Legislation Alert

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Scrutiny of Legislation Committee

53rd Parliament

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

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COMMITTEE RESPONSIBILITY

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

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

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

1. Examination of legislation

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

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

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

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

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

2. Monitoring the operation of statutory provisions

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

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

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

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

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

REPORT

Structure

This report follows committee examination of:

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

Availability of submissions received

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

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

PART 1 – BILLS EXAMINED

1. INTEGRITY REFORM (MISCELLANEOUS AMENDMENTS) BILL 2010

Date introduced: 3 August 2010

Member: Hon AM Bligh MP

Portfolio responsibility: Premier and Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 8 and 23** requiring officers to submit to a medical examination in specified circumstances;
   - **clauses 8, 23-4, 101 and 132** expanding the grounds on which disciplinary action may be taken;
   - **clauses 8, 23, 25 and 136** providing for disciplinary action to be taken against a former ambulance service officer or former fire service officer;
   - **clauses 12-3, 60, 67, 74 and 175** requiring statutory office holders and Members of Parliament to declare interests and conflicts of interest;
   - **clauses 59 and 61** which may affect information privacy rights of other statutory office holders;
   - **clauses 38-40, 43-4, 59 and 117** which may affect individuals' rights to privacy;
   - **clause 85** requiring people other than public officials to comply with a public service agency's standards of practice;
   - **clause 8** which may make rights and liberties, or obligations, dependent on insufficiently defined administrative power;
   - **clause 56** expanding the administrative power of the Integrity Commissioner regarding the registration of lobbyists;
   - **clause 8** which may be inconsistent with principles of natural justice;
   - **clauses 150 and 153** which may be inconsistent with principles of natural justice;
   - **clause 78** which may provide for rights to be affected detrimentally by the retrospective operation of legislation; and
   - **clause 164** conferring immunity from civil liability on persons who perform appeal functions under the *Public Service Act*.
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 85, 128, 164 and 167** which may delegate legislative power which would not be subject to the scrutiny of the Legislative Assembly.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **clauses 6, 8, 21 and 25** which may be inconsistent with employment-related and information privacy rights of individuals; and
   - **clause 58** and the intended operation of an amended prohibition on lobbying by unregistered entities.

BACKGROUND

4. Following a Queensland Government review of public sector integrity and accountability, a second stage of reform is to be implemented by way of three 'Integrity Reform Bills', the:
   - Integrity Reform (Miscellaneous Amendments) Bill 2010;
   - Ministerial and Other Office Holder Staff Bill 2010 (see chapter 2); and
   - Public Interest Disclosure Bill 2010 (see chapter 6).
5. The bill is to implement a range of integrity and accountability reforms.

LEGISLATIVE PURPOSE

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

   Amend legislation to implement a range of integrity and accountability reforms, and other operational improvements, designed to further strengthen Queensland's integrity and accountability framework.

7. In addition, the bill would amend the:

   - *Ambulance Service Act 1991*;
   - *Auditor-General Act 2009*;
   - *Civil Liability Act 2003*;
   - *Fire and Rescue Service Act 1990*;
   - *Government Owned Corporations Act 1993*;
   - *Integrity Act 2009*;
   - *Ombudsman Act 2001*;
   - *Parliament of Queensland Act 2001*;
   - *Public Sector Ethics Act 1994*;
   - *Public Service Act 2008*;
   - Public Service Regulation 2008; and
   - *Right to Information Act 2009*.

8. Further, the legislation would make minor and consequential amendments to four Acts identified in the schedule:

   - *Corrective Services Act 2006*;
   - *Education (General Provisions) Act 2006*;
   - *Parliament of Queensland Act 2001*; and
   - *Transport Operations (Passenger Transport) Act 1994*.

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. **Clauses 6, 8, 21 and 25** may be inconsistent with employment-related and information privacy rights of individuals. They would amend, respectively, the *Ambulance Service Act* and the *Fire and Rescue Service Act* to allow the chief executive to:

    - require the sharing of disciplinary information relating to previous employment; and
    - use disciplinary information regarding past employment in disciplinary decisions relating to current employment.

11. Clauses 6 and 21 would require a person to disclose a previous history of serious disciplinary action.

12. New section 13A(1) of the *Ambulance Service Act* would provide that, if the chief executive proposed to appoint a person, he or she may be required to disclose any 'serious disciplinary action' previously taken against them. Under new section 13A(2), the requirement need be complied with before the appointment took effect and as stated by the chief executive. Any information provided might be considered for a decision regarding the appointment (new section 13A(3)) and the chief executive need not further consider the person for appointment if he or she failed to comply with the disclosure requirement or gave false or misleading information (new section 13A(4)). 'Serious disciplinary action' would be defined in the schedule (clause 10) to mean disciplinary action involving dismissal, transfer or redeployment to other employment, reduction of remuneration or classification level or rank; or a disciplinary declaration which included either dismissal or reduction of classification level or rank as the penalty that would have been taken against the person if the person's employment had not ended.

13. Clause 21 would insert in the *Fire and Rescue Service Act*:

- a new section 25B in similar terms to proposed section 13A(1) of the *Ambulance Service Act*; and
- a new section 25C requiring a person to disclose past serious disciplinary action if the person is to be seconded to the fire and rescue service.

14. Clauses 8 and 25 would allow sharing and use of disciplinary information from past employment. Clause 8 would insert into the *Ambulance Service Act*:

- new section 18J stating that if another chief executive asked the chief executive of the ambulance service for disciplinary information about a former employee, the information must be provided;
- new section 18K requiring the provision of such information by the chief executive of the ambulance service if requested by another chief executive; and
- new section 18L allowing the chief executive to access disciplinary information from a person's past employment as a public service officer or as a fire service officer in order to make a decision regarding the person's appointment or a disciplinary finding, action or declaration.

15. Clause 25 would amend the *Fire and Rescue Service Act* in similar terms (see new sections 30I to 30K).

16. In relation to new section 18J, the explanatory notes indicate (at 12) that the chief executive must be reasonably satisfied that the giving of the information would not prejudice the investigation of a suspected contravention of the law. In relation to new section 18L, the explanatory notes state (at 13):

This covers circumstances in which the chief executive is the chief executive of more than one entity (for example the QAS and QFRS) and may have information relating to officers of one entity that is relevant for decision making in the other entity.

17. It is stated in the explanatory notes (at 5) that the proposed provisions are consistent with provisions in other Queensland legislation:

The amendments are similar to provisions contained in the Public Service Act 2008 *and the* Police Service Administration Act 1991*. Providing for a procedure to discipline former officers by a declaration can be seen as adversely affecting the rights of individuals. However, given the public interest in having a scheme to properly assess and record the grounds of discipline, it is considered that the amendments achieve an appropriate balance between the rights of the individual and the public interest.*

The use of a person's previous public service, including the ambulance service and fire and rescue service disciplinary information to determine their suitability for employment can been seen as adversely affecting the rights of the individual concerned. However, due to the public interest in upholding and maintaining the ethical standards of government employees, it is considered essential that this information be made available to maintain public confidence in government agencies. The amendments to the Ambulance Service Act 1991 *and the* Fire and Rescue Service Act 1990 *are similar to provisions already contained in the* Public Service Act 2008 *and the* Police Service Administration Act 1991*. The amendments provide that the information need only be provided by a former chief executive where the information is reasonably necessary for the chief executive to make decisions about the appointment of the person. It is therefore considered that the amendments achieve an appropriate balance between the rights of the individual and the public interest.*

18. The committee notes that the information in the explanatory notes refers to the past disciplinary information being used for determining suitability for employment only. However, both new sections 18L of the *Ambulance Service Act* and 30K of the *Fire and Rescue Service Act* refer to use of the information for determinations regarding a disciplinary finding, action or declaration. The committee invites the minister to provide information clarifying the intended operation of these provisions.

19. **Clauses 8 and 23** would require officers to submit to a medical examination in specified circumstances.

20. Clause 8 would insert a new part 2, division 4 into the *Ambulance Service Act* to provide for disciplinary action for service officers and former service officers. New section 18A would prescribe the grounds for disciplinary action to be taken by the chief executive. New section 18A(4) would apply where the chief executive was contemplating disciplinary action against an officer:

- in relation to performance or conduct considered to have been influenced by the officer's health; or
- on the ground of absence from duty.

21. New section 18A(4) would require an officer who may be subject to disciplinary action to submit to a medical examination as arranged by the chief executive.

22. In these circumstances, the chief executive may:

- appoint a medical practitioner to examine the officer and provide the chief executive with a written report about the officer's mental or physical condition or both; and
- direct the officer to submit to the medical examination.

23. In relation to new section 18A(4), the explanatory notes indicate (at 9):

This section clarifies that, where disciplinary action is contemplated on the ground of absence from duty without approved leave or reasonable excuse or where the chief executive considers the service officer's conduct or performance may have been influenced by the officer's health, the chief executive may appoint a medical practitioner to examine the officer concerned and provide a report to the chief executive on the mental or physical condition, or both, of the officer. This provision reflects the provisions relating to medical assessments in the existing disciplinary code of practice.

24. Clause 23 would make similar provision in the *Fire and Rescue Service Act*, inserting a new section 30 (see explanatory notes, 22).

25. **Clauses 8, 23-4, 101 and 132** would expand the grounds on which disciplinary action may be taken and may affect rights and liberties of individuals.

26. Clause 8 would insert new sections 18A and 18B of *Ambulance Service Act*. These provisions would enact existing administrative disciplinary grounds, as outlined in the explanatory notes (at 9) in respect of new section 18A:

New section 18A provides for grounds for disciplinary action taken by the chief executive. The chief executive must be reasonably satisfied that a service officer has performed the act or omission that constitutes the ground before disciplining an officer.

The new grounds are substantially the same as grounds established under the existing Queensland Ambulance Service (QAS) disciplinary code of practice. An additional ground has been added in relation to disclosure of serious disciplinary action in accordance with the new section 13A. The ground of contravention of a provision of an award or industrial instrument has been added to the grounds of contravention of the Act, code of practice and code of conduct for completeness.

27. Similarly, in relation to new section 18B (explanatory notes, 9-10):

New section 18B establishes the action that the chief executive may take, or order to be taken, in disciplining a service officer. Such action may be anything that the chief executive considers reasonable in the circumstances. A range of examples is included. The disciplinary action specified in this section does not differ from disciplinary action available under the existing QAS disciplinary code of practice.

If the chief executive is taking disciplinary action in regard to a disciplinary finding made by the subject officer's previous chief executive, following an agreement under section 18F(1), this section specifies that the chief executives must agree on the disciplinary action.

Additionally, safeguards have been inserted to ensure that monetary penalties cannot be more than the total of two of the officer's periodic remuneration payments and that an amount to be deducted from any particular periodic payment is not greater than the specified limits.

A note has been inserted at the end of the section to draw attention to disciplinary appeal provisions under the Public Service Act 2008 *and* Public Service Regulation 2008*, for clarity.*

28. Clauses 23 and 24 would amend existing provisions in the *Fire and Rescue Service Act* to ensure consistency with the *Ambulance Service Act*, as it is to be amended by clause 8, and the *Public Service Act* (explanatory notes, 22):

Clause 23 amends the grounds for disciplinary action by extending the ground of wilful failure to comply with a provision of a code of practice to include a wilful failure to comply, without reasonable excuse, with a provision of the Act, code of conduct, award or industrial agreement. This amendment is made for completeness and to enhance consistency between the disciplinary provisions of the Fire and Rescue Service Act 1990 *and the* Ambulance Service Act 1991*.*

An additional ground has been inserted in relation to disclosure of serious disciplinary action in accordance with the new sections 25B and 25C.

A further ground of use, without reasonable excuse, of a substance to an extent adversely affecting competent performance of duties, has been inserted to clearly identify the QFRS' existing approach to substance use. This ground reflects the Public Service Act 2008*.*

29. Clause 101 would amend the *Public Sector Ethics Act* and clause 132(5) would amend the *Public Service Act*. In each case, the amended section would provide that disciplinary action may arise from a breach of an approved standard of practice or a breach of an approved code of conduct.

30. **Clauses 8, 23, 25 and 136** would provide for disciplinary action to be taken against a former ambulance service officer or former fire service officer.

31. Clauses 8 and 23 together with 25 would amend respectively the *Ambulance Service Act* and the *Fire and Rescue Service Act* to allow the chief executive to discipline a former service officer on specified grounds. Relevant proposed provisions are:

- new sections 18A(3) and 18C to 18I of the *Ambulance Service Act*; and
- new sections 30(3)(b) and 30B to 30H of the *Fire and Rescue Service Act*.

32. New sections 18I of the *Ambulance Service Act* and 30H of the *Fire and Rescue Service Act* would provide for disciplinary action by way of a 'disciplinary declaration' to be taken against a former employee; that is, a declaration of a disciplinary finding against the former officer – the disciplinary action that would have applied if the officer had not ceased employment.

33. The explanatory notes suggest (at 4-5) that the proposed provisions would be consistent with fundamental legislative principles:

> *The amendments are similar to provisions contained in the* Public Service Act 2008 *and the* Police Service Administration Act 1991*. Providing for a procedure to discipline former officers by a declaration can be seen as adversely affecting the rights of individuals. However, given the public interest in having a scheme to properly assess and record the grounds of discipline, it is considered that the amendments achieve an appropriate balance between the rights of the individual and the public interest.*

34. Clause 136 would amend the *Public Service Act* to insert a new section 188AB. It would provide the disciplinary action that may be taken where a disciplinary ground arises in relation to an ambulance service officer or fire service officer who subsequently leaves the service and becomes a public service employee in a department. The explanatory notes state that the new section would not apply where action was taken, or was being taken or about to be taken, under the *Ambulance Service Act* or the *Fire and Rescue Service Act*.

35. **Clauses 12-3, 60, 67, 74 and 175** would require some statutory office holders and Members of Parliament to declare interests and conflicts of interest and may affect individual rights to information privacy.

36. Clauses 12 and 13 would amend the *Auditor-General Act* to require:

- the Auditor-General, within one month of appointment, to give the Speaker of the Queensland Parliament a statement as to his or her interests and the interests of each person who is a 'related person' (replacement section 12, with 'related person' defined in new section 12(11));
- the Auditor-General to disclose an interest that conflicts or may conflict with the discharge of responsibilities (new section 12A); and
- a deputy Auditor-General acting as Auditor-General to comply with new section 12A.

37. Similar requirements would be imposed on:

- the Information Commissioner (clause 175, new sections 140A and 140B of the *Right to Information Act*);
- the Integrity Commissioner (clause 60, new sections 80 and 81 of the *Integrity Act*);
- Members of Parliament (clause 74, new section 69B of the *Parliament of Queensland Act* regarding statements of interests); and
- the Ombudsman (clause 67, new sections 63A and 63B of the *Ombudsman Act*).

38. The explanatory notes indicate (at 6) sufficient regard to fundamental legislative principles:

> *These amendments arguably have an effect on a person's right to privacy potentially breaching the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals. However, there will be no impact on Members of Parliament as the Bill legislates requirements to disclose interests already required under the Standing Rules and Orders of the Legislative Assembly.*
>
> *Similarly, the Auditor-General and the Integrity Commissioner are already required to declare their interests under their respective Acts, although a new process will be adopted for the Integrity Commissioner to provide statements of interest. In relation to the Ombudsman and the Information Commissioner, these amendments are required to ensure they have consistent obligations to declare their interests. As these office holders are officers of the Parliament, the Bill requires statements of interest to be provided to the Speaker, which are only accessible in limited circumstances as set out in the Bill, based on an existing process in the* Auditor-General Act 2009*.*

39. **Clauses 59 and 61** would amend the *Integrity Act* and may affect information privacy rights of other statutory office holders.

40. Clause 59 would insert a new section 72C to require statutory office holders identified in schedule 1 to make declarations of interests to relevant Ministers and the Integrity Commissioner. Clause 64 would insert the new schedule 1.[1] Clause 61 would amend section 85 to require the Integrity Commissioner to include in the annual report of the Integrity Commission details of statutory office holders' compliance with new section 72C.

41. The explanatory notes do not indicate whether the proposed provisions would have sufficient regard to rights and liberties of individuals, but state generally about new section 72C (at 33-4):

> *This new section mirrors the requirements applying to chief executives under the* Public Service Act 2008*. Statutory office holders are required to provide statements of interest to the Integrity Commissioner and the relevant Minister in accordance with section 101(3) of the* Public Service Act 2008*, under which the chief executive of the Public Service Commission may issue a directive about the information to be declared. Statements must be provided within one month, or as soon as possible after a change in interests.*
>
> *The provision of these statements of interests to the independent monitor of integrity standards for the Queensland Government, the Integrity Commissioner, will allow independent review of possible conflicts between an office holder's public duties and private interests. If the Integrity Commissioner identified a conflict of interest or possible conflict of interest through a statement provided by a statutory office holder under this Act, or by a chief executive in accordance with section 101 of the* Public Service Act 2008*, the Integrity Commissioner would be able to raise the conflict or potential conflict directly with the officer involved. Where identified conflicts are not resolved, the Integrity Commissioner would also be able to raise the conflict, or potential conflict, with the relevant Minister, who would also have been provided with the statement in accordance with the requirements of the Acts.*

42. **Clauses 38-40, 43-4, 117** may affect individuals' rights to information privacy.

43. First, the *Integrity Act* is to be amended to change terminology within the Act from 'conflict of interest' to 'ethics or integrity issue'. The Integrity Commissioner would be required to disclose information, which may include personal information, as follows:

- clause 38 would amend section 29 to require disclosure to the Premier of a 'perceived, and significant, ethics or integrity issue' as well as 'an actual and significant conflict of interest';
- clause 39 would amend section 32 to require disclosure to the Leader of the Opposition of perceived and significant ethics or integrity issues involving specified people;
- clause 40 would amend section 33 to require disclosure to the chief executive officer of a department or public service office of actual or perceived and significant ethics or integrity issues in particular circumstances; and
- clauses 43 and 44 would amend respectively sections 38 and 39 to require disclosure to either the Premier (regarding Government Members) or the Leader of the Opposition (regarding non-Government Members) of perceived and significant interests issues regarding Members of Parliament.

44. In respect of these proposed amendments, the explanatory notes state (at 29):

> *These amendments strengthen the ability of the Integrity Commissioner to take action on identified actual or perceived conflicts of interest or other ethics or integrity issues, in the interest of resolution of these issues by the appropriate person.*

45. Clause 117 would amend the *Public Service Act* by inserting a new section 88C specifying the functions of the appeals officer. New section 88C(2) would allow communication of information which may include personal information; namely, the appeals officers functions would include to:

- communicate to specified persons (identified in new section 88C(2)(a)(i) to (iii)) matters arising out of an appeal that may affect decision-making in the public service or in a particular government entity (new section 88C(2)(a)); and
- report to the minister on the performance of the appeals officers functions (new section 88C(2)(b)).

[1] Information regarding the statutory office holders to be listed in schedule 1 is included in the explanatory notes (at 35, in relation to clause 64).

46. The committee notes that new section 88C is not stated expressly to be subject to the *Information Privacy Act*. However, the explanatory notes state (at 50):

This subsection provides discretion for the appeals officer to determine the means by which he or she communicates to specified persons, notwithstanding that the laws of privacy will prevent the disclosure of personal information about a person.

47. **Clause 58** would amend the *Integrity Act* and may affect individuals' rights.

48. Clause 58 would amend section 71 to require the 'responsible person' (see schedule 2) for a government representative to notify the Integrity Commissioner of unregistered lobbying activity. The explanatory notes do not identify any inconsistency with fundamental legislative principles but provide (at 32) the following information about clause 58:

Clause 58 inserts a new subsection (3) into section 71 (Lobbying by unregistered entity prohibited). This new subsection aims to strengthen the integrity framework by providing for a reporting obligation upon government representatives where unregistered lobbying activity is identified. In order to ensure that notifications to the Integrity Commissioner are made by government representatives with sufficient seniority, the clause places obligations on the 'responsible person' for a government representative to notify the Integrity Commissioner if unregistered lobbying activity is identified. The dictionary in schedule 2 defines 'responsible person' as generally being the chief executive of the relevant public sector entity. However, Ministers, Parliamentary Secretaries and councillors are to be responsible for notification for themselves or, where applicable, their staff. However, subsection (4) allows 'responsible officers' to delegate the obligation to report unregistered lobbying.

49. However, the committee notes that section 71, as amended by clause 58, would not:

- require that a government representative be notified whether an entity is a registered lobbyist; or
- impose a sanction for failure to comply with the reporting obligation.

50. The committee invites the minister to provide information regarding the intended operation of clause 58.

51. **Clause 59** may affect individuals' rights to privacy.

52. Clause 59 would insert a new section 72A of the *Integrity Act* authorising provision of information regarding lobbying activity by government representatives to the Integrity Commissioner. The provision of the information would be authorised where it was reasonably considered to be relevant to the functions or powers of the Integrity Commissioner (new section 72A(2)). New section 72A(3) would make it clear that the information which might be provided might include 'personal information' (as defined in *the Information Privacy Act 2009*).

53. In relation to clause 59, the explanatory notes state (at 33):

The information which may be provided may include personal information … such as names of lobbyists or clients. However, any personal information provided to the Integrity Commissioner would be subject to the provisions of the Information Privacy Act 2009 *in the subsequent handling of that information. The provision of this information to the Integrity Commissioner will ensure that the Integrity Commissioner is able to monitor the extent of lobbying activity in Queensland.*

54. More specifically, information is provided (at 6) to indicate consistency with fundamental legislative principles:

The proposed new section 72A of the Integrity Act 2009 *will allow a responsible person for a government representative to give the Integrity Commissioner information (including personal information) about lobbying activity. This section arguably has an effect on a person's right to privacy potentially breaching the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals. However, this section is not considered to be objectionable as the information may only be disclosed if it is relevant to the functions or powers of the Integrity Commissioner and the information disclosed may already be known to the Integrity Commissioner (e.g. names of registered lobbyists as listed on the Lobbyists Register maintained by the Integrity Commissioner). In addition, the protections in the* Information Privacy Act 2009 *will apply to the Integrity Commissioner in dealing with any personal information provided.*

55. **Clause 85** may affect rights and liberties of individuals by requiring persons other than public officials to comply with a public service agency's standards of practice.

56. It would insert a new section 12D of the *Public Sector Ethics Act*. The new section states that the purpose of a standard of practice is to apply additional standards of conduct and behaviour to public officials of a particular public service agency. Under new section 12D(3), a standard of practice may apply to 'other persons who are not public officials of the agency who have a contract or other agreement with the agency'. A note provides the following examples of such people:

- contractors with the agency and their employees;
- volunteers with the agency; and
- students on work experience with the agency.

57. In respect of this provision, the explanatory notes state (at 5):

The proposed amendment to the Public Sector Ethics Act 1994 *provides for a code of conduct and standard of practice (if applicable) to apply to individuals who are not public officials of an agency, such as contractors, volunteers or students. However, the disciplinary provisions will only be applied to public officials.*

58. Clause 85 would insert also a new section 13(1)(c) stating that a code of conduct for a public sector entity may apply to people who are not public officials of the entity by who have a contract or other agreement with the entity. Examples equivalent to those for new section 12D are provided.

59. In each case, the proposed provision states that the standard of practice or the code of conduct may make different provision for public officials and those who are not. However, the explanatory notes do not provide information regarding the consistency of clause 85 with rights and liberties of individuals.

Administrative power

60. Section 4(3)(a) of the *Legislative Standards Act* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

61. **Clause 8** may make rights and liberties, or obligations, dependent on insufficiently defined administrative power. It would amend the *Ambulance Service Act*, inserting a new section 18O.

62. New section 18M would state that the chief executive may suspend a service officer from duty if it was reasonably believed the officer was liable to discipline under the Act. New section 18O would prescribe the effect of suspension from duty, providing that the chief executive might decide that the suspension should be on remuneration other than normal remuneration.

63. The explanatory notes state (at 4) that, although the administrative power conferred by new section 18O would not be defined by the Act as amended, definition would be provided by a code of practice:

How the chief executive is to make this decision is not set out in the Bill. This provision is based on similar existing provisions within the Public Service Act 2008 *which provide that the chief executive is required to comply with a relevant directive. While the amendments reflect the approach under the* Public Service Act 2008*, the relevant instrument will be a code of practice.*

64. The committee notes that clause 125 would amend section 137 of the *Public Service Act* to confer similar powers on a chief executive who suspended a public service officer from duty.

65. **Clause 56** would amend the *Integrity Act* to expand the administrative power of the Integrity Commissioner regarding the registration of lobbyists. Decisions of this nature are not subject to administrative appeal.

66. In addition to the existing power to cancel a registration (under section 66), new section 66A would provide the Integrity Commission with powers to issue a warning to a registrant or suspend his or her registration for a reasonable period. The explanatory notes do not address the consistency of clause 56 with fundamental legislative principles, but provide general information regarding its intended operation (at 32).

67. In *Legislation Alert* 12/09 at 18, the committee examined clause 66 of the then Integrity Bill 2009, noting that decisions of the Integrity Commissioner regarding registration were subject to a show cause process and to review under the *Judicial Review Act 1991*, but not to administrative review or appeal. In relation to those provisions, the explanatory notes to the Integrity Bill 2009 stated that:

Although the decision to refuse or cancel a registration is recognised to affect a lobbyist's livelihood, it is important that the Integrity Commissioner have power to restrict membership of the Lobbyists Register in appropriate circumstances to meet the purpose of the Bill of regulating lobbying in accordance with public expectations of transparency and integrity. As the Integrity Commissioner is an independent statutory officer of the Parliament, a separate review of the Integrity Commissioner's decision would not be appropriate; however, the parliamentary committee will have general responsibility for oversight of the performance of the Integrity Commissioner's functions.

Natural justice

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

69. **Clause 8** would amend the *Ambulance Service Act*, inserting a new provision which may be inconsistent with principles of natural justice.

70. New section 18N would prescribe procedures for disciplinary action. While the chief executive would be required to comply with the Act, any relevant code of practice 'and the principles of natural justice' when disciplining a service officer or former service officer or suspending a service officer, new section 18N(2) would state:

> However, natural justice is not required if the suspension is on normal remuneration.

71. The explanatory notes provide (at 4) the following information regarding the consistency of new section 18N with fundamental legislative principles:

> *Under the proposed amendments, the chief executive is not required to comply with the principles of natural justice in suspending an officer on normal remuneration. This provision is based on similar existing provisions within the* Public Service Act 2008*. An officer is suspended only if the chief executive reasonably believes there is a ground for taking disciplinary action against the officer and that a suspension will not deprive the person of any income or rights relating to continuity of employment. The provisions also include a requirement for a chief executive to consider alternative duties before suspending a person.*

72. **Clauses 150 and 153** would amend the *Public Service Act* and may be inconsistent with principles of natural justice.

73. The legislation would insert a new chapter 3, part 5 to provide for appeals to be heard by an appeals officer, rather than by the commission chief executive (clause 117). Clause 150 would amend section 200 to replace references to the chief executive with the appeals officer. New section 200(1), in similar terms to existing section 200(1), would state:

> The appeals officer may decline to hear an appeal against a decision mentioned in section 194(1)(a) or (d) unless he or she is satisfied the appellant has used procedures required to be used under an employee complaints directive.

74. Accordingly, a person may not be able to exercise a right to appeal under the legislation if, in exercise of a discretion regarding the procedures followed, the appeals officer determined the appeal should not be heard.

75. The explanatory notes provide (at 57) information regarding new section 200(1), but do not address its consistency with fundamental legislative principles.

76. Currently, section 203(1)(d) provides that the commission chief executive may decide an appeal without hearing if the parties to the appeal agree. Clause 153 would amend section 203(1)(d) to provide that the appeals officer may decide an appeal without a hearing and without the agreement of the parties.

77. In relation to the consistency of the proposed amendment with fundamental legislative principles, the explanatory notes state that appellants will continue to be afforded procedural fairness as 'the appeals officer is required to observe natural justice under section 202, which supersedes subsection (1)(d)'. Further, it is said (at 3-4):

> *The amendments to the* Public Service Act 2008 *remove the requirement that the appeals officer obtain the agreement of the parties before deciding an appeal without a hearing. Allowing the appeals officer to decide an appeal without a hearing may breach the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals as it denies the parties the right to verbally present their case. However, the appeals officer is required to observe natural justice and the parties will still have the ability to make written submissions. The purpose of the removal of this requirement is to promote timely decision-making and reduce the administrative burden.*

Retrospective operation

78. 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.

79. **Clause 78** may provide for rights to be affected detrimentally by the retrospective operation of legislation.

80. Clauses 75 and 76 would amend respectively sections 70 and 71 of the *Parliament of Queensland Act* to make it clear that restrictions on Members of Parliament transacting business with the State only apply to agreements or contracts for the provision of goods by a Member to an entity of the State. Accordingly, clause 75 would amend section 70 to provide in express terms that the restrictions on Members transacting business with an entity of the State for a contract extend only to agreements or contracts to provide or receive goods (explanatory notes, 39):

The amendment clarifies the scope of the restrictions to ensure that it is consistent with the legislative position as it existed prior to the commencement of the Parliament of Queensland Act 2001*.*

81. Clause 76 would amend section 71 to state that the term 'entity of the State' does not include a local government (explanatory notes, 40):

The amendment clarifies that the prohibition of Members transacting business with the State is not intended to apply to transactions with local governments.

82. Clause 78 contains transitional provisions for the Integrity Reform (Miscellaneous Amendments) Act 2010, including a new section 167 of the *Parliament of Queensland Act*. It states that, during the 'transitional period' (from 6 June 2002 to the commencement of the legislation), the legislation is to apply 'as if sections 70 and 71 as amended … had commenced on 6 June 2002'.

83. Where legislation may have retrospective operation, the committee examines whether the retrospectivity might have any adverse effects on rights or liberties or whether obligations imposed retrospectively might 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 would have relied on and would have legitimate expectations based on the existing law.

84. In relation to the proposed retrospective operation to be given to amended sections 70 and 71 by clause 78, the explanatory notes state (at 5-6):

The retrospective operation is not considered to be objectionable in the circumstances on the basis that the amendment is intended to be curative in nature; the practical difficulty of seeking to undo transactions that may have taken place since 6 June 2002; and the amendments do not adversely effect the rights of individuals who have had dealings with Members.

Immunity from proceeding or prosecution

85. 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.

86. **Clause 164** would confer immunity from civil liability on persons who perform appeal functions under chapter 7, part 1 of the *Public Service Act*.

87. It would insert new section 214A(1) to state that an appeals official would not be civilly liable to someone for an act done, or omission made, honestly and without negligence under chapter 7. However, new section 214A(2) would provide that, if because of the new section civil liability did not attach to the official, it would attach instead to the State.

88. In respect of provisions such as new section 214A, the committee notes that one of the principles underlying a parliamentary democracy based on the rule of law is that all people should be equal before the law. Relevantly, the explanatory notes state (at 4):

A further amendment to the Public Service Act 2008 *confers immunity from prosecution for persons who perform functions for an appeal under chapter 7, part 1 of that Act. This potentially breaches the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals. However, the immunity applies only to acts done, or omissions made, honestly and without negligence and, in such cases, the liability shifts to the State. The conferral of the immunity is consistent with provisions across the statute book applying to persons performing similar functions and is generally justified on the basis that persons performing such functions need the freedom to act without fear of legal consequences for their honest and reasonable actions.*

Sufficient regard to the institution of Parliament

Parliamentary scrutiny of delegated power

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

90. **Clauses 85, 128, 164 and 167** may delegate power to make instruments, legislative in nature, which would not be subject to the scrutiny of the Legislative Assembly.

91. Clause 85 would amend the *Public Sector Ethics Act* to make greater legislative provision for codes of conduct, the purpose of which would be to provide standards of conduct for public service agencies, public sector entities and public officials consistent with ethics principles and values (new section 10). Accordingly, new part 4, division 1 of the Act would provide for codes of conduct generally. Under new section 12B, the Premier might approve a code of conduct for public service agencies. New section 12D would provide also for standards of practice to apply additional standards of conduct and behaviour to public officials of a particular public service agency. These would be approved by the commission chief executive (new section 12F). New section 12H would state:

> **Compliance with code and standard of practice**
>
> A public official of a public service agency must comply with the code of conduct for public service agencies and any standard of practice that applies to the official.

92. The codes of conduct and standards of practice may appear to be legislative in nature as they would be general rules of conduct without reference to particular cases.[2] Further, the legislation appears to regard them as legislative in nature:

- clauses 10 and 28 define 'relevant disciplinary law' to mean, for the *Ambulance Service Act* and the *Fire and Rescue Service Act* –
  - (a) the parent Act or a disciplinary provision of a code of practice (including a code of practice as in force from time to time before the commencement of this definition);
  - (b) a law of another State that provides for the same, or substantially the same, matters as this Act;
  - (c) a code of practice or other instrument under a law mentioned in paragraph (b) providing for disciplinary matters; or
  - (d) a public sector disciplinary law; and
- clause 132 and other proposed provisions state that contravention of a standard of conduct without reasonable excuse would provide grounds for discipline.

93. Clauses 128, 164 and 167 would allow for directives to be made by the commission chief executive under the *Public Service Act* regarding:

- the application of chapter 5, part 7 (Mental or physical incapacity) (clause 128, new section 179AA);
- appeals to the appeals officer (clause 164, new section 214B); and
- dealing with complaints by officers and employees (clause 167, new section 218A).

94. The codes of conduct, standards of practice and directives that may be made under clauses 85, 128, 164 and 167 would not appear to fall within the definition of 'statutory instrument' in section 9 of the *Statutory Instruments Act*. Accordingly, the documents would not need to be tabled in the Parliament and would not be subject to parliamentary scrutiny. However, the committee notes that the documents appear to be legislative in nature and likely to affect rights and liberties of individuals and to impose obligations.

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

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

95. 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)).

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

2. MINISTERIAL AND OTHER OFFICE HOLDER STAFF BILL 2010

Date introduced: 3 August 2010

Member: Hon AM Bligh MP

Portfolio responsibility: Premier and Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 23-5** which may affect rights and liberties of individuals, requiring publication of personal information; and
   - **clauses 44-5** amending the Criminal Code in two respects.
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 19, 22 and 26-9** which may delegate power to make instruments, legislative in nature, but not subject to the scrutiny of the Legislative Assembly.
3. The committee invites the minister to provide further information regarding the consistency of **clause 15** with section 4(3)(c) of *the Legislative Standards Act*

BACKGROUND

4. Following a Queensland Government review of public sector integrity and accountability, a second stage of reform is to be implemented by way of three 'Integrity Reform Bills', the:
   - Integrity Reform (Miscellaneous Amendments) Bill 2010 (see chapter 1);
   - Ministerial and Other Office Holder Staff Bill 2010; and
   - Public Interest Disclosure Bill 2010 (see chapter 6).

5. The bill is to regulate the employment and conduct of staff of ministers and Opposition and non-Government Members of Parliament.

LEGISLATIVE PURPOSE

6. The bill is intended to provide for the (clause 4):
   - employment of staff in the offices of particular members of the Legislative Assembly; and
   - proper work performance and conduct of the staff members.

7. It would amend the:
   - Criminal Code;
   - *Industrial Relations Act 1999*;
   - *Integrity Act 2009*;
   - *Parliamentary Service Act 1998*; and
   - *Public Service Act 2008*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

8. Initially, the committee notes the following statement in the explanatory notes (at 4) regarding the consistency of the legislation with fundamental legislative principles:

   The Bill is consistent with fundamental legislative principles and no breaches of the principles have been identified.

9. However, to assist the Parliament's consideration of whether the legislation has sufficient regard to both rights and liberties of individuals and the institution of Parliament, the committee identifies a number of matters below.

Sufficient regard to rights and liberties of individuals

Rights and liberties

10. 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.*

11. **Clauses 23-5** may affect rights and liberties of individuals, requiring publication of personal information. These clauses would form part 3, division 4, regarding declarations of interest and dealing with conflicts.

12. First, clause 23 states that a reference to an interest or to a conflict of interest is to be given its ordinary meaning under the general law, and that the definition of 'interest' in section 36 of the *Acts Interpretation Act 1954* would not apply. The explanatory notes say (at 11) that, 'This ensures that both pecuniary and non-pecuniary interests must be declared.'

13. Then, clause 24 would require a 'staff member' (defined in the schedule as a person employed under the Act as a staff member in the office of a minister, the Leader of the Opposition, or another non-Government Member of Parliament) to provide his or her employer with a statement of his or her interests:

- within one month of commencing employment;
- each June; and
- whenever the interests change in a way prescribed in a directive from the chief executive.

14. Clause 25 would require a staff member to:

- declare any actual or possible conflicts of interest to the Member of Parliament who employs him or her as soon as practicable after becoming aware of the conflict (clause 25(1)(a)); and
- refrain from action relating to the conflict unless authorised by the Member of Parliament (clause 25(1)(b)).

15. The Member of Parliament may direct the staff member to resolve the conflict or possible conflict (clause 25(2)).

16. The explanatory notes provide the following information (at 11):

This division applies consistent requirements to staff members as those which apply, or may be applied, to public service employees under the Public Service Act 2008*.*

17. **Clauses 44 and 45** would amend the Criminal Code in two respects and have potential to affect rights and liberties of individuals.

18. Clause 44 would amend the definition of 'person employed in the public service' in section 1 to include 'staff members' under the Ministerial and Other Office Holder Staff Act 2010.

19. Clause 45 would amend section 89 regarding public officers interested in contracts. Currently, section 89 states:

> Any person who, being employed in the public service, knowingly acquires or holds, directly or indirectly, otherwise than as a member of a registered joint stock company consisting of more than 20 persons, a private interest in any contract or agreement which is made on account of the public service with respect to any matter concerning the department of the service in which the person is employed, is guilty of a misdemeanour, and is liable to imprisonment for 3 years, and to be fined at the discretion of the court.

20. Clause 45 would insert a new section 89(2) stating that a reference to a person employed in the public service includes a ministerial staff member as defined under the Ministerial and Other Office Holder Staff Act 2010.

21. The explanatory notes indicate (at 23):

As this section refers to the department in which a person is employed, the amendment clarifies the relationship of Ministerial staff members to particular departments. For this purpose:

- *Ministerial staff members employed in Ministerial offices are taken to be employed in the department or departments administered by the Minister; and*

- *Ministerial staff members employed in the Parliamentary Secretary offices are taken to be employed in the department or departments for which the Parliamentary Secretary is given responsibility.*

Delegation of administrative power

22. Section 4(3)(c) 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 allows the delegation of administrative power only in appropriate cases and to appropriate persons.

23. **Clause 15** may allow the delegation of administrative power other than in appropriate cases and to appropriate persons.

24. Clause 15(1) states that a public service employee is not subject to the direction of a staff member, but clause 15(2) states that a staff member is not prevented from giving a direction to a public service employee on behalf of a person who may lawfully give the direction.

25. A legislative note provides an example of a person who may lawfully give a direction to a public service employee:

> The Minister administering a department may give a direction to the chief executive of the department under the *Public Service Act 2008*, section 100.

26. Section 100(1) of the *Public Service Act* states that, in managing the department, a chief executive is subject to direction from the departmental minister.

27. Further information about the intended operation is provided in the explanatory notes (at 8-9):

> *Clause 15 states that public service employees are not subject to the direction of a staff member. However, this does not prevent a staff member from giving a direction to a public service employee on behalf of another person who may lawfully give the direction. The primary mechanism through which this would occur would be a direction from a Minister to the chief executive of their department under the* Public Service Act 2008*.*
>
> *This clause is not intended to preclude communications between Ministerial staff and public service employees that would usually occur in the course of normal day-to-day interactions necessary for the administration of government business. Ministerial staff perform a critical role in facilitating communication of Ministerial priorities to departments and acting as a conduit between Ministers and public service employees, including communicating Ministerial views and decisions or requesting advice or other work to be undertaken to assist the Minister in the performance of their duties and responsibilities. For example, it would be appropriate for Ministerial staff to request that briefing notes be prepared on particular issues or by specific timeframes, but not appropriate to give directions on matters that could affect the giving of objective and accurate advice, such as the nature of the content or recommendations in the advice.*
>
> *Clause 15 reiterates the commitment outlined in the Government's response to the Crime and Misconduct Commission's inquiry into the issue of interactions between Ministers, Ministerial staff and public servants. Consistent with this response, the Premier issued a communiqué on 2 August 2010 setting out expected standards of conduct in interactions between Ministers, Ministerial staff and public service employees. Contracts of employment have also been amended to clearly stipulate that Ministerial staff do not have the power or authority to direct public service officers. This clause ensures that the Government's commitment is enshrined in legislation as well as being contained in individual contracts.*

28. However, the committee notes that the legislation is to regulate non-departmental staff. Delegation of administrative power regarding the management of the department to a 'staff member' may be a delegation in an inappropriate case or to an inappropriate person. The committee invites the minister to provide information regarding the consistency of clause 15 with section 4(3)(c) of the *Legislative Standards Act* and how the proposed provision would work in practice, including whether the delegation of administrative power needs to be in writing.

Sufficient regard to the institution of Parliament

Parliamentary scrutiny of delegated power

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

30. **Clauses 19, 22 and 26-9** may delegate power to make instruments, legislative in nature, which would not be subject to the scrutiny of the Legislative Assembly.

31. Clause 19 would allow the chief executive to approve a code of conduct applying to staff members. The code of conduct is intended to provide standards of conduct for the staff members to whom it applies (clause 20).

32. Clause 22 would require a staff member to comply with an approved code of conduct, stating that contravention may give rise to disciplinary action under the person's contract of employment.

33. Under clause 26, the chief executive may make a directive about a matter relating to the employment of staff members. The directive is to be made by way of gazette notice (clause 26(1)). The directive would bind the person to whom it applied (clause 26(3)). Clauses 27 and 28 provide that a directive would not prevail over an inconsistent Act or subordinate legislation, but would prevail over an industrial instrument.

34. Clause 29 would empower the chief executive to make a guideline about a matter relating to the employment of staff members, although a guideline would be for the 'guidance only of the persons to whom it applies' (clause 29(4)).

35. The code of conduct, directives and guidelines that may be made under clauses 19, 22 and 26 to 29 would not appear to fall within the definition of 'statutory instrument' in section 9 of the *Statutory Instruments Act*. Accordingly, the documents would need not be tabled in the Parliament and would not be subject to parliamentary scrutiny. However, the committee notes that, with the possible exception of the guidelines, the proposed documents appear to be legislative in nature and may affect rights and liberties of individuals or impose obligations.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

36. 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)).

37. 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. MOTOR ACCIDENT INSURANCE AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 5 August 2010

Responsible minister: Hon AP Fraser MP

Portfolio responsibility: Treasurer and Minister for Employment and Economic Development

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 11-3 and 55** creating new offences;
   - **clause 14** negating contractual rights;
   - **clause 75** providing for the imposition of civil penalties;
   - **clause 55** conferring the Queensland Competition Authority with authority to require information from a responsible person; and
   - **clause 58** which would allow a decision to be made without all relevant information.
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 19-20 and 41** removing powers currently exercised by way of regulation.

BACKGROUND

3. The legislation would effect reforms regarding motor accident insurance and the legislative framework for economic regulation of significant monopoly infrastructure and transport infrastructure.

LEGISLATIVE PURPOSE

4. The objective of the bill is to amend the *Motor Accident Insurance Act 1994* to (explanatory notes, 1):

   … reduce delivery and acquisition costs and promote greater price competition within the CTP scheme so as to deliver premium savings to motor vehicle owners.

5. In addition, the bill would amend the:
   - *Queensland Competition Authority Act 1997*;
   - Queensland Competition Authority Regulation 2007; and
   - *Transport Infrastructure Act 1994*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

6. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*
7. **Clauses 11-3 and 55** would create new offences and have the potential to affect rights and liberties of individuals. The proposed offences and maximum penalties are identified below.

Clause	New or amended section	Offence	Proposed maximum penalty
Motor Accident Insurance Act			
11	72A(4)	Failure to provide declaration as required or making a false declaration	300 penalty units ($30 000)
12	96(1)	Giving or offering an inducement for a CTP insurance business	300 penalty units ($30 000)
13	97(5)	Offering a discount of a CTP premium	300 penalty units ($30 000)
Queensland Competition Authority Act			
55	150AA(3)	Failure to comply with requirement to give information about compliance with approved access undertaking	500 penalty units ($50 000) or six months' imprisonment

8. In relation to the consistency of clause 55 with fundamental legislative principles, the explanatory notes state (at 8-9, see also under the heading 'Administrative power' below):

The introduction of an offence for not complying with an information request from the Authority is justified on the grounds that it reflects the significance of approved access undertakings in the regulatory process. However, the Bill provides appropriate protections for access providers by ensuring that the Authority allows an access provider a reasonable length of time to provide information, and that the access provider will not have committed an offence where it had a reasonable excuse for not complying with an information request. The offence (including the maximum penalty) is consistent with other offences supporting similar investigative powers provided to the Authority under the QCA Act.

9. **Clause 14** may affect rights and liberties of individuals as it would negate contractual rights. It would insert new sections 113 and 114 in the *Motor Accident Insurance Act* to provide transitional provisions for the legislation. The explanatory notes state (at 14-5):

Clause 14 *inserts a new part 7, division 6 (Transitional provisions for the Motor Accident Insurance and Other Legislation Amendment Act 2010). In order to deliver CTP premium savings to motor vehicle owners from 1 October 2010 and to promote CTP price competition, this clause ensures that any arrangements, including contracts entered into by the insurer and the third party for the purpose of directing CTP policies at any time, as well as any payment that has been made prior to 1 October 2010 for direction of CTP policies after 1 October 2010, are null and void.*

10. The committee notes it would be unlikely, however, for individuals to be parties to such contracts. Accordingly, rights of individuals may not be affected by the operation of clause 14.

11. **Clause 75** would provide for the imposition of civil penalties.

12. It would insert new sections 266A to 266H, regarding the preservation of train paths, into chapter 7, part 8 of the *Transport Infrastructure Act*. New section 266A would require the preservation of a train path allocated for a regularly schedule passenger service or a service involving the transportation of a type of freight other than coal.

13. New section 266B would provide that a railway manager who breached, without reasonable excuse, provisions of part 8 as amended would be liable to pay the State a civil penalty:

- for sections 265(1), 266(4) or 266(5A) – $5000; or
- for sections 266(5e) or 266A(2) – $25 000.

14. New section 266G would apply if, on application by the chief executive, the Supreme Court was satisfied that a railway manager had breached a train path obligation without reasonable excuse. Under new section 266G(4), the Supreme Court could order the railway manager to pay the State a civil penalty of no more than:

- $50 000 for a breach of section 256(1), 266(4) or 266(5A); or
- $250 000 for a breach of section 266(5E) or 266A(2).

15. In relation to the proposed civil penalties, the explanatory notes provide (at 9-11) lengthy information indicating that clause 75 would have sufficient regard to rights and liberties of individuals as:

- the quantum of the civil penalties would be appropriate and consistent with other legislation;
- railway managers are corporations and penalties would not be imposed on individuals;
- a defence of reasonable excuse would be provided;
- principles of natural justice would be observed; and
- appropriate avenues of review would be provided.

Administrative power

16. Section 4(3)(a) of the Legislative Standards Act provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

17. **Clause 55** would confer the Queensland Competition Authority with authority to require information from a responsible person.

18. It would insert a new section 150AA of the *Queensland Competition Authority Act* to authorise the Authority to require information from a responsible person (for an approved access undertaking) for the purpose of monitoring compliance with the approved access undertaking. The explanatory notes indicate (at 8) that clause 55 would have sufficient regard for rights and liberties of individuals:

New section 150AA of the QCA Act provides the Authority with specific powers to require information from access providers for the purpose of investigating compliance with an approved access undertaking. This section also creates a new offence (with a maximum penalty of 500 penalty units or six months imprisonment) should an access provider fail, without a reasonable excuse, to comply with a requirement to give information to the Authority.

Approved access undertakings are an important feature of the Regime. They provide guidance on the terms and conditions under which an access provider is to offer or negotiate access to services with access seekers. They also establish specific obligations for access providers including in relation to ringfencing, negotiations with access seekers and the provision of access to users of the service. By setting out the terms and conditions on which access will be made available to third parties, access undertakings provide certainty to access providers, users and access seekers.

Given the key role of access undertakings under the Regime, it is considered necessary to enable the Authority, as the independent regulator, to obtain necessary information to effectively monitor an access provider's compliance with the applicable access arrangements under an approved access undertaking.

19. The committee notes also that new section 150AA(4) would provide a protection against self-incrimination and new section 150AA(5) would allow an application to the Supreme Court regarding the validity of a claim of privilege.

Natural justice

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

21. **Clause 58** may be inconsistent with principles of natural justice as it would allow a decision to be made without all relevant information.

22. It would insert new section 168B of the *Queensland Competition Authority Act* relating to the information to be considered by the Authority in making decisions. New section 168B(3) would provide, however, that if a person making a submission or giving information to the Authority after the period specified by the Authority, the Authority could make the decision without taking the late information into account if to do so would be reasonable in all of the circumstances. New section 168B(4) prescribes factors the Authority must take into account when deciding what is 'reasonable in all of the circumstances'.

23. In respect of clause 58, the explanatory notes provide (at 9) justification for any inconsistency with principles of natural justice:

The intent of this provision is to provide incentive for relevant persons to provide the Authority with full and accurate information in a timely manner so that important regulatory processes are not unduly delayed.

While administrative law principles dictate that a decision maker should consider the most recent and accurate information available to it when making decisions, the Bill is quite specific in ensuring that 'late' information may only be disregarded if doing so is reasonable in all of the circumstances.

Sufficient regard to the institution of Parliament

Parliamentary scrutiny of delegated power

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

25. **Clauses 19-20 and 41** would remove powers currently exercised by way of regulation (delegated legislative power).

26. Part 3, containing the clauses, would amend the *Queensland Competition Authority Act* to provide for the powers to be administrative in nature, exercisable by way of declaration.

27. Part 5 of the *Queensland Competition Authority Act* regulates access to services. Within that part, section 70 provides the meaning of 'facility'. It would be amended by clause 19 so that a facility could no longer be excluded from part 5 by way of regulation.

28. Similarly, section 72 provides the meaning of 'service' and section 72(2)(d) states that it does not include:

> … a service declared under a regulation to be a service to which this part does not apply.

29. Clause 20 would omit section 72(2)(d). Subsequent clauses amending part 5 of the *Queensland Competition Authority Act* would then provide that the only avenue for declaration under part 5 would be an administrative declaration. They would remove also references to 'candidate services', allowing all 'services' to be considered for possible declaration under part 5, regardless of whether they were privately owned or publicly owned facilities, and without the minister having to first make a regulation declaring the service to be a 'candidate service' (explanatory notes, 15-6).

30. Clause 41 would omit part 5, division 3, regarding regulation based declaration.

31. The explanatory notes provide the following information (at 7-8), indicating that the proposed amendments are consistent with fundamental legislative principles:

> *The Bill removes the concept of a 'candidate service' from the Regime. This eliminates the preliminary requirement for the Ministers to make a regulation to identify a service provided by a private facility as a 'candidate service' before the service may be considered for declaration under the Regime.*
>
> *The repeal of the candidate service requirement may remove a 'protection' for the owners or operators of a private facility, as it essentially removes an extra step for the declaration of services provided by a private facility. However, the removal of the candidate service requirement is justified on the basis that the process for the declaration of a service is clear and transparent, and requires the Authority and the Ministers to assess whether the service meets each of the legislated access criteria in the Regime. A service may only be declared if the Ministers are satisfied about all of the access criteria for the service. This reflects the intention of the Regime to only apply to services provided by a defined and very limited class of significant infrastructure facilities.*
>
> *Furthermore, as there was no existing legislative guidance for the Ministers when making a candidate service regulation, its removal reduces potential inconsistency and uncertainty in regulatory outcomes which could arise as a result of specific facilities being declared as candidate services.*
>
> *It is important to note that private facilities in Queensland are potentially subject to access regulation at the Commonwealth level as there is no equivalent candidate service requirement under the National Access Regime established under part IIIA of the* Trade Practices Act 1974 *(Cth).*

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

32. 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)).

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

4. PENALTIES AND SENTENCES (SENTENCING ADVISORY COUNCIL) AMENDMENT BILL 2010

Date introduced: 3 August 2010

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 5** which would amend the sentencing guidelines in section 9 of the *Penalties and Sentences Act* in a number of respects.
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 5 and 7** which may have insufficient regard to the institution of Parliament.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to:
   - **clause 5** (new sections 9(8) and (9)) which may not be drafted in a sufficiently clear and precise way; and
   - **clause 6** and the apparent scope of State legislative power and its application to guideline sentences in respect of Federal offences.

BACKGROUND

4. The legislation would establish a Sentencing Advisory Council, allow the Court of Appeal to publish guideline judgments, and strengthen penalties regarding specific offenders or offences.

LEGISLATIVE PURPOSE

5. The bill is to amend the *Penalties and Sentences Act 1992* to (explanatory notes, 1):
   - establish a Sentencing Advisory Council;
   - give the Queensland Court of Appeal power to issue guideline judgments; and
   - strengthen the penalties imposed upon –
     - repeat offenders;
     - child sexual offenders; and
     - offenders who commit violence upon a young child and/or cause the death of a young child.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

6. Fundamental legislative principles include requiring that legislation have sufficient regard to rights and liberties of individuals. This requirement is stated in section 4(2) of the *Legislative Standards Act.*
7. **Clause 5** would amend the sentencing guidelines in section 9 of the *Penalties and Sentences Act* in a number of respects.

8. Section 9(2)(a) of the *Penalties and Sentences Act* provides that, in sentencing an offender, a court must have regard to principles that a sentence of imprisonment should only be imposed as a last resort and a sentence that allows the offender to stay in the community is preferable. Section 9(5) then states:

> Also, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence of a sexual nature committed in relation to a child under 16 years.

9. The committee identifies four groups of amendments to be made by clause 5. First, it would replace section 9(5). The new section 9(5) would state:

> Also, in sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years—
>
> (a) the principles mentioned in subsection (2)(a) do not apply; and
>
> (b) the offender must serve an actual term of imprisonment, unless there are exceptional circumstances.

10. This first element of clause 5 is examined also under the heading 'Institution of Parliament' below.

11. Second, it would insert a new section 9(5A), to provide that, for section 9(5)(b), in deciding whether there were exceptional circumstances, the court may have regard to the closeness in age between the offender and the child.

12. Third, it would insert new section 9(8) and 9(9), to:

- require a court sentencing an offender with one or more prior convictions to treat each previous conviction as an aggravating factor, if considered that the prior conviction could reasonably be treated as such having regard to –
  - the nature of the previous conviction and its relevance to the offence for which the offender was being sentenced; and
  - the time that had elapsed since the conviction (new section 9(8)); and
- state that nevertheless the sentence imposed must not be disproportionate to the gravity of the offence (new section 9(9)).

13. This second element is examined under the heading 'Clear meaning' below.

14. Finally, new section 9(10) would define two terms to be used in section 9 as amended – 'actual term of imprisonment' and 'corrective services facility'.

15. The explanatory notes acknowledge that it may be arguable that clause 5 would be inconsistent with fundamental legislative principles. Justification is provided (at 5-6):

> *There may be an argument that clause 5, sub clause (1), which amends section 9 of the* Penalties and Sentences Act 1992 *with regard to child sexual offenders, does not have sufficient regard to the rights and liberties of individuals as required by the* Legislative Standards Act 1992*.*
>
> *The amendment represents a current Queensland sentencing principle (*The Queen v Pham *[1996] QCA 3; and* R v Quick ex parte Attorney-General *(2006) 166 A Crim R 588 per Chief Justice de Jersey and Justice Chesterman).*
>
> *It is considered that whilst the amendment may adversely affect the rights and liberties of certain offenders it is justified in order to protect the community, in particular the most vulnerable members, from the risk posed by such offenders. Potential injustices will be avoided by restricting the amendment to 'adult' offenders and in providing that the court can take a lack of age disparity into account when considering the exceptionality of the offence.*

16. **Clause 6** would insert a new part 2A to allow the Court of Appeal to issue guideline judgments. In this regard, the explanatory notes state (at 1-2 and 4):

> *Conferring jurisdiction on the Queensland Court of Appeal to issue guideline judgements will enhance public confidence in the integrity of the sentencing process and further support consistency of approach in sentencing criminal offenders. It will provide a means by which the Court 'can give guidance to the primary judges charged with the exercise of judicial discretion' (*Wong v The Queen *[2001] HCA 64, per Chief Justice Gleeson)…*
>
> *A guideline judgment is to be taken into account by the court in sentencing criminal offenders. It contains guidelines which may apply generally; or to a particular offence or class of offence, including under a Commonwealth Act; or to a particular penalty or class of penalty; or to a particular court or class of court; or to a particular class of offender.*
>
> *The legislative framework ensures that the Court retains the discretion whether or not to give or review a guideline judgment. The Court may do so on its own initiative or on the application of the Attorney-General or Director of Public Prosecutions or the Chief Executive Officer of Legal Aid Queensland. On an appeal after a person is convicted, the person has the right to seek a review of a guideline judgment relating to their particular appeal. When the Court of Appeal is considering whether to give or review a guideline judgment, the Court must notify the*

Council and consider its written views, unless the Court considers that the time taken to notify the council and consider its views would result in an injustice to the convicted person.

17. Clause 6 is examined also under the heading 'Institution of Parliament' below.

Clear meaning

18. 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.

19. **Clause 5** (new sections 9(8) and (9) may not be drafted in a sufficiently clear and precise way.

20. It would amend section 9, as outlined above under the heading 'Rights and liberties'. In relation to new sections 9(8) and (9), the explanatory notes state (at 2 and 4-5):

Queensland Corrective Services confirm that of the prisoners under sentence as at 30 June 2009, 60.92% of the males and 47.8% of the females had previously served an actual term of imprisonment. Strengthening the penalties imposed upon repeat offenders will signal community expectation with regards to recidivism and reinforce the Government's position regarding offenders who continue to demonstrate an attitude of disobedience of the law.

The amendment is consistent with the principle referred to by the majority of the High Court in Veen v The Queen (No. 2) *(1988) 164 CLR 465. The intention is not to punish the offender twice for the same offence or to impose a sentence which is disproportionate to the gravity of the instant offence. The criminal history of the offender is relevant to show* 'whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law' *(*Veen v The Queen (No. 2) *at paragraph 14). In the case of the latter, the court should elevate the prospective penalty within the common law sentencing range for that conduct.*

21. The committee received a submission from the Queensland Law Society. The committee considered the submission and has authorised its tabling and publication. It is available at: www.parliament.qld.gov.au/slc

22. The submission received from the Queensland Law Society suggests that new section 9(8) and 9(9) might not be drafted in a sufficiently clear and precise way. The committee refers the minister to the issues raised in the submission in this regard (at 2-4) and invites him to provide information about whether, as drafted, new sections 9(8) and (9) would have sufficient regard to rights and liberties of individuals.

Sufficient regard to the institution of Parliament

Institution of Parliament

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

24. **Clauses 5 and 7** may have insufficient regard to the institution of Parliament.

25. The committee generally draws to the attention of the Parliament proposed provisions which might operate to limit judicial discretion, including regarding the sentencing of offenders.[3] Clauses 5 and 7 may operate in this way.

26. Clause 5 would amend section 9, as outlined above under the heading 'Rights and liberties'.

27. In relation to the insertion of a new section 9(5)(b) by clause 5, the explanatory notes provide the following information (at 2 and 4):

Strengthening the penalties imposed upon child sexual offenders complements the existing legislative measures aimed at the protection of our most vulnerable members of the community; recognises the inherent seriousness of any form of indecent treatment upon a child; reflects the lasting and potentially devastating impact this conduct may have upon the young victim; and ensures that the need for general deterrence, punishment and reflection of the community's condemnation of the conduct are at the forefront when passing sentence…

The amendment gives permanency to a current Queensland sentencing principle and reflects the Government and community expectation in relation to the commission of any offence of a sexual nature in relation to a child

[3] See, for example: *Legislation Alert* 03/10, 3-4.

who is under 16 years. It ensures that the imposition of an actual term of imprisonment is required. Judicial discretion is also ultimately preserved.

28. However, the submission from the Queensland Law Society argues that clause 5 may have insufficient regard to the institution of Parliament as it would unnecessarily:

- provide statutory intervention in a well-settled area of the law; and
- tighten judicial discretion regarding sentencing.

29. The submission states, in part (at 2):

*The Society objects to the new section 9(5) to the extent that the proposed change envisages that a child sex offender **must serve an actual term of imprisonment**. We consider that this unduly fetters the sentencing discretion of judicial officers. There is already a well established body of case law, including clear judgments from the Court of Appeal that, generally speaking, a person committing a sexual offence against a child must serve as part of an imposed sentence some time in jail.*

With the removal of a range of child sex offences from the District Court to the Magistrates Court as part of the implementation of the Moynihan Report, we are concerned that the effect of the new section 9(5)(b) will be to cause people to be actually jailed for low range sexual offences against children which currently do not attract an actual term of imprisonment. We have in mind those categories of offences where a child under 16 (say a 15 year old) is the victim of low level sexual offending such as touching through clothes or an indecent act constituted by, say, a sensual kiss.

The Society submits that the current body of comparative sentences, including effective Court of Appeal guideline judgments in relation to child sex offending adequately reflects punishment levels that should be imposed on persons engaging in child sexual offending, having regard to the fact that the circumstances and level of seriousness of child sex offences are highly variable. Upon review of these decisions, one can see that there clearly is no problem which requires legislative intervention. Furthermore, we are concerned that the significant tightening of judicial sentencing discretion in the proposed new section comes unacceptably close to mandatory sentencing.

30. Clause 7 would amend section 161B to include a new section 161B(5). Section 161B(1) provides for a serious violent offender declaration to be made as part of the sentence where an offender is convicted of a 'serious violent offence' (see section 161A(a)). However, section 161B(3) and (4) provide circumstances in which a declaration may be made at the discretion of the sentencing court. New section 161B(5) would provide that, for section 161B(3) and (4), the sentencing court must treat the age of the child as an aggravating factor in deciding whether to make a declaration if the offender was convicted on indictment of an offence that:

- involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or
- caused the death of a child under 12 years.

31. The explanatory notes provide the following information (at 2 and 5):

The community rightly has a keen interest in the penalties imposed upon offenders who commit violence upon a young child and/or who cause the death of a young child. These cases generate a strong emotive response. The intention is to ensure that sufficient weight is placed upon the age of the victim and genuine recognition made of their special vulnerability. The disproportionate position of an adult to that of a young child and the comparative level of force needed to cause significant harm to a young child as distinct from another adult, must be recognised by the court in deciding whether to declare the offender to be convicted of a serious violent offence…

The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction.

The reference to a child under 12 years is consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under twelve years and where a child under twelve years is legally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them.

32. The Queensland Law Society's submission expresses concern (at 5) that, although the explanatory notes state an intention not to fetter judicial discretion, the use of the word 'must' in the new section 161B(5) may in fact do so.

33. **Clause 6** is to confer power to issue guideline judgments for offences under Commonwealth.

34. In *Wong v The Queen*, the High Court held that the New South Wales Court of Criminal Appeal did not, of its own volition, have the power to make guideline judgments. The Court did not need to decide

the legality of State legislation providing for guideline judgments to be issued, nor did it need to decide whether a State Parliament could exercise its legislative power to confer such a function on a State Court exercising Commonwealth judicial power.

35. However, the committee notes that clause 6 would confer the Court of Appeal with power to issue guideline judgments for offences under Commonwealth legislation. In *Wong v The Queen*, statements made in *obiter dicta* by a number of the judges may suggest that there may be Commonwealth constitutional constraints upon the ability of a State Parliament to legislate to permit its Supreme Court to issue guideline judgments regarding Commonwealth offences, and therefore exercises of Commonwealth judicial power. The committee invites the minister to provide information regarding the apparent scope of State legislative power and its application to guideline sentences in respect of Federal offences.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

36. 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)).

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

5. PERSONAL PROPERTY SECURITIES (ANCILLARY PROVISIONS) BILL 2010

Date introduced: 5 August 2010

Responsible minister: Hon PJ Lawlor MP

Portfolio responsibility: Minister for Tourism and Fair Trading

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clause 6** which may affect information privacy rights; and
   - **clauses 7, 25, 47 and 63** conferring or continuing immunity from civil liability.
2. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to **the large number of clauses** regulating the order of priority of securities and their intended effect upon personal property security rights of individuals.

BACKGROUND

3. The *Personal Property Securities (Commonwealth Powers) Act 2009* referred to the Commonwealth Parliament State legislative power regarding personal property securities. Pursuant to an agreement of the Council of Australian Governments, the bill is to make further personal property security reforms.

LEGISLATIVE PURPOSE

4. The bill is intended to (explanatory notes, 1):
   - cease the existing Queensland personal property securities registers and transfer the information in those registers to the new national register;
   - exempt certain statutory licences from the national scheme; and
   - clarify State interests over abandoned or seized property.
5. The bill would repeal the:
   - *Bills of Sale and Other Instruments Act 1995*;
   - *Liens on Crops of Sugar Cane Act 1931*; and
   - *Motor Vehicles and Boat Securities Act 1986*.
6. In addition, the bill would amend the:
   - *Agricultural Chemicals Distribution Control Act 1966;*
   - *Alcan Queensland Pty. Limited Agreement Act 1965;*
   - *Burials Assistance Act 1965;*
   - *Casino Control Act 1982;*
   - *Central Queensland Coal Associates Agreement Act 1968;*
   - *Central Queensland University Act 1998;*
   - *City of Brisbane Act 2010;*
   - City of Brisbane (Operations) Regulation 2010;
   - *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957;*
   - *Cooperatives Act 1997;*
   - Cooperatives Regulation 1997;
   - *Criminal Proceeds Confiscation Act 2002;*
   - *Disposal of Uncollected Goods Act 1967;*

- *Drugs Misuse Act 1986;*
- *Electricity Act 1994;*
- *Financial Intermediaries Act 1996;*
- *Fire and Rescue Service Act 1990;*
- *Forestry Act 1959;*
- *Gaming Machine Act 1991;*
- *Gas Supply Act 2003;*
- *Geothermal Exploration Act 2004;*
- *Gladstone Power Station Agreement Act 1993;*
- *Greenhouse Gas Storage Act 2009;*
- *Griffith University Act 1998;*
- *James Cook University Act 1997;*
- *Legal Aid Queensland Act 1997;*
- *Libraries Act 1988;*
- *Liquor Act 1992;*
- *Local Government Act 2009;*
- *Major Sports Facilities Act 2001;*
- *Manufactured Homes (Residential Parks) Act 2003;*
- *Mineral Resources Act 1989;*
- *Motor Racing Events Act 1990;*
- *Mount Isa Mines Limited Agreement Act 1985;*
- *Offshore Minerals Act 1998;*
- *Petroleum Act 1923;*
- *Petroleum and Gas (Production and Safety) Act 2004;*
- *Petroleum (Submerged Lands) Act 1982;*
- *Police Powers and Responsibilities Act 2000;*
- *Property Agents and Motor Dealers Act 2000;*
- Property Agents and Motor Dealers Regulation 2000;
- *Property Law Act 1974;*
- *Queensland Art Gallery Act 1987;*
- *Queensland Museum Act 1970;*
- *Queensland Nickel Agreement Act 1970;*
- *Queensland Performing Arts Trust Act 1977;*
- *Queensland Theatre Company Act 1970;*
- *Queensland University of Technology Act 1998;*
- *Second-hand Dealers and Pawnbrokers Act 2003;*
- *Storage Liens Act 1973;*
- *Succession Act 1981;*
- *Supreme Court Act 1995;*
- *Thiess Peabody Coal Pty. Ltd. Agreement Act 1962;*
- *Transport Infrastructure Act 1994;*
- Transport Infrastructure (Rail) Regulation 2006;
- *Transport Operations (Marine Safety) Act 1994;*
- *Transport Operations (Road Use Management) Act 1995;*
- *University of Queensland Act 1998;*
- *University of Southern Queensland Act 1998;*
- *University of Sunshine Coast Act 1998*; and
- *Wine Industry Act 1994*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

8. **Clause 6** may affect information privacy rights.

9. It would authorise the chief executive to give the Commonwealth, the Personal Property Securities registrar or any other officer of the Commonwealth information considered appropriate and recorded in, or concerning the use of, a Queensland register. The purpose for which it might be given would be to assist the registrar to establish the Personal Property Securities register.

10. The explanatory notes do not state whether the information would include personal information but provide (at 8) the following information:

    This will facilitate the migration of data from the Queensland registers to the PPS register.

11. **A large number of clauses** would regulate the order of priority of securities. Examples of relevant clauses include:

    - clause 100, to insert a new section 4A of the *Disposal of Uncollected Goods Act* to provide that the charges of the bailee for goods sold under that Act would have priority over all security interests in relation to the goods;
    - clause 160, to insert a new section 42A of the *City of Brisbane Act* to ensure the council has a priority interest over the proceeds from the seizure and disposal of personal property under a local law (see also clause 166 which would amend the *Local Government Act* in similar terms); and
    - clause 180 to amend section 39 of the *Legal Aid Queensland Act* to declare a charge created under the section to be a statutory interest to which the *Personal Property Securities Act 2009* (Cth) would allow priority; and
    - clause 202 amending section 26 of the *Queensland Art Gallery Act* regulating how the proceeds of the sale of works of art are to be applied.

12. The explanatory notes appear to indicate (at 2-3) that the legislation would operate to afford all interests to be affected the same priority as they have at present. The committee invites the minister to provide information to clarify the intended effect of the legislation upon personal property security rights of individuals.

Immunity from proceeding or prosecution

13. 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.

14. **Clauses 7, 25, 47 and 63** would confer or continue immunity from civil liability.

15. Clause 7 would protect an official from civil liability in respect of the migration of personal property data.

16. Clause 6 would authorise the chief executive to give the Commonwealth, the Personal Property Securities Registrar or any other officer of the Commonwealth appropriate information recorded in, or concerning the use of, a Queensland register. Clause 7 would then provide that an official (defined in clause 7(3)) would not incur civil liability for an act done or omission made honestly and without negligence in the giving of information.

17. The explanatory notes state (at 5) that sufficient regard would be had to rights and liberties of individuals:

    The Bill is consistent with fundamental legislative principles. The Bill does however, provide immunity from civil liability for Queensland public servants involved in the migration of data from the Queensland registers to the PPS Register, but only to the extent the person has acted honestly and without negligence. The immunity from liability does not extend to the State, and therefore does not prevent an aggrieved party from seeking damages against the State for any loss suffered as a result of the person's actions.

18. Clauses 25, 47 and 63 would be transitional provisions, providing for continued immunity following the repeal of legislation. In respect of each transitional provision, the explanatory notes state that liability would continue to attach to the State; see:

    - clause 25 regarding the *Bills of Sale and Other Instruments Act* (explanatory notes, 13);
    - clause 47 regarding the *Liens on Crops of Sugar Cane Act* (explanatory notes, 20); and
    - clause 63 regarding the *Motor Vehicles and Boat Securities Act* (explanatory notes, 24).

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

19. 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.

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

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

Substantial uniformity with legislation of another jurisdiction

22. In relation to the bill being substantially uniform or complementary with legislation of the Commonwealth or another State, the explanatory notes provide substantial information, including (at 1-2):

    There is a complex network of legislation in Australia regulating security interests over personal property. Currently, the Commonwealth, States and Territories have their own regimes for registering security interests in various forms of personal property, encompassing multiple pieces of legislation.

    Following initiation by the Standing Committee of Attorneys-General in 2006, the Council of Australian Governments agreed to proceed with the reform of Australian personal property securities law.

    In 2008 an Inter-Governmental Agreement (IGA) was signed by First Ministers and the Prime Minister to progress the reforms. Under the IGA, the States agreed to refer power to the Commonwealth Parliament to regulate personal property securities.

    The Queensland referral of powers legislation, the Personal Property Securities (Commonwealth Powers) Act 2009 *(Referral Act), received royal assent on 22 September 2009 and commenced on 27 November 2009. The explanatory notes that accompanied the Referral Act provides detailed information about the development of the new personal property securities scheme.*

    Upon its commencement, the Commonwealth Personal Property Securities Act 2009 *(Commonwealth PPS Act) will establish a single, national law governing personal property securities. The Commonwealth PPS Act will also establish a single, national register for all personal property security interests—the Personal Property Securities Register (PPS Register).*

6. PUBLIC INTEREST DISCLOSURE BILL 2010

Date introduced: 3 August 2010

Member: Hon AM Bligh MP

Portfolio responsibility: Premier and Minister for the Arts

ISSUES ARISING FROM EXAMINATION OF BILL

1. In relation to whether the bill has sufficient regard to rights and liberties of individuals, the committee draws the attention of the Parliament to:
   - **clauses 41 and 65-6** creating offences;
   - **clause 44** limiting the statutory remedies available under the legislation;
   - **clauses 53-4** allowing the Industrial Commission or the Supreme Court to grant an injunction, restraining a person from action or requiring a person to act;
   - **clause 55** allowing for non-publication orders regarding proceedings under the legislation and for orders restricting publication;
   - **clause 65(3)** allowing the disclosure of confidential information, including personal information;
   - **clause 55(3)** permitting an application for an injunction to be heard without notice;
   - **clauses 36-8** conferring immunities upon a person making a public interest disclosure under the legislation; and
   - **clause 64** conferring immunity from civil liability on a person discharging functions under the Act.
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 60** delegating to the Public Service Commission power to make binding standards which would not be subject to the scrutiny of the Legislative Assembly.
3. The committee invites the minister to provide further information regarding the application of fundamental legislative principles to **clause 41** which may not be drafted in a sufficiently clear and precise way.

BACKGROUND

4. Following a Queensland Government review of public sector integrity and accountability, a second stage of reform is to be implemented by way of three 'Integrity Reform Bills', the:
   - Integrity Reform (Miscellaneous Amendments) Bill 2010 (see chapter 1);
   - Ministerial and Other Office Holder Staff Bill 2010 (see chapter 2); and
   - Public Interest Disclosure Bill 2010.
5. The third of these is to facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures and participate in proceedings.

LEGISLATIVE PURPOSE

6. The main objects of the bill are to (clause 3):
   - promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector;
   - ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with;
   - ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and
   - afford protection from reprisals to persons making public interest disclosures.

7. Clause 72 of the bill would repeal the *Whistleblowers Protection Act 1994* and, otherwise, the bill would amend the:

- *City of Brisbane Act 2010*;
- *Coal Mining Safety and Health Act 1999*;
- *Corrective Services Act 2006*;
- *Explosives Act 1999*;
- *Industrial Relations Act 1999*;
- *Information Privacy Act 2009*;
- *Local Government Act 2009*;
- *Mining and Quarrying Safety and Health Act 1999*;
- *Petroleum and Gas (Production and Safety) Act 2004*;
- *Public Sector Ethics Act 1994*;
- *Public Service Act 2008*;
- Public Service Regulation 2008;
- *Right to Information Act 2009*;
- *Transport Operations (Marine Pollution) Act 1995*;
- *Transport Operations (Marine Safety) Act 1994*; and
- *Workers' Compensation and Rehabilitation Act 2003*.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Rights and liberties

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

9. **Clauses 41 and 65-6** would create offences and would have the potential to affect rights and liberties of individuals. The proposed offences and maximum penalties are identified below.

Clause	Offence	Proposed maximum penalty
41	Taking a reprisal (an indictable offence)	167 penalty units ($16 700) or two years' imprisonment
65(1)	Disclosure of confidential information	84 penalty units ($8400)
66(1)	Giving information that is false or misleading to a proper authority (an indictable offence)	167 penalty units ($16 700) or two years' imprisonment

10. The committee identifies two matters relevant to clause 41. A third is identified below under the heading 'Clear meaning'.

11. First, the proposed offence itself may be regarded as an 'absolute offence'; that is, an offence of which a person may committed without intending to do so.[4] On its face, intention is not an essential element of the proposed offence in clause 41. However, clause 40 prescribes what would be a 'reprisal' for the purposes of clause 40 and intent is incorporated into the offence by requirements that a person 'cause' detriment to another person 'because, or in the belief' that a public interest disclosure has or will be made or participation in proceedings under the legislation.

12. Second, the committee notes that the meaning of reprisal in clause 41 would provide that, if the act or omission constituting the reprisal was taken on more than one ground, it would be sufficient if the intention to cause detriment because of the public interest disclosure or participation in proceedings were 'a substantial ground' for the act or omission.

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4 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) [9.22]

13. In respect of clauses 40 and 41, the explanatory notes state (at 14-5):

> Clause 40 *provides that a person must not cause, or attempt or conspire to cause, detriment to another in the belief that the other person has made, or intends to make, a public interest disclosure; or the person or someone else is, has been, or intends to be involved in proceedings under the Act. An attempt to cause detriment includes an attempt to induce a person to cause detriment. A contravention of this provision is a reprisal or the taking of a reprisal, and any of these reasons for taking the reprisal is an unlawful ground. For a contravention to be established, it is sufficient if the unlawful ground is a substantial reason, even if there is another ground for the act or omission.*
>
> Clause 41 *provides that it is an indictable offence for a person to take a reprisal. A maximum penalty of 167 penalty units or 2 years imprisonment applies.*

14. **Clause 43** would make a public sector entity liable for damages for a reprisal taken by an employee.

15. It would provide that if an employee of a public sector entity contravened section 40 in the course of her or his work, both the entity and the employee would be jointly and severally liable and a proceeding for damages under clause 42 (which provides that a reprisal is a tort) may be taken against either or both.

16. However, as the definition of 'public sector entity' in clause 6 does not include natural persons, and clause 43 will not affect rights and liberties of individuals. Further, the explanatory notes say (at 15):

> *This clause is intended to ensure that a claim in damages, including an entity's vicarious liability, may by brought against a public sector entity, and will not fail on the basis that it is a tort and must be directly committed by the entity.*

17. **Clause 44** would limit the statutory remedies available under the legislation.

18. Under clause 44, a person who has suffered a reprisal may make a complaint under the *Anti-Discrimination Act 1991* (explanatory notes, 15-6):

> *[T]he complaint can be dealt with under chapters 6 and 7 of the* Anti-Discrimination 1991 *as if the complaint were about an alleged contravention of that Act.*

19. However, clause 44(3) states that if a person commences proceedings for damages in a court under clause 42, he or she may not make a subsequent complaint in relation to the reprisal under the *Anti-Discrimination Act*. The reverse is also stated to apply. A prosecution under clause 41, though, would not affect remedies available.

20. The explanatory notes acknowledge that clause 44 may be inconsistent with fundamental legislative principles, but provide (at 2-3) justification for any inconsistency:

> *The Bill restricts a person's remedies for reprisals taken against the person for making a public interest disclosure. The Bill gives a person a right to bring proceedings for damages for a reprisal and also provides that a reprisal may also be dealt with as if it were an alleged contravention of the* Anti-Discrimination Act 1991*. However, a person can bring a claim for damages or an action under the* Anti-Discrimination Act 1991*, not both. A person may not seek an injunction from the Supreme Court or the industrial commission in relation to a reprisal if the person has made a complaint under the* Anti-Discrimination Act 1991 *(in this instance, remedies under the* Anti-Discrimination Act 1991 *will be available). Given that a person's remedies are not prohibited, only restricted, the proposal is considered reasonable in the circumstances.*

21. **Clauses 53-4** would allow the Industrial Commission or the Supreme Court to grant an injunction, restraining a person from action or requiring a person to act.

22. Clause 53(1) would confer on the Industrial Commission or Supreme Court the power to grant an injunction restraining a person from engaging in a reprisal. An injunction may be granted regardless of whether:

- the person intended to engage or continue to engage in the conduct;
- the person had previously engaged in the conduct; or
- there was an imminent danger of substantial damage to anyone.

23. Under clause 53(2), the Industrial Commission or Supreme Court might grant an injunction requiring a person to take action regardless of whether:

- it was considered the person intended to fail again or continue to fail to take the action;
- the person previously failed to take action; or
- there was an imminent danger of substantial damage to anyone if the person failed to take the action.

24. Clause 54 would permit an interim injunction. Further, clause 56 would provide that no undertaking about damages or costs would be required where an application for an injunction was made by the Crime and Misconduct Commission.

25. The explanatory notes do not address the consistency of clauses 53 and 54 with fundamental legislative principles.

26. **Clause 55** would allow for non-publication orders regarding proceedings under the legislation and for orders restricting publication. Clause 55(3) is examined under the heading 'Natural justice' below.

27. Clause 55(1) would allow the Industrial Commission or Supreme Court to order that any report of proceedings not be published or that evidence given, filed or tendered be withheld from release or be released on a stated condition.

28. Clause 55(2) provides that the direction may be given if it was considered that the disclosure would not be in the public interest, or that persons other than the parties to the application would not have a legitimate interest in being informed of the report or evidence.

29. Human rights principles regarding the administration of justice generally require that court hearings and judgments be held in public, with parties and the general public able to be present.[5] Although possible inconsistency with fundamental legislative principles is not identified, the explanatory notes provide (at 18) the following information regarding clause 55:

This discretionary power is provided primarily to safeguard the legitimate interests of the discloser where, in proceedings for injunctive relief, he or she may be subject to unsubstantiated attacks on their reputation from a party against whom the injunction is being sought.

30. **Clause 65(3)** would allow the disclosure of confidential information, including personal information.

31. A person would be permitted to make a record of 'confidential information' (an inclusive definition is provided in clause 65(7)) or disclose it to someone else:

- for the purposes of the legislation or to discharge a function under another Act;
- for a proceeding in a court or tribunal;
- if the person to whom the confidential information related consented in writing;
- if it would be reasonably necessary to provide for the safety or welfare of a person; or
- where authorised by a regulation or another Act.

32. Clause 65(3) would allow also the recording or disclosing of confidential information even if a relevant person's consent could not reasonably be obtained where it was unlikely that the person's interests would be harmed by the disclosure of the information and recording or disclosure was reasonable in the circumstances.

33. The explanatory notes state (at 21):

This subsection provides an appropriate balance between a requirement to receive and deal with public interest disclosures in private to safeguard the identity of disclosers and the need for some flexibility, where it is appropriate, to reveal confidential information in order to protect and support disclosers and to allow the effective management of public sector workplaces to reduce the possibility of reprisals. Public sector entities will be expected to only record or disclose the minimum amount of confidential information is necessary in the circumstances.

The section does not affect an obligation a person may have under the principles of natural justice to disclose information to a person whose rights may be otherwise be detrimentally affected, if it is essential to do so under the principles of natural justice and it is unlikely a reprisal will be taken because of the disclosure. Confidential information is broadly defined to include the identity and address of a person who makes or against whom a disclosure is made, personal information about either of these persons, and information disclosed by the disclosure.

34. More specifically, in relation to the consistency of clause 65(3) with fundamental legislative principles, the explanatory notes indicate (at 3):

The Bill may … have an effect on a person's right to privacy as it allows confidential information gained because of a person's involvement in the administration of the Act to be disclosed if the consent of the person to whom the information relates can not be reasonably obtained; it is unlikely that person's interests will be harmed by the disclosure; and it is reasonable in the circumstances. This means that confidential information about someone

[5] See, for example: Universal Declaration of Human Rights, articles 6-11.

could be disclosed without a person's consent. However, the requirement that the person's interests will not be harmed and that the disclosure is reasonable in the circumstances are safeguards and the clause gives effect to a recommendation from the Whistling While They Work report.

Natural justice

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

36. **Clause 55(3)** would allow an application for an injunction to be heard without notice. Clause 55 is examined above under the heading 'Rights and liberties'.

37. Clause 55(3) states that an application may be heard without notice to another person if the Industrial Commission or Supreme Court considers a hearing without notice to another person is necessary in the circumstances.

38. Again, the explanatory notes do not provide information about whether clause 55 would have sufficient regard to rights and liberties of individuals, but provides the following general information (at 18):

The Bill also enables an application to be heard in chambers. The Bill allows the Industrial Commission or the Supreme Court to hear an application for an injunction without the other parties being heard, if necessary in the circumstances.

Onus of proof

39. 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.

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

41. **Clause 43(2)** would impose an evidential onus on a public sector entity seeking to defend vicarious liability for a contravention of clause 40. As above under the heading 'Rights and liberties', the committee notes that clause 43 would not affect rights and liberties of individuals.

Immunity from proceeding or prosecution

42. 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.

43. **Clauses 36-8** would confer immunities upon a person making a public interest disclosure under the legislation.

44. Clause 36 would provide an exemption from either civil or criminal liability, or liability arising from administrative action, to a person for making a public interest disclosure.

45. Clause 37 states that, without limiting clause 36, a person who makes a public interest disclosure:

- will have immunity from prosecution or other legal proceedings for breach of the confidentiality requirements under an Act (clause 37(a)); and
- does not by doing so breach an obligation by way of oath or rule of law or under an agreement restricting the disclosure of information (clause 37(b)).

46. Clause 38 would confer a person making a public interest disclosure with absolute privilege in defamation actions arising from the making of the disclosure.

47. The committee states, in respect of provisions raising section 4(3)(h) of the *Legislative Standards Act*, that one of the principles underlying a parliamentary democracy based on the rule of law is that all people should be equal before the law. In this context, the committee notes that clause 39 states that a person's liability for his or her own conduct would not be affected by a disclosure of that conduct under the Public Interest Disclosure Act 2010. Clause 39(2) provides that 'liability' includes civil or criminal liability, or any liability arising by way of administrative process, including disciplinary action.

48. **Clause 64** would confer immunity from civil liability on a person discharging functions under the Act.

49. Clause 64(1) would provide that a person responsible for discharging a function or part of a function under the legislation would not be liable for an act or omission made honestly and without negligence. Under clause 64(2), liability would attach instead to:

    - the State, if the person was a public officer of an entity that represented the State; or
    - a public sector entity, in all other cases.

50. In respect of provisions such as clause 64, the committee notes that fundamental legislative principles suggest that all persons should be equal under the law. However, clause 64(2) would ensure that the conferral of immunity in respect of acts or omissions made honestly and without negligence would not deprive an affected person of a remedy.

Clear meaning

51. 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.

52. **Clause 41**, an offence provision, may not be drafted in a sufficiently clear and precise way. It was examined also under the heading 'Rights and liberties'.

53. The offence provision in clause 41 merely proscribes the taking of a reprisal, stating 'A person must not take a reprisal.' However, a separate clause, clause 40, states that a 'reprisal' is an act or omission taken on lawful and unlawful grounds. Clause 40 identifies the circumstances in which a reprisal is unlawful. As drafted, it is arguable that clause 41 makes all reprisals unlawful, even if taken on grounds which are 'lawful' as defined in section 40 or with the 'unlawful' ground being an insubstantial reason for the relevant act or omission.

54. The committee invites the minister to provide further information regarding whether clause 41 has sufficient regard to rights and liberties of individuals.

Sufficient regard to the institution of Parliament

Parliamentary scrutiny of delegated power

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

56. **Clause 60** would delegate to the Public Service Commission power to make binding standards which would not be subject to the scrutiny of the Legislative Assembly.

57. Under clause 60 and by way of gazette notice, the Public Service Commission could make standards regarding the way in which public sector entities must deal with public interest disclosures. The standards would be binding on most public sector entities (clause 60(6)) and may affect rights and liberties of individuals. The exception would be government owned corporations, bound only if the shareholding minister had:

    - notified the board that the standard was to apply to the corporation; and
    - complied with section 114 (3) of the *Government Owned Corporations Act 1993*.

58. The standards may have characteristics of delegated legislative power, but do not appear to fall within the definition of 'subordinate legislation' in section 9 of the *Statutory Instruments Act*. Accordingly, the documents would not need to be tabled in the Parliament and would not be subject to parliamentary scrutiny.

59. The following general information is provided in the explanatory notes (at 19):

    Standards are intended to relate to the operational administration of the Act. The Bill gives examples of the types of procedures which may be included in a standard. These include the way in which entities facilitate the making of public interest disclosures, the way in which entities perform their functions under the Act, the protection of persons from reprisal and the provision of statistical information about disclosures to the oversight body. The oversight agency is required to take reasonable steps to consult with the public sector entities to which the standard may apply before making the standard. A failure to consult does not affect the validity of the standard.

OPERATION OF CERTAIN STATUTORY PROVISIONS

Explanatory notes

60. 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.

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

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

Consistency with fundamental legislative principles

63. The committee notes that, in relation to a number of matters regarding the consistency of the legislation with fundamental legislative principles identified above, specific information and/or justification was not provided in the explanatory notes.

PART 2 – SUBORDINATE LEGISLATION EXAMINED

SUBORDINATE LEGISLATION TABLED: 9 JUNE TO 3 AUGUST 2010

(Listed in order of sub-leg number)

SLNo 2010	SUBORDINATE LEGISLATION	Other Docs Tabled (EN, RIS, MS)*	Date Of Gazettal	Tabling Date By	Date Tabled	Disallow Procedures Date
108	Health and Other Legislation Amendment Regulation (No.1) 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
109	Land Tax Regulation 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
110	Proclamation commencing certain provisions Transport and Other Legislation Amendment Act 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
111	Land Sales Amendment Regulation (No.2) 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
112	Proclamation commencing remaining provisions Credit (Commonwealth Powers) Act 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
113	Health (Drugs and Poisons) Amendment Regulation (No.1) 2010		11/06/2010	6/10/2010	3/8/2010	7/10/2010
114	Statutory Instruments Amendment Regulation (No.1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
115	Motor Accident Insurance Amendment Regulation (No.2) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
116	Mines and Energy Legislation Amendment Regulation (No.1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
117	Community Safety (Fees) Amendment Regulation (No.1) 2010	EN	18/6/2010	6/10/2010	3/8/2010	7/10/2010
118	Rural and Regional Adjustment Amendment Regulation (No.3) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
119	Plant Protection Amendment Regulation (No. 1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
120	Exotic Diseases in Animals Amendment Regulation (No.1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
121	Animal Management (Cats and Dogs) Amendment Regulation (No.2) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
122	Proclamation commencing remaining provisions Local Government Act 2009		18/6/2010	6/10/2010	3/8/2010	7/10/2010
123	Local Government (Beneficial Enterprises and Business Activities) Regulation 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
124	Local Government (Finance, Plans and Reporting) Regulation 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
125	Local Government (Operations) Regulation 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010

126	Transport Operations (Road Use Management—Vehicle Standards and Safety) and Another Regulation Amendment Regulation (No.1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
127	Proclamation commencing remaining provisions Trade Measurement Legislation Repeal Act 2009		18/6/2010	6/10/2010	3/8/2010	7/10/2010
128	Fair Trading and Other Legislation Amendment Regulation (No. 1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
129	Uniform Civil Procedure Amendment Rule (No.1) 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
130	Exotic Diseases in Animals Act 1981		18/6/2010	6/10/2010	3/8/2010	7/10/2010
131	Exotic Diseases in Animals (Asian Honey Bee) Notice 2010		18/6/2010	6/10/2010	3/8/2010	7/10/2010
132	Health Practitioner Regulation National Law (Transitional) Regulation 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
133	Taxation Administration Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
134	Government Owned Corporations Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
135	Queensland Competition Authority Amendment Regulation (No.2) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
136	Public Works Legislation Amendment Regulation (No. 1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
137	Land Legislation Amendment Regulation (No. 1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
138	Water Amendment Regulation (No.3) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
139	Aboriginal Land Amendment Regulation (No.3) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
140	Environment and Resource Management Legislation Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
141	South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
142	Mines and Energy Legislation Amendment Regulation (No.2) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
143	Petroleum and Gas (Production and Safety) Act 2004		25/6/2010	6/10/2010	3/8/2010	7/10/2010
144	Vocational Education, Training and Employment Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
145	Proclamation commencing remaining provisions Child Care and Another Act Amendment Act 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
146	Primary Industries Legislation Amendment Regulation (No. 1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
147	Water (Market Rules) Amendment Notice (No.1) 2010		28/6/2010	6/10/2010	3/8/2010	7/10/2010

148	Building and Other Legislation Amendment Regulation (No.3) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
149	Transport Infrastructure (Rail) Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
150	Adoption Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
151	Disability Services Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
152	Environmental Protection (Waste Management) Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
153	Workplace Health and Safety and Another Regulation Amendment Regulation (No.1)	EN	25/6/2010	6/10/2010	3/8/2010	7/10/2010
154	Uniform Civil Procedure Amendment Rule (No.2) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
155	Justice Legislation (Fees) Amendment Regulation (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
156	State Penalties Enforcement Amendment Regulation (No.6) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
157	Public Trustee Amendment Regulation (No.5) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
158	Legal Profession (Society Rules) Amendment Notice (No.1) 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
159	Professional Standards (Queensland Law Society Scheme) Notice 2010		25/6/2010	6/10/2010	3/8/2010	7/10/2010
160	Superannuation (State Public Sector) Amendment Notice (No.3) 2010		29/06/2010	6/10/2010	3/8/2010	7/10/2010
161	Public Service Amendment Regulation (No.2) 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
162	Environment and Resource Management Legislation Amendment Regulation (No.2) 2010		2/07/2010	6/10/2010	3/8/2010	7/10/2010
163	Proclamation commencing certain provisions South-East Queensland Water (Distribution and Retail Restructuring) and Other Legislation Amendment Act 2010		2/07/2010	6/10/2010	3/8/2010	7/10/2010
164	Fisheries Legislation Amendment Regulation (No.1) 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
165	Proclamation commencing certain provisions Building and Other Legislation Amendment Act 2010		2/07/2010	6/10/2010	3/8/2010	7/10/2010
166	Proclamation commencing remaining provisions Transport (Rail Safety) Act 2010		2/07/2010	6/10/2010	3/8/2010	7/10/2010
167	Transport (Rail Safety) Regulation 2010	RIS	2/07/2010	6/10/2010	3/8/2010	7/10/2010
168	Commission for Children and Young People and Child Guardian Amendment Regulation (No. 1) 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
169	Brisbane Forest Park Amendment By-law (No.1) 2010		2/07/2010	6/10/2010	3/8/2010	7/10/2010

170	City of Brisbane (Beneficial Enterprises and Business Activities) Regulation 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
171	City of Brisbane (Finance, Plans and Reporting) Regulation 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
172	City of Brisbane (Operations) Regulation 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
173	Disability Services Amendment Regulation (No.2) 2010		1/07/2010	6/10/2010	3/8/2010	7/10/2010
174	Fair Trading (Phthalates in Toys and Other Articles) Order 2010		5/07/2010	6/10/2010	3/8/2010	7/10/2010
175	Education (General Provisions) Amendment Regulation (No.1) 2010		9/07/2010	6/10/2010	3/8/2010	7/10/2010
176	Sustainable Planning Amendment Regulation (No.3) 2010		9/07/2010	6/10/2010	3/8/2010	7/10/2010
177	Housing Amendment Regulation (No.1) 2010		9/0720/10	6/10/2010	3/8/2010	7/10/2010
178	Water Amendment Regulation (No.4) 2010		16/07/2010	6/10/2010	3/8/2010	7/10/2010
179	Police Legislation Amendment Regulation (No. 1) 2010		16/07/2010	6/10/2010	3/8/2010	7/10/2010
180	Urban Land Development Authority Amendment Regulation (No.3) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
181	Proclamation commencing remaining provisions Transport (New Queensland Driver Licensing) Amendment Act 2008		16/07/2010	6/10/2010	3/08/2010	7/10/2010
182	Proclamation commencing remaining provisions Adult Proof of Age Card Act 2008		16/07/2010	6/10/2010	3/08/2010	7/10/2010
183	Proclamation commencing certain provisions Transport and Other Legislation Amendment Act 2010		16/07/2010	6/10/2010	3/08/2010	7/10/2010
184	Proclamation commencing certain provisions Transport and Other Legislation Amendment Act (No.2) 2010		16/07/2010	6/10/2010	3/08/2010	7/10/2010
185	Environmental Protection (Water) Amendment Policy (No. 1) 2010		16/07/2010	6/10/2010	3/08/2010	7/10/2010
186	Nature Conservation (Protected Areas) Amendment Regulation (No.5) 2010		16/07/2010	6/10/2010	3/08/2010	7/10/2010
187	Criminal Practice Amendment Rule (No.1) 2010		16/07/2010	6/10/2010	3/08/2010	7/10/2010
188	Health Services Amendment Regulation (No.1) 2010		23/07/2010	6/10/2010	3/08/2010	7/10/2010
189	Transport Legislation (New Queensland Driver Licensing) and Other Legislation Amendment Regulation (No.1) 2010		23/07/2010	6/10/2010	3/08/2010	7/10/2010
190	Transport Operations (Road Use Management—Accreditation and Other Provisions) Amendment Regulation (No.1) 2010		23/07/2010	6/10/2010	3/08/2010	7/10/2010
191	Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010		23/07/2010	6/10/2010	3/08/2010	7/10/2010

192	Transport Operations (Road Use Management—Vehicle Standards and Safety) Regulation 2010		23/07/2010	6/10/2010	3/08/2010	7/10/2010
193	Health Legislation (Fees) Amendment Regulation (No.1) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
194	Health (Drugs and Poisons) Amendment Regulation (No.2) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
195	Radiation Safety Amendment Regulation (No.1) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
196	Proclamation commencing remaining provisions Radiation Safety Amendment Act 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
197	Proclamation commencing certain provisions Gambling and Other Legislation Amendment Act 2009		30/07/2010	6/10/2010	3/08/2010	7/10/2010
198	Gambling Legislation Amendment and Repeal Regulation (No.1) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
199	Survey and Mapping Infrastructure (Survey Standards) Notice 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010
200	Queensland Competition Authority Amendment Regulation (No.3) 2010		30/07/2010	6/10/2010	3/08/2010	7/10/2010

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

SUBORDINATE LEGISLATION UNDER CONSIDERATION

7. LOCAL GOVERNMENT (FINANCE, PLANS AND REPORTING) REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon D Boyle

ISSUES ARISING FROM EXAMINATION OF LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding sections 116 and 119(1) which may not be drafted with sufficient clarity.

APPLICATION OF FUNDAMENTAL LEGISLATIVE PRINCIPLES

Sufficient regard to rights and liberties of individuals

Clear meaning

2. 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.

3. Sections 116 and 119 of the regulation may not be drafted in a sufficiently clear and precise way.

4. Section 116 provides (emphasis added):

> **Overseas travel**
>
> The annual report for a financial year must contain the following information about any overseas travel made by a councillor or local government employee in an official capacity during the financial year—
>
> (a) for a councillor—the name of the councillor;
>
> (b) for a local government employee—the name of, and position held by, the local government employee;
>
> (c) the destination of the overseas travel;
>
> (d) ***the purpose of the overseas travel;***
>
> (e) the cost of the overseas travel;
>
> (f) ***any other information about the overseas travel the local government considers relevant.***

5. The wording in section 116(d) and (f) may not be drafted with sufficient clarity as it and could lead to the situation where a councillor or employee was able to supply a very basic, non specific précis of travel undertaken, whilst still technically meeting the section's requirements. The committee queries whether this is appropriate, particularly with regard to overseas travel which may require the expenditure of significant public funds.

6. Section 119(1) of the regulation provides (emphasis added):

> **Other contents**
>
> (1) The annual report for a financial year must contain—
>
> (a) an assessment of the local government's performance in implementing its long-term community plan, 5-year corporate plan and annual operational plan; and
>
> (b) ***particulars of other issues relevant to making an informed assessment of the local government's operations and performance in the financial year; and***
>
> (c) details of any action taken for, and expenditure on, a service, facility or activity—
>
> (i) supplied by another local government under an agreement for conducting a joint government activity; and
>
> (ii) for which the local government levied special rates or charges for the financial year; and
>
> (d) the number of invitations to change tenders under section 177(7) during the year; and
>
> (e) a list of the registers kept by the local government; and

(f) a summary of all concessions for rates and charges granted by the local government; and

(g) the report on the internal audit for the year; and

(h) a statement about the local government's activities during the year to implement its plan for equal opportunity in employment; and

(i) the names of the local government's shareholder delegates for its corporate entities; and

(j) a summary of investigation notices given in the year under section 137 of the Business Activities Regulation for competitive neutrality complaints; and

(k) the local government's decisions in the year on—

(i) the referee's recommendations on any complaints under section 145(3) of the Business Activities Regulation; and

(ii) the Queensland Competition Authority's recommendations under section 158(5) of the Business Activities Regulation.

7. The wording used in section 119(1)(b) is quite broad and capable of varying interpretations. Its intended meaning may not be sufficiently clear.

8. As no explanatory notes were tabled regarding the regulation, the committee invites the minister to provide information about whether sections 116 and 119 are consistent with fundamental legislative principles. In particular, in addition to the issues raised above, the committee seeks information clarifying:

- whether section 116 is intended to cover sponsored travel; and
- whether section 119(1)(b) is intended to cover any declared conflicts of interest.

PART 3A – MINISTERIAL CORRESPONDENCE – BILLS

8. CARERS (RECOGNITION) AMENDMENT BILL 2010

Date introduced: 8 June 2010
Responsible minister: Hon A Palaszczuk MP
Portfolio responsibility: Minister for Disability Services and Multicultural Affairs
Committee report on bill: 08/10; at 7 - 8
Date response received: 16/8/10 (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 invites the minister to provide information to clarify the intended operation of **clause 9(3)**.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Annastacia Palaszczuk MP
Member for Inala

Queensland Government

Minister for Disability Services and Multicultural Affairs

Your reference: B30.10
Our reference: COM 12117-2010

16 AUG 2010

SCRUTINY OF
16 AUG 2010
LEGISLATION COMMITTEE
B30.10

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

Dear ~~Ms Miller~~ Jo-Ann

Thank you for your letter of 2 August 2010 concerning the Carers (Recognition) Amendment Bill 2010 (the Bill).

The Scrutiny of Legislation Committee has queried whether clause 9 of the Bill is drafted with sufficient clarity as to whether the clause would override obligations under the *Information Privacy Act 2009*.

Clause 9 amends the Queensland Carers Charter in the Schedule to the *Carers (Recognition) Act 2008* (the Act) to include two new principles in the Charter. The new principle 11 states 'Grandparents who are carers for their grandchildren need easy access to information that is clear and relevant to their role as a carer'.

The new principle 11 must be read in the light of section 9(5) of the Act which provides that Part 2 of the Act does not apply to a department if Part 2, or the principles of the Carers Charter, conflict with other considerations. 'Other considerations' are defined in section 9(4) to mean another Act or law that a public authority must consider or comply with.

The statement in principle 11 therefore does not override any obligations that a public authority may have under the *Information Privacy Act 2009*, or any other legislation.

If you require any further information or assistance in relation to this matter, please contact Ms Bronwyn Smith, Principal Advisor in my office on 3235 4562.

Thank you for taking the time to make me aware of your concerns.

Yours sincerely

Annastacia Palaszczuk MP
Minister for Disability Services and Multicultural Affairs

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9. CHILD PROTECTION AND OTHER ACTS AMENDMENT BILL 2010

Date introduced: 10 June 2010

Responsible minister: Hon PG Reeves

Portfolio responsibility: Minister for Child Safety and Minister for Sport

Committee report on bill: 08/10; at 9 - 17

Date response received: 13/8/10 (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 22, 31, 37-9 and 43-4** which seek to ensure the safety, wellbeing and best interests of children but may affect rights and liberties of other individuals;
   - **clauses 48, 93 and 110** which may affect rights of individuals as they would allow communication of information regarding police and traffic histories;
   - **clauses 70, 82 and 84** which may affect rights of individuals to information privacy;
   - **clause 31** providing for a temporary custody order to be made without notice to a child's parents;
   - **clauses 31 and 45** expanding rights of authorised officers and police officers to enter premises under the *Child Protection Act* and to exercise post-entry powers; and
   - **clause 91** which would protect persons who provide information for a review of a death of a child from civil and criminal liability and liability under an administrative process.
2. In relation to the application of fundamental legislative principles to the bill, the committee invites the minister to provide information regarding:
   - the consistency of the bill with the United Nations of the *Convention on the Rights of the Child*; and
   - the intended practical operation of clause 38.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Phil Reeves MP
Member for Mansfield

Queensland Government

Minister for Child Safety and Minister for Sport

SCRUTINY OF
13 AUG 2010
LEGISLATION COMMITTEE
B35.10

Your reference: B35.10
Our reference: COM 11893-2010

13 AUG 2010

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 2 August 2010 enclosing the pages of the Committee's Legislation Alert No. 08/10 relating to the Child Protection and Other Acts Amendment Bill 2010 (the Bill).

I thank the Scrutiny of Legislation Committee for its detailed consideration of the Bill. The Committee has highlighted several clauses with respect to fundamental legislative principles in the *Legislative Standards Act 1992* and noted in its Alert that the Explanatory Notes to the Bill provide justification and rationale for these amendments.

Rights and liberties
The Committee has specifically invited further information regarding the consistency of the Bill with the United Nations' Convention (the Convention) on the Rights of the Child. The *Child Protection Act 1999* (the Act) and the Bill are consistent with articles of the Convention.

Articles 3, 9, 19 and 20 of the Convention most directly relate to children in statutory child protection. In particular, Article 20(1) states "a child temporarily or permanently deprived of his of her family environment, or in whose own best interest cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State."

Significantly, Article 3 of the Convention states the child's best interests shall be the primary consideration in all matters. This aligns with the Act and with Clause 7 of the Bill. The paramount principal for the administration of the Act will be strengthened to be for the safety, wellbeing and best interests of a child. Clause 7 will also insert into the Act other principles for ensuring the safety, wellbeing and best interests of a child when a decision is made or a power exercised under the Act. Principles included are that the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family, and that if a child does not have a parent who is able and willing to protect them, the State is responsible for protecting the child, but, in doing so, should only take action that is warranted in the circumstances.

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The Act permits the chief executive to remove a child from his or her family only with the consent of the child's parents or under the authority of an order made by a Court.

A number of articles of the Convention also account for the rights and duties of a child's parents, legal guardians, or other individuals legally responsible for a child's wellbeing. In doing so, the Convention recognises and considers the best interests of a child by considering the child's relationship to their parents and also their relationships to legal guardians and persons legally responsible for the child's wellbeing. Under the Act, this would include suitable relatives of a child or other suitable persons to whom the Court grants long-term guardianship of a child (until the child is 18 years old). The Act's compliance with the Convention will be strengthened by the amendments in the Bill that will ensure that these long-term guardians are treated in the same way as parents.

Application of Clause 38

The Committee has also invited further information regarding the intended practical operation of clause 38 of the Bill which refers to assessment care agreements. These are agreements between the chief executive and a child's parents for the child to live in out-of-home care for up to 30 days while an assessment is conducted of whether the child is in need of protection. Clause 38 will amend section 51ZE so that the chief executive may enter into an assessment care agreement with the consent of only one of a child's parents, provided it is impractical to obtain the consent of the other parent or reasonable attempts have been made to obtain the consent of the other parent. Section 51ZE will also require the chief executive to make reasonable attempts, after the agreement has been entered into, to give a copy of the agreement to the other parent and obtain their consent.

With regard to the practical operation of Clause 38, the Committee has noted that the explanatory notes do not refer to the variety of circumstances in which it might apply and, specifically, the Committee provided an example of a parent who may be subject to a forensic examination order.

The chief executive may encounter practical difficulties in obtaining the consent of one parent. For example, if they do not take an active part in their child's life, their whereabouts are unknown or if, at the time the consent is required, the parent may be absent and not easily contactable within the short time needed to complete the agreement. In these circumstances, the agreement may be made with one parent and, at the same time, reasonable attempts will continue to provide a copy of the agreement to the other parent and to obtain their consent. Either parent, or the chief executive, may end the agreement on two days notice to the parties. The chief executive will not be able to enter into an assessment care agreement with only one parent if the other parent has refused their consent.

When the chief executive receives an allegation of harm or risk of harm to a child and reasonably suspects the child is in need of protection, the chief executive must immediately have an authorised officer investigate the allegation and assess whether the child is in need of protection (section 14 of the Act). In cases where the safety and best interests of the child require the child to be placed in out-of-home care during the assessment, it is important for the department to act quickly.

The assessment care agreement is one option provided for in the Act for the chief executive to respond to an allegation of harm or risk of harm to a child by conducting an assessment of whether a child is in need of protection. It is seen as the least intrusive means of conducting the assessment. During the 30 day period of the agreement, the parents retain custody and guardianship of their child who, by agreement, is placed in out-of-home care. If there are safety concerns about the parents retaining these parental rights, if the agreement of the parents cannot be obtained quickly, or if a parent cannot consent because of impaired capacity, then an assessment care agreement is not the appropriate intervention.

The alternative to an assessment care agreement is to obtain a court order for the chief executive to have custody of the child while an assessment is undertaken. An authorised officer may apply for a court assessment order which the Court may make if it is satisfied an investigation is necessary to assess whether the child is in need of protection and the investigation cannot be properly carried out unless the order is made (section 44 of the Act). The best interests of the child will be the paramount consideration.

Power to enter premises
The Committee has raised issues about the fundamental legislative principles in the *Legislative Standards Act 1992* in relation to Clauses 31 and 45 of the Bill which provide for new enter and search court orders.

Clause 31 of the Bill inserts new provisions for a temporary custody order by which the Court authorises an officer to take a child into the chief executive's custody for up to three business days to secure the child's immediate safety while the chief executive decides the most appropriate action to take for the child's ongoing protection and care needs.

Clause 45 adds to the orders the Court may make on adjournment of an application for a court assessment order or a child protection order. The amendment will allow the Court, when it does not make an order granting custody of the child to the chief executive during the adjournment, to make an order that the chief executive may have contact with the child. The Court may place the child in the custody of a suitable person who is a member of the child's family (section 67 of the Act).

The inclusion of enter and search orders is consistent with provisions currently in the Act in relation to temporary assessment orders (section 28) and court assessment orders (section 45). Enter and search orders will be necessary to give effect to the new temporary custody orders and the contact orders that enable the chief executive to have contact with a child who is not in their custody while proceedings are before the Court. To obtain enter and search orders, an authorised officer will be required to satisfy the Court that the orders are necessary to ensure the safety of a child. The Court will be required to have regard to the safety, wellbeing and best interests of the child in exercising its powers (section 104 as amended by Clause 53 of the Bill).

Immunity from proceeding or prosecution
The Committee has also raised an issue about the fundamental legislative principles in relation to Clause 91 which provides immunity from civil or criminal liability for entities providing information to the chief executive (Child Safety) for the conduct of a review of the death of a child who was known to the chief executive within the three years prior to its death.

Chapter 7A, Child deaths, was inserted into the Act by the *Child Safety Legislation Amendment Act 2004* following the inquiry by the Crime and Misconduct Commission (CMC) into the abuse of children in foster care. The CMC's report, *Protecting Children*, made recommendations about the investigation of the deaths of children known to the department. The CMC stated (in relation to recommendation 5.25 of its Report) that "it is extremely important that the department with child-protection responsibilities becomes aware, as quickly as possible, of any systemic or procedural factors that might have contributed to the death of any child interacting with it, and that might expose other children to risk".

Chapter 7A, section 246E, provides immunity from liability for persons providing information to the chief executive for a child death review. Clause 91 amends section 246E to provide a more comprehensive protection from liability. This is to ensure the original intent of the child death review process to discover whether the department's involvement with the child was adequate and appropriate, including the sufficiency of the department's involvement with other entities in the delivery of services to the child and the child's family, and making recommendations aimed at making any necessary improvements.

It is important that the department has access to comprehensive information about a child who has died which can be provided by other entities unfettered by statutory restrictions on their disclosure of information. Clause 91 is consistent with section 159Q which provides protection from liability for persons in government prescribed entities or service providers sharing information with the chief executive under Chapter 5A of the Act.

Criminal history

I note the Committee draws the attention of Parliament to whether the Bill has sufficient regard to the rights and liberties of individuals in relation to Clauses 48, 93 and 110 of the Bill, which may affect rights of individuals as it would allow communication of information regarding police and traffic histories.

In particular, the Committee notes the general rule regarding the non-disclosure and disregard of convictions after the expiration of the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* and draws Parliament's attention to provisions in the Bill where the general rule is overridden which:

- define criminal history differently to the definition in the *Criminal Law (Rehabilitation of Offenders) Act 1986*
- displace the 'rehabilitation period' provisions of the *Criminal Law (Rehabilitation of Offenders) Act 1986*, requiring disclosure of old convictions
- may be ambiguous as to which aspects of the *Criminal Law (Rehabilitation of Offenders) Act 1986* are to be displaced, particularly regarding the rehabilitation period.

I note the Committee's recognition that the general rule in the *Criminal Law (Rehabilitation of Offenders) Act 1986* is subject to "more specific legislative provisions, such as enabling a relevant official to request a copy of a person's criminal history from the Police Commissioner".

The following information is provided in response to the issues raised by the Committee about whether these clauses have sufficient regard to the rights and liberties of individuals.

Clause 48 expands the scope of criminal history screening in section 95 of the Act by allowing for screening of parents of a child, an adult member of their household and an adult against whom an allegation of harm to a child has been made for the purpose of making any decision about the child under the Act. Clause 93 amends the existing definition of "criminal history" in the Dictionary which overrides the *Criminal Law (Rehabilitation of Offenders) Act 1986*. The amendment is not intended to diminish the information to be accessed. It is based on the definition of "criminal history" in the *Commission for Children and Young People and Child Guardian Act 2000* (CCYPCG Act), including offender prohibition orders made under the *Child Protection (Offender Prohibition Order) Act 2008* which the Commission for Children and Young People and Child Guardian (the Commission) also accesses as part of a person's criminal history for the purpose of processing applications for positive notices or positive exemption notices, and disqualification orders issued under the CCYPCG Act.

The purpose of the Act is to provide for the protection of children (section 4 of the Act). The paramount principle for administering the Act (as amended by the Bill) is that the safety, wellbeing and best interests of a child are the paramount consideration. The persons who are screened for criminal history under the Act are the parents of a child, an adult member of their household, an adult against whom an allegation of harm to a child has been made, a person being considered for approval as a provisionally approved carer, a kinship carer or a foster carer and adult members of their households. These are the people who may have responsibility for the daily care of vulnerable children who are in need of protection or unsupervised access to those children. The chief executive has a duty of care to ensure that the children are safe and well cared for. It is therefore, necessary to obtain full details of the histories of each of those persons.

Clause 110 of the Bill inserts new chapter 8A in the CCYPCG Act. The Committee raises the issue that this chapter would provide for criminal history checks and the assessment of suitability of persons engaged or proposed to be engaged by the Commission.

The new chapter 8A under the CCYPCG Act will apply despite the *Criminal Law (Rehabilitation of Offenders) Act* and it is recognised that the definition of criminal history will differ under these pieces of legislation. The amendments will enable the disclosure of criminal history and related information to the Commissioner for Children and Young People and Child Guardian which would include all convictions (including unrecorded convictions and convictions past the rehabilitation period in the *Criminal Law (Rehabilitation of Offenders) Act*), charges and investigative information.

Until recently under the CCYPCG Act, this information was able to be disclosed to the Commissioner to assess suitability of a person to be, or continue to be, a Commission staff member. The definition of criminal history differed from that under the *Criminal Law (Rehabilitation of Offenders) Act*. To rectify an anomaly as a result of the *Criminal History Screening Legislation Amendment Act 2010*, it is proposed to reinstate the Commissioner's previous screening powers in order to assess suitability for persons engaged or proposed to be engaged by the Commission.

The explanatory notes provide justification for the potential breach of the fundamental legislative principle that legislation should have sufficient regard to the rights and liberties of individuals. Given the Commission's role as an independent statutory oversight body with the primary purpose of promoting and protecting the rights, interests and wellbeing of children and young people, it is in their best interests and in the public interest that persons proposing or continuing to be engaged by the Commission undergo a high level of screening.

It is also necessary to continue this high level screening to maintain community confidence in the integrity of the Commission as an oversight body of the child protection system, as administrator of the blue card system and as advocate for children and young people in Queensland.

The Commission's functions require some staff to have access to highly confidential and personal information about members of the public and children, such as having access to police information, which includes convictions, charges and investigative information, in order to make a decision under the blue card system. This is further justification that it is in the public interest and in the best interests of children and young people that persons proposing or continuing to be engaged by the Commission are screened to a high level.

I trust this information is of assistance to the Committee.

Yours sincerely

Phil Reeves

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

10. DISASTER MANAGEMENT AND OTHER LEGISLATION AMENDMENT BILL 2010

Date introduced: 8 June 2010

Responsible minister: Hon NS Roberts MP

Portfolio responsibility: Minister for Police, Corrective Services and Emergency Services

Committee report on bill: 08/10; at 19 - 21

Date response received: 13/08/10 (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 31, 33 and 46** conferring significant administrative powers exercisable in disaster or emergency situations.
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 32** which may delegate legislative power inappropriately.

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 Neil Roberts MP
Member for Nudgee

Queensland Government

Minister for Police, Corrective Services and Emergency Services

File No: (DES/02/0255/P1)
Ref No: (05816-2010)

11 AUG 2010

SCRUTINY OF
13 AUG 2010
LEGISLATION COMMITTEE

B29.10

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

Dear Ms Miller

Thank you for your correspondence dated 2 August 2010 inviting me to respond to comments made by the Scrutiny of Legislation Committee (the Committee) regarding the Disaster Management and Other Legislation Amendment Bill 2010 (the Bill).

I note that the Committee draws to the attention of Parliament aspects of the Bill, in particular clauses 31, 33 and 46 with respect to the question of whether these amendments have sufficient regard for the rights and liberties of individuals. It is also noted that the Committee raises the issue of whether Clause 32 has sufficient regard to the institution of Parliament in relation to the delegation of legislative power.

The above clauses confer significant administrative powers that are exercisable in disaster or emergency situations. The conferral of such powers is necessary given the immediacy of response required when danger presents to people and property. Public safety is paramount and these powers are essential for the State to act promptly and effectively when emergency or disaster situations occur.

Clause 31 amends section 71 of the *Disaster Management Act 2003* (the Act) by increasing the length of time for which an initial disaster situation may be declared by the Premier and myself from seven days to 14 days. This alleviates the need to make a Regulation to extend the disaster declaration should the situation exceed seven days. There are existing safeguards in Section 68 and 73 that require myself as Minister, or myself and the Premier, to end a disaster declaration once satisfied that it is no longer necessary.

.../2

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This practical amendment is necessary and justified, given that the true impact of an event, and the response required, may not be known for a number of days. This amendment therefore allows for a timely and flexible response to rapid onset events.

Clause 33 amends section 76 of the Act to permit district disaster co-ordinators and declared disaster officers to only exercise disaster powers for the purpose of preparing for, responding to or recovering from the disaster situation. This expressly limits the use of these powers and achieves a balance between the protection of the rights and liberties of individuals and allowing authorised officers of the State to take appropriate action to protect the community from the effects of disasters.

Clause 46 amends the definition of "emergency situation" in the *Public Safety Preservation Act 1986* to allow a commissioned police officer to declare that an emergency situation exists in relation to a naturally occurring event such as a flood or landslide. The expansion of the power to declare that an emergency situation exists under the *Public Safety Preservation Act 1986*.enables the State to effectively and immediately respond to rapid onset natural events in order to minimise the loss of life and property.

Clause 32 amends section 72 to allow extension of a disaster declaration for a period of 14 days by Regulation rather than the current seven days. Increasing the timeframe from seven to 14 days will allow the system to focus on the response and recovery activities that are required to be undertaken. This delegated power is safeguarded by sections 68 and 73 which require myself as Minister, or myself and the Premier, to end a disaster declaration once satisfied that it is no longer necessary. As such the amendment achieves an appropriate balance between the delegation of legislative power and the need to take appropriate and timely action to protect the community from the effects of disasters.

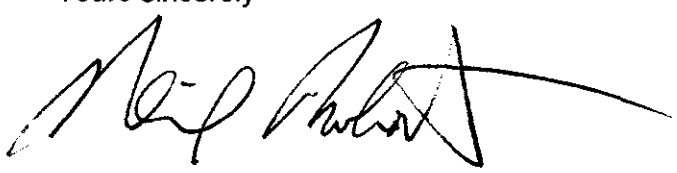
Therefore, I submit that the Bill provides for the appropriate protection of the rights and liberties of individuals as well as sufficient regard for the delegation of legislative power by the Parliament.

I trust this correspondence has addressed the matters the Committee has raised.

I thank the Committee for its consideration of the Bill.

Should you require further information, please contact Ms Corinne Mulholland, Senior Policy Advisor, on telephone number (07) 3239 0199.

Yours sincerely



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

11. MANUFACTURED HOMES (RESIDENTIAL PARKS) AMENDMENT BILL 2010

Date introduced: 8 June 2010

Responsible minister: Hon PJ Lawlor

Portfolio responsibility: Minister for Tourism and Fair Trading

Committee report on bill: 08/10; at 23 - 28

Date response received: 12/03/10 (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 6 and 8** which may affect rights and liberties of individuals who own converted caravans that are positioned in a residential park;
   - **clause 20** which may affect rights of park owners;
   - **clauses 10-1, 17-8, 24-6, 29, 31 and 33** creating new penalties; and
   - **clauses 10, 11 and 33** which may adversely affect rights and liberties retrospectively.
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 10** which may provide for inappropriate delegations of legislative power.
3. The committee invites the minister to provide information regarding both the status under current legislation of a caravan with a non-removable annexe and the status of such a caravan under the legislation, once amended by the bill.

EXAMINATION OF INFORMATION PROVIDED BY MINISTER

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

Hon Peter Lawlor MP
Member for Southport

Queensland Government

Minister for Tourism and Fair Trading

Ref: FTP-00101, B31.10, MN115753

10 AUG 2010

SCRUTINY OF
12 AUG 2010
LEGISLATION COMMITTEE
B31.10

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 2 August 2010 concerning the Manufactured Homes (Residential Parks) Amendment Bill 2010.

I refer to the Committee's comments included in the *Legislation Alert No. 08 of* 2010. The Committee has drawn to the attention of the Legislative Assembly, aspects of the Bill with respect to the rights and liberties of individuals and in relation to the institution of Parliament. I would like to take this opportunity to acknowledge the information reflected in the Bill's explanatory notes, which address these matters comprehensively, and the Committee's comments that the explanatory notes provide sound justification for the identified possible departures from fundamental legislative principles. However, please find attached my response to the Committee's comments on these two issues.

The Committee has also invited me to provide information regarding the status of a caravan with a non-removable annexe under the *Manufactured Homes (Residential Parks) Act 2003*, and the status of such a caravan following successful passage of the Bill.

Currently, there is uncertainty about the regulation of caravans that have been subject to structural additions or alterations in residential parks. The legislative framework that applies to a caravan with a non-removable annexe is dependant on whether the individual structure fits within the definition of a 'manufactured home' under the *Manufactured Homes (Residential Parks) Act 2003.*

The *Manufactured Homes (Residential Parks) Act 2003* defines a 'manufactured home' as a structure, other than a caravan or tent, that has the character of a dwelling house, is designed to be able to be moved from one position to another and is not permanently attached to land.

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The *Residential Tenancies and Rooming Accommodation Act 2008* defines a 'caravan' as a trailer principally used for residential purposes, designed to be attached to and towed by a self propelled vehicle and, as originally designed, was capable of being registered under a law of the State about the use of vehicles on public roads. A caravan can also be something not fitted with wheels but designed for attachment to a motor vehicle and used for residential purposes.

Some caravan owners have made substantial modifications and additions to their caravans after entering a residential park. In some cases residents have then argued that because of these changes, which can include attaching carports, annexes or making structural modifications to the caravan, their structure meets the definition of a 'manufactured home' and should be regulated by the *Manufactured Homes (Residential Parks) Act 2003.*

In 2006 the Court of Appeal[1] upheld a determination of the then Commercial and Consumer Tribunal, that the converted caravan in question was a manufactured home as it could no longer be defined as a caravan under the residential tenancies legislation. This decision highlighted to the industry the potential impact of providing sites for the long-term occupation of modified or converted caravans.

Successful passage of the Bill will provide much needed certainty about the regulation of converted caravans by clarifying that converted caravans will not be manufactured homes for the purposes of the amended *Manufactured Homes (Residential Parks) Act 2003.*

However, converted caravan owners currently living in residential parks will have three years after commencement of the amendments, to apply to the tribunal for an order for a site agreement, if they consider their structure (as it stands at the time the amendments commence) meets the definition of 'manufactured home' under the *Manufactured Homes (Residential Parks) Act 2003.* This is designed to ensure that the changes do not adversely impact on residents currently living in converted caravans in residential parks by providing existing converted caravan owners with ample opportunity to seek an order for a site agreement from the tribunal.

In addition, the amendments allow for a converted caravan owner and a residential park owner to agree to enter into a site agreement under the amended Act if they wish to do so. Importantly, the amendments regarding converted caravans will not impact on existing site agreements between converted caravan owners and residential park owners and these agreements will continue to be regulated by manufactured homes legislation.

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

Yours sincerely

Peter Lawlor.

Peter Lawlor MP
Minister for Tourism and Fair Trading

Encl.

RESPONSE TO
SCRUTINY OF LEGISLATION COMMITTEE
LEGISLATION ALERT No. 8 OF 2010

Manufactured Homes (Residential Parks) Amendment Bill 2010

The Scrutiny of Legislation Committee (the Committee) has identified the following provisions of the Manufactured Homes (Residential Parks) Amendment Bill 2010 (the Bill) that may infringe fundamental legislative principles pursuant to the *Legislative Standards Act 1992*.

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

- **clauses 6 and 8** which may affect rights and liberties of individuals who own converted caravans that are positioned in a residential park;
- **clause 20** which may affect rights of park owners;
- **clauses 10-1, 17-8, 24-6, 29, 31 and 33** which create new penalties; and
- **clauses 10, 11 and 33** which may adversely affect rights and liberties retrospectively.

In relation to whether the Bill has sufficient regard to the institution of Parliament, the Committee has drawn the attention of the Parliament to the following clause of the Bill:

- **clause 10** could be regarded as a breach of the fundamental legislative principle that legislation have sufficient regard to Parliament.

1. SUFFICIENT REGARD TO RIGHTS AND LIBERTIES OF INDIVIDUALS

Clauses 6 and 8

The Committee states that clauses 6 and 8 of the Bill may affect the rights and liberties of individuals who own converted caravans that are positioned in residential parks.

Response:
The possible breach of the fundamental legislative principle is justified as the amendment increases certainty in the operation and application of the Act. In addition, the potential impact on existing converted caravan owners has been mitigated as the Bill:

- ensures that any existing site agreement between a park owner and a converted caravan owner will remain valid under the Act;
- allows a converted caravan owner and a park owner to voluntarily enter into a site agreement under the Act; and
- provides converted caravan owners with a period of 3 years from the commencement of the amendments to apply to the Queensland Civil and Administrative Tribunal for consideration of whether they are entitled to a site agreement, based on the current definition of a manufactured home and the structural characteristics of the converted caravan at the time of commencement.

Clause 20

The Committee states that clause 20 of the Bill may affect rights of park owners.

Response:
I note the Committee's comments that the amendment to section 71 (clause 20) adversely impacts on the current rights of park owners to secure site rent increases outside the terms of the site agreement, due to the restrictions placed on applications the Tribunal may consider.

As outlined in paragraph 17 of the Committee's alert, the explanatory notes provide justification for this amendment, noting that the provision will increase transparency and acknowledging that home owners should have greater certainty in the terms of their site agreement.

The potential breach of the fundamental legislative principle is mitigated as the Bill continues to allow park owners to seek increases in site rent outside the terms of the site agreement, if this is necessary to cover significant increases in operational costs, significant unforseen repair costs and significant facility upgrades. The Bill also provides for a 'market review' clause to be inserted into a site agreement upon assignment.

Clauses 10, 11, 17, 18, 24, 25, 26, 29, 31 and 33

The Committee states that clauses 10, 11, 17, 18, 24, 25, 26, 29, 31 and 33 of the Bill create new penalties.

Response:
As noted in paragraph 19 of the Committee's alert, the penalties contained in these clauses are justified to discourage park owners from attempting to misuse, avoid or contract out of the policy principles underpinning the Act, and to ensure the protection of manufactured home owners. The penalties support, and are a reflection of, the importance of complying with the consumer protection provisions contained in the Act and the Bill.

Clauses 10 and 33

The Committee states that clauses 10 and 33 of the Bill may adversely affect rights and liberties retrospectively.

Response:
The Committee's comments contained in paragraph 31 confirm that the making of a regulation prohibiting stated types of terms in a site agreement is a potential breach of this fundamental legislative principle as it will adversely affect the park owner's rights retrospectively.

It is considered that the amendment in the Bill is justified to protect home owners who may be subject to special terms or park rules, which are unnecessarily onerous and prejudicial to home owners, and not necessary to protect the park owner's reasonable interests.

It is also important to note that site agreements can continue for an indefinite length of time and potentially for decades. Therefore, if the amendment did not apply retrospectively, terms which are considered unfair or prejudicial and prohibited by

regulation could continue to apply even to prospective home owners for decades to come.

The regulation prescribing the prohibited special terms and park rules will be developed in accordance with the rigorous analysis and consultation requirements of the *Statutory Instruments Act 1992*.

Clauses 11 and 33

The Committee states that clauses 11 and 33 of the Bill may adversely affect rights and liberties retrospectively.

Response:
The retrospectivity in this instance is considered justified as the use of fixed-term agreements fundamentally undermines, and is inconsistent with, the policy intention and termination provisions of the Act.

The amendments are necessary to protect home owners who are in a more vulnerable bargaining position and in some instances may have reasonably believed that the park owner would invariably renew their agreement at the end of the fixed-term.

2. SUFFICIENT REGARD TO THE INSTITUTION OF PARLIAMENT

Clause 10

New section 25B

The Committee is concerned that clause 10 may provide for inappropriate delegations of legislative power.

Response:
Paragraph 31 of the Committee's alert notes that the inclusion of a prohibited term in a regulation could be regarded as a breach of the fundamental legislative principle that legislation have sufficient regard to the institution of Parliament.

Due to the number and variety of particular special terms and park rules that can be detailed and technical, it is considered justified that the Act establishes a head of power to enable the regulation to prohibit special terms and park rules that are identified as unfair.

In addition, the development of new types of unfair special terms can be rapid and unpredictable. It is necessary for a special term or park rule which may exploit and unfairly prejudice vulnerable home owners to be prohibited as soon as practicable.

The potential breach of the fundamental legislative principle is mitigated in two ways:
1. The development of the regulation will be done in accordance with the rigorous analysis and consultation requirements of the *Statutory Instruments Act 1992*.
2. Any regulation is subject to potential disallowance by the Legislative Assembly under section 50 of the *Statutory Instruments Act 1992*.

Clause 10 is also consistent with the approach adopted in the New South Wales *Residential Parks Act 1998*.

PART 3B – MINISTERIAL CORRESPONDENCE – SUBORDINATE LEGISLATION

12. CITY OF BRISBANE (OPERATIONS) REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon D Boyle MP

Committee report on sub-leg: 08/10; at 36 - 37

Date response received: 16/8/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding sections 24(4)(f), 85(1) and 89 which may not be drafted with sufficient clarity.

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 Desley Boyle MP
Member for Cairns

Queensland Government

Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships

13 AUG 2010

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

Dear Ms Miller

I refer to your letter of 2 August 2010 regarding the *City of Brisbane (Operations) Regulation 2010* and thank you for the Committee's comments.

I note that the Scrutiny of Legislation Committee has provided comments in relation to sections 24, 85 and 89 of the Regulation. Please find attached my response to the Committee's comments.

Should you require any further information in relation to this matter, please contact Ms Meg Frisby, Principal Advisor of my office on telephone number 3227 8819.

Yours sincerely

Desley Boyle MP
Minister for Local Government and
Aboriginal and Torres Strait Islander Partnerships
Member for Cairns

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City of Brisbane (Operations) Regulation 2010

Scrutiny of legislation comment:
Section 24(4)(f) *of the regulation states that the vehicle may be sold if the registered operator or another person entitled to possession of the vehicle does not obtain possession of it within 28 days after the date the notice if given.*

On the face, this is quite onerous and does not appear to give an affected person much time to retrieve their vehicle or to confirm ownership. It could potentially pose problems if – for example – the registered operator or person entitle to possession was out of the jurisdiction as the time it was removed from the mall and unaware that this had occurred. The committee queries how this section is intended to work in practice.

Departmental response:
This is the timeframe that was in place in the repealed *Local Government (Queen Street Mall) Act 1981* that was simply carried over into the new legislation. This section is intended to work in practice as it has always worked. Brisbane City Council did not make the department aware of any operational issues with this section during consultation.

Further, Brisbane City Council did not object to the timeframe for, or way of, giving the notice during consultation on the regulation.

Scrutiny of legislation response:
Section 85 *of the regulation states:*
Appeal board may decide procedures
(1) The appeal board-
(a) is not bound by the rules of evidence; and
(b) may inform itself in any way it considers appropriate; and...'
The committee queries how section 85(1)(a) and (b) are intended to work in practice, and whether subsection (b) would allow the appeal board, for example, to consider hearsay. The committee notes the very wide scope the wording in subsection (b) provides to the appeal board.

Departmental response:
This is a common provision used across the statute books for courts and boards for conducting inquiries and hearing appeals. (The Office of Parliamentary Counsel's response to this should give further information as to the legal meaning and application).

This section has been carried over from section 1159 of the repealed *Local Government Act 1993*. As the intention of the section is the same, the wording used is the same. No issues were raised with this section during consultation.

Section 89 *of the regulation states:*
Prosecution of appeal
(1) An appeal must be prosecuted diligently.
(2) The appeal board may strike out an appeal if it considers the appellant is not prosecuting the appeal diligently.
(3) The appeal may be discontinued by the local government employee by written notice given to the appeal board and the chief executive officer.
This wording is very subjective and could lead to difficulties in interpreting and applying the legislation. What is considered 'diligently' could vary widely but is important in the context of appeal proceedings when there is a risk of proceedings being struck out should this not occur.

This section has been carried over from section 1162 of the repealed Local Government Act 1993. As the intention of the section is the same, the wording used is the same. No issues were raised with this section during consultation.

13. LAND TAX REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon AP Fraser MP

Committee report on sub-leg: 08/10; at 38

Date response received: 10/8/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding section 3(1) which may not be sufficiently clear and which may result in difficulty for individuals making application for clearance certificates.

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 Andrew Fraser MP
Member for Mount Coot-tha

Queensland Government

Treasurer and Minister for Employment and Economic Development

TRX-13796

-6 AUG 2010

SL 109.10

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 2 August 2010 enclosing pages of the Committee's Legislation Alert No. 8 of 2010 relating to the *Land Tax Regulation 2010*.

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

I trust this information is of assistance.

Yours sincerely

ANDREW FRASER

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RESPONSE TO SCRUTINY OF LEGISLATION COMMITTEE'S COMMENTS

Land Tax Regulation 2010

Clause 3(1) – Application for clearance certificate

Clause 3(1) sets out the method of applying for a clearance certificate and the applicable fees.

In relation to an online application, the wording of clause 3(1)(a) reflects clause 21 of the *Land Tax Regulation 1999*, which it replaces. That wording was adopted from 30 June 2009 to allow expansion of the range of service providers for issuing land tax clearance certificates; no concerns have been raised by taxpayers since that time. In relation to a written application, clause 3(1)(b) has been drafted to reflect that applications can be lodged at both the Office of State Revenue and Queensland Government Service Centres.

The clearance certificate process has been operating for a number of years and taxpayers and advisers understand, and are familiar with, the process. Full details of how and where to apply are contained on the Office of State Revenue website. Any new application channels that may open up will be advertised and included on the website.

14. LOCAL GOVERNMENT (BENEFICIAL ENTERPRISES AND BUSINESS ACTIVITIES) REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon D Boyle MP

Committee report on sub-leg: 08/10; at 39

Date response received: 16/8/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding:
   - section 103(1) and (2) which may not be drafted with sufficient clarity; and
   - sections 104 and 149 which extend protection from liability to councillors, employees of a local government, referees and persons who assist referees who act honestly and without negligence, the liability attaching instead to the local government

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 Desley Boyle MP
Member for Cairns

Queensland Government

Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships

13 AUG 2010

SCRUTINY OF
16 AUG 2010
LEGISLATION COMMITTEE

SL 123.10

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

Dear Ms Miller

I refer to your letter of 2 August 2010 regarding the *Local Government (Beneficial Enterprises and Business Activities) Regulation 2010* and thank you for the Committee's comments.

I note that the Scrutiny of Legislation Committee has provided comments in relation to sections 103, 104 and 149 of the Regulation. Please find attached my response to the Committee's comments.

Should you require any further information in relation to this matter, please contact Ms Meg Frisby, Principal Advisor of my office on telephone number 3227 8819.

Yours sincerely

Desley Boyle MP
Minister for Local Government and
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Member for Cairns

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Local Government (Beneficial Enterprises and Business Activities) Regulation 2010

Scrutiny of legislation comment:
Section 103(1) and (2) *of the regulation state that:*
Public access to document

(1) The local government must ensure the document may be inspected and purchased at the local government's public office.
(2) The price of a copy of one of those documents must be not more than the cost to the local government of having a copy available for purchase.

The wording used in section 103(2) may be problematic in that difficulties may arise in determining 'the cost to the local government of having a copy available for purchase'. The wording could give local governments broad discretion in pricing. It is not clear what formula sis to be applied in calculating this cost; that is, whether is it simply the cost alone of photocopying a document, or whether it also includes other associated costs (for example staff costs, the cost of obtaining the original document, any cost associated with binding etc). This should be clarified for consumers.

Department response:
It is the intention of the legislation to allow councils to recoup their costs associated with having copies of documents available to the public. The wording as previously used 'the cost of copying' didn't factor in the administrative costs. As having the documents available is a legislative burden on local government, it is reasonable that they are able to recoup all costs borne by them in fulfilling this burden. Local governments would be expected to follow the local government principle of 'transparent and effective processes' in quantifying and clarifying the costs to their consumers.

Scrutiny of legislation comment:
Sections 104 and 149 *of the regulation would extend protection from liability to councillors, employees of a local government, referees and persons who assist referees who act honestly and without negligence, the liability attaching instead to the local government.*
This protection from liability is not addressed further in the regulation and no explanatory notes were provided.

Department answer:
Sections 104 and 149 have been directly carried over from the repealed *Local Government Act 1993* and the intention remains the same, so the provisions have remained the same.

No issue with the sections was raised during consultation with stakeholders.

15. LOCAL GOVERNMENT (OPERATIONS) REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon D Boyle MP

Committee report on sub-leg: 08/10; at 40 - 41

Date response received: 16/8/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding:
   - sections 17 and 18 which contain a reference to documentation being available for inspection on the department's website; and
   - sections 33, 88(1) and 92 which may not be drafted with sufficient clarity.

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 Desley Boyle MP
Member for Cairns

Queensland Government

Minister for Local Government and Aboriginal and Torres Strait Islander Partnerships

13 AUG 2010

SCRUTINY OF
16 AUG 2010
LEGISLATION COMMITTEE

SL125.10

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

Dear Ms Miller

I refer to your letter of 2 August 2010 regarding the *Local Government (Operations) Regulation 2010* and thank you for the Committee's comments.

I note that the Scrutiny of Legislation Committee has provided comments in relation to sections 17, 18, 33, 88 and 92 of the Regulation. Please find attached my response to the Committee's comments.

Should you require any further information in relation to this matter, please contact Ms Meg Frisby, Principal Advisor of my office on telephone number 3227 8819.

Yours sincerely

Desley Boyle MP
Minister for Local Government and
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Member for Cairns

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Local Government (Operations) Regulation 2010

Scrutiny of legislation comment:
Sections 17 and 18 *of the regulation refer to certain guidelines, namely the 'identification guidelines' and the 'public interest test guidelines. An Editor's note accompanying each section indicates that both are 'available for inspection on the department's website'*
For ease of reference for members of the public, it would assist if the department's website address was provided in full in the accompanying Editor's notes.

Department response:
The Office of the Queensland Parliamentary Counsel advises against making specific reference to website addresses within legislation due to the frequency of changes to web pages. The change of a web address referenced in legislation would necessitate a change in the legislation. This is unlikely to happen for this reason alone, so the reference within the legislation would remain wrong until an amendment was made to the legislation and the reference checked.

The Department's website has a search function that is simple to use and the name of the documents in question can be put into this function and found from the front page of the website with ease.

Scrutiny of legislation comment:
Section 33 *of the regulation states:*
Obligation to give annual statements
'...(2) The statement must-
(a) state how many passenger journeys on the Kuranda rail line were provided by the Kuranda rail operator during the financial year, other than journeys provided free of charge; and
(b) if a form is approved for the statement-be in the approved form.
(3) The approved form may require the statement to be made or verified by statutory declaration.'
The wording used in section 33(2)(b) and (3) is quite vague and potentially confusing. There is no guidance provided as to how an operator might ascertain whether a relevant form exists, and the suggestion that there may be a requirement for the statement to be accompanied by a statutory declaration could lead to further confusion. These issues should be clarified so that operators can be confident that they are properly meeting their obligations.

Department response:
The form is an 'approved form' defined as being a form the chief executive can make under the Act. The process for the notification of approved forms would be followed in this circumstance.

Subsection (3) is allowing the chief executive to add to the approved form the requirement that a statutory declaration be used to verify a statement as to how many trips were taken on the particular rail line. This is because the State is collecting $1 for each trip on behalf of the Tablelands Regional Council. The statutory declaration is a mechanism the State can employ to ensure the validity of the amount collected from each operator.

This process has effectively been in place since 2001 and no issue was raised, or request to change the process, during consultation with affected councils, particularly the Tablelands Regional Council.

Scrutiny of legislation comment:
Section 88 *of the regulation states:*
Appeal board may decide procedures
(2) The appeal board-
(a) is not bound by the rules of evidence; and
(b) may inform itself in any way it considers appropriate; and... '
The committee queries how section 85(1)(a) and (b) are intended to work in practice, and whether subsection (b) would allow the appeal board, for example, to consider hearsay. The committee notes the very wide scope the wording in subsection (b) provides to the appeal board.

Department response:
This is a common provision used across the statute books for courts and boards conducting inquiries and hearing appeals. (The Office of Parliamentary Counsel's response to this should give further information as to the legal meaning and application).

This section has been carried over from section 1159 of the repealed *Local Government Act 1993.* As the intention of the section is the same, the wording used is the same.

Section 92 *of the regulation states:*
Prosecution of appeal
(1) An appeal must be prosecuted diligently.
(2) The appeal board may strike out an appeal if it considers the appellant is not prosecuting the appeal diligently.
(3) The appeal may be discontinued by the local government employee by written notice given to the appeal board and the chief executive officer.
This wording is very subjective and could lead to difficulties in interpreting and applying the legislation. What is considered 'diligently' could vary widely but is important in the context of appeal proceedings when there is a risk of proceedings being struck out should this not occur.

This section has been carried over from section 1162 of the repealed Local Government Act 1993. As the intention of the section is the same, the wording used is the same.

16. SOUTH-EAST QUEENSLAND WATER (DISTRIBUTION AND RETAIL RESTRUCTURING) REGULATION 2010

Date tabled: 3 August 2010

Disallowance date: 7 October 2010

Responsible minister: Hon S Robertson MP

Committee report on sub-leg: 08/10; at 43 - 44

Date response received: 12/8/10 (copy commences following page)

ISSUES ARISING FROM EXAMINATION OF SUBORDINATE LEGISLATION

1. In relation to whether the subordinate legislation has sufficient regard to rights and liberties of individuals, the committee invites the minister to provide information regarding:
   - whether section 6(3) and (4) make rights and liberties, or obligations, dependent on administrative power which is insufficiently defined; and
   - section 10 which may not be drafted with sufficient clarity.

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 Stephen Robertson MP
Member for Stretton

Queensland Government

Minister for Natural Resources,
Mines and Energy and
Minister for Trade

SCRUTINY OF
12 AUG 2010
LEGISLATION COMMITTEE

Ref CTS 13544/10
D/10/038986

12 AUG 2010

SL/141.10

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

Dear Mrs Miller

Thank you for your letter dated 2 August 2010 regarding the *South-East Queensland Water (Distribution and Retail Restructuring) Regulation 2010* (the Regulation).

My comments with respect to the relevant pages received from the Scrutiny of Legislation Committee's Legislation Alert No. 8 of 2010 (the Legislation Alert), which relates to the aforementioned subordinate legislation, are as follows:

The Legislation Alert expresses concern that some of the expressions used in section 6(3) and (4) of the Regulation may not sufficiently define the power to be exercised, that it is arguable that the terms are capable of varying interpretations and that the tests to be applied in section 6(3)(c) and (d) are subjective and provide board members and relevant officers with a wide discretion. It is suggested that this may not be consistent with section 4(3)(a) of the *Legislative Standards Act 1992* (the Standards Act).

The Legislation Alert also expresses concern that the words *"reckless or are intentionally dishonest"* used in section 10 of the Regulation may not be sufficiently clear and this could lead to difficulties in interpreting and applying the legislation. It is suggested that this may not be consistent with section 4(3)(k) of the Standards Act.

As section 5 of the Regulation indicates, all the provisions about which the Legislation Alert expresses concern are derived from the *Corporations Act 2001* (Cth) (the Corporations Act). This is in accordance with section 102 of the *SEQ Water (Distribution and Retail Restructuring) Act 2009* (the DR Act) which provides:

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102 Regulation-making power

(1) The Governor in Council may make regulations under this Act.

(2) A regulation may—

(a) apply a provision of the Corporations Act to a distributor-retailer, with or without change; and

(b) provide, in relation to distributor-retailers, boards, officers or employees of distributor-retailers, for any matter that the Corporations Act provides for corporations;...

Section 6(3) and (4) of the Regulation provides that.

(3) A board member or an officer of a distributor-retailer who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they—

(a) make the judgment in good faith for a proper purpose, taking into account any relevant matters mentioned in subsection (2); and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe the judgment is in the distributor-retailer's best interests.

(4) For subsection (3)(d), the board member's or the officer's belief that the judgment is in the distributor-retailer's best interests is a rational one unless the belief is one that no reasonable person in their position would hold.

In conformity with section 102 of the DR Act, this provision reflects section 180(2) of the Corporations Act which provides:

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Section 10 of the Regulation provides that:

Good faith, use of position and use of information—criminal offences

(1) A board member or officer of a distributor-retailer commits an offence if they—

(a) are reckless or are intentionally dishonest; and

(b) fail to exercise their powers and discharge their duties—

(i) in good faith in the best interests of the distributor-retailer; or

(ii) for a proper purpose.

Maximum penalty—20 penalty units.

In conformity with section 102 of the DR Act, this provision reflects section 184(1) of the Corporations Act which provides:

184 Good faith, use of position and use of information—criminal offences

Good faith—directors and other officers

(1) A director or other officer of a corporation commits an offence if they:

(a) are reckless; or

(b) are intentionally dishonest;

and fail to exercise their powers and discharge their duties:

(c) in good faith in the best interests of the corporation; or

(d) for a proper purpose

I do not consider that section 4(3)(a) of the Standards Act is applicable to section 6 of the Regulation. Section 6 of the Regulation is not creating an administrative power, upon which the rights, liberties and obligations of others will be dependent, but prescribing that board members and officers must exercise their powers and discharge their duties with care and diligence. Section 6(3) and (4) provide a defence to a board member or officer whereby they are taken to have exercised care and diligence if they take the specified steps – the so called "business judgment rule". I believe the issue you really intended to raise with regard to section 6 of the Regulation is the same as that which you raised with regard to section 10 of the

Regulation, namely, whether it is drafted in a sufficiently clear and precise way in accordance with section 4(3)(k) of the Standards Act.

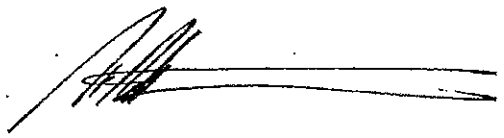
I consider that the language used in the provisions of concern is broadly expressed in order to accommodate a multiplicity of situations. However, I consider that the provisions are sufficiently certainly expressed to enable the courts to satisfactorily apply them to any situation which may be brought before them, and that they do not raise any issues of interpretation which would not typically arise for a court decision. The subject matter of section 6(3) and (4) of the Regulation reflect existing administrative law requirements. I do not consider that they would pose any additional difficulty to a court considering whether a board member or officer had exercised care and diligence in discharging their duties. With regard to section 10 of the Regulation, the courts are commonly called upon to consider the question of dishonesty in the area of criminal law and numerous statutory provisions call for a consideration of recklessness.

Furthermore, following the Corporations Act wording imports interpretation by the courts and in commentary in relation to those provisions. This gives the distributor-retailer authorities' board members and senior officers more certainty about the nature of their duties and the consequences for them if they are breached.

In following closely the relevant Corporations Act provisions, the Regulation is conforming to the power under which it is made in accordance with section 4(5) of the Standards Act.

Should you have any further enquiries, please do not hesitate to contact Ms Karen Waldman, Executive Director, Queensland Water Commission on telephone number 3227 8203.

Yours sincerely



STEPHEN ROBERTSON MP