

Penalties and Sentences and Other Legislation Amendment Bill 2012

Explanatory Notes

Objectives of the Bill

The objectives of the Penalties and Sentences and Other Legislation Amendment Bill 2012 (the Bill) are to: increase the value of a penalty unit from \$100 to \$110; introduce a nominal administration fee on criminal justice matters in the Supreme, District and Magistrates Courts where an offender is found guilty; address the expiry of certain rules of court; expand the definition of ‘relationship’ in section 67(7) of the *Civil Proceedings Act 2011*; facilitate the recovery of any overpayments and the transition loan paid to employees of Queensland Health or a Hospital or Health Service established under the *Hospital and Health Boards Act 2011*; and streamline the provision of evidence to commissions of inquiry. The Bill also makes minor and technical amendments to legislation within the justice portfolio.

Reasons for the Bill

The main purposes of the Bill are to implement the Government’s election commitments by increasing the penalty unit value from \$100 to \$110; and introducing a nominal administration fee on criminal justice matters where an offender is found guilty.

The Bill also specifically addresses issues with payments made by Queensland Health to its employees since its new payroll and rostering system went live in March 2010. While the majority of systems errors have been rectified, new overpayments due to processing and documentation problems accumulate at an average rate of \$1.7 million each fortnight. A moratorium on recovery of overpayments, announced on 10 July 2011, was lifted on 30 May 2012, and Queensland Health plans to commence recovery of overpayments as they occur. In addition, to minimise the risk of future overpayments or underpayments, Queensland Health proposes to change the pay date of future pay cycles (from 3 to 10 days after the end of the normal pay period), allowing more time for accurate payroll processing. As part of those changes, employees will be given a once-off

transition loan to assist them to honour their financial commitments over the time of the transition to the new pay date. These and other arrangements dealing with the repayment of the transition loan by agreement will form part of a public service ruling (directive). The Bill enables a health employer (i.e. Queensland Health or a Hospital or Health Service established under the *Hospital and Health Boards Act 2011*) to make deductions from future payments and final payments to health employees to recover overpayments and outstanding transition loan amounts.

Achievement of the Objectives

The Bill achieves the objectives of increasing the penalty unit value and introducing a nominal administration fee on criminal justice matters by amending the *Penalties and Sentences Act 1992*.

The Bill addresses the unintended expiry of the *Childrens Court Rules 1997* and the *Land Court Rules 2000* by amending the *Childrens Court Act 1992* and the *Land Court Act 2000* to apply the rules retrospectively from the time they expired and validating anything done or purported to be done under the rules during the time of expiry. The Bill also ensures that rules of courts and tribunals are not subject to provisions in the *Statutory Instruments Act 1992* relating to automatic expiry of subordinate legislation or the requirement for a regulatory impact statement.

The Bill amends the *Civil Proceedings Act 2011* to expand the definition of 'relationship' to include a 'registered relationship', as defined in section 36 of the *Acts Interpretation Act 1954*.

The Bill facilitates the giving of evidence to commissions of inquiry by amending the *Commissions of Inquiry Act 1950*.

Further, the Bill amends the *Industrial Relations Act 1999* and the *Industrial Relations Regulation 2011*, to enable a health employer to make deductions from amounts payable to health employees in relation to their employment to recover any future overpayment (i.e. an amount paid to a health employee to which they are not entitled).

The amendments also permit a health employer to recover, by deduction from a health employee's final payment, any amount of a transition loan that has not been repaid. The transition loan is not required to be paid during the period that an employee is a health employee. Other arrangements in relation to repayment of the transition loan, as agreed between a health employer and health employee, will be provided for in a

ruling (directive) under the *Public Service Act 2008* to be made by the time the amendments commence.

Alternative Ways of Achieving Objectives (if appropriate)

No other options were considered as legislative amendment is the only way to achieve these outcomes.

Estimated Cost for Government Implementation

The costs associated with implementation of the Bill will be met from within existing resources.

Consistency with Fundamental Legislative Principles

The following aspects of the Bill may represent breaches of fundamental legislative principles under section 4 of the *Legislative Standards Act 1992*.

Legislation should not adversely affect rights and liberties, or impose obligations, retrospectively (*Legislative Standards Act 1992*, section 4(3)(g)). The amendments to the *Childrens Court Act 1992*, the *Land Court Act 2000* and the *Penalties and Sentences Act 1992* operate retrospectively. Retrospective application of the amendments to the *Childrens Court Act 1992* and the *Land Court Act 2000* is required to overcome the expiry of the *Childrens Court Rules 1997* and the *Land Court Rules 2000*. Ensuring the retrospective operation of the provision is important to preserve the interests of those parties who have submitted their disputes to the jurisdictions of the courts in good faith. The continued operation of the rules is necessary for the effective operation of the courts and the efficient administration of justice.

The amendments to the *Penalties and Sentences Act 1992* have limited retrospective application. Although there is no retrospective imposition of liability to pay the offender levy, a person may be liable to pay the offender levy as a result of criminal conduct that occurred prior to commencement. This retrospective application, which is consistent with the levy being an administrative levy that is imposed on sentencing, is justified on the basis that the community will benefit from collection of the levy from the widest possible class of offenders.

The fundamental legislative principles require that legislation have sufficient regard to the rights and liberties of individuals (*Legislative Standards Act 1992*, section 4(2)(a)). The amendments to the *Commissions*

of Inquiry Act 1950 contain significant powers to inquire into a matter. The powers provided allow for any confidentiality or secrecy provisions that are contained in other legislation to be overridden. In view of the sensitive nature of the information that may be obtained under an inquiry, the amendments to the *Commissions of Inquiry Act 1950* include two confidentiality clauses which moderate the disclosure of information that has been obtained during an inquiry. The amendments to the *Commissions of Inquiry Act 1950* strike an appropriate balance between protecting an individual's right to privacy without impacting on the important work of an inquiry.

Legislation should be fair and reasonable in relation to any exemptions that an individual may rely upon. The Bill does not include any fee waiver provisions for the offender levy. This is justified on the basis that the *State Penalties Enforcement Act 1999* includes provision for payment by instalments in the event of financial hardship.

Legislation should allow the delegation of legislative power only in appropriate cases and to appropriate persons (*Legislative Standards Act 1992*, section 4(4)). The Bill includes an amendment to the *Penalties and Sentences Act 1992* to allow the amount of the offender levy to be prescribed by regulation. While this may give rise to a delegation of legislative power, this amendment is justified on the basis that it is common practice for fees and charges to be prescribed by regulation so that they can be subject to ongoing review.

The *Industrial Relations Act 1999* currently does not directly permit deductions from wages, except in the case of overpayments due to absence from work. The amendments conflict with fundamental legislative principles by making health employees uniquely liable to deductions from their wages or any other amount payable in relation to employment for a non-absence related overpayment, and to repay the transition loan up to the time of their final payment as a health employee.

The introduction of provisions authorising deductions under these arrangements and their limitation to use only in specific circumstances related to Queensland Health payroll issues is considered a proportionate response to a possible recurring debt of \$1.7 million per fortnight.

In relation to deductions to recover overpayments, a limitation on the amount that may be deducted at any time is afforded by a new section in the *Industrial Relations Regulation 2011* providing that amounts paid at any time must not be reduced to less than three quarters of the amount

otherwise payable at the time. Queensland Health will be obligated to negotiate repayment strategies with affected employees in the first instance and will only be able to recover monies without the employee's consent as a last resort. In relation to deductions to recover the transition loan, health employers and employees will be able to enter into a range of repayment options by agreement prior to final payment so that recovery from the final payment will be a last resort.

Consultation

Consultation has occurred with all relevant government departments including the Queensland Audit Office. All departments have supported the proposed policy approach. In addition, consultation has occurred with heads of jurisdiction in relation to the amendments to the rules of court. The Commissioner of the Queensland Child Protection Inquiry has been consulted on the amendments to the *Commissions of Inquiry Act 1950*.

In relation to the amendments contained in the *Industrial Relations Act 1999*, Unions have, through ongoing monthly meetings with Queensland Health, provided in-principle support for a recovery process.

There has been no public consultation on the amendments in the Bill.

Notes on Provisions

Part 1 Preliminary

Clause 1 states that, when enacted, the Bill may be cited as the *Penalties and Sentences and Other Legislation Amendment Act 2012*.

Clause 2 provides for commencement. Parts 5,8,10, 11 and 12 of the Bill will commence 7 days after assent.

Part 2 **Amendment of Childrens Court Act 1992**

Clause 3 states that this part amends the *Childrens Court Act 1992*.

Clause 4 inserts a new section 30A (Approved forms) which provides that the President of the Childrens Court may approve forms for use under the Act. Currently, the *Childrens Court Rules 1997* provide the President with the power to approve forms for use under the Rules. Providing the power to approve forms for use under the Act is consistent with current drafting practices.

Clause 5 amends the heading of part 7 (Transitional provisions) to include the words ‘and validation’ as a consequence of the amendments in clause 8.

Clause 6 inserts a new part 7, division 1 heading (Division 1 Transitional provision for Child Protection Act 1999).

Clause 7 inserts a new part 7, division 2 heading (Division 2 Transitional provisions for Justice and Other Legislation Amendment Act 2008).

Clause 8 inserts a new part 7, division 3 (Transitional and validation provisions for Penalties and Sentences and Other Legislation Amendment Act 2012).

New section 35 retrospectively applies the expired rules from the period when they expired until they are repealed and validates anything done or purported to be done under the rules after the date of expiry.

New section 36 is a transitional provision relating to forms approved under the *Childrens Court Rules 1997*.

Part 3 **Amendment of Civil Proceedings Act 2011**

Clause 9 states that this part amends the *Civil Proceedings Act 2011*.

Clause 10 amends section 67 (Damages for spouse’s benefit) to expand the definition of ‘relationship’ to include ‘a registered relationship within the meaning of the *Acts Interpretation Act 1954*, section 36’. Currently, the

definition of ‘relationship’ in section 67(7) includes a marriage; or a de facto relationship within the meaning of section 36 of the *Acts Interpretation Act 1954*. A registered relationship is a type of domestic relationship and is to be included within the meaning of ‘relationship’ for the purposes of this section.

Clause 11 amends a reference contained in schedule 1A (Minor and consequential amendments) to subsection 63(8) of the *State Penalties Enforcement Act 2000*. As that subsection has since been renumbered as section 63(11) by the *Local Government Electoral Act 2011*, this amendment is required to refer to the subsection as renumbered.

Part 4 Amendment of Commissions of Inquiry Act 1950

Clause 12 states this part amends the *Commissions of Inquiry Act 1950*.

Clause 13 amends section 5 (Power to summon witness and require production of books etc.) by inserting new sections 5(2A), (2B) and (2C). New section 5(2A) provides that despite any provision in an Act, a chairperson’s writing made under section 5(1) takes precedence over any oath taken, affirmation made or provision of an Act that might provide reasonable excuse for not complying with the writing.

New section 5(2B) provides that, for subsection (2A), the obligation to act as required by the oath, affirmation or provision is not a reasonable excuse; and the person bound by the oath, affirmation or provision who complies with the chairperson’s writing: does not breach the oath, affirmation or commit an offence against the provision; and is not liable to disciplinary action.

New section 5(2C) provides that despite any provision in an Act, a person is competent and compellable to be summoned and comply with the requirements contained in a chairperson’s writing under section 5(1) unless the person is not a person to whom the subsection applies.

Clause 14 inserts new sections 32A (Disclosure of particular information only if reasonable) and 32B (Confidentiality of information). New section 32A applies to information obtained as a result of the chairperson’s writing that apart from sections 5(2A) to (2C) would not have been able to be

disclosed to the chairperson (the protected information). Protected information must not be disclosed by the chairperson or anyone else who gains access to the information, for a purpose under this Act, unless the chairperson considers it is reasonable in the circumstances to disclose the information having regard to: the nature of the information; and the purposes of an inquiry under a commission.

New Section 32B is a general confidentiality provision that applies to a chairperson, deputy chairperson, commissioner, deputy commissioner or anyone else who for the purposes of the inquiry under a commission has gained, gains, or has access to, confidential information. Confidential information includes information about a person's affairs but does not include information already publicly available unless further disclosure is prohibited by law; or statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates. Subsection (2) provides that a person is prohibited from disclosing the information to anyone or giving access to the information to anyone other than: for a purposes under the Act; or with the consent of the person to whom the information relates; or in compliance with lawful process requiring production of documents or giving of evidence before a court or tribunal; or as permitted or required by another Act. The maximum penalty for breach of the provision is 200 penalty units or 1 year's imprisonment.

Clause 15 inserts a new section 35 (Transitional provision for Penalties and Sentences and Other Legislation Amendment Act 2012) which provides that section 5(2A) and (2C) apply to an oath taken, affirmation made or provision of an Act, whether taken, made or enacted before or after the commencement of new section 35.

Part 5 Amendment of Criminal Code

Clause 16 states that this part amends the *Criminal Code*.

Clause 17 amends section 704 (No court fees in criminal cases) to ensure that the section does not affect the imposition of the offender levy.

Part 6 **Amendment of Industrial Relations Act 1999**

Clause 18 states that this part amends the *Industrial Relations Act 1999*.

Clause 19 inserts a new section 396A and 396B. New section 396A (Recovery of health employment overpayments) provides that any health employer may recover an overpayment (i.e. an amount paid to a health employee in relation to their employment or purportedly in relation to employment to which the employee is not entitled). Recovery may be achieved by subsequently making deductions from amounts payable to the health employee in relation to employment. Amounts in relation to employment are defined as including both wages and any other amount in relation to employment payable to the employee.

Deductions may be made by a health employer even if the original overpayment was made by another health employer. For example, if an employee is overpaid while employed by Queensland Health and transfers to employment in a public hospital, deductions to recover the overpayment may still be made from the employee's payments by the public hospital.

The provisions of the section are specific to health employers and health employees and are not limited by any other provision of this division. This section does not affect the operation of the existing section 396 in relation to payments made to health employees before the commencement of this section.

To ensure all of the overpayments generated are able to be dealt with, deductions must be commenced within one year after the overpayment and may extend over a period of 6 years after the overpayment.

A deduction to recover overpayments must not reduce the amount payable to the employee in relation to employment on any single occasion to less than the amount prescribed under a regulation.

The section also defines the terms 'health employer', 'health employee' and 'Queensland Health'.

Currently, the *Industrial Relations Act 1999* limits allowable deductions from wages to those authorised by a relevant industrial instrument, by Chapter 11 part 2 division 3 (Paying and recovering wages of the *Industrial Relations Act 1999*), or by the written consent of the employee. In respect of overpaid wages, an employer is currently only able to recover by

deductions from wages an amount paid to an employee to which the employee is not entitled because of absence from work. These deductions must be commenced within one year after the payment, and may extend over a period of 6 years after the overpayment.

New section 396B (Recovery of transition loans) provides that, at the end of their period as a health employee, deductions can be made from an employee's final payment equal to the amount of the transition loan that has not been repaid. Arrangements relating to agreed repayment of the transition loan during employment will be set out in a public service ruling (directive) under the *Public Service Act 2008*.

A deduction from a health employee's final payment may be made by a health employer even if the original overpayment was made by another health employer.

The provisions of the section are specific to health employers and health employees and are not limited by any other provision of this division.

The section also defines the term 'final payment' and references definitions of the terms 'health employer' and 'health employee' in new section 396A.

Clause 20 inserts a new chapter 20, part 14 (Transitional provision for Penalties and Sentences and Other Legislation Amendment Act 2012). This provides that the amendments of the *Industrial Relations Regulation 2011* made by this Act do not affect the power of the Governor in Council to further amend or repeal the regulation.

Part 7 Amendment of *Industrial Relations Regulation 2011*

Clause 21 states that this part amends the *Industrial Relations Regulation 2011*.

Clause 22 inserts a new section 12A (Recovering health employment overpayments – Act, s396A) to provide that the amount below which a health employee's payments must not be reduced by a deduction to recover overpayments, is $\frac{3}{4}$ of the total amount payable on a single occasion.

Part 8 **Amendment of *Justices Act 1886***

Clause 23 states that this part amends the *Justices Act 1886*.

Clause 24 amends section 175A (Allocation of part payments) to ensure that any amount received by the clerk of the court from a person who is liable to pay the offender levy is first applied towards any unpaid compensation, restitution, damages or fixed portion of a penalty.

Part 9 **Amendment of *Land Court Act 2000***

Clause 25 states that this part amends the *Land Court Act 2000*.

Clause 26 inserts a new section 77B (Approved forms) to provide that the President may approve forms for use under the Act. Currently, the President has the power to approve forms for use under the *Land Court Rules 2000*. Providing the power to approve forms for use under the Act is consistent with current drafting practices.

Clause 27 amends the heading of Part 6 (Savings and transitional) to include validation provisions.

Clause 28 inserts a new part 6, division 3 (Transitional and validation provisions for Penalties and Sentences and Other Legislation Amendment Act 2012) to provide for transitional and validation matters.

New section 93 (Validation provision for Land Court Rules 2000) retrospectively applies the expired rules from the period when they expired until they are repealed and validates anything done or purported to be done under the rules after the date of expiry.

New section 94 (Transitional provision for approved forms) is a transitional provision relating to forms approved under the *Land Court Rules 2000*.

Part 10 **Amendment of Penalties and Sentences Act 1992**

Clause 29 states that this part amends the *Penalties and Sentences Act 1992*.

Clause 30 amends the long title of the Act to include a reference to the offender levy.

Clause 31 amends the preamble to include a reference to the offender levy.

Clause 32 amends section 3 (Purposes) to include the imposition of the offender levy in the purposes of the Act.

Clause 33 amends section 4 (Definitions) to provide for a definition of 'offender levy' and amend the definition of 'penalty' to ensure that the offender levy is not captured by the definition.

Clause 34 amends section 5 (Meaning of penalty unit) to replace \$100 in subparagraphs (a), (b) and (d) with \$110. The penalty unit value in section 5(1)(c) is not amended because the penalties for the offences in the *Work Health and Safety Act 2011*, the *Electrical Safety Act 2002*, and the *Safety in Recreational Water Activities Act 2011* have been established under a national agreement.

Clause 35 amends section 9 (Sentencing guidelines) to provide that the court must not have regard to the offender levy when sentencing an offender.

Clause 36 amends section 48 (Exercise of power to fine) to provide that the court must not take the offender levy into account when considering the financial circumstances of the offender under that section.

Clause 37 inserts a new Part 10A (Offender levy) in relation to the offender levy.

New section 179A (Purpose of pt 10A) provides that the purpose of Part 10A is to provide for a levy that is imposed on an offender on sentence to help pay for the cost of law enforcement and administration.

New section 179B (Definitions) includes definitions for the 'proper officer of the court', 'sentence' and 'SPE Act'. The term 'sentence' is defined widely to include any order made by a court to deal with the offender for an offence instead of passing sentence. This would, for example, capture an order of the court releasing an offender absolutely under section 19 of the

Act. Similarly, orders under sections 30, 31 and 32 would be captured by the definition.

New section 179C (Imposition of offender levy) concerns the imposition of the offender levy. The offender levy, which will be automatically imposed at the time of sentence, is an administrative levy that is separate from any punishment imposed on the offender. To this end, new section 179C provides that the levy applies regardless of whether a conviction is recorded, is not a sentence (including punishment) and is in addition to any sentence imposed by the court for the offence.

Pursuant to new section 179C(3), only one levy is payable if an offender is sentenced for multiple offences in the same sentencing proceeding. New section 179C(5) provides that the amount of the levy is to be set by regulation. New section 179C(6) provides that the offender levy does not apply to an offence under section 29 of the *Bail Act 1980*.

New section 179D (Subsequent sentences) concerns subsequent sentences. The purpose of the section is to ensure that the offender levy is not applied to resentences. However, the section is not intended to apply where an offender is convicted and sentenced for a new offence as a result of contravening a previous sentence. For example, the offender levy would be payable by a person who is convicted of an offence under section 123 of the *Penalties and Sentences Act 1992* for contravening a requirement of a community based order.

New sections 179E to 179H concern collection and enforcement of the levy. Under new section 179E (Payment of offender levy), if the particulars of the levy have been registered with the State Penalties Enforcement Registry under section 179F, the offender must pay the levy under the *State Penalties Enforcement Act 1999*. If the particulars of the levy have not been registered with the State Penalties Enforcement Registry, payment must be made to the proper officer of the court. New section 179F (Enforcement of offender levy by registration) facilitates registration of the levy under *State Penalties Enforcement Act 1999*. Pursuant to this section, the offender levy is taken to be an order of the court fining the offender for the amount of the levy so that it can be registered under section 34 of the *State Penalties Enforcement Act 1999*. In order to reflect that the offender levy is an administrative levy, new section 179F(3) operates to exclude fine option orders and imprisonment as enforcement options for the offender levy. New section 179G (Amounts to be satisfied before satisfying offender levy) prioritises payment of any unpaid compensation, restitution, damages and a fixed portion of a penalty ahead of payment of the offender

levy. New section 179H (Effect of appeal against relevant convictions) deals with the effect of an appeal on the offender levy. Both section 179G and 179H apply where the levy is paid to the proper officer of the court and is not registered under section 179F.

Clause 38 amends section 191 (Effect of order under s 190) to clarify that the offender levy applies to an offender released under section 190.

Clause 39 inserts new part 14, division 4 (Transitional provisions for Penalties and Sentences and Other Legislation Amendment Act 2012). New section 224 (Retrospective application of section 179C in particular circumstances) retrospectively applies the offender levy to offences for which the offender is sentenced after commencement, even if the offence was committed, or offender charged or convicted but not sentenced before the commencement of new section 179C. New section 225 (Amendment of regulation by Penalties and Sentences and Other Legislation Amendment Act 2012 does not affect powers of Governor in Council) provides that the amendment of the *Penalties and Sentences Regulation 2005* by the *Penalties and Sentences and Other Legislation Amendment Act 2012* does not affect the power of the Governor in Council to amend or repeal the regulation.

Part 11 Amendment of Penalties and Sentences Regulation 2005

Clause 40 states that this part amends the *Penalties and Sentences Regulation 2005*.

Clause 41 inserts a new section 8A (Offender levy – Act, s 179C(5)) to prescribe the amount of the offender levy.

Part 12 Amendment of State Penalties Enforcement Act 1999

Clause 42 states that this part amends the *State Penalties Enforcement Act 1999*.

Clause 43 inserts a note in section 34 (Default in paying fine, penalty or other amount under court order) to highlight the other Acts that may facilitate registration of amounts under section 34.

Clause 44 inserts a new section 54A (Effect of appeal on enforcement order for offender levy) which applies where an offender appeals against all of the convictions that gave rise to the offender levy. Under this section, the appeal suspends all enforcement action pending the determination of the appeal. If all of the convictions that resulted in the imposition of the offender levy are quashed, the registrar must refund any amount paid to the State Penalties Enforcement Registry for the levy.

Clause 45 amends section 112 (Order of satisfaction of other amounts) to include the offender levy in the order of satisfaction of unpaid amounts.

Clause 46 amends the regulation-making power in section 165 to ensure that a regulation can be made about the prescribed particulars for the offender levy.

Clause 47 inserts a definition of ‘offender levy’ in the dictionary contained in Schedule 2 of the Act.

Part 13 Amendment of Statutory Instruments Act 1992

Clause 48 states that this part amends the *Statutory Instruments Act 1992*.

Clause 49 amends section 46 (When is preparation of regulatory impact statement unnecessary?) to provide that rules of court made under the *Childrens Court Act 1992*; the *Industrial Relations Act 1999*; the *Land Court Act 2000*; the *Mental Health Act 2000*; the *QCAT Act 2000*; and the *Sustainable Planning Act 2009* are exempt from the requirement to prepare a regulatory impact statement.

Clause 50 amends schedule 2A (Subordinate legislation to which part 7 does not apply) to provide that rules of court made under the *Childrens Court Act 1992*; the *Industrial Relations Act 1999*; the *Land Court Act 2000*; the *Mental Health Act 2000*; and the *Sustainable Planning Act 2009* are exempt from the provisions relating to automatic expiry of subordinate legislation.

Part 14 **Minor amendments**

Clause 51 states that the schedule amends the legislation it mentions.

Schedule Acts amended

The amendments in the schedule make minor or technical amendments to correct and update references to the *Industrial Relations Tribunals Rules 2011* and the rules of court made under the *Childrens Court Act 1992* in various legislation.

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