

# **CRIMINAL LAW AMENDMENT (PUBLIC INTEREST DECLARATIONS) AMENDMENT BILL 2013**

## **Explanatory Notes**

### **Short title**

The short title of the Bill is the Criminal Law Amendment (Public Interest Declarations) Amendment Bill 2013.

### **Policy objectives and the reasons for them**

The objective of the Criminal Law Amendment (Public Interest Declarations) Amendment Bill 2013 is to ensure the safety, welfare and order of the Queensland community.

### **Achievement of policy objectives**

The Bill amends the *Criminal Law Amendment Act 1945* (Criminal Law Amendment Act) to empower the Governor in Council to declare that a ‘relevant person’ must be detained under new Part 4 of the Criminal Law Amendment Act, if satisfied it is in the public interest to make the declaration (a ‘public interest declaration’).

A ‘relevant person’ is a person who is subject to one of the following orders made under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA):

- a continuing detention order; or
- a supervision order (where immediately before the supervision order the person was subject to a continuing detention order).

The effect of the ‘public interest declaration’ is that the DPSOA ceases to apply to the relevant person and the person must be detained in an institution (defined to include a corrective services facility).

The relevant person is subject to an annual review by two psychiatrists who will report on the level of risk that the person will commit an offence of a sexual nature if released from detention.

If satisfied that detaining the relevant person under new Part 4 of the Criminal Law Amendment Act is no longer in the public interest, the Governor in Council may declare that new Part 4 of the Criminal Law Amendment Act no longer applies to the person.

If the ‘public interest declaration’ no longer applies or stops applying, to a relevant person, the DPSOA will again apply to the relevant person and the existing order under the DPSOA will revive.

## **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objectives other than through amendment to existing legislation.

## **Estimated cost for government implementation**

Any costs in relation to the amendments will be met from existing agency resources.

## **Consistency with fundamental legislative principles**

The Bill potentially departs from fundamental legislative principles (FLPs) as outlined in section 4 of the *Legislative Standards Act 1992*. Any such departures occur in the context of balancing FLPs with a competing community expectation that Government will ensure the safety, welfare and order of the community.

Section 4 (2) of the *Legislative Standards Act 1992* provides that legislation must have sufficient regard to the rights and liberties of individuals. Subsection (3) 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 and where rights and liberties are dependent on administrative power, whether the power is sufficiently defined and subject to appropriate review. Further, legislation must not confer immunity from proceedings or prosecution without adequate justification.

The Bill potentially breaches these FLPs.

It may be argued that the requirement that the Governor in Council merely consider whether the declaration is in the ‘public interest’ does not provide a sufficiently clear statutory procedure and guideline; there is no guidance as to how the Governor in Council is to determine whether detention is in the public interest or not.

Also, where the relevant person is subject to a continuing detention order under DPSOA at the time the Governor in Council considers making a declaration, natural justice is denied. The Minister may recommend that the Governor in Council make a public interest declaration for a person subject to a continuing detention order without giving the person prior notice of the proposed recommendation. The individual has no opportunity to make a submission to the Minister about the proposed recommendation.

It is submitted that the FLP breaches are justified to protect the community from dangerous sex offenders. Under the DPSOA, the Supreme Court is solely concerned with whether the offender is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released without a supervision order being made. However, the public interest declaration will apply in circumstances where it is no longer appropriate for an offender to be detained under the DPSOA; where the safety, welfare and order of the community dictate the transfer of the offender to a detention regime where release is controlled by the Governor in Council. In considering the public interest it is anticipated that the Governor in Council will have regard to a wide range of relevant matters including the likely reaction of the community to the release of the offender.

With regards to the issue of natural justice – relevant persons on supervision orders are given notice of the intention of the Minister to recommend a ‘public interest declaration’ to the Governor in Council. They are given an opportunity to respond and the Minister must have regard to any submission made. While relevant persons on continuing detention orders are not afforded these measures, it is because such persons are already subject to indefinite detention. If detained under the new Part 4, these prisoners will still be subject to annual reviews to assess their level of risk of reoffending.

The Bill grants immunity from liability to individuals who act honestly and without negligence. However, liability will instead attach to the State (see new section 22R).

## **Consultation**

Consultation occurred with the Department of the Premier and Cabinet, Queensland Treasury and Trade and the Department of Community Safety.

## **Consistency with legislation of other jurisdictions**

The Bill does not introduce uniform or complementary legislation.

## **Notes on provisions**

*Clause 1* states that, when enacted, the Bill will be cited as the *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013*.

*Clause 2* states that this Act amends the *Criminal Law Amendment Act 1945* (Criminal Law Amendment Act).

*Clause 3* amends the long title to acknowledge that this Act inserts new provisions into the Criminal Law Amendment Act to provide for the detention in the public interest of a particular class of offenders convicted of sexual offences.

*Clauses 4 and 5* read together transfer the definition of the phrase ‘corrective services facility’ from section 18 to section 2A.

*Clause 6* inserts new Parts 4 and 4A into the Criminal Law Amendment Act.

New Part 4 includes new sections 19 to 22 and new sections 22A to 22K.

## **New Part 4 – Further detention of particular sexual offenders**

### **Division 1 Preliminary**

New section 19 provides the definitions for new Part 4 which are self explanatory.

The term ‘institution’ means: a corrective services facility; or an institution prescribed for section 18(14). The definition of ‘institution’ in section 18(4) includes an institution prescribed under a regulation for that section. Clause 2 of the *Criminal Law Regulation 2004* prescribes ‘The Park – Centre for Mental Health’.

The term ‘relevant person’ means a person subject to: a continuing detention order made under the DPSOA; or a supervision order made under the DPSOA if the person was subject to a continuing detention order immediately before the supervision order was made. The inclusion of the term ‘immediately’ is not intended to imply a close proximity in time between the supervision order and the continuing detention order. For example, a relevant person may have been subject to the supervision order for an extended period at the time the public interest declaration is made. However, immediately prior to being subject to the supervision order the relevant person must have been subject to a continuing detention order.

New section 20 provides that when deciding whether the detention of a person under new Part 4 is in, or is no longer in, the public interest, the Minister or Governor in Council may have regard to any matter the Minister or Governor in Council considers relevant and in that regard they are not limited by any other provision of the Criminal Law Amendment Act or another Act. The intention is that the ‘public interest’ test is not limited by the scope and purpose of the Criminal Law Amendment Act, the DPSOA or any other Act.

### **Division 2 Declaration for detention in the public interest**

New section 21 provides for the making of a public interest declaration.

Subsection (1) provides that, on the recommendation of the Minister, the Governor in Council may, by gazette notice, declare that a relevant person must be detained under division 3 of the new Part 4 (a public interest declaration). The Governor in Council must be satisfied it is in the public interest to make the declaration.

Subsection (2) provides that the Governor in Council can not make a public interest declaration for a relevant person until any relevant appeal period under the DPSOA has ended or if an appeal has commenced; until it is finalised.

New section 22 provides the process for the Minister to make a recommendation to the Governor in Council to make a public interest declaration.

Subsection (1) provides that the Minister (that is the Minister who administers the Criminal Law Amendment Act) may recommend that the Governor in Council make a

public interest declaration for a relevant person if the Minister is satisfied it is in the public interest to make the declaration.

Subsection (2) allows the Minister to make a recommendation that the Governor in Council make a public interest declaration for a person subject to a continuing detention order without giving the person prior notice of the proposed recommendation.

Subsection (3) provides that if the relevant person is subject to a supervision order the Minister must serve the person with written notice of the Minister's intention to recommend that the Governor in Council make a public interest declaration. Such notice must include the grounds on which the Minister intends to rely. The person has an opportunity to make submissions about why the declaration should not be made, to which the Minister must have regard. However, subsection (4) allows the Minister to make a recommendation for a person subject to a supervision order without complying with the notice provisions if the Minister considers it necessary because of urgent circumstances.

New section 22A provides for the giving of notice of the public interest declaration.

Subsection (1) provides that the relevant person must be personally served with a written notice that includes notice of the declaration and either a copy of division 3 of the new Part 4 or a summary of the effect of the declaration.

Subsection (2) provides that the declaration takes effect upon service.

### Division 3 Dealing with detained person

New section 22B provides for the effect of a public interest declaration.

Subsection (1) provides that a public interest declaration has effect until: the Governor in Council declares that the declaration no longer applies to the relevant person (see new section 22F); or the declaration stops applying to the person because the Supreme Court determines the declaration is affected by jurisdictional error.

Subsection (2) provides that while a public interest declaration has effect, the DPSOA does not apply to the relevant person and the person must no longer be detained or subject to supervised release under the DPSOA. Instead the relevant person must be detained in an institution (as defined in new section 19). The relevant person is a prisoner for the purposes of the *Corrective Services Act 2006* other than the provisions relating to conditional release, discharge or release and parole.

Subsection (3) provides that a relevant person may be temporarily detained in a watch-house.

Subsection (4) provides that if a relevant person is on a supervision order when the public interest declaration is made that person may be arrested without warrant and taken to an institution or watch-house.

New section 22C provides for annual examinations of persons detained under division 3 of the new Part 4.

Subsection (1) requires the Chief Executive of Corrective Services to ensure a detained person is examined annually by two psychiatrists.

Subsection (2) provides that the detained person must submit to the examinations. The subsection is consistent with section 21(4) of the *Corrective Services Act 2006*.

Subsection (3) provides that the examining psychiatrists must provide a report that indicates their assessment of the level of risk that the detained person will commit an offence of a sexual nature if released from detention, including their reasons for the assessment.

Subsections (4) to (9) deal with the provision of relevant material to the examining psychiatrists.

New section 22D requires the Chief Executive of Corrective Services to give a copy of the psychiatric reports discussed in new section 22C to the Minister and the detained person (and their legal representative).

New section 22E provides the steps the Minister must take upon receiving the psychiatric reports.

Subsection (1) provides that the Minister must, as soon as practicable, consider the report and make a recommendation to the Governor in Council regarding the continuation of the public interest declaration. The Minister must consider whether it is in the public interest to continue to detain the person under division 3 of the new Part 4 (subsections 2 and 3).

Subsection (3) provides that the Minister must give the detained person a reasonable opportunity to make a submission and must have regard to any submission made.

#### Division 4 Ending of declaration for detention

New section 22F provides that the Governor in Council may, by gazette notice, declare that division 3 of the new Part 4 no longer applies to a relevant person, if satisfied the person's continuing detention under division 3 is no longer in the public interest. Subsection (3) provides for personal service of the declaration.

#### Division 5 Effect of ending of declaration for detention etc.

New section 22G applies if the public interest declaration stops applying or does not apply, to the relevant person because the Governor in Council declares it no longer applies (under new section 22F) or because of a determination of the Supreme Court that a decision about the public interest declaration is affected by jurisdictional error (see new section 22K).

Subsection (1) provides that the relevant person is no longer detained under division 3 of the new Part 4 and the DPSOA order to which the relevant person was subject prior

to the public interest declaration being made, revives. A supervision order does not revive if the period for which the order has effect, as stated in the order, has passed.

Subsection (2) provides that if a supervision order revives, the period for which the person was detained under division 3 of the new Part 4 must be counted as part of the period for which the supervision order has effect.

New section 22H provides that if a continuing detention order under the DPSOA is revived and the review period under the DPSOA has passed, the Attorney-General must immediately apply for a review of the order under section 27 of the DPSOA.

New section 22I provides that if a supervision order under the DPSOA is revived, an application for amendment of the supervision order may be made under section 18 of the DPSOA and such application may be made on or before the day the public interest declaration purportedly stops applying to the person. Where an application is made on or before the day the public interest declaration purportedly stops applying, the effect of the declaration ending is postponed until the application is finally determined under DPSOA. The ability for either party to apply for an amendment to the supervision order before the supervision order revives anticipates that there may be occasions where the conditions of the supervision order are no longer relevant or able to be complied with, given the passage of time.

New section 22J applies where the supervision order under the DPSOA does not revive because the period for which the order has effect has passed.

Subsection (2) enables the Attorney-General to apply for a further supervision order under section 19B of the DPSOA as if the original supervision order had not ended.

Subsection (3) allows the application for a further supervision order to be made on or before the day the public interest declaration purportedly stops applying to the person. Where an application is made on or before the day the public interest declaration purportedly stops applying, the effect of the declaration ending is postponed until the application is finally determined under the DPSOA. Allowing the Attorney-General to apply for a further supervision order before division 3 of the new Part 4 stops applying to the person, addresses the risk of the relevant person being unconditionally released.

#### Division 6 Limitation of review

New section 22K provides that the decisions of the Minister and the Governor in Council, made under new Part 4 are final and conclusive. The decisions can not be reviewed other than for jurisdictional error. Therefore, apart from Part 5, the *Judicial Review Act 1991* does not apply to such decisions, except to the extent the decision is affected by jurisdictional error.

### New Part 4A – Miscellaneous provisions for operation of Part 4

#### Division 1 Preliminary

New section 22L provides that the definitions in new section 19 apply to this part.

New section 22M provides that a reference to the operation of Part 4 includes a reference to its purported operation.

## Division 2 Provisions about DPSOA orders

New section 22N provides that division 2 of the new Part 4A applies if a public interest declaration does not apply or stops being applied to a relevant person other than because of a declaration by the Governor in Council under new section 22F or because of a determination of the Supreme Court that a decision about the public interest declaration is affected by jurisdictional error; that is, other than because of a 'relevant event' (as defined in section 19).

New section 22O provides that the relevant person is no longer detained under division 3 of the new Part 4 and the DPSOA order to which the relevant person was subject prior to the public interest declaration being made, revives. A supervision order does not revive if the period for which the order has effect, as stated in the order, has passed.

Subsection (3) provides that if a supervision order revives, the period for which the person was detained under division 3 of the new Part 4 must be counted as part of the period for which the supervision order has effect.

New section 22P provides that if a continuing detention order under the DPSOA is revived and the review period under the DPSOA has passed, the Attorney-General must immediately apply for a review of the order under section 27 of the DPSOA.

New section 22Q applies where the supervision order under the DPSOA does not revive because the period for which the order has effect has passed.

Subsection (2) enables the Attorney-General to apply for a further supervision order under section 19B of the DPSOA as if the original supervision order had not ended.

Subsection (3) provides that the application for a further supervision order must be made as soon as practicable after the day the public interest declaration stops applying or being applied to the person.

## Division 3 Protection from liability

New section 22R protects a public official from civil liability for acts or omissions made honestly and without negligence and the liability attaches instead to the State.

Subsection (3) defines the term 'public official'.