Legislation Alert

Tabled 9 February 2010 - Issue No 1 of 2010

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. CONSTITUTION (PREAMBLE) AMENDMENT BILL 2009

Date introduced: 24 November 2009

Responsible minister: Hon AM Bligh MP

Portfolio responsibility: Premier

ISSUES ARISING FROM EXAMINATION OF BILL

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

   - **clause 5** which is intended to ensure that a preamble inserted into the *Constitution of Queensland 2001* has no effect upon rights and liberties of individuals; and
   - **clauses 4 and 5,** for consideration whether they may have 'unintentional disregard' for Aboriginal tradition and Island custom.

BACKGROUND

2. The legislation would insert a preamble, an introductory statement, into the *Constitution of Queensland 2001*.

LEGISLATIVE PURPOSE

3. The bill is to amend the Constitution by inserting:

   - a preamble after the long title; and
   - a new section 3A stating that the preamble is not intended to grant any legal right, create any liability or be used as an aid to statutory interpretation of the Constitution or any other law.

4. In her second reading speech, the Premier stated that the proposed preamble:[1]

   … will provide an enduring statement on behalf of the Queensland people that acknowledges where we have come from and our aspirations for tomorrow's Queensland.

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 5** would insert a new section 3A (Effect of preamble) into the Constitution to ensure that the proposed preamble has no effect upon rights and liberties of individuals. In her second reading speech to the bill, the Premier stated that the government had sought advice regarding the use of the proposed preamble as an aid to interpretation. However, the advice has not been tabled.

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[1] The Hon Anna Bligh MP, Premier and Minister for the Arts, Second Reading Speech, *Record of Proceedings (Hansard)*, 24 November 2009, 3476.

7. The legal effect of a constitutional preamble, together with a provision such as the new section 3A, has been considered in a number of Australian jurisdictions. An overview is provided below.[2]

8. A preamble is part of a statute and, ordinarily, use can be made of it for the purposes of interpreting the whole Act. Provisions of the *Acts Interpretation Act 1954* are consistent with this approach (see, for example, sections 10 and 35B). In *Wacando v Commonwealth* (1981) 148 CLR 1 at 23, Mason J described use of a legislative preamble as follows:

> *It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object. There is, however, one difficulty in seeking to restrict the generality of the operative provision by reference to a suggested restriction expressed in the preamble: it is that Parliament may intend to enact a provision which extends beyond the actual problem sought to be remedied. Recognition of this difficulty led Viscount Simonds in Attorney*-General v. Prince Ernest Augustus of Hanover *(1957) AC 436, at p 463 to say "that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it".*

9. However, the bill makes specific provision as to the intention of Parliament for the role of the preamble. Clause 5 states:

> **3A Effect of preamble**
> The Parliament does not intend by the preamble to—
> (a) create in any person any legal right or give rise to any civil cause of action; or
> (b) affect in any way the interpretation of this Act or of any other law in force in Queensland.

10. The explanatory notes say (at 3) that clause 5 makes it clear that the preamble is a statement of aspiration, not intended to create nor affect rights, nor to be used for the purposes of statutory interpretation. Accordingly, although at common law a preamble may assist statutory interpretation of an Act (including interpretation of provisions affecting individual rights and liberties), clause 5 is intended to remove this prospect.

11. Clause 5 is modelled on section 1A(3) of the *Constitution Act 1975* (Vic) (explanatory notes, 3):[3]

> *The new section 3A is substantially the same as subsection 1A (3) of the Victorian* Constitution Act 1975*, inserted by the* Constitution (Recognition of Aboriginal People) Act 2004*, which provides a statement of recognition of Aboriginal peoples.*

12. The Victorian provision itself followed proposed amendments to the Commonwealth Constitution rejected by the Australian people in a national referendum in 1999. The proposal was for a preamble and an amendment in the following terms:[4]

> **125A Effect of preamble**
> The preamble to this Constitution has no legal force and shall not be considered in interpreting this Constitution or the law in force in the Commonwealth or any part of the Commonwealth.

13. Prior to the national referendum, the legal effect of a constitutional preamble had been the subject of discussion at the 1998 Constitutional Convention.[5] At that time, in relation to the proposed section 125A, some doubts were expressed about whether it would in fact preclude 'judicial recourse to the values and principles expressed in the new preamble': [6]

> *Several suggestions have been made as to ways in which those values and principles could be harnessed by courts, and especially the High Court, in spite of the sweeping s 125A directive. Leslie Zines has stated in regard to the more limited approach of the Convention, in an argument that applies equally to s 125A:*

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2 See also: K Roach, *The Uses and Audiences of Preambles in Legislation* (2001) 47 McGill LJ 129.

3 Explanatory notes, 3.

4 *Constitution Alteration (Preamble) 1999* (Cth), s4.

5 See: http://www.aph.gov.au/library/pubs/CIB/1997-98/98cib11.htm.

6 M McKenna et al, 'With hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 UNSWLJ 401, 411-2; L Zines, 'Preamble to a Republican Constitution' (1999) 10 PLR 67, 68; and H Gibbs, 'A Preamble: The Issues' (1999) 11 *Upholding the Australian Constitution* 85, 92.

> 'Whatever one thinks of the Convention's attempt to prevent judicial use of the preamble, I doubt whether it would be effective. It would, for example, be open to judges to find those very values or aspirations to be community values if they arrived at that conclusion from other sources, such as their own experience or intuition.'

Sir Harry Gibbs, a former Chief Justice of the High Court, argued that even given s 125A, a preamble might be relied upon as evidence supporting, as a matter of fact, the statements made therein.

14. In Queensland, the legal effect of a preamble has been considered by two parliamentary committees asked to examine the enactment of a preamble to the *Constitution of Queensland*. In 2004, the Legal, Constitutional and Administrative Review Committee of the 51st Parliament reported that it did not believe that a preamble should be developed or enacted at that time, including for the reason that 'uncertainty exist[ed] as to how such a preamble should or might be used to interpret the Constitution, particularly if that preamble contained statements of values or aspirations'.[7] In September 2009, the Law, Justice and Safety Committee recommended a suggested preamble be inserted into the Constitution, but that the Government should first obtain expert legal advice on any statutory interpretation implications which might arise.[8] A statement of reservation from three members of the Law, Justice and Safety Committee expressed concern about a preamble being used to interpret statutes, 'without first being considered and approved by the people of Queensland by way of a referendum' and said advice on the legal effect of the proposed preamble should be obtained from expert/s independent of Government.[9]

15. In respect of these matters, the Premier stated in her second reading speech: [10]

The [Law, Justice and Safety] *committee's report … recommended that the government seek advice on any legal implications arising from the insertion of a preamble. I inform the House that the government, on the basis of that advice, has included a clause which will exempt the use of the preamble as an aid for interpreting the Constitution or any other Queensland law. Further, the Solicitor-General has confirmed that this preamble can be included in the* Constitution of Queensland *by an act of parliament and therefore does not require a referendum.*

16. The committee notes, also, that to date, the effect of section 1A(3) of the *Constitution Act 1975* (Vic) has not raised for consideration or application by Victorian courts.

Aboriginal tradition and Island custom

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

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

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

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

19. **Clauses 4 and 5** and relevant matters regarding Aboriginal tradition and Torres Strait Islander custom are examined below.

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7 Report No. 46, 23, available at: http://www.parliament.qld.gov.au/view/committees/documents/lcarc/reports/LCAR046.pdf.

8 Report No. 70, 14, available at: http://www.parliament.qld.gov.au/view/committees/documents/lcarc/reports/Report%2070.pdf.

9 Report No. 70, 15, available at: http://www.parliament.qld.gov.au/view/committees/documents/lcarc/reports/Report%2070.pdf.

10 The Hon Anna Bligh MP, Premier and Minister for the Arts, Second Reading Speech, *Record of Proceedings (Hansard)*, 24 November 2009, 3477.

20. The Premier's second reading speech referred to a key aspect of the proposed preamble as the acknowledgment of Aboriginal peoples and Torres Strait Islanders as the First Australians: [11]

Queensland's Aboriginal and Torres Strait Islander peoples are part of what defines Queensland. As we celebrate Queensland's 150th anniversary, we also acknowledge that Queensland's Aboriginal and Torres Strait Islander people have been the custodians of Queensland for significantly longer. This preamble includes an acknowledgement of Indigenous Queenslanders as the first Australians, their unique relationship with the beautiful lands, seas and waterways of Queensland, and their position as representatives of the oldest living culture on earth. Indeed, unique among the states and territories of Australia, Queensland is home to two distinct Indigenous peoples, our Aboriginal people and our Torres Strait Islander people, and with this preamble we recognise and honour their ancient cultures. Queenslanders can be proud of this important step in the ongoing reconciliation process that Queensland's Aboriginal and Torres Strait Islander peoples are recognised.

21. Clause 4 states:

Preamble—

The people of Queensland, free and equal citizens of Australia—

(a) intend through this Constitution to foster the peace, welfare and good government of Queensland; and

(b) adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; and

(c) honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share; and pay tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community; and

(d) determine to protect our unique environment; and

(e) acknowledge the achievements of our forebears, coming from many backgrounds, who together faced and overcame adversity and injustice, and whose efforts bequeathed to us, and future generations, a realistic opportunity to strive for social harmony; and

(f) resolve, in this the 150th anniversary year of the establishment of Queensland, to nurture our inheritance, and build a society based on democracy, freedom and peace.

22. The committee has, in the past, noted that the example of fundamental legislative principles provided in section 4(3)(j) of the *Legislative Standards Act* appears to have developed from two considerations: [12]

- the need to take 'a modest first step towards recognition of customary laws'; and
- recognition of the unique status of Aboriginal peoples and Torres Strait Islanders as Australia's Indigenous peoples.

23. The second reading speech to the Legislative Standards Bill 1992 also indicated that the example provided in section 4(3)(j) was intended to be both innovative and adaptive over time to accommodate changed understandings of the fit between our 'parliamentary democracy based on the rule of law' and 'Aboriginal tradition and Island custom': [13]

I would like to make mention of one further principle which this Government supports and which is trailblazing and unique in Australia. I refer to the requirement, which honourable members will notice in the Bill, that regard should be had for Aboriginal tradition and Torres Strait Islander custom when considering introduction of new legislation. This Government considers that, for too long, little notice has been taken of the traditions and customs of our indigenous peoples when legislation is drafted by members of our non-indigenous majority...

This provision will ensure that legislators will take account of concerns that Aboriginal and Torres Strait Island people may have insofar as they might affect their rights and interests. Parliament would, of course, retain its prerogative whether or not it accepted this principle in particular circumstances, but what would be avoided would be the unintentional disregard of tradition and custom that is currently possible.

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11 The Hon Anna Bligh MP, Premier and Minister for the Arts, Second Reading Speech, *Record of Proceedings (Hansard)*, 24 November 2009, 3476.

12 *Legislation Alert* 01/99, 12-7.

13 The Hon Wayne Goss MP, Premier, Minster for Economic Trade Development and Minister for the Arts, Second Reading Speech, *Queensland Parliamentary Debates (Hansard)*, 6 May 1992, 5003.

24. For the application of section 4(3)(j) to clause 4, matters for the consideration of the Parliament as to whether clause 4 might have 'unintentional disregard' for Aboriginal tradition and Torres Strait Islander custom include:

- the relationship between the *Constitution of Queensland* as a whole and Aboriginal tradition and Torres Strait Islander custom;
- the wording of the proposed preamble which refers to honouring Aboriginal peoples and Torres Strait Islanders, their values and cultures but is silent on issues such as sovereignty, governance, customary laws and rights and liberties of Aboriginal peoples and Torres Strait Islanders;
- international law human rights standards relating to Queensland's Aboriginal peoples and Torres Strait Islanders;[14] and
- that although the proposed preamble was drafted following public consultation by a parliamentary committee, including consultation of the Aboriginal and Torres Strait Advisory Council, the diversity of the people of Queensland including those who identify as Aboriginal or Torres Strait Islander have not had an opportunity to demonstrate broad support for the proposed wording.

25. The committee notes, however, that clause 4 does not seek to address complex issues of law, sovereignty and rights. Further, the Aboriginal and Torres Strait Advisory Council's 'statement of recognition of Indigenous Queenslanders is included in full and unamended'. These factors may indicate that the preamble represents no more than a negotiated compromise, an incremental 'step in the ongoing reconciliation process'. [15]

26. In relation to whether clause 5 has sufficient regard to Aboriginal tradition and Torres Strait Islander custom, the committee refers to its examination of clause 5 regarding rights and liberties generally. The committee observed there that, in relation to amendments proposed for the Commonwealth Constitution, commentators suggested courts might refer to values and principles expressed in a preamble even where a provision such as clause 5 was included in the Constitution. The late Sir Harry Gibbs argued that a preamble might be relied upon as evidence supporting, as a matter of fact, the statements made therein. Relevantly, the former Chief Justice cautioned that this might prove particularly significant in the context of native title if a preamble contained recitals about the dispossession of 'Indigenous peoples' or their relationship with the land.[16] In this context, the committee notes that paragraph (c) of the proposed preamble states that the people of Queensland honour the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, 'whose lands, winds and waters we all now share'.

27. The committee refers to the Parliament the question whether clauses 4 and 5 might have 'unintentional disregard' for Aboriginal tradition and Island custom.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

28. 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 providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

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

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14 United Nations Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (2010), ch 6.

15 The Hon Anna Bligh MP, Premier and Minister for the Arts, Second Reading Speech, *Record of Proceedings (Hansard)*, 24 November 2009, 3476.

16 H Gibbs, 'A Preamble: The Issues' (1999) 11 *Upholding the Australian Constitution* 85, 92.

2. CRIMINAL CODE (ABUSIVE DOMESTIC RELATIONSHIP DEFENCE AND ANOTHER MATTER) AMENDMENT BILL 2009

Date introduced: 26 November 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:
   - **clause 3** which would alter the legislative balance currently struck regarding rights and liberties of individuals;
   - **clause 4** which would insert a new offence in the Criminal Code;
   - **clause 5** inserting a new section 723 into the Criminal Code to make the partial defence in the new section 304B available from the commencement of the legislation; and
   - **clause 3** which would incorporate terminology in the *Domestic and Family Violence Protection Act 1989* into new section 304B(2) of the Criminal Code.

BACKGROUND

2. The legislation would amend the Criminal Code to:
   - adopt a recommendation of the Queensland Law Reform Commission regarding unlawful killing in an abusive domestic relationship; and
   - implement further reforms developed by the Model Criminal Law Officers' Committee regarding debit/credit card skimming and identity theft.

LEGISLATIVE PURPOSE

3. The objective of the bill is to (explanatory notes, 1):

   … amend the Criminal Code by inserting a new partial defence to murder of "killing in an abusive domestic relationship" and a new offence of unlawfully possessing equipment.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

4. 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.*

5. **Clause 3** would insert a new section 304B (Killing in an abusive domestic relationship) into chapter 28 of the Criminal Code. An unlawful killing by a person of his or her partner in a seriously abusive and violent relationship would constitute manslaughter, rather than murder according to existing provisions of the Code.

6. Accordingly, the new section 304B would alter the legislative balance struck between competing rights and liberties of individuals. Information regarding the competing considerations is provided in the explanatory notes (at 3-4):

The defence represents a balance between necessarily punishing those who would otherwise be guilty of murder, and providing some legal protections for victims of serious abuse.

It provides a sentencing discretion for those to whom the defence could apply, instead of mandatory life imprisonment. However, it will operate with constraints by linking the category of offenders who can rely on the defence to prescriptive definitions of relationship and violence, and requiring an element of reasonableness with regard to the history of the relationship to avoid unmeritorious abuse of the defence. The use of the term 'serious' within the provision in relation to the level of domestic violence represents an appropriate threshold for the application of a defence that protects accused who would otherwise be guilty of murder.

The new defence will operate to reduce a charge of murder to manslaughter. It will operate in addition to, not instead of, other defences/excuses. Therefore, a victim of abuse charged with the murder of their abuser may wish to raise the complete defence of self-defence for the purposes of an acquittal, the partial defence of diminished responsibility or provocation to reduce a charge of murder to manslaughter, as well as the new partial defence depending on the circumstances of the case. It will then be a matter for the jury having regard to all the defences/excuses left to them to determine criminal responsibility.

7. **Clause 4** would amend section 408D of the Criminal Code to insert a new offence. The proposed offence and maximum penalty are outlined below.

Clause	New section	Offence	Proposed maximum penalty
4	408D(1A)	Obtaining or dealing with identification information	Three years' imprisonment

8. The explanatory notes provide (at 4) the following information regarding the consistency of clause 4 with fundamental legislative principles:

The creation of a new offence, with a maximum penalty of three years imprisonment, will affect the rights and liberties of individuals. However, the defences and excuses available under Chapter 5 of the Criminal Code will apply and the offence is dependant on proof of an unlawful purpose, that is, that the person possesses the equipment for the purpose of committing or facilitating the commission of an offence against section 408D (1).

Identity theft/fraud significantly impacts businesses and financial institutions. Such conduct can leave individual victims with a lost financial, social or legal reputation that is difficult to recover. Specifically, skimming of bank card information is estimated to have cost Australian individuals, businesses and financial institutions tens of millions of dollars over the past five years. Victims face a loss of savings, damage to their credit rating and the emotional distress of having their bank card information stolen.

The proposed penalty for this offence is consistent with the penalty for obtaining or dealing with identification information under section 408D of the Queensland Criminal Code, which is three years imprisonment. This is consistent with the approach taken in South Australia and Victoria, where the maximum penalties for possessing bank card information skimming devices is also three years imprisonment.

9. The explanatory notes also indicate (at 3) that the new section 408D(1A) is to be a more specific offence than an existing offence in section 510 of the Criminal Code:

Whilst section 510 of the Criminal Code provides the offence of possessing instruments and materials for forgery it is limited in its application and carries a maximum penalty of 14 years imprisonment.

The new offence will make it unlawful to possess equipment for the purpose of committing an offence of obtaining or dealing with identification information and will carry a maximum penalty of three years imprisonment, consistent with the offence of section 408D (1).

Onus of proof

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

11. **Clause 3** would provide a partial defence which may be raised by a victim of serious domestic violence upon trial for the murder of the abuser. The explanatory notes state (at 11) that the persuasive onus of proof remains with the Crown:

The onus of proof will be on the Crown. The prosecution, in cases where the defence is raised on the evidence, will have the responsibility of disproving the defence beyond a reasonable doubt; in particular, establish beyond a reasonable doubt any or all of the following:

• the accused was not in a serious domestic violence with the deceased;

- *the deceased did not commit acts of serious domestic violence against the accused in the course of the relationship;*
- *the accused did not hold a belief at the time of the killing that the killing was necessary for the accused's preservation from death or grievous bodily harm;*
- *even if the belief was held, that the belief was not reasonable having regard to the abusive relationship and all the circumstances of the case.*

Retrospective operation

12. 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.

13. **Clause 5** would insert a new section 723 into the Criminal Code. Clause 5 would operate to make the partial defence in the new section 304B available from the commencement of the legislation. The explanatory notes provide the following information (at 11-2):

Clause 5 inserts a transitional provision, section 723, in relation to the new defence so that the defence applies to proceedings for an offence that were started but not finished at the time of commencement of the provision. Further, for the application of the new defence, it does not matter whether the act or omission constituting the offence charged was committed before or after the commencement. The transitional provision allows the defence to be raised:

- *at any proceeding started before the commencement of the Bill, provided the proceeding has not finished, and*
- *at any proceeding that starts after the commencement of the Bill, regardless of when the act or omission constituting the offence charged was committed.*

Section 723(3) does not allow the amendments to apply to an appeal from a conviction or sentence where the conviction or sentence appealed from happened before the commencement of the provision.

14. The committee first notes that section 20C of the *Acts Interpretation Act* (creation of offences and charges in penalties) would have no application – it relates to increases in penalties.

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

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

16. Clause 5 would make clear the parliamentary intention that, from commencement, the partial defence would be available. Any retrospective operation would favour a person found guilty of the offence of manslaughter in the new section 304B.[17]

Clear meaning

17. 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.

18. **Clause 3** would insert new section 304B(2) into the Criminal Code. The new subsection would have the effect of incorporating terminology in the *Domestic and Family Violence Protection Act 1989* into new section 304B.

[17] Common law principles of statutory interpretation similarly provide that, where it is clear that a changed penalty is to apply to all who are sentenced after the amendment to the law, a court must follow the legislative edict, see: *Siganto v R* (1998) 194 CLR 656; *R v Morton* [1986] VR 863; and DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [9.20].

19. New section 304B(2) states:

> (2) References to the following are to be interpreted in the same way as they are interpreted under the *Domestic and Family Violence Protection Act 1989* for that Act—
>
> (a) the existence of a domestic relationship between 2 persons;
>
> (b) an act of domestic violence in a domestic relationship.

20. The committee notes a number of issues regarding whether new section 304B(2) is drafted in a sufficiently clear and precise way.

21. The terms to be interpreted by reference to the *Domestic and Family Violence Protection Act* are included in the elements of the offence of manslaughter in new section 304B. A determination as to whether the elements of the offence are made out on the evidence would be a question of fact, to be determined by a jury. A jury would therefore need to consider:

- sections 11A, 12 and 12A-C of the *Domestic and Family Violence Protection Act*, regarding the existence of a domestic relationship between two people; and
- section 11, regarding an act of domestic violence in a domestic relationship.

22. The explanatory notes indicate (at 7) that provisions of the *Domestic and Family Violence Protection Act* 'outline the definition' of each of the terms identified in new section 304B(2). The explanatory notes also provide (at 7-8) information regarding four District Court judgments which have 'provided guidance as to the wording in the definition under s.11 of the DFVPA'.

23. Sections 11 to 12C are contained within part 2 of the *Domestic and Family Violence Protection Act* (Explanation of how domestic violence is dealt with under this Act). Section 10, setting out the purpose of part 2, suggests the 'ideas and expressions' in that part are not intended to be defined with a high degree of precision:

> **10 Purpose of this part**
>
> (1) This part explains how domestic violence is dealt with under this Act, including setting out some of the ideas and expressions that are important for an understanding of this Act.

24. Principles of statutory interpretation indicate that beneficial legislation, such as the *Domestic and Family Violence Protection Act*, should be interpreted liberally to achieve its purpose.[18] By contrast, the purpose of the Criminal Code is to prescribe criminal responsibility regarding specific acts or omissions. Statutory interpretation approaches penal provisions, such as those in the Code, so as not to extend their operation beyond the words used. Accordingly, the expansive and less precise nature of part 2 of the *Domestic and Family Violence Protection Act* should be contrasted with the prescriptive nature of the Criminal Code. Three matters arise.

25. Firstly, in theory, 'a codifying Act gathers together all the relevant statute and case law on a given topic and restates it in such a way that it becomes the complete statement of the law on that topic'.[19] Particular rules regarding the interpretation of codes are applied by the courts.[20] In *Bank of England v Vagliano Bros* [1891] AC 107 at 144, Lord Herschell stated:

> *The purpose of such a statute surely was that on any point specially dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.*

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18 *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426, 433.

19 DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [8.7]. In 1878, the Report of the Commissioners appointed in England to report on a draft criminal code said, 'It must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed': see *Carter's Criminal Law of Queensland*, [1005.1].

20 See, for example, *Brennan v R* (1936) 55 CLR 253 at 263 per Dixon and Evatt JJ.

26. Second, a main objective of codification is to make the law accessible. In *Boughey v R* (1986) 161 CLR 10 at 21, Mason, Wilson and Deane JJ provided a clear statement of this purpose as it applied to a criminal code:

> *A basic objective of any general codification of the criminal law should be, where practicable, the expression of the elements of an offence in terms which can be comprehended by the citizen who is obliged to observe the law and (where appropriate) by a jury of citizens empanelled to participate in its enforcement. History would indicate that the codifier will never achieve the clarity and completeness which would obviate any need for subsequent interpretation or commentary (see Jolowicz,* Historical Introduction to the Study of Roman Law *(1939), pp.491-492; Gray*, The Nature and Sources of the Law *(1909) pp.176-177). The courts should, however, be wary of the danger of frustrating that basic purpose of codification of the criminal law by unnecessarily submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation which is more likely to cause than to resolve ambiguity and difficulty.*

27. Finally, the main purpose of the *Domestic and Family Violence Protection Act* may be contrasted with the purpose of the Criminal Code. Section 3A of the *Domestic and Family Violence Protection Act* sets out the main purpose of that Act:

> (1) The main purpose of this Act is to provide for the safety and protection of a person in the case of domestic violence committed by someone else if any of the following domestic relationships exist between the 2 persons—
>
> (a) a spousal relationship;
>
> (b) an intimate personal relationship;
>
> (c) a family relationship;
>
> (d) an informal care relationship.
>
> (2) The way in which the main purpose of this Act is to be achieved is by allowing a court to make a domestic violence order to provide protection for the person against further domestic violence.

28. The committee draws to the attention of Parliament these matters regarding the incorporation of terminology in the *Domestic and Family Violence Protection Act* into new section 304B(2) of the Criminal Code.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

29. 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 providing certain information. If the explanatory note does not include the information, it must state the reason for the non-inclusion (section 23(2)).

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

3. RADIATION SAFETY AMENDMENT BILL 2009

Date introduced: 25 November 2009

Responsible minister: Hon PT Lucas MP

Portfolio responsibility: Deputy Premier and Minister for Health

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 8-14, 16, 22, 24-7 and 42** which would amend existing offences or create new offence provisions and have the potential to affect the rights and liberties of individuals:
   - **clauses 42, 50 and 56** as they have the potential to affect individual rights and liberties, including rights to the privacy of personal information; and
   - **clause 51** which would confer immunity from proceeding or prosecution.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to **clauses 22 and 56** which may authorise the amendment of an Act by way of subordinate legislation.

BACKGROUND

3. The legislation is to enhance the radiation safety protections currently provided by the *Radiation Safety Act 1999*. It follows a national Review of Radiological Materials sponsored by the Council of Australian Governments.

LEGISLATIVE PURPOSE

4. In his second reading speech, the minister stated that:

   The purpose of the Bill is to amend the Radiation Safety Act 1999 *to enhance the security of particularly hazardous radiation sources located in Queensland.*[21]

5. The explanatory notes state (at 1) that the objectives of the bill are to:
   - enhance the security measures for radiation sources and thereby minimise the risk of the sources being used for malicious purposes; and
   - promote greater consistency with the object of the legislation, to protect the environment from the harmful effects of radiation.

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*.

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21 The Hon P Lucas MP, Deputy Premier and Minister for Health, Second Reading Speech, *Record of Proceedings (Hansard),* 25 November 2009, 3567.

7. **Clauses 16, 22, 26 and 42** would insert new offence provisions in the *Radiation Safety Act*, with potential to affect rights and liberties of individuals. The new offences and proposed maximum penalties are identified below. Relevant pages of the explanatory notes containing information and justification for breach of fundamental legislative principles regarding the proposed offences and penalties are identified.

8. With the exception of clause 42, each of the new offences would be an offence of strict liability. Generally, the committee draws to the attention of the Parliament proposed provisions creating offences of strict liability and examines the explanatory notes for justification. However, the committee notes that the relevant information identified in the table does not include information directed to proposed offences of strict liability.

Clause	New section	Offence	Proposed maximum penalty	Information in explanatory notes
16	27A(1)	Abandonment of a radiation source	2500 penalty units ($250 000)	22
22	34E(2)	Failure to return security plan documents to chief executive	50 penalty units ($5000)	28
22	34F(2)	Failure to take reasonable steps to meet obligations in relation to approved security plan - possession licensees	2500 penalty units ($250 000)	28
22	34G(2)	Failure to take reasonable steps to meet obligations in relation to approved security plan – access	2500 penalty units ($250 000)	28
22	34I(2)	Transporting a security enhanced source without an approved transport security plan	2500 penalty units ($250 000)	30
22	34P(2)	Failure to return transport security documents to chief executive	50 penalty units ($5000)	33
22	34Q	Failure to take reasonable steps regarding approved transport security plan – transport security plan holder	2500 penalty units ($250 000)	33-4
22	34R(2)	Failure to take reasonable steps regarding approved transport security plan – access	2500 penalty units ($250 000)	33-4
26	44A(2)	Failure to take reasonable steps to ensure security of security enhanced source	2500 penalty units ($250 000)	35-6
26	44B(2)	Failure to appoint and retain an individual to oversee the security of the security enhanced source	2500 penalty units ($250 000)	35-6
42	103J	Failure to disclose changes in criminal history	100 penalty units ($10 000)	52

9. **Clauses 8-14, 24-5 and 27** would amend existing offence provisions, as outlined in the table below. In most cases, the amendments provide an additional, increased maximum penalty where proscribed activity relates to a 'security enhanced source', defined in schedule 2 (as it is to be amended by clause 56) to mean:

… a radiation source, or an aggregation of radiation sources, prescribed under a regulation to be a security enhanced source.

10. Relevant pages of the explanatory notes containing information and justification for any breach of fundamental legislative principles are identified in the table.

Clause	Section amended	Offence	Existing maximum penalty	Proposed maximum penalty	Information in explanatory notes
8	12(1)	Possession of radiation source without licence	1000 penalty units ($100 000)	1000 penalty units ($100 000) for a radiation source that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	14
9	13(1)	Use of radiation source without licence	400 penalty units ($40 000)	400 penalty units ($40 000) for a radiation source that is not a portable security enhanced source; and 2500 penalty units ($250 000) for a portable security enhanced source	14-6
10	14(2)	Transporting a radioactive substance by road without licence	400 penalty units ($40 000)	400 penalty units ($40 000) for a radioactive substance that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	17-8
11	15(1)	Transporting a radioactive substance other than by road without licence	400 penalty units ($40 000)	400 penalty units ($40 000) for a radioactive substance that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	18-9
12	23(1)	Acquisition of radiation source without licence and approval to acquire	400 penalty units ($40 000)	400 penalty units ($40 000) for a radiation source that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	20-1
13	24(1)	Supply of radiation source to a person who does not possess a licence and an approval to acquire	400 penalty units ($40 000)	400 penalty units ($40 000) for a radiation source that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	21
14	25	Relocation of radiation source without approval	400 penalty units ($40 000)	400 penalty units ($40 000) for a radiation source that is not a security enhanced source; and 2500 penalty units ($250 000) for a security enhanced source	21
24	43(2)	Failure by person holding possession licence to take reasonable steps to ensure health and safety – amended to include failure to take reasonable steps to prevent adverse effects on environment	500 penalty units ($50 000)	500 penalty units ($50 000)	34-5

Clause	Section amended	Offence	Existing maximum penalty	Proposed maximum penalty	Information in explanatory notes
25	44(2)	Failure by person carrying out radiation practices to take reasonable steps to ensure health and safety – amended to include failure to take reasonable steps to prevent adverse effects on environment	500 penalty units ($50 000)	500 penalty units ($50 000)	35
27	45(2)	Failure to give notice of dangerous event	50 penalty units ($5000)	100 penalty units ($1000) if the event relates to a radiation source that is not a security enhanced source; and 2500 penalty units ($250 000) for an event relating to a security enhanced source	36-7

11. **Clauses 42 and 56** would provide for security background checks (identity checks, criminal history checks and security checks for politically motivated violence) to be undertaken of people having contact with radiation sources that are security enhanced sources. These provisions may affect individual rights and liberties, including individual rights to information privacy, and by overriding protections in the *Criminal Law (Rehabilitation of Offenders) Act 1986*.

12. Clause 42, in new sections 103B-103D, would allow the sharing of personal information:

- new section 103B - the chief executive may ask the commissioner of police or 'other entity' (see clause 56) for a written report about the criminal history of a person or for a brief description of the circumstances of a conviction or charge;
- new section 103C – the chief executive may ask the commissioner of police or other entity to conduct a security check of a person and may then request further information; and
- new section 103D – the commissioner of police must notify the chief executive of any change in a person's criminal history.

13. Clause 42 would also insert a new part 7, division 10 to enable the conduct of security background checks. The operation of the new division is outlined in the explanatory notes (at 6-7):

Similar to other licensing and registration schemes, the Bill will enable the chief executive to request that a criminal history check or security check be conducted for specified persons listed in the new section 103A. In accordance with the National Security Code, such checks will only be required for those persons who have primary responsibility for a security enhanced source (e.g. a possession licensee, transport licensee or the nominee of a corporation that holds either of these licences) or persons who will have unrestricted access to a security enhanced source (e.g. a use licensee who uses and transports a portable security enhanced source which is designed to be easily moved from place to place).

14. Relevantly, clause 56 would provide definitions of:

- 'conviction' – a finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded;
- 'criminal history' – of a person, meaning all the following –
  - every conviction of the person for an offence, in Queensland or elsewhere, and whether before or after the commencement of the legislation;
  - every charge made against the person for an offence, in Queensland or elsewhere, and whether before or after the commencement of the legislation; and

- 'security check' - a check of a person's background and activities to assess whether a person is, or may be, a threat to national security.

15. In relation to whether clauses 42 and 56 have sufficient regard to rights and liberties of individuals, the committee notes that in Queensland the *Criminal Law (Rehabilitation of Offenders) Act* established a general rule that after the expiration of a 'rehabilitation period' (five or ten years from the date of conviction for a criminal offence, depending on the nature of the offence):

- a person need not disclose past criminal convictions;
- other people were prohibited from disclosing the criminal convictions; and
- officials considering the person's fitness for a profession or for any other purpose had to disregard the conviction.

16. The general rule in the *Criminal Law (Rehabilitation of Offenders) Act* is conditional on the person not having re-offended and is subject to exceptions in relation to specified employment. It is also subject to subsequent inconsistent or more specific legislative provision, such as legislation enabling a relevant official to request a copy of a person's 'criminal history' from the commissioner of the police service.

17. Where legislation would permit use of a person's criminal history in employment related matters, the committee draws the attention of the Parliament to provisions which:

- provide a definition of 'criminal history' that differs from the definition in the *Criminal Law (Rehabilitation of Offenders) Act* – 'the convictions recorded … in respect of offences';
- displace the 'rehabilitation period' provisions of the *Criminal Law (Rehabilitation of Offenders) Act*, requiring old convictions to be disclosed; and
- are ambiguous as to which aspects of the *Criminal Law (Rehabilitation of Offenders) Act* are to be displaced, particularly regarding the rehabilitation period.

18. Accordingly, the committee notes that the legislation would:

- provide a different definition of 'criminal history' and would include charges for offences and unrecorded convictions;
- require disclosure of charges and convictions occurring at any time in the past.

19. The explanatory notes provide a lengthy justification for any breach of fundamental legislative principles (at 6-8):

The National Security Code requires certain persons who have primary responsibility for, or unrestricted access to, a security enhanced source to undergo a security background check (which is comprised of an identity check, criminal history check and security check for politically motivated violence). This requirement is a key measure under the Code to prevent persons with malicious intent from being able to acquire radiation sources that are security enhanced sources.

The Bill provides for a new division to be incorporated in part 7 of the Act to provide for the conduct of criminal history and security checks, which will enable consideration of all convictions and charges, regardless of when they occurred. The Bill therefore overrides the protections under the Criminal Law (Rehabilitation of Offenders) Act 1986*. This aspect of the Bill raises the issue of whether the legislation should abrogate established state law rights and liberties [section 4(3)(g) of the* Legislative Standards Act 1992*]…*

The capacity of the chief executive to access information about a person's full criminal history will ensure that a more complete assessment can be undertaken. Access to information about a person's 'old' convictions and charges may, for example, indicate a pattern of behaviour that the person poses a potential security risk. While it may be argued that this aspect of the Bill erodes a person's right of privacy, the proposed legislative scheme does ensure that:

- *a criminal history check or security check may not be conducted without the person's knowledge;*
- *a person must be advised of the outcome of a check and provided with an opportunity to make representations before the information is used to make a decision under the Act (unless the provision of such information would be prejudicial to the interests of national security); and*
- *a person has a right of review should a decision be made that the person is not a suitable person to hold a licence or other approval under the Act (e.g. it is an unacceptable security risk for the person to have possession of, or unrestricted access to, a security enhanced source).*

It is considered that the conduct of a full criminal history check and security check for those persons who have primary responsibility for, or unrestricted access to, a security enhanced source is justified given the potentially

serious consequences for the community, the environment and the economy should a security enhanced source be intentionally used for a malicious purpose. The misuse of a source for such a purpose could result in persons experiencing immediate and long-term health problems as a result of radiation exposure; rendering an area or place unusable for extended periods of time due to contamination; and causing wide-spread psychological and social distress due to the uncertainty people may feel given the possible long-term effects of exposure to radiation. The combined effects of these consequences are likely to have a significant economic impact at a local, state and national level, such as the need for long-term health services, the relocation of residential and industrial areas, decontamination and other clean-up costs, the negative impact on industry and trade.

20. **Clause 50** may also affect individual information privacy rights. It would remove the existing restriction in section 209 on the use of information provided to an entity of the State, another State or entity within the State and the Commonwealth or an entity of the Commonwealth.

21. Currently, section 209 makes it an offence for specified persons to disclose 'protected information' which a person has obtained in the course of, or because of, the person's functions under the Act, unless the disclosure is expressly authorised under section 209. As defined in section 209(8), 'protected information' includes personal health information; personal monitoring information; and information that could damage the commercial activities, or adversely affect the intellectual property rights, of the person to whom the protected information relates.

22. Clause 50 would amend section 209 to state that an entity, another State or the Commonwealth can give information to someone else if the giving of the information is necessary to protect national security.

23. The explanatory notes provide justification for any inconsistency with fundamental legislative principles (at 10-1):

The proposed amendment to the duty of confidentiality in section 209 of the Act raises the issue of whether the legislation has sufficient regard to individual rights and liberties [section 4(2) Legislative Standards Act 1992*]. The amendment removes the current restriction on the use of information provided to an entity of the State, another State or entity within that State, and the Commonwealth or an entity of the Commonwealth...*

Personal monitoring and commercial information may be disclosed to an entity of the State, another State or entity within that State, or the Commonwealth or an entity of the Commonwealth for a purpose prescribed under a regulation. However, the Act currently specifies that this information must not be given to anyone else and must only be used for the purpose for which it was given. It is proposed that this restriction be modified to enable protected information to be passed on, if the Commonwealth, another State or entity reasonably considers the giving of the information is necessary to protect national security.

This amendment is necessary to give effect to the recommendations of the Review of Radiological Materials that the Commonwealth, in consultation with the States and Territories, establish a centralised database and notification system to provide for the tracking of radiation sources within Australia (not just within individual jurisdictions) and to enable a coordinated response to be initiated should a security breach arise in relation to a security enhanced source (e.g. unauthorised access leading to the theft of a source). The effectiveness of this system will be undermined if information provided by Queensland cannot be shared with the relevant authorities such as ARPANSA, ASNO, the Queensland Police Service and the Australian Federal Police.

Immunity from proceeding or prosecution

24. 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.

25. **Clause 51** would extend to members of the Radiation Advisory Council and the Council's committees immunities currently provided in the Act.

26. Clause 51 would amend section 211 which provides that an 'official' is not civilly liable for an act done, or omission made, honestly and without negligence under the Act. Such liability attaches instead to the State. An 'official' is currently defined to mean the minister, the chief executive, a State radiation analyst, an inspector or a person acting under the direction or authority of an inspector. Clause 51 would expand the definition of 'official' to include members of the Radiation Advisory Council, and members of committees convened by the Council.

27. The explanatory notes indicate (at 57) that the amendment would ensure that individuals administering the Act are provided with protection from liability for the performance of the statutory functions allocated to them and (at 10) that sufficient regard would be had to rights and liberties of individuals:

Section 162 of the Act sets out the functions of the Council, including the provision of advice to the Minister about the operation and application of the Act and the chief executive about the merits of an application for review of a decision for which an information notice has been given to a person under the Act (e.g. refusal of a licence or a refusal to grant a change to a security plan).

It is not considered appropriate that a member of the Council, or a Committee, be made personally liable as a consequence of that individual carrying out his or her statutory responsibilities in good faith. As occurs for other officials, section 211 will prevent a civil liability from being attached to the individual - in these circumstances the liability attaches to the State. However, immunity will not extend to a person who has been negligent, even though the official may have acted in good faith.

Sufficient regard to the institution of Parliament

Amendment of Act other than by another Act

28. 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.

29. **Clauses 22 and 56** may authorise the amendment of an Act by way of subordinate legislation as they would provide for a number of terms used in the Act to be defined by regulation.

30. Clause 22 would insert a new part 6, division 1A and 1B regarding security plans and transport security plans. New section 34A(5) would define 'security measure' to mean 'measures, prescribed under a regulation, for ensuring the security of a security enhanced source'. New section 34H(5) would define 'transport security measure' to mean 'measures, prescribed under a regulation, for ensuring the security of a security enhanced source during its transport'.

31. Clause 56 would amend the dictionary in schedule 2 by inserting definitions of:

- 'relevant offence' –
  - an offence involving a prescribed activity; or
  - an offence involving violence or threatened violence; or
  - an offence involving the use, carriage, discharge or possession of a firearm; or
  - another offence prescribed under a regulation; and
- 'security enhanced source' – a radiation source, or an aggregation of radiation sources, prescribed under a regulation to be a security enhanced source.

32. 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. 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.

33. The relevant provisions fall within the fourth of the categories of Henry VIII provisions considered excusable by the committee. However, the committee notes that the definitions of the terms to be prescribed by regulation are integral to legislative provisions which may significantly affect rights and liberties of individuals; for example:

- definitions of 'security enhanced source', 'security measure' and 'transport security measure' are elements of a range of new and amended offences, often attracting significant maximum penalties; and
- 'relevant offence' provides, in part, the scope of allowable criminal history and security checks.

34. However, the explanatory notes (at 8-9) provide detailed information directed to demonstrating sufficient regard to the institution of Parliament:

The matters to be prescribed under the definitions security enhanced source, security measure and transport security measure will be highly technical in nature. It will, for example, be necessary for a number of calculations to be performed in order to determine whether a radiation source, or aggregation of radiation sources, is a security enhanced source and to then classify the source into one of five categories. Depending on what category a source falls within, a range of security measures will need to be implemented that are commensurate with the risks posed by the source. Category 1 sources are considered to pose the highest risk and will therefore be subject to the most stringent security requirements.

The National Security Code adopts a graded approach whereby the stringency of the security measures to be implemented is proportional to the likelihood of the source, or aggregation of sources, being acquired for a malicious purpose. The regulations will be developed having regard to the methodology for the categorisation of security enhanced sources and the security measures to be implemented for each category detailed in the Code. This is necessary to ensure that requirements imposed in Queensland are consistent with the requirements being imposed by other jurisdictions to reduce the risk of radiation sources being acquired and used for malicious purposes.

As part of the decision-making process for the granting of a possession, use for transport licence for a security enhanced source, the chief executive will be required to consider whether a person has been convicted of, or charged with, a relevant offence in Queensland or elsewhere indicating that it is an unacceptable security risk for the person to have a licence for a security enhanced source.

The term relevant offence is to be defined to mean an offence associated with an activity involving a drug, chemical, explosive, radiation source or biological agent (a prescribed activity); or involving violence or threatened violence; or involving the use, carriage, discharge or possession of a firearm; or another offence prescribed under a regulation.

It has been proposed that other offences be able to be prescribed by regulation as work is continuing at a national level to finalise a set of core disqualifying offences which may indicate that a person poses a security risk. Consideration is being given to which offences under Commonwealth, State and Territory legislation may need to support the stated purpose of the National Security Code to prevent unauthorised access to, or unauthorized acquisition of, radiation sources by persons with malicious intent (e.g. offences under the Commonwealth's Criminal Code Act 1995*,* Crimes Act 1914*, or* Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*).*

In order to ensure that national consistency can be achieved at the earliest opportunity, it is proposed that any additional offences that may indicate a person poses an unacceptable security risk be prescribed under regulation. Consideration would then be given to incorporating the list of offences in the definition of relevant offence under the Act at a future date.

Such regulations will be subject to the requirements of section 49 of the Statutory Instruments Act 1992*. Section 49 specifies that subordinate legislation must be tabled in the Legislative Assembly within 14 sitting days after it is notified in the gazette, in order for it to come into effect. If for some reason, the Legislative Assembly objects to the substance of a regulation, section 50 of the* Statutory Instruments Act 1992 *could be utilised to disallow the gazette notice which notified the making of the regulation. As a consequence of the notice being disallowed, the regulation would cease to have any effect.*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

35. 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.

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

37. 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.

38. In particular, the explanatory notes state the bill is to give effect to a COAG agreement that each jurisdiction take the necessary steps to ensure its radiation safety legislation give required authority to the regulation of the security of radioactive sources (see explanatory notes, 1-3). Detailed information as to the reasons for the bill, provided in the explanatory notes (at 1-4), meet the section 23 requirement for a brief statement regarding a bill complementary with legislation of the Commonwealth or another State.

4. SURROGACY BILL 2009

Date introduced: 26 November 2009

Responsible minister: Hon CR Dick MP

Portfolio responsibility: Attorney-General and Minister for Justice

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:

   - **chapters 1-3** decriminalising altruistic surrogacy arrangements and allowing for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement, raising issues regarding rights and liberties of people born pursuant to surrogacy arrangements and of individuals within their birth and surrogate families;
   - **chapter 6, parts 2-3 and 10** altering current legislative provisions regarding legal parentage and raising issues regarding the rights of the child and freedom of family structure and family life;
   - **clause 22(f) and (g)** requiring different treatment of people on the basis of age;
   - **clauses 79 and 80** imposing an age-based condition on rights regarding personal information;
   - **clauses 55-7** re-enacting offences in the *Surrogate Parenthood Act* and **clauses 53 and 58** creating new offences;
   - **clauses 38, 41, 79 and 80** which may affect individual information privacy rights;
   - **clauses 63 and 111** which would operate to allow for the retrospective application of provisions of the legislation; and
   - **the bill generally** as to whether the legislation has sufficient regard for Aboriginal tradition and Island custom.

2. The committee invites the minister to provide further information regarding whether:

   - **clauses 107 and 111** have sufficient regard for the rights of the child; and
   - **the bill generally** has sufficient regard for Aboriginal tradition and Island custom.

BACKGROUND

3. The legislation would provide for the court-sanctioned transfer of parentage of children born as a result of particular surrogacy arrangements and prohibit commercial surrogacy arrangements.

4. It would implement recommendations of a parliamentary select committee.[22] Prior to introduction of the bill, the Queensland Government released a consultation paper on 18 August 2009,[23] an exposure draft bill on 29 October 2009,[24] and reviewed the legal status of children being cared for by same-sex parents.[25]

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22 Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland*, (2008); available at: www.parliament.qld.gov.au/surrogacy

23 *Queensland Government model for the decriminalisation of altruistic surrogacy and the transfer of legal parentage*: www.justice.qld.gov.au/510.htm#Queensland_Government_model_for_the_decriminalisation_of_altruistic_surrogacy_and_the_transfer_of_legal_parentage

24 Surrogacy Bill 2009, Consultation draft, available at: *http://www.parliament.qld.gov.au/view/legislativeAssembly/tableOffice/documents/TabledPapers/2009/5309T1216.pdf*

25 *Review on the legal status of children being cared for by same sex parents*, (2009), available at: http://www.justice.qld.gov.au/510.htm#Review_of_the_legal_status_of_children_being_cared_for_by_same-sex_parents

5. On 11 November 2009, Mr LJ Springborg MP, Deputy Leader of the Opposition, Shadow Attorney-General and Shadow Minister for Trade, Shadow Minister for Industrial Relations, introduced as a private member's bill the Family (Surrogacy) Bill 2009. The committee's examination of that bill was reported in *Legislation Alert* 12/09 at 9.

LEGISLATIVE PURPOSE

6. The main objects of the legislation are set out in clause 5:

> **5 Main objects of Act**
>
> The main objects of this Act are—
>
> (a) to regulate particular matters in relation to surrogacy arrangements, including by prohibiting commercial surrogacy arrangements and providing, in particular circumstances, for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement; and
>
> (b) in the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result—
>
> (i) to establish procedures to ensure parties to the arrangement understand its nature and implications; and
>
> (ii) to safeguard the child's wellbeing and best interests.

7. The bill would amend the:

- *Adoption Act 2009*;[26]
- *Births, Deaths and Marriages Registration Act 2003*;
- Births, Deaths and Marriages Registration Regulation 2003;
- Criminal Code;
- *Domicile Act 1981*;
- *Evidence Act 1977*;
- *Guardianship and Administration Act 2000*;
- *Powers of Attorney Act 1998*; and
- *Status of Children Act 1978*.

8. In addition, the bill would effect further consequential amendments to the Criminal Code and a number of the Acts identified above.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

9. 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.*

10. The committee first notes that the bill seeks to balance competing rights and liberties of individuals. Examples of the rights and liberties affected by legislation, and to which sufficient regard should be had, include rights:

- of children;
- to freedom of family structure and family life;
- to freedom from discrimination on the basis of marital status, sexuality and age;
- to identity and bodily rights;

[26] This Act is to commence on proclamation.

- to equal application of and protection under the law; and
- of privacy.

11. The proposed accommodation of competing individual rights and liberties is made clear in clauses 5 and 6:

6 Guiding principles

(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

(2) Subject to subsection (1), this Act is to be administered according to the following principles—

(a) a child born as a result of a surrogacy arrangement should be cared for in a way that—

(i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing;

(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of—

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;

(c) the long-term health and wellbeing of parties to a surrogacy arrangement and their families should be promoted;

(d) the autonomy of consenting adults in their private lives should be respected.

12. In respect of the guiding principle 'the well-being and best interests of a child born as a result of a surrogacy arrangement' the committee notes that in *Queenslander's Basic Rights*, the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament provided the following information regarding the rights of children, teenagers and young people:[27]

In general, Queensland and Australian law tries to ensure as much as possible that children, teenagers and other young persons benefit from:

- *having decisions about them made in their best interests;*
- *being told about and being able to express views on anything affecting their well-being and to have those views appropriately taken into account in light of their age, maturity, level of understanding, and capacity;*
- *giving informed consent to medical treatment and surgical operations … if they are able to give that consent in light of their age, maturity, level of understanding, and capacity;*
- *living with either or both of their parents unless their interests and needs require other arrangements;*
- *knowing and being cared for by parents and other significant people in their life, including a right to receive appropriate financial support from either or both of their parents in care and upbringing;*
- *being cared for by government if no family member, relative, or other appropriate family member, relative, or other appropriate person is available to care for them;*
- *living in a harm-free home environment and being protected from harm by anyone;*
- *being adopted if suitable adoptive parents are available;*
- *knowing information about their birth parents if adopted; … [and]*
- *being free from unjustified discrimination solely on the basis of birth (for example, discrimination against a child of unmarried parents or a child artificially conceived) or age (for example, discrimination against young people in employment and work conditions).*

A person becomes a legal adult in Queensland at eighteen years, under the Law Reform Act 1995 *(Qld).*

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27 *Queenslanders' Basic Rights*, May 1999, 24; available at: www.parliament.qld.gov.au/LCARC

13. Australia is a signatory to both the International Covenant on Civil and Political Rights (CCPR) and the Convention on the Rights of the Child (CRC). In *Human Rights: Handbook for Parliamentarians*, prepared for the Inter-Parliamentary Union and the Office of the United Nations High Commissioner for Human Rights, the following information is provided regarding the protection of family life:[28]

Institutional guarantees for the family (i.e., its legal recognition and specific benefits deriving from that status, and the regulation of the legal relationship between spouses, partners, parents and children, etc.) is intended to protect the social order from trends towards disintegration and to preserve specific family functions (such as reproduction or bringing up children) – considered indispensable to a society's survival – rather than condone their transfer to other social institutions or the State. The human rights to marry and found a family, including reproductive rights, to equality of spouses, to protection of motherhood and the special rights of children as laid down in the CRC are directly linked to the institutional guarantee of the family. The right of children not to be separated from their parents, the common responsibilities of both parents for the upbringing and development of the child and the rights to family reunification, foster placement and adoption are particularly important.

14. The *Human Rights: Handbook for Parliamentarians* provides the following information about what 'family' means in international human rights law:[29]

In addition to support under the Universal Declaration of Human Rights, the institutional of the family, as the "natural and fundamental group unit of society", enjoys special protection under article 23 of CCPR, article 10 of the [International Covenant on Economic, Social and Cultural Rights], article 16 of the European Social Charter, article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms], article 17 of the [American Convention on Human Rights] and article 18 of African Charter on Human and Peoples' Rights. This broad range indicates that the meaning of the term "family" transcends the concept of a nuclear family prevalent in highly industrialized countries, and encompasses much larger units, such as the extended family, for example in African societies. In addition to blood relations and statutory ties (marriage, adoption, registration of homosexual partnerships, etc.), cohabitation, an economic relationship and the specific social and cultural values in a given society are the key criteria used to determine whether a group with a given type of relationship between human beings constitutes a family.

15. The Altruistic Surrogacy Committee identified five key principles that should guide the legislative framework for altruistic surrogacy in Queensland. The first three related to the best interests of the child in the context of regulation of altruistic surrogacy:[30]

- a child's rights to survival and development;
- a child's right to identity; and
- a child's right to enjoyment of the same status and legal protection as other children.

16. The remaining principles were:[31]

- the promotion of the health and wellbeing of parties to a surrogacy arrangement; and
- respect for the autonomy of parties to a surrogacy arrangement.

17. The explanatory notes provide information regarding the legislative balancing of competing rights regarding:

- surrogacy (at 5-16);
- parenting presumptions in the *Status of Children Act* (at 17-18 regarding same-sex parenting and 18-19 regarding 'fertilisation procedures'); and
- rights to information under the *Births, Deaths and Marriages Act* (at 17).

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28 Inter-Parliamentary Union and Office of the United Nations High Commissioner for Human Rights, *Human Rights Handbook for Parliamentarians* (2005), 103.

29 Inter-Parliamentary Union and Office of the United Nations High Commissioner for Human Rights, *Human Rights Handbook for Parliamentarians* (2005), 103.

30 Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), 40; available at: www.parliament.qld.gov.au/surrogacy; see also the paper referenced, J Tobin (Victorian Law Reform Commission), *The convention on the rights of the child: the rights and best interests of children conceived through assisted reproduction* (2004).

31 Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), 40; available at: www.parliament.qld.gov.au/surrogacy.

18. In respect of specific provisions of the bill, issues as to the legislative regard for rights and liberties of individuals are identified below.

Rights of the child and to freedom of family structure and family life

19. **Chapters 1-3** would decriminalise altruistic surrogacy arrangements and allow for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement. Provisions in chapters 1-3 raise issues regarding rights and liberties of people born pursuant to surrogacy arrangements and of individuals within their birth and surrogate families. Relevant proposed provisions include, for example:

- clause 7 provides the meaning of 'surrogacy arrangement', thereby setting out the minimum requirements for such arrangements;
- clause 9 provides the meanings of 'intended parent' and 'couple';
- clause 15(1) provides that a surrogacy arrangement is not enforceable;
- clause 17 declares that unless and until a parentage order is made transferring the parentage of a child born as a result of a surrogacy arrangement, the parentage presumptions under the *Status of Children Act* apply;
- clause 21 provides that an application for a parentage order may be made not less than 28 days and not more than six months after a child's birth, but that leave may be granted to extend the time;
- clause 22(2)(b) requires a child to have resided with the applicant/s for a parentage order;
- clause 22(2)(c) allows for parentage of a child born as a result of a surrogacy arrangement to be transferred to one intended parent who is single or two intended parents who are a couple;
- clause 24 provides that if a child, the subject of an application for a parentage order, has one or more living siblings born as a result of the same pregnancy, the order must be a joint order about each living birth sibling;
- clause 35 states that the child's names are the names that the court approves for the child in the parentage order;
- clause 38 provides that, if on an application for a parentage order, the court considers a child is a child in need of protection within the meaning of the *Child Protection Act 1999*, the court may provide notice to the relevant chief executive;
- clause 39 states that, on the making of a parentage order, the child –
  - becomes a child of the intended parent/s and the intended parent/s become the parent/s of the child; and
  - stops being a child of a birth parent and a birth parent stops being a parent of the child;
- clause 40 applies clause 39 in relation to dispositions and devolutions of property; and
- clauses 46 and 47 allow for an application to discharge a parentage order and for a discharge order to be made by the Childrens Court; and
- clause 48 provides that, on the making of a discharge order, the rights, privileges, duties, liabilities and relationships of the child and all other persons are the same as if the parentage order had not been made.

20. In respect of the rights of a child, the committee notes that, if a court did not make a parentage order under clause 22, the parentage of the child born pursuant to the surrogacy arrangement would remain as provided under the parentage presumptions in the *Status of Children Act*. In these circumstances, a parenting order under the *Family Law Act 1975* (Cth) might also be sought. However, the explanatory notes suggest (at 11) that such a parenting order is a less satisfactory alternative:

Although a parenting order made under the FLA may create similar legal entitlements in some areas, a parenting order is not final and therefore, can be varied at any time, expires when the child is 18 years and is subject to its specified terms. Also a parenting order will not overcome the problems associated with the child's entitlements under succession law.

21. The explanatory notes do not specifically address the consistency of chapters 1-3 with fundamental legislative principles requiring sufficient regard to rights and liberties of individuals and, in particular, those born as a result of a surrogacy arrangement. However, safeguards of the rights, wellbeing and best interests of a child born as a result of a surrogacy arrangement are identified (at 12):

The Bill includes safeguards to protect the rights, wellbeing and best interests of a child born as a result of a surrogacy arrangement and also to ensure that the parties understand the implications of entering into the surrogacy arrangement and the making of the parentage order. The safeguards are built into the court process and require the court to be satisfied of certain matters before a parentage order is made, including:

- *the parentage order is for the wellbeing, and in the best interests of the child;*
- *that the parties to the surrogacy arrangement received independent legal advice before entering into the surrogacy arrangement. The lawyer who gives legal advice to the intended parent/s can not be the same lawyer who gives the legal advice to the birth mother and her spouse (if any);*
- *that the parties to the surrogacy arrangement received counseling before entering into the arrangement;*
- *that there was a medical or social need for the surrogacy;*
- *the receipt by the court of a surrogacy guidance report by an independent and appropriately qualified counsellor, prepared following the child's birth;*
- *that the parties to the surrogacy arrangement are of a certain age; and*
- *that the intended parent/s are Queensland residents.*

22. The committee notes that, although the final safeguard is that the intended parent/s is/are Queensland residents, there is no requirement that the birth mother be a Queensland resident. Although the Standing Committee of Attorneys-General is examining model legislation regarding altruistic surrogacy,[32] there are discrepancies currently between the bill and the legislation in other Australian jurisdictions. More broadly, the surrogacy laws in Queensland will differ from those in existence in other countries. In *Re: X & Y (Foreign Surrogacy)* [2008] WL 5326758, the Hon Mr Justice Hedley of the United Kingdom's High Court of Justice Family Division drew the attention of the Parliament of the United Kingdom to 'a cautionary tale for any who contemplate parenthood by entering into a foreign surrogacy agreement'. The judgment in that matter stated (at [3]):

Surrogacy remains an ethically controversial area and different societies and different nations take radically different stances in their approach to it. Under some legal systems (e.g. Italy, Germany, Turkey) it is simply prohibited. In others, commercial surrogacy agreements are permitted (e.g. California, Ukraine, India) and perhaps sometimes even encouraged. The position in the United Kingdom lies between those extremes: whilst commercial surrogacy is unlawful, surrogacy itself is not but no surrogacy agreement is legally enforceable as such. Each sovereign state will have its own preferred approach and its own regulatory system. Those who enter into surrogacy agreements abroad will have to take account both of the law of that state and of the United Kingdom. As this case vividly demonstrates, not only may (and probably will) those laws be different but they may be incompatible to the point of mutual contradiction.

23. The committee notes also that the matters of the rights of the child and the range of possible safeguards that might be included in legislation were considered in detail by the select committee.[33] Examined, for example, were ways to limit risks of violence and child abuse and of ensuring stabililty of relationships. The committee concluded potential risks should be an issue addressed by counselling.[34]

24. In respect of regard had by parts 1-3 to individual rights and liberties relating to freedom of family structure and family life, again the explanatory notes do not specifically address consistency with fundamental legislative principles. However, regarding the absence of restrictions on who may enter into a surrogacy arrangement, the explanatory notes state (at 7):

Surrogacy arrangements are regarded as private arrangements made between adults. The autonomy of these parties in decision making about starting a family should be respected. It is inconsistent with the principle that the welfare and best interests of the child are paramount to exclude the intended parent/s from applying for a parentage order because of their relationship status. All children are entitled to the same legal protections and

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32 Standing Committee of Attorneys-General, Communique and Summary of Decisions, 5-6 November 2009, available at: www.scag.gov.au

33 Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), 40-2; available at: www.parliament.qld.gov.au/surrogacy

34 Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), 40-2 and 64-5; available at: www.parliament.qld.gov.au/surrogacy

certainty regardless of the nature of the relationship of their parents or the circumstances that resulted in their conception and birth.

The Committee noted at page 6 of its Report that there is greater social recognition of the diversity of family types raising children, including extended, nuclear and blended families and families headed by single parents and same-sex couples. The Committee did not make any recommendations that there should be any restrictions upon who may enter into a surrogacy arrangement based on the relationship status of the intended parent/s.

25. **Chapter 6, parts 2-3 and 10** would alter current provisions regarding legal parentage, raising issues regarding the rights of the child and freedom of family structure and family life. Relevant proposed provisions include:

Births, Deaths and Marriages Act – registration of relevant event

- clause 70 inserting a new section 10A into the *Births, Deaths and Marriages Registration Act* (and related amendments in clauses 87-8) to provide for the registration of parentage details in relation to the registration of a child's birth, adoption or change of parentage under a parentage order or discharge order – one or two parents of the child must be registered as the child's parents;

Status of Children Act – status of children

- clauses 102-4 amending sections of the *Status of Children Act* to substitute gender neutral language;

Status of Children Act – parentage of children – fertilisation procedures – married women with husband's consent

- clause 105-6 respectively amending sections 18 and 19 of the *Status of Children Act* to include, in each case, within the definition of 'fertilisation procedure' fertilisation occurring inside a woman's body;

Status of Children Act – parentage of children – fertilisation procedures – women with female de facto partner's consent

- clause 107 inserting a new subdivision 2A in part 3, division 2 of the *Status of Children Act* -
  - new section 19B provides that the subdivision applies if a woman has a female de facto partner and undergoes a fertilisation procedure with the consent of her female de facto partner;
  - new sections 19C(3), 19D(3) and 19E(3) provide that a woman's de facto partner is presumed, for all purposes, to be a parent of any child born as a result of a pregnancy following, respectively, artificial insemination, an implantation procedure where donor semen is used and an implantation procedure where a donor ovum is used;
  - new section 19C(2), 19D(2) and 19E(2) provide that the gamete donor has no rights or liabilities relating to a child born as a result of a pregnancy for which the gamete was used;
  - new section 19F provides that the presumptions declared to exist under section 19C to 19E are irrebuttable;
  - new section 19G provides that in proceedings in relation to the operation of subdivision 2A, there is a rebuttable presumption as to a female de facto partner's consent mentioned in new section 19B;

Status of Children Act – parentage of children – fertilisation procedures – other married women and unmarried women

- clause 108 replacing section 20 of the *Status of Children Act* to provide that part 3, division 2, subdivision 3, applies to a woman who undergoes a fertilisation procedure where the woman –
  - is married and undergoes a fertilisation procedure other than with her husband's consent;
  - is not married and does not have a de facto partner; and
  - has a de facto partner and undergoes a fertilisation procedure other than with her partner's consent;
- clauses 108-9 respectively amending sections 22 and 23 of the *Status of Children Act* to include, in each case, within the definition of 'fertilisation procedure' fertilisation occurring inside a woman's body;

Births, Deaths and Marriages Act – transitional provision

- clause 81 inserting a new section 63 into the *Births, Deaths and Marriages Registration Act* to require the registrar to amend the register of births to record a birth mother's female de facto partner as a parent of a child born prior to the commencement of the legislation; and

Status of Children Act – transitional provision

- clause 111 inserting a new 36 into the *Status of Children Act* to allow sections 18,19, 22 and 23 to apply retrospectively to a child born as a result of a fertilisation procedure prior to the commencement of the legislation.

26. In respect of the regard had by chapter 6, parts 2-3 and 10 for rights and liberties of individuals, the committee draws attention to two matters respecting the rights of the child. First, new section 19F provides for the presumptions declared to exist under section 19C to 19E to be irrebuttable. While the provision is likely to be directed to protecting rights and liberties generally, it would deny a child legal connection with one or both biological parents and would operate irrespective of any understanding to the contrary reached between individuals.

27. Second, amendments to the *Status of Children Act* (new sections 19B-19G and 36) to be made by clauses 107 and 111 would confer parentage presumptions upon parents of a child born to a female de facto couple where one was the birth mother. Under the amended legislation, the law may recognise both parents of the child. However, this legal recognition may be contrasted with the parents of a child born to:

- a male de facto couple – if one of the parents was a birth parent, he would be entitled to register himself a parent under the *Births, Deaths and Marriages Act*, as amended, but the co-parent may obtain legal parentage only under the *Surrogacy Act* or the *Family Law Act*; and
- a heterosexual couple – again, if the male was the only birth parent, he would be entitled to register himself a parent under the *Births, Deaths and Marriages Act*, as amended, but the co-parent would obtain legal parentage only under the *Surrogacy Act* or the *Family Law Act* and the *Adoption Act*.

28. These matters as to the sufficient regard of the legislation for rights and liberties of individuals are not directly addressed in the explanatory notes. The minister is invited to provide further information regarding the regard had by clauses 107 and 111 to the rights of the child in these circumstances.

Freedom from discrimination on the basis of age

29. **Clause 22(f) and (g)** would allow different treatment of people on the basis of age.

30. Chapter 2 provides for 'surrogacy arrangements' (defined in clause 7). Chapter 3 then provides for 'parentage orders', court orders for the transfer of the parentage of a child born as a result of a surrogacy arrangement (clause 12(1)).

31. Within chapter 3, clause 21 sets out the requirements to be met upon an application for a parentage order. Clause 22 confers jurisdiction on the Childrens Court constituted by a Childrens Court judge (clause 13) to make a parentage order for the transfer of parentage of a child to the applicant or joint applicants.

32. Upon an application for a parentage order, a court may make an order under clause 22 only if satisfied of specified matters. Two of the matters are that when the surrogacy arrangement was made:

- the birth mother and the birth mother's spouse (if any) were at least 25-years-old; and
- the applicant/s was/were each at least 25-years-old.

33. Clause 23 would allow a court to dispense with a requirement in clause 22(f) or (g) only if the court is satisfied:

- there are exceptional circumstances for giving the dispensation; and
- the dispensation will be for the wellbeing, and in the best interests, of the child.

34. The committee notes that clause 22:

- prescribes minimum, but not maximum, ages for birth parents and applicants; and
- would, in the circumstances identified, make specific legislative provision for the age of 'the fullest possible capacity to do legal acts and exercise legal rights'.

35. Section 17 of the *Law Reform Act* states, 'The age of majority is 18 years'. The legal effect of the age of majority was described in *King v Jones* [1972] 128 CLR 221 at 234 per Gibbs J:

> *The rule of the common law which, during mediaeval times, fixed the age of majority at twenty-one remained unaltered for many centuries. It was still in force in each of the Australian colonies when the Commonwealth was established. The period of twenty-one years thus settled as the duration of infancy was, however, as Blackstone said, "merely arbitrary, and juris positivi" (Blackstone, Commentaries, book 1, p. 464) and thus, although hallowed by time, not insusceptible of change.*
>
> [Gibbs J outlined legislation passed in some Australian states providing that a person becomes of full age on attaining the age of 18. At that time, the *Law Reform Act 1995* (Qld) had not been passed.]
>
> *At no stage in the history of the common law have infants been devoid of all capacity or free from all responsibility. At the time of the first settlement of Australia, for instance, a boy of fourteen might marry, make a will or be put to death for a capital offence, but he was none the less an infant (Blackstone, Commentaries, book 1, 463-466; book 2, 497). The distinction between infancy on the one hand and full age on the other is that a person having the latter status, if not otherwise under a disability, has the fullest possible capacity to do legal acts and exercise legal rights; generally speaking, he has no incapacity or disability which results from age alone.*

36. Accordingly, clause 22(f) and (g) would provide that a person would not have the fullest possible capacity to do legal acts and exercise legal rights under the Surrogacy Act until he or she was 25-years-old.

37. The explanatory notes state (at 19-20) that any breach of fundamental legislative principles is justified in the circumstances of the legislation:

> *This may preclude a couple or a person from becoming parents under a surrogacy arrangement or a woman from becoming a birth mother under a surrogacy arrangement because they are considered 'too young'. Although age is not necessarily a determinant of whether a person is an appropriate parent or not, or whether a woman is appropriate to be a birth mother or not, the serious implications of entering into a surrogacy arrangement require age limits being imposed in the Bill.*
>
> *The implications of entering into a surrogacy arrangement are complex and involve emotional, social, economical and legal consequences to the parties. Imposing an age limit of 25 for parties to enter into a surrogacy arrangement ensures that the parties have gained suitable life experience and are appropriately mature to understand and manage the social, emotional, economical and legal implications that result from entering into a surrogacy arrangement. Parties are better able to consider the likely effect upon them and make informed choices about whether to enter into such an arrangement or not.*

38. The explanatory notes state also (at 14) that minimum age restrictions exist in surrogacy legislation in Western Australia and Victoria.

39. **Clauses 79 and 80** would impose an age-based condition on rights regarding personal information. They would require a person to be 18 years or older to access information in a closed entry on a birth register.

40. Chapter 6, part 3 would amend the *Births, Deaths and Marriages Registration Act*. Clause 78 would insert new sections 41D and 41E. Under each new section, the registrar would be required, in prescribed circumstances, to:

- register a transfer of parentage on the parentage order register; and
- close the child's birth entry.

41. Clause 79 would amend section 44 to provide, in new section 44(13)(c), that the registrar may only give a person access to his or her parentage order (an entry closed under section 41D or 41E) if he or she is at least 18 years old. However, provision is made in new section 44(16) and (17) for the release of the information to a person less than 18 with the consent of the birth parents and the intended parents. New section 44(18) would require the registrar issuing a certificate from a closed entry to stamp the certificate or mark it in another way to indicate the certificate is not for official use.

42. Clause 80 would insert a new section 44A to require the registrar to attach an addendum, stating that further information is available about the person's birth, to a certificate issued to a person about whom a parentage order was made. However, new section 44A(1)(ii) requires that the person be at least 18 years at the time of making the application.

43. The committee notes that, as indicated by Gibbs J in *King v Jones*, young people below the age of majority have never been devoid of all capacity at common law – legal recognition and the exercise of rights depends upon the person's age, maturity and understanding. Consent to medical procedures and access to health information provide examples. Further, as identified in *Queenslander's Basic Rights*, rights of young people include the right to know, as much as possible, information about birth parents.

44. In relation to clauses 79 and 80, the explanatory notes do not directly address any breach of fundamental legislative principles. However, (at 12), the explanatory notes say:

Consistent with the Committee's recommendation, the Bill will also allow the child, once the child is 18 years, to access information about the child's birth parentage.

45. The select committees recommendation followed the adoption model regarding birth certificates.[35] Under this model a child born of altruistic surrogacy could access his or her original birth certificate at 18 years or earlier with intending parents' permission.

46. **Clauses 55-7** would re-enact offences currently contained in the *Surrogate Parenthood Act*. That Act is to be repealed by clause 61. Maximum penalties for offences would remain the same.

Clause	Current section (*Surrogate Parenthood Act*)	Offence	Maximum penalty
55	3	Advertising for surrogacy	100 penalty units ($10 000) or three years' imprisonment
56	3	Entering into a commercial surrogacy arrangement	100 penalty units ($10 000) or three years' imprisonment
57	3	Receiving or paying brokerage fees for surrogacy	100 penalty units ($10 000) or three years' imprisonment

47. Regarding these offences, the explanatory notes state (at 20):

These matters are existing offences in SPA and have been included in this Bill. The offences carry the same penalties that are imposed in SPA. The Committee in the Report recommended that these matters be retained as offences when new legislation is enacted for the regulation of surrogacy in Queensland.

48. **Clauses 53 and 58** 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
53(2)	Publishing identifying material without written consent	100 penalty units ($10 000) or two years' imprisonment – for an individual; 100 penalty units ($10 000) – for a corporation
58	Providing technical, professional or medical services for a commercial surrogacy arrangement	100 penalty units ($10 000) or three years' imprisonment

49. The explanatory notes provide (at 20-1) the following information regarding the proposed offences:

The Bill provides that it is an offence for a person to knowingly provide a medical, technical or professional service to a person to facilitate a pregnancy under a commercial surrogacy arrangement. This offence will only apply if the person providing the service to facilitate the pregnancy is aware at the time the service is provided that the surrogacy arrangement is commercial in nature. However, if a service is provided after the pregnancy, the offence provision does not apply. The penalty imposed is the same as that which applies to parties who enter into commercial surrogacy arrangements. The Committee was clear in the Report that commercial surrogacy

[35] Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), 87; available at: www.parliament.qld.gov.au/surrogacy

arrangements should not be fostered. This offence will ensure that all those associated with the arrangement or facilitation of commercial surrogacy can be prosecuted.

The Bill also provides that it is an offence for a person to publish identifying material about a court proceeding for the making, or discharge of, a parentage order, without obtaining the requisite consent from the parties. This offence imposes a maximum penalty of 100 penalty units or 2 years imprisonment for an individual, and 1000 penalty units for a corporation. The publication of sensitive and personal information about the private affairs of a family and a child born as a result of a surrogacy arrangement may have significant effect upon the family or child's health and well being. Therefore, the inclusion of this offence to prohibit such publications is warranted. The Guardianship and Administration Act 2000 *and the* Childrens Services Tribunal Act 2000 *also create offences for a person to publish identifying information from a tribunal hearing in certain circumstances. The recently passed* Adoption Act 2009 *contains a similar offence with the same penalty imposed.*

50. In respect of the proposed offences in clauses 53 and 55-7, the committee notes also that the offences would be offences of strict liability. However, the committee notes also that the offence provisions are similar to current offences of strict liability in section 3 of the *Surrogate Parenthood Act*.

51. **Clauses 38, 41, 79 and 80** may affect individual information privacy rights:

- clause 38 would allow the Childrens Court to notify the chief executive under the *Child Protection Act* that the court considers a child in need of protection within the meaning of that Act;
- clause 41 would allow the public trustee to:
  - find out the name and address of a person in respect of whom a parentage order transferred parentage and, if relevant, the date of death of that person;
  - obtain information from the registrars of the Childrens Court and of births, deaths and marriages about the person; and
  - regarding the information obtained, provide notice to the personal representative of a testator; and
- clause 79 would both allow prescribed persons to access information in a closed entry and limit access to the information by a person to whom the entry relates; and
- clause 80 would limit personal information included on a birth certificate if the applicant for his/her birth certificate was under 18.

52. The explanatory notes do not provide information regarding the consistency of these provisions with fundamental legislative principles.

Retrospective operation

53. 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.

54. **Clauses 63 and 111** would operate to allow for the retrospective application of provisions of the legislation:

- clause 63 would allow the intended parent/s of a child born before the bill commences or born pursuant to a surrogacy arrangement entered into before the commencement of the legislation to apply for a parentage order – for such an application, the provisions of chapter 3 would apply; and
- clause 111 would insert –
  - a new section 36 into the *Status of Children Act* to allow extended definitions of 'fertilisation procedure' (in sections 18, 19, 22 and 23) to operate retrospectively to a child born as a result of the fertilisation procedure prior to the commencement of the Surrogacy Act – however, under new section 36(3) the retrospective operation will not apply in respect of the vesting of property interests; and
  - a new section 37 into the *Status of Children Act* to provide that parentage presumptions (created by clause 107 inserting a new part 3, division 2, subdivision 2A) regarding fertilisation procedures to a woman with a female de facto partner would apply to children born prior to commencement – again, under new section 37(3) the retrospective operation will not apply in respect of the vesting of property interests.

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

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

56. In respect of the retrospective operation of clause 63, the explanatory notes provide the following justification (at 21-2):

The Bill also allows intended parent/s under a surrogacy arrangement that was made prior to the Bill's commencement to apply to the court for the transfer of parentage of the child. Such applications must be made within two years of the Bill's commencement and comply with the Bill's requirements. The Committee found that children had been born in Queensland as a result of surrogacy arrangements. Allowing the intended parent/s of these children to obtain a transfer of parentage will ensure that these children have the same rights and status as other children irrespective of when they were born.

Each of the above mentioned amendments, which apply retrospectively, do not impose any obligations upon parties or affect the rights and liberties of individuals. The provisions are beneficial in purpose and ensure that the child born in the respective circumstances is afforded the same rights and protections as other children.

57. Regarding clause 111, the explanatory notes state (at 21):

The SCA amendment to create the presumption that the female de facto partner of a child's birth mother is a parent of the child, when the birth mother has undergone a fertilisation procedure, including self-insemination, to conceive the child with the consent of her female de facto partner, will apply retrospectively. The purpose of the retrospective provision in the Bill is to allow this parenting presumption to apply when the child is born prior to the commencement of the Bill. This will ensure that those children are no worse off than other children and have the same legal rights and status as other children regardless of when they were born or the relationship status of their parents. The effect of this amendment is the child will have two parents recognised at law.

The Bill also provides that the amendment to correct the definition of 'fertilisation procedure' in SCA will apply retrospectively. The purpose of the retrospective operation is so that those women and their partners who conceived a child using a fertilisation procedure that involved fertilization of the egg inside the woman's body will be presumed the parents of their child and the donor of the gametes will have no rights or liabilities in relation to the child. This is consistent with the intention of the parties involved in the birth of the child, namely the birth mother and her partner who would be regarded as the parents of the child; and also the donors of gametes who donated their gametes on the understanding they would not have any rights or liabilities towards the child.

For both of these amendments to SCA, the retrospective operation of the amendments does not affect the vesting in possession or in interest of any property that occurred before the commencement of the amendments. This protects the previous disposition of property under a will or devolution of property on intestacy.

Aboriginal tradition and Island custom

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

59. **The bill** may raise issues as to unintentional disregard for Aboriginal tradition and Island custom. The issues may arise in relation to both altruistic surrogacy and parentage presumptions under the *Status of Children Act*.

60. In its report, the select committee examined at length issues relevant to traditional Torres Strait Islander 'adoptions'.[36] However, the explanatory notes do not provide, for the consideration of the Parliament or the people of Queensland, information as to whether the legislation has sufficient regard to Aboriginal tradition and Torres Strait Islander custom. Nor do the explanatory notes refer to the consultation undertaken on this issue. The committee invites the minister to provide information regarding these issues.

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[36] Investigation into Altruistic Surrogacy Committee, *Investigation into the Decriminalisation and Regulation of Altruistic Surrogacy in Queensland* (2008), ch 9; available at: www.parliament.qld.gov.au/surrogacy

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

61. 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.

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

63. Explanatory notes were tabled at the first reading of the bill. They are drafted in clear and precise language. As noted in this chapter, the explanatory notes provide some information to meet section 23 requirements, but the committee has invited the minister to provide further information as to whether the legislation has sufficient regard to Aboriginal tradition and Torres Strait Islander custom.

64. The explanatory notes state (at 23) that, although the bill is not uniform or complementary with legislation allowing for the transfer of parentage following an altruistic surrogacy arrangement, regard was had to the interstate legislation. For the section 23 requirement for a brief statement regarding a bill complementary with legislation of the Commonwealth or another State, the explanatory notes further state (at 23-4):

> *The* Births, Deaths and Marriages Registration Act 2003 *is based upon a model law that has been adopted in all Australian jurisdictions, but with modifications in each of the jurisdictions to suit local conditions. In Western Australia, Victoria, South Australia and the Australian Capital Territory, amendments have been made to their respective Births, Deaths and Marriages legislation to allow for registration of the court's order transferring parentage and the issue of a birth certificate showing the intended parent/s as the child's parents.*
>
> *The* Status of Children Act 1978 *and similar legislation in other States and Territories was introduced in the 1970's to remove discrimination against children based on the marital status of their parents and to provide legal certainty about the parentage of children.*
>
> *With the development of assisted reproductive technologies, amendments were made to the legislation containing the parenting presumptions in most States and Territories in the 1990's to clarify the status of parents, children and donors. This occurred in 1988 in Queensland following the passage of the* Status of Children Act Amendment Act 1988*.*
>
> *Since this time, all States and Territories have passed amendments to legislation providing for the status of children conceived using donor material. All States and Territories, apart from Queensland and South Australia have already passed amendments to extend the parentage presumption to the female de facto partner of a birth mother, when the birth mother has undergone a fertilisation procedure to conceive the child with the consent of her female de facto partner.*
>
> *The definition of 'fertilisation procedure' in the respective Status of Children legislation of New South Wales, South Australia and Western Australia, includes a procedure where fertilisation occurs inside the woman's body. The proposed amendment in this Bill relating to the definition of a 'fertilisation procedure' in the Status of Children Act 1978 is consistent with these other jurisdictions' legislation.*

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 28 OCTOBER TO 10 NOVEMBER 2009

(Listed in order of sub-leg number)

SLNo 2009	SUBORDINATE LEGISLATION	Other Documents Tabled (EN, RIS, MS)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Date
254	Proclamation commencing remaining provisions		13/11/2009	24/03/2010	24/11/2009	25/03/2010
255	Electricity Amendment Regulation (No.5) 2009		13/11/2009	24/03/2010	24/11/2009	25/03/2010
256	Transport Planning and Coordination Amendment Regulation (No.1) 2009		13/11/2009	24/03/2010	24/11/2009	25/03/2010
257	Nature Conservation Legislation Amendment Regulation (No.1) 2009		13/11/2009	24/03/2010	24/11/2009	25/03/2010
258	Water (Market Rules) Amendment Notice (No.1) 2009		13/11/2009	24/03/2010	24/11/2009	25/03/2010
259	Proclamation commencing remaining provisions		20/11/2009	24/03/2010	24/11/2009	25/03/2010
260	Proclamation commencing remaining provisions		20/11/2009	24/03/2010	24/11/2009	25/03/2010
261	Integrated Planning Amendment Regulation (No.6) 2009		20/11/2009	24/03/2010	24/11/2009	25/03/2010
262	Building and Other Legislation Amendment Regulation (No.3) 2009		20/11/2009	24/03/2010	24/11/2009	25/03/2010
263	Nature Conservation (Protected Areas Management) Amendment Regulation (No.5) 2009		20/11/2009	24/03/2010	24/11/2009	25/03/2010
264	Nature Conservation (Wildlife) Amendment Regulation (No.1) 2009		20/11/2009	24/03/2010	24/11/2009	25/03/2010
265	Queensland Civil and Adminstrative Tribunal (Jurisdiction Provisions) Amendment Regulation (No.1) 2009		20/11/2009	24/03/2010	24/11/2009	25/03/2010

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

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

5. CREDIT (COMMONWEALTH POWERS) BILL 2009

Date introduced: 10 November 2009
Responsible minister: Hon PJ Lawlor MP
Portfolio responsibility: Minister for Tourism and Fair Trading
Committee report on bill: 12/09; at 1 - 6
Date response received: 10 December 2009 (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:
   - **clause 25** which may affect rights of individuals to information privacy;
   - **clause 29** containing an offence provision; and
   - **clause 26** which would confer the Australian Securities and Investments Commission with administrative power which may not be sufficiently defined nor subject to appropriate review.
2. In relation to whether the bill has sufficient regard to the institution of Parliament, the committee draws the attention of the Parliament to:
   - **clauses 4-6** which would refer matters to the Parliament of the Commonwealth and allow for the termination of references;
   - **clause 5** under which subordinate legislation would revoke referrals of State legislative power; and
   - **clauses 25-6** which would, despite any other Act or law, allow the minister to provide information and assistance to ASIC and to enter into an agreement or arrangement with ASIC.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Tradin

Ref: MN=108649

01 DEC 2009

SCRUTINY OF
10 DEC 2009
LEGISLATION COMMITTEE

B60·09.

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

Dear Ms Miller

Thank you for your letter of 23 November 2009 concerning the *Credit (Commonwealth Powers) Bill 2009* (the Referral Bill).

I refer to your comments in the committee's Legislation Alert № 12 of 2009.

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

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

The attached document addresses each of these concerns in turn.

I trust this information is of assistance.

Yours sincerely

Peter Lawlor.

PETER LAWLOR
Minister for Tourism and Fair Trading

Encl.

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RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT № 12 OF 2009

Credit (Commonwealth Powers) Bill 2009

The Scrutiny of Legislation Committee (the committee) has identified the following provisions of the Credit (Commonwealth Powers) Bill 2009 (the Referral Bill) as invoking Fundamental Legislative Principles (FLPs) pursuant to section 4(2) of the *Legislative Standards Act 1992*.

In relation to whether the Referral Bill has sufficient regard to the FLP of *rights and liberties of individuals*, the committee has drawn attention of the Parliament to the following clauses of the Referral Bill:

- **clause 25** which may affect rights of individuals to information privacy;
- **clause 29** which contains an offence provision; and
- **clause 26** which would confer the Australian Securities and Investments Commission (ASIC) with administrative power which may not be sufficiently defined, nor subject to appropriate review.

In relation to whether the bill has sufficient regard to the FLP of *institution of Parliament*, the committee has drawn attention of the Parliament to the following clauses of the Referral Bill:

- **clauses 4-6** which would refer matters to the Parliament of the Commonwealth and allow for the termination of references;
- **clause 5** under which subordinate legislation would revoke referrals of state legislative power; and
- **clauses 25-26** which would, despite any other Act or law, allow the minister to provide information and assistance to ASIC and to enter into an agreement or arrangement with ASIC.

The following provides a response to each clause.

SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

The committee alerts that **clause 25** of the Referral Bill may affect rights of individuals to information privacy as the clause would provide for the transfer of information and documents to ASIC.

Response:

The committee appears satisfied with the justification provided for any inconsistency with fundamental legislative principles as provided in the Explanatory Notes (at page 5).

The committee alerts that **clause 29** contains an offence provision for entering into a new credit contract exceeding the maximum annual percentage rate, which proposes a maximum penalty of 100 penalty units ($10 000).

Response:

The committee makes no further comment on this clause.

The committee alerts that **clause 26(1)** confers ASIC with administrative power which may not be sufficiently defined, nor subject to appropriate review.

Clause 26(1) enables the Minister, or a person authorised in writing by the Minister, to enter into an agreement or arrangement with ASIC:

> *... for the performance of **functions or the exercise of powers by ASIC** as an agent of the state, even if those functions or powers are or may be conferred on another person or body by or under a law of the state.*

The committee cautions that clause 26(1) has insufficient regard to section 4(3)(a) of the *Legislative Standards Act 1992* as it makes the rights and liberties, or obligations, of individuals dependent on administrative power only that is sufficiently defined and subject to appropriate review.

The committee is concerned that in clause 26(1) the administrative powers to be conferred on ASIC are not stated to be confined to 'appeals, review and enforcement proceedings', nor to be conferred 'for the purposes of giving effect to the National Consumer Credit Protection Bill 2009'.

The committee also notes that review under the *Judicial Review Act 1991* may not be available in respect of administrative power conferred under clause 26(1), as an exercise of the power would not appear to fall within the meaning of 'decision to which this Act applies' in section 4 of the *Judicial Review Act 1991*. Additionally, review may not be available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Response:

Clause 26(1) provides for the transfer of information prior to the repeal of current credit laws and has particular effect on information obtained by the Office of Fair Trading, as the administering authority.

Authorising the supply of information held by Queensland to the Commonwealth, through the Referral Bill, is considered reasonable and necessary in the circumstances. As administration of credit will be transferred to the Commonwealth, this information will be necessary to ensure the on-going efficient administration and enforcement of credit.

The relevant Commonwealth agency that will receive the information is ASIC. The only information provided will be that information obtained in the lawful administration of the repealed credit laws. The information provided will be for the same purpose that it is currently utilised under the Queensland credit laws being repealed.

It is critical 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 as this will maintain business and market confidence by avoiding gaps in administration and enforcement of trade measurement law during the transition.

SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

The committee alerts that **clauses 4 to 6** of the Referral Bill, which refer matters to the Parliament of the Commonwealth and allow for the termination of references, raise three (3) issues regarding the institution of Parliament.

Firstly, **clause 4** invokes the issue of Queensland having the ability to terminate a referral in accordance with the standard provisions contained in the Referral Bill.

The committee questions 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. This issue was raised by the committee in relation to the *Water (Commonwealth Powers) Act 2008.*

The committee states that it is arguable that the states can revoke the referral, given their incapacity to abdicate legislative power. It is also arguable that the effect of a revocation is not only to terminate the referral of power to the Commonwealth, but it also terminates the operation of any Commonwealth law enacted in reliance on that referral. However, the committee also acknowledges that an alternative argument is that state legislation revoking the reference would be rendered ineffective by section 109 of the Australian Constitution for being inconsistent with the Commonwealth legislation enacted pursuant to the original reference.

Response:

As outlined in relation to the *Water (Commonwealth Powers) Act 2008*, the use of revocation provisions is extremely common in state referral of power legislation. The approach taken in the Referral Bill, enabling the Governor to fix a day by proclamation to terminate the reference, accords with the vast majority of precedent state referrals of power to the Commonwealth since 1952.

Further, as acknowledged by the committee, the Referral Bill makes provision for Queensland to terminate both the initial reference and the amendment reference or just the amendment reference at any time. In particular, clause 19 of the National Consumer Credit Protection Bill 2009 adequately protects the state's interests in the event that the state no longer wishes the Commonwealth to continue to have power to legislate for Queensland in relation to the referred matters. The National Consumer Credit Protection Bill 2009 makes it clear that the termination of the initial reference has the effect of revoking in its entirety the referral of powers (including both initial and amendment) on behalf of Queensland to the Commonwealth, resulting in Queensland ceasing to be a referring state, and consequently terminating the Commonwealth's power to legislate for Queensland in relation to the referred matters. This does not however, affect the status of other referring states or the Commonwealth's power to legislate for them.

Secondly, **clause 4(4)** invokes the issue that once the legislative power has been referred to the Commonwealth Parliament, the National Credit legislation may be amended either by the Commonwealth Parliament or by way of instruments made under legislative power delegated in the national credit legislation.

Response:

The Explanatory Notes (at page 8) provide that Clause 4(4) envisages for Queensland Parliament that the National Credit legislation be amended or affected by Commonwealth legislation enacted in reliance on other powers and that instruments under the National Credit legislation may affect the operation of that legislation otherwise than by express amendment.

Thirdly, the committee raises concerns that **clause 5** would allow subordinate legislation to revoke referrals of state legislative power as it provides for the termination of the references made under clause 4 or the amendment reference under clause 4(1)(b). The effect of Clause 5 being that the Governor could, by proclamation, fix a day on which the references or amendment reference would terminate.

The committee acknowledges that these concerns were also raised by the Senate Standing Committee for the Scrutiny of Bills regarding the National Consumer Credit Protection Bill 2009 (Cth), as per the letter of the Chair of the Senate committee, the Senator the Hon Helen Coonan, dated 13 August 2009, regarding the extensive use of 'Henry VIII' clauses and strict liability offences.

Response:

With respect of the Referral Bill, the committee states that while generally it opposed the use of Henry VIII clauses in bills, it does 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: (1) immediate executive action; (2) the effective application of innovative legislation; (3) transitional arrangements; and (4) the application of national schemes of legislation.

The committee further states that it is arguable that clause 5 would fall within the fourth of the categories of Henry VIII provisions considered excusable by the committee. The Explanatory Notes (at pages 4-5) further indicate that sufficient regard is had to the institution of Parliament.

The committee is concerned that **Clauses 25 and 26** also authorise amendment of an Act other than by another Act.

In particular, the committee has concerns that **clause 25(1)** authorises the Minister to provide information and assistance to ASIC. Clause 25(2) states that subsection (1) 'applies despite any other Act or law'.

Further, **clause 26(1)** enables the Minister, or a person authorised in writing by the minister, to enter into an agreement or arrangement with ASIC. The agreement or arrangement would be for ASIC, as an agent of the state, to perform functions or exercise powers.

The agreement or arrangement may be entered into 'even if those functions or powers are or may be conferred on another person or body by or under a law of the state'. Clause 26(2) then provides for such an agreement or arrangement to have effect 'despite any provision of a law of the state in relation to any function or power that is the subject of the agreement or arrangement'.

The committee is concerned that the Explanatory Notes do not address the consistency of clauses 25(2) and 26 with fundamental legislative principles and, in particular, whether sufficient regard is had to the institution of Parliament.

Response:

As mentioned, authorising the supply of information held by Queensland to the Commonwealth, through the Referral Bill, is considered reasonable and necessary in the circumstances. As administration of credit will be transferred to the Commonwealth, this information will be necessary to ensure the on-going efficient administration and enforcement of credit.

The relevant Commonwealth agency that will receive the information is ASIC. The only information provided will be that information obtained in the lawful administration of the repealed credit laws. The information provided will be for the same purpose that it is currently utilised under the Queensland credit laws being repealed.

It is critical 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 consumer credit law during the transition.

EXPLANATORY NOTES

Additionally, the committee has made observations based on Part 4 of the *Legislative Standards Act 1992*, which places content requirements on explanatory notes tabled with bills.

Response:

The committee acknowledges that the Explanatory Notes were tabled at the first reading of the Referral Bill. They are drafted in clear and precise language and contain the information required by section 23 of the *Legislative Standards Act 1992.*

6. 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

Committee report on bill: 11/09; at 7 - 10

Date response received: 21 January 2010 (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:

   - **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.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

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

Dr Bruce Flegg MP

Shadow Minister for Educatic and Training
Member for Moggill
Website: www.moggill.net

January 18, 2010

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

Dear Jo-Ann

Thank you for your letter in relation to my Private Members Bill Criminal Code (Filming or Possessing Images of Violence Against Children) Amendment Bill 2009 and the copy of your committee's consideration in relation to the clauses of the bill and the explanatory notes.

Your committee has raised some issues that may be unintended consequences of the way the bill has been drafted and I will endeavour to address that by means of an amendment. Where possible the views of your committee will be taken into account when drafting any amendment.

Yours faithfully

Bruce Flegg MP
Shadow Minister for Education and Training
Member for Moggill

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LNP

7. INTEGRITY BILL 2009

Date introduced: 10 November 2009
Responsible minister: Hon AM Bligh MP
Portfolio responsibility: Premier
Date Passed: 25 November 2009
Committee report on bill: 12/09; at 15 - 22
Date response received: 24 November 2009 (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 16-20** which may affect rights of 'designated persons';
   - **clauses 29 to 33, 38-9 and 53** which may affect rights and liberties of individuals regarding information privacy;
   - **clause 70** limiting individual rights and liberties regarding employment;
   - **clauses 24 and 69** creating new offences;
   - **clauses 21(4), 23(4), 60(3) and 66(3)** which may confer administrative power not subject to appropriate review;
   - **clause 97** which would, in effect, provide for clauses 55 and 62 to operate retrospectively; and
   - **clauses 8 and 40** conferring immunity from proceedings.
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 68** which may delegate legislative power not subject to the scrutiny of the Legislative Assembly.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Premier of Queensland

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Email ThePremier@premiers.qld.gov.au
Website www.thepremier.qld.gov.au

For reply please quote: *LJP/RJL –TF/09/32938*

B59-09.

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

Dear Jo-Ann,

Thank you for your letter of 23 November 2009 providing the Scrutiny of Legislation Committee's comments regarding the Integrity Bill 2009, as contained in Legislation Alert No. 12 of 2009.

I note that the Committee makes reference to justifications provided in the explanatory notes for several potential breaches of fundamental legislative principles. I reiterate the comments in the explanatory notes which set out the necessity and justifications for these clauses.

The Committee also makes comment about the declaration of relevant criminal history under clause 53 of the Bill. The Bill only requires the declaration of certain types of convictions rather than a full criminal history (offences for which the person has been sentenced to a term of imprisonment of 30 months or more, or a dishonesty offence for which an adult has been convicted in the previous ten years) and specifically provides that the *Criminal Law (Rehabilitation of Offenders) Act 1986* would apply to the disclosure.

Therefore, any convictions which are no longer considered to form part of a person's criminal history in accordance with the provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, will not be required to be declared as part of the lobbyist registration process. This is consistent with current administrative arrangements under the *Queensland Contact with Lobbyists Code* (the Code). The approved form will provide further guidance for lobbyists in providing declarations of their criminal history for the Register.

Queensland Government

In relation to the Committee's comments regarding the retrospective alteration of obligations under the Code, I note that the obligations provided for in the Bill largely reflect the administrative requirements established by the Code. Although the Bill allows the Integrity Commissioner to consider a lobbyist's compliance with Code requirements, the consequence of non-compliance under the Bill effectively reflects administrative arrangements under the Code.

For example, under section 9 of the Code, the Director-General of the Department of the Premier and Cabinet may refuse to accept or remove a lobbyist's registration if the lobbyist has contravened the terms of the Code. Clause 97 of the Bill allows the Integrity Commissioner to take the same action by refusing or cancelling a registration in accordance with clauses 55 and 62 respectively on the basis of non-compliance with obligations under the Code. As noted by the Committee, natural justice considerations are more fully reflected in the legislative scheme by establishing a show cause process which must be conducted prior to the refusal or cancellation of a lobbyist's registration.

I note the comments from the Committee regarding potential interpretations of the constitutionality of the legislation. I reiterate the purpose of the lobbying provisions of the Bill, which is to set appropriate limits on the contact between lobbyists and government representatives. To this end, I consider that there is a clear public interest in establishing formal and transparent parameters around the operations of the lobbying industry which ensure that decisions of government are not inappropriately influenced. As the Committee has noted, in this respect the law is considered reasonably appropriate and adapted to serve a legitimate end.

I thank the Committee for its careful consideration of the legislation, and for the opportunity to comment on the Legislation Alert as it relates to the Integrity Bill 2009.

Yours sincerely

ANNA BLIGH MP
PREMIER OF QUEENSLAND

PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

8. EDUCATION AND TRAINING LEGISLATION AMENDMENT REGULATION (NO.1) 2009 SL188.09

Date tabled: 15 September 2009
Disallowance date: 26 November 2009
Responsible minister: Hon GJ Wilson MP
Committee report on sub-leg: 10/09 at 47
Date response received: 26 November 2009 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. The committee invites the minister to provide information regarding increases in fees in excess of CPI.

CORRESPONDENCE RECEIVED FROM MINISTER

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

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

Hon Geoff Wilson MP
Member for Ferny Grove

Queensland Government

Minister for Education and Training

25 NOV 2009

SCRUTINY OF
26 NOV 2009
LEGISLATION COMMITTEE

SL 188-09

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

Dear Ms Miller

Thank you for your letter dated 26 October 2009 attaching the comments of the Scrutiny of Legislation Committee in Legislation Alert No. 10 of 2009 that relate to the Education and Training Legislation Amendment Regulation (No. 1) 2009.

I am pleased to advise as follows in relation to the matters raised by the Committee.

The Committee states that 'during a period roughly equivalent to 12 months, some fees imposed under the Education and Training Legislation Amendment Regulation (No.1) were increased on two occasions, by way of subordinate legislation made on 1 January 2009 and 4 September 2009. The combined effect of the fee increases was in the order of 7 per cent and exceeded CPI.'

CPI increases occur annually in accordance with announced Government policy for fees and charges, namely that fees and charges are to be indexed annually by the full movement in the actual Brisbane All-Groups CPI, as published by the Australian Bureau of Statistics.

The Education Legislation Amendment Regulation (No.1) 2008 (SL323 of 2008) increased various fees in the Education and Training portfolio by the movement in the Consumer Price Index (CPI), including fees in the *Education (Queensland College of Teachers) Regulation 2005* (QCT Regulation) and the *Education (Queensland Studies Authority) Regulation 2002* (QSA Regulation). This regulation commenced on 1 January 2009.

The CPI increase of 5.1 per cent in this Regulation that related to the QCT and QSA Regulations was based on CPI movements for the June quarter 2007 to the June quarter 2008.

The Education Legislation Amendment Regulation (No.1) 2009 (SL188 of 2009) also effected CPI increases to the QCT and QSA Regulations. The amendments effecting these CPI increases will commence on 1 January 2010.

The CPI increase of 2 per cent in this Regulation that relates to the QCT and QSA Regulations was based on CPI movements for the June quarter 2008 to the June quarter 2009.

Therefore the fee increases for each year were effected within the movement of the CPI.

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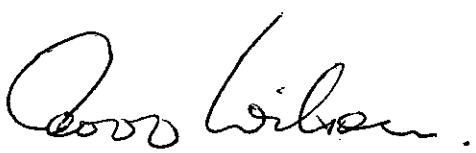
The Committee also states that fee increases in excess of the movement of the CPI occurred with respect to the QCT Regulation between 18 April and 4 September 2009.

The Committee further states that fee increases in excess of the movement of the CPI occurred with respect to the QSA Regulation between 1 August 2008 and 4 September 2009.

As explained above, fee increases in accordance with the CPI were applied to fees in the QSA Regulation by SL323 of 2008 and SL188 of 2009, with the increases of 5.1 per cent and 2 per cent respectively to take effect on 1 January following their making. Therefore there have been no increases in excess of the CPI movement.

I trust this information is of assistance and I thank the Committee for its comments.

Yours sincerely



GEOFF WILSON MP
Minister for Education and Training

Ref: 09/207359 ET/09/4941
Your ref: SL188.09

9. PROCLAMATION COMMENCING CERTAIN PROVISIONS SL223.09

Date tabled: 16 October 2009
Disallowance date: 25 February 2010
Responsible minister: Hon R Nolan MP
Committee report on sub-leg: 11/09; at 43
Date response received: 23 November 2009 (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 *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: MC45631

Your ref: SL223.09

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

Dear Mrs Miller

Proclamation commencing certain provision SL223.09

Thank you for your letter of 9 November 2009 enclosing an extract from the committee's Legislation Alert No. 11 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 section 70 of that Act.

As part of the adoption of national reforms for heavy vehicles, section 70 sought to make a minor amendment to the definition of "extreme overloading offence" in the *Transport Operations (Road Use Management) Act 1995*. Following passage of the amendment, however, it was discovered that there was some potential ambiguity in the proposed new definition.

The commencement of section 70 was therefore postponed to allow time for a clarifying amendment to be progressed as part of the *Transport and Other Legislation Amendment Act 2008*. The amended section 70 was then commenced on the same date as associated regulation amendments on 19 October 2009.

I am advised that the delayed commencement of section 70 did not adversely affect the rights and liberties of any individual. As mentioned above, section 70 made a minor amendment to a definition to reflect new terminology used in national model legislation. This did not affect the way in which the section operated.

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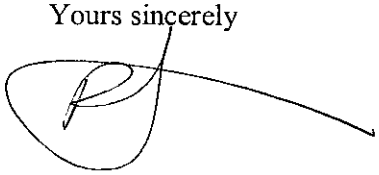
I thank the committee for its careful consideration of the legislation and for its comments and trust the above information has been of assistance.

Yours sincerely



RACHEL NOLAN MP
Minister for Transport

10. TRANSPORT OPERATIONS (PASSENGER TRANSPORT) AMENDMENT REGULATION (NO. 2) 2009 SL231.09

Date tabled: 27 October 2009
Disallowance date: 25 February 2010
Responsible minister: Hon RG Nolan MP
Committee report on sub-leg: 12/09 at 30
Date response received: 4 January 2010 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the regulation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information about introduction of a minimum age for eligibility to hold an authorisation to drive a taxi.

2. In relation to whether the regulation has sufficient regard to the institution of Parliament, the committee invites the minister to provide information regarding section 4.

CORRESPONDENCE RECEIVED FROM MINISTER

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

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

Hon Rachel Nolan MP
Member for Ipswich

Our ref: MC45891

Your ref: SL231.09

Queensland Government

Minister for Transport

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

Dear Mrs Miller

Thank you for your letter of 23 November 2009 enclosing an extract from the committee's Legislation Alert No. 12 of 2009.

The Committee has noted that two amendments in the *Transport Operations (Passenger Transport) Amendment Regulation (No. 2) 2009* (the Amending Regulation) to the *Transport Operations (Passenger Transport) Regulation 2005* (the Regulation) may not have sufficient regard to the fundamental legislative principles.

The amendment (section 3 amending section 20) to establish a minimum age of 20 for a person to apply for driver authorisation was in response to a recent increase in complaints and reports of poor driver standards attributed to inexperienced drivers. In particular, drivers who initially obtained their driver licence and accrued their driving history overseas may not have been subject to an appropriately high licence assessment standard, comparable driving conditions or road rules as a driver who obtained their licence in Australia or another country with recognised driver licence standards.

The previous provisions effectively required a person progressing through the Australian driver licensing regime to be at least 20 years old before gaining the open driver licence necessary to hold driver authorisation. The previous provisions helped ensure that new taxi drivers had an appropriate level of maturity and driving experience before they provided a public passenger service. The new specific 20 years age minimum provision reinforces this policy intent.

The new specific 20 years age minimum provision is not expected to disadvantage many individuals. A check of departmental records undertaken prior to the amendment identified that there were 31 driver authorisation holders under the age of 20. All of these drivers obtained their authorisation after an open Australian licence was issued based on

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their overseas driver licence history. Although in each case the driver was required to successfully undertake a practical and written driving examination before being issued with the Queensland driver licence, in some cases the applicant had to take these tests multiple times before passing.

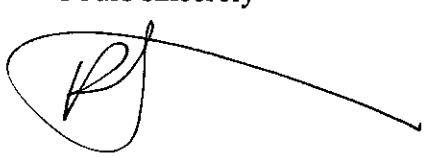
This new requirement provides a practical balance between the rights and liberties of an individual with the need to ensure public transport drivers have a reasonable level of driving experience.

The purpose of section 4 of the amending regulation which included the insertion of new section 20C(3) was to shift the head of power for applying particular requirements on all drivers from the *Transport Operations (Passenger Transport) Standard 2000* (the Standard) to the Regulation. This was because the provisions in section 4 were more suitable for a regulation rather than the Standard which establishes compliance criteria and performance standards.

All of the provisions in section 4 of the Amending Regulation, (that is, new sections 20A-C) replicate most of those in sections 6 to 9 of the Standard. As well, there has been no change in policy or intent in the replicated provisions, including section 20C(3). In these circumstances, it was considered appropriate to retain the chief executive's power to require taxi drivers to undertake training on their driver authorisation renewal.

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