsibility: Attorney-General and Minister for Industrial Relations

ISSUES ARISING FROM EXAMINATION OF BILL

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

   - **clause 7** which would provide for the manner in which a reference of legislative power to the Commonwealth Parliament may be terminated;
   - **clauses 7 and 9(2)** which may allow the delegation of legislative power in an inappropriate case;
   - **clause 72** which would exempt proclamations made under the legislation from the staged automatic expiry provisions in part 7 of the Statutory Instruments Act; and
   - **clauses 7, 96, 109 and 111** which may authorise the amendment of an Act other than by another Act.

BACKGROUND

2. The legislation would refer particular matters to do with workplace relations to the Commonwealth Parliament and make related amendments to Queensland legislation, including regarding trustee companies. It would also make unrelated amendments to legislation regarding adoption and mutual recognition.

LEGISLATIVE PURPOSE

3. The bill is intended to 'refer to the Commonwealth the state's industrial relations powers for the private sector'.[3] It also has policy objectives of (explanatory notes 1-2):

   - facilitating national changes leading to Commonwealth regulation of trustee companies;
   - including in the *Adoption Act 2009* transitional arrangements for interim adoption orders made under the *Adoption of Children Act 1964*; and
   - allowing the Governor to make a gazette notice endorsing regulations proposed under the *Trans-Tasman Mutual Recognition Act 2003* (Cth).

4. Therefore, the bill would amend the:

   - *Acts Interpretation Act 1954*;
   - *Building and Construction Industry (Portable Long Service Leave) Act 1991*;
   - *Contract Cleaning Industry (Portable Long Service Leave) Act 2005*;
   - *Electoral Act 1992*;
   - *Electricity Act 1994*;
   - *Health Services Act 1991*;
   - *Industrial Relations Act 1999*;

[3] The Hon Cameron Dick MP, Attorney-General and Minister for Industrial Relations, Second Reading Speech, *Queensland Parliamentary Debates (Hansard),* 27 October 2009, 2863.

- Industrial Relations Regulation 2000;
- *Magistrates Courts Act 1921*;
- *Statutory Instruments Act 1992*;
- *Summary Offences Act 2005*;
- *Workers' Compensation and Rehabilitation Act 2003*;
- *Workplace Health and Safety Act 1995*;
- *Trustee Companies Act 1968*;
- *Foreign Ownership of Land Register Act 1988*;
- *Guardianship and Administration Act 2000*;
- *Trusts Act 1973*;
- *Adoption Act 2009*;
- *Trans-Tasman Mutual Recognition (Queensland) Act 2003*; and
- *Mutual Recognition (Queensland) Act 1992*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to the institution of Parliament

Institution of Parliament

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

6. **Clause 7** provides for the manner in which a reference of legislative power to the Commonwealth Parliament may be terminated. As stated in the explanatory notes (at 7), the committee has raised concerns in the past about the ability of the State to terminate a reference:

> *The Committee has previously raised concerns about the ability of the State to terminate a reference in accordance with provisions such as those in clause 7 of the Bill. For instance, in relation to the* Water (Commonwealth Powers) Act 2008*, the Committee questioned whether a state can revoke its referral of power at any time, by enactment, irrespective of the period of the referral, and the effect of that revocation on the Commonwealth enactment made pursuant to the referral.*
>
> *In relation to the* Water (Commonwealth Powers) Act 2008*, the Committee noted that it is arguable that the States can revoke a referral, given their incapacity to abdicate legislative power. The Committee further noted that it is also arguable that the effect of a revocation is that it not only terminates the referral of power to the Commonwealth, but that it also terminates the operation of any Commonwealth law enacted in reliance on that referral. It is acknowledged that an alternative argument is that State legislation revoking the reference would be rendered ineffective by section 109 of the Commonwealth Constitution as inconsistent with the Commonwealth legislation enacted pursuant to the original reference.*

7. The explanatory notes (at 7) provide a response to the committee's past concerns and indicate that clause 7 is consistent with fundamental legislative principles:

> *In response to these concerns, it is noted that the use of revocation provisions is common in State reference legislation. The approach taken in the Bill, enabling the Governor to fix a day, by proclamation, to terminate all of the references, or only the amendment or transition references, accords with the vast majority of State reference legislation enacted since 1952. For example, this approach was used in the* Water (Commonwealth Powers) Act 2008 *and the* Personal Properties Securities (Commonwealth Powers) Act 2009.
>
> *The Bill makes provision for Queensland to terminate all of* [the] *references, or just the amendment reference, or just the transition reference, at any time. The* Fair Work Amendment (State Referrals and Other Measures) Bill 2009 *(Cwlth) is the Commonwealth Bill which will give effect to Queensland's referral of matters. Item 31 of Schedule 1 of that Bill will insert into the* Fair Work Act 2009 *(Cwth) a new section 30L. The new section 30L will adequately protect the State's interests in the event that Queensland no longer wishes the Commonwealth to have the power to legislate with respect to the referred matters. Section 30L(6) makes it clear that the termination of the initial reference, the amendment reference, or the transition reference, would result in Queensland ceasing to be a referring State (except in specified circumstances explained below). This would bring to an end the Commonwealth's power to legislate for Queensland in relation to any of the referred matters. In other words, the*

new section 30L of the Fair Work Act 2009 (Cwlth) has been drafted in such a way that it will overcome any argument, based on s 109 of the Constitution, that Queensland could not terminate its referral.

8. More generally, the explanatory notes additionally address the argument that the bill may not have sufficient regard to the institution of Parliament because it reduces, in practical terms, the power of the Parliament of Queensland by referring power to the Parliament of the Commonwealth. However, justification for the referral is provided (at 9):

It is acknowledged that, in practical terms, the effect of the Bill will be that the power to legislate with respect to private sector employers and their employees will be referred to the Commonwealth Parliament. Technically, the Queensland Parliament will retain a concurrent power to legislate with respect to the referred matters. However, any Queensland law relating to industrial relations is likely to be rendered ineffective in so far as it applies to the referred private sector, because it is likely to be inconsistent with the Fair Work Act 2009 *(Cwth).*

Nonetheless, it is considered that the Bill is justified. As explained above, the Commonwealth's use of the "corporations power" to regulate employment relationships has created significant confusion about which employers and employees are subject to the Commonwealth laws. The Bill's referral of powers will remove that confusion and provide certainty to employers and employees in Queensland about which industrial relations system regulates their relationships. Further, as has again been explained above, it will remain open to Queensland to terminate the referral of powers at any time.

Delegation of legislative power

9. 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.

10. **Clauses 7 and 9(2)** would allow the Governor to terminate one or more of the references made under the legislation. However, the explanatory notes indicate (at 9-10) that sufficient regard is had to the institution of Parliament:

[C]lause 7 of the Bill enables the termination of all of the references, or only the amendment or the transition references, by the publication of a proclamation made by the Governor. Clause 9 provides that the date fixed for the termination of the references must usually be 6 months from the day of the proclamation. As explained above, the effect of terminating all, or any, of the references, will usually be that Queensland ceases to be a referring State.

However, new section 30L of the Fair Work Act 2009 *(Cwlth) will provide that if the Governor terminates the amendment reference on six months' notice, and the amendment reference of every other referring State terminates on the same day, Queensland and all other referring States will remain referring States.*

Additionally, clause 9(2) of the Bill makes it clear that the Governor may terminate the amendment reference on 3 months' notice if the Governor declares that, in his or her opinion, the Fair Work Act 2009 *(Cwth) has been amended, or is proposed to be amended, in a way that breaches one or more of the fundamental workplace relations principles. If the Governor terminates the amendment reference in these circumstances, Queensland will remain a referring State.*

If the amendment reference terminates in either of the two situations explained above, then the Fair Work Act 2009 *(Cwth), as in force at the time of the termination, will continue to apply in Queensland because Queensland will remain a referring State. However, until the Queensland Parliament re-enacts the amendment reference, any subsequent amendments the Commonwealth Parliament makes to the* Fair Work Act 2009 *(Cwth) will not take effect in Queensland's referred jurisdiction.*

Parliamentary scrutiny of delegated power

11. 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.

12. **Clause 72** would exempt proclamations made under the legislation from the staged automatic expiry provisions in part 7 of the *Statutory Instruments Act*.

13. Clause 72 would insert at the end of schedule 2A of that Act (Subordinate legislation to which part 7 does not apply) the words, 'a proclamation under the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009*'.

14. In its *Review of Part 7 of the* Statutory Instruments Act*: Interim Report and Call for Public Submissions*, the committee stated that:[4]

Subordinate legislation made by the executive is not subject to the same parliamentary and public checks as primary legislation. Therefore, common law, statutory and administrative mechanisms ensure the accountability of those who make subordinate legislation. Expiry and the related periodic review required by part 7 of the Statutory Instruments Act *are one accountability mechanism.*

15. However, consistency of clause 72 with fundamental legislative principles requiring that a bill sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly is not addressed in the explanatory notes (see, for example, 34).

Amendment of Act other than by another Act

16. 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.

17. **Clauses 7, 96, 109 and 111** may authorise the amendment of an Act other than by another Act.

18. 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. In January 1997, the committee reported to the Parliament on Henry VIII clauses.[5] 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.

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

20. The relevant sections of the national law would fall within the fourth of the categories of Henry VIII provisions considered excusable by the committee. The explanatory notes (at 10-1) indicate also that, for a number of additional reasons, sufficient regard is had to the institution of Parliament:

Clause 7 may be considered to be a "Henry VIII clause" because the effect of the Bill once enacted will be able to be brought to an end by an Executive act. It must be noted, however, that clause 10 of the Bill provides that a proclamation made by the Governor in accordance with clause 7 is subordinate legislation. This means that the proclamation must be tabled in the Legislative Assembly and may be disallowed by the Assembly (see sections 49 and 50 of the Statutory Instruments Act 1992*). The clause therefore is considered to have sufficient regard to the institution of Parliament, because Parliament has the opportunity to disallow the Governor's proclamation. Further, the power of the Governor to terminate a reference does not affect the power of the Parliament, by legislation, to repeal the referral law and thereby terminate the references.*

[I]t is arguable that the regulation-making power is a "Henry VIII clause" because the effect of the Act can be added to by regulation. It is therefore necessary to note that there are considerable restrictions governing the exercise of the power to declare employers not to be national system employers. Such a declaration can only be made in respect of an employer which is:

- *a body corporate established for a public purpose by or under a law of Queensland, by the Governor, or by a Minister; or*
- *a body established for a local government purpose by or under a law of Queensland; or*

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4 At 5, available at www.parliament.qld.gov.au/slc.

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

- *a wholly-owned subsidiary (within the meaning of the* Corporations Act 2001*) of, or a body which is wholly controlled by, a body mentioned above.*

A declaration cannot be made in respect of a university. Further, unless the employer is a body established for a local government purpose, or is owned or controlled by such a body, a declaration cannot be made in respect of an employer that:

- *generates, supplies, or distributes electricity; or*
- *supplies or distributes gas; or*
- *provides services for the supply, distribution or release of water; or*
- *operates a rail service or a port.*

To take effect, the declaration must name the particular employer (that is, a class or kind of employer cannot be declared), and be endorsed in writing by the Commonwealth Minister.

The regulation-making power to declare a particular employer not to be a national system employer is therefore limited to a small category of employers and must be exercised in an open and transparent manner. Further, that the declaration may be made by regulation is not considered objectionable because the regulation must be tabled in the Legislative Assembly, and may be disallowed.

21. Clause 96 would insert a new section 81 into the *Trustee Companies Act*. The new section would provide for the making of regulations of a saving or transitional nature for the purposes of:

- the enactment of part 4 of the bill;
- the transition from the regulation of trustee companies under the *Trustee Companies Act* to the regulation of trustee companies under the *Corporations Act 2001* (Cth); or
- applying, complementing or otherwise giving effect to the provisions of the *Corporations Act* regulating trustee companies.

22. Again, clause 96 would fall within one of the excusable categories. Nevertheless, the explanatory notes indicate (at 11-2) that it represents an appropriate delegation of legislative power:

[T]his regulation-making power is necessary where the Commonwealth is able to modify the operation of its legislation in this area by regulation. Those regulations may necessitate modifying the operation of provisions of the Trustee Companies Act 1968*; to avoid an inconsistency with the Commonwealth legislation; to ensure there is not a regulatory gap in the transitional arrangements between the Commonwealth and the State; or to complement Commonwealth regulatory measures. Similar provisions have been used in Queensland legislation when regulatory regimes are being substantially changed. The section and regulations made under it will expire two years after the commencement of the section.*

23. Clause 109 would amend the *Trans-Tasman Mutual Recognition (Queensland) Act* to allow the Governor to make, for the purposes of that Act, a gazette notice in the form stated in the schedule. The schedule then provides for authorised gazette notices to endorse proposed Commonwealth regulations.

24. Clause 111 would amend the *Mutual Recognition (Queensland) Act* to allow the Governor to approve by proclamation the terms of amendments to the *Mutual Recognition Act 1992* (Cth).

25. These clauses would also appear to fall within an excusable category of Henry VIII provisions and further justification is provided in the explanatory notes (at 12):

The amendment of the Queensland Mutual Recognition Act in this Bill expands the amendments of the Commonwealth Mutual Recognition Act that can be endorsed by the executive rather than with Parliamentary approval.

The intention of the Mutual Recognition legislation was to create legislative schemes allowing the sale of goods and carrying on of certain occupations across participating jurisdictions.

These Acts allow certain laws and certain goods to be excluded on a temporary or permanent basis from the operation of the mutual recognition schemes. The Commonwealth Mutual Recognition Act was fixed some time ago and there has arisen the need to amend the Commonwealth Mutual Recognition Act schedules to provide exemptions for other laws or categories of goods or occupations from the operation of the schemes.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

26. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

- the policy objectives of the bill and reasons for them;
- how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
- if appropriate, any reasonable alternative way to achieve the policy objectives and the reasons for not adopting the alternative/s;
- assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
- consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
- the extent to which consultation was carried out in relation to the bill;
- explanation of the purpose and intended operation of each clause of the bill; and
- whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State.

27. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

28. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislative Assembly with information regarding whether the notes:

- have been tabled by the member;
- are in clear and precise language; and
- contain the information required by section 23.

29. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and contain the information required by section 23. In respect of the requirement in section 23(1)(i) 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, the following information is provided (at 13):

> *Referral of matters to the Commonwealth Parliament*
>
> *The Bill is consistent with the other Australian states that have referred, or intend to refer, their private sector industrial relations powers to the Commonwealth.*
>
> *Amendments to the Trans-Tasman Mutual Recognition (Queensland) Act 2003*
>
> *This Bill is substantially uniform national legislation. The mutual recognition legislation adopts the Commonwealth mutual recognition legislation under section 51(xxxvii) of the* Commonwealth of Australia Constitution Act.
>
> *The Commonwealth mutual recognition legislation creates legislative schemes allowing the sale of goods and carrying on of certain occupations across the participating jurisdictions.*

Staged automatic expiry of subordinate legislation

30. Part 7 of the *Statutory Instruments Act* requires the staged automatic expiry of subordinate legislation to ensure:[6]

- reduction in the regulatory burden;
- relevance of subordinate legislation to the people of Queensland; and
- a statute book of the highest standard.

31. The essential features of the part 7 scheme are that:

- generally, subordinate legislation automatically expires after 10 years;
- it expires on the 1 September first occurring 10 years after it was made; and
- unlimited one year extensions to the expiry period may be made by regulation.

32. Slightly different arrangements are made for subordinate legislation made under 'national scheme legislation' and some legislation is exempted from the operation of part 7.

33. Section 57 of the *Statutory Instruments Act* provides that part 7 does not apply to subordinate legislation:

- requiring a resolution of the Legislative Assembly before it may be repealed or the status of land to which it applies may be changed; or
- mentioned in schedule 2A.

34. Currently, the following subordinate legislation is mentioned in schedule 2A:

- Drugs Misuse Regulation 1987;
- Nature Conservation (Protected Areas) Regulation 1994;
- Superannuation (State Public Sector) Deed 1990;
- Traffic Regulation 1962;
- Weapons Categories Regulation 1997; and
- a management plan under the *Wet Tropics World Heritage Protection and Management Act 1993*.

35. Clause 72 would insert at the end of schedule 2A the words, 'a proclamation under the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009*'.

[6] The committee is conducting an inquiry into part 7, see: *Review of part 7 of the* Statutory Instruments Act*: Interim Report and Call for Public Submissions* (2009).

6. INTEGRATED PLANNING AMENDMENT BILL 2009

Date introduced: 28 October 2009

Member: Mr PW Wellington MP

Nature of bill: Private member's bill

ISSUES ARISING FROM EXAMINATION OF BILL

1. The committee does not identify, for the consideration of Parliament, any matters regarding the application of fundamental legislative principles nor the operation of certain statutory provisions.

BACKGROUND

2. The bill would facilitate planning approvals for community hospice guest houses.

LEGISLATIVE PURPOSE

3. The bill is intended to make it easier to gain approval for community hospice guest houses (cottage hospices located in rural or rural residential areas) (explanatory notes, 1).

4. The bill would amend the *Integrated Planning Act 1997*.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

5. Part 4 of the *Legislative Standards Act* relates to explanatory notes. Section 22(1) requires a member who presents a bill to the Legislative Assembly to circulate to members an explanatory note for the bill before the resumption of the second reading debate. Section 23 requires an explanatory note for a bill to be in clear and precise language and to include the bill's short title and a brief statement regarding:

   - the policy objectives of the bill and reasons for them;
   - how the bill will achieve the policy objectives and why the method adopted is reasonable and appropriate;
   - if appropriate, any reasonable alternative way to achieve the policy objectives and the reasons for not adopting the alternative/s;
   - assessment of the administrative cost to government of implementation of the bill, including staffing and program costs but not the cost of developing the bill;
   - consistency of the bill with fundamental legislative principles and, if inconsistency arises, the reasons for the inconsistency;
   - the extent to which consultation was carried out in relation to the bill;
   - explanation of the purpose and intended operation of each clause of the bill; and
   - whether the bill is substantially uniform or complementary with legislation of the Commonwealth or another State.

6. Section 23(2) states that if the explanatory note does not include the information above, it must state the reason for the non-inclusion.

7. The committee examines explanatory notes to monitor generally the operation of part 4 and to provide the Legislative Assembly with information regarding whether the notes:

   - have been tabled by the member;

- are in clear and precise language; and
- contain the information required by section 23.

8. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language and contain the information required by section 23.

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 7 OCTOBER TO 27 OCTOBER 2009

(Listed in order of sub-leg number)

SL No 2009	SUBORDINATE LEGISLATION	Other Documents Tabled*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
211	Water Amendment Regulation (No.3) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
212	Water Resource (Pioneer Valley) Amendment Plan (No.1) 2009	EN	9/10/2009	24/02/2010	27/10/2009	25/02/2010
213	Fisheries Legislation Amendment Regulation (No.4) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
214	State Development and Public Works Organisation Amendment Regulation (No.3) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
215	Liquor Amendment Regulation (No.2) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
216	Adoption of Children Amendment Regulation (No.2) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
217	Proclamation commencing remaining provisions (*Adoption Act 2009*)		9/10/2009	24/02/2010	27/10/2009	25/02/2010
218	Forestry and Nature Conservation Legislation Amendment Regulation (No.5) 2009		9/10/2009	24/02/2010	27/10/2009	25/02/2010
219	Fair Trading (Sky Lantern) Order 2009		7/10/2009	23/02/2010	27/10/2009	24/02/2010
220	Health Practitioners (Special Events Exemption) Regulation 2009		16/10/2009	24/02/2010	27/10/2009	25/02/2010
221	Local Government Legislation Amendment Regulation (No.2) 2009		16/10/2009	24/02/2010	27/10/2009	25/02/2010
222	Transport Legislation and Another Regulation Amendment Regulation (No.1) 2009		16/10/2009	24/02/2010	27/10/2009	25/02/2010
223	Proclamation commencing certain provision (*Transport Legislation Amendment Act 2007*)		16/10/2009	24/02/2010	27/10/2009	25/02/2010
224	Proclamation commencing certain provisions (*Transport and Other Legislation Amendment Act 2008*)		16/10/2009	24/02/2010	27/10/2009	25/02/2010
225	Proclamation commencing certain provisions (*Transport and Other Legislation Amendment Act 2008*)		16/10/2009	24/02/2010	27/10/2009	25/02/2010
226	Motor Racing Events Amendment Regulation (No.3) 2009		16/10/2009	24/02/2010	27/10/2009	25/02/2010
227	Environmental Protection and Other Legislation Amendment (Postponement) Regulation 2009		16/10/2009	24/02/2010	27/10/2009	25/02/2010
228	Radiation Safety Amendment Regulation (No.1) 2009		23/10/2009	24/02/2010	27/10/2009	25/02/2010
229	Police Legislation Amendment Regulation (No.1) 2009		23/10/2009	24/02/2010	27/10/2009	25/02/2010
230	Food Production (Safety) Amendment Regulation (No.1) 2009		23/10/2009	24/02/2010	27/10/2009	25/02/2010

SL No 2009	SUBORDINATE LEGISLATION	Other Documents Tabled*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
231	Transport Operations (Passenger Transport) Amendment Regulation (No.2) 2009		23/10/2009	24/02/2010	27/10/2009	25/02/2010
232	Proclamation commencing certain provision (*Transport (New Queensland Driver Licensing) Amendment Act 2008*)		23/10/2009	24/02/2010	27/10/2009	25/02/2010
233	Proclamation commencing certain provisions (*Electrical Safety and Other Legislation Amendment Act 2009*)		23/10/2009	24/02/2010	27/10/2009	25/02/2010

* EN – Explanatory Notes; RIS – Regulatory Impact Statement; MS – Ministerial Statement

** TBA – Disallowance date to be advised when 2010 parliamentary sitting dates are available.

SUBORDINATE LEGISLATION UNDER CONSIDERATION

7. PROCLAMATION COMMENCING CERTAIN PROVISIONS SL223.09

Date tabled: 16 October 2009

Disallowance date: 25 February 2010

Responsible minister: Hon R Nolan MP

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding the delayed commencement of amendments to *Transport Operations (Road Use Management) Act 1995*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to the institution of Parliament

Rights and liberties

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

3. The *Transport Legislation Amendment Act 2007* received assent on 25 October 2007. Section 2 of that Act provided:

   2 Commencement

   (1) The following provisions commence on a day to be fixed by proclamation—

   - parts 4 and 5
   - part 6, division 2
   - sections 79(2), 80 to 83, 87(3) to (5), (7) and (8)
   - schedule.

   (2) Section 79(1) commences immediately after the commencement of the *Transport Legislation and Another Act Amendment Act 2007*, section 56(2).

4. On 15 October 2009, nearly two years after assent, a proclamation was made for the commencement of section 70 (in part 6, division 2) of the *Transport Operations (Road Use Management) Act 1995* on 19 October 2009.

5. The section proclaimed amended section 163(8) (Forfeiture on conviction) of the *Transport Operations (Road Use Management) Act* and, in particular, the definition of an 'extreme overloading offence'.

6. Legislation commencing by way of proclamation nearly two years after the date of assent has the potential to affect rights and liberties of individuals. The committee invites the minister to provide information regarding the delayed commencement. In this context, the committee notes in its report in *Legislation Alert 10/09* regarding commencement of section 87(3), (5), (7) and (8) of the TORUMS Act on 12 October 2009.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

8. 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
Committee report on bill: 09/09; at 21 - 23
Date response received: 28/10/09 (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 14 and 16** which may affect rights to privacy of personal information.

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.

Hon Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trad

Ref: MN107482 / B44.09.09

27 OCT 2009

SCRUTINY OF
28 OCT 2009
LEGISLATION COMMITTEE
B44.09

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

Jo-Ann

Dear Ms Miller

Thank you for your letter of 5 October 2009 providing the Scrutiny of Legislation Committee's comments regarding the Trade Measurement Legislation Repeal Bill 2009, as contained in Legislation Alert 09/09.

The Committee has drawn the Legislative Assembly's attention to whether Clauses 14 and 16 of the Bill have sufficient regard to the rights and liberties of individuals, in particular, the right to privacy of personal information. The attached document complements information provided in the explanatory notes addressing this issue.

The committee has also drawn attention to the requirement of the explanatory notes to identify the uniform and complementary nature of legislation and to provide a brief explanation of the scheme. The committee has noted that the explanatory notes for the Trade Measurement Legislation Repeal Bill 2009 identify the uniform and complementary nature of the scheme and provide a brief description of this scheme. The attached document provides further information about the nature of the uniform trade measurement law and Commonwealth administration.

Thank you for the opportunity to comment on the Legislation Alert as it relates to the Trade Measurement Legislation Repeal Bill 2009.

Yours sincerely

Peter Lawlor.

Peter Lawlor MP
Minister for Tourism and Fair Trading

Encl

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Response to Scrutiny of Legislation Committee
Legislation Alert Number 09 of 2009

Trade Measurement Legislation Repeal Bill 2009

Rights and liberties of individuals - privacy of information

The Committee has indicated that clauses 14 and 16 of the Trade Measurement Legislation Repeal Bill 2009 may impact on the fundamental legislative principle requiring that legislation have sufficient regard to rights and liberties of individuals (section 4(2) of the *Legislative Standards Act 1992*), in that the relevant clauses may impact on privacy of personal information.

Clause 14 of the Bill provides for the provision of information to the National Measurement Institute, following the repeal of the *Trade Measurement Act 1990* and the *Trade Measurement Administration Act 1990* (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.

Authorising the supply of information held by Queensland trade measurement authorities, including about licensees and regulated traders, to the Commonwealth in the Trade Measurement Legislation Repeal Bill 2009, is considered reasonable and necessary in the circumstances.

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 relevant Commonwealth agency, which will receive the information, is the National Measurement Institute - Department of Innovation, Industry, Science and Research.

The only information provided will be that information obtained in the lawful administration of the repealed Trade Measurement Acts. Currently under the *Trade Measurement Act 1990*, licences are issued to operate public weighbridges and to verify and service trade measuring instruments. The licensee information is held by the Queensland Government in accordance with section 47 of the *Trade Measurement Act 1990*. This section provides for a register of the prescribed particulars in relation to licences to be kept. It is this information that it is proposed to be transferred to the Commonwealth in accordance with clause 16 of the Bill.

The information provided will be for the same purpose that it is currently utilised under the Trade Measurement Acts - that is a system of licensing for the trade measurement system. This is also information that the current licensees themselves would provide to the Commonwealth upon commencement of Commonwealth administration in accordance with the provisions of the amended *National Measurement Act 1960* (Cwth). The provisions in this Bill expedite this process so that the Commonwealth can establish information systems and can recognise licensees under the new national trade measurement regime prior to the commencement of Commonwealth administration.

Therefore the provision of the register relating to licences will have beneficial impacts for current Queensland licensees as it will enable the recognition of their licences by the Commonwealth, without the need for them to apply under the Commonwealth scheme.

It is also important that the Commonwealth receive the particulars of ongoing disciplinary and enforcement matters. The transfer of information about administrative and enforcement matters yet to be finalised at the time of the repeal will maintain business and market confidence by avoiding gaps in administration and enforcement of trade measurement law during the transition.

Uniform or complementary nature of legislation to be addressed

The Committee has indicated that section 23(1)(i) of the *Legislative Standards Act 1992* 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.

The new Commonwealth law will be substantially based on the uniform trade measurement law currently administered by the States and Territories.

Currently the *Commonwealth National Measurement Act 1960* establishes a national system of units and standards of measurement and provides for the uniform use of those units and standards throughout Australia.

State and Territory legislation provides the legal framework for ensuring that weights and measures used in trade are accurate. In accordance with the Uniform Trade Measurement Legislation and Administration Agreement of 1990, each jurisdiction has implemented substantially uniform trade measurement law.

The *National Measurement Amendment Act 2008* amends the *National Measurement Act 1960* so that from 1 July 2010 the Commonwealth will administer the uniform trade measurement law. The legislation includes provisions for:

- requirements for measuring instruments used for trade
- general provisions for using measurement in trade
- requirements for measurement of pre-packaged goods
- enforcement provisions including provisions for infringement notices and enforceable undertakings
- requirements for the appointment of Commonwealth trade measurement inspectors and their powers
- licensing provisions for the verifiers of measuring instruments and the operation of public weighbridges and
- requirements for the appointment of verifiers of utility meters.

Like the existing legal framework, the technical and administrative details required for the system will be specified in regulations.

It is expected that each State and Territory will introduce similar legislation to the Trade Measurement Legislation Repeal Bill 2009, repealing their own trade measurement laws and providing for transitional arrangements, prior to the end of 2009.

9. TRANSPORT AND OTHER LEGISLATION AMENDMENT BILL 2009

Date introduced: 8 October 2009

Responsible minister: Hon Ms R Nolan MP

Portfolio responsibility: Minister for Transport

Committee report on bill: 10/09; at 31 - 38

Date response received: 06/11/09 (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 14 and 18** as they would create new offences;
   - **clause 22** which would allow a taxi service licence to be suspended or cancelled for the non-payment of a taxi industry security levy;
   - **clause 14** conferring administrative powers on authorised persons for the purposes of waterway transport management plans;
   - **clause 18** conferring the general manager for Maritime Safety Queensland with powers of direction regarding pilotage areas;
   - **clauses 31 to 33** allowing transport inspectors to enforce Queensland Road Rules regarding bus and transit lanes; and
   - **clause 14** requiring a person to give their name and address to an authorised person.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clause 11** allowing the chief executive to make guidelines regarding development under the *Integrated Planning Act;* and
   - **clause 34** authorising a regulation to amend a section of the *Transport Operations (Road Use Management) Act*.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Rachel Nolan MP
Member for Ipswich

Queensland Government

Minister for Transport

Our ref: MC45241

Your ref: B52.09

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

Dear Mrs ~~Miller~~ Jo-Ann

Re: Transport and Other Legislation Amendment Bill 2009

Thank you for your letter of 26 October 2009 requesting that the Committee's comments on the Transport and Other Legislation Amendment Bill 2009 (the Bill) be included in Alert Digest No. 10 of 2009.

The Committee has noted that the Bill contains a number of potential breaches of fundamental legislative principles. It has also identified material in the accompanying explanatory notes justifying the potential breaches.

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

Yours sincerely

RACHEL NOLAN MP
Minister for Transport

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PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

10. PROCLAMATION COMMENCING CERTAIN PROVISIONS SL195.09

Date tabled: 15 September 2009
Disallowance date: 26 November 2009
Responsible minister: Hon R Nolan MP
Committee report on bill: 10/09; at 48
Date response received: 06/11/09 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding the delayed commencement of amendments to the *Transport Operations (Road Use Management) Act 1995.*

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.

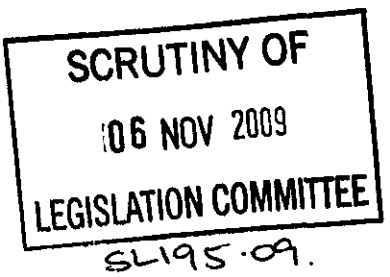
Hon Rachel Nolan MP
Member for Ipswich

Queensland Government

Minister for Transport

Our ref: MC45242

Your ref: SL195.09



Ms Jo-Ann Miller
Chair
Scrutiny of Legislation Committee
Parliament House
George street
Brisbane Qld 4000

Dear Ms ~~Miller~~ Jo-Ann

Thank you for your letter of 26 October 2009 enclosing an extract from the committee's Legislation Alert No. 10 of 2009.

The Committee has noted the time that elapsed between the *Transport Legislation Amendment Act 2007* receiving assent and the commencement by proclamation of certain sections within that Act. Those sections inserted definitions of 'motorised scooter' and 'scooter' into the *Transport Operations (Road Use Management) Act 1995.*

Insertion of these new definitions was one component of Queensland's adoption of national reforms for the use of motorised scooters on roads and road-related areas. Given the timeframes for the amendment of primary legislation, the amendments were progressed in the first appropriate amendment bill following the release of the national reforms. It was always the intention that commencement of the amendments would need to await the second component of the national reforms which involved changes to the Queensland Road Rules.

Drafting of the related amendments to the Queensland Road Rules was done in conjunction with the 10-year rewrite of that regulation (see Part 7 of the *Statutory Instruments Act 1992*) and with the adoption of subsequent packages of national road rules amendments. To allow time for this significant drafting process, the automatic commencement of the Act amendments was postponed as allowed under section 15DA(3) of the *Acts Interpretation Act 1954.*

The new Queensland Road Rules commenced on 12 October 2009 and the new definitions of 'motorised scooter' and 'scooter' commenced on that same date.

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I am advised that the delayed commencement of these definitions did not adversely affect the rights and liberties of any individual.

I thank the committee for its careful consideration of the legislation and for its comments and trust the above information has been of assistance.

Yours sincerely

RACHEL NOLAN MP
Minister for Transport